

The Exercise of the jurisdiction in accordance with the terms and conditions established by the International Criminal Court

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Abstract

This article examines the legal framework governing the exercise of jurisdiction by the International Criminal Court (ICC) under the Rome Statute. It explains that the Court has jurisdiction over the most serious international crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. The study highlights the principle of complementarity, under which the ICC acts only when national judicial systems are unwilling or unable to genuinely investigate or prosecute such crimes. It also outlines the legal bases for jurisdiction, including referrals by States Parties, investigations initiated by the Prosecutor proprio motu, and referrals by the United Nations Security Council under Chapter VII. The article further analyzes the preconditions for exercising jurisdiction, including territorial, personal, and temporal jurisdiction, as well as the procedural requirements established by the Rome Statute. Particular attention is given to the admissibility of cases, applicable law, and the legal elements required to establish crimes within the Court's jurisdiction. The study also discusses the mechanisms for challenging the Court's jurisdiction or the admissibility of a case. In addition, it examines key principles of international criminal responsibility, including individual criminal liability, the irrelevance of official capacity, grounds for excluding criminal responsibility, mistakes of fact and law, superior orders, and issues related to statutory limitations. The article concludes by emphasizing the importance of these legal safeguards in ensuring the effective and fair administration of international criminal justice.

Keywords:

(International Criminal Court, Rome Statute, International Crimes, Criminal Responsibility, Jurisdiction.1-Crimes within the jurisdiction of the Court

1-Crimes within the jurisdiction of the Court

International political theory presents numerous visions of the state of war and the state of peace, yet international law is silent as to their philosophical underpinnings. Instead, one must rely upon theoretical perspectives which not only may have played a role in the creation of the laws of nations but also the history and development of the International Criminal Court ('ICC'). To this end, this analysis traces the historical development of the ICC, its jurisdictional limitations, and its possible philosophical underpinnings, including the works of: Thomas Hobbes, Immanuel Kant, and John Locke; ultimately concluding that Locke provides the most complete, implicit support for the ICC and international criminal law in general ¹ .

All treaties, Nevertheless, he believed that public criticism of violations of the Geneva Convention would be sufficient, 'because public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down. The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other. Thus, Moynier sought merely to regulate war via an implicit Hobbesian approach to international governance ² .

The provisions of the Geneva Conventions of 1949³ on grave breaches, as extended by Article 85(2)-(4), and breaches are extended to the Protocol (Article 85(1))³. Thus, parties are obliged to enact the legislation necessary to ensure effective penal sanctions for those committing or ordering grave breaches of the Convention; such persons are to be pursued and brought to trial, regardless of their nationality. Parties are also obliged to suppress all acts contrary to the Conventions and Protocol that are not grave breaches. There must be safeguards for proper trial and defence ⁴ .

On April 11, 2002, the U.N. held a ceremony in the headquarters to accept the instruments of ratification to the Statute of International Criminal Court from 10 states in the world, and the total number of states who has ratified the Statute has reached to 66. On July 1 of the same year, according to the related articles of it, the Statute of International Criminal Court took its effect formally, and a permanent standing institute, i.e. the International Criminal Court was found. The headquarters of it was located at the Hage in the Netherlands, and 18 judges and an independent procurator will work in the headquarters. By the end of the year, the U.N will have finished the work of establishing the international criminal court⁵.

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: The crime of genocide; Crimes against humanity; War crimes; the crime of aggression⁶.

1-1-Genocide

Genocide is a crime that consists of one or more prohibited underlying acts, as detailed in this section, committed against members of a national, ethnic, racial, or religious group, with the intent to destroy, in whole or in part, the group, as such. The definition of genocide was first authoritatively set out in the Genocide Convention of 1948, and the definition has not changed significantly from that instrument until the present day⁷.

There is hardly disagreement on genocide being put forward and put into the jurisdiction, which is concerned with several genocide incidents happened in the last century. The word genocide was created by Poland jurist Raphael Lemkin in his work *Axis Powers: Sovereignty in the Conquered Europe* published in 1944. It can define exactly how and why only Germany Nazi slaughtered 8 million natives or foreigners especially Jews and how ferociously Japanese militarist massacred more than 10 million residents of China and other Asian countries⁸.

On August 8, 1945, the governments of the United States, France, Britain, and the Soviet Union signed the London Charter, which established the International Military Tribunal (IMT) to prosecute major war criminals of the Axis powers in Europe⁹.

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group¹¹.

1-2- Crimes against humanity

Crimes Against Humanity¹². Unlike the first three categories, crimes against humanity represent a legal concept already firmly entrenched in international law. According to the Rome Statute, a "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds, enforced disappearance of persons, the crime of apartheid and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The second and third parts of the Statute's Article 7 then go on to describing each of the individual acts under the crimes' heading. As it can be seen, this category of crimes has been established at the international treaty level, with many of their constituting elements having been

already defined or somewhat sufficiently well explained in the treaty law and its corresponding commentaries as well as in the scholarly and practical literature. As it was mentioned in the Introduction, the historical development of crimes against humanity, their practical application, material and mental elements, scope and role in ICL, pertinent jurisdiction and many other aspects have been a subject of both general and detailed analysis. Some of these elements are continuing to be worked out and further clarified in the developing case law of the ICC where charging counts of crimes against humanity figure quite often¹³.

As crimes, the crimes against humanity were put forward in the form of international law document for the Charter of European International Military Tribunal and the following the Charter of Far-east International Military Tribunal¹⁴.

