

ACTA UNIVERSITATIS BRUNENSIS

---

IURIDICA

No 430

SPISY PRÁVNICKÉ FAKULTY

MASARYKOVY UNIVERZITY

---

*řada teoretická*

Svazek 430

# INTERNATIONAL CRIMINAL COURT

*Jurisdiction over Genocide, Crimes against Humanity  
and War Crimes, including the Legal Regulation  
of the Crime of Aggression*

Jan Lhotský

Masarykova univerzita

Brno, 2012

Recenzent: JUDr. Ivana Janů

Tato publikace byla financována z prostředků specifického výzkumu Masarykovy univerzity č. 2012/22/MUNI/A/0931/2011.

© 2012 Jan Lhotský

© 2012 Masarykova univerzita

ISBN 978-80-210-6065-4

# CONTENTS

## INTRODUCTION.....9

### 1. Historical development and the Emergence of International Criminal Law..... 13

- 1.1 Ad hoc Tribunals..... 14
  - 1.1.1 International Military Tribunals after the Second World War..... 15
  - 1.1.2 International Criminal Tribunal for the Former Yugoslavia..... 18
  - 1.1.3 International Criminal Tribunal for Rwanda ..... 19
  - 1.1.4 Special Court for Sierra Leone ..... 21
  - 1.1.5 Extraordinary Chambers in the Courts of Cambodia..... 23
  - 1.1.6 Special Tribunal for Lebanon ..... 24
  - 1.1.7 Special Panels in East Timor ..... 26
  - 1.1.8 Judicial System in Kosovo..... 27
  - 1.1.9 Supreme Iraqi Criminal Tribunal..... 27
- 1.2 Justification for the Need for a Permanent Judicial Institution ..... 28

### 2. Rome Statute of the International Criminal Court..... 31

- 2.1 Establishment and Character of the Court..... 31
- 2.2 Structure of the Rome Statute ..... 32
  - 2.2.1 Establishment of the Court ..... 33
  - 2.2.2 Jurisdiction, Admissibility and Applicable Law ..... 33
  - 2.2.3 General Principles of Criminal Law ..... 34
  - 2.2.4 Composition and Administration of the Court..... 36
  - 2.2.5 Investigation and Prosecution ..... 37
  - 2.2.6 Trial ..... 37
  - 2.2.7 Penalties..... 38
  - 2.2.8 Appeal and Revision..... 38
  - 2.2.9 International Cooperation and Judicial Assistance ..... 39
  - 2.2.10 Enforcement ..... 40
  - 2.2.11 Assembly of States Parties ..... 40

2.2.12 Financing .....	41
2.2.13 Final Clauses .....	41
<b>3. Jurisdiction of the Court.....</b>	<b>45</b>
3.1 Ratione Materiae .....	45
3.1.1 Genocide .....	46
3.1.2 Crimes against Humanity.....	46
3.1.3 War Crimes .....	47
3.1.4 Aggression .....	49
3.2 Ratione Personae .....	49
3.3 Ratione Loci .....	50
3.4 Ratione Temporis .....	51
3.5 Trigger Mechanism .....	51
3.6 Principle of Complementarity .....	52
3.7 Applicable Law .....	53
<b>4. Position of States not Party to the Rome Statute .....</b>	<b>55</b>
4.1 Position of the USA.....	55
4.2 Position of China and Russia.....	57
<b>5. Value of the Court .....</b>	<b>59</b>
5.1 Arguments of the Opponents of the Court .....	59
5.2 Arguments of the Supporters of the Court .....	64
5.3 Universality .....	67
<b>6. Real Cases of the International Criminal Court.....</b>	<b>69</b>
6.1 General Characteristic .....	70
6.2 The Prosecutor v. Thomas Lubanga Dyilo.....	73
6.3 The Prosecutor v. Omar Hassan Ahmad Al Bashir.....	75
6.4 Situation in Kenya.....	81
6.5 Preliminary Examinations .....	82

- 7. International Criminal Court and a Definition of the Crime of Aggression..... 85**
  - 7.1 International Law and the Historical Development of the Crime of Aggression ..... 85
    - 7.1.1 The First Half of the 20th Century ..... 86
    - 7.1.2 The Second Half of the 20th Century ..... 87
  - 7.2 Possible Definitions of New Crimes in the Situation between Rome and Kampala ..... 90
    - 7.2.1 Negotiations about the Definition of the Crime of Aggression and the Conditions for Exercise of Jurisdiction ..... 91
    - 7.2.2 Possible Inclusion of More Crimes ..... 93
  - 7.3 Review Conference in Kampala..... 94
  - 7.4 Adopted Amendments to the Rome Statute ..... 96
    - 7.4.1 New Legal Regulation of the Crime of Aggression..... 96
    - 7.4.2 The Other Amendments ..... 107
  - 7.5 Expert Reactions on the Results of the Review Conference ..... 110
  - 7.6 Summary of the New Regulation of the Crime of Aggression .... 116
- CONCLUSION ..... 125**
- SUMMARY ..... 129**
- List of Abbreviations ..... 133**
- List of References..... 134**
- List of Annexes..... 143**



**Motto:** The role of the international criminal law does not consist only in doing justice, but also in describing reality and in contributing to similar wrongdoings not being repeated.

## INTRODUCTION

Even in remote history the integral part of legal systems of individual states was criminal law. Its aim was to maintain the minimum standard of behaviour of individuals in a certain society. They constituted a population, the subjects of the king. The king was not responsible for his actions, and therefore he could freely handle not only his power, but also the territory and the people themselves. Later this position of the sovereign was weakened by various documents which guaranteed the people certain fundamental rights and freedoms.<sup>1</sup>

As they have developed, the respect for basic human rights has become one of the key factors on the path of transformation of these societies into modern democratic rule-of-law states. The so-called culture of impunity of an individual for his own actions, regardless of his formal status, is still not a concept of the past. Not only historical but also recent experience has shown that the activity of national judicial authorities itself often fails to ensure the prosecution and punishment of the offenders of the most serious crimes of concern to the international community as a whole. During the twentieth century, traditionally internal criminal law gradually gained its place in international law.

International law is traditionally defined as a set of rules that govern relations between states. [69, p. 20] Of course, the concept remains basically the same, but it should be noted that an individual has also been considered

---

<sup>1</sup> Apart from Magna Charta in England in 1215, there was for example the English Bill of Rights in 1689, the American Declaration of Independence in 1776, and the French Declaration of the Rights of Man and of the Citizen in 1789.

as a subject of international law since the 1940s.<sup>2</sup> This approach is shown, inter alia, in two areas; namely, the protection of human rights and international criminal justice. In these cases the individual may also invoke an international law or it can be directly applied. Human rights and international criminal law actually represent different perspectives of the same problem. [4, p. 12] One determines a certain space within which the individual may not be interfered and the other constitutes a penalty for the mass violation of these rights. Therefore it is pertinent to define international law in a broader sense of the word and that is, with regard to its purpose, as a set of legal rules which secure the peaceful existence and continuous development of the international community. [67, p.15]

International criminal law is a relatively new legal branch and as such it is experiencing a striking development. Based on experience with the *ad hoc* criminal tribunals in the nineties, in 1998 the Rome Statute was signed, the treaty that established the International Criminal Court which should have universal competence and whose purpose is to punish the most serious crimes under international law – genocide, crimes against humanity, war crimes and the crime of aggression.<sup>3</sup> The new permanent court has considerable ambitions; namely to become a ground-breaking institution which would change the often idle approach of the international community. Therefore it could become an effective tool in the fight against the aforementioned crimes. The question is whether it will be successful.

The content of this publication is the characteristic and analysis of the operating rules of the International Criminal Court and an evaluation of certain controversial issues regarding its running. Firstly, the historical events that led to the establishment of the Court and its *ad hoc* predecessors will be described. Then, a necessary amount of space is devoted to the Rome Statute as an establishing document of the International Criminal Court, the description and analysis of its content, and principally the Court's jurisdiction which is often criticised by representatives of some states. It will be

---

<sup>2</sup> But it is important to point out that the international legal personality of an individual is qualitatively different from the personality of states or international organizations, especially with regard to their norm-creating capacity. [65, p. 85–92].

<sup>3</sup> At present, the Court does not have the jurisdiction over the crime of aggression. The analysis of this issue is the content of chapter 7.

also necessary to deal with the attitude of these states and the overall critical analysis of the Rome Statute. Also the functioning of the Court will be demonstrated on cases currently being heard. The outcome of the work will be the analysis of the results of a Review Conference where a new definition of the crime of aggression was adopted. In conclusion the findings will be summarised and certain conclusions about the institution will be drawn from them.

At this point it is appropriate to specify the topic of this publication. The presented work will not analyse in detail either criminal and procedural issues, or practical examples of cases currently being heard or the operating of individual *ad hoc* criminal tribunals. On the contrary, the key content of the work will be an analysis of the legitimacy of the establishment of the Court and its jurisdiction, a critical study of the founding document, and last but not least, an explanation and analysis of the newly defined crime of aggression.



# 1. HISTORICAL DEVELOPMENT AND THE EMERGENCE OF INTERNATIONAL CRIMINAL LAW

In the 1930s and 1940s, when leaders of Nazi Germany were devising the realisation of their political course, they were well aware of what happened during the First World War in Armenia. They also realised that the affair had been “forgotten” and no one had been brought to justice. During the years 1915 and 1916, approximately 1.5 million Armenians, out of the total number of 2 – 2.5 million, were systematically killed in the former Ottoman Empire in what is now Turkey. The main culprits, the representatives of the Ottoman government never appeared in a court. [75]

Efforts to punish the initiators of the First World War came to nothing too. The Allied Powers pressed for a prosecution of Wilhelm II, German Emperor. On the basis of Article 227 of the Treaty of Versailles, he should have been accused of “*a supreme offence against international morality and sanctity of treaties*”. [5, p. 3] For this purpose a special court composed of five judges, coming from the USA, the United Kingdom, France, Italy and Japan, should have been established. [77] The former German Emperor was never brought to justice due to political unwillingness of the Netherlands where he was granted asylum.

**International criminal law** started to be distinguished from international law after the Second World War, with the emergence of the first international criminal tribunals. In a broader sense of the word, international criminal law can be considered a legal branch consisting of four dimensions. These dimensions are international criminal law itself, supranational, or more precisely European criminal law, legal cooperation in criminal matters and regulation of the application of criminal law in cases with an international element.<sup>4</sup> In the narrower sense, international criminal law itself can be understood as a set of norms of international law referring to the

---

<sup>4</sup> In original: *Völkerstrafrecht, Supranationales, insbes. Europäisches Strafrecht, Rechtshilfe-recht, Strafanwendungsrecht*. [98, p. 30–31]

punishment of individuals who have committed offences for sanction of which international cooperation is needed. [66, p. 423]

The basic element and the reason for formation of international criminal law is **crime under international law**. Antonio Cassese assumes that crime under international law results from the cumulative presence of four elements. Firstly, it must be a violation of customary international law. Secondly, it has to be a breach of rules which protect the values that are considered to be important to the international community as a whole, and therefore they are binding for all states and individuals. In addition, there must be a universal interest in the suppression of such crimes. And last but not least, in such a case no state can plead immunity of an offender. [3, p. 11–12]

In the traditional concept which is adopted from the Statute of the Nuremberg Tribunal, there are three categories of crimes under international law, namely **crimes against peace, war crimes and crimes against humanity**. [70, p. 9–10] The last-mentioned was a basis for the formulation of the crime of genocide which is often mentioned on its own because of its gravity. There is a general agreement among the authors that it is a conduct of individuals which has a legal basis directly in international law. This means that in these cases international law substitutes for statutes for purposes of criminal prosecution. It applies regardless of the fact whether national law provides the criminalisation of a certain behaviour or not.

## 1.1 AD HOC TRIBUNALS<sup>5</sup>

Based on bitter experience, several proposals for the establishment of the International Criminal Court were already drafted in the interwar period. But either those were never stated in an official document, or did not re-

---

<sup>5</sup> Professor Pavel Šturma's lecture is the source of a number of pieces of information in this subchapter. The lecture was part of an academic seminar which was organized by the Czech National Group of *Association Internationale de Droit Pénal* (AIDP). The seminar was concerned in issues regarding implementation of the Statute of the International Criminal Court in the legal system of the Czech Republic. [84]

ceive the required number of ratifications. Due to a lack of political will no permanent criminal court was created.

