International Criminal Law

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1 International Criminal Law and Human Rights Law

The term international criminal law (ICL) already indicates that this body of law is made up of two distinct elements. It is a mixture of both public international law (PIL) and domestic criminal law. The fusion of these two fields of law makes ICL truly unique.

On the one hand, ICL is part of PIL because it rests on the same sources: treaties, customary international law (CIL) and—to some extent—general principles of law (Article 38 of the International Court of Justice's Statute (ICJ Statute)). ICL is at the same time at odds with PIL because the subjects function differently in both legal orders: ICL deals with individuals, while PIL is mainly concerned with States and international organisations.

On the other hand, ICL carries significant characteristics of domestic criminal law, dealing with punishing individuals for having committed crimes. At the same time, ICL is fundamentally different from domestic criminal law as the application of criminal law is usually based on a State's national territory and jurisdiction. Criminal law is usually detached from the international legal plane because a State only has the sovereignty to punish its own citizens (active personality principle)[1] for committing crimes, or any person if they commit crimes on that State's territory (territorial principle).[2]

ICL thus combines elements of PIL and domestic criminal law while at the same time being at odds with both of these fields. In this way, ICL is best understood as a

[1]Ipsen (2014), pp. 582, 585; v. Arnauld (2014), p. 532 at para. 1273.

[2]Cassese et al. (2013), p. 274; Ipsen (2014), p. 584; v. Arnauld (2014), p. 532 at para. 1272.

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body of PIL that imposes criminal responsibility directly onto individuals instead of leaving it to domestic criminal prosecution.

ICL is sometimes also said to be the logical mirror of international human rights law (HRL).[3] This is only partly true. It is true insofar as both fields of law put the individual into the focus, not (as is usually the case in PIL) the State: while HRL accords the individual powerful basic rights towards the State, ICL imposes specific duties on the individual, namely the duty not to commit certain fundamental crimes. Only in this case is the prosecution lifted from the national level to the international level. In this way, the Rome Statute of the International Criminal Court[4] emphasises in its preamble and Articles 1 and 5 (1) that ICL only deals with 'the most serious crimes of concern to the international community as a whole'. Just as rights and duties can be considered two sides of the same coin, HRL and ICL can be too: HRL accords (international) rights to the individual, whereas ICL imposes an international duty on it.

However, there are also aspects in which ICL and HRL do not simply mirror one another. Most importantly, ICL only applies to exceptional cases—the threshold at which a case is lifted from the level of national jurisdiction to international tribunals is enormously high. While any commitment of an international crime will always violate HRL in one way or another, the opposite is often not true. Certainly, not every human rights violation amounts to an international crime.[5]

2 The Origins of International Criminal Law

The Westphalian system, developed by the treaty of Westphalia in 1648, which ended the Thirty-Year War, which had ravaged Europe, acts to secure the peaceful coexistence of sovereign and equal States, a goal also enshrined in Article 2 (1) UN Charter. Nevertheless, this system has often been criticised as being blind towards the individual. Within this classical concept, the individual is solely mediated through the State, for instance in the form of *diplomatic protection*: a State claims rights violations of its nationals abroad not as violations of that individual but rather as a violation of the State itself.[6] Indeed, PIL—in its traditional conception—accords rights and duties to States, not to individuals.

[3] Pires (1995), pp. 133–136; Tulkens (2011), pp. 577–578.

[4] Rome Statute of the International Criminal Court, 17 July 1998, in: UNTS 2187 (2004), p. 3.

[5] Cryer et al. (2014), p. 14.

[6] Permanent Court of International Justice, Case of the Mavrommatis Palestine Concessions, Judgement of 30 August 1924, Series A No. 2, p. 12. A different course is taken by the ICJ in its Diallo judgement (ICJ, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgement of 19 June 2012, I.C.J. Reports 2012, pp. 324, 344 at para. 57, in which the court states that reparation is paid to compensate Mr. Diallo (not Guinea) for the injury caused. This is in some ways at odds with the classical understanding of diplomatic protection which assumes a right of the State, not the individual.

2.1 The Nuremberg and Tokyo Tribunals

With the end of World War II in 1945, this thinking changed. During and after the war, the conviction ripened that political redress (as represented by the Treaty of Versailles after World War I) was not sufficient to bring closure to conflict. A legal response was also considered necessary, in particular the prosecution of surviving high-ranking Nazi Imperial Japanese officials by an international criminal legal procedure.

A few months after the end of the war, the Allies (USA, Soviet Union, United Kingdom and France) signed the London Agreement,[7] which regulated the prosecution and punishment of the major war criminals of the European Axis. This agreement was included as an annex to the Charter of the International Military Tribunal at Nuremberg (hereinafter 'Nuremberg Charter').[8] The tribunal started its proceedings against high-ranking political and military Nazi leaders on 20 November 1945 in Nuremberg (hereinafter 'Nuremberg trials'). The tribunal consisted of one judge per allied State (Article 2 Nuremberg Charter). The Nuremberg trials were to deal with the very limited number of crimes listed in Article 6 Nuremberg Charter: crimes against the peace, war crimes and crimes against humanity. In a very similar manner, the Allies also conducted an International Military Tribunal for the Far East in Tokyo (Japan). The judges' bench of the Tokyo tribunal—like the Nuremberg one—was exclusively made up of judges from the four allied States. The Tokyo tribunal started its work on 3 May 1946 and prosecuted Japanese individuals for crimes committed on the Asian continent.[9]

Both tribunals—as politically desirable as they might have been—have faced severe criticism from a legal perspective.

