The ICC and its Jurisdiction – Myths, Misperceptions and Realities

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A. von Bogdandy and R. Wolfrum (eds.),
Max Planck Yearbook of United Nations Law, Volume 7, 2003, 409-512.

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I. Introduction

Following the events in Jenin and other Palestinian cities during an operation of the Israeli Defense Forces (IDF) called "Defensive Shield" between March and May 2002,[1] a number of individuals and groups have openly called for prosecutions of alleged war crimes and crimes against humanity by the International Criminal Court (ICC)[2] or have made statements suggesting that the ICC could be brought into action with respect to acts that took place during this operation.[3]

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1 See e.g. A/ES-10/186 of 30 July 2002, Report of the Secretary-General prepared pursuant to General Assembly Resolution A/RES/ES-10/10; Human Rights Watch, Vol. 14, No. 3 (E), Israel, the Occupied West Bank and Gaza Strip, and the Palestinian Authority Territories – Jenin: IDF Military Force, May 2002; Amnesty International, *Israel and the Occupied Territories – Shielded from scrutiny: IDF violations in Jenin and Nablus*, November 2002, <http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/MDE151432002ENGLISH/$File/MDE1514302.pdf> (4 August 2003).

2 J. Huggler, "Israel's new Defence Minister 'guilty of war crimes'", *The Independent*, 4 November 2002, 2; BBC Monitoring, "UN Arab group urges discussion of Jenin report at General Assembly on 5 August", 2 August 2002, Westlaw File WL 24808442; Agence France-Presse, "Iran calls on US to distance itself from Israel" , 15 April 2002, Westlaw File WL 2386405.

3 The Nation, "Israel and the ICC", 1 July 2002, 7 quoting Israel's Attorney-General Elyakim Rubinstein who reported to a Knesset committee that Israelis might be charged and indicted by the ICC after it convenes on 1 July 2002 for acts committed during operation "Defensive Shield" and for settling in the occupied territories.

Hardly has any treaty ever aroused such interest throughout the international community as the ICC-Statute.[4] This is partly due to the fact that the subject matter which the ICC is concerned with is highly controversial and concerns private individuals as opposed to states/international organizations as a legal entity on the one hand while on the other it places military action under close international scrutiny.[5] However, the persecution of crimes on the international level has caused a debate in which a number of issues become blurred, as evidenced by the statements provided above.[6]

Another reason for the large amount of attention that the ICC-Statute received includes the numerous changes that are necessary in order to implement this treaty's provisions through a state's domestic legislative process. Hardly any other treaty has such an impact as the ICC-Statute, which requires some countries to rethink their previous stances on a variety of issues such as extradition of its own nationals (article 16 of the German Basic Law — its constitution — was changed on 29 November 2000 to provide for extradition to international judicial organs or to a member state of the European Union[7]) or criminal responsibility of its Heads of State,[8] among others.

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4 Doc.A/CONF.183/13 Vol. I. Entry into force 1 July 2002 [hereonafter ICC-Statute]. Reprinted in this Volume. See Annex.

5 This aspect in and of itself is not a novelty brought about by the ICC. Prior to the establishment of the ICC, numerous international instruments pertaining to humanitarian law existed and were widely ratified. For an overview of the status of ratification of the *Geneva Conventions*, see Département Fédéral des Affaires Étrangères, Protection des victimes de la guerre, <http://www.eda.admin.ch/eda/f/home/foreign/intagr/train/iprotection.html> (4 August 2003) or International Committee of the Red Cross, *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: ratifications, accessions and successions*, 13 December 2002, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/77EA1BDEE20B4CCDC1256B6600595596> (4 August 2003). See also R.S. Lee, "Introduction", in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues – Negotiations – Results*, 1999, lv et seq. (lix).

6 These calls are either based on a misunderstanding of the jurisdictional bases of the ICC or must be considered to be politically motivated.

7 The text of article 16 (2) Basic Law now reads:
"No German may be extradited to a foreign country. The law can provide otherwise for extraditions to a member state of the European Union or to an international court of justice as long as the rule of law is upheld".
For an overview of the German implementation legislation, see J. Meißner, "Das Gesetz zur Ausführung des Römischen Statuts des Internationalen

II. The Jurisdiction of the ICC

Among the most complicated matters of the ICC-Statute both in a legal and political sense — which at the same time is of utmost importance for its proper functioning and its international acceptance — is that of its jurisdictional range.[9] Various conceptions and connotations of the term "jurisdiction" exist, ranging from fairly narrow constructions in which the term is applied solely to the exercise of the jurisdiction of the ICC[10] to wider notions of jurisdiction encompassing not only *ratione tertiis* and *ratione personae*, but also *ratione materiae* and *ratione temporis*.[11] For the purpose of this article, the broader notion of jurisdic-

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Strafgerichtshofes", *Neue Justiz* 2002, 347 et seq.; H. Satzger, "Das neue Völkerstrafgesetzbuch – Eine kritische Würdigung", *Neue Zeitschrift für Strafrecht* 2002, 125 et seq.

8 See e.g. the decision of the French Conseil Constitutionnel, Décision No. 98-408 DC, Traité portant statut de la Cour pénale internationale, 22 January 1999. The Constitutional Council found the ICC-Statute to be incompatible with those provisions of the French Constitution pertaining to the responsibility of the President of the Republic, government officials and members of the French Parliament. A subsequent constitutional amendment resolved these problems. See No. 1462, Assemblé Nationale, Projét de Loi constitutionnelle, insérant au titre VI de la Constitution un article 52-3 et relatif à la Cour pénale internationale, enregistrée à la Présidence de l'Assemblée nationale le 11 mars 1999. This constitutional amendment introduced article 52-3 which reads: "La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998. [The Republic may recognize the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998.]"

9 A. Zimmermann, "The Creation of a Permanent International Criminal Court", in: J. Frowein/ R. Wolfrum (eds), *Max Planck UNYB* 2 (1998), 169 et seq. (170); Ph. Kirsch/ J. Holmes, "The Birth of the International Criminal Court", *CYIL* 36 (1998), 3 et seq. (22).

10 E.g. E. Wilmshurst, "Jurisdiction of the Court", in: Lee, see note 5, 127, referring solely to arts 12-16 of the ICC-Statute. A similar view is promulgated by R. Goldstone, "Terrorists can be brought to justice only by legal means", *The Independent*, 2 October 2001, 5.

11 Such an understanding is implicit in the most recent commentary on the ICC-Statute. See A. Cassese/ P. Gaeta/ J. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Volume I-III, 2002, viii et seq. A similar definition is contained in *Black's Law Dictionary*, "Jurisdiction", in: B. Garner (ed.), *Black's Law Dictionary*, 7th edition, 2000, 687: "[A] court's power to decide a case or issue a decree".

tion including all three areas is applied. This seems especially appropriate in light of the inter-relationship[12] of the various jurisdictional aspects and is supported by the wording of article 15 (4) of the ICC-Statute which deals with the commencement of prosecutorial investigations after the Pre-Trial Chamber has found, *inter alia*, "that the case appears to fall within the jurisdiction of the Court".[13] Such an approach is furthermore in line with a similar understanding of the jurisdiction of the ICJ.[14] It is hardly conceivable that in any future case before the ICC these areas can be kept strictly separate as it will be necessary to evaluate the acts of the accused not only in terms of the locational or personal elements, but also with respect to the material — criminal — and temporal elements. Therefore, this article will examine each of these areas in turn. Starting with the crimes covered by the ICC-Statute, this section will also include a discussion on whether additional crimes should become part of the ICC-Statute by means of amending the Statute (1.). This is followed by an analysis of the provisions on the exercise of jurisdiction and its preconditions (2.). The temporal element will be dealt with (3.) before turning to the inherent jurisdictional limitations that were agreed upon during the negotiating process (4.).

1. Jurisdiction *ratione materiae* of the ICC

For a number of reasons the issue of the crimes that would be covered by the future ICC-Statute was the cause of considerable discussion in

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12 C. Blakesley, "Extraterritorial Jurisdiction", in: M. Cherif Bassiouni (ed.), *International Criminal Law – Volume II*, 2nd edition, 1999, 33 et seq. (36). Blakesley stresses the interdependence of *ratione tertiis, ratione personae, ratione materiae and ratione temporis*, while using a narrow conception of the term "jurisdiction" itself. His definition of jurisdiction – "the authority to effect legal interests" – has to be seen before this background.

13 A similar argument can be advanced by way of article 19 (4) of the ICC-Statute which deals with challenges to jurisdiction and article 58 (1) of the ICC-Statute which deals with the issuance of arrest warrants or a summons to appear.

14 S. Rosenne, *The Law and Practice of the International Court*, 1920-1996, 3rd edition, Volume II – Jurisdiction, 1997, 536 et seq. In the case of the ICJ, Rosenne points out that the Court follows a unitary concept of the term "jurisdiction" and that the distinction between *ratione personae*, *ratione materiae* or the scope of the jurisdiction *ratione temporis* is merely a matter of systematic presentation.

the drafting stage of the Statute. Prior to the Rome Conference itself a consensus had emerged throughout the preparatory process that genocide, crimes against humanity and war crimes would be included, while a decision on the inclusion of the crime of aggression into the ICC-Statute was still outstanding. The first group of crimes are defined in the ICC-Statute. As there was no consensus on the definition of the crime of aggression, this task was delegated to a Preparatory Commission in the *Final Act of the Rome Conference*.[15] The list of the treaty-based crimes for which no consensus had emerged until the Rome Conference contained apartheid, torture, a crime headed "Terrorism"[16] and mercenarism, but also drug trafficking.[17] The latter crime had been the impetus for restarting the negotiations about the legal basis for an international criminal adjudicative body, when the then Prime Minister of Trinidad and Tobago, Arthur N. R. Robinson, made a statement to this effect in the General Assembly of the United Nations in 1989.[18]

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15 A/CONF.183/10 of 17 July 1998, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8 et seq.

16 For an overview of the definitional difficulties see C. Walter, "Defining Terrorism in National and International Law", <http://edoc.mpil.de/conference-on-terrorism/present/walter.pdf> (4 August 2003).

17 See e.g. A. Zimmermann, "Article 5 – Crimes within the Jurisdiction of the Court", mn.1, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999; P. Robinson, "The Missing Crimes", in: Cassese et al., see note 11, 497 et seq.

18 A/RES/44/39 of 4 December 1989, International Criminal Responsibility of Individuals and Entities engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over such crimes. The relevant portion of the resolution reads:
"[...] 1. Requests the International Law Commission, when considering at its forty-second session the item entitled "Draft Code of Crimes against the Peace and Security of Mankind", to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code of crimes, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote particular attention to that question in its report on that session [...]".
For an overview of the various crimes that were considered to be part of the *ratione materiae* of the ICC see International Law Commission, Analytical Guide to the Work of the International Law Commission – 7.4, Draft Code of Crimes Against the Peace and Security of Mankind (Part II),

Ultimately, a clear trend had emerged to limit the jurisdiction of the court to the so-called "core crimes" during the preparatory process.[19] The rationale behind this move was clear: the ICC was to have the broadest support possible and furthermore, it would enhance the credibility and moral authority of the institution to be.[20] In light of the discussion after the events of 11 September 2001, the lack of inclusion of terrorism as a crime under the jurisdiction of the court can only be seen as a fortunate turn.

Among other tasks, the Preparatory Commission was also mandated with preparing draft texts of the *Rules of Procedure and Evidence*[21] and of the *Elements of crimes*,[22] both of which have been completed in the allotted timeframe, i.e. 30 June 2000,[23] and which were adopted by consensus.[24]

a. The *Elements of Crimes*

The latter document, in particular, could prove to be problematic. The nature of the *Elements of crimes* can be summed up as focussing on the

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1998, <http://www.un.org/law/ilc/guide/7_4.htm> (4 August 2003). On the Draft Code of Crimes Against the Peace and Security of Mankind, see generally J. Allain/ J. Jones, "A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind", *EJIL* 8 (1997), 100 et seq. and K. Ambos, "Establishing an International Criminal Court and an International Criminal Code – Observations from an International Criminal Law viewpoint", *EJIL* 7 (1996), 519 et seq.

19 Report of the Committee on the Establishment of a Permanent International Criminal Court, GAOR 50th Sess., Suppl. No. 22 (Doc. A/50/22), 11.

20 H. v. Hebel/ D. Robinson, "Crimes within the jurisdiction of the Court", in: R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2001, 79 et seq. (80).

21 PCNICC/2000/1/Add.1, Report of the Preparatory Commission for the International Criminal Court – Addendum, Part I – Finalized draft text of the Rules of Procedure and Evidence of 2 November 2000.

22 PCNICC/2000/1/Add.2, Report of the Preparatory Commission for the International Criminal Court – Addendum, Part II – Finalized draft text of the Elements of Crimes of 2 November 2000.

23 A/CONF.183/10, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court done at Rome, 17 July 1998, 9.

24 R.S. Lee, "An Assessment of the ICC Statute", *Fordham Int'l L. J.* 25 (2002), 750 et seq. (750).

precise material and mental elements of each crime and the interplay with the general principles of criminal law.[25] The provision pertaining to the *Elements of crimes* (article 9 of the ICC-Statute) was included at the insistence of the United States[26] claiming that otherwise the crimes would lack the necessary "clarity, precision and specificity" required by criminal law and would run counter to the principle *nullum crimen sine lege*.[27] It was furthermore suggested that more specific provisions outlining the essential requirements — both in terms of quantity and quality — would provide shelter from "any political manipulation of the definitions".[28] The fact that ultimately the task of elaborating a document containing the *Elements of crimes* was undertaken was largely due to a conviction by a majority of countries that "there was a genuine concern by a country important to the success of the ICC and that the integration of the *Elements of crimes* into the Statute would not necessarily weaken the ICC".[29] Nevertheless, throughout the drafting process, many apprehensions remained and many states were wary in the wake of the first session of the PrepCom.[30]

The elaboration of the *Elements of crimes* could have adverse consequences in the long run. According to one participant of the Rome Conference and its preparatory commission meetings, "[t]he proposal drew little support from other delegations, many reservations, and much open opposition".[31] This was mainly due to the fact that the con-

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25 D. Robinson/ H. van Hebel, "Reflections on the Elements of Crimes", in: Cassese et al., see note 11, 219 et seq. (220).

26 P. Kirsch/ V. Oosterveld, "The Preparatory Commission for the International Criminal Court", *Fordham Int'l J. L.* 25 (2002), 563 et seq. (564); D. Scheffer, "A Negotiator's Perspective on the International Criminal Court", *Mil. L. Rev.* 167 (2000), 1 et seq. (5).

27 Report of the Preparatory Committee on the Establishment of the International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March–April and August 1996), GAOR 51st Sess., Suppl. No. 22 (Doc. A/51/22), 16.

28 Report of the Preparatory Committee, see above, 17, para. 56.

29 D. Pfirter, "The Position of Switzerland with Respect to the ICC Statute and in particular the Elements of Crimes", *Cornell Int'l L. J.* 32 (1999), 499 et seq. (502).

30 Pfirter, see above 29, 502.

31 Pfirter, see note 29, 502.

cept of codified *Elements of crimes* is alien to most legal systems.[32] In addition, it was viewed by many delegations as a further attempt to accommodate the concerns of the United States to weaken the substance of the ICC-Statute.[33] Moreover, the majority of participating countries was of the opinion that the existing definitions contained in international instruments already provided sufficient guidance.[34]

Some of the detrimental impacts that the *Elements of crimes* have is that they strip the court of a genuine judicial function, i.e. the independent interpretation of legal norms.[35] However, it should be noted that the *Elements of crimes*, unlike the *Rules of Procedure and Evidence*,[36] are — according to article 9 (1) of the ICC-Statute — not binding for the ICC.[37] This view is supported by the wording[38] of article 9 (1) of the ICC-Statute as the elements "[...] shall assist the Court [...]" in interpreting and applying the crimes covered by the Statute,[39] as

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32 Pfirter, see note 29, 502 stating that the elaboration of the *Elements of Crimes* "has confused and complicated matters"; M. Politi, "Elements of Crimes", in: Cassese et al., see note 11, 443 et seq. (448).

33 Pfirter, see note 29, 502.

34 H v. Hebel, "Status of Elements of Crimes under the Statute", in: Lee, see note 20, 4 et seq. (6).

35 J. Delbrück/ R. Wolfrum, Völkerrecht, Part I/3, 2nd edition, 2002, 1145.

36 Article 51 of the ICC-Statute.

37 Article 9 (1) of the ICC-Statute reads: "Elements of Crimes *shall assist* the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties". [Emphasis added].

38 S. Rosenne, "Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute", *Va. J. Int'l L.* 41 (2000), 164 et seq. (168). Although the author points out that article 21 ICC-Statute mentions that the Court "shall apply" the *Elements of Crimes*, this provision is merely a list of sources of law to be applied and despite its language is not to be understood as binding. A similar argument is advanced by H. v. Hebel, in: Cassese et al., see note 11, 3 et seq. (8). One might also argue that read in combination with article 9 (3) of the ICC-Statute – dealing with the *Elements'* consistency with the Statute itself, the *Elements of Crimes* are to have a subsidiary character with the ICC-Statute being the yardstick they have to measure up to.

39 Proposals made prior to the final version contained considerably stronger language which would have had a binding effect. Doc. A/CONF.183/C.1/L.69 and Doc. A/CONF.183/C.1/L.8. Both of these documents proposed that the *Elements* "shall be applied by the Court in reaching determinations as to guilt".

well as the drafting history of the *Elements*.[40] Despite their non-binding nature *per se*, they will undoubtedly have persuasive force for the judges of the ICC.[41] The *Elements* will make it difficult for the judges of the ICC to adapt the provisions to situations that were not envisaged by the drafters of the *Elements*, but which could well warrant to fall under the *ratione materiae* of the ICC and which under normal circumstances would not be considered cases of judicial over-interpretation.[42] In addition, neither the International Criminal Tribunal for the former Yugoslavia (ICTY)[43] nor the International Criminal Tribunal for Rwanda (ICTR)[44] — both of which are based on United Nations Security Council resolutions and not on an international treaty[45] — are equipped with similar constraints. This could lead to a different interpretation of essentially the same crimes.[46] Moreover, the ICTY's interpretation of humanitarian law has lead to significant developments of the present status of humanitarian law with respect to the war crime of rape, e.g. in the *Furundzija*[47] and *Kunarac*[48] cases.

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40 During the preparatory process, "elements of crimes" were first suggested by the United States in 1996. Report of the Preparatory Committee, see note 27. The final Preparatory Committee session prior to the Rome Conference saw another attempt by the United States, when it submitted a proposal calling for a binding document containing the *Elements of Crimes*. See Proposal Submitted by the United States, Elements of Offences for the International Criminal Court, Doc. A/AC.249/1998/DP.11 of 2 April 1998. Another proposal by the United States was tabled at the beginning of the Rome Conference. See Proposal Submitted by the United States, Annex on Definitional Elements for Part Two Crimes, Doc. A/CONF.183/C.1/L.10 of 19 June 1998. A final proposal was submitted towards the end of the Diplomatic Conference. Proposal Submitted by the United States Concerning the Bureau Proposal, Doc. A/CONF.183/C.1/L.69 of 14 July 1998.

41 v. Hebel, see note 34, 3 et seq. (8); Politi, see note 32, 473.

42 Delbrück/ Wolfrum, see note 35, 1145; Politi, see note 32, 473.

43 Statute of the International Criminal Tribunal for the former Yugoslavia, pursuant to S/RES/827(1993) of 25 May 1993.

44 Statute of the International Criminal Tribunal for Rwanda, pursuant to S/RES/955 (1994) of 8 November 1994.

45 D. Sarooshi, "The Powers of the United Nations International Criminal Tribunals", in: J. Frowein/ R. Wolfrum (eds.), *Max Planck UNYB* 2 (1998), 141 et seq. (143 et seq.).

46 Delbrück/ Wolfrum, see note 35, 1146; Politi, see note 32, 473.

47 IT-95-17/1-T, *Prosecutor v. Furundzija* of 10 December 1998, paras 165 et seq. and especially para. 173.

In light of the fact that the genocide definition in the ICC-Statute is identical to article II of the *Convention on the Prevention and Punishment of the Crime of Genocide*,[49] that there is no other document which lists crimes against humanity in such a detailed manner and that the definition of war crimes is based on a variety of precedents in international law, the legal necessity of the *Elements of crimes* can be called into question.[50] However, this does not preclude the usefulness of the *Elements* in the interpretation of the norms embodied in the ICC-Statute.

b. Individual Crimes under the Statute — Genocide

The provision concerned with the Crime of Genocide was the least controversial norm in the process leading to the adoption of the text of the ICC-Statute at the Rome Conference.[51] Its inclusion was therefore already agreed upon at an early stage of the drafting process. However, its exact delineation was not as clear as a comparison between article II of the *Genocide Convention* and article 6 of the ICC-Statute would suggest, as the operative part of both provisions are exactly the same.

aa. Cases on the National and International Level

While the importance of the *Genocide Convention* has never seriously been questioned, there has been a relatively low number of prosecutions and an even lower number of actual convictions for the crime of Genocide both on the national[52] and international level.[53]

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48 IT-96-23-T & IT-96-23/1-T, *Prosecutor v. Kunarac* of 22 February 2001, para. 436. In this judgment, the Trial Chamber states that "[t]he jurisdiction to prosecute rape as [a violation] of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 to the 1949 Geneva Conventions, is also clearly established".

49 A/RES/260 A (III) of 9 December 1948, UNTS Vol. 78 No. 1021. Hereonafter *Genocide Convention*.

50 Robinson/ van Hebel, see note 25, 223.

51 Zimmermann, see note 9, 171.

52 W. Schabas, "National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'", *Journal of International Criminal Justice* 1 (2003), 39 et seq. (41 et seq.).

53 Schabas, see above, 59 admits however that there was only "one truly clear-cut case of genocide since 1948, that of the physical destruction of

aaa. National Prosecutions

Domestically, some of the most well-known early cases were the trial of Rudolf Franz Hoess, the commander of the Auschwitz concentration camp, before the Supreme National Tribunal of Poland in 1947[54] and the trial of Adolf Eichmann before Israeli courts[55] in 1961 after having been abducted in Argentina in 1960.[56] Other, more recent cases took place in Germany[57] and Canada[58] with respect to events that took place in the territory of the former Yugoslavia and Rwanda, respectively.

Rwanda's Tutsi minority over three months in 1994, [...]."; A. Zahar, "Command Responsibility of Civilian Superiors for Genocide", *LJIL* 14 (2001), 591 et seq. (591).

54 United Nations War Crimes Commission, Law Reports of Trials of War Criminals VII (1948), Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoss, 11 et seq. (24-26).

55 *A.G. Israel v. Eichmann*, *ILR* 36 (1968), 18 et seq. (34) – District Court decision; *A.G. Israel v. Eichmann*, *ILR* 36 (1968), 277 et seq. – Supreme Court decision.

56 For an account of the events surrounding the abduction, see M. Lippman, "Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice", *Buffalo Human Rights Law Review* 8 (2002), 45 et seq.

57 *Prosecutor v. Djajic*, Bavarian Supreme Court, Judgment of 23 May 1997, reprinted in: *Neue Juristische Wochenschrift* 1998, 392 et seq. The Bavarian Supreme Court acquitted the defendant of the count of Genocide on the grounds of lack of *mens rea*. Bavarian Supreme Court, 3 St 20/96, Judgment of 23 Mai 1997, *Neue Juristische Wochenschrift* 1998, 392 et seq.; see commentary by K. Ambos, Case Note, *Neue Zeitschrift für Strafrecht* 1998, 138 et seq. Other judgments by German courts include German Supreme Court, 3 StR 215-98, judgment of 30 April 1999, *Neue Zeitschrift für Strafrecht* 1999, 396 et seq.; German Supreme Court, 3 StR 244/00, Judgment of 21 February 2001, *Neue Juristische Wochenschrift* 2001, 2732 et seq.; German Supreme Court, 3 StR 372/00, Judgment of 21 February 2001, *Neue Juristische Wochenschrift* 2001, 2728 et seq.

58 Federal Court of Canada, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 460. For the initial decision of the Canadian Immigration and Refugee Board, *Revue Universelle de droits de l'homme* 7 (1996), 195 et seq. For a comment to the latter decision, W. Schabas, "Denial of Residence Status to Alien on Grounds of Genocide – Application of Refugee Convention – Duty to Extradite under Genocide Convention – Use of NGO-Reports and Experts in Municipal Proceedings", *AJIL* 93 (1999), 529 et seq. In the *Akayesu* judgment, the ICTR made passing reference to the Léon Mugesera, ICTR-96-4-T, *Prosecutor v. Akayesu*, Judgment of 2 September 1998, paras 100 and 149.

bbb. International Decisions

On the international level, the ICJ has so far commented on the *Genocide Convention* on two occasions. First, it stated in a 1951 Advisory Opinion that the "principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation" and that "[i]t was intended that the Convention would be universal in scope".[59] This view was refined in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Bosnia-Herzegovina and Yugoslavia, when the ICJ indicated that the content of the *Genocide Convention* was reflective of customary international law.[60]

Apart from these decisions and prior to 1994, the *Genocide Convention* had thus not been of major importance in judicial decisions and political interpretations,[61] when the ICTR handed down the first criminal judgment of an international court with respect to the crime of Genocide in the *Akayesu* trial.[62] This judgment was to be followed by a number of other judgements both by the ICTR and the ICTY.[63]

Taken together, these cases form the basis upon which future decisions will most likely be based. A number of questions have arisen in judgments rendered so far with respect to the meaning of the relevant provisions of the *Genocide Convention*.

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59 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951 15 et seq. (23).

60 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1993, 325 et seq. The same view was taken by the Secretary-General of the United Nations in his report to the Security Council, Doc. S/25704, Report pursuant to para. 2 of S/RES/ 808 (1993) of 3 May 1993, 12, para. 45.

61 The General Assembly in 1982 declared that the events surrounding the Sabra and Shatila refugee camps situated at Beirut constituted "an act of genocide." A/RES/37/123 D of 16 December 1982, *The situation in the Middle East*,. However, a resolution cannot be considered to have judicial character, but especially in this instance has to be considered a political statement. This view is echoed by the ICTY in IT-95-10-T, *Prosecutor v. G. Jelisić*, Judgment of 14 December 1999, para. 83.