Unfortunately, several mass crimes have been committed around the world since the 1930s. After the crimes had been committed, there was within the international community a general agreement that it was necessary to bring the perpetrators before the court and punish them. Since there was no international court which would be competent to do so, in such cases international criminal tribunals were constituted for a given specific case, on an *ad hoc* basis. The first of them were two criminal tribunals after the Second World War. After a long pause these were followed by others during the 1990s. The first two of these were set up by the UN Security Council, but the following ones have a specific hybrid nature.

#### 1.1.1 INTERNATIONAL MILITARY TRIBUNALS AFTER THE SECOND WORLD WAR

International military tribunals at Nuremberg and Tokyo represented a sequel to the old international law of war, which allowed the occupying powers to establish an interim justice. Nevertheless, they become an important milestone in the development of international criminal law. Criticism is directed against so-called *Siegerjustiz* which means that justice is subordinated to the will of the victors. This concept of justice is attacked not only because of retroactivity. Other objections are raised against the fact that some judges participated in drawing up the statute of the court. In addition, no criminal investigation was conducted against the Allies, e.g. with regard to the military necessity of bombing Dresden or the vast loss of civilian lives due to dropping atomic bombs on Hiroshima and Nagasaki. [98, p. 204] These processes became an important milestone primarily because international law was applied instead of national law.

In August 1945 the victorious powers adopted an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with a Charter of the International Military Tribunal attached, the so-

called London Charter. Within the Agreement three crimes were defined – crimes against peace,<sup>6</sup> war crimes and crimes against humanity.

After the process the International Law Commission was entrusted by the General Assembly of the UN with drawing up a Code of Crimes against the Peace and Security of Mankind. In 1950 the Commission formulated the following principles of international law, the **Nuremberg Principles**: [51]

- I. *Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.*
- II. *The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.*
- III. *The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.*
- IV. *The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.*
- V. *Any person charged with a crime under international law has the right to a fair trial on the facts and law.*
- VI. *The crimes hereinafter set out are punishable as crimes under international law:*
  - (a) *Crimes against peace:*
    - (i) *Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*
    - (ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).*

---

<sup>6</sup> Crime against peace is currently understood and named as the crime of aggression. Very simply put, it concerns a situation when a particular state conducts a military attack against another state.

(b) *War crimes:*

*Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.*

(c) *Crimes against humanity:*

*Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.*

VII. *Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.*

The Nuremberg Principles defined the core of international criminal law for the second half of the 20th century and the relationship between the individual, the state and the international community. To quote one of the judgements of the Tribunal: “*Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*” [2, p. 19–20]

Based on the Statute of the Nuremberg Tribunal, a **Charter of the International Military Tribunal for the Far East** was established in parallel in Tokyo. It was adopted only on the basis of a special proclamation made by General MacArthur. An interesting fact in this regard is that during the Tokyo process, the Japanese Emperor, Hirohito, was not tried, unlike other offenders. This was due to the specific culture of Japan where the imperial family enjoys high authority over the people, even though there was evidence that the Emperor himself issued some orders to commit crimes. [82]

### 1.1.2 INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

After the Cold War the international community's attention was more focussed on local conflicts, and especially on the conflict which took place in the former Yugoslavia, in Europe, the stability of which is in the interest of many world powers. An International Criminal Tribunal for the former Yugoslavia (ICTY) **was instituted by the UN Security Council** in 1993 by a resolution No. 827 under Chapter VII of the UN Charter which has a binding effect on all UN member states. Yet the Court's jurisdiction itself is often questioned mainly by the defendants.<sup>7</sup>

As opposed to previous tribunals this one was not founded by a victorious party. The Tribunal was competent to judge an individual of any party of a war conflict who had committed violations of international law. This was the next step made towards the removal of injustice from international criminal judiciary. Also the highest punishment possible, compared to the postwar courts, was imprisonment for life instead of the death penalty.

The Court is located in The Hague. With respect to its territorial and temporal **jurisdiction** [78] the Court is competent to prosecute crimes which were committed on the territory of the former Yugoslavia since 1 January 1991. Regarding its personal jurisdiction, the Court is authorised to try natural persons.

Subject-matter jurisdiction was determined in such a way that the International Criminal Tribunal for the Former Yugoslavia prosecutes the following crimes:

- Grave breaches of the Geneva Conventions of 1949;
- Violations of the laws or customs of war;
- Genocide;
- Crimes against humanity.

---

<sup>7</sup> The legitimacy of the tribunals is sometimes questioned. In particular, that the UN Security Council has the competence to decide in matters regarding international security under the Charter of the UN, but does not have judicial competence.

The jurisdiction of the Tribunal in relation to the jurisdiction of national courts is based on the principle of concurrence. There is a parallel competence of national courts and the Tribunal but the ICTY is superior to national courts. Thus, the ICTY's verdict is not reviewable by the national court, while at a request of the Tribunal in a certain case, the national court must transfer a pending case to the Tribunal. The Tribunal may also examine crimes already heard by national courts if there is a reasonable ground. It is a case of the principle of concurrence with the priority of the Tribunal.

In 2011 Ratko Mladić was apprehended. He was accused primarily because of his role in the Siege of Sarajevo and his responsibility for the Srebrenica massacre. The massacre was the vastest act of its kind in Europe since the end of the Second World War. Less than two months later Goran Hadžić, the former President of the Republic of Serbian Krajina, was caught as the last suspect sought. He was accused of persecution of non-Serb citizens.

### 1.1.3 INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In the 1990s, there were tensions escalating between the Hutu and Tutsi ethnic groups in Rwanda. The events culminated in 1994 when the Hutu militias killed about 800,000 Tutsis or moderate Hutus in just a hundred days. As a result of the conflict about 2 million people became refugees. Even though the UN had its international units in place and had information about the situation, the international community was still not able to react quickly and prevent the crimes.

Subsequently, in 1994 the UN Security Council issued a resolution No. 955 under Chapter VII which established the International Criminal Tribunal for Rwanda (ICTR) in the manner of the ICTY. The Court is located in the Tanzanian city Arusha. As for its **jurisdiction**, [70, p. 99–104] the Court has material competence over the three following categories of crimes:

- Genocide;
- Crimes against humanity;

- Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>8</sup>

The Court's territorial and temporal jurisdiction is also distinct from the one that the ICTY has. The jurisdiction applies not only in Rwanda but also in the territory of neighbouring states on condition that crimes are committed by Rwandan citizens. Compared to the ICTY, the temporal jurisdiction of which is limited only at the beginning, the ICTR is limited to the crimes committed from the beginning to the end of 1994. Concerning its relationship to national courts, the ICTR is regulated in the same way as the ICTY. The principle of concurrence with the priority of an international tribunal applies here as well. Considering the range of crimes committed, the Court concentrates only on persons responsible for the largest massacres. Parallel to this, a decentralised community system of so-called *Gacaca* courts was established which tried the majority of crimes of that time.

The International Criminal Tribunal for Rwanda has always been, rather without justification, in the shadow of its older brother. However, during its existence more than 60 people were convicted of a crime and 10 were acquitted. [41] For example, at the beginning of December 2010, a former commander of the Ngoma Camp, Ildéphonse Hategekimana, was convicted of genocide and crimes against humanity with a life sentence. [43]

Due to the fact that the ICTY and the ICTR have already managed to hear the majority of cases and also due to being a financial burden on the UN, in 2010 the Security Council adopted a Resolution No. 1966, with the Statute of the **International Residual Mechanism for Criminal Tribunals** attached. Although its designation contains the word "mechanism" it is essentially a new criminal tribunal which will substitute both of the above-mentioned courts. The operation of the Residual Mechanism starts in July 2012 for the ICTR and in July 2013 for the ICTY. It will probably be operating in parallel with the original courts for several years. After the closure of the ICTY and the ICTR, the Residual Mechanism provides an ad-

---

<sup>8</sup> This item defines a certain humanitarian minimum for civil wars. The minimum is contained in Article 3 common to the Geneva Conventions of 1949, and also in the Additional Protocol II of 1977, which develops and completes the article. This definition contributed by the inclusion of an internal armed conflict in the category of war crimes.

vantage to the effect that it can exist in a kind of a stand-by mode with a minimum number of employees. Nevertheless, if there is a wanted offender caught it can activate its functioning. Issues related to the execution of a sentence of convicted persons will also fall within its competency. [91]

#### 1.1.4 SPECIAL COURT FOR SIERRA LEONE

From 1991, there was a civil war in Sierra Leone. It was accompanied by particularly cruel methods of fighting and also by the mass use of child soldiers. The basis for a peace process was the Lomé Peace Accord in 1999. At the request of President Kabbah, the UN Security Council adopted a Resolution No. 1315. The Resolution challenged the Secretary General Kofi Annan to negotiate an agreement with the government about a constitution of a new independent criminal tribunal. Subsequently in 2002 an **international treaty** establishing a Special Court for Sierra Leone (SCSL) was signed between the UN and the government of Sierra Leone.

It should be pointed out that it was a new way of establishing an international criminal tribunal. Previous courts were created either on the basis of multilateral agreements or a resolution of the UN Security Council. While the ICTY and the ICTR have the character of subsidiary organs of the UN, the Special Court for Sierra Leone has its legal basis in a bilateral agreement. The disadvantage of such a form of constitution of a court, as opposed to the creation of a court on the basis of a resolution of the UN Security Council, is that it does not constitute a duty for other states to cooperate with the tribunal in the case that the perpetrators of crimes are located in their territory.<sup>9</sup>

---

<sup>9</sup> As an example the President of Liberia of that time, Charles Taylor, can be mentioned. He was accused by the Court and then he lived in exile in Nigeria which refused to extradite him for several years.

Within a brief characteristic of the **jurisdiction** of the Court it must be said that subject-matter jurisdiction of the Special Court for Sierra Leone covers, on the basis of its Statute, the following crimes:

- Crimes against humanity;
- Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II;
- Other serious violations of international humanitarian law;
- Crimes under Sierra Leonean law.

The mentioned provisions are taken substantially from the Statute of the ICTR with the exception of the crime of genocide. Also, its jurisdiction includes other serious violations of international humanitarian law. The range of crimes was designated according to the crimes which are characteristic for the conflict in Sierra Leone. The crimes mentioned also complement certain serious criminal offences under the laws of Sierra Leone. As for territorial jurisdiction, it applies only on the territory of Sierra Leone and in the time period from 30 November 1996. It is subject to criticism because the temporal jurisdiction does not cover the entire period of the civil war.

The Court is located in the capital of Sierra Leone, Freetown. There was an exception in the case of the former Liberian President, Charles Taylor, who was accused of war crimes for his role in the civil war in Sierra Leone. Based on a resolution of the UN Security Council, the trial was moved for reasons of safety to The Hague in the Netherlands. In 2012, Charles Taylor was found guilty of aiding and abetting the commission of war crimes and has been sentenced to 50 years in prison. Thus he became the first former Head of State to be convicted of war crimes since the Nuremberg trials in 1940s. [49]

The SCSL is, because of the way in which it was created and its applicable law, often referred as a so-called **mixed court**. For one thing, the applicable law comprises international and national law. For another, the composition of the court panels is mixed as the judges are appointed by both the UN Secretary General and the government of Sierra Leone. It should be said that the model of mixed criminal tribunals proved relatively successful, as shortly after others began to appear.

### 1.1.5 EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

In 1975, an ultra-left organisation, the Khmer Rouge took power over Cambodia. Then the government of the Khmer Rouge was overthrown during a Vietnamese military intervention in 1979. As a part of its political line the organisation outlawed all religions, closed schools and started to physically liquidate all its political opponents, supporters of capitalism, and people with practically any kind of education. During these four years around 1.7 million people became victims of extermination, representing one fifth of the population of the state.

Due to political reasons, punishment of the crimes was not considered until the 1990s. Cambodia's government rejected the recommendation of an expert group of the UN who suggested creating an *ad hoc* tribunal under the auspices of the UN. Thus, a compromise solution was the establishment of a tribunal which would be part of Cambodia's legal system and would consist both of international and national judges. In 2001, Cambodia approved the establishment of the Extraordinary Chambers in the Courts of Cambodia.

They have the character of mixed judicial chambers and crimes under both national and international law fall within the scope of their **jurisdiction**, regardless of the nationality of the perpetrator. Within the subject-matter jurisdiction of the Chambers fall the crimes under domestic law – homicide, torture, religious persecution, and crimes under international law – genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property during armed conflict and crimes against internationally protected persons.<sup>10</sup>

---

<sup>10</sup> Under domestic law – homicide, torture and religious persecution under the Cambodian Penal Code of 1956, under international law – genocide pursuant to the Convention of 1948, crimes against humanity under the Statute of the ICTR, grave breaches of the Geneva Conventions of 1949, destruction of cultural property during armed conflict pursuant to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, and crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.