First, the composition of judges failed to include judges from neutral States. In this way, they were not international but essentially western tribunals.

Second, both tribunals dealt exclusively with German and Japanese war criminals; crimes committed by the allied forces were excluded from jurisdiction. In this way, it may be argued that both tribunals exercised one-sided justice imposed by the victors (*Siegerjustiz*).

Third, some of the crimes tried in Nuremberg and Tokyo had not been previously explicitly defined as such. It is hard to argue that sentencing defendants under penal norms specifically designed for the trials does not violate one of criminal law's golden rules, the principle of *nullum crimen sine lege* (lat. 'no crime without pre-existing penal law').[10] The Nuremberg judges recognised this obvious problem with their jurisdiction. They nevertheless justified it with reference to the

[7] Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, in: UNTS 82 (1951), p. 280.

[8] Annex to *id*., p. 284.

[9] Werle and Jessberger (2014), pp. 10–11.

[10] This principle is discussed in detail in Sect. 3.1 of this chapter.

exceptional cruelty of the Nazi crimes: actions so heinous as to clearly amount to severe crimes that required punishment—even without their previous codification.[11]

2.2 The International Tribunals for the Former Yugoslavia and Rwanda

Because of this serious criticism and, even more importantly, as a result of PIL's paralysis during the Cold War, it took a long time for ICL to take its next crucial steps. The 1990s saw some of the worst atrocities since World War II. The international community's ensuing outrage led to the creation of two international bodies to prosecute crimes committed: the International Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Tribunal for Rwanda (ICTR) in 1994. Given their very similar composition, these two tribunals are often described as 'sister-tribunals',[12] indeed two sisters that were brought up very far apart from each other with the ICTY based in The Hague (the Netherlands) and the ICTR located in Arusha (Tanzania). After their official *expiration date* in 2015, pending cases are now dealt with by an international transitional tribunal, the International Residual Mechanism for Criminal Tribunals,[13] also located in The Hague. The inception of the two tribunals for the former Yugoslavia and Rwanda and the reasons for their establishment are remarkable.

First, both the genocide and ethnic cleansing of Muslim men and boys in the former Republic of Yugoslavia, as well as the genocide committed by the Hutu majority in Rwanda against the Tutsi minority and the butchering of moderate Hutus, are hardly comparable with any other crimes committed since World War II. These crimes certainly screamed for international criminal prosecution.

Second, both tribunals were not created by an international treaty involving the successor States of Yugoslavia or Rwanda, which would certainly have been the most common way. Instead, they were established by two UN Security Council (UNSC) resolutions.[14] Article 41 UN Charter enables the UNSC to 'decide what measures not involving the use of armed force are to be employed to give effect to its decisions'. While the majority of legal scholars have by now endorsed this approach of the UNSC, some authors severely doubt that the creation of an international tribunal truly fell within the council's mandate under Article 41 UN Charter.[15]

[11]International Military Tribunal, Nazi Conspiracy and Aggression: Opinion and Judgment, Washington 1947, p. 49.

[12]Møse (2005), pp. 920–927; Zacklin (2004), pp. 541–542.

[13]UN Security Council, Resolution 1966, UN Doc. S/RES/1966, 22 December 2010.

[14]UN Security Council, Resolution 827, UN Doc. S/RES/827, 25 May 1993 (establishing the ICTY) and Resolution 955, UN Doc. S/RES/955, 8 November 1994 (establishing the ICTR).

[15]See, for instance, Arangio-Ruiz (2000), pp. 609, 722; Lamb (1999), pp. 361, 376.

On the one hand, the UNSC can only make use of the means of Articles 39–42 UN Charter if it has previously found an 'act of aggression, a breach of the peace or a threat to the peace' (Article 39 UN Charter) to have occurred. Thus, the council would have needed to find that international criminal tribunals for Yugoslavia and Rwanda were necessary to restore international peace and security or to prevent them from being threatened in the future. To assume this was the case might indeed appear far-fetched: criminal justice is mainly a punitive rather than a preventive measure. What is more, the UNSC regularly addresses *de iure* States in its resolution, while the establishment of a criminal tribunal *de facto* targets individuals.

On the other hand, the list of coercive non-military means in Article 41 UN Charter, although quite extensive, is not exhaustive,[16] as emphasised by the word 'including'. Thus, the UNSC may choose one of the means listed in Article 41 UN Charter—or any other non-military means that it might deem appropriate. There is no cogent reason apparent *per se* why this should not also include the establishment of a criminal tribunal. The UNSC is generally accepted to have a very wide margin of discretion in choosing the means necessary to maintain international peace and security.[17]

2.3 *Other International and Hybrid Criminal Tribunals*

Further international or *hybrid*—partly international, partly domestic—criminal courts followed shortly after this initiative of the UNSC.

In the Special Court for Sierra Leone (2002),[18] the government of that State set up a court in cooperation with the UN in order to prosecute individuals for serious violations of international humanitarian law (IHL) and domestic law during Sierra Leone's civil war (1991–2002). The court operated offices in Freetown (Sierra Leone), The Hague (the Netherlands) and New York City (USA). Its most famous case is certainly the one against Charles Taylor, who in 2012 became the first convicted African Head of State and was sentenced to 50 years in prison.[19]

The Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal)[20] were established by an agreement of the Cambodian government and the UN in 2003

[16]Krisch (2012), p. 1305, para. 14; Wilson (2014), p. 84; v. Arnauld (2014), p. 443 at para. 1036 and p. 445 at para 1042.

[17]Krisch (2012), para. 14; Wilson (2014), p. 84.