62 *Prosecutor v. Akayesu*, see note 58.

63 It should be noted however that both the Statute of the ICTY and the Statute of the ICTR include both article II and III of the *Genocide Convention*.

bb. actus reus *Requirement*

The protected groups are explicitly mentioned in the text of article 6 of the ICC-Statute. They are limited to national, ethnical, racial or religious groups. A number of attempts have been made to afford the protection of the *Genocide Convention* to other groups, such as political,[64] economic or social groups.[65] However, to date, none of these suggestions has found entry into the *Genocide Convention* or any other relevant international treaty. The ILC had concluded in 1996 that the "[...] definition of genocide contained in article II of the Convention, [...] is widely accepted and generally recognized as the authoritative definition of this crime [...]".[66] Especially with respect to the inclusion of political groups, the ILC stated that such groups did not possess the required stability for the purposes of the crime of genocide.[67] Other suggestions to extend the meaning of the text of the *Genocide Convention* by way of extensive interpretation have also been rejected in the case law of the ICTY.[68] Referring specifically to the judgment of the German Constitutional Court, the ICTY has stated that it cannot disregard the principle of *nullum crimen sine lege* and that "customary international law limits the definition of genocide to those acts seeking the physical or

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64 L. Bruun, "Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law", *Maryland Journal of International Law and Trade* 17 (1993), 193 et seq. (207); B. v. Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot", *Yale L. J.* 106 (1997), 2259 et seq. (2280 et seq.).

65 W. Schabas, *Genocide in International Law*, 2000, 145; M. Lippman, "Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium", *Houston Journal of International Law* 23 (2001), 467 et seq. (485).

66 Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996, GAOR 51st Sess., Suppl. No. 10 (Doc. A/51/10), 87.

67 Report of the International Law Commission, see note 66, 87.

68 In a decision of the German Constitutional Court of 2000, the Court had pronounced that "the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the social existence of the group [...]. The intent to destroy the group [...] extends beyond physical and biological extermination [...]. The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group", BVerfG 2 BvR 1290/99, available at <www.bverfg.de> (4 August 2003).

biological destruction of all or part of the group".[69] It thus made clear that an attack on the sociological characteristics of a human group, even if all other requirements of the *Genocide Convention* are fulfilled, would not lead to a conviction of genocide.

In this respect, the *Akayesu* judgment of the ICTR is especially noteworthy. Facing the problem of not being able to distinguish the minority Tutsi population from the majority Hutus under any of the groups mentioned in the *Genocide Convention*, it adopted something that could be labeled a "no challenge to group membership" approach. It deduced from the *travaux préparatoires* of the *Genocide Convention* that the crime of genocide was perceived as targeting only "stable" groups to which one belongs to not by choice — such groups are labeled "mobile" groups by the ICTR —, but in which membership is determined by birth.[70] It concluded that "membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[71] Such an interpretation is open to criticism for various reasons. First and foremost, reliance on the *travaux préparatoires* is inconsistent with arts 31 and 32 of the *Vienna Convention on the Law of Treaties*, of which the latter stipulates that recourse to the *travaux préparatoires* may only be had when the interpretation according to article 31 of the *Vienna Convention*: "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".[72] It is apparent that a literal interpretation of the *Genocide Convention* neither leaves the meaning ambiguous or obscure, nor does it lead to a result which is absurd or unreasonable. It might not yield the desired result, but that does not warrant stretching the boundaries of legal interpretation. Secondly, if the drafters of the Convention had wanted to include a reference to stable groups, wording to that effect would have been included in the text of the Convention.[73] Moreover, as

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69 IT-98-33-T, *Prosecutor v. Krstic*, Judgment of 2 August 2001, para. 580; C. Hoss/ R. Miller, "German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence", *GYIL* 44 (2001), 576 et seq. (601-610).

70 *Prosecutor v. Akayesu*, see note 58, para. 511.

71 *Prosecutor v. Akayesu*, see note 58, para. 511.

72 *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS Vol. 1155 No. 18232.

73 The *Delalic* Judgment alludes to this principle, see IT-96-21-T, *Prosecutor v. Delalic* of 16 November 1998, para. 412.

pointed out above, the ICTY in its *Krstic* judgment considered such extensions to be inconsistent with the criminal law principle of *nullum crimen sine lege*.[74]

Allegations claiming the existence of "loopholes"[75] or of fundamental flaws or "blind spots"[76] leading to an escape from liability are unfounded as there are other international instruments under which such action can be subsumed. While it must be acknowledged that those acts would thus not receive the same stigma as that attached to genocide, it should be stressed that extending the content enshrined in the *Genocide Convention* — and thus the parallel meaning of the crime of genocide under customary international law — to include other groups could — in the long run — leave the Convention less meaningful.

cc. mens rea *Requirement*

One characteristic which sets genocide apart from the other crimes in the ICC-Statute is the requirement of a *dolus specialis* which has to be proven in addition to the criminal intent accompanying the underlying offences,[77] and which are mentioned in subsections (a)-(e). Thus, the

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74 IT-98-33-T, *Prosecutor v. Krstic*, Judgment of 2 August 2001, para. 580. In the *Delalic* judgment, the ICTR specifically laid out the requirements set out by international criminal law, *Prosecutor v. Delalic*, see note 73, para. 402 et seq. The ICTR, in a later judgment and through a different trial chamber, found that the Tutsis did constitute a different ethnic group the Hutus, thereby circumventing the problem posed by the finding of Trial Chamber I in the *Akayesu* Judgment. See ICTR-95-1-T, *Prosecutor v. Kayashima and Ruzindana*, Judgment of 21 May 1999, para. 523.

75 P. Drost, *The Crime of State*, Volume II – Genocide, 1959, 123.

76 v. Schaack, see note 64, 2272.

77 *Prosecutor v. Akayesu*, see note 58, para. 516; ICTR 97-23-S, *Prosecutor v. J. Kambanda*, Judgment and Sentence of 4 September 1998; ICTR-95-1-T, *Prosecutor v. C. Kayashima and O. Ruzindana*, Judgment of 21 May 1999, para. 91; ICTR-96-3, *Prosecutor v. G. Rutaganda* of 6 December 1999, para. 59 et seq.; A. Cassese, "Genocide", in: Cassese et al., see note 11, 335 et seq. (338); Schabas, see note 65, 215 and 217 et seq. The Appeals Chamber in the *Jelisić* case held that the terms *dolus specialis* and *special intent* could be used interchangeably, IT-95-10-A, *Prosecutor v. Goran Jelisić*, Judgment of 5 July 2001, 18 et seq.

mens rea requirement can be separated into two parts.[78] While it is sufficient to prove that one or more of the underlying offences enumerated in subsections (a)-(e) were committed "with intent and knowledge"[79], thus mirroring the *actus reus*,[80] it must be proven that the perpetrator had the specific intention to destroy, in whole or in part, one of the groups mentioned in the chapeau of article 6 of the ICC-Statute. While this connotes a considerably higher requirement, no physical destruction of the group must have taken place, i.e. the perpetrator must not have achieved this result.[81] Any lower level of *mens rea*, such as negligence or recklessness, neither meets the threshold required by article 30 of the ICC-Statute nor the specific intent required by genocide for forms of direct participation.[82]

It is also noteworthy that the *Elements of crimes* seem to insert an additional layer of conditions which needs to be met. All subsections are annotated to include an element outlined as:

> "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".[83]

Such an element does not add anything to the existing definition. If anything, it can bring about confusion with respect to the delineation of the crime of genocide. The additional element enshrined in this phrase requires similar conduct to that embodied in the chapeau of article 7 of the ICC-Statute, i.e. Crimes against Humanity, which refers to "a widespread or systematic attack".[84] This element was included in order to

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78 O. Triffterer, "Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such", *LJIL* 14 (2001), 399 et seq. (400). Thus, the opinion that "[w]hether Article 30 applies to acts of genocide remains an open question" is at least doubtful, D. Nersessian, "The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals", *Tex. Int'l L. J.* 37 (2002), 231 et seq. (265).

79 Article 30 of the ICC-Statute.

80 Triffterer, see note 78, 400.

81 Triffterer, see note 78, 401.

82 Report of the International Law Commission, see note 66, 87; Hoss/Miller, see note 69, 603, fn. 150. National criminal codes might differ with regard to this element however, see K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts*, 2002, 412.

83 *Elements of Crimes*, see note 22, 6-8. This phrase is the last element in each of the subsections (a)–(e).

84 Article 7 ICC-Statute.

provide guidance on the context of the acts carried out and which are the basis for an accusation of the crime of genocide.[85] Furthermore, there was concern that isolated hate crimes could lead to a conviction and thus to a trivialization of genocide.[86] The premise that seemed to be the basis for the inclusion of such an element can only be explained by a deep-rooted mistrust towards the organs of the ICC, and ultimately the judges. The track record of the ICTY or ICTR with respect to genocide does not indicate that there has been a lack of judicial self-restraint and while the situations that these tribunals are concerned with could be different from those the ICC will have to deal with as a permanent organ, it seems far-fetched that individuals qualified and chosen for the position of a judge on the bench of the ICC would not bear these issues in mind.[87] On the other hand, if one follows the interpretation of the *Elements of crimes* presented above[88] and if one accepts that there could be cases that do not involve a plan that would lead to the destruction of one of the groups in the chapeau,[89] it is still possible to make a finding of genocide despite the lack of such a contextual element.

dd. Participation in Genocide

One aspect that deserves special attention is the lack of a provision similar to article III of the *Genocide Convention*, which deals with the various forms of participation in the crime of genocide, in the ICC-Statute. This "omission" however must be seen against the background that the ICC-Statute aimed at codifying not only the actual crimes, but also general principles of criminal law that are to be applied.[90] Thus,

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85 V. Oosterfeld, "The Elements of Genocide – II. The Context of Genocide", in: Lee, see note 20, 45.

86 Oosterfeld, see above, 45.

87 Article 36 ICC-Statute makes specific reference to the qualifications of the judges and their election. The ICC would be competent to deal with situations that do not necessarily require the existence of an armed conflict, be it an international or internal one.

88 See note 38.

89 Only very few cases are conceivable in this respect, as was pointed out in the discussion of the Preparatory Commission, see Schabas, see note 65, 209.

90 The Statutes of the ICTY and ICTR took a different approach in that they included both article III of the *Genocide Convention* as well as a general provision on participation. This might explain some inconsistencies in a number of cases before the ICTR, see Schabas, see note 65, 265.

participation is dealt with in a separate provision of the ICC-Statute, namely article 25 of the ICC-Statute. A close analysis reveals that most – though not all – forms of participation laid down in the *Genocide Convention* are included in this provision. Article III (c) *Genocide Convention* – direct and public incitement to commit genocide is included in article 25 (3)(e) of the ICC-Statute, article III (d) *Genocide Convention* – attempt to commit genocide is codified in article 25 (3)(f) of the ICC-Statute and article III (e) – complicity in genocide is to be found in article 25 (3)(c) and (d) of the ICC-Statute. Thus, the only participatory form of genocide that is not included in the ICC-Statute is "conspiracy to commit genocide",[91] i.e. an inchoate crime consisting of planning and organizing of genocide not necessarily followed by the actual perpetration of the crime.[92] This dichotomy between the original wording of the *Genocide Convention* and the ICC-Statute can only be explained by taking into account two legal traditions with considerably different approaches to this issue. While the common law approach has a long history of including conspiracy,[93] the continental European tradition treats complicity not as a separate crime, but presumes that it can only be committed as a form of complicity with the additional requirement that the crime must have been carried out or at least attempted (*Akzessorietätsgrundsatz*).[94] The relevant provisions of the ICC-Statute indicate that, contrary to the *Genocide Convention* which followed the common law tradition, the Romano-Germanic traditions have prevailed.[95]

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91 See article III (b) of the *Genocide Convention*.

92 A. Cassese, "Genocide", in: Cassese et al., see note 11, 335 et seq. (347).

93 See e.g. the concurring opinion of Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, who noted that "[t]he doctrine does not commend itself to civil-law countries, despite universal recognition that an organized society must have legal weapons for combating organized criminality [...]. Jackson referred to F. Sayre, "Criminal Conspiracy", *Harv. L. R.* 35 (1922), 393 (427), who stated – in 1922 – that conspiracy "is utterly unknown to the Roman law; it is not found in modern Continental codes; few Continental lawyers ever heard of it"; G. Fletcher, "The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt", *Yale L. J.* 111 (2002), 1499 et seq. (1512).

94 W. Schabas, "Article 6 – Genocide", mn. 16, in: Triffterer, see note 17.

95 W. Schabas, see note 94, 116, mn. 16. However, Schabas' claim that the inconsistency of the ICC-Statute with the *Genocide Convention* in this regards "appear to be inadvertent" are refuted by the drafting history of the

One aspect that, at least so far, is unresolved is the question of whether a commander is required to have the same *dolus specialis* as the actual perpetrator of the crime if the commander was not directly involved in any of the acts mentioned in subsections (a)–(e) of article 6 of the ICC-Statute.[96] While the general issue of command responsibility has been discussed in both national and international fora as well as in academia[97] — one of the early and most frequently referred to cases being that of General *Tomoyuki Yamashita* for his conduct — or lack thereof — during the American advance on the Philippines during 1945.[98] One of the few cases which actually dealt with this issue of command responsibility with respect to the crime of genocide was the District Court's decision in the *Eichmann* case.[99] In recent case law, only the indictment of *Radovan Karadzic* and *Ratko Mladic* made such a reference.[100] Different views have been promulgated. While Schabas indicates that the ICC-Statute "appears to allow" that genocide be committed with a lower level of intent "in that it contemplates liability of commanders for genocide committed by their subordinates even if they have no real knowledge of the crime",[101] Cassese reasons that such a view is unacceptable on the grounds that one must distinguish between the subjective requirement for a commander and that of the principal perpetrator of the crime.[102]

This is also reflected in article 28 of the ICC-Statute, the provision pertaining to the responsibility of the commander. Before presenting

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ICC-Statute. See A. Eser, "Individual Criminal Responsibility", in: A. Cassese et al., see note 11, 767 et seq. (802).

96 See generally on the issue of command responsibility Ambos, see note 82, 666 et seq.; T. Wu/ Y. Kang, "Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in United States Law", *Harv. Int'l L. J.* 38 (1997), 272 et seq.

97 See e.g. N. Laviolette, "Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda", *CYIL* 36 (1998), 93 et seq.

98 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* 4 (1948), 1 et seq.; B. Landrum, "The Yamashita War Crimes Trial: Command Responsibility Then and Now", *Mil. L. Rev.* 149 (1995), 293 et seq.

99 *A.G. Israel v. Eichmann* – District Court decision, see note 55.

100 IT-95-5-I, *Prosecutor v. R. Karadzic and Ratko Mladic*, Indictment.

101 Schabas, see note 94, mn. 4.

102 Cassese, "Genocide", in: Cassese et al., see note 11, 335 et seq. (348).

the central argument, it is necessary to briefly outline the general approach that is embodied in the ICC-Statute with respect to the required mental element. In this regard, article 30 of the ICC-Statute is the central and generally applicable norm. However, it stipulates that its degree of *mens rea* applies only "unless otherwise provided". Article 6 of the ICC-Statute requires a higher degree of *mens rea* and in cases of direct responsibility of the actual perpetrator constitutes a rule *lex specialis* to article 30 of the ICC-Statute. However, in cases of superiors, article 28 of the ICC-Statute becomes *lex specialis* to article 30 of the ICC-Statute.[103] This provision provides that the commander is responsible for the acts of her/his subordinates when s/he "either knew [...] or should have known that the forces were committing or about to commit such crimes" and "failed to take all necessary and reasonable measures within his or her power to prevent [...]" the commission of the crime.[104] A second possibility to attribute criminal responsibility to a commander arises when "the superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes" at a time when the commander was in effective control over the troops in question.[105] Thus, if a commander had knowledge or, due to failure in overseeing the troops under her/his command, failed to have such knowledge and did not take the necessary and reasonable steps within her/his power, it falls within that individual's responsibility that genocidal acts should not take place. The opposing view[106] fails to make the crucial differentiation between the subjective requirement for a commander and that of the principal perpetrator of the crime that is necessary when having to attribute responsibility of the commanding officer.[107]

Such an understanding was prominently put forth in the trial of *Adolf Eichmann* in the Jerusalem District Court when it stated that "[...] the legal and moral responsibility of he who delivers up the victim

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103 This is what Cassese seems to imply when he states that "[i]t may be argued that Article 28 constitutes an exception to that which is provided for in Article 30 [..]". Cassese, "Genocide", in: Cassese et al., see note 11, 335 et seq. (348).

104 Article 28 (a) (i) and (ii) ICC-Statute.

105 Article 28 (b) ICC-Statute.

106 K. Ambos, "General Principles of Criminal Law in the Rome Statute", *Criminal Law Forum* 10 (1999), 1 et seq. (19); W.A. Schabas, "General Principles of Criminal Law", *European Journal of Crime and Criminal Justice* 4 (1998), 84 et seq.

107 Similar to the view taken here, Zahar, see note 53, 613.

to his death is, in our opinion, no smaller, and may be greater, than the responsibility of he who kills the victim with his own hands".[108] The Trial Chamber in the *Akayesu* Judgement echoed that sentiment when it pronounced — referring to the *Eichmann* case — that: "[I]f the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group".[109]

A similar line of argument was used in the indictment of *Radovan Karadzic* and *Ratko Mladic* when they were charged with, *inter alia*, genocide on the grounds that they "individually and in concert with others planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of persecutions on political and religious grounds or knew or had reason to know that subordinates were about to do the same or had done so and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[110] While an indictment in and of itself should not be accorded an excessive amount of significance and certainly cannot be considered to represent proof of a certain practice in international law, it can nevertheless serve as an indication of the current state of law when seen in light of the developments outlined above.

It would thus seem that — in light of the command responsibility doctrine's origins, codification and most recent application — "it is apparent that the doctrine now operates under agreed-upon principles".[111] Moreover, the problem might in reality never present itself. It seems highly unlikely that a commanding officer will not have knowledge of genocidal acts of her/his subordinate(s) or that s/he does not possess the required genocidal intent herself/himself. Considering the purported uniqueness of the crime of genocide,[112] such a finding — if the

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108 *A.G. Israel v. Eichmann* – District Court decision, see note 55, 179 et seq.

109 *Prosecutor v. Akayesu*, see note 58, para. 541.

110 IT-95-5-I, *Prosecutor v. R. Karadzic and Ratko Mladic*, Indictment, para. 33.

111 Wu/ Kang, see note 96, 278.

112 W. Schabas, "The *Jelisić* Case and the *Mens Rea* of the Crime of Genocide", *LJIL* 14 (2001), 125 et seq. (139) and Schabas, see note 65, 9 calls it the "crime of crimes". It has also been described as "the ultimate crime and the gravest violation of human rights it is possible to commit." E/CN.4/Sub.2/1985/6, Benjamin Whitaker, Special Rapporteur, Review of Further Developments in Fields with Which the Sub-Commission Has

other requirements are met, if the circumstances so warrant, and if no extenuating circumstances exist — does not seem inappropriate.

c. Individual Crimes under the Statute — Crimes Against Humanity

While the inclusion of a norm under the heading "Crimes Against Humanity" was uncontroversial,[113] it proved considerably more difficult to agree on its content. Some of the difficulties that could only be resolved at the Rome Conference included the exact definition of the crimes under this heading, the questions of whether the victims can only be civilians and whether crimes against humanity could be committed in times of armed conflict, and finally whether the terms "widespread" on the one hand and "systematic" on the other must be fulfilled cumulatively or whether it would be enough if only one element was present at the time of the commission of the crime. These manifold problems stemmed from the fact that the precedents for crimes against humanity were to some extent contradictory and — in comparison to genocide and war crimes — the content of crimes against humanity was not clearly marked out.[114] Crimes against humanity can probably be classified as the category of crimes which was — apart from aggression — most hotly debated due to divergent views of the content of the state of customary law in this regard. However, the debates prior to and during the Rome Conference alleviated this category of crimes from its customary form[115] to take a more precise, conventional form.

Been Concerned, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, Human Rights Commission, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 38th Sess., 5.

113 Zimmermann, see note 9, 172; van Hebel/ Robinson, see note 20, 90.

114 These precedents included the Nuremberg and Tokyo Charters, but also the statutes of the two international criminal tribunals which were operating at the time, the ICTY and the ICTR. Moreover, the Draft Code of Crimes Against the Peace and Security of Mankind, prepared under the auspices of the International Law Commission served as a another source. All of these sources are contained in M.C. Bassiouni, "Crimes Against Humanity", in: M.C. Bassiouni (ed.), *International Criminal Law – Volume I*, 2nd edition 1999, 521 (563 et seq.). See also Delbrück/ Wolfrum, see note 35, 1094.

115 M. Lippman, "Crimes Against Humanity", *Boston College Third World Law Journal* 17 (1995), 171 et seq. (271).

aa. Drafting History

The first time crimes against humanity were prosecuted was under the statute of the International Military Tribunal at Nuremberg, although some authors date its history back well into the Middle Ages.[116] Its article 6 (c) included crimes such as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during" World War II.[117] If the aforementioned wording can serve at least as an indication that not only acts during times of armed conflict were to be included, the second part of this subsection makes such a finding even more convincing. It considers crimes against humanity to include "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal" regardless of whether such action was in violation of the domestic law of the country where it took place.[118] Crimes against humanity have their conceptual origin in the laws of war, namely the "Martens clauses" of the 1899 and 1907 Hague Conventions,[119] but go beyond international humanitarian law in that they

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116 Various opinions exist in this regard, cf. L. Green, "The Law of Armed Conflict and the Enforcement of International Criminal Law", *Annuaire Canadien de Droit International* 27 (1984), 1 et seq. (7); L. Green, "Human Rights and the Law of Armed Conflict", *Isr. Y. B. Hum. Rts* 10 (1980), 9 et seq. (10); but also K. Chaney, "Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials", *Dick. J. Int'l L.*14 (1995), 57 et seq. It seems however, that caution should prevail in this regard. While the term humanity is innate in earlier codifications, only some of them concern the well-being of the civilian population, such as the St. Petersburg Declaration of 1868, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, reprinted in: A. Roberts/ R. Guelffs (eds.), *Documents on the Laws of War*, 3rd edition, 2000, 53 et seq.

117 Similar wording was included in article 5 (c) of the Charter of the International Military Tribunal for the Far East. Schwarzenberger raises doubts about whether the Nuremberg Charter was declaratory at the time of its inception; G. Schwarzenberger, *The Law of Armed Conflict*, 1968, 498.

118 The wording "in connection with any crime within the jurisdiction of the Tribunal" ties crimes against humanity to other criminal acts set forth in this, thereby limiting the jurisdiction of the Tribunal.

119 See B. van Schaack, "The Definition of Crimes Against Humanity: Resolving the Incoherence", *Colum. J. Transnat'l L* 37 (1999), 787 et seq. (795 et seq.); Lippman, see note 115, 173, The purpose of the Martens Clause was to act as a catch-all clause which was to curb the action of military

criminalize acts which take place in a territory that is under the control of the state to which the perpetrator belongs and furthermore do not have to be committed in times of armed conflict.[120] It has been argued that the provision on crimes against humanity in the Nuremberg Charter was adopted for the sole purpose to ensure that offences committed by German individuals against Germans would not be left in a legal vacuum, but could be prosecuted under the statute of the Nuremberg tribunal.[121] For fear of potential internal problems or problems regarding their colonies, the Allies insisted that crimes against humanity could only be committed if they were associated with one of the other crimes within the tribunal's jurisdiction, i.e. war crimes or crimes against the peace.[122] Be that as it may, crimes against humanity have — since their coming into being before a judicial body — left behind their oftentimes vague and overlapping relationship with war crimes.[123] Some even argue that their "delayed maturation [...] allowed the international community better to clarify, expand and shape them, taking fuller account of relevant norms of contemporary general international law".[124]

bb. Crimes Against Humanity in the Rome Statute

The final form agreed upon during the Rome Conference lays out a series of subsections in section 1 which mention the criminal acts that can lead to a conviction for crimes against humanity. These crimes include, *inter alia*, murder, extermination, torture, rape and sexual slavery, but

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commanders for which no prohibition existed. See Delbrück/ Wolfrum, see note 35, 1087.

120 For a more thorough discussion see II. 1. c. bb. aaa.

121 M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd edition, 1999, 41 et seq.

122 E. Schwelb, "Crimes Against Humanity", *BYIL* 23 (1946), 178 et seq. (183); R. Clark, "Crimes against Humanity at Nuremberg", in: G. Ginsburgs/ V. Kudriavtsev (eds), *The Nuremberg Trials and International Law*, 1990, 177 et seq. (197).

123 L. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, 1992, 68. See also Clark, see note 122, 199; M.C. Roberge, "Jurisdiction of the *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide", *Int'l Rev. of the Red Cross* 321 (1997), 651 et seq. (654).

124 L. Sunga, "The Crimes within the Jurisdiction of the International Criminal Court (Part II, Articles 5-10)", *European Journal of Crime, Criminal Law and Criminal Justice* 6 (1998), 61 et seq. (68).

also "other inhumane acts of a similar character" which cause great suffering, or serious injury to body or to mental or physical health. These acts are more clearly defined in article 7 (2) of the ICC-Statute, while section 3 defines gender not only for the purpose of article 7 of the ICC-Statute, but equally for all other provisions of the entire document.[125] According to the *chapeau* of article 7 of the ICC-Statute, these crimes must have been committed as part of a widespread *or* systematic attack directed against any civilian population, with knowledge of the attack.

aaa. Nexus to Armed Conflict

On a general level, the most contentious issue during the negotiating process — both before and during the Rome Conference — turned out to be the question whether there needed to be any kind of nexus to armed conflict, or whether crimes against humanity would be punishable also in times of an absence of such conflict if all other conditions were met. The outcome of this discussion was crucial with respect to the operability of crimes against humanity. Those nations that argued in favor of the requirement of such a nexus — with some even going as far as demanding the existence of an international armed conflict — cited the Nuremberg and Tokyo charters, but also the ICTY statute as precedent. However, there are several reasons why the existence of such a correlation would ultimately render the provision of crimes against humanity almost entirely useless. First and foremost, once it is accepted that these conditions would have to be present, the relationship with war crimes under article 8 of the ICC-Statute would be one of duplicity, as most of the crimes covered under article 7 of the ICC-Statute could be subsumed under the former provision.[126] Moreover, the perceived precedent of the Nuremberg and Tokyo charters did not take into consideration other important aspects and developments. First of all, the nexus requirement in the charters of the Nuremberg and Tokyo tribunals served as a limitation to the jurisdiction of these tribunals rather than narrowly defining crimes against humanity.[127] Secondly, the

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125 See M. Boot, "Article 7 – Crimes against Humanity, mn. 127", in: Triffterer, see note 17.