In Cambodia five prominent leaders of the Khmer Rouge were charged. One of them was Kaing Guek Eav, nicknamed “Duch”, the former commander of the S-21 prison where a systematic extermination of people was executed. The others were Nuon Chea, the former Deputy Secretary of the Communist Party and so-called Brother Number Two, Ieng Sary, the former Deputy Prime Minister for Foreign Affairs, his wife Ieng Thirith,<sup>11</sup> the former Minister of Social Affairs, and Khieu Samphan, the former Head of State. [40]

In 2010, the Court gave its judgement in the first case and Kaing Guek Eav was sentenced to imprisonment of 35 years. Due to his previous detention, the sentence was mitigated to 19 years. But at the beginning of 2012, the Supreme Court Chamber quashed the decision and sentenced Kaing Guek Eav to life imprisonment. [39]

#### 1.1.6 SPECIAL TRIBUNAL FOR LEBANON

On 14 February 2005, there was a massive terrorist attack in Lebanon. The explosion of a car full of explosives killed the former Lebanese Prime Minister, Rafic Hariri, and a further 22 people. At the end of the year, the Lebanese government asked the UN to establish a tribunal which would try those responsible for the attack. A tribunal was established by a Resolution No. 1757 of 30 May 2007, with an Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (STL) attached. The tribunal has also jurisdiction over other attacks in Lebanon between 1 October 2004 and 12 December 2005 if it is proven that they are connected to the events of 14 February and are of similar nature and gravity. [57]

Compared to the other aforementioned *ad hoc* criminal tribunals, the Special Tribunal for Lebanon has some differences that are worth mentioning: [65, p. 786]

1. The Tribunal should have been created by a bilateral agreement. Nevertheless, there were problems with ratification, so the Tribunal was activated by a resolution of the UN Security Council, which replaced the agreement mentioned.

---

<sup>11</sup> Her indictment was suspended due to poor health condition.

2. No crimes under international law fall within the subject-matter jurisdiction of the Tribunal, only the bomb terrorist attack concerned. Thus the Tribunal will not be operating again once the cases related to the bomb attack are heard.
3. Despite its international base and a mixed composition of judges, the Tribunal applies national Lebanese criminal law.

The Tribunal is located in The Hague and currently the inquiry is in progress. Right from the beginning, there were very apparent opinions on the part of the Lebanese that some high-ranking Syrian officials were behind the attack. This belief was even strengthened by a certain lack of cooperation on the part of Syria. [22] During 2011, four people linked to the Hezbollah were submitted an indictment, and subsequently arrest warrants were issued against them.

<b>Court</b>	<b>Tribunal created</b>	<b>Status</b>
International Criminal Tribunal for the Former Yugoslavia (ICTY)	1993	161 indicted: 64 sentenced, 13 acquitted, 13 referred to national court, 36 indictments withdrawn, 35 persons on trial, including Radovan Karadžić, Ratko Mladić and Goran Hadžić
International Criminal Tribunal for Rwanda (ICTR)	1994	72 cases completed: 62 sentenced, ten acquitted, two cases in progress, nine fugitives
Special Court for Sierra Leone (SCSL)	2002	13 indicted: nine sentenced, including Charles Taylor, three deceased, one fugitive
Extraordinary Chambers of the Courts of Cambodia	2006	Five senior Khmer Rouge leaders indicted: one proceeding suspended, Kaing Guek Eav sentenced to life imprisonment
Special Tribunal for Lebanon	2007	Four persons indicted

Source: *The Economist*, [47] according to the updated information of courts in June 2012.

### 1.1.7 SPECIAL PANELS IN EAST TIMOR

A former Portuguese colony, East Timor was occupied by Indonesian armed forces from 1975. In 1999, a referendum under UN supervision was held under an agreement between Indonesia and Portugal. Three quarters of the population voted in favour of independence. Independence was declared on 20th May 2002. [92] But before the referendum, and especially after the publication of the results, the East Timor militia supported by the Indonesian army committed numerous acts of violence.

Therefore the UN Security Council adopted resolutions, which authorised a presence of international forces in East Timor, and established a United Nations Transitional Administration in East Timor (UNTAET). At the initiative of the UNTAET Special Panels were created, composed of East Timor and international judges, with the majority of an international element, as in the case of the SCSL.

With respect to jurisdiction, having a specific nationality was not a condition. Material jurisdiction covered crimes of genocide, war crimes, crimes against humanity, murder, torture and sexual crimes in the period between 1 January and 25 October 1999. The applicable law was Indonesian criminal law, provided that it was in accordance with international law and the regulation issued by the UNTAET. A definition of genocide was adopted from the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, a definition of torture from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

A definition of crimes against humanity and war crimes was adopted from the already existing Rome Statute of the International Criminal Court. As for a transfer of the accused, the Court faced certain problems because the Indonesian authorities were not willing to fully cooperate with Special Panels, even though the agreement existed.

### 1.1.8 JUDICIAL SYSTEM IN KOSOVO

As a result of the ethnic conflict between the Serbs and the Albanians in Kosovo, there was a NATO military intervention against the Federal Republic of Yugoslavia. Later the agreement governing a withdrawal of Yugoslav armed forces was concluded between these parties. In 1999, the UN Security Council adopted a resolution which placed Kosovo under a temporary United Nations Administration (UNMIK). The administration passed a regulation, creating mixed panels with the participation of international judges and prosecutors.

The UNMIK does not specify which crimes should be tried by the panels, but provides this option in case of a doubt about the impartiality of a process. In the case of trying “serious crimes”, the prosecutor, defendant and defence counsel are entitled to ask the UNMIC for the involvement of international judges or prosecutors. [6, p. 11–12] That is how the panels in Kosovo differ from the Special Panels in East Timor, which have special material jurisdiction. In Kosovo, there are national courts completed by international judges.

### 1.1.9 SUPREME IRAQI CRIMINAL TRIBUNAL<sup>12</sup>

After a military intervention in Iraq and the fall of Saddam Hussein in 2003, the former Iraqi President was captured. When considering how the perpetrators of the crimes which occurred in Iraq could be tried, there were several options.

One of the options was the creation of a court by a decision of the UN Security Council, using the same model as the ICTY and ICTR, but they are relatively costly and slow. The next option was the establishment of a court, following the example of the Special Court for Sierra Leone. But this type of a court is not funded from the UN budget, so there may arise some problems with financing it. Also, if there is a court which was not constituted by a UN Security Council resolution under the Chapter VII,

---

<sup>12</sup> The former Iraqi Special Tribunal for Crimes Against Humanity.

states are not obliged to cooperate with the court. And finally, the Iraqi party insisted on engaging the Iraqi judiciary and also keeping the death penalty, which practically eliminated the option of creating an international tribunal.

So the Statute of the court was adopted by passing a law. The **jurisdiction** of the court includes the period from 17 July 1968 to 1 May 2003, and applies both to Iraqi nationals, and those who are resident in the territory of Iraq. [76] The subject-matter jurisdiction covered genocide, crimes against humanity, war crimes and three crimes under Iraqi law. Definitions of the first three mentioned crimes are essentially adopted from the Statute of the International Criminal Court. The crimes under Iraqi law include manipulating the judiciary, squandering national resources, and last but not least, the use of armed force against an Arab country.

It is interesting that the latter is actually a crime against peace, or more precisely, a crime of aggression. An international element is represented by the possibility for the judges to use the decisions of international courts for interpretation. Although the appointment of a non-Iraqi judge by the government is allowed if necessary, the statute states that the judges should be Iraqi nationals. Foreign experts may be called up as advisers.

## 1.2 JUSTIFICATION FOR THE NEED FOR A PERMANENT JUDICIAL INSTITUTION

When looking comprehensively at the *ad hoc* criminal tribunals, we discover that except for the postwar military tribunals which were constituted by multilateral international agreements, but practically unilaterally, there are three types of international criminal tribunals according to the method of their establishment since the 1990s. The first is the creation of a court by a resolution of the UN Security Council under Chapter VII (the ICTY, ICTR, STL). The second is the establishment of a court by an agreement made between the UN and the government of a certain state (the SCSL, the Extraordinary Chambers in the Courts of Cambodia), and the last is the formation by interim administration under the UN (East Timor, Kosovo). [6,

p. 11–13] The Iraqi criminal tribunal is rather a national court with certain international elements.

The courts that focus on a single conflict can see the local specifics of a particular conflict better, and they are not located far from victims. However, they need to be established individually and the political will for it may be lacking. In contrast, a permanent international court has stability and uniformity of approach. [71]

After the end of the Second World War, it seemed that the crimes committed were some kind of an excess. The international community hoped that nothing like that would ever happen again. But it was mistaken. During the second half of the 20th century, similar or different extremely serious crimes occurred repeatedly in different parts of the world. In some cases the international community responded by creating the above described *ad hoc* international criminal tribunals. However, they were constituted only for the bloodiest cases. It is important to point out that many other crimes went unpunished mainly due to various political interests of world powers. Considering that, unfortunately, these events have been registered repetitively, it is necessary to respond to the worst crimes systematically.

Albert Einstein once said: “*The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing.*” [42] *Ad hoc* tribunals are often criticised for their retroactive creation, and for the fact that they incorporate a certain element of imposition. Based on experience with prosecuting crimes under international law, the international community came to the conclusion that it was necessary to establish a permanent International Criminal Court with clearly defined jurisdiction. The establishment of such a court would be based on a multilateral international agreement, which individual countries could join on a voluntary basis.



## **2. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

As mentioned above, the first proposals of establishing a permanent international criminal court were made as early as in the interwar period.<sup>13</sup> In reality, the international community approached the creation of such a judicial body after the end of the Cold War, enhanced by the experience of the first half of the 1990s. The court was not established by the UN Security Council resolution but on the basis of an open international treaty. Although the treaty represents a certain interference in the state's sovereignty, the states may freely decide to ratify the treaty and thereby accept the jurisdiction of the court. It is obvious that the role of international law is currently becoming more important. There is a widespread belief that some issues should be solved by the international community as a whole. This open multilateral international treaty is the Rome Statute of the International Criminal Court.<sup>14</sup>

### **2.1 ESTABLISHMENT AND CHARACTER OF THE COURT**

In 1990 and then again in 1991, the UN General Assembly asked the International Law Commission to analyse the problems connected with international criminal jurisdiction, and the possible establishment of an international criminal court. In 1995, the General Assembly formed a Preparatory Committee, a so-called PrepCom. The objective of the Committee was to create a draft of a treaty establishing the court. The activities of the Preparatory Committee were in progress until 1998 when the Conference of

---

<sup>13</sup> For example, under the Convention for the Prevention and Punishment of Terrorism of 1937 an international tribunal should have been established. The tribunal should have tried the perpetrators of terrorist attacks who had not been tried by national courts. However, the Convention has never entered into force because of the low number of ratifications.

<sup>14</sup> In the text thereafter, the Rome Statute is often referred only as the Statute and the International Criminal Court as the Court, or as ICC (International Criminal Court), a generally used abbreviation.

Plenipotentiaries on the Establishment of an International Criminal Court took place.

At the heart of the disputes within the Preparatory Committee were issues related to the jurisdiction and the institution of proceedings. Permanent members of the UN Security Council, with the exception of Great Britain, especially the USA, France, Russia and China, but also Israel and most of the Arab states, pressed for the wide control of the Court performed by the UN Security Council and objected to the establishment of an independent prosecutor. So-called like-minded states protested against this and they argued for an independent prosecutor and a minimal role of the UN Security Council. [99] These states advocated rather for the concept of an independent court.

The diplomatic Conference of Plenipotentiaries was held in Rome where the Rome Statute of the International Criminal Court was adopted on 17 July 1998. Seven countries voted against the proposal, 21 abstained from voting and 120 endorsed the proposal. [84] Although in accordance with Art. 120 of the Statute there must be at least 60 ratifications for legal effect, the first ratifications passed relatively quickly, and **on 1 July 2002 the Rome Statute of the International Criminal Court came into force.**

In September 2002, in accordance with a provision of the Statute there was a meeting of the Assembly of States Parties which passed two key documents. These are the Elements of Crimes and the Rules of Procedure and Evidence. The Court budget was also approved. At the beginning of the following year, the first 18 judges were appointed, and after that also the Chief Prosecutor, an Argentinian, Luis Moreno-Ocampo.