Afterward, some international legal documents such as Draft Penal Provisions the Convention of International Criminal Tribunal for Yugoslavia and the Convention of International Criminal Tribunal for Rwanda all define acts against humanity as crimes. But up to now, there is not a convention special for the punishment of crimes against humanity yet¹⁵. Having synthesized relative provisions in previous international legal documents, the Statute define crimes against humanity¹⁶ as any (totally 11 kinds) of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (Artic 7 of the Statute). It has confirmed in Advisory Opinions and contentious cases that the obligations under human rights law do not cease during armed conflict, except through the application of derogation provisions¹⁷.

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of such crimes¹⁸;

- (1) Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.
- (2) Extermination includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.
- (3) Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.
- (4) Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.
- (5) Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful

sanctions.

(6) Forced pregnancy means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

(7) Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

(8) The crime of apartheid means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

(9) 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.

For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

1-3-War crimes

War crimes are the third and oldest category of atrocity crimes. They are grounded in international humanitarian law, traditionally known as *jus in bello* (the law of war)¹⁹.

It regulates the conduct of parties engaged in an armed conflict and seeks to minimize suffering and harm. It is based on a balancing between military and humanitarian considerations. In armed conflict, certain acts of violence are allowed (lawful) and others prohibited (unlawful). International humanitarian law regulates both lawful and unlawful acts of violence. It needs to reconcile different perspectives: a principled humanitarian commitment 'to prevent or mitigate suffering'²⁰.

The sufferings caused to mankind by two world wars in the 20th century help to bring about the entrance of war crimes to the Statute as one of the four kinds of crimes within the jurisdiction of the Court. According to the Statute, war crimes means acts that seriously violate laws or customs of armed conflicts in international armed conflicts or non-international ones²¹. This definition breaks the traditional one which confines the crimes in international armed conflicts, in taking the acts in non-international ones into the jurisdiction of the Court²². But for a long time even to now, whether non-international armed conflicts can be taken as international crimes and laws of war and international customs can be applied on them is a problem which leads to endless argument from the academic circles to practice ones.

In fact, the harmfulness of the non-international armed conflicts is not less than the international ones. And some scholars may have noticed that since World War II, the casualties of non-international conflicts-pure internal conflicts and despotic rule have far exceeded the total number of casualties of the World War I and the World War II. However, most of the criminals of the non-international armed conflict benefited from the exemption from penalty²³.

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

For the purpose of this Statute, "war crimes" means ²⁴ :

(I) Grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(1) Wilful killing.

(2) Torture²⁵ or inhuman treatment, including biological experiments.

(3) Wilfully causing great suffering, or serious injury to body or health.

(4) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

(5) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power.

(6) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial.

(7) Unlawful deportation or transfer or unlawful confinement.

(8) Taking of hostages.

(II) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts.

(1) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

(2) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

(3) Intentionally directing attacks against personnel, installations, material units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict²⁶.

(4) Intentionally launching an attack in the knowledge that such attack will cause

incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

(5) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives

(6) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion.

(7) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury.

(8) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

(9) Intentionally directing attacks against buildings dedicated to religion education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

(10) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.

(11) Killing or wounding treacherously individuals belonging to the hostile nation or army.

(12) Declaring that no quarter will be given.

(13) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

(14) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

(15) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

(16) Pillaging a town or place, even when taken by assault.

(17) Employing poison or poisoned weapons.

(18) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.

(19) Employing bullets which expand or flatten easily in the human body such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

(20) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.

(21) Committing outrages upon personal dignity, in particular humiliating and degrading treatment.

(22) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

(23) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

(24) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.

(25) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.

(26) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(III) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949,

1-4- The Crime of aggression

The crime of aggression²⁷ posed an added difficulty. There emerged a view that under Article 39 of the UN Charter, only the Security Council had the ability to determine that an act of aggression had occurred. The 1993 report of the ILC's Working Group on a draft statute, for example, proposed that 'a person may not be charged with a crime of or directly related to an act of aggression ...unless the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge'. The commentary to the relevant Article explained that the Court would in effect only decide consequential issues, principally whether an individual has 'acted on behalf of that State in such a capacity as to have played a part in the planning and waging of the aggression'. Not all members of the ILC, however, were prepared to concede such a significant role in international criminal law to the Security Council. A second jurisdictional issue was highlighted in the final Draft Code adopted by the ILC in 1996. Article 8 provided that jurisdiction over the crime of aggression was to be exercised

exclusively by the future international criminal court, unless a domestic court was trying its own nationals²⁸.

The definition of the Crime of Aggression Negotiations on the crime of aggression were among the most difficult parts of the making of the ICC. Being concerned that the legal constraints imposed by this crime would hamper their freedom of military humanitarian interventions, some States argued that aggression should not be included in the Court's jurisdiction²⁹.

In the history of development of international law, the definition of aggression has been discussed for a long time. During more than 20 years from 1952 to 1974, the U.N. designated 4 committees successively but did not pass unanimously a definition of aggression until given by a special committee in 1974³⁰. However, there is still vacancy for the definition because the Statute of 1998 did not adopt it.

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge³¹.