126 D. Robinson, "Defining Crimes Against Humanity at the Rome Conference", *AJIL* 93 (1999), 43 et seq. (46).

127 M.C. Bassiouni, "Crimes Against Humanity", in: M.C. Bassiouni (ed.), *International Criminal Law*, 2nd edition 1999, 41 states that the "definition

ICTY in its *Tadic* decision had regarded the nexus to armed conflict to be superfluous taking into account the development of the doctrine of crimes against humanity after World War II, i.e. leaving out of consideration the current state of customary international law regarding this crime.[128] In this regard, it should be noted that US military courts, declared that "[...] crimes against humanity are in international law, completely independent of either crimes against peace or war crimes."[129] Finally, the statute of the ICTR, which came into force after the statute governing the ICTY, does not contain such a requirement any more. These arguments prevailed in the end, giving meaning to crimes against humanity outside of times of armed conflict.[130]

bbb. Widespread and/or Systematic

Another issue that caused considerable debate was that of the threshold that was necessary in order for international adjudication to be war-

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in the Nuremberg charter fitted the unforeseen and unforeseeable depredations which had occurred between 1932-1945". Delbrück/ Wolfrum, see note 35, 1097; V. Morris/ M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, 1995, 239.

128 The ICTY stated in its *Tadic* decision on the trial chamber level, that "[d]espite this precedent, the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nuremberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict." See IT-94-1-T *Prosecutor v. Dusko Tadic* of 7 May 1997, para. 618. A similar argument is advanced in the Report of the Secretary-General, see note 60, para. 47. Bassiouni, see note 127, 70 argues that the Nuremberg Charter was "the final step of a steady progressive historical development and evolution of international criminal responsibility for harmful conduct committed against civilian populations irrespective of nationality, but subject to the condition that the violation be linked to the initiation and conduct of war." However, following the Nuremberg trials, "this connection to war was removed in Control Council Law No. 10, and in subsequent historical developments".

129 *United States v. Ohlendorf*, Trials of War Criminals Before the Nürnberg Military Tribunals under Control Council Law No. 10, Vol. 4, 49. This decision was based on Control Council Law No. 10, which did not require such a nexus any more, see note 128.

130 The outcome of this discussion can also be derived from article 7 (2) (a), which speaks of a "course of conduct [...] pursuant to or in furtherance of a State or organizational policy to commit such attack".

ranted.[131] It is clear that not every crime mentioned in subsection 1 of article 7 of the ICC-Statute would warrant a conviction for crimes against humanity, but would be better dealt with on the national level. Thus a certain threshold requirement was necessary. The division between two major groups of countries concerned the question whether the two elements "widespread" as well as "systematic" would be linked cumulatively or whether they would operate independently.[132] The proponents of the former alternative pointed to the problem that a "widespread" commission of the crime would not only encompass large-scale atrocities, but also "crime waves" which were generally recognized not to fall under the jurisdiction of the ICC. The group of "like-minded" states on the other hand argued that customary international law — evidenced by the statute of the ICTR[133] and ICTY jurisprudence[134] — regarded as sufficient such a disjunctive test.[135] The ICTR in the *Akayesu* case had declared that "it is a prerequisite that the act must be committed as part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both."[136] In light of this, it

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131 van Hebel/ Robinson, see note 20, 94.

132 The content of these terms were defined by the ICTR in its *Akayesu* Judgment, see note 58, para. 580: "The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims", while [t]he concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".

133 The chapeau of article 3 of the statute of the ICTR reads in its relevant part: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds [...]."

134 See especially *Prosecutor v. Dusko Tadic*, see note 128, paras 645 et seq. (647). There the trial chamber cites numerous authorities, ranging from another trial chamber's finding in the *Vukovar Hospital Decision* case, and more conclusively, the various statements by the ILC in the process leading to the Rome conference.

135 W.J. Fenrick, "Should Crimes Against Humanity Replace War Crimes?", *Colum. J. Transnat'l L.* 37 (1999), 767 et seq. (777).

136 *Prosecutor v. Akayesu*, see note 58, para. 579. However, the French version of the ICTR statute suggests a conjunctive rather than a disjunctive reading, essentially raising the threshold for the application of the crime to a considerably extent: "Dans le cadre dune adieux generalise et systematic

seems appropriate to state that the state of customary international law in 1998 was reflected in this codification — with its disjunctive test.[137]

ccc. Attack Directed against any Civilian Population

The solution to the question of whether there needed to be a conjunctive or disjunctive relation between the elements "widespread" and "systematic" was made considerably easier by the inclusion of the requirement that the attack be "directed against any civilian population". Similar wording can be found in the statutes of the ICTY and ICTR. The element that the attack be committed against the "civilian population" is one of scale ("multiple commission"), but must be interpreted to be considerably lower than the "widespread" element also present in the chapeau.[138] More controversial, however was the inclusion of the element of a governmental or organizational policy.[139] This element is part of the definition of the term "attack directed against any civilian population" contained in article 7 (2) (a) of the ICC-Statute. It was moreover mentioned by the Trial Chamber in the *Tadic* case that the reason why crimes against humanity "so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts".[140] Compared to the term "systematic", it is not necessary that the attack be highly organized and orchestrated in accordance with a developed plan.[141] The question whether such an organizational policy should be included was decided on the basis of a

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[...]." However, the trial chamber declared that "[s]ince Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation.

137 M. de Guzman, "The Road from Rome: The Developing Law of Crimes against Humanity", *HRQ* 22 (2000), 335 et seq. (375); Fenrick, see note 135, 777; Delbrück/ Wolfrum, see note 35, 1096.

138 van Hebel/ Robinson, see note 20, 96.

139 Bassiouni, see note 127, 255 argues that without such a governmental or organizational policy, crimes against humanity could simply not be carried out. Similarly, Morris and Scharf assert that this element requires a "systematic plan or general policy". Morris/ Scharf, see note 127, 79 et seq.

140 *Prosecutor v. Dusko Tadic*, see note 128, para. 653.

141 van Hebel/ Robinson, see note 20, 97.

compromise whereby the proponents of a conjunctive test with respect to the elements "widespread" and "systematic" were satisfied that "crime waves" would not be subject to international adjudication and would therefore fall outside of the jurisdiction of the ICC.[142] The concept of the presence of such an organizational element was also not an entirely novel one at the Rome Conference despite criticism to that effect from various non-governmental organizations.[143] In addition to the judgment of international tribunals, various national courts — with varying differences in certain elements — made similar pronouncements on this issue. Some of the best known national cases to deal with this aspect was the *Menten* decision by the Hoge Raad in the Netherlands in 1981,[144] the *Barbie*[145] and *Touvier*[146] cases before the French Cour de Cassation, in 1985 and 1991, respectively, and the 1994 *Finta* case before the Canadian Supreme Court,[147] all of which considered an element of organizational policy to be necessary when crimes against humanity were concerned.

One final aspect that should be mentioned is the question of whether crimes against humanity can be committed against military personnel. The wording of crimes against humanity under the ICC-Statute seems to indicate that this is not the case, as it speaks solely of an attack against "any civilian population". It is however conceivable that some of the acts embodied in article 7 (1) (a)–(k) of the ICC-Statute will be committed against military personnel, but would not fall under war crimes according to article 8 of the ICC-Statute. To start with, one would have to rule out that murder would fall under this category of crimes — a view adopted by the International Military Tribunal for the Far East.[148] If the acts were prohibited under international humanitarian law, but could not be prosecuted under war crimes, a

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142 L. Wexler, *The International Criminal Court and the Transformation of International Law – Justice for the New Millenium*, 2002, 152.

143 van Hebel/ Robinson, see note 20, 96.

144 *Public Prosecutor v. Menten*, *International Law Review* 75 (1981), 362 et seq. (363).

145 *Fédération Nationale Des Déportés Et Internés Résistants Et Patriots And Others v. Barbie*, 20 December 1985, *ILR* 78 (1988), 124 et seq.

146 *Touvier*, 1 June 1995, *ILR* 100 (1995), 337 et seq. (340).

147 *Regina v. Finta*, [1994] 1 S.C.R., 701 (814).

148 International Military Tribunal for the Far East, 1 November 1948, B. Röling/ C. Rüter, *The Tokyo Judgment*, Volume 1, 1977, 1 et seq. (32 et seq.).

prosecution under crimes against humanity would nevertheless be possible.[149] This is especially true in situations in which belligerents *hors de combat* have laid down their weapons because they are wounded or because they were captured.[150] This view is confirmed by the position taken by various international and national courts.[151]

ddd. Element of Discrimination

Another cause for debate in the deliberation process was the question of whether crimes against humanity necessarily included an element of discrimination.[152] The differing views are mirrored when analyzing the statutes of the ICTR and the ICTY — the former containing a discrimination clause,[153] the latter omitting such an element. Similarly, while the ILC held that such an element was contained in article 6 (c) of the Nuremberg charter,[154] this view was vehemently and widely rejected in academia.[155] The latter seems to be the view that it is closer to the wording of the relevant provision of the Nuremberg charter. While its article 6 (c) makes mention of discriminatory — political, racial or

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149 Zimmermann, see note 9, 179.

150 A. Cassese, "Crimes Against Humanity", in: Cassese et al., see note 11, 353 et seq. (375).

151 For a list of cases, see Zimmermann, see note 9, 178 et seq. and Cassese, "Crimes Against Humanity", in Cassese et al., see note 11, 353 et seq. (368).

152 Lippman, see note 115, 171 who defines crimes against humanity before the background of discriminatory grounds; it should be borne in mind that this article was written well prior to the Rome Conference.

153 The relevant provision of the ICTR statute – article 3 – states that "[t]he International Tribunal for Rwanda shall have the power to prosecute [...] crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds [...]."

154 ILC, Draft Code of Offences against the Peace and Security of Mankind, 1954, *ILCYB* 1954, Vol. II, 112 et seq. Article 2 (10) of the 1954 Draft Code reads:
"Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with toleration of such authorities".

155 D. Johnson, "Draft Code of Offenses against the Peace and Security of Mankind", *ICLQ* 4 (1955), 445 et seq.

religious — motives, it does so explicitly only with respect to "persecutions in execution of or in connection with any crime within the jurisdiction of the Tribunal". While this does seem to give the opportunity to narrow the scope of the application of this provision, a teleological interpretation leaves no other choice but to restrict the discriminatory grounds to persecutions. While it is thus obvious that the crime of persecution (article 7 (1) (h) of the ICC-Statute) does require a discriminatory motive, it is far more plausible that such a requirement is not necessary with respect to other crimes under the jurisdiction of the ICC, e.g. murder. Persecution as defined in that provision,[156] and as explained in article 7 (2) (g) of the ICC-Statute — meaning the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively —, is by its very nature based on discrimination.[157] A similar conclusion was reached both by the Trial Chamber[158] as well as the Appeals Chamber in the *Tadic* case, which found that on the basis of a textual interpretation of the specific subsection,[159] a logical and systematic construction of the entire provision,[160] as well as a historical interpretation[161] in addition to a comparison with the customary international rule,[162] a discriminatory motive could only be said to exist with respect to persecution. Such a construction is also a sensible approach to the crimes in question. Especially with respect to the crime of persecution, a general requirement of a discriminatory motive would impose a double re-

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156 According to article 7 (1) (h), the criminal act consists of "[p]ersecution 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 [...]".

157 Robinson, see note 126, 46.

158 *Prosecutor v. Dusko Tadic*, see note 128, paras 650 et seq.

159 IT-94-1-A, *Prosecutor v. Dusko Tadic*, Judgment of 5 July 1999, para. 283.

160 *Prosecutor v. Dusko Tadic*, see note 159, para. 284.

161 *Prosecutor v. Dusko Tadic*, see note 159, para. 285.

162 *Prosecutor v. Dusko Tadic*, see note 159, paras 287 et seq. and para. 293. However, the Appeals Chamber noted that its own view was "not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal's Statute was adopted by the Council", all of which had at least made mention of the need for these elements to be present. See Report of the Secretary-General, see note 60, para. 48.

quirement for acts of persecution.[163] On a more general level, raising the threshold for crimes against humanity to include a discriminatory approach would place an onerous and unnecessary burden on the prosecution, in addition to resulting in a possible and inadvertent exclusion of some acts that would have otherwise fallen under this provision.[164]

eee. *mens rea*

The final element of the chapeau — mentioning "with knowledge of the attack" and referring to the subjective element or *mens rea* — is essentially superfluous. Under general principles of national and international criminal law, the accused must have been at least aware that her/his individual action formed part of a widespread or systematic attack.[165] Indeed, article 30 of the ICC-Statute already contains such a general rule. In addition, the reality of past events seems to be indicative that an individual who commits one of the crimes under article 7 (1) of the ICC-Statute as part of a widespread or systematic attack cannot claim to have been unaware of that particular situation.

fff. The Criminal Conduct Listed in Article 7 (1) of the ICC-Statute

General Remarks

Most of the provisions in para. 1 of article 7 follow closely the precedents of the Nuremberg charter or the statutes of the ICTY or the ICTR. The Nuremberg charter already listed "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population [...], or persecutions on political, racial, or religious grounds", almost all of which were repeated in the statutes of

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163 Zimmermann, see note 9, 176; Amnesty International, *The International Criminal Court: Making the Right Choices – Part 1* of 1 January 1997, 46.

164 Robinson, see note 126, 47.

165 Similar to the view of this author, A. Cassese, "Crimes Against Humanity", in: Cassese et al., see note 11, 353 et seq. (373); Sunga, see note 124, 72. For a different view – based on a characterization of the terms "widespread" and "systematic" as objective elements – see ELSA, Handbook on the draft Statute for an International Criminal Court, May 1998, 25.

the ICTY and the ICTR, with only slight modifications.[166] The ICC-Statute departs from this established route in a number of ways. One of these changes concerns the addition of the term "forcible transfer of population" in subpara. (d), thereby expanding and refining considerably the previous jurisdiction as it now also includes the forcible transfer of a population *within* the boundaries of a state,[167] in accordance with national laws, which themselves have to conform to the *ordre public*. Furthermore, persecution, imprisonment and gender crimes were expanded — sometimes considerably — in scope compared to earlier documents. Some of the crimes listed mark entirely new entries into the category of crimes against humanity, such as torture, enforced disappearances of persons and apartheid. This constitutes a considerable step forward in the status of these crimes as the Rome Statute attaches a higher stigma as these crimes now form part of a category of crimes which — according to the Preamble of the ICC-Statute — are the most serious crimes of concern to the international community as a whole, which must not go unpunished.

The Crimes of Murder, Extermination, Enslavement and Enforced Disappearances

While murder is — in line with previous jurisdictional charters — the first crime mentioned among the inhumane acts of article 7 (1) of the ICC-Statute, the content of the crime was regarded to be sufficiently clear so as to not warrant more specific elaboration.[168] In contrast to

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166 The ICTY and ICTR charters differ slightly from the Nuremberg formulation, which stated that persecutions would have to be based on "political, racial *or* religious grounds", while the ICTY and ICTR statutes use a conjunctive terminology.

167 The first alternative – deportation – means the "forced removal of people from one country to another", see Bassiouni, see note 127, 312.

168 van Hebel/ Robinson, see note 20, 98. Two judgments by the ICTR and the ICTY have reached similar conclusions as to the elements of murder. The trial chamber in the *Akayesu* case stated that murder – the unlawful, intentional killing of a human being – consisted of three elements, namely (1) the victim is dead, (2) the death resulted from an unlawful act or omission of the accused or a subordinate, and (3) at the time of the killing the accused or a subordinate had the intention to kill or inflict bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not. *Prosecutor v. Akayesu*, see note 58, para. 587 et seq.

murder, where one single offence is sufficient, extermination (article 7 (1) (b) of the ICC-Statute) is directed against a group of individuals and involves an element of mass destruction.[169] One requirement is necessarily the destruction of a group of individuals, although this group does not need to be tailored along the lines of the definition of the *Genocide Convention*.[170] Enslavement — article 7 (1) (c) of the ICC-Statute has been included in all predecessor regimes and was one of the earliest violations of human rights that was specifically recognized under international law with the creation and subsequent entry into force of the *Slavery Convention* of 1926.[171] According to the *Elements of crimes*, slavery can take a variety of forms, including when the "perpetrator exercises any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending, or bartering such a person or by imposing on them a similar deprivation of liberty."[172] However, the Appeals Chamber in the *Kunarac* case correctly stated that

> "the law does not know of a 'right of ownership over a person'. Article 1(1) of the 1926 Slavery Convention speaks more guardedly 'of a person over whom any or all of the powers attaching to the right of ownership are exercised.' That language is to be preferred."[173]

Another novelty is embodied in article 7 (1) (i) of the ICC-Statute, which prohibits the enforced disappearance of persons on the universal level.[174] One obvious requirement stemming from the plural form of the term person is that more than one person must have disappeared. While the impetus for the crime is somewhat unclear[175] and its inclu-

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169 Report of the International Law Commission, see note 66, 97.

170 Report of the International Law Commission, see note 66. Similarly, IT-98-33-T, *Prosecutor v. Krstic*, Judgment of 2 August 2001, para. 503 which found that for "the crime of extermination to be established, [...] there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population".

171 *Slavery Convention*, LNTS Vol. 60 No. 1414.

172 *Elements of Crimes*, see note 22, 10.

173 *Prosecutor v. Kunarac*, Trial Chamber, see note 48, para. 118.

174 Previously, the General Assembly had recognized the severe problem of enforced disappearances in A/RES/47/133 of 18 December 1992, Declaration on the Protection of all Persons from Enforced Disappearances.

175 Wexler, see note 142, traces the inclusion back to the experience in Latin America, C. Hall, "Article 7 – Crimes against Humanity", mn. 73 et seq., in: Triffterer, see note 17, attributes the inclusion to the *Nacht und Nebel*

sion into the ICC-Statute open to criticism,[176] the provision raises a number of interesting problems. One noteworthy aspect in connection with this crime is that it supports the decision of the Rome Conference that there does not need to be a nexus to armed conflict, as such enforced disappearances do occur in times of peace as well as in times of war. Another problem could arise with respect to the principle of non-retroactivity (article 24 of the ICC-Statute) should the ICC consider these crimes to be ongoing crimes. Furthermore, the ICC-Statute seems to include enforced disappearance of persons not only by governmental organs, but also by "political organizations",[177] thus deviating considerably from the current notion of this crime under customary international law.[178] However, despite this departure,[179] it seems in line with the decision to expand the notion of crimes against humanity to non-state actors. Finally, on a practical level, this provision might increase the caseload of the court,[180] considering that the number of reported enforced disappearances around the world has reached abominable levels.[181] However, given that the requirements of the chapeau need to be fulfilled, the number of potential cases could decrease significantly.

Erlass (Night and Fog Decree) of 7 December 1941. In light of the considerable amount of such acts, specifically in Latin America, the former proposition seems more likely.

176 Zimmermann, see note 9, 184.

177 Article 7 (2) (i) of the ICC-Statute reads: "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a 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".

178 Article II of the *Inter-American Convention on the Forced Disappearance of Persons* of 9 June 1994, states: "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees".

179 Hall, see note 175, mn. 124, in: Triffterer, see note 17.

180 Wexler, see note 142, 158.

181 Doc. E/CN.4/1997/34, Report of the Working Group on Enforced or Involuntary Disappearances, Question of Human Rights of All Persons Sub-

Persecution

The inclusion of persecution as a separate crime was the cause of considerable debate prior to and during the Rome Conference.[182] While all previous major precedents had included this category of crimes, some states argued that its ambiguity and the lack of a firm basis in international criminal law would require it being left out of the ICC-Statute entirely,[183] with at least one author calling it "the weakest element of the Rome Statute's definition of 'crimes against humanity' [...]."[184] Another aspect that should also be considered is that the concept of a crime under the label "persecution" is alien to the major criminal justice systems in the world.[185] A compromise was reached when the wording of prior statutes was amended considerably, especially in comparison to the statutes of the ICTY and ICTR.[186] Persecution is now described as a conduct in connection with acts embodied in one of the crimes under the jurisdiction of the court, if that conduct is carried out against an identifiable group of collectivity[187] because of that group's/collectivity's

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jected to Any Form of Detention or Imprisonment – Question of Enforced or Involuntary Disappearances, 13 December 1996.

182 Report of the Committee on the Establishment of a Permanent International Criminal Court, see note 19, 17; W. Schabas, *An Introduction to the International Criminal Court*, 2001, 39; van Hebel/ Robinson, see note 20, 101.

183 van Hebel/ Robinson, see note 20, 101.

184 Sunga, see note 124, 73.

185 Bassiouni, see note 127, 327. Delbrück/ Wolfrum, see note 35, 1088 point out that the prohibited conduct within crimes against humanity is for the most part included in national penal codes.

186 Both the ICTY and ICTR statutes merely contained the wording "persecutions on political, racial and religious grounds". Contrary to the analysis of Schabas, see note 182, 39, the Nuremberg Charter was more elaborate and the ICC-Statute resembles it more closely when it criminalized "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"

187 It is unclear what purpose the distinction between group and collectivity serves. Neither article 7 (2) (g) ICC-Statute nor the *Elements of Crimes* provide any guidance on this issue. If one were to assume that it meant a people as a whole, such a meaning could be subsumed under the element "group". The same is true if collectivity is to be understood as an association of individuals who share an ideological basis. Thus, every collectivity could be subsumed under the term group, but not *vice versa*.

identity.[188] The latter aspect requires that persecution must be committed on discriminatory grounds, the list of which has been extended by inclusion of the grounds of nationality, ethnicity and gender. However, this list is not exclusive, but any other such ground must reach the level of being "universally recognized as impermissible under international law". This wording leaves the door open for a wide margin of interpretation by the bench of the ICC and is at the very least problematic given the nature of the ICC-Statute as a tool of criminal law, which is bound to a high degree of specificity.[189] The terminology in connection with other crimes under the jurisdiction of the ICC-Statute could potentially lead to cases in which a single murder was committed, while the persecution was carried out including the elements mentioned in the chapeau.[190] This departure from legal regimes recently established under the ICTY and ICTR statutes might be attributable to the different

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188 The definition set out in article 7 (2) (g) of the ICC-Statute – apart from including a subjective element which would have to be present in any case – does not clarify the rather imprecise provision in section 1, as it reads: "'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity [...]". This wording begs the question what is to be understood by "severe". The mere "disadvantage to an identifiable group or collectivity or their individual members" being "an obvious consequence of a severe form of discrimination" obscures the meaning of crimes against humanity. Rather, severity should be understood to amount to a higher threshold in the sense of a certain level that correlates to the stigmatic meaning attached to crimes against humanity. This is supported by the quotations from the Nuremberg tribunal found in the Trial Chamber's finding in the *Tadic* case, *Prosecutor v. Dusko Tadic*, see note 127, para. 704 et seq.; Y. Dinstein, "Crimes Against Humanity After Tadic", *LJIL* 13 (2000), 373 et seq. (382) comes to a similar conclusion about the relationship between the crimes in section 1 and their "definitions" in section 2.

189 The Trial Chamber in the *Furundzija* case refers to the German term *Bestimmtheitsgrundsatz* and the Latin phrase *nullum crimen sine lege stricta*. See *Prosecutor v. Furundzija*, see note 47, para. 177. Hall, see note 175, mn. 71, in: Triffterer, see note 17, takes a much more liberal view, basing his argument on the overall purpose of the Rome Statute. However, while the ICC-Statute aims at restricting the number of cases of impunity, it must still adhere to the principle of *nullum crimen sine lege, nulla poena sine lege* in order to forego any allegations that have plagued the prior tribunals.

190 Such a construction lifts persecution out of the quandary that otherwise it might be no more than an auxiliary crime (although such an interpretation would still carry an added amount of stigma to the conduct in question) and which would make this category of crimes essentially self-referential.

legal nature between a treaty-based body as is the case with the ICC on the one hand and *ad hoc* tribunals which are based on the will of the Security Council of the United Nations on the other.

Crimes of Sexual Violence

The category of sexual violence (article 7 (1) (g) of the ICC-Statute) contains a number of normative as well as descriptive conducts, as well as a specific catch-all phrase for this category of crimes against humanity. Among the conducts that are prohibited by this provision are rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization among which only forced pregnancy seemed to merit closer definition in section 2 of Article 7. This result is a marked departure from predecessor statutes (ICTY and ICTR) which were generally limited to rape and did not prohibit specifically any of the other acts now mentioned in article 7 (g) of the ICC-Statute.[191] Their inclusion is however amply justified, especially as seen before the experience in the civil wars in the former Yugoslavia and Rwanda.[192] While it was beyond question that rape would be included, there was no agreed upon definition of this form of conduct in international criminal law. This is evidenced by the lengthy finding of the ICTY on this matter in the *Furundzija* case.[193] After stating that there existed no definition under in-

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191 Crimes against humanity were interpreted broadly during the Nuremberg trials, as is evident from the following statement by Francis de Menthon, the French prosecutor at Nuremberg. He regarded crimes against humanity as "crimes against the human status (la condition humaine)", which he defined in relevant part as "all those faculties, the exercising and developing of which rightly constitute the meaning of human life." Judgment of the International Military Tribunal sitting at Nuremberg, 30 September 1946, in: Trial of Major War Criminals, 1947, Vol. 4, 364.

192 See discussion in the Trial Chamber's judgment in the *Furundzija* case, see *Prosecutor v. Furundzija*, see note 47, paras 174 et seq., especially para. 186; B. Bedont/ K. Hall Martinez, "Ending Impunity for Gender Crimes Under the International Criminal Court", *Brown Journal of World Affairs* 6 (1999), 65 et seq.; C. Steains, "Gender Issues", in: Lee, see note 20, 357.