## **2.2 STRUCTURE OF THE ROME STATUTE**

The Rome Statute of the International Criminal Court is relatively well-structured. It has 128 articles, which are thematically divided into 13 parts. Of course, at the beginning there is a **preamble**, which summarises the reasons for the creation of the Court and its mission, emphasising respect for international justice. It is interesting that even the preamble mentions the

complementarity principle with respect to national jurisdictions. In the following subsections certain essentials of the Statute are going to be briefly mentioned. To increase clarity, the subsections are numbered analogically with the particular parts of the Rome Statute.<sup>15</sup>

### 2.2.1 ESTABLISHMENT OF THE COURT

The Rome Statute established the International Criminal Court. It is a permanent institution which has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute, and it is complementary to national criminal jurisdictions. The seat of the Court is at The Hague, but the Court may sit elsewhere when necessary. The Court has international legal personality. The relationship between the Court and the UN shall be regulated through an agreement concluded by them.

### 2.2.2 JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Part II of the Statute regulates the jurisdiction of the Court, the questions of admissibility; that is the principle of complementarity, and also applicable law. In this respect it represents **the very core** of this international treaty in terms of content. As for jurisdiction, the Statute exhaustively enumerates and specifies the particular crimes which fall within the jurisdiction of the Court. It also regulates the temporal, territorial and personal jurisdiction of the Court and the so-called trigger mechanism, which determines particular variations of an initiation of an investigation. Furthermore, this section addresses the question of admissibility before the Court, which is governed by the principle of complementarity. It states that the crimes mentioned should be primarily investigated and prosecuted by a particular state. Last but not least, it determines the law that the Court is authorised to use for decision making. Due to the importance of these rules, the regulation of the above-mentioned provisions is subject to its own Chapter 3 of this work.

---

<sup>15</sup> The text of the Rome Statute is given in Annex No. 1 of this publication.

Apart from these rules, Part II provides for a **deferral** of investigation or prosecution. The proceedings may be stayed for 12 months after the Security Council has requested the Court to that effect, by a resolution adopted under Chapter VII. This can be done repeatedly. The principle *ne bis in idem* is grounded here as well. Yet there are two exceptions to this principle determining when the Court may hear the case which has been already investigated by a national court. For one thing, it covers situations when the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility for crimes, and for another, situations when the proceedings of the national court were not conducted independently or impartially.<sup>16</sup>

### 2.2.3 GENERAL PRINCIPLES OF CRIMINAL LAW

Furthermore, the Statute regulates the general principles that are considered to be an essential part of criminal law, ensuring that the process is fair. The Statute expressively provides for the principle of *nullum crimen sine lege, nulla poena sine lege, in dubio pro reo*, non-retroactivity and prohibition of applying the law by analogy to the detriment of the accused. As for individual criminal responsibility, a person is criminally responsible if that person:

- Commits such a crime, whether as an individual, jointly with another or through another person;
- Orders, solicits or induces the commission of such a crime;
- Aids, abets or otherwise assists in its commission;

---

<sup>16</sup> *Ne bis in idem* applies to the ICC in the case that a national court duly qualifies the crime as a crime under the Statute. It does not apply to the situation when a national court does not duly make such a determination, although it should have been made. On the contrary, if the ICC, having fulfilled the conditions for the jurisdiction, decided that the act committed was a crime under the Statute in a verdict of guilty, the principle *ne bis in idem* would apply here, with respect to a national court. It does not apply in case of an acquittal, stating that the act concerned does not constitute a crime under the Statute. In such a case a national court may investigate the act, but it cannot qualify it as a crime under Statute, but only as a crime of a different nature. [79]

- In any other way intentionally contributes to the commission of such a crime.

A military commander or his or her superior is criminally responsible for crimes committed by forces under his or her effective command and control. The crimes within the jurisdiction of the Court are not subject to any statute of limitations and as for a mental aspect of a crime, an offender must act with intent and knowledge.<sup>17</sup> The grounds for excluding criminal responsibility are mental disease or defect, self-defence, distress, and a temporary insanity caused by intoxication, unless the person has become voluntarily intoxicated, and was aware of the possible risk of his or her subsequent conduct. Another substantive provision is the one stating that the fact that a crime has been committed by a person pursuant to an order of a Government or a superior does 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 order was unlawful; and
- The order was not manifestly unlawful.<sup>18</sup>

The very fundamental principle of international criminal law is defined in Art. 27 of the Statute which regulates **immunities**,<sup>19</sup> or rather the irrele-

---

<sup>17</sup> Within the Anglo-American system, the doctrine describes it as *actus reus* (guilty act) and *mens rea* (guilty mind), which within the Continental concept corresponds, in terms of content, with subjective and objective aspect of a crime. [4, p. 3]

<sup>18</sup> For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

<sup>19</sup> Generally, in public international law there is a distinction between functional immunity (*ratione materiae*) and personal immunity (*ratione personae*). The functional immunity covers the actions committed while executing office, so it does not cover personal actions, and it is perpetual. The personal immunity applies to personal actions, but only for the period in office. In 1998, when the former Chilean dictator, Augusto Pinochet, arrived in Great Britain, there had been an arrest warrant issued against him by the Spanish authorities. During the extradition proceedings, the British judges, or law lords, examined whether Pinochet had functional immunity. The essence of the dispute was whether torture and inhuman treatment can be considered a part of discharge of office, provided that this has been committed by a Head of a State. If so, the functional immunity should theoretically remain untouched. It should be mentioned that particular lords had different opinions. The situation can be pro-

vance of official capacity. It means that the Statute applies equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the Statute.

#### 2.2.4 COMPOSITION AND ADMINISTRATION OF THE COURT

The Court is composed of the following organs: the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor and the Registry. With the exception of a possible increase in the number of judges, there are 18 judges of the Court. The judges are admitted at the meeting by a vote of two thirds of the members of the Assembly of States Parties. A candidate for a judge must be a recognised expert either in the field of criminal or international law. A judge is impartial and holds office for a term of nine years with no possibility of re-election. The President and the First and Second Vice-Presidents are also elected. The Appeals Division is composed of the President and four other judges, the Trial Division of not less than six judges. The Appeals Chamber consists of all the judges of the Appeals Division, Trial Chamber of three judges of the Trial Division and the Pre-Trial Chamber either of three judges or of a single judge.

The Statute also governs the Office of the Prosecutor, the Registry, removal from office, disciplinary measures and privileges and immunities which are necessary for the fulfilment of the Court's purposes. The Rules of Procedure and Evidence enter into force if adopted by a two-thirds majority of the members of the Assembly of States Parties. Amendments to the Rules are adopted through the same procedure. The judgements of the Court are published in the official languages, which are Arabic, Chinese,

---

bably understood as an execution of public function, but not a legitimate one. And regarding the fact that it is a crime under international law, the functional immunity does not cover such an act. Eventually, the extradition proceedings were abandoned with respect to Pinochet's ill health.

English, French, Russian and Spanish. The working languages of the Court are English and French.

### 2.2.5 INVESTIGATION AND PROSECUTION

The Prosecutor, having evaluated the information made available to him or her, initiates an investigation. The Statute regulates the duties and powers of the Prosecutor and also the rights of persons during an investigation. The Prosecutor submits to the Pre-trial Chamber a request for authorisation of an investigation, together with any supporting material collected. The Pre-Trial Chamber examines the request and may authorise the commencement of the investigation. Then the Prosecutor initiates the investigation unless he or she determines that there is no reasonable basis to proceed. In that case the Prosecutor informs the Pre-Trial Chamber, the State, or the UN Security Council. At the request of the above-mentioned subject or on its own initiative, the Pre-Trial Chamber may reconsider that decision.

If an investigation proceeds, the Pre-Trial Chamber may issue a summons for the person to appear at the request of the Prosecutor. The person is then arrested in the custodial state and brought before the Court. Then the initial proceedings before the Court begin and the person is informed of the crimes which he or she is alleged to have committed. Before the Trial has begun, the person is granted an interim release or put into custody. Also, prior to the Trial, the Pre-Trial Chamber holds a hearing to confirm the charges at the request of the Prosecutor or on its own motion. At the hearing the Prosecutor presents evidence and the person may object to the charges or challenge the evidence. After the hearing, the Prosecutor asks for the commencement of the Trial. After possible confirmation of charges, the Presidency constitutes a Trial Chamber which is responsible for the conduct of the subsequent proceedings.

### 2.2.6 TRIAL

The accused is present during the whole Trial and the Court is obliged to ensure a prompt hearing, conducted impartially, and the protection of

victims and witnesses. The trial is held in public, and the principle of presumed innocence is respected. When the accused makes an admission of guilt, the Trial Chamber determines whether the admission is supported by the facts of the case. The Statute also governs the rights of the accused, the protection of victims and witnesses, the reparations to victims and other rules of a procedural character. In accordance with the Statute, the judges should attempt to achieve unanimity in their decision. If they fail to do so, the decision is taken by a majority of the judges. The decision must be in writing, and must contain the reasoned statement of the Trial Chamber's findings and alternatively the view of the minority of the judges.

### 2.2.7 PENALTIES

The Court may impose on a person convicted of a crime, referred to in Article 5 of the Statute, imprisonment for a specified number of years, which cannot exceed a maximum of 30 years, or a term of life imprisonment. In addition, the Court may order a fine and a forfeiture of proceeds, property and assets derived directly or indirectly from that crime.<sup>20</sup> A person convicted of more than one crime will be sentenced for each crime in a joint sentence specifying the total period of imprisonment.

### 2.2.8 APPEAL AND REVISION

An appeal against a decision of acquittal or conviction or against a sentence can be made. The Prosecutor appeals on the grounds of procedural error, error in fact or error in law. The convicted person, or the Prosecutor on that person's behalf, may make an appeal also on any other ground that affects the fairness or reliability of the proceedings or decision. In principle, an appeal does not have suspensive effect. If the Appeals Chamber recogni-

---

<sup>20</sup> A Trust Fund is established for victims of the crimes which fall within the jurisdiction of the Court, and for family members of the victims. The Court may order a transfer of money or other property which has been obtained from fines and forfeitures of property in favour of this Trust Fund.

ses the request for the appeal as legitimate, it may reverse or amend the decision, or order a new trial before a different Trial Chamber.

The Prosecutor and the convicted person, or after death another stated person, may apply to the Appeal Chamber to revise the final judgement if new evidence has been discovered that was not available at the time of trial, and it is sufficiently important to give grounds for a different verdict. Also in the case that it has been newly discovered that decisive evidence was false or there has been an abuse of authority. Anyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation. A person convicted of a crime has the same right when subsequently his or her conviction has been reversed.

### 2.2.9 INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

States Parties make a commitment to fully cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. The Court may invite any State not party to the Statute to provide assistance on the basis of an *ad hoc* arrangement.<sup>21</sup> The Court cannot proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State. The costs for executing requests on the territory of the requested State are divided between that State and the Court, according to specification in the Statute. The Statute also contains a rule of speciality, which means that a person surrendered to the Court cannot be prosecuted for any conduct committed prior to surrender, other than the conduct which forms the basis of the crimes for which that person has been surrendered.

---

<sup>21</sup> If that state concludes such an agreement with the Court, but does not cooperate, the Court may inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council. The Court may submit a request for the arrest and surrender of a person to any state where the person is located, and ask that state for cooperation in the arrest and surrender of such a person.

## 2.2.10 ENFORCEMENT

A sentence of imprisonment is served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. The Court may decide to transfer a sentenced person to a prison in another state. The enforcement of a sentence of imprisonment is subject to the supervision of the Court and must be consistent with widely accepted international treaty standards governing the treatment of prisoners. In no case can such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court reviews the sentence to determine whether it should be reduced. The Court may reduce the sentence if there is the early willingness of the person to cooperate, the voluntary assistance of the person in enabling the enforcement of the judgement and orders of the Court in its other investigations or other relevant factors.

## 2.2.11 ASSEMBLY OF STATES PARTIES

The Statute establishes the Assembly of States Parties. Each State Party shall have one representative in the Assembly and other States may be observers. The Statute governs the powers of the Assembly which meets once a year and when circumstances so require. The Assembly has a Bureau which has a representative character and assists the Assembly in the discharge of its responsibilities. Each State Party has one vote. Every effort should be made to reach decisions by consensus. If consensus cannot be reached, decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting, whereas decisions on matters of procedure are taken by a simple majority of States Parties present and voting. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court has no right to vote.