On the base of the ilc report, the General Assembly tasked a committee to draft a Statute for an International Criminal Court³². However, the special committee submitted two reports which reflected the increasing reluctance of the international community regarding the establishment of an international criminal jurisdiction³³. On 4 December 1954, the General Assembly asked for a draft definition of aggression to be submitted to it³⁴. This last request saw the early progress of the ilc succumb to the paralysis of the Cold War. The General Assembly considered that the Draft Code of Offenses against the Peace and Security of Mankind and the Draft Statute for an International Criminal Court be postponed until a draft definition of aggression was submitted³⁵.

private capacity and prosecution before "certain international criminal courts, where they have jurisdiction" have been the subject of a hot debate between scholars and of varying interpretation by international courts. The third circumstance applies when the high-ranking State official no longer holds office – he then enjoys immunity *ratione materiae*; other States "may try the former high-ranking officials in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity"³⁶.

In accordance with the Resolution on the Definition of Aggression, the crime of aggression means violation of a states territorial integrity and sovereignty by another with armed force of using armed force in other ways not consistent with the United Nations Charter³⁷. As the Resolution stipulates, the features of the acts of aggression are obviously different from those of other crimes, they are as following:

(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 .

Feb 26-March 9, 2001, the seventh session of the preparatory committee of the ICC discussed again the conditions under which the Court will exercise jurisdiction over the crime of aggression and put forward three proposal documents in the Comprehensive Proposals on Aggression for negotiation:

The first one is as following³⁸ :

(1) the Court exercises its jurisdiction over aggression pursuant to Article 13 of the Statute.

(2) before the Court handles the proceedings on aggression, there should be a decision made by Security Council of U.N. that the nation to which the persons involved in the case belong have committed aggression in accordance with relevant articles of the United Nations Charter.

(3) the Security Council should make a decision that the nation to which the persons belong involved in the case belong have committed aggression pursuant to Article 13-2 of the United Nations Charter.

(4) when it receives the charge of aggression on the ground of Item 1 or 3 of Article 13, the Court should consider appropriately Part 7 of the United Nations Charter³⁹ the Security Council of U.N . should make a decision for the request in 6 or 12 months.

(6) the decision should be informed to the President of the Court by the chairman of Security Council by mail. There are two options contained

the first proposal, the first is⁴⁰ :

- even if Security Council has not made a decision within the time limitation mentioned in Paragraph 5, the Court can start proceedings.

- that the Security Council should make a decision must not be interpreted as that it has influence on the independence of the exercise of jurisdiction of the Court.

the second is⁴¹:

- despite of Paragraph 2 mentioned above, when the Security Council has not made a decision within the time limitation mentioned in Paragraph 5, the Court should still considers Article 12, 14, 24 of the United Nations Charter and request proposal from General Assembly of U.N...⁴²
- General Assembly should give the proposal within 12 months.
- the proposal should be informed to President of the Court by mail by the chairman of General Assembly in time.
- if the Court has not gotten the proposal within the time limitation mentioned in Paragraph 8, the Court can start proceedings.
- that the Security Council makes a decision in accordance with Paragraph 5 listed above or the General Assembly gives a proposal according to Paragraph 8 above must not be interpreted as they have influence on the independence of the exercise of jurisdiction of the Court .

It is worth paying attention to that, the International Criminal Court can draw up the clauses for the definition of aggression and conditions under which the jurisdiction will be exercised if conforms the spirits of Article 121 and Article 123, not violating the UN Charter, at the same time, Article 39 of the charter of the United Nations stipulates explicitly that the Security Council has the exclusive authority to determine the constitution of the acts of aggression. Thus the extensions of power of the two institutions are bound to clash because of this. This may be also the greatest obstacle for the Court to make relevant clauses. Therefore, some scholars hold that the definition of aggression and the conditions under which the Court will exercise the jurisdictions over the crime of aggression will be still the key problem to improve the exercise of jurisdiction of the Court⁴³ .

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations ⁴⁴.

2-Exercise of jurisdiction

2-1-Preconditions to the exercise of jurisdiction

A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. but in the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3.

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; so the State of which the person accused of the crime is a national.

If the acceptance of a State which is not a Party to this Statute is required under

paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9⁴⁵.

2-2 Jurisdiction *ratione temporis*

The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3⁴⁶

Every decision made by a decision-making body affects a series of actors, who internalize the decisions and structure their behavior in light of them. Decision-makers can set third-party expectations through the use of precedent. The use of precedent allows a decision-maker to accomplish two goals that are crucial to the functioning of the decision-maker's community. First, precedent can act as an informational device for a wide variety of actors. It allows various parties to predict future rules and to structure their actions accordingly. When domestic Courts⁴⁷,

through the use of a different formal model, reached a similar conclusion. Other commentators have found that lower court judges selectively use precedent to signal their willingness to be promoted. Appellate judges have also been found to use precedent as a way to guide trial judges towards their own preferred outcomes⁴⁸.

2-3- Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; and if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15⁴⁹.

2-4- Rules of Procedure and Evidence

The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

The Amendments to the Rules of Procedure and Evidence may be proposed by: Any State Party; The judges acting by an absolute majority; or The Prosecutor. Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

The Rules of Procedure and Evidence, amendments thereto and any provisional Rule

shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail⁵⁰.