[18]Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, in: UNTS 2178 (2004), p. 138.

[19]Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-01-T, Trial Chamber II, Judgment of 18 May 2012, http://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf; and Case No. SCSL-03-01-A, Appeals Chamber, Judgment of 26 September 2013 (essentially conforming the Trial Chamber's judgment), http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf.

[20]Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, in: UNTS 2329 (2005), p. 1.

to try senior leaders of the Khmer Rouge regime that had devastated Cambodia between 1975 and 1979. It is a so-called hybrid court as it is set up within the framework of the Cambodian legal system but has many international legal characteristics. For instance, judges are both Cambodian and nationals from other States, and the applicable law is also a mixture of Cambodian law and PIL.[21]

The Special Tribunal for Lebanon (2007)[22] was established for the international prosecution of the assassination of Rafiq Hariri on 14 February 2005, who served as Prime Minister of Lebanon from 1992–1998 and 2000–2004. Mr. Hariri was killed in a terrorist attack by a car bomb, the perpetrators of which have never been found. The tribunal has its seat in Leidschendam-Voorburg, near The Hague (the Netherlands), as well as an office in Beirut (Lebanon). It was established by an agreement between the Lebanese government and the UN in 2006, following a UNSC resolution.[23] Like the Khmer Rouge Tribunal in Cambodia, it is a hybrid court as it applies both national and international laws. Since it began to operate in 2009, the tribunal has issued four arrest warrants to the authorities of Lebanon against Hezbollah members.[24] All suspects, however, remain at large. The procedures are thus led *in absentia*, meaning without the accused being present: an approach that is certainly unusual in criminal proceedings. Another important facet of this tribunal is that the suspects are *de facto* charged with *terrorism*.[25] The tribunal is the first international court to include such a charge in its investigative work, despite the

[21]See, *id*., Art. 3 and Art. 9 in conjunction with Art. 3 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12, http://www.skpcambodia.com/Laws%20&%20Regulations%20of%20the%20Kingdom%20of%20Cambodia/Tribunals/KR%20trial%20law-final-after-amend-Eng.pdf.

[22]Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, 22 January 2007 and 6 February 2007, in: UNTS 2461 (2007), p. 257.

[23]UN Security Council, Resolution 1664, UN Doc. S/RES/1664, 29 March 2006; see also UN Security Council, Resolution 1757, UN Doc. S/RES/1757, 30 May 2007 (endorsing the agreement).

[24]The warrants to arrest Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi, and Mr Assad Hassan Sabra, respectively, each including transfer and detention order, of 28 June 2011, are available at the Tribunal's website: http://www.stl-tsl.org. On 11 February 2014, the Trial Chamber issued an oral ruling to join the case against Hassan Habib Merhi with the case against the four accused mentioned above.

[25]See Art. 2 (a) of the Statute of the Special Tribunal for Lebanon, declaring the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism and others to be applicable. The text is attached to the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, 22 January 2007 and 6 February 2007, in: UNTS 2461 (2007), pp. 293, 294.

difficulties that PIL has experienced over the last years in elaborating a legal definition of the term 'terrorism'.[26]

The International Crimes Tribunal of Bangladesh (2009) investigates the genocide committed in 1971 by the Pakistani Army and local groups during the Bangladesh Liberation War. It is based on the International Crimes (Tribunals) Act of 1973,[27] which is largely compatible with the standards required under PIL. As with the Special Tribunal for Lebanon, trials held *in absentia* are possible.

Lastly, the Extraordinary African Chambers in the Senegalese Courts constitutes special chambers for the prosecution of former Chadian President Hissène Habré and affiliates for international crimes within the legal framework of the Senegalese judicial system.[28]

2.4 The International Criminal Court

Finally, since 2002, the International Criminal Court (ICC) has taken up its operations. It must by now be considered the most important of all international criminal courts and tribunals. It aims to cover not a specific time frame or region but strives to become the universal court in charge of all international criminal prosecutions.

The ICC is the first independent, treaty-based and truly international criminal court. The treaty establishing this court—the Rome Statute (RS)[29]—was drafted in 1998 and entered into force on 1 July 2002. The court started its operations with an inaugural session on 11 March 2003; its seat is The Hague in the Netherlands (Article 3 (1) RS).

While the RS currently has 139 signatory States and 124 States parties (including all South American States, most European States and many African States),[30] some important States have explicitly not supported it so far. The United States has signed but not ratified the treaty (which would be necessary for its legal effects to unfold), Russia most recently repealed its signature and China never signed the RS. Some of these States have even displayed somewhat hostile behaviour towards the jurisdiction of the ICC. Famously, in 2002, the US Congress adopted the

[26]See Art. 2 of the proposed Comprehensive Convention on International Terrorism. For the text of the draft convention see Appendix II to UN General Assembly, UN Doc. A/59/894, 12 August 2005. This definition remains, however, largely contested, see for instance the Kuala Lumpur Declaration on International Terrorism of 3 April 2002, Annex II to UN General Assembly, UN Doc. A/56/911, 8 April 2002, which emphasises that also the motivation should be part of the definition, while the proposed Convention put an emphasis exclusively onto the means employed.

[27]Act No. XIX of 20 July 1973, http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435.

[28]Chambres Africaines extraordinaires, http://www.chambresafricaines.org/.

[29]See Rome Statute of the International Criminal Court, 17 July 1998, in: UNTS 2187 (2004), p. 3.