### 2.2.12 FINANCING

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, are paid from the funds of the Court. The funds are created by assessed contributions made by States Parties and funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget. The Court may receive also voluntary contributions.<sup>22</sup>

### 2.2.13 FINAL CLAUSES

No reservations can be made to the Statute. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. Any other dispute between two or more States Parties relating to the interpretation or application of the Statute which is not settled through negotiations within three months of their commencement is referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice.

As for amendments, after the expiry of seven years from the entry into force of the Statute, any State Party may propose amendments.<sup>23</sup> In that case a majority of those present and voting decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference. The adoption of an amendment which does not refer to definitions of the crimes requires a two-thirds majority of States Parties. An amendment enters into force for all States Parties one year after instru-

---

<sup>22</sup> Voluntary contributions may be accepted from governments, international organisations, natural persons, legal persons and other subjects, in accordance with the criteria adopted by the Assembly of the States Parties.

<sup>23</sup> Regarding the fact that the Statute entered into force on 1 July 2002, the seven years passed on 1 July 2009.

ments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them. If an amendment has been accepted by seven-eighths of States Parties, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect.

Any amendment to Articles 5, 6, 7 and 8 that include the crimes will enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court does not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.<sup>24</sup> The amendments of an exclusively institutional nature are adopted by a two-thirds majority of States Parties.

According to the Statute, seven years after its entry into force, a Review Conference shall be convened to consider any amendments to the Statute, and among other provisions, the list of crimes contained in Article 5 may be reviewed.<sup>25</sup> As provided by the Statute, a State on becoming a party to the Statute may declare that for a period of seven years it does not accept the jurisdiction of the Court with the respect to the category of war crimes. The Statute is open to accession by all states. It was supposed to come into force after a certain time following the date of the deposit of the 60th instrument of ratification. The Statute became effective on 1 July 2002. A State Party can withdraw from the Statute by written notification ad-

---

<sup>24</sup> Through interpretation of that provision a conclusion can be drawn that nationals of a Non-Party State who can fall within the jurisdiction of the Court on the basis of committing the crime on the territory of a State Party (that is, on the grounds of territorial jurisdiction) would not fall within the jurisdiction if that Non-Party State became a State Party and did not accept the amendment. Paradoxically, it could be more convenient for the State that avoids the jurisdiction over the crime that is only about to be incorporated to become a State Party, and thus "protect" its nationals against the amended jurisdiction of the Court on the territory of a State Party. If it does not become a State Party, it has no such possibility. The question is whether this was intended by the authors of the Statute. But this theorization loses relevance with regard to the new definition of the crime of aggression which contains the provision according to which the Court has no jurisdiction over nationals of Non-Party States (even on the grounds of territorial jurisdiction).

<sup>25</sup> This provision refers to the intent to define the crime of aggression so that the crime could fall within the jurisdiction of the Court. More about this issue in chapter 7.

dressed to the Secretary-General of the United Nations. The withdrawal takes effect one year after the date of receipt of the notification. The Arabic, Chinese, English, French, Russian and Spanish texts of the Statute are equally authentic.



### 3. JURISDICTION OF THE COURT

The provisions relating to the jurisdiction of the Court are the core of the whole Statute and they are located in Part II. The basic prerequisite for exercise of powers of the Court is ratification of the Statute. The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. Those crimes are exhaustively defined, for purposes of determining the subject-matter jurisdiction.

#### 3.1 RATIONE MATERIAE

The crimes mentioned in Art. 5 of the Statute fall within the scope of the subject-matter jurisdiction of the Court. This jurisdiction cannot be extended in any case, either by analogy or by using another legislation outside the Statute.<sup>26</sup> In accordance with Art. 5 of the Statute, the Court has jurisdiction with respect to the following crimes:

- ⇒ The crime of genocide
- ⇒ Crimes against humanity
- ⇒ War crimes
- ⇒ The crime of aggression

The individual crimes are defined in the following provisions and the definitions are further specified in a document called the Elements of Crimes adopted by the Assembly of the States Parties. The Court will exercise jurisdiction over the crime of aggression in accordance with Art. 5, par. 2, once a provision is adopted, defining the crime and setting the conditions for the exercise of jurisdiction of the Court with respect to this crime. From the beginning, the Court has had jurisdiction only over the first three above-mentioned crimes.

---

<sup>26</sup> Article 21 of the Statute regulates applicable law of the Court which, besides the Statute, accepts other sources. But the provisions of the Statute must not be evaded by subsidiary use of those sources.

### 3.1.1 GENOCIDE

The crime of genocide is specified in Art. 6 of the Statute, stating that genocide is understood 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:

- 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 group.

The concept of genocide was used for the first time in the book *Axis Rule in Occupied Europe* by a Polish lawyer, Raphael Lemkin in 1944. As early as 1948, a Convention on the Prevention and Punishment of the Crime of Genocide was concluded. [5, p. 91] The definition of genocide pursuant to this Agreement is generally accepted, so it was adopted by a provision of the Statute.

### 3.1.2 CRIMES AGAINST HUMANITY

Crimes against humanity are defined in Art. 7 of the Statute. In accordance with the Statute, crimes against humanity are understood as 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 in violation of fundamental rules of international law;

- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious or gender grounds;<sup>27</sup>
- Enforced disappearance of persons;
- The crime of apartheid;
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The Article also specifies certain key terms. There is a general condition for the application of Art. 7, the attack directed against civilian population must be widespread and systematic. This means that isolated acts of violence do not constitute a crime against humanity, but only a compound act. [83] That is what differs the crimes under the Statute from other criminal acts that are not part of a widespread and systematic attack.

### 3.1.3 WAR CRIMES

War crimes are regulated in Art. 8 of the Statute. Pursuant to Art. 8, the Court has jurisdiction with respect to war crimes **in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes**.<sup>28</sup>

- Grave breaches of the Geneva Conventions of 12 August 1949 (wilful killing, torture or inhuman treatment, wilfully causing great suffering, extensive destruction and appropriation of property, compelling a prisoner of war to serve in the forces of a hostile Power,

---

<sup>27</sup> Also on other grounds that are universally recognised as impermissible under international law.

<sup>28</sup> In order to preserve lucidity of the text, particular crimes are given demonstratively in brackets.

wilfully depriving a prisoner of war of the rights of fair trial, unlawful deportation, taking of hostages);

- Other serious violations of the laws and customs applicable in international armed conflict;
 

(intentionally directing attacks against the civilian population, against civilian objects, against personnel involved in a humanitarian assistance or peacekeeping mission etc.);<sup>29</sup>
- 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
 

(acts committed against persons taking no active part in the hostilities, including combatants who have laid down their arms etc.);
- Other serious violations of the laws and customs applicable in armed conflicts not of an international character
 

(intentionally directing attacks against the civilian population, against personnel involved in a humanitarian assistance or peacekeeping mission etc.).<sup>30</sup>

This Article is structured in such a way that the first two clauses regulate international armed conflict, and the other two so-called internal armed conflict, that is a civil war.<sup>31</sup> The Statute applies to the crimes mentioned in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. However, the use of the term “in particular” shows that in certain circumstances individual war crimes may also be prosecuted. The article above shows that a relatively broad definition of war crimes was enforced in the Statute. The major part of provisions has its origin in the already concluded Conventions, the rest in customary international law of war. The Statute was the first to qualify a breach of international humanitarian rules during an internal armed conflict as a crime punishable under international law. [83]

---

<sup>29</sup> Within this item also fall 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. [12]

<sup>30</sup> This item No. 4 has its origin in Additional Protocol II of 1977.

<sup>31</sup> Except for internal disturbances, that is, internal conflicts of a lower intensity.

### 3.1.4 AGGRESSION

At the time of formulation of the Statute, there was no apparent consensus of the international community about the legal regulation of the crime of aggression. Although the crime is mentioned in Art. 5 of the Statute, it is not specified, so **the Court lacks jurisdiction over the crime of aggression**. But the Statute itself took into account the fact that seven years after the entry into force of the Statute a Review Conference would be convened. A definition of the crime of aggression would be adopted and subject-matter jurisdiction of the Court would be extended at the meeting. Analysis of the results of the Review Conference and the newly adopted definition of the crime of aggression is treated separately in Chapter 7.

## 3.2 RATIONE PERSONAE

The personal jurisdiction of the Court is regulated in Art. 12, and 25 to 28 of the Statute. The jurisdiction is permanent and applies to **all natural persons who at the time of committing a crime had reached the age of eighteen years**. The Statute makes no exception to jurisdiction and no immunity on the grounds of political or another function prevents the exercise of jurisdiction against such a person. The relationship between personal jurisdiction and the need to be a national of a State Party will be explained in the following subsection.

On the part of France, jurisdiction over legal persons was also suggested in the proposed text, but it was not enforced. Another topic discussed was whether the jurisdiction against juveniles should be covered by the Statute. But it turned out to be impossible in terms of time. [98, p. 214] However, this does not prevent the States from trying juvenile offenders internally. If the conduct of juvenile offenders constitutes a substantial problem in the future, it is theoretically possible that, regarding this matter, potential changes to the text of the Statute will be discussed.

### 3.3 RATIONE LOCI

Territorial jurisdiction of the Court together with personal jurisdiction is regulated in Art. 12 of the Statute. According to Art. 12, if an investigation is initiated by the Prosecutor or by a State Party, the Court may exercise its jurisdiction provided that one or more of the following States are Parties to the Statute:

- The State on the **territory** of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- The State of which the person accused of the crime is a **national**.

Also, a State not party to the Statute may accept jurisdiction of the Court on the basis of an *ad hoc* arrangement. Generally, it would seem logical if the Court had universal competence and could investigate the crimes regardless of the place where they have been committed. Nevertheless, the principle of universal competence was not enforced because it would mean a limitation to the sovereignty of States. The principle of the States acceding to the Statute and thereby accepting its jurisdiction on a voluntary basis was adopted instead.

The Court, therefore, has jurisdiction over the crimes which were committed on the territory of a State Party (**principle of territoriality**) and also over the crimes committed by its nationals (**active personality principle**). [98, p. 215] An important conclusion can be drawn from this, based on the principle of territoriality, i.e. that a national of a State not party to the Statute can fall within the jurisdiction of the Court.

This was the main reason for criticism on the part of the USA which, regarding its troops deployed abroad, disapproved of this fact. On the other hand, even the combination of the principle of territoriality and the active personality does not enable the jurisdiction over the crimes which a certain Non-Party State commits against its own population. But in such a case, the proceedings may be initiated by the UN Security Council, which is explained in subsection 3.5.

### 3.4 RATIONE TEMPORIS

According to Art. 11, in connection with Art. 126 of the Statute, temporal jurisdiction of the Court covers only the **crimes which have been committed since 1 July 2002**, the date of commencement of the Statute. If a State becomes a Party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State. However, there is an exception under Art. 12, par. 3, according to which a State not party to the Statute may accept the *ad hoc* jurisdiction of the Court. The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

### 3.5 TRIGGER MECHANISM

The methods of initiation of an investigation are regulated in Art. 13 of the Statute, according to which the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 if:

- The situation in which crimes appear to have been committed is referred to the Prosecutor by a **State Party**;
- The **Prosecutor** has initiated an investigation in respect of such a crime;
- A situation in which crimes appear to have been committed is referred to the Prosecutor by the **Security Council** acting under Chapter VII of the Charter of the United Nations.

These are the three possibilities of initiating an investigation. A matter of dispute was primarily whether to enable the Prosecutor to commence an investigation on his or her own initiative. Eventually a compromise was reached, where the Prosecutor has this opportunity but he or she has to submit a request for authorisation of an investigation to the Pre-Trial Chamber, together with any supporting material collected. [87]

As far as the three above-mentioned alternatives are concerned, **it is necessary to point out the key difference between the first two and the**

**third way of initiating an investigation.** If an investigation is initiated by a State party or the Prosecutor, the Court has jurisdiction only over the crimes committed on the territory of a State Party or over its nationals, in conformity with the principle of territoriality and active personality. However, in the case of the commencement of an investigation at the initiation of the Security Council through a resolution adopted under Chapter VII of the UN Charter, the Court has jurisdiction also over the crimes committed on the territory of a State not party to the Statute and its nationals. For instance, the investigations of crimes in Sudan and Libya, which are Non-Party States, were initiated by the UN Security Council.