193 The *Furundzija* finding in this matter is the culmination of a series of findings both by the ICTR and the ICTY. The ICTR in the *Akayesu* case found that rape was the "physical invasion of a sexual nature, committed on a person under circumstances which are coercive". It thereby avoided a technical analysis, stating "that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts". See *Prosecutor v. Akayesu*, see note 58, para. 688. This finding was confirmed

ternational law[194] and after comparing and analyzing several national provisions[195] (and mindful of the fact that a mechanical importation or transposition from national law into international criminal proceedings is [to be] avoided,[196] it concluded that the objective elements of rape were:

> "(i) the sexual penetration, however slight:
> (a) of the vagina or anus of the victim by the penis of the perpetrator
> or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
> (ii) by coercion or force or threat of force against the victim or a third person."[197]

The inclusion of at least one conduct now under the jurisdiction of the ICC caused considerable debate, namely the inclusion of the crime of "forced pregnancy". This was not so much due to states being opposed to its inclusion *per se*, but rather because a number of states feared that its inclusion, *inter alia*, might open the way for obliging states to provide access to abortion to women who were forcibly impregnated.[198] Thus, the definition in article 7 (2) (f) of the ICC-Statute consists of three elements, namely that the perpetrator (1) confines a woman (2) who was forcibly made pregnant and (3) has the intention to affect the ethnic composition of any population or carrying out other grave violations of international law. One of the offenses mentioned in this category seems somewhat superfluous, namely "sexual slavery", as such conduct would already be captured by article 7 (1) (c) of the ICC-Statute. The provision is not limited to the specific conduct referred to in article 7 (1) (g) of the ICC-Statute. Rather, through the wording "any other form of sexual violence" it retains considerable flexibility,[199]

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by the ICTY in its *Delalic* judgment, Prosecutor v. Delalic, see note 73, para. 479.

194 *Prosecutor v. Furundzija*, see note 47, paras 178.

195 *Prosecutor v. Furundzija*, see note 47, paras 179-182.

196 *Prosecutor v. Furundzija*, see note 47, paras 178.

197 *Prosecutor v. Furundzija*, see note 47, paras 185.

198 Steains, see note 192, 368; Wexler, see note 142, 159.

199 The Trial Chamber in the *Akayesu* case held that "[s]exual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive." *Prosecutor v. Akayesu*, see note 58, para. 688.

which is limited by the requirement that any such "other form of sexual violence" must be of "comparable gravity".[200]

Torture

While torture was not specifically recognized in the Nuremberg Charter,[201] it was listed in both the statute of the ICTY as well as the statute of the ICTR. There is no doubt that the prohibition of torture forms an integral part of customary international law, and, significantly, part of *jus cogens*.[202] The most significant difference brought about by the definition of torture under the ICC-Statute compared to the definition set out in article I of the *Torture Convention*[203] is the fact that there does not need to be any kind of involvement of public officials. Article 7 (2) (e) of the ICC-Statute defines torture as "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". This signifies a considerable — horizontal — expansion of the potential *ratione personae* — bearing in mind that torturous acts, in order to fall under the jurisdiction of the ICC, must be committed under the conditions set out in the chapeau. In this regard, it should be noted that the *jus cogens* nature of the prohibition of torture referred to above only pertains to torture by government officials. Nevertheless, the expansion is in line with the recognized issue of non-state actors acting as perpetrators of these

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200 This wording was inserted to avert concerns that sexual harassment and genital mutilation would fall under the jurisdiction of the ICC. Wexler, see note 142, 159.

201 Bassiouni, see note 127, 331 points out that the Nuremberg tribunal subsumed torturous acts under "other inhumane acts".

202 N. Rodley, *The Treatment of Prisoners under International Law*, 2nd edition, 1999, 74; E. Peters, *Torture,* 1996, 62; Rosalyn Higgins, "Derogations under Human Rights Treaties", *BYIL* 48 (1976-77), 281 et seq. (282), referring to the norm under customary international law; J. Paust et al., *International Criminal Law – Cases and Materials*, 2nd edition, 2000, 13; Restatement (Third) of Foreign Relations Law of the United States, § 702 comment n; *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (941); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (714).

203 *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNTS Vol. 1465 No. 24841.

crimes.[204] Without this change from the *Torture Convention*, the application of this provision would have been severely limited and would have excluded acts which were intended to fall under the jurisdiction of the ICC. Furthermore, there is no need for a specific purpose for which torture must be carried out.[205] Thus, the definition also includes acts carried out at random or for sadistic purposes — if all other requirements, including those of the chapeau are met.[206] However, the definition included in the ICC-Statute still contains wording similar to the lawfulness-exception embodied in article I of the *Torture Convention*, thereby excluding torture from the jurisdiction of the ICC when it is "inherent in or incidental to, lawful sanctions". Whether it will be wise to overcome this "quandary" by determining the lawfulness of the sanctions "against the background of customary international human rights standards"[207] remains to be seen.

Apartheid

The crime of apartheid was not included in any other previous international criminal law instrument and is therefore a novelty.[208] The inclusion of apartheid as a crime[209] in article 7 (1) (j) of the ICC-Statute, separate from persecution, seems appropriate for two reasons. First and foremost, the two crimes differ in that the concept of apartheid seeks to ensure the domination on various levels of one racial group over other(s). Second, listing apartheid as a separate crime makes clear the

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204 This requirement was repeatedly confirmed however in the *Kunarac* case – both by the Trial Chamber as well as the Appeals Chamber. See *Prosecutor v. Kunarac*, Trial Chamber, see note 48 and IT-96-23 & IT-96-23/1-A, *Prosecutor v. Kunarac et al.*, Judgment, Appeals Chamber, 12 June 2002, para. 148. For a different view – promulgated prior to the Rome Conference – see Zimmermann, see note 9, 181.

205 *Prosecutor v. Kunarac*, Trial Chamber, see note 48, 22 February 2001, para. 497 and IT-96-23 & IT-96-23/1-A; *Prosecutor v. Kunarac et al.*, Judgment, Appeals Chamber, 12 June 2002, para. 153.

206 Hall, see note 175, mn. 107, in: Triffterer, see note 17.

207 Sunga, see note 124, 74.

208 Bassiouni, see note 127, 364.

209 However, the ILC took a different view in 1991, when it stated that the practice is "nowadays so deeply condemned by the world's conscience that it [is] conceivable for the Commission to exclude it from a code which punishes the most abominable crimes that jeopardize the peace and security of mankind", *ILCYB* 1991, Vol. II, 2, 102.

stigma attached to apartheid as a criminal policy,[210] as already evidenced by the *International Convention on the Suppression and Punishment of the Crime of Apartheid*,[211] which in its article II lists numerous acts which, when "committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them", will be considered a criminal act according to arts III and IV of the Convention.[212] Another conceivable method would have been for apartheid to be implicitly understood to be included in article 7 (1) (k) of the ICC-Statute ("other inhumane acts"). However, the wording of the relevant provision of the ICC-Statute is considerably narrower,[213] as it requires that an "inhumane act of a similar character to those referred to in paragraph 1" be committed, but this must have taken place 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".[214]

Other Inhumane Acts

The final provision of article 7 (1) of the ICC-Statute is a catch-all provision ("other inhumane acts"), which was included in all previous stat-

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210 This was the reason for various countries pressing for the inclusion of that crime, particular African nations but also Bangladesh, India and Trinidad and Tobago. Doc. A/CONF.183/C.1/L.12 of 22 June 1998.

211 Of 30 November 1973, UNTS Vol. 1015 No. 14861. Hereonafter *Apartheid Convention*.

212 The *Apartheid Convention* in article V allows for trials "by a competent tribunal of any State Party to the Convention [...] or by an international penal tribunal [...]."

213 Similarly, Hall, see note 175, mn. 116, in: Triffterer, see note 17. However, Hall contemplates that the provision lacks – to some degree – specificity and must be seen as a residual norm. However, the term apartheid does have a relatively long and pronounced history in international law, as evidenced by numerous resolutions passed by both the General Assembly and the Security Council. R. Clark, "Apartheid", in: M.C. Bassiouni (ed.), *International Criminal Law – Volume II*, 2nd edition, 1999, 643 et seq. Moreover and in light of this, the claim that it might have to be construed on a residual basis leaves out of consideration the specific stigma that attaches to the crime of apartheid. While article 7 (1) (k) of the ICC-Statute does refer to other crimes within article 7 (1) of the ICC-Statute, it does so to establish the necessary threshold that individual acts must reach.

214 Article 7 (2) (h) of the ICC-Statute.

utes, but which has undergone considerable qualifications, as it now extends only to acts which are "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The inclusion of this category caused serious concerns during the Rome Conference because of its potential for being used in politically motivated cases and its innate ambiguity.[215] As a general clause, intended to encompass those acts which are not specifically mentioned in other parts of article 7 of the ICC-Statute, crimes falling under this category must necessarily be comparable to the other classes of crimes mentioned. The ICTY in its *Tadic* and *Blaskic* judgements found that acts such as "mutilation and other types of severe bodily harm, beatings and other acts of violence, and serious physical and mental injury"[216] constituted "other inhumane acts". While some of these acts could arguably be subsumed under different categories, the inclusion of this class might prove meritorious for acts that have been unforeseeable at the time of the Rome Conference.

d. Individual Crimes under the Statute — War Crimes

Compared to its historical predecessors, the sheer length of article 8 of the ICC-Statute, the norms circumscribing war crimes,[217] is staggering.[218] This extensive enumeration of prohibited conduct is testament to

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215 van Hebel/ Robinson, see note 20, 102; Wexler, see note 142, 158.

216 *Prosecutor v. Dusko Tadic*, see note 127, para. 729; IT-95-14-T, *Prosecutor v. Blaskic*, Judgment of 3 March 2000, para. 243.

217 As a full discussion of each of the various forms of war crimes included in the ICC-Statute would go beyond the scope of this paper, only the most relevant and legally problematic features of this norm are discussed.

218 See e.g. article 6 (b) of the Nuremberg Charter, which reads:
"war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity [...]."
While the relevant provisions in the statutes of the ICTY and ICTR are more detailed, they are still considerably shorter than article 8 of the ICC-Statute.

lengthy negotiations and a complicated historical forthcoming.[219] This was to some degree — and converse to the elaboration of crimes against humanity — due to the necessity to make a selection from the "abundance of precedents",[220] including the *Hague Convention No. IV* of 1907,[221] the 1949 *Geneva Conventions*,[222] as well as the 1977 *Additional Protocols*.[223] Its content is much more detailed and significantly contains a number of provisions pertaining not only to international conflicts, but also internal conflicts. This richness in detail can be seen to have both a negative side, but also a positive one. On the one hand, it can be considered underinclusive due to the fact that a more abstract provision would have left the door open to judicial interpretation; more-over, it might be underinclusive with respect to the crimes that could be considered to be a threat to the values mentioned in the Preamble to the ICC-Statute. On the other hand, it can also be considered to be more complete than its predecessor rules on this matter, especially because it includes rules on the criminal liability for behavior in armed conflicts not of an international character.[224]

War crimes could not be more precisely defined before 1997, as a number of countries — instrumental to the eventual success of the

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219 van Hebel/ Robinson, see note 20, 103 and 106 for a brief discussion of the issues prior to the Rome Conference.

220 van Hebel/ Robinson, see note 20, 103.

221 *Convention (IV) Respecting The Laws and Customs of War on Land (Hague IV)* of 18 October 1907, Martens NRG 2ème série, Vol. XXVI, 949 et seq.

222 *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* of 12 August 1949, UNTS Vol. 75 No. 970; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* of 12 August 1949, UNTS Vol. 75 No. 971; *Convention (III) Relative to the Treatment of Prisoners of War* of 12 August 1949, UNTS Vol. 75 No. 972; *Convention (IV) Relative to the Protection of Civilian Persons in Time of War* of 12 August 1949, UNTS Vol. 75 No. 973.

223 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* of 8 June 1977, UNTS Vol. 1125 No. 17512; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* of 8 June 1977, UNTS Vol. 1125 No. 17513. These countries included France, India, Indonesia, Israel, Pakistan, Turkey, the United Kingdom and the United States.

224 See article 8 (2) (c) and (e) ICC-Statute.

ICC-Statute — had not ratified the two *Additional Protocols*. This caused a deadlock which was encompassed in two conflicting proposals tabled by the United States on the one hand[225] and Switzerland and New Zealand on the other.[226] Throughout various informal consultations and conferences on this matter, the so-called Bonn proposal emerged, which served as a basis for the discussions in Rome.[227]

As a general comment, it should be noted that the ICC-Statute presupposes the existence of an armed conflict. This is made clear by the *Elements of crimes*, which stipulate that "[t]he conduct [must have taken] place in the context of and was associated with an (international) armed conflict (not of an international character)."[228] Moreover, the Trial Chamber in the *Tadic* case — while recognizing that each case has to be analyzed on its own merits[229] — had argued that "[f]or a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law".[230]

The final structure agreed upon may be described as follows. Article 8 contains three sections, the first one of which lays down a threshold clause. The second section defines the term "war crimes" for the purpose of the ICC-Statute and deals in sub-sections (a) and (b) with armed conflicts of an international character, while sub-sections (c) through (f) embody the rules pertaining to internal armed conflicts. Section 3 serves as a "reminder" of the non-violability of the unity and territorial integrity of a state.

The most hotly debated issues were those pertaining to the inclusion of parts of the *Additional Protocols*, while the inclusion of provisions stemming from the 1949 *Geneva Conventions* and the Hague Regulations was — with minor exceptions — generally accepted.[231]

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225 Doc. A/AC.249/1997/WG.1/DP.1 of 14 February 1997.

226 Doc. A/AC.249/1997/WG.1/DP.2 of 14 February 1997.

227 van Hebel/Robinson, see note 20, 106.

228 See each of the *Elements of Crimes*, see note 22, article 8 – War Crimes.

229 *Prosecutor v. Tadic*, see note 128, para. 573.

230 *Prosecutor v. Tadic*, see note 128, para. 572; similarly, the Appeals Chamber had declared in its prior ruling on jurisdictional issues that such a nexus must exist, see IT-94-1-AR72, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 67.

231 van Hebel/ Robinson, see note 20, 107.

aa. The Threshold Clause for War Crimes — Departure from Customary Law or Political Necessity?

The inclusion of a threshold clause was controversial from the start and can be considered to be a departure from customary law in this field,[232] as such a clause had not been included in any of the precedents. The arguments for such a threshold clause were promulgated for the most part by the United States which argued that such a clause — similar to the one preceding article 7 on Crimes Against Humanity — would aid the court in a number of ways. This included the arguments that only the most serious crimes should come under the jurisdiction of the Court and that it would keep the Court's workload at acceptable levels.[233] The latter argument is especially unconvincing in light of the fact that it was clear from the start out that the Court would only act if national courts were unwilling or unable to do so — according to the principle of complimentarity, as now embodied in article 17 of the ICC-Statute. The inclusion of the threshold clause in its current form (in particular), must be seen as a compromise between those countries which favored that the Court should have jurisdiction *only* when such crimes were committed as part of a plan or policy or as a part of a large-scale commission of such crimes and the countries which wanted to do away with such a proposal altogether. The chapeau, and specifically the limitation embodied by the wording *in particular*, is probably best understood as a cautious warning to the Court to exercise its jurisdiction in such cases which are especially egregious, without the necessity of the crime having been committed as part of a large-scale commission or part of a plan or policy.[234] Another aspect that should be borne in mind is that the threshold clause does not touch the characterization of the individual crime, which will have to be judged against the provisions of the following sub-sections.[235]

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232 Zimmermann, see note 9, 187.

233 van Hebel/ Robinson, see note 20, 107.

234 Wexler, see note 142, 161; M. Bothe, "War Crimes", in: Cassese et al., see note 11, 398; W. Fenrick, "Article 8 – War Crimes", mn. 4, in: Triffterer, see note 17; for a different view see Sunga, see note 124, 76. It would appear that states are more willing to prosecute isolated incidents, thus barring such acts from the adjudication by the ICC on the basis of the complimentarity principle according to article 17 of the ICC-Statute.

235 Zimmermann, see note 9, 187.

bb. International Armed Conflicts

Clearly, the most elaborate scheme within the ICC-Statute is the one concerned with war crimes in international armed conflict. The long list is the product of the conviction by a large number of states that all grave breaches of the *Geneva Conventions* should be part of the ICC-Statute, but that other crimes also merit international criminal adjudication. This overwhelming number of countries in favor of such an approach is explicable given that — at the time of the Rome Conference — more than 185 countries had ratified the *Geneva Conventions*, in addition to the ICJ's finding in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that these norms constituted customary international law.

aaa. Grave Breaches of the *Geneva Conventions* — Article 8 (2) (a)

Article 8 (2) (a) of the ICC-Statute can be considered the norm that was the least controversial within the category of war crimes, as it is based on recognized principles of international humanitarian law, both in terms of treaty law, but also in customary international law.[236] This is evident when analyzing the wording of this provision, in which such crimes as the wilful killing,[237] the application of torture or inhuman treatment[238] or the extensive destruction and appropriation of property, if unjustified by military necessity and carried out unlawfully and wantonly[239] are incorporated. The protection of the prohibition of wilful killing not only extends to belligerents, but also to civilians. This can be deduced from the wording which does not delimit the group of individuals to which protection shall be accorded and from the introductory sentence of article 8 (2) (a) of the ICC-Statute; furthermore, if such protection were to extend only to belligerents, such acts would not be punishable at all under the Statute, if they do not reach the threshold set forth in article 7 of the ICC-Statute (crimes against humanity).[240] The provision regarding torture raises a number of interesting issues. First of all, the prohibition of torture exists under the um-

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236 The provision furthermore incorporates almost verbatim article 2 of the ICTY-Statute.

237 Article 8 (2) (a) (i) of the ICC-Statute.

238 Article 8 (2) (a) (ii) of the ICC-Statute.

239 Article 8 (2) (a) (iv) of the ICC-Statute.

240 See II. 1. c. bb. bbb.

brella of crimes against humanity. Second, it should be stressed that despite the fact that biological experiments are mentioned, the prohibition is not limited to such conduct. This is clear as the Statute uses the terminology "including". Moreover, on several occasions the ICTY[241] as well as the ICTR[242] has extended the protection — referring to the construction of the 1984 *Torture Convention* — to the infliction of mental pain or suffering. Similarly, the long-standing prohibitions of hostage-taking,[243] deprivation of due process rights[244] and great suffering and serious injury to body or health[245] are contained in this provision. Hostage-taking for the purpose of international criminal law was defined by the Trial Chamber of the ICTY in the *Lasva Valley* case as consisting of "the unlawful deprivation of liberty, including the crime of unlawful confinement" in addition to the "issuance of a conditional threat in respect of the physical and mental wellbeing of civilians who are unlawfully detained." It concluded from this latter aspect that "such a threat must be intended as a coercive measure to achieve the fulfillment of a condition."[246] As hostage-taking is only included in the *Fourth Geneva Convention*, the protection of this norm only covers ci-

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241 *Prosecutor v. Delalic*, see note 73, para. 494; similarly *Prosecutor v. Furundzija*, see note 47, para. 162. In this decision the Trial Chamber found that torture "(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a *de facto* organ of a state or any other authority-wielding entity.

242 *Prosecutor v. Akayesu*, see note 58, para. 593.

243 Article 8 (2) (a) (viii) of the ICC-Statute.

244 Article 8 (2) (a) (vi) of the ICC-Statute.

245 Article 8 (2) (a) (iii) of the ICC-Statute. It is argued that while this prohibition is a special case of torture, it differs from that prohibition in that there do not need to be lasting consequences from the act or omission. Delbrück/ Wolfrum, see note 35, 1056.

246 IT-95-14/2-T, *Prosecutor v. Kordic* of 26 February 2001, paras 312-313. See also the Trial Chamber judgment in the *Blaskic* case which stated that "[t]he Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage," IT-95-14-T, *Prosecutor v. Blaskic* of 3 March 2000, para. 158.

vilians, but not belligerents. Finally, it should be noted that the list of crimes contained in this sub-section is an exhaustive one, as evidenced by the usage of the term "namely".

bbb. Other Serious Violations of the Laws and Customs Applicable in Armed Conflict — Article (2) (b)

In a second step, the ICC-Statute criminalizes "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law". Similarly to the introductory sentence of sub-section (a), this sub-section contains an exhaustive list of crimes. This is indicated by the terminology "namely".[247] Its content originates — without specifically referring to its sources — to a range of international humanitarian law treaties, such as *inter alia Additional Protocol I*, the *Hague Regulations*, the 1925 *Geneva Protocol on Chemical Weapons*.[248] The sources are indicative of the fact that most conduct mentioned in this sub-section is not only prohibited under treaty law, but also under customary international law.[249]

Sub-section (b) can broadly be categorized into prohibiting conduct within four areas, namely: methods of warfare, means of warfare/weapons, attacks on specially protected persons and objects and violations of human rights in armed conflict.[250]

Prohibited Methods of Warfare

The list of crimes that can be grouped under the prohibited methods of warfare include, *inter alia*, rules designed to protect the civilian popula-

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247 In this, the ICC-Statute deviates from the ICTY-Statute which – in its article 3, Violations of the laws or customs of war – uses the wording "[s]uch wording shall include, but not be limited to", which the Appeals Chamber in the *Tadic* case understood to be "merely illustrative, but not exhaustive," see *Prosecutor v. Dusko Tadic*, see note 230, para. 87.

248 *Protocol for the Prohibition of the Use in War of Poisonous, or Other Gases, and of Bacteriological Methods of Warfare*, LNTS Vol. 94 No. 2138.

249 Delbrück/ Wolfrum, see note 35, 1058; W. Fenrick, "Article 8 – War Crimes", mn. 20, in: Triffterer, see note 17.

250 Differentiation according to M. Bothe, "War Crimes", in: Cassese et al., see note 11, 397 et seq.

tion, the destruction of property,[251] the improper use of signs and perfidy,[252] and finally the treatment of combatants. The protection of the civilian population in international armed conflicts is a long-standing principle and is now enshrined in article 8 (2) (b) (i) and (ii) of the ICC-Statute, under which both civilians and civilian objects are protected.[253] Another fundamental norm — attacks in violation of the principle of proportionality — is included in this category.[254] While its inclusion is laudable, *Bothe* points to the problem that — when applied — the balance of values under the proportionality principle is virtually impossible, as loss of life and destruction of civilian property have to be weighed against each other.[255] Moreover, the *Elements of crimes* regarding this provision seem to deviate from the wording of the statutory provision.[256] Finally, using civilians as human shields and starva-

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251 It is worth noting that the destruction of civilian property is only permissible when "imperatively demanded by the necessities of war." See article 8 (2) (b) (xiii) of the ICC-Statute.

252 Article 8 (2) (b) (vii) and article 8 (2) (b) (xi) of the ICC-Statute.

253 Article 52 (2) of *Additional Protocol I* defines military objects being 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".

254 Article 8 (2) (b) (iv) of the ICC-Statute.

255 M. Bothe, "War Crimes", in: Cassese et al., see note 11, 398. This problem was raised in the NATO bombing of a TV station in Belgrade, as well as certain infrastructure. See e.g. R. Wright, "Combating Civilian Casualties: Rules and Balancing in the Developing Law of War", *Wake Forest Law Review* 38 (2003), 129 et seq.; H. Reinhold, "Target Lists: A 1923 Idea with Application for the Future", *Tulsa Journal of Comparative and International Law* 10 (2002), 1 et seq. (27); A. Laursen, "NATO, the War over Kosovo, and ICTY Investigation", *Am. U. Int'l L. Rev.* 17 (2002), 765 et seq. (790); S. Belt, "Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas", *Naval Law Review* 47 (2000), 115 et seq.

256 In a footnote, the *Elements of Crimes*, see note 22, explains that "[t]he expression 'concrete and direct overall military advantage' refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the pro-

tion — if employed as a method of warfare — is especially prohibited under article 8 (2) (b) (xxiii) and (xxv) of the ICC-Statute, respectively. Finally, this subcategory addresses the issue of the treatment of combatants, specifically in article 8 (2) (b) (vi) and (xii) of the ICC-Statute. The underlying principle is already included in the *St. Petersburg Declaration*, which stated that "[t]he only legitimate object which States should endavour to accomplish during war is to weaken the military forces of the enemy" and regarded it as "sufficient to disable the greatest possible number of men".[257] Thus, killing or wounding enemy combatants *hors de combat* is regarded as being an illegitimate purpose. Furthermore, and again as an outflow of notions of chivalry and limiting combat to what is militarily necessary, article 8 (2) (b) (xii) of the ICC-Statute criminalizes the denial of giving quarter to prisoners.

Prohibited Means of Warfare/Weapons

The ICC-Statute furthermore prohibits means of warfare and the use of certain weapons. This includes the employment of poison or poisoned weapons, chemical weapons, so-called dumdum bullets, indiscriminate weapons and methods which lead to unnecessary suffering or superfluous injury. Chemical weapons — article 8 (2) (b) (xviii) of the ICC-Statute — have been the subject of comprehensive prohibitions since 1925, with the adoption of the *Geneva Protocol.* Their inclusion was undisputed; claims to subsuming biological or nuclear weapons under this provision however are to be rejected, in light of the clear wording, and with regard to nuclear weapons, of the 1996 Advisory Opinion by the ICJ.[258] Although specifically mentioned, the use of so-called dum-

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portionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict".
Wexler, see note 142, 165 considers this explanation to be inconsistent with the wording of the ICC-Statute.

257 See note 116.

258 ICJ Reports 1996, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 226 et seq. (248). The ICJ held that no weapon-specific prohibition existed in international law and hence that nuclear weapons as such were not prohibited. The ICJ's finding provided for some exceptional circumstances in its opinion, see 256. It would have been highly problematic to formulate such a prohibition for nuclear weapons, as this would have had to be based on existing customary international law given the ICJ's opinon, which itself is based on and reflects customary international law in this regard.

dum bullets,[259] i.e. bullets which expand or flatten easily, thus causing great suffering, can also be subsumed under the following prohibition. In more general terms, article 8 (2) (b) (xx) of the ICC-Statute prohibits the use of weapons which cause superfluous injury or unnecessary suffering or which are inherently indiscriminate. However, these weapons and methods must be the subject of a comprehensive prohibition and must be included in an annex to the ICC-Statute. Although the wording of the introductory clause is clear in that the list of crimes is exhaustive, the wording of the prohibition allows for an extension of the weapons that are encompassed, thus permitting a reaction to newly created weapons which otherwise fulfill the requirement of this provision.[260]

Attacks on Specially Protected Persons and Objects

Among the crimes in this category are attacks against specially protected buildings,[261] attacks on medical personnel units and transports, but also attacks against humanitarian assistance or peace-keeping missions. Under the heading protection of medical personnel units and transports, attacks against medical personnel and units are criminalized, providing for comprehensive protection of both civilian and military medical and religious personnel.[262] Finally, humanitarian assistance or peace-keeping missions find protection under the ICC-Statute. This provision is based on the *Convention on the Safety of United Nations and Associated Personnel.*[263] The terminology "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict" refers to those situations in which United Nations personnel would be engaged in the hostilities, at which

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259 Article 8 (2) (b) (xix) of the ICC-Statute.