[30]Status of the Rome Statute, including signatures, ratifications and withdrawals, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

'American Service-Members' Protection Act'.[31] This piece of legislation states that should a US citizen or a 'covered allied person' ever be tried by the ICC, the US President would have the authority 'to use all means necessary and appropriate' to free that person. This is understood as also giving authority to invade the premises of the ICC and return that US citizen or covered allied person back to the USA, which is why the act has also been termed 'The Hague Invasion Act'.

The court has 18 judges (Article 36 (1) RS) and consists of three different legal divisions: the pre-trial division, the trial division and the appeals division (Article 34 lit. b) RS). It also has an office of the prosecutor (Article 34 lit. c) RS) and a registry (Article 34 lit. d), 43 RS). The presidency rotates and is currently held by Argentinian Judge Silvia Fernández de Gurmendi; Gambian lawyer and former Minister of Justice Fatou Bensouda heads the office of the prosecutor. The election of Fatou Bensouda was hoped to be a significant breakthrough for the ICC's general acceptance. Not only is Bensouda the first woman to hold the position but also the first individual from the African continent.

Previously, the court had been criticised as a court for the prosecution of African nationals instead of a truly global criminal court.[32] While this criticism has to be taken seriously, as the acceptance by African States is certainly crucial for the court's future success, it overlooks two important factors.

First, the ICC has by now commenced several preliminary investigations outside of Africa, for instance in Afghanistan, Colombia, Georgia, Honduras, Iraq, Palestine, South Korea, Ukraine and Venezuela.

Second, and even more importantly, the investigations and trials conducted so far often relied on the explicit request of the respective African States. Out of 10 situations the prosecutor is currently investigating, five were referred to the court by the respective States.[33]

Thus, there is not much ground to claim that the ICC has imposed its investigations one-sidedly on African States; it is rather the case that many African States have actively sought the court's help. Nevertheless, over the course of 2016, several African States, including South Africa, Burundi and Gambia, have announced their withdrawal from the RS.

[31] American Service-members' Protection Act of 2002, 2 August 2002, http://web.archive.org/web/20031015053419/http://www.state.gov/t/pm/rls/othr/misc/23425.htm.

[32] Mbaku (2014), p. 9, http://www.brookings.edu/~/media/Research/Files/Reports/2014/foresight-africa-2014/03-foresight-international-criminal-court-africa-mbaku.pdf?la=en; du Plessis et al. (2013), http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf; Akande (2009), http://www.ejiltalk.org/africa-and-the-international-criminal-court./.

[33] For an overview of situation and cases, see the ICC's webpage at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

3 Some General Principles of Criminal Law

Before dealing *in extensio* with the jurisdiction of the ICC, it is worth recapitulating some basic features that distinguish criminal law from public or civil law.

3.1 Nullum Crimen, Nulla Poena sine Lege

It is well accepted in criminal law that any behaviour that is up for prosecution must have been a criminal offence at the time it occurred. Often the two principles of *nullum crimen sine lege* (lat. 'no crime without law') and *nulla poena sine lege* (lat. 'no punishment without law') are mixed up. In truth, however, they are two distinct principles.

On the one hand, the *nullum crimen* principle—the more important of the two—demands that a person must not be convicted if the accused could not have reasonably been aware at the time of his/her action that this behaviour was criminal in nature.[34] This principle is not a new development in ICL. Article 15 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 states that '[n]o one shall be held guilty on account of any act or omission which did not constitute a criminal offence, (. . .) at the time when it was committed'. Both the Nuremberg Charter and the Tokyo Charter were heavily criticised for violations of exactly this principle.[35] The judges in Nuremberg defended their jurisdiction by claiming that the crimes in question were so horrific that nobody could have reasonably assumed them to be in accordance with the law.[36]

Some authors have claimed an even stronger variant of the *nullum crimen* principle, demanding that criminal conviction requires a written law.[37] Certainly, this principle would indeed hold true in many national criminal legal orders. Thus, CIL would be generally excluded as a source of ICL as per the principle of *nullum crimen sine lege scripta* (lat. 'no crime without written law'). The ICTY has, however, explicitly rejected this stricter form of the *nullum crimen* principle;[38] some authors have further emphasised that international (criminal) law, in contrast

[34]ICTY, Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Trial Chamber II, Judgment of 29 November 2002, para. 193, http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf; ICTY, Prosecutor v. Milan Milutinović *et al*., Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise of 21 May 2003, paras. 37–42, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00207160-00207178.pdf.

[35]See Sect. 2.1 of this chapter.

[36]Nuremberg International Military Tribunal (1947), pp. 172, 217.

[37]Degan (2005), pp. 45, 67; Olásolo (2007), p. 301.

[38]Most prominently ICTY, Prosecutor v. Dusko Tadic aka 'Dule', Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, paras. 139–144, http://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

to many domestic legal orders, does not always require a written source,[39] as also evidenced by Article 38 (b) ICJ Statute.

In order to nevertheless do justice to the *nullum crimen* principle, the RS of the ICC incorporates the so-called *elements of crime*, which include detailed definitions of the enumerated crimes. Article 22 RS also explicitly emphasises two specific elements of the *nullum crimen* principle: non-retroactivity (Article 22 (1) RS) and clarity of the law (Article 22 (2) RS).