### 3.6 PRINCIPLE OF COMPLEMENTARITY

Questions of admissibility are regulated in Art. 17 of the Statute. Pursuant to this Article, 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 case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- The person concerned has already been tried for conduct which is the subject of the complaint (except for cases, as stated in Art. 20 par. 3 of the Statute, where the proceedings in the other court were for the purpose of shielding the person concerned from the jurisdiction of the Court, or were not conducted independently or impartially);
- The case is not of sufficient gravity.

As opposed to earlier *ad hoc* international criminal tribunals, **the Court operates on the basis of the principle of complementarity. This means that the crimes within the jurisdiction of the Court should be primarily investigated at national level. Only if this is for certain reasons not possible, the Court may start to investigate the case.**

The tribunals of the 1990s had jurisdiction based on the principle of concurrence, whereas the Statute regulates the jurisdiction of the Court without having to demonstrate the failure or inadequacy of the domestic system. [5, p. 175] The Statute also specifies the circumstances when it is possible to decide that the State is unwilling or unable to carry out the investigation. In accordance with Art. 19 of the Statute, the admissibility of a case may be challenged by an accused or a State concerned. According to the stage of trial, challenges to admissibility are decided by the Pre-Trial Chamber or the Trial Chamber, or alternatively the Appeals Chamber.

### 3.7 APPLICABLE LAW

Determination of the sources of law which can be applied by the Court undoubtedly has a substantial importance for the legality and functioning of the Court. As hierarchically provided for in Art. 21 of the Statute, the Court shall apply:

- In the first place, **the Statute, Elements of Crimes and its Rules of Procedure and Evidence**;
- In the second place, where appropriate, **applicable treaties and the principles and rules of international law**, including the established principles of the international law of armed conflict;
- Failing that, **general principles of law** derived by the Court from national laws of legal systems of the world.<sup>32</sup>

The Court may apply principles and rules of law as interpreted in its previous decisions, and so respect its own established case law. The application and interpretation of law must be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, and must be consistent with internationally recognised human rights.

---

<sup>32</sup> Provided that those principles are not inconsistent with the Statute and with international law and internationally recognised norms and standards.



## 4. POSITION OF STATES NOT PARTY TO THE ROME STATUTE

At present there are more than 120 countries in the world which are States Parties to the Statute. [61] As for the states which **support** the creation and operation of the Court, those are Canada, Australia, the states of South America, Central and Southern Africa, and above all, European countries. It is the **European Union** which plays an important role in this context, as its active support of the Court is one of the priorities of the Common Foreign and Security Policy.

With respect to the universality of the functioning of the International Criminal Court, the role of permanent members of the UN Security Council is very important, since each of them has veto power which can block the adoption of any resolution. Only the Security Council is authorised to initiate proceedings in a State not party to the Statute, based on a resolution under Chapter VII. That is why it is necessary for the universality of the operation of the Court that the permanent members of the Security Council look with favour on it. Great Britain and France are States Parties, as opposed to Russia, China and the USA, who have not yet ratified the Statute. From the beginning, the USA led the opposition against the Court.

### 4.1 POSITION OF THE USA

Even though the USA actively participated in drafting up the text of individual provisions, the **final form of the Statute has broader jurisdiction than the delegation of the USA advocated**. Thanks to the combination of the principle of territoriality and active personality, the Court also has jurisdiction over the nationals of Non-Party States provided that they commit a crime in the territory of a State Party. The fundamental idea of the Court is definitely consistent with the position of the USA, as during the 20th century the USA a number of times fought against the regimes which violated human rights on a large-scale. The pragmatic reason for

rejecting the Court's jurisdiction is mainly the protection of American troops abroad, or rather the concern that the jurisdiction of the Court could be misused against them.

On the last day of December 2002, less than a month before the end of his period in office, the American President, Bill Clinton, signed the Rome Statute. However, the treaty would have come into force after its ratification by Senate. But he advised his successor not to submit the Statute to the Senate. [18] The American side required that American soldiers participating in military missions all over the world were not subject to the jurisdiction of the Court. [89] But this was against the principle of territoriality enshrined in Art. 12, par. 2, of the Statute.

The following administration of George W. Bush withdrew the signature and **started openly arguing against the International Criminal Court**. It began to conclude bilateral agreements with as many states as possible about not committing American nationals to the Court. Also on the ground of the UN, the USA enforced the UN Security Council resolutions excepting the member of peacekeeping operations of States not party to the Statute from the jurisdiction of the Court.

In 2002 the American Service-Members' Protection Act was adopted. It gave the President of the USA the power to use "*all means necessary and appropriate*" to ensure that all detainees by the Court are released.<sup>33</sup> This Act also prohibits providing military help to the States Parties to the Statute, with the exception of the States Parties to NATO, unless they have entered into the aforementioned bilateral agreement with the USA. Later, economic assistance to such states was also reduced. At the present time it is possible that the members of American forces may be subjects to a potential investigation of the Court on condition that the USA provides a mission with their own personnel, the mission takes place in the territory of a State Party to the Statute and no other court (e.g. the ICTY) enjoys priority over the case. [73]

It is necessary to note that the government has changed its very critical attitude because in 2005 it enabled, by not using a veto power, the adoption of a UN Security Council Resolution No. 1593 referring to the situation in

---

<sup>33</sup> It is colloquially referred as *The Hague Invasion Act*.

the Darfur region of Sudan. It allowed the Court to start an investigation of crimes in this Non-Party State. Hereby the USA expressed, for pragmatic reasons, that in a way it respects the Court. In connection with the subsequent change of American administration, the attitude of the USA to the Court has changed to a certain extent. The strategy of rejecting, used during previous years, has been replaced by a so-called policy of positive engagement where the USA as a Non-Party State actively participates in negotiations about further development of the Court. [29]

## **4.2 POSITION OF CHINA AND RUSSIA<sup>34</sup>**

China has not signed the Statute, but on the other hand, it has not opposed it strongly. Contrary to this, Russia signed the Statute in 2002 but has not ratified it yet. Russia does not significantly argue against the Statute either. Nevertheless, both states are wary of it. In the case of Russia, the reason is probably the situation in Chechnya or other separatist areas. In China it can be the situation in Tibet or other regions. To sum up, both states are likely to choose the wait-and-see attitude to make sure that the Court becomes a truly independent institution, free from political influence.

---

<sup>34</sup> See a report [95].



## 5. VALUE OF THE COURT

The International Criminal Court breaks the preconceived notions of the impunity of high-ranking persons, who protect themselves by immunities awarded by national legislation. But it should be pointed out that the Court is not designated only for officials holding a high rank. Anyone who is responsible for a large-scale commission of the above-mentioned crimes can be brought to the Court provided that the Court has jurisdiction over such a person. The whole concept aims to have universal competence over the crimes of concern to the international community as a whole, based on a voluntary accession of all States to the Statute.

### 5.1 ARGUMENTS OF THE OPPONENTS OF THE COURT

Taking into account the fact that some major countries act or acted in the past actively against the Court, it is necessary to name the main reasons for the disapproving approach of the representatives of these states, and follow up the individual arguments. Leaving aside the operating costs of the Court, or rather the potential adverse ratio of cost, the main arguments of the opponents against the Court are the following: [90]

- **Jurisdiction can be exercised over the nationals of third countries**

The USA points out the violation of a principle *pacta tertii nec nocent nec prosunt*, as the national of a Non-Party State falls within the jurisdiction of the Court on condition that the crime is committed on the territory of a State Party to the Statute.

- **Inequality between a contracting party and non-contracting party**

Provided that jurisdiction is extended with new crimes, the Court will not exercise its jurisdiction with respect to a crime covered by the amendment over the nationals of a State Party which has not

accepted the amendment. However, a third State does not enjoy this right.

- **Establishment of *ad hoc* tribunals reflects local specifics better** [71]

A uniform approach is not suitable regarding the fact that every conflict is different and needs to be examined individually.

- **The Court arrogates the role of the Security Council**

An investigation can be initiated, apart from the request of the Security Council, at the request of a State Party or the Prosecutor, so the role of the Security Council is limited.

- **Concerns about politicised Prosecutor**

The Prosecutor may initiate an investigation on his or her own initiative, so the USA is concerned about his or her objectivity and possible politicised decision making.

- **Fear of politicised judges** [94]

In the selection of judges, the need for equitable geographical representation is taken into account, and a right of vote is the same for democratic and non-democratic States Parties to the Statute. So the independence of the judges on their non-democratic governments can not be ensured.

- **The Court may interfere in the judiciary of sovereign states**

In accordance with the principle of complementarity, the Court decides whether national proceedings are independent and impartial.

As far as the **exercise of jurisdiction over the nationals of third countries** is concerned, in my opinion the jurisdiction of the Statute based on the principle of territoriality is not contrary, in the true sense of the word, to the principle *pacta tertiū nec nocent nec prosunt*. It would not be logical if the nationals of a State Party who have committed a certain crime were tried under the Statute whereas other nationals were not prosecuted for the same crime committed in the same territory.

In fact it is not anything new. Each state exercises jurisdiction over persons on its territory even though they are not its nationals. So, if someone travels to a neighbouring country, he or she has to count on the fact that the

laws of the country apply to him or her. As long as the country accepted the norms, or rather the jurisdiction under the Statute, it is necessary to respect this will. Any different attitude would be basically a denial of territorial jurisdiction of a sovereign state.

On the other hand, I consider **the existing inequality between a contracting and non-contracting party** contentious. As is regulated in Art. 121, par. 5, the second clause of the Statute, which governs amendments to the crimes: “*In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.*” So if a national of a Non-Party State commits a crime covered by the amendment on the territory of a State Party, he or she falls within the jurisdiction of the Court. However, if the crime concerned is committed by a national of a State Party, after the State has not accepted the amendment, the Court cannot exercise its jurisdiction over that national. In this way the Statute provides the States Parties with a privileged position in comparison to the States not party to the Statute.<sup>35</sup>

The opinion that a **creation of *ad hoc* tribunals respects local specifics better** is without doubt relevant. The following situation serves as an example. The Court can exercise its jurisdiction over persons older than eighteen years. But in case of the SCSL, with respect to the large amount of juvenile offenders in Sierra Leone, the age limit was set at fifteen years. So the Court would not have jurisdiction over those offenders. On the other hand, nothing prevents states from prosecuting those persons at national level.

However, we have to look at the comparison of those tribunals and the Court in their entirety. Although *ad hoc* tribunals may better reflect the specifics of conflict and are closer to victims, it is necessary to establish them individually every time, and the political will of the Security Council to do so may be lacking. Therefore, a lot of crimes may remain unpunished. Besi-

---

<sup>35</sup> But it should be mentioned, with regard to the adoption of the new definition of the crime of aggression which excludes nationals of Non-Party States from the jurisdiction of the Court with respect to that crime (even on the grounds of the principle of territoriality), that this inequality is tapering off. But the question is whether possible future amendments to the Statute will contain such provisions as well.

des the fact that the Court reflects the principle of non-retroactivity in criminal law better, primarily it ensures a unified approach towards crimes, no matter where they have been committed, and that can certainly be seen as an asset.

The allegation that **the Court arrogates the role of the Security Council** is in my opinion unfounded. The Security Council was established by concluding an international treaty, which is the UN Charter. Any method of an initiation of proceedings by a court, regarding punishment of crimes under international law, is not covered by the Charter. Thus, it is the aim of the Rome Statute to regulate this issue. The States Parties have agreed with the fact that an initiator of proceedings can be, besides the Security Council, also a State Party or the Prosecutor, so no collision occurs here.

Moreover, the UN Security Council is a platform where compromises are negotiated in a complicated manner, so its decision-making is relatively rigid. If proceedings could be initiated only by the UN Security Council, the Court would hear only the cases which the permanent members of the Security Council agreed on, and that would politicise the Court to a certain extent.

**The concerns about the politicised actions of the Prosecutor** could be theoretically pertinent. On the other hand, the regulation of the Statute regarding the Prosecutor's position was adopted on the basis of a certain compromise and the Prosecutor's powers are not too wide. First of all, the Prosecutor is elected by the Assembly of States Parties. Secondly, his or her role is limited by the fact that, before an initiation of a concrete investigation he or she has to submit a request for authorization of an investigation to the Pre-Trial Chamber. In reality, the rather reserved actions of the Prosecutor do not support the concern. For instance, the first Prosecutor refused, regarding the principle of complementarity, to report the British soldiers in Iraq with the explanation that if it was reasonable the cases would be heard by the British courts. [74]

The allegation that the **independence of judges is not ensured** due to the fact that in the process of the election of judges the need for equitable geographical representation is taken into account, and that members of the Assembly of States Parties may be also dictatorial regimes, is in my opinion not very significant. Relevant non-democratic states usually do not rat-

ify the Statute because of the danger of the jurisdiction of the Court, and thus they cannot vote at the meeting of the Assembly.