260 The lack of an exhaustive list could prove to be a positive aspect, as States parties will be able to agree on certain weapons which should fall under this prohibition, such as chemical and biological weapons, anti-personnel mines or laser-blinding weapons.

261 Article 8 (2) (b) (ix) of the ICC-Statute. Such protected objects include buildings dedicated to religion, education, art and science, but also hospitals.

262 Bothe, see note 256, 410.

263 A/RES/49/59 of 15 December 1994, *Convention on the Safety of United Nations and Associated Personnel.* See A. Bouvier, "Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis", *Int'l Rev. of the Red Cross* 309 (1995), 638 et seq.

point they would not be afforded the protection of the ICC-Statute under this provision, but would have to be regarded as combatants. Prior to such a scenario, such personnel would have the same status as civilians.[264]

Violations of Human Rights in Armed Conflict

Generating great debate, the prohibition of the transfer of population found entrance into the ICC-Statute in article 8 (2) (b) (viii) of the ICC-Statute. In terms of content, the provision remained unchanged in comparison to the *Fourth Geneva Convention*. However, the positioning of the transfer of parts of a nation's own civilian population into the territory it occupies as the first of the crimes covered by this provision was intended to be and is due to Israel's settlement policy in the West Bank and the Gaza Strip.[265] This provision was cited by Israel as one of the reasons why it would not become a party to the Rome Statute.[266]

Crimes of sexual violence are contained in article 8 (2) (b) (xxii) of the ICC-Statute.[267] Similar to the parallel provision in crimes against humanity, some elements of this category of crimes required careful elaboration in the drafting stage. However, the cruelty with which these crimes are carried out and the lasting physical effects and mental trau-

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264 Bothe, see note 256, 411 draws the attention to the problem of when peacekeepers enjoy such a status. Such a determination would have to be made taking into account the legitimizing source for the action taken, i.e. the establishment by the competent United Nations organ.

265 van Hebel/ Robinson, see note 20, 112; Bothe, see note 256, 413; see also A. Imseis, "On the Fourth Geneva Convention and the Occupied Palestinian Territory", *Harv. Int'l L. J.* 44 (2003), 65 et seq.

266 Israel Ministry for Foreign Affairs, Israel and the International Criminal Court, Office of the Legal Adviser to the Ministry of Foreign Affairs, June 2002, <http://www.mfa.gov.il/mfa/go.asp?MFAH0lw40> (4 August 2003).

267 See generally K. Askin, "Prosecuting Wartime Rape and other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles", *Berkeley Journal of International Law* 21 (2003), 288 et seq.; J. Gardam/ M. Jarvis, *Women, Armed Conflict and International Law*, 2001; K. Boon, "Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent", *Colum. Hum. Rts. L. Rev.* 32 (2001), 625 et seq.; C. Maravilla, "Rape as a war crime: the implications of the International Criminal Tribunal for the Former Yugoslavia's decision in Prosecutor v. Kunarac, Kovac, & Vukovic on international humanitarian law", *Florida Journal of International Law* 13 (2001), 321 et seq.

matization and given that the large-scale commission of these crimes in Yugoslavia and Rwanda had only recently taken place, the recognition of these sexual and gender-based crimes was uncontroversial in general terms.[268] Similar to the provision appearing in crimes against humanity, this norm is at first sight open-ended ("or any other form of sexual violence"). However, it is limited to those acts which constitute "a grave breach of the Geneva Conventions". Despite the fact that most of such conduct could be subsumed under other provisions within the category of war crimes,[269] such as torture[270] or crimes against humanity, its inclusion was agreed upon because of the heightened stigma that such a conviction carries with it.

The use of child soldiers, a growing problem in contemporary conflicts[271] and the cause for considerable debate during the Rome Conference,[272] is the subject of criminalization under article 8 (2) (b) (xxvi) of the ICC-Statute. Based on article 77 (2) of *Additional Protocol I* and article 38 of the *Convention on the Rights of the Child*,[273] the minimum age for conscription or enlistment of child soldiers is 15 years. Delimiting the precise age for this crime was the subject of controversial discussions prior to and during the Rome Conference. In light of article 1 of the *Convention on the Rights of the Child*, which defines children as "[...] every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" lowering the

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268 van Hebel/ Robinson, see note 20, 117.

269 Delbrück/ Wolfrum, see note 35, 1065.

270 See *Prosecutor v. Furundzija*, see note 47, para. 172; *Prosecutor v. Delalic*, see note 73, para. 496; *Prosecutor v. Kunarac*, Trial Chamber, see note 48, para. 436 et seq.

271 A/51/306, Impact of armed conflict on children, Promotion and Protection of the Rights of Children, Note by the Secretary-General, Impact of Armed Conflict on Children, Report of the Expert of the Secretary-General, Ms. Graça Machel, submitted pursuant to A/RES/48/157 of 26 August 1996, 13; S. Bald, "Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children", *Suffolk Transnational Law Review* 23 (2000), 499 et seq.; S. Maslen, "Relevance of the Convention on the Rights of the Child to Children in Armed Conflict", *Transnat'l L. & Contemp. Probs* 6 (1996), 329 et seq.

272 van Hebel/ Robinson, see note 20, 117 et seq.

273 A/RES/44/25 of 20 November 1989, *Convention on the Rights of the Child.*

age limit is not unproblematic.[274] The same applies to internal armed conflicts under Article 8 (2) (e) (vii) of the ICC-Statute.

ccc. Armed Conflicts not of an International Character

The mere fact that the part of article 8 dealing with non-international armed conflicts comprises four subsections is at least indicative of some of the divisions that plagued the deliberations concerning this aspect. While there was discussion as to the inclusion of this category of crimes, there was a considerable number of countries which argued for the applicability of the ICC-Statute to internal armed conflicts on the basis that the majority of conflicts today are internal in nature.[275] Moreover, internal armed conflicts coincide — for the most part — with non-functioning criminal justice systems which are unable to respond adequately to the perpetration of such fundamental norms as are encompassed by the ICC-Statute.[276] The inclusion of article 8 (2) (e) into the framework of the ICC-Statute can be considered a novelty,[277] while the inclusion of article 8 (2) (c) of the ICC-Statute was relatively

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274 See further, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts* – Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, which in its article 1 proscribes that:
"States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."
The *Optional Protocol* has been ratified by 52 states and has entered into force on 12 February 2000.
Under the *Elements of Crimes*, see note 22, article 8 – War Crimes, the mental element for this crime is lowered to include negligence, thus considerably enlarging the possible number of superiors who could be liable for this crime.

275 T. Seyboldt, "Major Armed Conflict", *Sipri Yearbook 2002 – Armaments, Disarmament and International Security*, 2002, 21 et seq. (23) and for a more detailed analysis, M. Eriksson/ M. Sollenberg/P. Wallensteen, "Appendix 1A. Patterns of major armed conflicts, 1990-2001", *Sipri Yearbook 2002 – Armaments, Disarmament and International Security*, 2002, 63 et seq.

276 van Hebel/ Robinson, see note 20, 105.

277 Bothe, se note 256, 417.

uncontroversial — thus evincing the customary nature of this prohibition.[278]

Violations of Common Article 3 of the *Geneva Conventions* — Article 8 (2) (c) and (e)

This first enumeration follows closely common article 3 of the *Geneva Conventions* and incriminates conduct such as violence to life and person, outrages upon personal dignity, hostage-taking and the denial of due process rights, thus to some extent representing a repetition of or at least being similar to the prohibited conduct of article 8 (2) (a) of the ICC-Statute. The fact that it was nevertheless opposed by some states was a surprise in light of the pronouncement of the ICJ in the *Nicaragua* case, in which it considered these norms to constitute a minimum yardstick in international armed conflicts.[279] Similarly, the ICTY in the *Tadic*[280] case but also the ICTR in its *Akayesu* judgment[281] contended that criminal responsibility attaches to grave breaches of the *Geneva Conventions* in internal armed conflicts. One question that could arise is whether all of the norms embodied in article 8 (2) (c) of the ICC-Statute automatically constitute a "serious" breach of that prohibition. There are strong indications in the case law of the ICTY[282] that this is

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278 C. Kress, "War crimes committed in non-international armed conflict and the emerging system of international criminal justice", *Isr. Y. B. Hum. Rts* 30 (2001), 103 et seq. (107).

279 See ICJ Reports 1986, 14 et seq. (114), *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). However, the wording of the judgment is indicative in that the ICJ considers these norms to be such a yardstick not only in international armed conflict, but also in internal conflicts. It stated that common article 3 of the *Geneva Conventions* "defines certain rules to be applied in the armed conflict of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect, what the Court in 1949 called 'elementary considerations of humanity' [...]", referring to the *Corfu Channel Case*.

280 *Prosecutor v. Dusko Tadic*, see note 230, para. 134.

281 *Prosecutor v. Akayesu*, see note 58, para. 608.

282 *Prosecutor v. Dusko Tadic*, see note 280, para. 94. The ICTY stated that in order for a violation to be serious, "it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim". The ICTY mentions one example for such a lack

the case, with one possible exception being the "singular passing of a short term imprisonment without adequate judicial guarantees".[283] However, it should also be noted that the list in article 8 (2) (c) of the ICC-Statute is an exhaustive one, a fact indicated by the wording "namely". This excludes other conduct that is prohibited by common article 3 of the *Geneva Conventions* to be read into this provision.

Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of an International Character

In furtherance of article 8 (2) (c) of the ICC-Statute, subpara. (e) prohibits conduct that is not included in common article 3 of the *Geneva Conventions*, but which nevertheless forms part of the law and customs applicable in armed conflicts not of an international character. These violations are however, subject to the finding that they are prohibited under the established framework of international law. The crimes under this heading — all of which already appear with the same or similar wording in article 8 (2) (b) of the ICC-Statute — are largely based on *Additional Protocol II*.[284] However, some conduct which one could reasonably expect to have been included is omitted. This indicates that it is correct to assume that the "choice of criminal acts" — to some degree at least — "is due to the creative imagination of the negotiators of the Preparatory Meeting of the Rome Conference".[285] The crimes which were not included are e.g. starvation, the prohibition of certain weapons — such as landmines, chemical and biological weapons. While some authors argue that this conduct could be said to be prohibited under

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of a serious breach, elaborating that "for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law' although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby 'private property must be respected' by any army occupying an enemy territory; [...]".

283 A. Zimmermann, "Article 8 – War Crimes", mn. 264, in: Triffterer, see note 17.

284 van Hebel/ Robinson, see note 20, 119.

285 Bothe, see note 255, 420. But see D. Momtaz, "War Crimes in Non-International Armed Conflicts Under the Statute of the International Criminal Court", *Yearbook of International Humanitarian Law* 2 (1999), 177 et seq. (185 et seq.).

customary international law,[286] it should be kept in mind that such conduct is also not prohibited under article 8 (2) (b) of the ICC-Statute and that thus, not all of these prohibitions can be said to constitute customary international law.[287]

In a world increasingly plagued by internal conflicts, it is a strange logic to not include such conduct, thus essentially privileging those individuals fighting internally to those who are part of an international conflict and implicitly recognizing that barbaric acts and atrocities can be carried out in one instance, but not in the other.[288] Despite these setbacks, the inclusion of this category marks an important step[289] in the evolution of humanitarian law, which — although slowly — adapts to the ever-increasing percentage of internal conflicts.

The Scope of Application of the ICC-Statute in Non-international Conflicts — Article 8 (2) (d) and lit. (f)

The scope of application of article 8 (2) (c) of the ICC-Statute is delimited by article 8 (2) (d) of the ICC-Statute by negatively defining the term "armed conflict not of an international character" to situations which do not constitute "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." It represents a repetition of article 1 (2) of *Additional Protocol II*. A similar provision is contained in article 8 (2) (f) of the ICC-Statute which delimits the provision concerned with "other serious violations of the laws and customs applicable" in internal conflicts. In addition to the exclusionary character of the negative definition encapsulated in article 8 (2) (d) of the ICC-Statute, it circumscribes the notion of "non-international armed conflict" by stating that "[i]t 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".[290] This positive

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286 Bothe, see note 255.

287 Delbrück/ Wolfrum, see note 35, 1067.

288 Again, one possible explanation is that of the outcome of the discussion on the inclusion of certain conduct having taken place in a highly politicized atmosphere.

289 Zimmermann, "Article 8 – War Crimes", mn. 264, in: Triffterer, see note 17; Momtaz, see note 285, 191.

290 See in this regard also *Prosecutor v. Dusko Tadic*, see note 280, para. 70; C. Greenwood, "The development of International Humanitarian Law by the

definition is inspired by — though not identical to — article 1 (1) of *Additional Protocol II*, but provides a lower threshold than Protocol II for not requiring that governmental forces have to be involved in the conflict,[291] for not requiring that such an organized armed group "exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations" and for not requiring that the forces or group whose conduct is in question act "under responsible command." In comparison to subsection (c) of this provision, the threshold is however higher in that it requires a "protracted armed conflict", i.e. fighting that has occurred over a period of time.[292] Moreover, the wording "in the territory of a State" seems at odds with the regime governing the Exercise of Jurisdiction of the ICC enshrined in article 13 of the ICC-Statute as only conduct on the territory of a State party could come under scrutiny. However, the current wording paves the way for referrals of a situation by the Security Council (article 13 (b) of the ICC-Statute) even if the conduct in question took place in the territory of a non-State party or if the alleged perpetrator of the crime is a national of a State party. Despite earlier findings to the contrary by the ICTY,[293] it seems to be a natural interpretation — both on a literal as well as a systematic basis — to require that the alleged acts were committed as part of an armed conflict not of an international character. This is already evidenced by the existence of the chapeau which is not limited to international armed conflicts. Otherwise, any conduct mentioned in article 8 (2) (c) and (e) of the ICC-Statute would have to be considered war crimes — with the attached stigma of such a finding, even though there might not have been any connection with

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International Criminal Tribunal for the former Yugoslavia", *Max Planck UNYB* 2 (1998), 97 et seq. (118).

291 Dropping this requirement is sensible in the light of the historical forthcoming of the 1977 *Additional Protocol II* as an international treaty, but also in light of the purpose of the ICC-Statute and the rising number of internal conflicts, where sometimes fighting does not take place between a rebel group and governmental authorities, but rather between such groups. The inclusion of the current wording still allows for the prosecution of such crimes in cases such as Somalia or Lebanon, which is impossible had the wording of *Protocol II* been adopted.

292 Zimmermann, see note 283, mn. 334 points out that *Additional Protocol II* included the wording sustained, which required that fighting would have had to be carried out on a continuous basis. For a different view see Delbrück/ Wolfrum, see note 35, 1069.

293 *Prosecutor v. Tadic*, see note 280, para. 70.

the armed conflict in question and the act having been carried out for purely personal reasons.[294] This is reflected in the *Celibici* judgment of the ICTY when the Trial Chamber declared that such a connection is axiomatic[295] and furthermore in the *Elements of crimes*.[296]

The Savings Clause — in article 8 (3) of the ICC-Statute — which was included once it became clear that the ICC-Statute would address the question of internal armed conflict[297] — reiterates that the ICC cannot serve as a mechanism for interference in a state's domestic affairs. It is thus a repetition — which now appears in the operative part of the ICC-Statute however — of the eighth preambular paragraph, which reaffirms the principle of non-intervention by stating "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 [...]". The savings clause is based on article 3 (1) of *Additional Protocol II*, with one important omission, namely the lack of the words "affecting the sovereignty of a state". Its meaning cannot be seen as an exclusionary clause for all action that takes place within a state's territory, as this would render the provisions pertaining to non-international armed conflict inoperable. In order to substantiate this provision in a meaningful way, it is necessary to be cognizant of the limitation that is itself placed on the Savings Clause, i.e. that only "legitimate means" can be used to "maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State". This would exclude from the application of this norm conduct such as outrages upon personal dignity, torture, attacks against medical personnel, etc.[298] Moreover, it could be argued that not only would such means be outside the scope of this norm, but also illegitimate goals, such as genocide.[299]

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294 Delbrück/ Wolfrum, see note 35, 1070. One practical example may be the application of torturous methods or degrading treatment taking place outside of the context of an armed conflict, by a private citizen directed towards another private citizen.

295 *Prosecutor v. Delalic*, see note 73, para. 193.

296 *Elements of Crimes*, see note 22, article 8 – War Crimes, Introduction.

297 van Hebel/ Robinson, see note 20, 121.

298 Bothe, see note 256, 424 for more examples as well as Zimmermann, see note 283, mn. 343, who goes further in that he considers all conduct prohibited by common article 3 of the *Geneva Conventions* – i.e. those included in article 8 (2) (c) of the ICC-Statute – which constitutes a peremptory norm according to article 53 of the *Vienna Convention on the Law of Treaties*, and thus non-derogable.

299 Zimmermann, see note 283, mn. 343.

Furthermore, any action would have to be carried out by an agent of the legitimate government of that state.

e. Individual Crimes under the Statute — Aggression

The crime of aggression — also labeled crime against the peace — has been the cause for long debates from the outset of the deliberations of a founding document for an international criminal court.[300] This crime differs from the other crimes of the ICC-Statute in that the other crimes are carried out by individuals against individuals, while the crime of aggression is — on the decision-making level — committed by one or more individuals who bring about an armed conflict, thus creating the preconditions for the commission of (most of) the other crimes.[301]

Although article 5 (1) (d) of the ICC-Statute mentions "The crime of aggression" as coming within the jurisdiction of the ICC, definitional problems have so far prevented agreement on a more precise form. Moreover, the second contentious issue concerns the role of the Security Council[302] — more specifically its powers under Chapter VII of the Charter of the United Nations — with regard to what the Nuremberg Tribunal had called the "supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[303]

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300 For a thorough historical analysis see B. Ferencz, *Defining International Aggression*, 1975, Vols I and II. See also Sunga, see note 124, 64 et seq.; Y. Dinstein, *War, Aggression and Self-Defense*, 3rd edition, 106 et seq.; A. Carpenter, "The International Criminal Court and the Crime of Aggression", *Nordic J. Int'l L.* 64 (1995), 223 et seq.

301 G. Westdickenberg/ O. Fixson, "Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes", in: J. Frowein/ K. Scharioth/ I. Winkelmann/ R. Wolfrum, *Verhandeln für den Frieden – Negotiating for Peace, Liber Amicorum Tono Eitel*, 2003, 483 et seq. (483).

302 G. Gaja, "The Long Journey towards Repressing Aggression", in: Cassese et al., see note 11, 433.

303 International Military Tribunal (Nuremberg) – Judgment and Sentences, *AJIL* (1947), 172 et seq. (186). Most commentators share this view, calling it "the mega-crime"; T. Meron, "Defining Aggression for the International Criminal Court", *Suffolk Transnational Law Review* 25 (2001), 1 et seq. (4) or the "arch-crime which most menaces international society"; A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", *EJIL* 10 (1999), 144 et seq. (146); see also J. Bush, "The Supreme Crime and its Origins", *Colum. L. R.* 102 (2002), 2324 et seq.

The deep tensions regarding the definition of the crime of aggression eventually lead to the non-inclusion of this crime. Two main groups of countries can be discerned however. The first group argued that the basis for any definition in the ICC-Statute should be the Annex to A/RES/3314 (XXIX),[304] a resolution passed by the General Assembly in 1974. The proponents of this school of thought could argue that the ICJ had indicated that at least part of this definition could be considered to be customary international law.[305] However, a number of points should be considered. The ICJ merely declared that article 3 (g) of the Annex to A/RES/3314 (XXIX) could be considered to reflect customary international law.[306] It did not do so — nor did it have to — for the other subsections. This has lead some authors to raise doubts about the customary law nature of the content of large parts of article 3 of the

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304 Article 3 of A/RES/3314 (XXIX) of 14 December 1974, Annex: Definition of Aggression, provides: "Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, 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. See B. Ferencz, "Aggression", in: R. Bernhardt (ed.), *EPIL* Vol. I (1992), 58 et seq.

305 See ICJ Reports 1986, 14 et seq. (103), Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), in which the ICJ declared that article 3 (g) of the Annex to A/RES/3314 (XXIX) "may be taken to reflect customary international law."

306 Although an analysis of the various alternatives indicates that others might fall under this category as well.

Annex to A/RES/3314 (XXIX).[307] Moreover, one cannot conclude that the prohibition of such acts in A/RES/3314 (XXIX) necessarily entails *individual criminal* responsibility,[308] a finding that is confirmed by article 5 (2) of the Annex to A/RES/3314 (XXIX), which stipulates that "[a]ggression gives rise to *international* responsibility".[309] Finally, it should be noted that the General Assembly resolution is to serve merely as a tool for the Security Council.[310]

Another group of countries attempted to tailor the definition of the crime of aggression more closely to the historical precedent set forth in the Nuremberg Charter, which had defined crimes against the peace in the following terms:

> "[...] planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".[311]

This approach differs from the one that is founded in A/RES/3314 (XXIX) in that it is an attempt to define the crime of aggression in more abstract terms, departing from a pre-established list. This proposal was put forth by a number of states which were instrumental in the negotiating process.

Due to the lack of agreement, the outcome of the Rome Conference with respect to the crime of aggression is embodied in article 5 (2) of the ICC-Statute, which provides that jurisdiction over this crime shall be

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307 Meron, see note 303, 9-10; Zimmermann, see note 9, 201. Both authors argue in favor of basing any definition of the crime of aggression more firmly in customary international law.

308 But see F. Mayer, "Angriffskrieg und europäisches Verfassungsrecht – Zu den rechtlichen Bindungen von Außenpolitik in Europa", *AVR* 41 (2003), Issue 3 (forthcoming, on file with author).

309 Emphasis added. See Delbrück/ Wolfrum, see note 35, 1047 and 1049; Dinstein, see note 300, 118; Draft Report on the 8th Sess. of the Preparatory Commission 24 September – 5 October 2001 Coalition for an International Criminal Court of 7 October 2001, 5 et seq.; Westdickenberg/ Fixson, see note 301, 489 do not share this view, but conclude from the word "crime" in article 5 (2) of the Annex to A/RES/3314 (XXIX) a basis for construing this norm to invoke state responsibility as well as individual criminal responsibility.

310 See A/RES/3314 (XXIX) of 14 December 1974, operative clause 4.

311 See article 6 (a) of the Nuremberg Charter. Similar language was used in article 5 (a) of the Tokyo Charter.

exercised once a definition is incorporated into the Statute, with this provision having to be consistent with the relevant provisions of the Charter of the United Nations. This latter aspect includes two separate issues. First of all, it recognizes that any such provision must adhere to article 103 of the Charter of the United Nations, which stipulates that:

> "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

This presumably includes the right of self-defense according to article 51 of the Charter of the United Nations.[312] Secondly, article 5 (2) of the ICC-Statute raises the question of whether the Security Council must determine that an act of aggression has occurred before prosecution for the act in question can commence.[313]

It is clear that the crime of aggression should only be attached to acts committed by persons who are in a position of exercising control or are capable of directing the political or military action of a state.[314] Because of this however, only a small number of countries had included the crime of aggression in their domestic legal order, e.g. Germany.[315] Moreover, it is not a comforting thought that national courts should prosecute this crime under their own — sometimes very different — standards, with special circumstances — such as being the country against which aggression had been waged — coming to play too prominent a role.

In the light of the foregoing, it seems unlikely that the Assembly of States Parties of the ICC will be able to agree on a definition for the

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312 See the contribution by R. Wolfrum in this volume.

313 Zimmermann, see note 17, mn. 28 in: Triffterer, see note 94, takes a cautious stance requiring that such a determination must have taken place by the Security Council. Similarly, Westdickenberg/ Fixson, see note 301, 517.

314 Doc. A/AC/.249/1997/WG.1/DP.6; Westdickenberg/ Fixson, see note 301, 503.

315 See Section 80 of the German criminal code which prohibits the preparation of a war of aggression. The norm is only infrequently used by German courts and one of the few statements rendered so far has not brought about much clarification. See Landgericht Köln, *Neue Zeitschrift für Strafrecht* 1 (1981), 261 et seq.

crime of aggression, thus untying the — political[316] — Gordian Knot(s) presented by this provision.[317] Its debates "generate at times a frustrating sense of déjà vu", despite — but maybe because — the crucial issues still need to be overcome.[318] The prospects have become even more bleak considering the recent changes brought about by non-state actors carrying out attacks on a large scale.

f. The "Missing Crimes" – Dangerous Ommission or Prudent Choice?

For a number of reasons, certain crimes were not included in the Rome Statute. The objections to their inclusion concerned jurisdictional hurdles, but — more importantly — also more general questions. Again, one should recall that according to the preamble, the ICC is designed to deal with "the most serious crimes of concern to the international community as a whole". Considering this purpose, it is not surprising that some of the crimes mentioned in previous drafts — such as terrorism,[319] drug trafficking,[320] serious threats against the environment[321] or

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316 Westdickenberg/ Fixson, see note 301, 484; M.C. Bassiouni/ B. Ferencz, "The Crime Against Peace", in: M.C. Bassiouni (ed.), *International Criminal Law – Volume II*, 2nd edition 1999, 313 et seq. (347).

317 Cassese, see note 303, 147 states that "the ICC is likely to start out on the wrong footing" should the Assembly of States parties not be able to agree on a definition for the crime of aggression. For a more optimistic view, see Sunga, see note 124, 66; I. K. Müller-Schieke, "Defining the Crime of Aggression under the Statute of the International Criminal Court", *LJIL* 13 (2001), 409 et seq. (428).

318 S. Fernández de Gurmendi, "The Working Group on Aggression at the Preparatory Commission for the International Court", *Fordham Int'l L. J.* 25 (2002), 589 et seq. (604).