On the other hand, the *nulla poena* principle requires defined penalties to be attached to the different criminal norms. For the RS, this principle was addressed in Article 23, which states that a person must be punished in accordance with the statute. Thus, possible punishments are clearly elaborated in the RS. The situation was less clear with regard to the ICTY and the ICTR. Both tribunals were required to have recourse to the practice of prison sentences of the respective states in which the crimes had occurred.[40] However, this would have enabled the tribunals in extreme cases to impose the death penalty, which existed in Yugoslavia and Rwanda at the time the crimes were committed. To exclude this possibility, the statutes of the ICTY and ICTR emphasised that recourse to national law related only to terms of imprisonment (thus implicitly excluding other forms of punishment such as the death penalty).[41]

3.2 In Dubio Pro Reo

Human rights are often interpreted broadly by courts and scholars in a way that maximises the protection of the individual.[42] This can be understood as a legitimate interpretation in light of Article 31 lit. c) Vienna Convention on the Law of Treaties (VCLT): an interpretation of each individual human right in light of the object and purpose of the human rights treaty as a whole. In that way, human rights treaties are often very liberally interpreted, going beyond what the drafters originally had in mind.

However, this does not hold true for ICL, whose treaties also serve the rights of suspects and the accused. An expansive interpretation of the rights of one side tends to result in a restrictive interpretation of the other side's rights. Hence, in ICL, a

[39] Cassese et al. (2013), pp. 73–74.

[40] Art. 24 (1) S. 2 of the Statute of the ICTY, annexed to UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, p. 36; and Art. 23 S. 2 of the Statute of the ICTR, annexed to UN Security Council, Resolution 955, UN Doc. S/RES/955, 8 November 1994 (establishing the ICTR).

[41] Art. 24 (1) S. 1 of the ICTY's Statute, and Art. 23 S. 1 of the ICTR's Statute, both UN Security Council, Resolution 827, UN Doc. S/RES/827, 25 May 1993 (establishing the ICTY) and Resolution 955, UN Doc. S/RES/955, 8 November 1994 (establishing the ICTR).

[42] Cryer et al. (2014), p. 13.

broad interpretation of the listed crimes is much more problematic than in the case of HRL.

What is more, where there is indeed ambiguity in the law or in the evidence gathered, this must be taken into account in a favourable light for the accused rather than to his/her disadvantage: *in dubio pro reo* (lat. 'when in doubt, for the accused'). Thus, the interpretation of crimes under PIL has to be restrictive (rather than expansive) as the rights of the accused might otherwise be infringed; extreme cases might result in a scenario in which the *nullum crimen* principle is violated. In a similar manner, Article 22 (II) (2) RS emphasises that in case of ambiguity, a norm shall be interpreted in favour of the person under investigation or prosecution.

3.3 Ne bis in Idem

The principle *ne bis in idem* (lat. '*not twice for the same*') requires that nobody be punished twice for the same crime. This principle is not yet generally accepted as custom applying between all States, but rather restricted to municipal State jurisdiction. This is confirmed by Article 14 (7) ICCPR, which states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each State. The European Union (EU) has gone one step further and established a transnational *ne bis in idem* principle for its member States under Article 50 EU Charter of Fundamental Rights.[43]

The ICC's RS goes even further than the EU, establishing three variants of the *ne bis in idem* principle, which stipulate as follows: the ICC cannot convict twice for the same crime (horizontal prohibition, Article 20 (1) RS), a national court cannot sentence where the ICC has already made a decision (downward prohibition, Article 20 (2) RS) and the ICC cannot convict where a national court has already done so (upward prohibition, Article 20 (3) RS).[44]

4 The International Criminal Court's Jurisdiction Under the Rome Statute

Turning from general principles of criminal law to the particular jurisdiction of the ICC, a number of problems, both procedural and substantive, arise.

[43]See Art. 50 of the Charter of Fundamental Rights of the European Union, 18 December 2000, in: Official Journal of the European Union (2010), C 83/02.

[44]For the specific problem of upward prohibition of *ne bis in idem*, see also the principle of complementarity, see Sect. 4.1.2 of this chapter. See, also, Surlan (2005), http://www.esil-sedi.eu/sites/default/files/Surlan_0.PDF.

4.1 Criminal Procedure

Some procedural requirements can be summarised very briefly. These include questions of who can be tried before the ICC (jurisdiction *ratione personae*; generally speaking: individuals), what the eligible time period for crimes to be prosecuted is (jurisdiction *ratione temporis*, only after the entry into force and after ratification of the RS) and which crimes the court may investigate (jurisdiction *ratione materiae*, only crimes defined in the RS).

Other procedural requirements are more complex. These include the modes in which jurisdiction is established, the relationship between the ICC's jurisdiction and national jurisdiction and issues surrounding the principle of immunity.

4.1.1 Ways to Establish Jurisdiction

The ICC does not have jurisdiction over just any international crime. Quite to the contrary, the principle of non-intervention as derived from the sovereign equality of States (Article 2 (1) UN Charter) accords States' jurisdiction over their territory and their citizens. Only if a State consents to international criminal prosecution is a case lifted from the national to the international sphere. The first two modes to establish the court's jurisdiction reflect this requirement of State consent.

First, jurisdiction can arise if the accused is a citizen of a State that has either previously ratified the RS or that has recognised the jurisdiction of the ICC *ad hoc* (for the case at hand only, Article 12 (2) lit. b), (3), and Article 13 RS). The accused's nationality is thus one possible link to establish the ICC's jurisdiction.

Second, the court also has jurisdiction if an alleged crime was committed on the territory of a State that has either previously ratified the RS or that accepts the jurisdiction of the ICC *ad hoc* (Article 12 (2) lit. a), (3); Article 13 RS). Thus, the territory of the State on which the alleged crime took place may also be a link for the establishment of the ICC's jurisdiction.

Both links are very much in line with the idea of the active personality principle and the territorial principle. States are accepted to hold jurisdiction over their citizens and over their territory; this includes the right to conduct criminal prosecution. The significant resistance that many governments have levelled against the jurisdiction of the ICC is in part explained by the fact that these two principles do not always function in accordance with each other.