The next argument is that the Court **may interfere in the judiciary of sovereign states** by determining whether a State is willing or able genuinely to carry out the investigation or prosecution, whether the proceedings are conducted for the purpose of shielding the person from criminal responsibility, or whether the proceedings are or are not conducted independently or impartially. Simply put, that the Court is competent to decide about the fact that national proceedings are conducted objectively.

With regard to this issue, the question is whether the Court is capable of doing so, that is, whether it has adequate capabilities to determine it objectively. But in the case of error, a State or an accused person may challenge the admissibility of the Court, in conformity with Art. 19 of the Statute, or even take an appeal. The challenge to the admissibility is referred to the Pre-Trial Chamber or the Appeals Chamber which considers it.

**To sum up**, the majority of the above-mentioned arguments which are used against the Court can actually be seen as assets. Without them, the Court would be hampered and it could hardly, with its powers limited, contribute to keeping criminal justice within the international community. In contrast to the aforesaid arguments, many authors agree on the fact that it is not very advantageous for the USA to keep aloof. Thanks to the attitude of the USA at the beginning, the USA has been losing its international prestige and authority. [14] Regarding the fact that the Court has jurisdiction over persons based on the principle of territoriality, the USA, by not being a State Party, cannot effectively defend its foreign units against the Court. [21] It would be more advantageous for the USA to accede to the Statute and participate in the control of its functioning, and influence the negotiations including possible drafting of definitions of new crimes.

The principle of complementarity should also be mentioned. If relevant crimes were committed by the members of American foreign forces, the Court would not be involved unless no national proceedings were conducted in the USA. In summary, regarding the fact that the Court already exists and has relatively wide international support, eventually even the world powers will be under pressure to at least respect it. In the long-term scale, it can be expected that they will become involved in its structure.

## 5.2 ARGUMENTS OF THE SUPPORTERS OF THE COURT

In the text above, the often mentioned arguments of the critics of the Court were evaluated. Some of them can be considered relevant, while others not because they criticize the provisions of the Statute without which the Court would practically not be able to operate effectively. Also the arguments in favour of the existence of the Court and accession to the Statute should be evaluated, at least briefly. These are mainly the following:

- **Punishment of crimes and depriving the offender of the capacity to commit further crimes**
- **Description of reality**
- **Giving publicity**
- **Possibility to influence the functioning of the Court**
- **Universal Competence**
- **Prevention**

These arguments mainly refer to the general principles that govern international criminal justice, and to certain specific attributes. As for **the punishment of crimes and depriving the offender of the capacity to commit others**, it should be mentioned that the very core of national and international criminal law contains the idea that the offender should be brought to a fair court and tried in justice according to the gravity of the crime committed. Eventual sentence or imprisonment isolates the offender from society, and thus deprives him or her of the capacity to commit more crimes.<sup>36</sup>

It is also important to point out that justice has an enormous moral importance for victims and for the bereaved, as it reduces their desire for revenge. It is obvious that most likely not all offenders will be always caught. But that is not a reason to resign from justice and not bring anybody to court.

---

<sup>36</sup> The given explanation is, of course, simplified. The purpose of punishment in history was retribution. Nowadays, it is primarily prevention, isolation and reformation of offenders.

Judicial investigation of complex cases also often reveals various unexpected facts and connections which have not been known before. So an investigation helps to objectively **describe the reality** of certain conflicts and brings to light the information that would have remained unknown, which may have a great importance for historical documentation of the events.

When speaking of **giving publicity**, objective and judicially proved information attracts the attention of the general public and influences public opinion. It can be said that the ICTY and ICTR contributed to reduction of popularity of extremist political representatives. Also, the trial with Thomas Lubanga fastened the public attention on the situation of child soldiers in the Democratic Republic of the Congo and neighbouring countries after its commencement.

Regarding the position of states, it is advantageous for them to accede to the Statute because they get **the possibility to influence the functioning of the Court**. That means not only participation in its control, but also the possibility to take part in drafting amendments to the crimes. The problems related to **universal competence** of the Court will be dealt with in a separate subchapter 5.3.

To finish the list of advantages of the creation of the permanent International Criminal Court, I consider it important to mention the purpose which would be the most important if it worked. That is **prevention**, which means the effect of deterrence from committing such serious crimes. It can be said there is no empirical proof of the preventive function of international criminal tribunals. The existence of the Nuremberg Tribunal did not prevent either Pol Pot or Milošević from their actions. On the other hand, it is necessary to distinguish the character of an *ad hoc* criminal tribunal from the permanent International Criminal Court.

In a situation where a dictator controls his actions and is aware of his immunity, supposing that there is no international court which would have jurisdiction over him, he does not have to fear anything. So he may be worried only about the establishment of an *ad hoc* criminal tribunal created to try his actions. But he is probably well aware of the fact that the process of its creation is complicated. And as long as he has superior relations with at least one permanent member of the UN Security Council, he does not have

to worry too much. But the character of the permanent International Criminal Court is different. At present, when the first trials take place, the people who may be investigated in the future are potentially aware of that fact.

For instance, in the Democratic Republic of the Congo the Court has drawn the attention of the public, and it can be presumed that the awareness of responsibility has the potential to change behaviour and control aggression. Of course, it may be objected that there are many conflicts and large-scale acts of violence going on. The country has a subverted justice but it is a State Party to the Statute. Wouldn't there be more mass acts of violence there if it were not for the deterrent effect of the Court? Has it not discouraged at least a few individuals or warlords from committing large-scale crimes? We will never know in an empirical way and we can only speculate about it. However, if so, it would be a rather invisible but great success of the Court.

In my opinion, the preventive function of the Court should not be marginalized. The existence of the International Criminal Court will probably have a bigger preventive function with respect to potential offenders than the existence of a national court for a common offender. Those are often criminals who act very impulsively, controlled by sudden emotions. In that case, a person does not think of the possible consequences of his or her actions.

But instigators and schemers of the crimes within the jurisdiction of the Court tend to be people with a certain status, often very intelligent people, like, for instance, Slobodan Milošević or Radovan Karadžić. This kind of a man has fewer tendencies to act impulsively; he rather has the inclination to make a cool-headed calculation. In that case he will have to rationally take into account that if he commits such an action he can be brought to the International Criminal Court.<sup>37</sup> Because of the potential to prevent certain

---

<sup>37</sup> In the case that a state is not a State Party to the Statute and the crime has not been committed on the territory of a State Party, the case may be referred to the Court if the proceedings are initiated by the UN Security Council. With respect to the situation in Sudan and Libya, this procedure does not seem to be unlikely. But it should be added that for the effectiveness of the exercise of jurisdiction of the Court over nationals of Non-Party States the full support on the part of the UN Security Council is needed in such a case.

mass crimes, I hold the view that **it is actually the preventive function which is one of the crucial assets of the Court.**

### **5.3 UNIVERSALITY**

In the conclusion of this chapter the current situation with respect to achievement of the aim should be evaluated which is included in the very fundamental idea of the International Criminal Court – that is its universal competence. The fundamental idea is that the gravest crimes concern the international community as a whole, no matter where they have been committed. It is necessary to act against these crimes unitedly. So the jurisdiction of the Court is being extended on the basis of a voluntary accession of states to the Statute.

As stated above, at the present time, the States Parties to the Statute in general are European countries, Canada and Australia, South American states and states of Southern and Central Africa. On the other hand, the Statute has not been joined by the USA, Asian and Arab countries. Up to the present time, the Statute has been ratified by more than 120 countries of the world, out of 193 UN member states. So, how has the Court fulfilled the aim which was set? It seems that much more than half the battle is over.

However, it is important to point out that the success on the course to the universal competence of the Court cannot simply be measured by the number of the States Parties or, for example, the size of their territory. Above all, we have to take into consideration the following:

- **The population of individual States**
- **The power factor**
- **The degree of democratic establishment**

Regarding the population, it is important to realize that six out of the ten most populous countries in the world, which are China, India, the USA, Indonesia, Pakistan and Russia, are not States Parties. These six countries alone represent practically a half of the world population. As far as power factor is concerned, the leading world powers have the potential, partly to

influence small states, partly to be naturally followed by them.<sup>38</sup> Last but not least, it is important to remark that not only the size of a state is important, but also the locations which are really endangered by the relevant crimes being committed. Those may be very little countries, as for instance Rwanda was.

The question is whether the States Parties are the states where such acts may happen in reality. Such states are often ruled by non-democratic regimes which do not access the Statute deliberately. The States Parties to the Statute are mainly the states which do not have problems with such crimes anyway.<sup>39</sup> Leaving aside the possibility to initiate an investigation by the UN Security Council, it must be concluded that to the effect of reaching, or rather approaching the universal competence of the Court, a long and difficult journey is still ahead.

On the other hand, with regard to the fact that only during the fifteen years since its creation, the international treaty has been ratified by almost two thirds of all countries of the world, there is a hope that the trend will continue and important world powers will accede to the Statute with other states following them.

---

<sup>38</sup> For example, within the discussion about the ratification of the Rome Statute in the Czech Republic, there were opinions stating that it has no sense to accede to the Statute when even the USA has not joined it.

<sup>39</sup> Of course, some African states represent an important exception.

## 6. REAL CASES OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court entered into force on 1 July 2002. Since that moment the Court has been able to exercise jurisdiction over the crimes of genocide, crimes against humanity and war crimes. The Court has been operating for over ten years now, so it is at least partially possible to evaluate its activity up to now.

The Court is currently intensively occupied with the crimes which have been committed in a number of countries. These are Uganda, the Democratic Republic of the Congo, the Central African Republic, and also Sudan (respectively Darfur), Kenya, Libya and Côte d'Ivoire. Opening of an investigation in Mali is expected. The Court investigates, with respect to temporal jurisdiction, only the crimes which have been committed after 1 July 2002. And due to the number of acts of violence, the Prosecutor restricts the investigation only to high-ranking representatives responsible for large-scale crimes.

In connection with that, it is important to mention that the method of investigation has brought some not quite expected findings. It is worth noting that the practise was established when the first three mentioned countries asked the Court for an investigation of the crimes committed on their territory. [20] The Prosecutor, having evaluated the grounds of the requests, accepted them, and on the basis of their request initiated an investigation.

This method of initiation, so-called *self-referral*, constitutes a certain advantage for the Court. As in that case it can be expected that the authorities of a State Party concerned will smoothly cooperate. On the other hand, we can see a disadvantage in the fact that, due to the conflicts usually running between a government and rebel groups, and the government having the possibility to refer to the Court, but not the rebels, the situation creates a certain inequality of the parties involved in a conflict with respect to access to the Court. [86] The investigation in Sudan was initiated by the UN Security Council because Sudan is not a State Party to the Statute. Later, the investigation in Libya was commenced in the same way. In the cases re-

lated to Kenya and Côte d'Ivoire, an investigation was opened by the Prosecutor.

In connection with this issue, it is important to mention that, according to Art. 16 of the Statute, any investigation or prosecution may be suspended for a period of 12 months after the UN Security Council has requested the Court to do so, in a resolution adopted under Chapter VII, and that request may be renewed. The stated provision should be taken rather positively. As a situation may come about when the prosecution of a certain person could give rise to disorders in a country or endanger a peace process going on. For that reason, in my opinion, it is convenient that the Security Council can, after examining the specifics of a concrete situation, alternatively suspend an investigation of a case for later.

## 6.1 GENERAL CHARACTERISTIC<sup>40</sup>

As far as the situation in **Uganda** is concerned, the present conflict on the territory of that state already arose in 1986 when the current President, Yoweri Museveni, took power. The so-called Lord's Resistent Army (LRA) stood up to him. The LRA is responsible, mainly in the northern part of Uganda and the surrounding area, for mass attacks on the civilian population, murders, systematic raping and kidnapping for the purpose of joining the ranks of the LRA. The share of child soldiers in the LRA was estimated at almost 85 %, which comprises over 20,000 people. [81] At the end of the year 2003, President Museveni asked the Prosecutor of the Court for an investigation of the crimes. The investigation was initiated in the middle of the next year and in 2005, five warrants were issued against the commanders in chief of the LRA. One of them has already died, the others, including a leader of the LRA, Joseph Kony, have not been captured yet.