319 For an overview of the discussion on the definition of terrorism, see Report of the Ad Hoc Committee on International Terrorism, GAOR 28th Sess., Suppl. No. 28 (Doc. A/9028), 11-12; A.P. Schmid, *Political Terrorism: A Research Guide*, 2nd edition 1988; R. Higgins, "The General International Law of Terrorism", in: R. Higgins/ M. Flory (eds), *International Law and Terrorism*, 1997, 13 et seq. (28); R. Baxter, "A Skeptical Look at the Concept of Terrorism", *Akron Law Review* 7 (1974), 380 et seq.; W. Laqueur, "We Can't Define 'Terrorism,' but We Can Fight it", *The Wall Street Journal*, 15 July 2002, A12; G. Levitt, "Is 'Terrorism' Worth Defining?", *Ohio Northern University Law Review* 13 (1986), 97 et seq. (97); Walter, see note 16; L. Rene Beres, "The Legal Meaning of Terrorism for the Military Commander", *Conn. J. Int'l L.* 11 (1995), 1 et seq. (4); M.C. Bassiouni,

mercenarism[322] — have not found their way into the final form of the ICC-Statute that was agreed upon at the end of the Rome Conference. Others have, although under the cloak of crimes against humanity or war crimes, as is the case for apartheid[323] and torture[324] or for intentional attacks on peacekeeping mission personnel, installations, material, units or vehicles.[325] Some countries tried to apply the same technique that was applied for the crime of aggression to drug trafficking and terrorism, i.e. including it in the list of crimes which would be under the jurisdiction of the ICC, but leaving the elaboration of the definition for the Assembly of States Parties.[326] This proposal however found little support.[327] Nevertheless, at the insistence of Turkey, these offences are mentioned in the Final Act of the Conference. It recommends that a future Review Conference "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".[328]

The decision to not include some of these crimes will prove beneficial for the ICC in the long run. While it is beyond question that most

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"International Terrorism", in: M.C. Bassiouni (ed.), *International Criminal Law – Volume I*, 2nd edition 1999, 765 et seq. (769).

320 It was this crime that lead to the resumption of the discussion about the creation of an international criminal court in 1989. Thus, the issue of inclusion of this crime was taken up again in Rome. Despite the fact that drug trafficking is a criminal act under most domestic legislation, the majority of countries felt that this conduct did not reach the level of heinousness and gravity that would be necessary to include it in the current statute. Moreover, practical problems were cited as reasons for leaving such crimes to national courts. See Report of the Preparatory Committee on the Establishment of the International Criminal Court, see note 27, 27.

321 Report of the Preparatory Committee on the Establishment of the International Criminal Court, see note 27, 27.

322 P. Robinson, "The Missing Crimes", in: Cassese et al., see note 11, 497 (521). The proposal for the inclusion of this crime was raised several times prior to and during the Rome Conference, but never received sufficient support.

323 See article 7 (1) (j) of the ICC-Statute.

324 See article 7 (1) (f) and article 8 (2) (a) (ii) of the ICC-Statute.

325 See article 8 (2) (b) (iii) of the ICC-Statute.

326 van Hebel/ Robinson, see note 20, 87.

327 van Hebel/ Robinson, see note 20, 87.

328 Final Act of the Conference, Resolution E, Doc. A/CONF.183/C.1/L.76/ Add.14 of 17 July 1998, 8.

— if not all — of these crimes are egregious in and of themselves, each one of them carries with it troubling ramifications. Some of them can only be vaguely defined — some of them seemingly not at all, as is the case for terrorism[329] —while the grounding of others in customary international law remains opaque to say the least. Yet with others, questions as to the ICC being the proper forum may be raised. While the amount of drug trafficking has reached worring levels, it seems that the sheer amount of cases could overburden the ICC, raising costs infinitely and undermining its credibility.

2. Jurisdiction *ratione personae* and *ratione tertiis* of the ICC

According to at least one author, the "group of Articles governing the exercise of the jurisdiction of the International Criminal Court gave rise to some of the most difficult negotiations at the Rome Conference".[330] According to others, articles 12 and 13 of the ICC-Statute contain the cornerstone provisions on the jurisdictional regime of the ICC[331] and were the theme of the "dramatic endgame of the conference."[332] The strongly held views during the negotiations are hardly surprising considering the legal, political and organizational ramifications these provisions have for the operation of the ICC. They touch upon issues such as state sovereignty, the relationship of the ICC and its organs — including the Prosecutor[333] — with the United Nations Security Council[334] as well as with States Parties.

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329 See note 319.

330 Wilmshurst, see note 10, 127. Wilmshurst's comments pertain solely to arts 12-16.

331 M. Bergsmo, "The Jurisdictional Régime of the International Criminal Court", (Part II, Article 11-19), *European Journal of Crime, Criminal Law and Criminal Justice* 6 (1998), 29 et seq. (30); similarly Kirsch/ Holmes, see note 9, 26.

332 H.P. Kaul/ C. Kreß, "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises", *Yearbook of International Humanitarian Law* 2 (1999), 143 et seq. (155).

333 See the contribution by V. Röben in this volume.

334 See the contribution by B. Fassbender in this volume.

Before analyzing the jurisdictional provisions pertaining to *ratione personae* and *ratione tertiis*,[335] a short analysis of the different so-called "trigger mechanisms" seems necessary in order to place the jurisdictional provisions in their proper context.[336] According to article 13 of the ICC-Statute, there are three ways by which a case can be brought before the Court. First of all, according to article 13 (a) of the ICC-Statute, a State Party may refer a situation[337] [338] to the Prosecutor, provided that "one or more crimes within the jurisdiction of the Court appear to have been committed".[339] The second option — article 13 (b) of the ICC-Statute — is that of the Security Council referring such a situation to the Prosecutor, provided that the Security Council act under Chapter VII of the Charter of the United Nations.[340] Considerable discussion ensued over this issue with a number of states, namely India and Mexico, being fundamentally opposed to the Security Council playing any role in the workings of the Court. Since the Appeals

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335 Article 12 (1) of the ICC-Statute stipulates that a State party "accepts the jurisdiction of the Court with respect to the crimes referred to in article 5". This mechanism is sometimes called "automatic" or "inherent" jurisdiction. Neither of these terms seems accurate and furthermore does not add anything in a substantive sense, as there are no crimes for which a non-automatic jurisdictional mechanism exists. The way the provision is now phrased, it simply refers to the jurisdiction *ratione materiae* contained in article 5 (1) of the ICC-Statute over which the ICC as a matter of fact has jurisdiction.

336 P. Kirsch/ D. Robinson, "Referral by States Parties", in: Cassese et al., see note 11, 619 et seq. (619) point to the lack of precedent in this field.

337 During the negotiating process the wording was changed from crimes to situations. This must be considered as a fortunate decision, as it will allow the prosecutor to investigate not only an individual act, but rather the context in which the conduct in question took place, thereby possibly finding other perpetrations or extenuating circumstances. Moreover, this would have increased the burden upon the State party to be more specific than might be possible for that state.

338 The term "situation" is probably best understood in a broad sense, i.e. referring to a conflict as a whole or a discernable part of this conflict. In this regard, both temporal as well as geographic limitation seem possible although not necessarily desirable.

339 Article 14 (1) of the ICC-Statute; moreover, section 2 of this provision asks states to submit, as far as possible supporting information to the Prosecutor.

340 See L. Condorelli/ S. Villalpando, "Referral and Deferral by the Security Council", in: Cassese et al., see note 11, 627 et seq. for a detailed analysis.

Chamber's decision in the *Tadic* case, it has been almost undisputed that the Security Council does indeed have the power to establish *ad hoc* tribunals.[341] Although it is not strictly necessary to conclude that the Security Council should have a role in the proceedings of the ICC as a permanent body, its inclusion seems to have been almost a natural choice — although its ultimate form with the accompanying ramifications can be put into question and raises serious doubts.[342] Furthermore, it is up to the Security Council to determine whether a new *ad hoc* tribunal should be instituted for future cases, thereby circumventing the ICC — and thereby weakening it considerably.[343] Any such referral will most likely only occur in situations in which nationals from states are concerned which do not enjoy the status of a permanent member of the Security Council with its veto power according to Article 27 of the Charter of the United Nations.[344] Finally, and this was one

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341 *Prosecutor v. Tadic*, see note 230, para. 33 et seq. The Appeals Chamber concluded this section of its analysis by stating that "[i]n sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41."

342 See II. 4. b.

343 It is to be hoped that such a scenario will not become reality. Apart from the outright affront such a move would constitute towards the ICC if it were able to exercise its jurisdiction, the costs would be almost prohibitively high. The budget for the ICTY in the biennium 2002–2003 amounted to US$ 223,169,800. See International Criminal Tribunal for the former Yugoslavia, The ICTY at a Glance, 7 August 2003, <http://www.un.org/icty/glance/index.htm> (4 August 2003). See also International Court of Justice, Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly of 26 October 2000, <http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_GA55_20001026.htm> (4 August 2003), in which former ICJ President Guillaume compared the budgets of the ICJ and the ICTY. However, given the relatively large number of ratifications and the necessity to garner support not only from the other P5, but also four more Security Council members, and considering in addition the – at least so far – relatively positive stance of at least one Member State of the Security Council with regard to the ICC, this is an unlikely prospect.

344 However, given the aspirations of the ICC-Statute, which proclaims in its Preamble that the "most serious crimes of concern to the international community as a whole must not go unpunished" and that there must be an "end to impunity for the perpetrators of these crimes", not including this option as it stands right now would have led to serious gaps in the jurisdiction of the ICC. For the discussion on this issue see Bergsmo, see note 331, 36; Condorelli/ Villalpando, see note 340, 627.

of the single most contentious issues during the negotiations,[345] the Prosecutor may *initiate*[346] an investigation *proprio motu*, i.e. in one's own motion or acting at her/his own initiative.[347] The way the norms in question — article 13 (c) and article 15 of the ICC-Statute — have been crafted shows how intense these negotiations were.[348] It should be remembered that it is a characteristic of an independent criminal justice system to grant prosecutorial independence. Indeed, as has been pointed out, prosecutorial discretion is encapsulated in all mature national jurisdictions, and has to be considered to be the norm and not the exception.[349] Considering the — necessary and prudent — safeguards

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345 D. Scheffer, "The United States and the International Criminal Court", *AJIL* 93 (1999), 12 et seq. (17); M. Bergsmo/ J. Pejić, "Article 15 – Prosecutor", mn. 1, in: Triffterer, see note 17; Kirsch/ Holmes, see note 9, 26; S. Fernández de Gurmendi, "The Role of the International Prosecutor", in: Lee, see note 5, 175 (177); E. LaHaye, "The Jurisdiction of the International Criminal Court: Controversies over the Preconditioning for Exercising Its Jurisdiction", *NILR* 46 (2000), 1 et seq. (15); M. Arsanjani, "Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court", in: H. von Hebel/ G. Lammers/ J. Schukking, *Reflections on the International Criminal Court*, 1999, 57 et seq. (66). See for a comprehensive study on the Role of the Prosecutor, L. Arbour/ A. Eser/ K. Ambos/ A. Sanders (eds), *The Prosecutor of a Permanent International Criminal Court – International Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*, 2000.

346 The term initiate is not to be confused with the actual commencement of investigations. This is evident by the wording of article 15 (4) of the ICC-Statute, which states that:
"[i]f 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, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation [...]".

347 There are a number of ways that a Prosecutor could be made aware of a situation which could warrant her/his attention. The Prosecutor could truly act on her/his own initiative or a situation could be brought to the attention of the Prosecutor by non-governmental organizations or individuals, but also by States parties which do not have the necessary information, but which nevertheless want the situation to be investigated by the Prosecutor.

348 Kirsch/ Holmes, see note 9, 26.

349 Bergsmo/ Pejić, see note 345, mn. 11, in: Triffterer, see note 17; similarly Delbrück/ Wolfrum, see note 35, 1153 and Zimmermann, see note 9, 214.

that have been put in place by way of article 15 of the ICC-Statute[350] to prevent political misuse and abuse of the wide powers granted to the Prosecutor, without infringing too heavily on the independence of that position, fears to that effect seem to be motivated less by genuine concern, but rather by political views based on more fundamental opposition to international criminal adjudication as such, without the restraints of *ad hoc* jurisdiction. If anything, the current practice in international courts and under other complaint procedures, such as the ECHR[351] or the United Nations Human Rights Committee,[352] shows that state complaints are extremely rare and it would come as a surprise if such behavior were to change with the ICC.[353] Indeed, the — although extremely short — current record of the ICC is indicative of this view. Had it not been decided at the Rome Conference to grant —

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350 According to this provision, the Prosecutor will have to submit a request for authorization for an investigation to the Pre-Trial Chamber and cannot commence an investigation without its approval. F. Hoffmeister/ S. Knoke, "Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof", *ZaöRV* 59 (1999), 785 et seq. (793); P. Kirsch/ D. Robinson, "Initiation of Proceedings by the Prosecutor", in: Cassese et al., see note 11, 657 et seq. (663) even go as far as stating that due to the various safeguards, the procedure according to article 15, the principle of subsidiarity under article 17 and the provisions pertaining to the qualification and disqualification of ICC officials, the independent prosecutor should be seen as "the *least* politicized trigger mechanism" (emphasis in orginial).

351 European Treaty System No. 005, *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950. In the years since the inception of the *European Convention on Human Rights*, only 13 state to state complaint procedures have been instituted. See C. Grabenwarter, *Europäische Menschenrechtskonvention – Ein Studienbuch*, 2003, 61.

352 Until the time of writing, no state complaints according to article 41 of the *International Covenant on Civil and Political Rights* have been submitted. See *International Covenant on Civil and Political Rights* of 16 December 1966, UNTS Vol. 999 No. 14668. The same is true for the state complaint procedure under the *American Convention on Human Rights*. See *American Convention on Human Rights* of 11 November 1969, UNTS Vol. 1144 No. 17955.

353 At a recent conference in mid-2002, the Prosecutor indicated that his office had received almost 500 communications after 1 July 2002. From this staggering number the Prosecutor would closely examine only one, namely the situation in the Democratic Republic of the Congo. See International Criminal Court, Press conference of the Prosecutor – Communications, 24 July 2003, <http://www.icc-cpi.int/php/news/details.php?id=19> (4 August 2003).

relative — judicial independence to the Prosecutor, the ICC would have been hamstrung from its inception, as it cannot be expected that the Security Council will shun away from its largely political function and become an organ that is concerned genuinely with the persecution of criminal conduct.

a. *ratione personae*

The ICC-Statute is clear that with respect to *ratione personae* it applies solely to individuals and not to organizations. While article 1 of the ICC-Statute omits the adjective "natural", article 25 (1) of the ICC-Statute clarifies that "[t]he Court shall have jurisdiction over natural persons pursuant to this Statute". While the issue of including juridical persons caused some debate in the negotiating process[354] and has historical predecessors on which it could possibly rely on,[355] it was ultimately — and prudently — not incorporated in the final document. Considering the disparate approaches of domestic legal systems to this form of criminal liability[356] — with some nations opposing such an approach vehemently — and the experience during the negotiations of earlier international instruments, the outcome of that debate seems to have been almost predictable.

With regard to the jurisdictional basis *ratione personae*, the ICC-Statute makes reference solely to the well-recognized and uncontroversial active personality principle when it states that the Court may only exercise its jurisdiction if the alleged perpetrator of the crime is a national of a State party or a national of a state which has accepted the jurisdiction of the Court.[357] Adopting such a common basis was — for a

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354 A/CONF.183/2/Add.1 of 14 April 1998. However, it was clear that states would be excluded from the jurisdiction of the ICC, see article 23 (5) and (6) of the proposed statute in Doc. A/CONF.183/2/Add.1, Report of the Preparatory Committee on the Establishment of an International Criminal Court – Addendum of 14 April 1998. Arsanjani, see note 345, 61 et seq.

355 M. Frulli, "Jurisdiction *Ratione Materiae*", in: Cassese et al., see note 11, 527 (528).

356 G. Heine, *Die strafrechtliche Verantwortlichkeit von Unternehmen – von individuellem Fehlverhalten zu kollektiven Fehlentwicklungen, insbesondere bei Grossrisiken*, 1995.

357 Article 12 (2) (b) of the ICC-Statute reads:
"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

long time during the preparatory process — not as certain as it seems prudent in hindsight. On the contrary, there were considerable discussions for proscribing universal jurisdiction to (a) certain crime(s), such as genocide, while retaining a different regime for other crimes.[358] The outcome as it has been agreed upon presents a compromise between those states which were in favor of a wider jurisdictional basis, i.e. the universality principle,[359] and those countries which tried to restrict the jurisdiction of the Court even further by requiring that not only the state of nationality of the alleged perpetrator must have accepted the jurisdiction of the ICC, but also the territorial state on which the alleged conduct occurred.[360] [361] Should a definition for the crime of aggression ever be agreed upon in accordance with article 5 (2) of the ICC-Statute, it is not impossible that a different solution may be sought, which would, to a lesser degree, constitute a legal necessity, but more likely be the result of political bargaining.

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or have accepted the jurisdiction of the Court in accordance with paragraph 3:
[...]
(b) The State of which the person accused of the crime is a national."

358 Various systems were debated, such as an "opt-in" or "opt-out" regime. For an overview of the various proposals in this regard, see Wilmshurst, see note 10, 128 et seq.; S. Williams, "Article 12 – preconditions to the exercise of jurisdiction", mn. 3 et seq., in: Triffterer, see note 17; Arsanjani, see note 345, 59.

359 Proposal put forth by Germany in the preparatory process, Doc. A/AC.249/1998/DP.2 of 23 March 1998. For the view of the proponents of this view, both of whom where part of Germany's delegation to the Rome Conference, see Kaul/ Kreß, see note 332, 145. This view is strongly opposed by the Head of the US Delegation to the Rome Conference, see Scheffer, see note 345, 18.

360 This suggestion was presented by the United States in A/CONF.183/C.1/L.70 of 14 July 1998.

361 W. Lietzau, "International Criminal Law After Rome: Concerns from a U.S. Military Perspective", *Law and Contemporary Problems* 64 (2001), 119 et seq. (128) calls the notion of such a "balance" misplaced, as "it fails to give adequate recognition to the Role of the Security Council or appropriate consideration to the court's role in existing international frameworks." Lietzau claims that "it might be argued that the Rome Treaty combines the worst of both worlds." But see P. Kirsch, "Keynote Address, Symposium – The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression", *Cornell Int'l L. J.* 32 (1999), 437 et seq. (439).

One exception to this narrow authorization exists however. The ICC has virtually — at least on a legal basis and leaving political considerations aside — unlimited personal jurisdiction for those situations which are referred to it by the Security Council under article 13 (b) of the ICC-Statute. Only by way of such a referral does no such nationality requirement exist.[362] The same is true for the requirement that the alleged conduct must have taken place on the territory of a State party.

A conceivable problem that could arise with respect to the nationality requirement concerns dual nationality. However, it is submitted that such a case should be decided according to the long-standing principle developed by the ICJ in the *Nottebohm* case, in which it found that in order for citizenship to be recognized, it must be genuine and substantial.[363] In the same vein, the ICC should decide any contentious case before it, i.e. by determining to what country such a "genuine" connection does indeed exist.

b. *ratione tertiis*

While the active personality principle was never a substantially contentious issue, the question whether the territoriality principle should apply on its own right has to be seen in a different light. This was mainly due to the question of whether the territoriality principle could be said to expand the jurisdiction of the ICC to non-State parties.[364]

A literal reading of the provision reveals that the ICC has jurisdiction over those crimes which are contained in article 5 (1) of the ICC-Statute, i.e. genocide, crimes against humanity and war crimes, if the conduct in question was committed on the territory of a State party, or if it was committed on board a vessel or aircraft, if these vessels or aircraft fly the flag of a State party or are registered in a State party.[365]

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362 See note 344 and accompanying text.

363 ICJ Reports 1955, 4 et seq. (23 et seq.), *Nottebohm (Second Phase)*, Jugdgment, 4.

364 For a discussion of this matter, see II. 2. c.

365 Article 12 (2) (a) ICC-Statute reads:
"[...] the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; [...]."

As such, the geographical reach of the ICC-Statute is considerably larger than that of any of its predecessors, probably best symbolized by the very limited geographical focus of the ICTY and ICTR, both of which were confined to events taking place in the former Yugoslavia in the case of the ICTY[366] and to Rwanda and its neighboring countries in the case of the ICTR.[367] The foundation for the quasi-global reach of the ICC is already laid out in the Preamble which affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished". However, this potential truly global reach is limited by the territorial application of the ICC-Statute to those states which are States parties, a result that clearly constitutes an expression of the principle of state sovereignty.

A number of scenarios can be — and indeed should be — distinguished when applying the territorial principle. One of these situations concerns crimes that were committed in the territory of more than one state or where action was commenced in one state, but produced results in a second state; another situation concerns the question of whether the effect principle should apply in certain cases. Either of these cases will prove unproblematic if all states concerned (the territorial state or the state of nationality of the alleged perpetrator) are States parties to the ICC-Statute. However, in cases in which the alleged perpetrator is a national of a non-State party and one of the territorial states is not a State party,[368] the situation is less clear. Recourse should thus be had to

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366 Article 1 of the ICTY statute reads:
"Article 1 – Competence of the International Tribunal
The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".

367 Article 1 of the ICTR statute reads:
"Art. 1 – Competence of the International Tribunal for Rwanda
The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute".

368 For the purpose of this analysis the state in or over which the conduct commenced.

more general principles regarding jurisdictional bases.[369] Although there was considerable discussion between the objective and subjective theories in the past, it is now possible to state that jurisdiction can be claimed by all states with a connection to the conduct in question.[370] Thus, in a situation in which poison is delivered by an airplane flying over its own territory but in which this agent is — e.g. by way of a rocket or a similar device — dispersed over the territory of a State party, the ICC-Statute would grant jurisdiction over this conduct. A different construction would lead to the absurd result that countries would aim for such acts to be conducted this way, relying exclusively on long-distance delivery systems. Thus, as long as the effects of the conduct in question occur on the territory of a State party, the ICC would be able to claim jurisdiction.[371]

Moreover, crimes committed on board a vessel or aircraft could also prove to be problematic. But it is submitted that some of the principles just enunciated should also apply. Again, a number of situations can be distinguished. Scenarios in which the perpetrator is a national of a State party or a non-State party do not pose a problem when determining the question of the jurisdictional basis. The same is true if the flag state or the state of registration can be identified.[372] However, the situation is different when the flag state or the state of registration cannot be identified. In such a case, the only opportunity for the ICC to be seized is a referral by the Security Council according to article 13 (b) of the ICC-Statute.[373]

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369 See Blakesley, see note 12, 43 et seq. giving extensive examples on various scenarios.

370 S. Bourgon, "Jurisdiction *Ratione Loci*", in: Cassese et al., see note 11, 559 et seq. (567).

371 For a different view, see Schabas, see note 182, 63 arguing that the ICC-Statute is silent on this matter. However, at least one of the examples given, an order to take prisoners given in a non-State party with no action taken pursuant to this order, would in this author's view not give rise to jurisdiction.

372 In cases in which a vessel was attacked on the high seas, it is submitted that the effects principle should apply, i.e. the effect on the target vessel should be considered to trigger jurisdiction, a construction which is in line with the above-mentioned scenario spawning action in more than one state.

373 It is however unlikely that the Security Council will characterize such a situation as threat to international peace and security and institute such proceeding. The range of cases that could trigger such action by the Security Council has to be considered to be extremely narrow; nevertheless, the

Finally, one aspect that should be mentioned is that the jurisdictional basis *ratione materiae* is not to be confused with the location of an alleged perpetrator on the territory of a State party. As problematic as it may seem in general — and deplorable as it may be in the fight against impunity — the ICC will not have jurisdiction over an individual who committed crimes on the territory of a non-State party and who is a national of a non-State party. The only exception to this is a referral by the Security Council. Other than that, the jurisdiction of the ICC would not come into play.[374]

c. Jurisdiction over Nationals of non-States Parties

The debate on the jurisdictional reach of the ICC-Statute — more specifically its application to non-States parties — was not only the subject of considerable debate during the negotiating process, but has also produced a large number of scholarly articles.[375] The central point of con-

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wide discretion that the Security Council enjoys in its determination whether such a situation exists, should be borne in mind. See M. Koskenniemi, "The Police in the Temple – Order, Justice and the UN: A Dialectical View", *EJIL* 6 (1995), 325 et seq. (342); J. Frowein/ N. Krisch, in: B. Simma (ed.), *The Charter of the United Nations – A Commentary*, Volume I, 2nd edition, 2002, Article 41, mn. 11.

374 This does not preclude the exercise of jurisdiction of States parties or non-States parties into their domestic legal system.

375 LaHaye, see note 345, 18 et seq.; Kaul/ Kreß, see note 332, 145 et seq.; J. Paust, "The Reach of ICC Jurisdiction over Non-Signatory Nationals", *Vand. J. Int'l L.* 33 (2000), 1 et seq.; M. Morris, "High Crimes and Misconceptions: The ICC and Non-Party States", *Law and Contemporary Problems* 64 (2001), 13 et seq.; M. Scharf, "The ICC's Jurisdiction over the Nationals of Non-State Party States: A Critique of the U.S. Position", *Law and Contemporary Problems* 64 (2001), 67 et seq.; J. van der Vyver, "Personal and Territorial Jurisdiction of the International Criminal Court", *Emory International Law Review* 14 (2000), 1 et seq.; R. Wedgwood, "The International Criminal Court: An American View", *EJIL* 10 (1999), 93 et seq. (99); G. Hafner/ K. Boon/ A. Rübesame/ J. Huston, "A Response to the American View as Presented by Ruth Wedgwood", *EJIL* 10 (1999), 108 et seq. (115); G. Danilenko, "The Statute of the International Criminal Court and Third States", *Mich. J. Int'l L.* 21 (2000), 445 et seq.; B. Brown, "U.S. Objections to the Statute of the International Criminal Court", *International Law and Politics* 31 (1999), 855 et seq. (868 et seq); J. Taulbee, "A Call to Arms Declined: The United States and the International Criminal Court", *Emory International Law Review* 14 (2000), 105 et seq.

tention was and still is the ability of the ICC to exercise its jurisdiction over nationals of non-States parties if the alleged crimes occurred on the territory of a State party. This approach, it was argued,[376] was in clear contravention of the rule *pacta tertiis nec nocent nec prosunt* enshrined in article 34 of the *Vienna Convention on the Law of Treaties*, as it would create obligations for states which had not given their consent to be bound by the ICC-Statute. Thus, the question that needs to be answered is whether the ICC-Statute, especially its article 12, does indeed create obligations for non-States parties, thus running counter to article 34 of the *Vienna Convention on the Law of Treaties*.