We can easily imagine cases in which the territorial sovereignty of one State collides with the personal jurisdiction of another State, for example where a citizen of a non-signatory State commits a crime on the territory of a signatory State. Assuming all formal conditions are met, the latter finding would suffice to justify the ICC's jurisdiction over such a citizen committing crimes in the territory of a signatory State. In that case, the outspoken and repeated protests of the non-signatory home State of the perpetrator could not hinder the establishment of such jurisdiction of the ICC. In essence, a State would have to tolerate the prosecution of one of its citizens in The Hague against its explicit will—an idea

that appears almost unimaginable to sovereign nations, especially superpowers like the USA. There are also other issues at play: Israel, for example, is concerned about future cases against its citizens since Palestine has acceded to the RS,[45] and the prosecutor has opened a preliminary investigation for cases on Palestinian soil.[46]

The third alternative to establish the court's jurisdiction is by way of referral of a situation to the ICC by the UNSC (Article 13 lit. b) RS). The status of the UNSC and its mandate to maintain international peace and security justify this exceptional possibility of establishing jurisdiction for the ICC without State consent. This constellation has so far occurred twice: once in the case of Darfur in 2005[47] and once in the case of Libya in 2011.[48] Establishing jurisdiction without State consent can lead to difficult questions, for example, the parallel validity of provisions of the RS (such as immunity[49]) as CIL, where the statute itself cannot be directly applied without State ratification.

4.1.2 The Principle of Complementarity

While the ICTY and the ICTR both enjoy general primacy over national law and national courts,[50] the ICC does not. Instead, it fulfils a complementary function to national criminal jurisdiction. The ICC would simply be overburdened if it were to deal with all international crimes on a global scale. Thus, according to Article 17 (1) RS, the court shall only determine a case admissible if a State that would otherwise hold jurisdiction over the case is either unwilling or unable to genuinely carry out the investigation or prosecution.

Unwillingness can mean that either a State has undertaken proceedings only for the purpose of shielding a person from international criminal responsibility (Article 17 (2) lit. a) RS), there is an unjustified delay in the proceedings undertaken (Article 17 (2) lit. b) RS) or the proceedings are not conducted independently or impartially (Article 17 (2) lit. c) RS).

Inability is given in a case of total or substantial collapse or unavailability of any national judicial system. This can be, *inter alia*, the case if a State is unable to obtain the accused or the necessary evidence and testimony (Article 17 (3) RS).

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[45] M. Abbas, Declaration Accepting the Jurisdiction of the International Criminal Court, 1 January 2015, http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf; UN Secretary-General, Depositary Notification of Accession to the Rome Statute by the State of Palestine, UN Doc. C. N.13.2015.TREATIES-XVIII.10, 15 January 2015.

[46] ICC Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

[47] UN Security Council, Resolution 1593, UN Doc. S/RES/1593, 31 March 2005.

[48] UN Security Council, Resolution 1970, UN Doc. S/RES/1970, 26 February 2011.

[49] Immunity is discussed in detail in Sect. 4.1.3 of this chapter.

[50] Art. 9 (2) of the ICTY's Statute and Art. 8 (2) of the ICTR's Statute, both UN Security Council, Resolution 827, UN Doc. S/RES/827, 25 May 1993 (establishing the ICTY) and Resolution 955, UN Doc. S/RES/955, 8 November 1994 (establishing the ICTR).

4.1.3 The Principle of Immunity

Rules of immunity have traditionally hindered the exercise of ICL before national courts. In the Yerodia case,[51] for instance, Belgium had issued an international arrest warrant with Interpol against the then foreign minister of the Democratic Republic of Congo, who was accused of genocide. When Congo accused Belgium of having illegally issued the arrest warrant before the ICJ, the court sided with Congo, emphasising that the immunity of Yerodia blocked the issuance of an arrest warrant.[52] Similarly, in the cases on the former Chadian President Habré[53] and former Chilean President Pinochet,[54] it was confirmed that persons holding public office could only be held responsible after the end of their mandate.

International criminal jurisdiction is regularly designed to overcome this problem of immunity. Article 7(2) ICTY Statute, Article 6(2) ICTR Statute and most importantly Article 27(2) RS (*no immunity principle*) state that immunities shall not bar international criminal courts from exercising their jurisdiction over persons otherwise enjoying immunity. Indeed, criminal procedures were started against heads of State on several occasions while they were still holding public office. Such was the case of Slobodan Milošević (Yugoslavia) before the ICTY,[55] Charles Taylor (Liberia) before the Special Court for Sierra Leone,[56] as well as Laurent Gbagbo (Ivory Coast), Uhuru Kenyatta, William Ruto and Joshua Sang (all three Kenya) before the ICC.[57] Similarly, arrest warrants were issued against Omar al Baschir (Sudan) and Muammar Gaddafi (Libya) by the ICC.[58]

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[51]ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement of 14 February 2002, I.C.J. Reports 2002. p. 3.

[52]*Id*., p. 29 at para. 70.

[53]ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012. p. 422.

[54]United Kingdom House of Lords, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, Judgment of 24 March 1999, in: I.L.M. 38 (1999), p. 430.

[55]ICTY, Prosecutor v. Slobodan Milošević., Case No. IT-02-54: http://www.icty.org/case/slobodan_milosevic/4.

[56]Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1: http://www.rscsl.org/Taylor.html.

[57]ICC, Prosecutor v. Laurent Koudou Gbagbo, Case No. ICC-02/11-01/12; Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11; Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11; for all cases at the trial stage, see http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx.