2-4-1- Referral of a situation by a State Party

A referral in accordance with the Statute should not pose too many difficult legal issues. However, the practice of the SC suggests that it does not explicitly state which provisions of the Rome Statute shall apply nor does it make any other express reference to the applicability of the Rome Statute. In this context it is important to be reminded that the SC is a political, not a legal body, and its members are not necessarily legally minded. From the outset, it must be emphasized that a SC referral to the ICC is assumed to be in accordance with the Statute, unless a deviation from the provisions of the Statute can be deduced from the SC resolution including the referral. This follows from the general rule that statements of governments must be construed as ‘producing and intending to produce effects in accordance with existing law and not in violation of it’. This applies, at least in principle, also to the interpretation of SC resolutions. Thus, a strong presumption against conflict exists and calls for techniques of harmonious interpretation to be used so that the conflict does not materialize in a genuine one. Hence the presumption that unless it explicitly and clearly states the contrary, the SC intended to refer a situation in accordance with the Statute. In practice the SC adopts no detailed language in its resolution providing for the referral. In various decisions emanating from the use of art 13(b), the ICC stated that in making such referrals, ‘the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole’⁵¹.

As stated above, art 13(b) of the Statute contains no detailed language of any conditions or any particular mechanism for its operation. It sets out two preconditions that must be satisfied from the perspective of the Rome Statute. First, there must exist a situation in which one or more of such crimes (as referred to in art 5 of the Statute) appear to have been committed. Second, this situation must be referred to the Prosecutor of the ICC by the SC acting under Chapter VII of the UN Charter. The first precondition refers to ‘a situation in which one or more of such crimes [referred to in art 5] appears to have been committed’. As the preparatory work regarding this provision demonstrates, the wording ‘situation’ must be distinguished from ‘case’. In a late draft at the Rome Conference, the word ‘situation’ and ‘matter’ were presented as alternatives. Why the word ‘situation’ was eventually adopted instead of ‘matter’ is not answerable based on the official records of the Rome Conference. One participant of the negotiations suggests that ‘situation’ was considered to be of a more general nature, compared to ‘matter’ which was ‘too specific for the functioning of the Court’. The Pre-Trial Chamber held that situations,

which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such⁵².

In principle, the jurisdiction *ratione materiae* in case of SC referrals appears to be defined by the general rules on jurisdiction as provided for in the Statute. The heading of art 13 clearly states that the court exercises its jurisdiction ‘in accordance with the provisions of this Statute’. Since no specific rules or exceptions are provided for in the Statute regarding its jurisdiction *ratione materiae*, it follows *prima facie* that the jurisdiction *ratione materiae* extends over the crimes as provided for in art 5. However, as concluded above considering the powers of the SC, legislation of ICL should not be presumed and without explicit language to that effect, the ICC is bound to apply its definitions of crimes only insofar that it is recognized as customary international⁵³.

According to this narrative, the Rome Statute asserts prescriptive jurisdiction beyond its state parties. This overreach of the law contained in the Rome Statute is premised on the theory of universal prescriptive jurisdiction. Then if the Rome Statute bound all individuals since its entry into force, it is always applied prospectively. Indeed, this seems to be the view of the ICC. The reasoning of Pre-Trial Chamber I in the Confirmation of Charges against Lubanga is illustrative of how the principle of legality operates before the ICC. The Chamber stated that There is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga ought to be committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy in *malam partem* (*lex stricta*)⁵⁴.

The ICC has never distinguished the applicability of criminal norms contained in the Statute under a retroactive SC referral from situations where the accused, at the time of the conduct, was a national or had committed the alleged crime in the territory of a state party to the Statute. While it was the intention of some states during the negotiations in Rome that the Statute would reflect customary international law,³⁶ most scholarly commentaries consider the definition of crimes in the Rome Statute as not entirely reflective of customary international law. Following a strict interpretation of the principle of legality As pointed out⁵⁵.

Art 25 of the UN Charter clearly establishes that only such decisions of the SC are binding that are adopted ‘in accordance with the present Charter’. It follows preliminarily that SC referrals not in accordance with the Charter (and hence *ultra vires*) are not legally binding. Resulting from the legal nature of the SC referral, the ICC is then not authorized to exercise jurisdiction over situations in non-party states in such cases. A SC referral that is *ultra vires* has therefore no legal effects. In practice, it is important to recognize the

tendency of the ICJ to minimize claims of acts being ultra vires through a twofold presumption.

First, there is a presumption of acts not being ultra vires in case they may be considered 'appropriate for the fulfilment' of the stated purposes of the organization.

Second, acts based on one of its assigned functions are presumed to be within the constitutional powers of the organization. It must also be noted that each organ must determine its own powers. It follows that an act must arguably be presumed not to be ultra vires.

The SC cannot easily be considered to be acting ultra vires, as Sir Michael Wood correctly points out: Much of the writing about the Security Council by international lawyers has an air of unreality. It is based neither on the practice of states nor on the practice of the organs of the United Nations, nor yet on decisions of courts and tribunals⁵⁶. It reflects the authors' dogmatic reading of the text of the United Nations Charter⁵⁷.

A State Party⁵⁸ may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation⁵⁹.

2-4-2- Prosecutor

The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court. and shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. so the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence⁶⁰.

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. so If, after the preliminary examination referred to in

paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence .

2-4-3 referral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions⁶¹.

Prosecution counsel should be held personally accountable for disclosure misconduct, which approach is more often implemented with regard to the defence counsel⁶². Just as at the ad hoc tribunals, the ICC Chambers have oftentimes cautioned, warned or reprimanded the Prosecution office for disclosure malpractice, rather than particular prosecutions attorneys⁶³.

For example, the legitimacy deficit that results from relying on the Security Council to refer non-Party States to the ICC has at least three aspects⁶⁴.