Leaving practical considerations aside— such as the fact that the vast majority of crimes that could fall under the ICC-Statute were committed in internal conflicts in the last decades — a number of relevant points should be considered when examining this question.

First and foremost, the claim that there exists an obligation for non-States parties lacks a clear foundation. The ICC-Statute does not impose an obligation for a non-State party to co-operate with the Court according to articles 86 et seq. of the ICC-Statute.[377] This non-obligation pertains to any conceivable kind of assistance, e.g. handing over alleged perpetrators or evidence. It rather seems that two separate

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376 The arguments were advanced by a number of states and are exemplified by Scheffer, see note 345, 18. These countries included China, India and the United States. India for example stated:
"[b]ut while we tried, unsuccessfully, to ensure that the Court would be free from political influence, and its Statute in full conformity with the Law of Treaties, on the penultimate day of the Conference, the purists resurrected and forced into the Statute the concept of universal or inherent jurisdiction, which too makes a mockery of the distinction between States parties and those who choose not to be bound by a treaty. It is truly unfortunate that a Statute drafted for an institution to defend the law should start out straying so sharply from established international law. Before it tries its first criminal, the ICC would have claimed a victim of its own – the Vienna Convention on the Law of Treaties".
See Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Criminal Court, 17 July 1998, <www.un.org/icc/speeches/717ind.htm> (4 August 2003).

377 The obligations of States parties to the ICC-Statute are to provide funding (article 117 ICC-Statute), evidence (article 93 ICC-Statute) and other forms of cooperation to the ICC (article 109 (1) ICC-Statute) and surrender and transfer of indicted persons to the ICC (article 89 (1) ICC-Statute).

concepts are intermingled in this line of argument.[378] This pertains to the imposition of treaty obligations on non-States parties on the one hand, and the exercise of jurisdiction over nationals of such states.[379] Furthermore, both (active) nationality and territoriality are well-recognized principles as bases for jurisdiction. In this vein, the ICC's jurisdictional regime is not extraordinary.[380] It is moreover recognized that the state on whose territory criminal conduct occurs has concurrent jurisdiction with the state of nationality.[381] If one accepts this proposition — and most countries with an Anglo-American legal system subscribe fully to territoriality as the principal basis for the exercise of jurisdiction — it is the territorial state's right to either prosecute the person within its own legal system, extradite that person to another country with a jurisdictional title, or hand that person over to another forum,[382] which could be the ICC. Such a jurisdictional basis is embodied in most international criminal law conventions, where no such distinction between nationals and non-nationals takes place.[383] Thus, it cannot be claimed that the ICC-Statute creates any obligation for a

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378 D. Scheffer, "The International Criminal Court: The Challenge of Jurisdiction", *Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law* 93 (2000), 68 et seq. (70).

379 Scharf, see note 375, 98 extends this argument further on the problems posed by anti-terrorist conventions, referring to the *Yunis* decision of the United States Court of Appeals for the D.C. Circuit. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

380 Similarly Danilenko, see note 375, 459.

381 See only Blakesley, see note 12, 43 et seq. and 61 et seq.

382 Paust, see note 375, 2; M. Arsanjani, "The Rome Statute of the International Criminal Court", *AJIL* 96 (1999), 22 et seq. (26); Hafner et al., see note 375, 117. For a different view, see Morris, see note 375, 45 claiming that there is no customary international law basis for the delegation of territorial jurisdiction and concluding the purported lawfulness of such delegation is a "legal innovation", see 47.

383 Similarly Danilenko, see note 375, 460; Scharf, see note 375, 99. This applies to a number of conventions, such as the 1949 *Geneva Conventions*, the 1958 *Geneva Convention of the High Seas*, UNTS Vol. 450 No. 6465, the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*, UNTS Vol. 860 No. 12365, the 1971 *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, UNTS Vol. 974 No. 14118 and the 1979 *International Convention Against the Taking of Hostages*, A/RES/146 of 18 December 1979.

non-State party.[384] Rather, the ICC's jurisdictional regime follows closely that of many domestic legal systems.[385] Indeed, the Nuremberg Tribunal affirmed this approach, when it stated that the creators of the tribunal "made regulations for the proper conduct of the Trial. In doing so, they have done together what any of them might have done singly, for it is not to be doubted that any nation has the right to set up special courts to administer the law".[386] Further, the ICC-Statute does not create state liability,[387] but rests entirely on individual criminal responsibility. This is a fundamental premise of the ICC-Statute and finds support in numerous provisions, starting with the Preamble and is spelled out clearly in article 25 (1) of the ICC-Statute. Again, the ICC does not go beyond or expand existing international legal principles, as the crimes that can only be committed by individuals and which are covered by the ICC-Statute are — for the most part — deeply embedded in customary international law. Attempts to claim that states are being subjected to obligations under the ICC-Statute in some extended sense for crimes that were perpetrated by individuals,[388] can rightly be called

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384 It is however questionable to base the legality of the territoriality principle as embodied in article 12 of the ICC-Statute on customary international law. But see Y. Sok Kim, "The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute", *Journal of International Law and Practice* 8 (1999), 47 et seq.

385 Similarly Scharf, see note 375, 110.

386 International Military Tribunal, see note 303, 216.

387 Doc. A/56/10, Suppl. No. 10, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its 53rd Sess. (2001).

388 T. Meron, "The Court We Want", Washington Post, 13 October 1998, A15; Morris, see note 375, 15; R. Wedgwood, "The Irresolution of Rome", *Law and Contemporary Problems* 35 (2001), 193 et seq. (199). Wedgwood claims that "enthusiasts" would not recognize "where the charged conduct consists of the faithful execution of official policy, the state remains a real party in interest and the matter is closely akin to the jurisdictional prerequisite of an 'indispensible party'." In this Wedgwood blurs the distinction between legal obligations and public policy. The latter is not free from scrutiny through the former. One should bear in mind the statement by R. Goldstone, former Prosecutor for the ICTY and ICTR who stated that "I really have difficulty understanding that policy. What the United States is saying is, 'In order to be peacekeepers [...] we have to commit war crimes.' That's what the policy boils down to." US Stance Contradictory, former UN

a "novel theory."[389] Finally, the ICC could not exercise its jurisdiction if a state has prosecuted the person for the conduct in question, as it has jurisdiction only with regard to situations, in which the state in question was "unwilling or unable genuinely to carry out the investigation or prosecution".[390] While it is true that the ICC can assert jurisdiction if a state is unwilling or unable to investigate or prosecute its national for conduct committed on the territory of a State party, the state of nationality is under no international obligation to assist in any way.[391] Moreover, considering the character of the conduct in question, a nation would be hard pressed not to be subject to an outcry for its unwillingness to act.

In light of the foregoing, it appears that the arguments put forth by the opponents of the ICC's jurisdictional regime are based on a more fundamental rejection of the ICC exercising jurisdiction over its nationals, rather than a sound legal basis. Such a specter may be well-suited to argue on a political level.[392] The legal grounding however seems more than questionable.

A number of other existing jurisdictional bases are not included in the ICC-Statute, namely the universality principle and the passive personality principle. This is the result of a political compromise, with both bases — or lack thereof — providing for potential problems in the

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Prosecutor Says, *Terra Viva*, 17 June 1998, 7. The statement is also available at <http://www.ips.org/icc/tv1706.htm> (4 August 2003).

389 Brown, see note 375, 869. Brown argues further that equating the two concepts might be a "clever rhetorical device, but as legal reasoning it is completely untenable".

390 Article 17 ICC-Statute. See II. 4. c. for more detail.

391 Hafner et al., see note 375, 118.

392 S. HRG. 105–724, Is a U.N. International Criminal Court in the U.S. National Interest, Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105th Congress, 2nd Session, 23 July 1998. Senator Rod Grams states that "[t]his court claims universal jurisdiction", 1; similar statement by Senator Jesse Helms, referring to the Rome Statute's "universal jurisdiction provision", 7, and statement of Senator John Ashcroft to the effect that "[t]he Court's claim to universal jurisdiction smacks of arrogance". However, these statements do not take into account that the jurisdiction of the ICC does not incorporate the principle of universality, unless of course one proscribes to the understanding of universality put forth by Senator Rod Grams, 1, who defines this term as "the right to prosecute United States citizens even though the U.S. is not a party to the treaty."

future. Regarding the universality principle, one could conceive of a case in which the perpetrator is in the custody of a State party, but is a national of a non-State party and committed her/his crimes on the territory of a non-State party. In such a constellation, the ICC would not be able to claim jurisdiction over that person, although the universality principle would grant the state where the perpetrator is held to do so.[393] It is however not surprising that the passive personality principle[394] did not find entry into the ICC-Statute given the disparate views held on this matter between common law and civil law countries.[395]

3. *ratione temporis*

In keeping with the general principle of international law of the non-applicability of treaties prior to their coming into force for the state in question[396] — as embodied in article 28 of the *Vienna Convention on the Law of Treaties* —,[397] the jurisdiction according to the ICC-Statute does not take effect retroactively, but can only be invoked prospectively after its entry into force.[398] Article 11 of the ICC-Statute stipulates that:

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393 Delbrück/ Wolfrum, see note 35, 1152.

394 The passive personality principle applies when the victim(s) of criminal conduct is a/are national(s) of a State party.

395 See note 356.

396 One example for an international adjudicative body that has made a pronouncement to that effect is the finding of the European Commission of Human Rights in the case of *De Becker v. Belgium*, Application No. 214/56 of 27 March 1962, *Yearbook of the European Commission of Human Rights* 2 (1962), 214 et seq. The commission found that the European Convention did not take effect retroactively, but rather that it would only have prospective effect.

397 *Vienna Convention on the Law of Treaties*, UNTS Vol. 1155 No. 18232. Its Article 28 reads:
"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

398 There is a fundamental distinction between article 11 of the ICC-Statute and article 24 of the ICC-Statute. The former is concerned with the issue of procedural legislative retroactive assumption of jurisdiction, while the latter deals with retroactive substantive criminalization. Thus, while it is possible that any given conduct could be subsumed under any of the crimes

"[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute".[399]

With regard to the actual date of the coming into force of the ICC-Statute, it stipulates more specifically that this was "the first day after the month after the 60th day following the day of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."[400] This relatively high number of required ratifications is testament to the willingness of the framers of the ICC-Statute that it should operate with a high rate of approval from the start, without being considered — and possibly condemned —as a political instrument of a small number of nations aiming to impose upon other states their ideals of international justice. The ICC-Statute entered into force on 1 July 2002, after 10 countries had submitted its instrument of ratification to the Secretary-General.[401] At the time of writing, an additional 31 states have become States parties to the ICC-Statute, thus bringing the number to 91 States parties.[402] It was unclear at the beginning whether the required number of States parties would be reached as early as mid-2002 and it is still surprising, consid-

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mentioned in article 5 of the ICC-Statute, article 11 of the ICC-Statute would still bar the Court from assuming jurisdiction over the conduct in question.

399 The ICC-Statute as an international treaty deviates from its *ad hoc* predecessors in the 1990s in this respect. The ICTR's temporal jurisdiction was limited by article 2 of the ICTR-Statute for the time period between 1 January 1994 and 31 December 1994, while the ICTY-Statute allows for an open-ended jurisdiction, stating in its article 1 that:
"[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".

400 Article 126 (1) of the ICC-Statute.

401 On this day, Bosnia and Herzegovina, Bulgaria, Cambodia, the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia submitted their instruments of ratification formally.

402 For an overview of the current ratification status, see United Nations, United Nations Treaty Database – Multilateral Treaties Deposited with the Secretary-General, Rome Statute of the International Criminal Court, 17 July 1998, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (4 August 2003).

ering the sometimes major changes that the ICC-Statute necessitates in domestic legal systems.[403]

For states becoming a party to the ICC-Statute after its entry into force, article 11 (2) of the ICC-Statute provides that 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".[404]

This language is based on the understanding that whatever occurs in a given state that could remotely be considered to fall under the jurisdiction of the ICC in any other jurisdictional category (e.g. genocide committed by a national of that state or on the territory of that state), such conduct would not be subject to the jurisdiction of the ICC. However, this does not bar the state from prosecuting the perpetrator within its own criminal justice system.[405] This regime might not be satisfactory to all commentators and has caused some to criticize[406] or even oppose it. However, it should be stressed that it is probably the only way for countries to be able to become States parties to the Rome Statute which do not wish to submit past conduct to international adjudication.[407] On the other hand, it should also be noted that a state does have the option to submit such a case to the ICC's jurisdiction if it has

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403 For the legislative changes that were made to accommodate the ICC's requirements, United Nations Treaty Database, see note 402; Coalition for an International Criminal Court, Country Information, <http://www.iccnow.org/countryinfo.html> (5 August 2003). See also text accompanying footnotes 7 and 8, above.

404 Similar to the language used in article 126 (1) of the ICC-Statute, section 2 provides:
"For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession."

405 Similar S. Williams, "Article 11 – Jurisdiction *ratione temporis*", mn. 9, in: Triffterer, see note 17.

406 S. Bourgon, "Jurisdiction *Ratione Temporis*", in: Cassese et al., see note 11, 543 et seq. (549); S. Singh, "The Future of International Criminal Law: The International Criminal Court (ICC)", *Touro International Law Review* 10 (2000), 1 et seq. (9).

407 Similarly to the view of this author Schabas, see note 182, 57.

made a declaration to that effect in accordance with the requirements set forth in article 12 (3) of the ICC-Statute.[408]

At least one interesting and problematic case could arise from this general regime, namely the issue of continuous crimes. If the first element of such a crime[409] — such as taking a person into custody in the case of enforced disappearances[410] — were to have taken place prior to the entry into force for a given state and if the detention of that person continued until the coming into force of the ICC-Statute, it remains an open question whether such conduct could be regarded to fall within the temporal jurisdiction of the ICC. The Appeals Chamber in the aforementioned *Ngeze and Nahimana v. Prosecutor* case had decided that any facts that fell outside the jurisdictional time limit set forth in article 2 of the ICTR-Statute would have to be withdrawn from the indictment. However, in the case of continuous violations, it could be argued that the effects of the crime, which in the case of enforced disappearance is the detention of the person without knowledge of her/his whereabouts, are present at the time of the coming into force of the ICC-Statute. Thus, the perpetrator of that crime could be convicted on the basis of the ICC-Statute without contravening the principle of non-

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408 The requirements for such a declaration however should be regarded restrictively. Such a declaration would have to specify the time for which it operates, the crime or situation it refers to and without conditions. Similarly Bourgon, in: Cassese et al., see note 11, 551.

409 Such violations are committed prior to the entry into force of the Statute, but have effects that continue even afterwards, or violations that are commenced prior to the entry into force of the Statute and deemed to be 'continued' afterwards. R. Pangalangan, "Article 24 – Non-retroactivity *ratione personae*", mn. 13, in: Triffterer, see note 17; similarly, P. Saland, "International Criminal Law Principles", in: Lee, see note 5, 189 et seq. (197); Arsanjani, see note 345, 64; Schabas, see note 182, 59 make mention of this problem, without however offering solutions.

410 Most authors mention the crime of genocide in this regard, referring to the decision of the ICTR Appeals Chamber in 2000, ICTR-99-52-A, *Ngeze and Nahimana v. Prosecutor*, Decision on the Interlocutory Appeals of 5 September 2000. The Appeals Chamber found however that conduct prior to 1 January 1994 which would allow to prove genocidal intent, was admissible. Another such crime under the jurisdiction of the ICC is the forcible transfer of population according to article 8 (2) (b) (viii) of the ICC-Statute. D. Blumenthal, "The Politics of Justice: Why Israel Signed the International Criminal Court Statute and What the Signature Means", *Ga. J. Int'l & Comp. L.* 30 (2002), 593 et seq. (609).

retroactivity because the crime's effects are still palatable at a point in time after the coming into force of the ICC-Statute.

Finally, a situation could occur in which the Security Council refers a situation to the ICC according to article 13 (b) of the ICC-Statute. The only time limit for this situation is that the ICC-Statute has come into force, regardless of the nationality of the perpetrator or the territory on which the crime in question occurred. As the coming into force of the ICC-Statute has already occurred in mid-2002, this problem will not arise.[411]

4. Limitations on the Jurisdiction of the ICC

The jurisdictional regime outlined above is subject to a number of limitations, some of which have been analyzed above. A number of other limitations should be pointed out however, as they might have a considerable impact on the work of the Court in the future. These exceptions concern the age limit according to which individuals can be prosecuted, the issue of Security Council deferral under article 16 of the ICC-Statute, the limitation by way of the principle of complementarity according to article 17 of the ICC-Statute and the limitation on the jurisdiction over war crimes according to article 124 of the ICC-Statute.

a. Article 26 of the ICC-Statute – Age Limit

In order for the Court to have jurisdiction, the alleged offender must have reached the age of 18 at the time of the commission of the crime. This rule — enunciated in article 26 of the ICC-Statute — was the cause for long debate during the negotiating process. The reason for the division lay in the divergent age limitations which exist in national legal

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411 K. Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts", *Villanova Law Review* 48 (2003), 763 et seq. (811) describes an example that confirms this author's view. A national of a non-State party commits crimes within the jurisdiction of the ICC on the territory of that state, which afterwards becomes a party to the ICC-Statute. Gallant calls it absurd that in such a situation the perpetrator should be able to rely on the bar to temporal jurisdiction for states becoming a State party after the entry into force of the Rome Statute according to article 11 (2) ICC-Statute.

systems.[412] The inclusion of such a jurisdictional limitation clause is a novelty, considering that neither one of the predecessor statutes contained a similar clause. However, it should be pointed out that an implicit recognition for this age limit did indeed exist, as an age limitation was not the subject in either the ICTY's or the ICTR's jurisprudence. The exclusion of jurisdiction for the ICC — described as "disarmingly simple" in light of the heated discussions on this subject[413] — does not preclude national prosecutions under the implementing legislation for the ICC-Statute.[414]

One of the few problems imaginable with respect to this provision is the commission of a continuous crime by an alleged offender and in which the initiation for the conduct in question occurred when that person was under the age of 18, but continues after the alleged offender turned 18. Similar to the solution proposed above,[415] it is submitted that the offender cannot be held liable under the ICC-Statute for the time period in which he was under the age of 18. However, for the time period after her/him becoming of age, article 26 of the ICC-Statute would not present a bar to jurisdiction for the ICC.[416] Another issue has been

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412 P. Saland, see note 409, 200 et seq.

413 Schabas, see note 182, 64.

414 R. Clark/ O. Triffterer, "Article 26 – Exclusion of jurisdiction over persons under eighteen", mn. 9 and mn. 20, in: Triffterer, see note 17.

415 See note 409 et seq. and accompanying text.

416 Similarly Clark/ Triffterer, see note 414, who mentions other problems, e.g. attempt and effects. See M. Frulli, "The Special Court for Sierra Leone. Some Preliminary Comments", *EJIL* 11 (2000), 857 et seq. (866) outlining that the Special Court does have jurisdiction over offenders at the age of 15. However, offenders between the age of 15 and 17 are subject to a special regime for juvenile offenders. See article 7 entitled "Jurisdiction over persons of 15 years of age" of the Statute of the Special Court, which reads:
"1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.
2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educa-

raised regarding the divergence between the age limit for conscripting children (article 8 (2) (b) (xxvi) and article 8 (2) (e) (vii) of the ICC-Statute) and the exclusion of jurisdiction for offenders under the age of 18 according to article 26 of the ICC-Statute.[417] This divergence is unfortunate, considering that an individual under the age of 18 can be considered a combatant, but cannot be punished. However, under the war crimes provision, it is only the commander who can be held liable for conscripting or enlisting children or using them to participate actively in hostilities under the age of fifteen. This dichotomy thus concerns two different aspects, one of which is the criminal culpability of a superior, the other being a limitation on the jurisdiction of the Court.

b. Article 16 of the ICC-Statute – Security Council Deferral

According to article 16 of the ICC-Statute, the Security Council has been granted the right to request that no investigation or prosecution may commence or proceed under the ICC-Statute for a period of 12 months, if the Security Council makes such a request under the powers given to it by Chapter VII of the Charter of the United Nations. Already its inclusion in the ICC-Statute was the cause for considerable debate, with some countries arguing that the jurisdiction of a judicial organ should not be subject to the decisions of a political organ.[418] It is unsurprising that the P5 were particularly in favor of such powers to be granted to the Security Council.[419] The final version as it appears now in the ICC-Statute requires a much higher threshold for the request by the Security Council in comparison to previous proposals from the

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tional and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies".

417 Cassese, see note 303, 153.

418 Report of the Committee on the Establishment of a Permanent International Criminal Court, see note 19, 28. The view taken by some commentators, namely that "[m]ember States of the International Criminal Court have rejected a role for the U.N. Security Council" is untenable in light of the ICC-Statute. But see M. Abramowitz/ P. Williams, "Peace Before Prosecution?", Washington Post, 25 August 2003, A17.

419 C. Hall, "The First and Second Session of the UN Preparatory Committee on the Establishment of an International Criminal Court", *AJIL* 91 (1997), 182 et seq.

ILC,[420] namely that the Security Council acts under Chapter VII of the Charter of the United Nations.

The requirements for invoking this provision by the Security Council are to be found both in the Charter of the United Nations and the ICC-Statute. For once, it has to fulfill the requirements of invoking Chapter VII of the United Nations Charter, i.e. it has to determine that there does indeed exist a threat to the peace, breach of the peace, or act of aggression in accordance with Article 39 of the Charter of the United Nations. In addition, none of the mentioned P5 must vote against that resolution.[421] Furthermore, the Security Council will have to specify that any investigation or prosecution does interfere with its responsibilities to maintain international peace and security, i.e. that in the absence of its decision to halt all investigations and prosecutions under article 16 of the ICC-Statute, international peace and security would be threatened,[422] i.e. it must refer to a particular situation.[423] The request can be renewed by a new resolution of the Security Council, again acting under Chapter VII of the Charter of the United Nations. It is however required that the Security Council make a positive statement in the form of a resolution that, should the ICC recommence or proceed with an investigation or prosecution, such action would again bring about at least a threat to the peace.[424] The consequence of such a request is simple. The ICC — including all of its organs — are to halt all investigations or prosecutions.[425] [426] This does not however preclude the Prose-

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420 Report of the Committee on the Establishment of a Permanent International Criminal Court, see note 19.

421 Article 27 of the Charter of the United Nations.

422 Cassese, see note 303, 163; S. Heselhaus, "Resolution 1422 (2002) des Sicherheitsrates zur Begrenzung der Tätigkeit des Internationalen Strafgerichtshofs", *ZaöRV* 62 (2002), 907 et seq. (923); for a different view see Condorelli/ Villalpando, see note 340, 647.

423 S/PV.4772, SCOR 58th Sess., 4772nd Mtg., 12 June 2003.

424 Critical with regard to this requirement, Wedgwood, see note 375, 97, calling it a "palace revolution".

425 The term "investigation or prosecution" should be construed bearing in mind the provisions of Part 5 – Investigation and Prosecution. Nevertheless, in the context of article 16 ICC-Statute it is submitted that such a construction finds its limits when such a preliminary examination constitutes a threat to international peace and security.

426 It is highly problematic to call for a judicial review on the level of the ICC on resolutions of the Security Council. B. Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from

cutor from conducting further "preliminary examinations."[427] This raises a number of unresolved questions, namely the protection of witnesses and victims, but also the question of the rights of the accused, as it is conceivable that an accused may be in custody when such a request is made. Considering the potential indefinite time period for which deferrals can be made, such a situation would pose serious problems, as fundamental judicial guarantees, such as the right not to be subjected to arbitrary arrest or detention under article 9 (1) of the *International Covenant on Civil and Political Rights*[428] could be infringed.[429]

On 12 June 2002, the dispute regarding exceptions to the ICC-Statute again featured prominently in the media[430] and led to a large number of commentaries on the correct interpretation of article 16 of the ICC-Statute.[431] Former Canadian Foreign Affairs Minister Ax-

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Lockerbie?", *EJIL* 10 (1999), 517 et seq. (545). But see Condorelli/ Villalpando, see note 340, 650.

427 M. Bergsmo/ J. Pejić, "Article 16 – Deferral of investigation or prosecution", mn. 15, in: Triffterer, see note 17.

428 See note 352.

429 Condorelli/ Villalpando, see note 340, 652; Amnesty International, *International Criminal Court – The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice*, May 2003, AI Index: IOR 40/006/2003, 50.

430 P. Koring, "Canada, other allies blast immunity push Bush administration wants peacekeepers shielded from prosecutions of war crimes", *The Globe and Mail*, 22 June 2002, A16; C. Lynch, "European Countries Cut Deal to Protect Afghan Peacekeepers", *The Washington Post*, 20 June 2002, A 15; J. Dempsey/ C. Hoyos, "Europe – UN seeks to ease world court tensions", *Financial Times*, 28 June 2002, P6; C. Lynch, "Bush Promises to Try To Save Bosnia Mission; U.S. Immunity to War Court Is Key", *The Washington Post*, 3 July 2002, A 16; "ICC row threatens UN mission in Bosnia", *The Globe and Mail* of 3 July 2002, A10; J. Ibbitson, "Canada condemns world court compromise U.S. wins peacekeepers one-year grace from war-crimes prosecution by new body", *The Globe and Mail*, 13 July 2002, A11; O. Burkeman/ R. Norton-Taylor, "Newborn world court fights for survival – US demands for legal immunity put peacekeeping operations at risk", *The Guardian*, 1 July 2002, 15.