[58]ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09, Pre-Trial Chamber I, First Warrant of Arrest of 4 March 2009 and Second Warrant of Arrest of 12 July 2010, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx; Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Pre-Trial Chamber I, Warrant of Arrest of 27 June 2011, http://www.icc-cpi.int/iccdocs/doc/doc1099321.pdf.

With regard to the ICC, the cases in which a situation is transferred to the court by the UNSC remain particularly difficult. The RS—and with it the no-immunity principle of Article 27 (2) RS—is not directly applicable if a State has not ratified it. Nevertheless, the prosecutor may start investigations on the explicit request of the UNSC. The question then is whether and in how far Article 27 (2) RS has become part of CIL.[59]

4.2 Substantive Law

The ICC's jurisdiction covers four international crimes: genocide, crimes against humanity, war crimes and aggression.

4.2.1 Genocide (Article 6 Rome Statute)

Genocide has been referred to as the 'crime of crimes'.[60] The term genocide is a combination of Greek and Latin: *genos* being Greek for 'race', while *caedere* means 'to kill' in Latin.[61] Coined by Raphael Lemkin as a reaction to the mass killings of Jews by the Nazis in World War II,[62] the term featured first in UN General Assembly (UNGA) Resolution 96(I) of 1946[63] and shortly after in the Genocide Convention of 1948.[64] The ICJ has made clear that the prohibition of genocide is one of the rare norms in PIL from which no derogation is permitted (Article 53 S. 2 VCLT, *ius cogens*).[65]

Article 6 RS, in direct replication of Article II Genocide Convention, defines genocide as

> . . . any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

[59]Thielboerger (2011) and Frau (2011).

[60]Schabas (2009).

[61]See the definition of '*genocide*' at: http://www.oxforddictionaries.com/definition/english.

[62]Lemkin (1944), pp. 79–82.

[63]UN General Assembly, Resolution 96 (I), UN Doc. A/RES/96(I), 11 December 1946.

[64]Art. 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in: U.N.T.S. 78 (1951), p. 277. The Convention entered into force on 12 January 1951 and currently (April 2017) has 147 parties, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=e for the Convention's status.

[65]ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement of 19 December 2005, I.C.J. Reports 2005, pp. 168, 202 at para. 64.

(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 6 RS enumerates certain objective elements, such as killing or causing physical or mental harm. It also prescribes, however, that any of these acts must be carried out 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group' (*subjective element*) in order to qualify as genocide. Two elements in the definition of genocide are noteworthy.

First, ethnic cleansing will most often, maybe surprisingly, not qualify as genocide. Usually, ethnic cleansing focuses not on the partial or complete destruction of a group but on its relocation.[66] Ethnic cleansing might often fall within the scope of crimes against humanity, but it generally does not constitute genocide, although it targets a specific ethnic group.

Second, the crime of genocide must be carried out with the *intent*, a highly condensed form of will, to destroy a group. This high threshold has made it very difficult for international criminal tribunals to prove genocidal intent, most recently in the Croatia-Serbia Genocide case before the ICJ.[67] One of the rare instances where such intent was confirmed by an international tribunal is the attack on the city of Srebrenica by Bosnian Serbs, which the ICJ examined in a 2007 case pinning Bosnia and Herzegovina against Serbia and Montenegro.[68]

4.2.2 Crimes Against Humanity (Article 7 Rome Statute)

Most statutes of international criminal tribunals include definitions of crimes against humanity.[69] However, these definitions are inconsistent and have generated substantial confusion about the term for a long time.[70]

Article 7 RS now clarifies that

[66] v. Arnauld (2014), p. 544 at para. 1304.

[67] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgement of 3 February 2015, para. 441 (dismissing Croatia's claim) and para. 515 (dismissing Serbia's counter-claim), http://www.icj-cij.org/docket/files/118/18422.pdf.

[68] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007, pp. 43, 155–166 at paras. 278–297.

[69] Art. 6 (c) of the Charter of the International Military Tribunal at Nuremberg, Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, in: UNTS 82 (1951), p. 280; Art. 5 (c) of the International Military Tribunal for the Far East, 19 January 1946, in: T.I.A.S. 1589; Art. 5 of the ICTY's Statute, UN Security Council, Resolution 827, UN Doc. S/RES/827, 25 May 1993 (establishing the ICTY) and Resolution 955, UN Doc. S/RES/955, 8 November 1994 (establishing the ICTR); and Art. 23 S. 1 of the ICTR's Statute, UN Security Council, Resolution 827, UN Doc. S/RES/827, 25 May 1993 (establishing the ICTY) and Resolution 955, UN Doc. S/RES/955, 8 November 1994 (establishing the ICTR).

[70] Bassiouni (1994), pp. 457, 471.

> 1. (. . .) '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:
> (a) Murder; (. . .)
> (c) Enslavement;
> (d) Deportation or forcible transfer of population; (. . .)
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (. . .)
> (i) Enforced disappearance of persons; (. . .)
> (k) Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Given the logic of Articles 6–8 *bis* RS, Article 7 RS should have been listed as the last of the four crimes. It acts in many ways as a residual crime covering aspects of the other three crimes while at the same time being much broader in scope.

Crimes against humanity differ from the crime of genocide in a number of ways. First, the threshold of the subjective element is certainly lower: no *intent* is needed to fulfil the subjective element of crimes against humanity; *knowledge* of the facts that constitute the crime is sufficient. Second, with regard to the objective elements, the target group is different. Crimes against humanity are offences against the civil population in general, not necessarily against one specific group. Third, the required level of organisation behind the crimes committed is set higher than in the case of genocide: a *systematic or widespread attack* against a civilian population is necessary. In this way, crimes against humanity are best understood as an *umbrella crime*. Rather than targeting one specific act—the concept seeks to criminalise an organised policy that lies behind a set of different crimes.