-First, it suppresses the role of less powerful states in the development of international law.

-Second, there is no guarantee of effectiveness, as has been seen in Darfur, where the Prosecutor recently suspended the ICC investigation due to the Security Council's lack of support. Omar al-Bashir remains President of Sudan, and the conflict in Darfur continues. The Court's treatment of African states and the AU has given states a more general reason to not cooperate with the ICC, further reducing the Court's effectiveness and thus undermining its legitimacy.

-Third, in terms of rules and norms, Security Council referrals not only depend on international law, they also import into international criminal law the hierarchy of states that exists in general international law, asserting 'the old political order of the veto, secret meetings, and self-serving interpretations of "security"'. The failure to refer Syria to the ICC is another example of the capriciousness that may result. The legitimacy of the ICC, therefore, suffers as the inequalities of the international order are plainly integrated into the regime of international criminal justice.

Also, the International Criminal Tribunal for Rwanda (ICTR) located in Arusha in the United Republic of Tanzania was established by means of United Nations Security Council Resolution 955 of November 8, 1994. That UN Security Council resolution also incorporates the Court's statute which governs the functioning of the Court (the text of the ICTR statute is available in Appendix C.1). Article 14 of that statute sets out the rules of procedure for the Court. The working languages of the ICTR are English and French. The ICTR has jurisdiction to prosecute persons (both nationals and non-nationals)

responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. The crimes are punishable whether the perpetrator(s) had an intentional direct or indirect role; were conspirators or in any way complicit⁶⁵.

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justices or equities require.

The temporal period under the ICTR's jurisdiction covers the 1994 massacre of an estimated 800,000 Tutsis and moderate Hutus by the extremist Hutu militias in an attempted genocide⁶⁶. The Court began hearing its first case in 1997 and was the first international court which was called upon to interpret the term "genocide" as set out in the Convention for the Prevention and Punishment of the Crime of Genocide (1948). The ICTR is not a permanent Court and the United Nations Security Council resolution 1503, adopted on August 28, 2003 set out the plan for the ICTR to have investigations completed by the end of 2004, all trials completed by the end of 2008 and all appeals and other work by 2010. It is noteworthy that to date Rwanda has not ratified the Rome Statute of the International Criminal Court (ICC) and hence is not subject to the power of the ICC. This though the ICTR was fully involved in the development of the ICC⁶⁷.

3- The admissibility

3-1-Issues of admissibility

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

The proceedings were or are being undertaken or the national decision was made for

the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; so there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; The proceedings were not or are not being conducted independently or impartially , and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings⁶⁸.

3-2- Preliminary rulings regarding admissibility

When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction⁶⁹ over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

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

The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of referral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

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

A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances. and concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has

deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available⁷⁰.

3-3 Applicable law

The Court shall apply in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; but in the second place, where the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7 paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status⁷¹.

Appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. And the Court may apply principles and rules of law as interpreted in its previous decisions. These process considerations remain important at the meso-level, but we are also concerned with the development of a coherent or internally consistent body of law⁷².

3-4- Elements of Crimes

The 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.

The amendments to the Elements of Crimes may be proposed by any State Party; the judges acting by an absolute majority; the Prosecutor. Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

The Elements of Crimes and amendments thereto shall be consistent with this Statute. In the same time nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute⁷³.

4- Challenges to the jurisdiction of the Court or the admissibility of a case

The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17. challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by an accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or a State from which acceptance of jurisdiction is

required under article 12.

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial.

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17 paragraph 1 (c).

A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82. Adding to this case if a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

Pending a ruling by the Court, the Prosecutor may seek authority from the Court to pursue necessary investigative steps of the kind referred to in article 18, paragraph 6; and to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and in cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

The Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17⁷⁴.

The issues of admissibility will be considered in a subsequent phase of the prosecution of crimes by the organs of the ICC (notably the Prosecutor and the competent Pre-Trial or Trial Chamber). However, it is possible that the SC considers that a particular national judicial authority – though available and willing to prosecute and thus in a position to successfully challenge admissibility before the ICC – is unable to deal with the crimes committed in their entirety. In situations where crimes cannot be geographically located in one single state or where there is a controversy between states on the forum conveniens, the SC may consider the ICC as being the most appropriate jurisdiction to investigate and judge certain crimes. In these situations, the SC decisions to refer the situation to the Court could be justified by the determination that the inherent characteristics of the crimes concerned are the cause of the inability of single states to obtain the necessary evidence

or otherwise carry out the proceedings impartially and appropriately. It is clear from the legal relationship between the SC and the ICC established here²³⁶ that the SC is not bound by the principle of complementarity. But the ICC is bound by the provision of its constituent treaty, including the rules on complementarity. Therefore, a SC resolution imposing an obligation⁷⁵

5- Criminal responsibility

5-1 Individual criminal responsibility

Traditionally, international law has created responsibilities for states only. In other words, the main subject of international law has been “the nation-state.” However, with the creation of the ICC, the individuals became responsible in international law. Although there has been individual criminal responsibility before the creation of the ICC, it was either temporary, or the individual concerned, while being responsible under the principles and rules of international law⁷⁶.

The Court shall have jurisdiction over natural persons pursuant to this Statute. a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

In accordance with this Statute, a person shall be criminally responsible⁷⁷ and liable for punishment for a crime within the jurisdiction of the Court if that person: Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or be made in the knowledge of the intention of the group to commit the crime.