431 For highly detailed and thorough analysis see Heselhaus, see note 422. See also C. Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)", *EJIL* 14 (2003), 85 et seq.; C. Jayaraj, "The International Criminal Court and the United States: Recent Legal and Policy Issues", *Indian Journal of International Law* 42 (2002), 489 et seq. (499 et seq.); Z. Deen-Racsmány, "The ICC, peacekeepers and Resolution 1422: Will the Court

worthy, who was one of the most prominent political proponents of the ICC, publicly denounced United States action as being "foul play" and "shocking".[432] With S/RES/1422 (2002) of 12 July 2002, the Security Council adopted a resolution in which it requested the ICC retroactively to not "commence or proceed with investigation or prosecution" of any case involving non-States parties nationals who are part of a Security Council mandated peace-keeping operation.[433] This resolution was put forward by the United States which had threatened to withdraw its forces from any peace-keeping missions in the absence of such a decision by the Security Council.[434] [435] The content of the resolution effectively barred any investigation, much less a prosecution, for nationals of non-State Parties, with some arguing that it granted a *carte*

Defer to the Council?", *NILR* 49 (2002), 353 et seq. (355); Report by Amnesty International, see note 429, which gives a very detailed chronological overview. Arguments made by countries during a Special Plenary Session of the Preparatory Commission are available on a country-by-country basis. See Coalition for an International Criminal Court, Government Responses to US-proposed Security Council Resolution on ICC and Peacekeeping, Special Plenary Sess., Preparatory Commission for the ICC of 3 July 2002, <http://www.iccnow.org/documents/statements/governments10July2002.html> (4 August 2003).

[432] L. Axworthy, "International Criminal Court – Stop the U.S. foul play – Any illusions that Washington sought real global co-operation to fight evil was dispelled in the UN", *The Globe and Mail*, 17 July 2002, A13.

[433] Heselhaus, see note 422, 915 argues convincingly that the immunity under this resolution is limited to peace-keeping operations on the basis of the wording and the historic forthcoming of S/RES/1422 (2002). Furthermore, it should be noted that such operations do not include acts of self-defense according to Article 51 of the Charter of the United Nations. M. Byers, "Terrorism, the Use of Force and International Law", *ICLQ* 51 (2002), 401 et seq. (402).

[434] U.N. Ends Wrangle Over U.S. Immunity, *New York Times*, 13 July 2002, A1; C. Lynch, "U.S. Wins 1-Year Shield From War Crimes Court", *Washington Post*, 13 July 2002, A16; J. Dempsey, "Little applause on criminal court deal", *Financial Times*, 15 July 2002.

[435] This is confirmed by the subsequent resolutions that were passed immediately after S/RES/1422, namely S/RES/1423 of 12 July 2002, which extended the mandate of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and S/RES/1424 of 12 July 2002, which extended the mandate of the United Nations Mission of Observers in Prevlaka (UNMOP).

blanche for United States troops.[436] From the perspective of the United States, the adoption of the resolution can be seen as a victory and is furthermore in line with its more general — negative — approach to the ICC. Moreover, it furthers its attempts to exempt its nationals from the jurisdiction of the ICC.[437] But, as the Secretary-General has pointed out again in the debate concerning the renewal of S/RES/1422 in June 2003, at least so far, "no peacekeeper or any other mission personnel have been anywhere near committing the kinds of crimes that fall under the jurisdiction of the ICC."[438] Be that as it may, S/RES/1422 is problematic in a number of areas. First of all, in the light of the above mentioned necessity to specify action taken by the ICC that could be said to amount to a breach of the peace, only scant reference could potentially be drawn from preambular clauses 6 and 7 of S/RES/1422.[439] Indeed, as one author has pointed out, the "absence of [...] a finding [that there was a threat to or breach of the peace] is unprecedented in the 57

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436 See e.g. Remarks by H.E. Ambassador P. Heinbecker, Permanent Representative of Canada to the UN, at the UN Security Council open debate on the situation in Bosnia and Herzegovina (New York, USA) of 10 July 2002, Doc. S/PV.4568, SCOR 57th Sess., 4568th Mtg of 10 July 2002, 2. For the second part of the debate, see Doc. S/PV. 4568 (Resumption 1), Security Council, SCOR 57th Sess., 4568th Mtg of 10 July 2002.

437 It is ironical in some sense that United States troops were not even in danger of coming under the jurisdiction of the ICC regarding the mission in Bosnia-Herzegovina, as the ICTY would enjoy primary jurisdiction. Indeed, at the time the resolution was passed, no United States troops would have been subject to the jurisdiction of the ICC. Coalition for an International Criminal Court, Chart and explanation illustrating zero exposure of US peacekeepers to ICC's jurisdiction, July 2002, <http://www.iccnow.org/html/UsexposuretoICCchart.pdf> (4 August 2003).

438 Doc. S/PV.4772, see note 423, 3. Similar statements were made by a number of nations throughout this open debate in the Security Council. In addition, UN peacekeeping operations are traditionally based on so-called Status of Forces Agreements (SOFAs). See M. Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?", *EJIL* 10 (1999), 124 et seq. (127).

439 These clauses state:
"*Determining* that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security,
Determining further that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council, [...]."

years of practice of the Security Council."[440] Second, article 16 of the ICC-Statute must be characterized to constitute an exception to the general rule and as such, must be construed narrowly. Third, the deferral of proceedings *ex ante* poses additional problems, also with respect to the foregoing. Such a *carte blanche* could even be said to be inconsistent with the Charter of the United Nations as the Security Council simply cannot determine whether any action by any of the organs of the ICC will constitute at least a threat to the peace in the meaning of Article 39 of the Charter of the United Nations in the future.[441] Fourth, the somewhat ominous reference to the Security Council's "intention to renew the request [...] under the same conditions each 1 July for further 12-month periods for as long as may be necessary"[442] is another cause for concern. This was already a considerable departure from the draft that was suggested by the United States, which would have exempted peace-keepers indefinitely, save for a resolution by the Security Council to the contrary.[443] Such a wording would have run counter to the provision of article 16 of the ICC-Statute which states that "such a request may be renewed by the Council." Furthermore, the legal significance of

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440 F. Lattanzi, "La Corte penale internazionale: una sfida per le giurisdizione degli Stati", *Diritto Pubblico Comparato ed Europeo*, 2002 – III, 1365 et seq. (1372).

441 Stahn, see note 433, 88-89 arguing that while such a construction would possibly be compatible with the wording of article 16 of the ICC-Statute, it runs counter to its purpose and its systematic position.

442 S/RES/1422 (2002) of 12 July 2002, operative clause 2.

443 The United States proposal read in its relevant part:
"The Security Council, Acting under Chapter VII of the Charter,
1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC for a twelve-month period shall not commence or proceed with any investigations or prosecutions involving current or former officials or personnel from a contributing State not a party to the Rome Statute for acts or omissions relating to UN established or authorized operations;
2. Decides by this resolution, acting consistent with Article 16 of the Rome Statute, that on July 1 of each successive year, the request not to commence or proceed with investigations or prosecutions as set forth in paragraph 1 shall be renewed and extends during successive twelve-month periods thereafter unless the Security Council decides otherwise and directs the Secretary-General to communicate these annual requests of the Security Council to the ICC;
3. Decides that Member States shall take no actions, such as arrest or surrender, inconsistent with the requests set forth in paragraphs 1 and 2."

the terminology "intent" remains unclear. It is submitted that – in line with what was said above, a restrictive view on this matter and bearing in mind the object and purpose of the ICC-Statute – all that needs to be done is a re-evaluation after a one-year period by the members of the Security Council of the situation as it then exists. Finally, and although bearing in mind that the *travaux préparatoires* should only be considered as a secondary source according to article 32 of the *Vienna Convention on the Law of Treaties*, it should be borne in mind that article 16 of the ICC-Statute was never intended to give impunity to nationals of non-States parties.[444]

In S/RES/1487 (2003) of 12 June 2003, the Security Council decided to renew its measures adopted under S/RES/1422. A number of proposals had been discussed informally before a draft was submitted to the Security Council, ranging from simply stating that S/RES/1422 would be renewed to a completely new resolution. S/RES/1487 is an almost verbatim copy of S/RES/1422. An overwhelming majority of countries were opposed to this resolution,[445] considering that such a renewal would not be based on a sound legal foundation, but rather accepting that without such renewal, some of the ongoing peace-keeping operations would be in jeopardy.[446] In addition to the reasons for opposing the original resolution, a number of states stressed the point that the renewal of S/RES/1422 by way of S/RES/1487 should not be seen as granting such immunity for perpetuity.[447] Moreover, the Secretary-General expressed his hope that such an extension would "not become an annual routine."[448] This view was reflected to some degree in the vote count on the draft resolution before the Security Council. Unlike its predecessor, which had been passed unanimously,[449] S/RES/1487 re-

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444 Numerous countries made statements to that effect in the debate prior to the voting procedure on S/RES/1422, see Coalition for an International Criminal Court, see note 431.

445 See Coalition for an International Criminal Court, Statements made or endorsed by Governments in the Open Meeting of the Security Council Discussion of the Proposed Renewal of Resolution 1422 of 12 June 2003, [prepared by the NGO Coalition for the International Criminal Court], <http://www.iccnow.org/documents/otherissues/1422/CountryChart12June03eng.pdf> (4 August 2003).

446 Doc. S/PV.4772, see note 423.

447 Doc. S/PV.4772, see note 423, e.g. statement made by the representative of New Zealand, 6.

448 Doc. S/PV.4772, see note 423, 3.

449 Doc. S/PV.4572, SCOR 57th Sess., 4572nd Mtg of 12 July 2002.

ceived three abstentions, namely from France, Germany and Syria.[450] Similarly, when the Security Council decided to authorize a multinational force to support the ceasefire in Liberia[451] — and again granting immunity for peacekeeping personnel — this resolution again was not supported unanimously, with France, Germany and Mexico abstaining.[452] This latest inclusion of an immunity clause must be regarded with caution, especially if seen as part of an ongoing development. At the time of writing, only three such clauses existed in resolutions which were concerned with peacekeeping operations. It can be expected that a provision similar to what has been used so far will be included in future resolutions. In the long run, this could prove detrimental to the working of the ICC, thus confirming the apprehension which the Secretary-General had expressed in the debate surrounding the adoption of S/RES/1487.[453]

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450 SC/7789, Press Release, Security Council Requests One-Year Extension of UN Peacekeeper Immunity from International Criminal Court, Adopts Resolution 1487 (2003) by 12-0-3 (France, Germany, Syria); Secretary-General Says Continued Annual Adoption Could Undermine Court, Council, 12 June 2003, <http://www.un.org/News/Press/docs/2003/sc7789.doc.htm> (4 August 2003).

451 S/RES/1497 (2003) of 1 August 2003. Its operative clause 7 reads:
"7. *Decides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State; [...]."

452 Doc. S/PV.4803, SCOR 58th Sess., 4803rd Mtg of 1 August 2002, 5. See especially the statement by the representative of Germany arguing that this resolution "goes far beyond what the Council decided just a few weeks ago in resolution 1487 (2003)." This assessment must be underscored, as operative clause 7 does not only preclude the jurisdiction of the ICC, but also of any potential national legal system. It is however questionable to state that such an operative clause is contrary to international law as the French representative has claimed.

453 See note 448.

c. Article 17 of the ICC-Statute – Complimentarity

With some authors calling its inclusion an irony,[454] the principle of complimentarity is nevertheless one of the founding principles upon which the ICC rests. [455] It was understood from the start that the ICC would only be accepted by a large number of states — and thus would only receive indispensable widespread recognition — if the primary jurisdiction for the crimes covered would not lie with the ICC itself, but with national criminal justice systems. Contrary to the tribunals for Yugoslavia and Rwanda which have concurrent, but primary jurisdiction,[456] the ICC will exercise its jurisdiction only if a state showed its unwillingness or inability genuinely to investigate or prosecute the alleged offender.[457] This principle is a display of deference to national sovereignty on the one hand.[458] It serves however other — sometimes

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454 J. Holmes, "Complimentarity: National Courts *versus* the ICC", in: Cassese et al., see note 11, 667 (667).

455 See the contribution of M. Benzing in this Volume.

456 Article 9 of the ICTY Statute provides for "Concurrent jurisdiction" and reads:
"1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal".
A similar provision exists in article 8 of the ICTR Statute and article 8 of the Special Court for Sierra Leone.

457 Article 17 (1) b of the ICC-Statute.

458 See the commentary by G. Arangio-Ruiz, made during the 1994 meeting of the International Law Commission. He stated:
"There was an enormous difference between ICJ and the proposed international criminal court. The compulsory jurisdiction of ICJ affected States in their relations with one another as sovereign states. The jurisdiction of the international criminal court would affect States in the exclusive "control" that they exercised over their nationals and most particularly over their leaders or officials. The very fabric of states would be penetrated; there would be a break in the veil of their sovereignty in that they would sending individuals in high Government posts to the court for trial and possible sentencing. [...] [T]he individual who might be brought before the court, tried, condemned and compelled to serve a sentence could be a head

more practical — functions as well. First of all, the potential caseload would overburden the Court in the long run. Secondly, such a principle might, over a period of time, contribute to shunning away from granting impunity to individuals because of their status, as it is conceivable that a state would not want to be the subject of an investigation of its unwillingness or inability genuinely to investigate or prosecute potential offenders. Thus, the ICC-Statute could be a factor in establishing mechanisms that strengthen the rule of law.

d. Transitional Provision – Article 124 of the ICC-Statute

Although article 120 of the ICC-Statute states that "[n]o reservations may be made to this Statute", there is one notable exception.[459] Article 124 of the ICC-Statute — the subject of considerable criticism from various sides[460] — has to be considered in light of its drafting history, short as that may have been. A proposal to that effect was only part of

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of State, a prime minister, the supreme commander of the armed forces or the minister of denfense of any given country," *ILCYB* 1994, Vol. 1, 33-34.

459 Until the time of writing, two states have made declarations pursuant to article 124 of the ICC-Statute, namely France and Colombia. United Nations, Multilateral Treaties, see note 402. The French declaration reads:
"Pursuant 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".
The Colombian declaration reads:
"[...] Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia 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 Colombian nationals or on Colombian territory".

460 On the one hand, it is claimed that this provision is an extension of the ICC's jurisdictional basis, see Lietzau, see note 361, 131 with scathing criticism, calling it either "a thoughtless error" or "at worst [...] an unabashed attempt to further isolate the United States in the final hours of the negotiation by drawing away one or more permanent members of the Security Council, which had otherwise held fairly consistent views on jurisdictional issues. On the other hand, the Standing Committee of the Parliamentary Assembly of the Council of Europe has urged Council of Europe Member States not to make such a declaration. See Standing Committee of the Parliamentary Assembly of the Council of Europe, International Criminal Court Recommendation 1408, 26 May 1999, <http://assembly.coe.int/Documents/AdoptedText/TA99/EREC1408.HTM> (4 August 2003).

the discussion in the last stages of the Rome Conference and its inclusion was mainly part of a political bargain[461] in order to appease certain countries, namely P5 states.[462] The inclusion of article 124 of the ICC-Statute has to be seen before the background of the jurisdictional regime under article 12 of the ICC-Statute. Some countries had argued that war crimes and crimes against humanity should be excluded from the *ipso facto* acceptance of the Court's jurisdiction after ratifying the ICC-Statute, but should instead only be granted by way of Security Council referral or by way of acceptance of the state of which the alleged perpetrator is a national. Although different interpretations regarding the content of this provision — especially with respect to the term "does not accept the jurisdiction of the Court" — exist,[463] it seems appropriate[464] to construe this provision in such a manner as to entirely exclude all[465] war crimes from the jurisdiction of the Court for a period of seven years for the nationals of a state which has made such a declaration, or if such crimes were committed on the territory of said state.[466] The exclusion however does not apply in cases in which an alleged offender tries to take refuge in a country which has made such a

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461 Other countries wanted an "opt-in" mechanism instead of an "opt-out" clause. See e.g. Senate Hearing, see note 392, statement by D. Scheffer, 13. The current wording is the result of a compromise that narrowed the more acceptable "opt-out" system to war crimes. Other schemes have been proposed, but were not accepted, see e.g. D. Scheffer, "Staying the Course with the International Criminal Court", *Cornell Int'l L. J.* 35 (2002), 47 et seq. (80); see also Kim, see note 384, 56; Lietzau, see note 361, 127.

462 Bergsmo, see note 331, 31; A. Zimmermann, "Article 124 – transitional provision", mn. 1 et seq., in: Triffterer, see note 17, offers a chronological overview of the drafting history.

463 Zimmermann, see note above, mn. 5-7.

464 Similarly Wilmshurst, see note 10, 141.

465 This is implied by the reference of article 124 of the ICC-Statute to "the category of crimes referred to in article 8". Furthermore, this includes prosecution for crimes falling in this time period after the said period has elapsed. Furthermore, it unfortunately, but necessarily includes a situation in which a national of the country having made the declaration commits such crimes on the territory of another state, as otherwise the reference to the nationality of the offender would be meaningless.

466 The use of the word "or" does not lead to an exclusion of either war crimes based on nationality or territoriality.

declaration,[467] unless that individual is a national of that state or the crimes were committed on the territory of the said state.

Such a declaration under article 124 of the ICC-Statute does not touch upon the power of the Security Council to refer a situation to the ICC and its subsequent exercise of jurisdiction.[468] Furthermore, it can be withdrawn at any point in time and does not necessarily have to be made for the entire seven years that are possible.

Claims to the effect that the current mechanism favors States parties over non-States parties rest on a shaky legal basis. The argument put forth is that states, having made a declaration under article 124 of the ICC-Statute, are not subjected to the same obligations as non-States Parties.[469] First of all, advancing this argument is at odds with that country's own proposal for a ten-year opt-out clause. Furthermore, it has been pointed out that the practical effect of this provision is to place the state making such a declaration in the same position as a non-State party with regard to war crimes.[470]

III. Conclusion

This *tour d'horizon* has touched upon some of the most fundamental aspects of — and as evidenced by a similarly fundamental opposition to — the ICC's founding treaty. With the election of the Prosecutor in the spring of 2003, this latest in a series of international adjudicative bodies[471] has taken yet another step away from its infancy and towards be-

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467 But see J. Stanley, "Focus: International Criminal Court: A court that knows no boundaries?: The international criminal court treaty is a big achievement but can it deliver what it promises?", *The Lawyer*, 11 August 1998, 8.

468 For a different view see Bourgon, see note 370, 565. Similar to this author's view, Zimmermann, see note 462, mn. 8, in: Triffterer, see note 17.

469 See Scheffer, see note 461; Lietzau, see note 361, 131.

470 Brown, see note 377, 876.

471 T. Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?", *LJIL* 14 (2001), 267 et seq.; J. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals", *N.Y. U. J. Int'l L. & Pol.* 31 (1999), 697 et seq.; C. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", *N. Y. U. J. Int'l L. & Pol.* 31 (1999), 709.

coming fully operational.[472] While a number of commentators ponder the fact that the Court's adolescence has taken a considerable amount of time, this can be explained by taking into consideration the political realities in the second half of the 20th century. The Rome Statute represented an important step forward in the codification of international law in various areas — not only in the jurisdictional realm that has been the focus of this comment, but rather in a more general way.[473] The fact that over 90 nations have so far ratified the ICC-Statute with all the ramifications that such an operation brings about — and in light of the changes that need to be made in order to accommodate the national implementation — is testament to a certain consensus underlying the treaty.

The ICC-Statute is far from being a perfect treaty and there is hardly anyone who would make such a claim. This is the case, however, for almost all international treaties. International negotiation, like national legislation, is to a considerable extent a give-and-take-exercise.[474] But it should be stressed that the creation of an international treaty is not a race to the bottom in search for the lowest common denominator.[475] Almost each provision of Part 2 of the Rome Statute entitled "Jurisdiction, Admissibility and Applicable Law" may have its defects and may be characterized by concessions, but in the overall context this does not forfeit for the recognition and effectiveness of an international

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472 For a highly critical but misguided view of international criminal law see H. Quaritsch, "Nachwort", in: H. Quatrisch (ed.), *Carl Schmitt, Das international-rechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege"*, 1994, 219. Quaritsch, following the lines of Carl Schmitt, believes that international criminal law (referring to the Nuremberg Trials) is a game played by an international legal sect (Glasperlenspiel einer internationalen Juristensekte – translation by author), contravening the very core of minimal rules of legal culture.

473 This however, might also explain that some of the provisions were phrased extremely carefully – forced pregnancy might be one of them – as some of the legislative work will become part of the permanent fabric of the international community's legal landscape.

474 The number of square brackets – reportedly over 1.400 – which were still part of the draft prior to the Rome Conference is testament to the number of contentious points that needed to be resolved.

475 But see Lietzau, see note 361, 122.

criminal judiciary.[476] The ICC-Statute's jurisdictional regime concerning the bases of jurisdiction could have been broader — much broader had the German proposal for universal jurisdiction been accepted. It was not — mainly because it was considered genuinely to go a step too far during the Rome conference. Claims have been made that the lack of adjudicative jurisdiction over internal conflicts will severely hamper the ICC in its operation and devalue it as a dog that barks, but doesn't bite.[477] This is certainly a regrettable outcome of the deliberations prior to and during the Rome conference, but it should be remembered that the current scheme represents a compromise which was heavily influenced by countries which have chosen not to become a party to the Rome Statute.[478] Moreover, internal conflicts can fall under the jurisdiction of the ICC by way of Security Council referral. Some of the changes that were introduced in order to accommodate concerns by the United States have to be seen in a positive light. Others however were unacceptable, especially considering that the threat to United States citizens is minimal given the extensive safeguards that have been put in place — and that apparently a considerable number of nations have less of a problem recognizing. Conservative commentators even claim that the ICC is an attempt to influence United States military operations indirectly, stating that the "Rome Treaty will become the single most effective brake on international and regional peacekeeping in the 21st century."[479] This so-called chilling effect is not a natural and direct outcome of the ICC-Statute based on its provisions, but rather a — politically motivated — reaction to it. The resultant lack of support — or rather outright opposition — is unnecessary and to some extent self-defeating. To some degree for example, the crimes covered by the ICC-Statute are even part and parcel of United States military handbooks. Recent domestic developments in this area however are the cause for considerable concern.[480]

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476 O. Triffterer, "Der lange Weg zu einer internationalen Strafgerichtsbarkeit", *Zeitschrift für die gesamte Strafrechtswissenschaft* 114 (2002), 321 et seq. (361 et seq.).

477 J. Goldsmith, "The Self-Defeating International Criminal Court", *U. Chi. L. R.* 70 (2003), 89 et seq.; Wedgwood, see note 388, 199; Lietzau, see note 361, 129.

478 D. Scheffer, "U.S. Policy and the International Criminal Court", *Cornell Int'l L. J.* 32 (1998), 529 et seq.

479 Lietzau, see note 361, 127 et seq.

480 According to Department of Defense, Military Commission Instruction No. 2, 30 April 2003, US military commission are not to rely on any other

It would be in the interest of many to find the United States in support of the ICC – and not only because of the perceived lack of military might of those countries which have joined the ICC-Statute.[481] Ousting the United States on this matter will only lead to widening what has been called the new transatlantic gap and could lead to a situation that some believe is already present.[482] [483] It is clear however that participation cannot be achieved at the cost of some of the most

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sources than this Instruction when determining e.g. the content of the term "military objective". The document is available at <http://www.dod.mil/news/May2003/d20030430milcominstno2.pdf> (4 August 2003).
This becomes evident when analyzing section 5D entitled "Military Objective" with section 3B entitled "Effect of other Laws".
The former provision reads:
"'Military objectives' are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack".
The latter provision reads:
"No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this Instruction as compared to other articulations of law".
Section 5D is based on article 52 (2) of *Additional Protocol I*, but deviates from that provision in some aspects. Specifically it uses the terminology "war-sustaining" capabilities. This could include a wide range of targets, such as, but not limited to, infrastructure and power and water supply systems. In addition, the Instruction does not make mention of the word "definite" before "military advantage" lowering the threshold for military commanders when attacking a civilian object.

481 Goldsmith, see note 477, 93; similarly Wedgwood, see note 388, 200.

482 The most prominent author holding this view is certainly R. Kagan, *Of Paradise and Power – America and Europe in the New World Order*, 2003. But see also J. Bolton, "War and the United States Military: Is there Really 'Law' in International Affairs?", *Transnational and Contemporary Problems* 10 (2000), 1 et seq.

483 It is obvious that statements such as the following from Senator Jesse Helms are not helpful to overcome this gap. "The ICC treaty without a clear U.S. veto [...] will be 'dead on arrival' at the Senate Foreign Relations Committee." B. Crossette, "Helms Vows to Make War on U.N. Court", *New York Times*, 27 March 1998, A9.

fundamental norms that underlie the international legal landscape, namely equality and accountability.[484]

At the moment, the ICC has not become fully operational and one can only hope that it will never have to take action as this would either ensure that no atrocities as envisaged by the ICC-Statute have taken place — a prospect that is unlikely to become reality — or that States parties have fulfilled their treaty obligation, i.e. were — according to article 17 of the ICC-Statute — either willing or able to investigate or prosecute the offenders of the most serious crimes. Whether it will be ultimately successful and contribute to world peace[485] or whether "the world will never be the same after the establishment of the International Criminal Court"[486] will be a matter of its first cases for which certain scenarios have already been developed.[487] For the time being, it can nevertheless be considered a "gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law" and "an achievement which, only a few years ago, nobody would have thought possible".[488]

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484 But see Lietzau, see note 361, 127; see also the misguided statement by Bolton claiming that the "the [Security] Council is essentially barred from any real role in the ICC's work." J. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective", *Law and Contemporary Problems* 64 (2001), 167 et seq. (173). Such a statement is untenable in light of the power to refer a situation to the ICC and the power to suspend any proceedings.

485 B. Ferencz, *An International Criminal Court – a Step to World Peace*, 1980.

486 M.C. Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court", *Cornell Int'l L. J.* 32 (1999), 443 (468).

487 P. Bekker/ D. Stoelting, "The ICC Prosecutor v. President Medema: Simulated Proceedings before the International Criminal Court", *Pepperdine Dispute Resolution Law Journal* 2 (2002), 1 et seq.; M. Goldmann/ C. Schneider, "ICC Case Simulation Exercise: Prosecutor v. Five Pilots from Blueland and Whiteland", *German Law Journal* 4 (2003), 815 et seq.

488 Statement by United Nations Secretary-General Kofi Annan at the Ceremony held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court, 18 July 1998, 2. The speech is available at <http://www.un.org/icc/speeches/718sg.htm> (4 August 2003).