4.2.3 War Crimes (Article 8 Rome Statute)

War crimes connect ICL with IHL, the topic of the previous chapter.[71] Not all violations of IHL, however, constitute war crimes. Only grave violations of IHL create international individual liability. While Article 2 ICTY Statute and Article 4 ICTR Statute contain rather general and extendible regulations on war crimes, the drafters of the ICC's RS decided to include an exhaustive list of cases that constitute war crimes.

It includes an enumeration of more than 500 individual elements of crime. Although commendable from the perspective of the *nullum crimen sine lege principle*,[72] the article's drafting has created a convoluted paragraph that is hard to handle in practice. What is more, given that the list was clearly meant to be

[71] See chapter 3 on international humanitarian law.

[72] This principle is discussed in detail in Sect. 3.1 of this chapter.

exhaustive, there is little room for adjusting Article 8 RS to new developments in IHL or to new modes of warfare.

As is common in IHL, Article 8 RS strictly divides armed conflicts into two categories: international armed conflicts (Article 8(2) lits. a) and b) RS) and non-international armed conflicts (Article 8 (2) lits. c) and e) RS). Many of the listed elements of crime, however, apply to both forms of armed conflict.

The wording that the ICC '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' is very unfortunate. Far from aiming to exclude the punishability of individuals in cases where such plan or policy is absent, it was instead meant as an appeal to the court to focus particularly on the prosecution of crimes committed as a result of such plan or policy but did not intend to leave other war crimes unpunished.

4.2.4 Aggression (Article 8 *bis* Rome Statute)

While the statutes of Nuremberg and Tokyo included *crimes against peace*[73] in order to prosecute political leaders for having led their countries into fully fledged wars, the statutes of the ICTY and ICTR did not include such crimes as both conflicts started within one State. Given that *crimes against peace* or *crimes of aggression* specifically target political leaders, the inclusion of this crime was particularly controversial. Article 5 (2) RS (initial version) emphasised that the ICC could only exercise jurisdiction over such crimes once States parties had agreed on a definition of aggression.

For a long time, it seemed as though States would not be able to agree on the elements of aggression, and many observers believed that this crime would actually never find its way into the jurisdiction of the ICC. However, in the first review session on the RS in Kampala (Uganda) in 2010, States parties agreed on the new Article 8 *bis* RS.[74] It adopts the definition of UNGA Resolution 3314 of 1974[75] nearly fully for its definition of the crime of aggression.

Nevertheless, many caveats remain even after the inclusion of Article 8 *bis* RS. Most of them are listed in Article 15 RS itself: before the ICC can exercise

[73] Art. 6 (a) of the Charter of the International Military Tribunal at Nuremberg, Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, in: UNTS 82 (1951), p. 280; Art. 5 (a) of the Charter of the International Military Tribunal for the Far East, 19 January 1946, in: T.I.A.S. 1589.

[74] Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, Resolution RC/Res.6, 11 June 2010 (adopted by consensus), in: Official Records, p. 17: http://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-Part.I-ENG.pdf.

[75] UN General Assembly, Resolution 3314 (XXIX), UN Doc. A/RES/3314 (XXIX), 14 December 1974.

jurisdiction over the crime of aggression, a two-thirds majority of signatory States is needed (Article 15 *bis* (3) and 15 *ter* (3)), retroactive application is specifically excluded (Article 15 *bis* (2) and 15 *ter* (2)) and States can even generally exclude the applicability of that crime against their citizens or subject to their State territory and jurisdiction (Article 15 *bis* (4) RS). Thus, although the crime of aggression has finally been included in the RS, there is not much hope that it will become a well-functioning part of the Statute.

5 Conclusion

ICL is one of the most fascinating and vibrant parts of PIL. While it is not a new field of law (the Nuremberg and Tokyo trials as a reaction to World War II took place in the late 1940s), it has recently experienced a steep ascent. With the international criminal tribunals for Rwanda and particularly the former Yugoslavia perceived as rather successful, an even more ambitious project became feasible: the establishment of a general international criminal court. What seemed an audacious dream two decades ago has become reality: the ICC took up its work in 2002.

When discussing the future of ICL, one refers, in fact, to the future of this very court. As much as it is fervently praised as a breakthrough for international criminal justice by some, it is at the same time bitterly condemned as an instrument of intervention in States' internal affairs by others. It will be crucial for the court to convince the sceptics of its value in order to become a truly universal court.

That is why it is important to very seriously consider the concerns and withdrawals of some African States over the last years. The support of African nations is crucial for the court's future development. It must never become an instrument of western democracies to bring African leaders to international justice: such a perception of the court would, indeed, be the end of the ICC. The appointment of Fatou Bensouda was in this way a first step in trying to reduce the simmering distrust of African States against the court.

Similarly, the court must also take the concerns expressed by the USA and Israel seriously—even if these concerns are at times expressed in provocative rather than constructive ways. The court must be particularly careful towards if and how it addresses potential cases in the Palestinian territories against Israeli citizens. Whether the court likes it or not, it is not only a legal but also a highly political and politicised institution, certainly more so than any national criminal court. In this way, the court must at all times remain keenly aware of its double responsibility as a legal and as a political institution. To balance and reconcile these two responsibilities will be the main challenge for the ICC in the years to come.

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