Exclusion of jurisdiction over persons under eighteen the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime⁷⁸.

Thus, Diverging Approaches to the Relationship Between State and Individual Responsibility for International CrimeS Identifying the general approaches to the relationship between state and individual responsibility is not an easy task⁷⁹. The Separation of State and Individual Responsibility explain that the first approach that can be traced back in the works of international law scholars essentially focuses on the differences between state and individual responsibility for international crimes.

While no explicit theory on the relationship between state and individual responsibility for international crimes is put forward, this approach responds to the concrete need to prosecute those responsible for international crimes and to develop, both logically and practically, a regime of individual criminal liability separate and independent from state responsibility⁸⁰. Basis of Responsibility all criminal justice systems of the world recognize the concept of individual criminal responsibility for the violation of a norm that carries penal consequences. consequently, individual criminal responsibility is a general principle of law, whether under national criminal law or under Icl. because the difference between national criminal law and Icl is essentially related to the source of applicable law, it follows that if Icl can develop normative proscriptions, they can be applied to individuals who are the proper subjects of individual criminal responsibility. whether Icl can impose such normative proscriptions directly and not through the mediation of states brings up a separate question relating to enforcement techniques⁸¹.

5-2 Irrelevance of official capacity

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State⁸² or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person⁸³.

May assert jurisdiction over a breach of an obligation owed to the international community as a whole. More importantly, the international community itself may assert that authority⁸⁴.

The most important ‘head’ of jurisdiction is territoriality. Territorial jurisdiction is the authority of a State to exercise jurisdiction over acts committed on its territory. To put it simply, territorial jurisdiction as a ‘head’ of jurisdiction is based on the principle of territorial integrity. This ‘head’ of jurisdiction is unquestionably available to States to exercise any ‘type’ of jurisdiction, i.e. jurisdiction to prescribe, adjudicate and enforce⁸⁵.

5-3 Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing

or about to commit such crimes; and That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

With respect to superior and subordinate relationships not described before a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; The crimes concerned activities that were within the effective responsibility and control of the superior; and The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution⁸⁶.

For example the testimony from ninety-nine witnesses on January 7, 2008 and the defense opened their case more than a year later on July 13, 2009. In April 2012 the trial chamber found Taylor guilty of aiding and abetting crimes in Sierra Leone, but acquitted him of command responsibility and membership in a joint criminal enterprise. As discussed above, the ICC does not recognize immunity for heads of state. Thus, the ICC has investigated and prosecuted several cases involving high-level officials. Notably, the ICC prosecutor presented a case to the pre-trial chamber regarding Sudanese President Omar Hassan Ahmad al-Bashir, the first ever ICC indictment against a sitting head of state. Prosecutor Luis Moreno-Ocampo presented evidence against al-Bashir for genocide, crimes against humanity, and war crimes in the Darfur region of Sudan. The pre-trial chamber issued an arrest warrant for Bashir on March 4, 2009 and a second arrest warrant on July 12, 2010, requesting the cooperation of State parties in his surrender and arrest. Although Bashir has yet to be brought before the court, his arrest warrant alone sparked a debate in the international legal community over the warrant's legality. Such questions focus on the interplay between the immunity-stripping article 27 of the Rome Statute; the effect of article 98 of the Rome Statute, which calls for the cooperation of States parties with respect to the waiver of immunity; the role of Security Council referrals to the ICC; and the relationship between States parties and non-States parties like Sudan. Separately, the ICC is proceeding with a case against several high-level officials of the Kenyan government, including a deputy prime minister, regarding alleged crimes against humanity committed in post-electoral violence from 2007 to 2008. In August 2011, the ICC dismissed an appeal by the Kenyan government to throw out the cases against the officials, instead finding reasonable grounds to believe that the various officials were criminally responsible for murder, forcible transfer, persecution, and other inhumane acts⁸⁷.

5-4 Grounds for excluding criminal responsibility

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct⁸⁸:

- The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law .

-The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

- The person acts reasonably to defend himself or herself or another person or in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

- The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: Made by other persons or constituted by other circumstances beyond that person's control.

The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it. but at trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence⁸⁹.

Courts and tribunals as well as their rules may find application in addressing these procedural issues. Another way in which international courts and tribunals can act despite the silence of their constitutive instruments is through the exercise of their general power to regulate their own procedures ⁹⁰

6- The case of excluding criminal responsibility

6-1- Mistake of fact or mistake of law

A mistake of fact shall be a ground for excluding criminal responsibility only if it

negates the mental element required by the crime. so a mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. a mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33 ⁹¹.

6-2- Superior orders and prescription of law

committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: The person was under a legal obligation to obey orders of the Government or the superior in question; The person did not know that the or The fact that a crime within the jurisdiction of the Court has been der was unlawful and The order was not manifestly unlawful. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful ⁹².

Summary

The scope and limits of the Court's work are determined by its States parties. Its success in playing a meaningful role in the fight against impunity for the most serious crimes is dependent upon the States parties' confidence. The future development and the impact of the ICC – as the first permanent international criminal court – will depend on the development of its jurisprudence and its way of dealing with politically contested issues.

However, it should also not be forgotten that the ICC will have a problem of credibility as long as three out of the five permanent members are not parties to the Rome Statute but are entitled, together with others, to refer situations to the Court.

This is a point of criticism which I often have to face in discussions about the ICC. It is true that this can be seen as a structural deficit of the Rome Statute. Yet, complaining

about it will get us nowhere. The Rome Statute still remains a big accomplishment; if the big powers were States parties to the Rome Statute, chances would be high that they would dominate the institution and attempt to politicise judicial proceedings. Since they are not, the ICC does not have to cater to their wishes. Ultimately, it is the Chief Prosecutor who decides if she initiates an investigation upon referral by the Security Council. If this legal power is applied confidently, it can be an effective means to counter possible considerations by members of the Security Council to use the ICC as a political tool.

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- 25-torture, and killing, which resulted in the murder of an estimated 30,000 people. Such systematic violence and repression, of course, did not occur in a political or historical vacuum. This case will address the complex role of the United States in Argentina’s “Dirty War” what they saw as a battle against “subversion,” driven in many ways by a powerful American ideological doctrine of eradicating communism in the Western hemisphere. This effort involved the US government providing military training in counterinsurgent practices and aid, as well as diplomatic cover in the early years of the military dictatorship..Dirty Hands and Vicious Deeds The US Government’s Complicity in Crimes Against Humanity and Genocide.United States—Foreign relations—20th century—Decision making—Case studies. .library and Archives Cataloguing in Publication. Canada .2017.p217
- 26-However, the Darfur conflict has undergone various transformations through different periods of time , the conflict transformed itself into an armed fight between the Sudanese government and non-state armed opposition by the beginning of 2000.The International Committee of the Red Cross in Internal Armed Conflicts Is Neutrality Possible?. Springer Nature Singapore Pte Ltd. 2019.pp-101-102
- 27- As was the case at Nuremberg, justifying its participation in the war by prosecuting the crime of aggression also served to justify its behavior during the war. Anticipating potential backlash against its use of the atomic bomb, “the Allies felt in need of vindication, not only for the justness of their cause in the war, but also a vindication of their conduct of the war .The Politics of International Criminal Courts.Cornell University Press, London. 2017 .p35
- 28-Carrie McDougall.The Crime of Aggression under the Rome Statute of the International Criminal Court.First published . the MPG Books Group. United Kingdom.2013. p7
- 29 - Morten Bergsmo and LING Yan. State Sovereignty and International Criminal Law . Torkel Opsahl Academic EPublisher Beijing.2012.p100.

- 30-M cherif bassiouni. Necessary of foundation formal international court criminal law review .vol 2.p 503.
- 31- Carrie McDougall. The Crime of Aggression under the Rome Statute of the International Criminal Court.Carrrie McDougall.First published .Printed and bound in the United Kingdom by the MPG Books Group. 2013. p¹^⁹
- 32- General Assembly Resolution 489 (v) of 12 December 1950, International Criminal Jurisdiction, UN Doc. A/ RES/ 5/ 489.
- 33- See Official Records of the General Assembly, Seventh Session, Supplement No. 11, UN Doc. A/ 2136; See Official Records of the General Assembly, Ninth Session, Supplement No. 12, UN Doc. A/ 2645.
- 34- General Assembly Resolution 895 (ix) of 4 December 1954, Question of Defining Aggression, UN Doc. A/ RES/ 9/ 895.
- 35- General Assembly Resolution 897 (ix) of 4 December 1954 Question of Defining Aggression, UN. Doc. A/ RES/ 9/ 895; General Assembly Resolution 898 (ix) of 14 December 1954, International Criminal Jurisdiction, UN Doc. A/ RES/ 9/ 898.
- 36 -Carsten Stahn. Larissa van den Herik.Nico Schrijver. UN Security Council Referrals to the International Criminal Court Legal Nature, Effects and Limits. Alexandre Skander Galand. Koninklijke Brill NV, Leiden, The Netherlands. 2019.p156.
- 38-Wang tieya.tian ruxuan. Data of international law selections.beiking.law publish house .1994.p35.
- 39-Wang xiumei.research to international criminal court op.cit .2002.p303.
- 40- Ibid . p305.
- 41- Ibid . p305.
- 42 - Ibid. p306.
- 43 - Ibid .pp306-3077
- 44-Rome statute of the international criminal court , op.cit .p.04.
- 45-46-Rome statute of the international criminal court , .p10.
- 47- hristodoulos Kaoutzanis.The UN Security Council and International Criminal Tribunals: Procedure Matters.Volume 20.Series Editor Deen K. Chatterjee, University of Utah, Salt Lake City, UT, USA.Springer Nature Switzerland AG 2020.p146
- 48-ibid.p149
- ⁴⁹-50- Rome statute of the international criminal court , Ibid.p10 .
- 51-Gabriel M. Lentner - The UN Security Council and the International Criminal Court the referral mechanism in theory and practice-Edward Elgar (2018).pp-105-106
- 52-ibid.p107
- 53-ibid.p108
- 54- ibid.p108
- 55-ibid.p109
- 56-ibid.p 232

57- UN conventions followed by General Assembly or Security Council recommendations are a good example of intra-organization regulatory support. Recommendations embody the consensus and can be helpful to interpret conventions. Instead of recommendations or guidelines, organizations sometimes adopt model rules, another type of soft law instrument aimed at assisting states in fulfilling their obligations see -Adán Nieto Martín. Global Criminal Law Post national Criminal Justice in the Twenty-First Century. Springer Nature Switzerland AG 2022.p30

58-Also a nonparty state may accept the jurisdiction of the Court on an ad hoc basis with regard to that particular situation. Rome Statute, Art. 12(3). 13 “Draft Statute for the International Criminal Court,” The evidence that the Rome Statute has contributed to strengthening of the laws and institutions to deter international crimes is strong and systematic.

59-Rome statute of the international criminal court , Ibid.p 27.

60-61 -Rome statute of the international criminal court , Ibid.p p11.

62-Series Michael Brzoska .The Defence in International Criminal Trials Observations on the Role of the Defence at the ICTY, ICTR and ICC .Democracy, Security, Peace Volume 217.first Edition . NomosVerlagsgesellschaft, Baden-Baden, Germany 2016. p 23

63-ibid p 23

64- NOBUO HAYASHI AND CECILIA M. BAILLIET.E LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS. Cambridge University Press 2017.p115

65-Sonja C. Grover .Prosecuting International Crimes and Human Rights Abuses Committed Against Children .Springer Heidelberg Dordrecht. London .2010.p55

66-ibid.p57

67-ibid.p58

68-Rome statute of the international criminal court, Ibid.pp.12-13.

69-A jurisdiction overlap is even more foreseeable as the two institutions will have similar jurisdictional triggers. For instance, a case is admissible before the ICC if a state party refers the case to the prosecutor, if the UN Security Council refers the case to the prosecutor, or if the prosecutor herself initiates an investigation proprio motu. In this case, the latter court’s legitimacy might be jeopardised. Given that the ICC is a court of last resort, the negative sentiment among some African states towards the ICC, and the controversies that led to the expansion of the jurisdiction of the court, it is hard to imagine that some of these states would refer cases directly to the ICC and not the African court..see-NOBUO HAYASHI AND CECILIA M. BAILLIET.THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS.Cambridge University Press .uk.2017.p274

70-Rome statute of the international criminal court , Ibid.pp.12-13.

71- Ibid.pp.14-15.

72- THERESA SQUATRITO .ORAN R. YOUNG . Santa Barbara ANDREAS FOLLESDAL THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS. First published.. Cambridge University Press. United Kingdom. 2018 .p 16

73-Rome statute of the international criminal court , Ibid.pp.9-10.

74- Ibid.pp.13-14.

75-Gabriel M. Lentner - The UN Security Council and the International Criminal Court the referral mechanism in theory and practice-Edward Elgar (2018).pp-109-111

76-Cenap Çakmak .A Brief History of International Criminal Law and International Criminal Court.This Palgrave Macmillan published london . 2017.p208

77-The SCSL is authorized under its statute at Article 1 to prosecute persons aged 15 and over who bear the greatest responsibility for international crimes constituting a violation of humanitarian law and/or the most serious crimes committed on the territory of Sierra Leone since 30 November, 1996. (Sierra Leone had wanted the Court to handle the prosecution of those who had committed atrocities in the Sierra Leonean civil war dating back to 1991.) Note that the ICTR and the ICTY, unlike the SCSL, did not contain the specification that only those who bore the greatest responsibility for the crimes over which the respective courts had jurisdiction.see-Sonja C.

Grover.Prosecuting International Crimes and Human Rights Abuses Committed Against Children Leading International Court Cases.Springer-Verlag Berlin Heidelberg .2010.p 70

78-Rome statute of the international criminal court , Ibid.pp.15-16.

79 - Beatrice I. Bonafè .Th e Relationship Between State and Individual Responsibility for International Crimes. Koninklijke Brill NV, Leiden, Th e Netherlands. Koninklijke Brill NV incorporates the imprints Brill, Hotei Publishing, IDC Publishers, Martinus Nijhoff Publishers . 2009.p46

80-Ibid.p47

81- M. Cherif Bassiouni.Introduction to International Criminal Law. Second Revised Edition. Library of Congress Cataloging-in-Publication .LEIDEN. BOSTON. 2014.pp.66-68

82-Head of state immunity under the iCtY/iCtR and iCC the statues of both the IctY and Ictr reject immunity for heads of states and government officials.148 accordingly, both the IctY and Ictr have brought cases against high-level officials believed to be responsible for acts of violence in the respective situations. In 1998, the Ictr undertook the prosecution of jean Kambanda,149 the former prime minister of rwanda. as a head of state...at the time of his prosecution, milosevic was still the president of the federal republic of Yugoslavia. milosevic died during his trial, removing any possibility of a sentence. the IctY also brought charges against the subjects of international criminal law.see M. Cherif Bassiouni. Introduction to International Criminal Law: Second Revised Edition.Martinus Nijhoff Publishers. LEIDEN. BOSTON. 2014.p147

83-Rome statute of the international criminal court , Ibid.p16.

84-Alexandre Skander Galand..UN Security Council Referrals to the International Criminal Court Legal Nature, Effects and Limits. VOLUME 5.Koninklijke Brill NV, Leiden, The Netherlands. 2019.p34

85- ibid.p738

86-Rome statute of the international criminal court .Ibid.p18.

87- M. Cherif Bassiouni. Introduction to International Criminal Law: Second Revised Edition.Martinus Nijhoff Publishers. LEIDEN. BOSTON. 2014.p163

88-Rome statute of the international criminal court .Ibid.p19.

. 89- Patrícia Galvão Teles and Manuel Almeida Ribeiro. Case- Law and the Development of International Law Contributions by International Courts and Tribunals.Leiden ; Boston : Brill Nijhoff, 2022 .p5

90-Ibid.47

91-Rome statute of the international criminal court.Ibid.p19.