Long-time conflicts in **the Democratic Republic of the Congo** between the government and rebel units have been going on mainly in the eastern province of Ituri. The reasons for the conflicts are political (in an effort to change the regime), economic (control over numerous mineral resources),

---

<sup>40</sup> For general information, see ICC web [60].

and even ethnic (hatred between members of the Hema and Lendu tribes). For those reasons, there are a lot of brutal attacks going on, the victims of which are mostly civilians. The share of child soldiers constitutes up to 40 %. In 2004, the Prosecutor received the official request of the Democratic Republic of the Congo and commenced an investigation. Up to the present time, five arrest warrants have been issued. Bosco Ntaganda is still at liberty and Callixte Mbarushimana was released after the Pre-Trial Chamber declined to confirm the charges. Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui have also been apprehended. Thomas Lubanga Dyilo has already been convicted by the Trial Chamber and the cases of Germain Katanga and Mathieu Ngudjolo Chui are being tried by the Trial Chambers, after confirmation of the charges has been made.

In 2004, the President of **the Central African Republic** asked the Prosecutor of the Court for an investigation into the events which were committed during an armed conflict between rebels, government units and other armed groups. In 2008, a warrant for arrest was issued and in the same year, Jean-Pierre Bemba Gombo, accused of crimes against humanity and war crimes, was apprehended and transferred to The Hague. After the charges have been confirmed, the trial is held by the Trial Chamber.

In 2005 the Security Council adopted a UN resolution No. 1593 which requested the Prosecutor to investigate the crimes committed in **Sudan**, in the western province of Darfur, and challenged the government of Sudan to cooperate with the Court. An arrest warrant was issued against Ali Kushayb, Ahmad Harun, Abdel Hussein and Omar Al Bashir. Kushayb is the leader of *Janjaweed* militia, Harun is the former Minister of the Interior and paradoxically the succeeding Minister for Humanitarian Affairs, Hussein is current Minister of National Defence and Omar Al Bashir is the current President. Later, the Court started investigating other three persons who appeared voluntarily before the Court. The government of Sudan refuses to cooperate with the Court.

The first situation, when the Prosecutor started investigating a case on his own initiative, was the investigation of post-election acts of violence in **Kenya** in 2007-2008. Regarding the fact that a reasonable basis to proceed was concluded and sufficient supporting material was submitted, in March 2010, the investigation was approved by the Pre-Trial Chamber of the

Court. In March of the following year, six persons were called up and after they voluntarily appeared, their cases have been tried by the Pre-Trial Chambers that confirmed the charges of four of them.

From the end of the year 2010, a groundswell of protests and demonstrations against long-time authoritarian regimes in the Arab world took place in the region. Later it was named “the Arab Spring”. The protests spread to **Libya** which had been led by Colonel Muammar Gaddafi for over forty years. Peaceful demonstrations were repressed by military forces and the situation escalated into a civil war. Libya is not a State Party to the Statute, so the UN Security Council adopted a resolution No. 1970 which referred the situation to the International Criminal Court for an investigation. In June 2011 warrants of arrest were issued against Muammar Gaddafi, his son, Saif Al-Islam Gaddafi, acting as the Libyan *de facto* Prime Minister, and Abdullah Al-Senussi, the Head of the Military Intelligence. [59] In October of the same year, Muammar Gaddafi was captured and killed by opposition fighters.

In the **Côte d’Ivoire**, in West Africa, presidential elections took place in autumn 2010. Alassane Ouattara won the elections but the then President, Laurent Gbagbo, refused to admit defeat and resign from office. During a four-month post-election crisis and consequent combats, many acts of violence were probably committed by both sides of the conflict. In March the following year, Gbagbo was arrested. Côte d’Ivoire is not a State Party to the Rome Statute, but it already accepted the jurisdiction of the International Criminal Court earlier, in a declaration under Art. 12, par. 3, of the Statute. In October 2011 the Pre-Trial Chamber of the Court granted the Prosecutor’s request for authorization of an investigation. [45] Later the Pre-Trial Chamber issued a warrant of arrest against the expresident Gbagbo who was then transferred to the International Criminal Court.

International Criminal Court	Investigation opened	Status
Uganda	2004	Five arrest warrants for rebel leaders: one deceased, four fugitives, including Joseph Kony
Democratic Republic of the Congo	2004	Five arrest warrants: Thomas Lubanga convicted, two on trial, one released, one fugitive
Sudan (Darfur)	2005	Four fugitives, including president Omar Al Bashir, three other suspects appeared voluntarily, one was released, two are on trial
Central African Republic	2007	Jean-Pierre Bemba in custody, trial underway
Kenya	2010	Six persons indicted, four on trial
Libya	2011	Three arrest warrants, Muammar Gaddafi dead
Côte d'Ivoire	2011	Laurent Gbagbo in pre-trial

Source: *The Economist*, [47] updated according to the information of the Court in June 2012.

## 6.2 THE PROSECUTOR V. THOMAS LUBANGA DYILO

Thomas Lubanga is one of the founders and a leader of a political and military movement, the Union of Congolese Patriots (*Union des patriotes congolais*, UPC) which was constituted in 2000 and is responsible for numerous acts of violence in East Congo, in the Ituri region. [37] The movement is composed of members of the Hema tribe and is strongly ethnically defined.

The biggest crimes of which civilians were victims were committed from the middle of 2002 to the end of 2003. The ethnic cleansing was directed against the members of the Lendu tribe. During the conflict, the UPC recruited many children who were schooled in fighting, murdering, pillag-

ing and raping. In 2003, Lubanga had several thousand child soldiers in his militias. [62]

After a warrant of arrest had been issued by the Court, Lubanga was transported to The Hague on 17 March 2006. The first hearing before the Pre-Trial Chamber took place on 20 March 2006. On 29 January 2007 the accusation of Lubanga was confirmed by the Pre-Trial Chamber, so the Trial Chamber could be constituted, and subsequently the trial began. [13] The Court is criticized by some non-governmental groups which find the charge relatively narrowly formulated, regarding what Lubanga is probably responsible for. Thomas Lubanga was charged with the following **war crimes** under the Statute:

- Art. 8(2)(b)(xxvi): Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (in international armed conflict);
- Art. 8(2)(e)(vii): Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities (in internal armed conflict).

Initially, the trial should have begun in June 2008 but it was suspended due to a dispute with respect to confidential evidence between the judges and the Prosecutor. The UN and non-profit organizations provided the Prosecutor with 200 pieces of evidence on the understanding that there would be no breach of confidence. But the judges were of the opinion that such an approach was unacceptable because it could endanger the fairness and objectivity of the whole trial. As a consequence, there was the possibility of releasing Lubanga if access to the information of the both sides was not ensured. [24] After that, the Prosecutor consented to provide the Court with the confidential information. It must be added that the Prosecutor came in for general criticism in relation to those events, while the strict action of the Trial Chamber in order to ensure the objectivity of the trial is to be evaluated positively.

The trial started in January 2009 and there were repeated disputes between the Trial Chamber and the Prosecutor, with respect to the attitude of the defence to the information of the Prosecutor. Due to the disputes there

was again a danger that Lubanga would be released. However, after that the Court proceeded with the trial.

During the trial the Court cooperated with 129 persons who have been granted the status of victim before the Court. Over the course of 204 days of hearings, the Chamber heard 36 witnesses called by the Office of the Prosecutor, 24 witnesses called by the Defence and 3 witnesses called by the legal representatives of the victims participating in the proceedings. The parties and participants in the trial presented their closing statements in August 2011. On 14 March 2012 the Trial Chamber decided unanimously that Thomas Lubanga Dyilo is guilty of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities. He was sentenced to a total period of 14 years of imprisonment. This was the first verdict issued by the International Criminal Court. [37]

### **6.3 THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR**

The conflicts in the western Sudanese province of Darfur have their roots in the remote past. The society living on the territory of Darfur was traditionally tribal. The tribal ownership of the land played a key role in the society. The land was divided between the tribes by the last Darfur Sultan at the beginning of the 20th century. Then tribal chiefs kept dividing it between individual members of the tribe. Potential disputes were decided at a meeting of the tribal chiefs. Droughts and desertification were contributive to worsening the conflicts. President Nimeiry, who came to power in 1969, imposed an Islamic regime and Sharia, and abolished the existing tribal system. During the following decades the conflicts escalated because of easy access to weapons and the tribes started creating their own militias. [81]

The core of the conflict is partly **the access to natural resources** (oil, water, land and pastures), and partly **the membership to a particular ethnic group**. The affiliation plays a key role in the conflict in Darfur, mainly

the affiliation with African (inhabitants of Darfur) or Arab (central government) origin. The leading rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), started to stand in defiance against the central government in Khartoum.

In 2002, they took the first armed action. The government was not prepared for such a situation and was not able to control the regions. For that reason, the government took advantage of the ethnic and intertribal conflicts and began to encourage the local tribes to help the government with the fight against the rebels. The Arab tribes constituted the *Janjaweed* units which started to interfere in Darfur, together with the Sudanese army. Frequent targets of their attacks were civilians belonging to the African ethnic group. The conflict caused an involuntary emigration of 1.65 million of people, [96] but some sources state up to 3 million refugees.

The UN Security Council began to deal with the situation in 2004. **The International Commission of Inquiry on Darfur** was established and it presented its report on 25 January 2005. The Commission observed that there was a serious violation of international human rights law and humanitarian law on the territory of Darfur, and it reached the intensity of crimes under international law. It was mainly the killing of civilians, torture, enforced disappearance, sexual violence, destruction of villages and pillaging. According to the report of the Commission, the Sudanese government and the *Janjaweed* units were responsible for these events. Regarding the fact that the attacks were committed on a widespread and systematic basis, they may be qualified as crimes against humanity. [81] The victims of these acts of violence were mainly the African tribes.

The report also states that the local units of the SLM/A and JEM are also responsible for serious violations of international law, for instance, killing of civilians and pillage. But in this case they were not committed on a systematic and widespread basis. The George W. Bush administration, based on its own information, described the situation in Darfur as genocide. The Commission, on the other hand, said that there was probably no genocide in Darfur because apparently there was no intent to exterminate a certain ethnic group. The Commission drew up a list of suspects which was submitted to the UN Security Council with a recommendation stating

that the Security Council should refer the case to the International Criminal Court.

With regard to the fact that Sudan is not a State Party to the Statute, an investigation had to be initiated by the UN Security Council. So the Security Council, in a resolution No. 1593 of 2005, asked the Court to start investigating the crimes which had been committed on the territory of Sudan. The USA abstained from voting. However, the USA enabled the adoption of the resolution by not exercising the veto power. It was the first case when the investigation was initiated by the UN Security Council.

Then in 2007, the **first arrest warrants** were issued against the former Minister of the Interior and the future Minister for Humanitarian Affairs, Ahmad Harun, and the *Janjaweed* militia commander, Ali Kushayb. The Pre-Trial Chamber came to the conclusion that Harun, as the Minister of the Interior, knew about the crimes against civilians on the territory of Darfur, and also about the practices of *Janjaweed*, and that he himself initiated the crimes being committed against the civilian population. Kushayb was in command of the militias which committed crimes against civilians and he personally participated in some armed action. [96] The crimes committed on the territory of Darfur claimed, according to the UN, 300,000 victims, while the Sudanese government admitted only 10,000.

In 1989, after a military coup, **Omar Al Bashir** took power and he has been the Sudanese President since 1993. The President was directly responsible for the actions of the Sudanese army and had a real influence on the Arab militias. Therefore, in July 2008 the Prosecutor, in accordance with Art. 25, par. 3, of the Statute which regulates, inter alia, indirect perpetration or perpetration-by-means, [10] decided to bring a charge against the President, containing ten points in the claim: three of them in respect of genocide, five referring to crimes against humanity and two regarding war crimes.

After the investigation made by the Pre-Trial Chamber, an **arrest warrant was issued** against the Sudanese President on **4 March 2009**. He thus became the first Head of a State against whom the International Criminal Court issued a warrant of arrest. But he is not the first Head of a State to be accused by an international criminal tribunal generally. The former Serbian and subsequently the Yugoslavian President Slobodan Milošević was

brought before the ICTY. But due to his ill health he died before the end of the trial. The former president of Liberia, Charles Taylor, was sentenced by SCSL for aiding and abetting the commission of war crimes.

Sudan is currently in a situation when it should apprehend and extradite its own President. But the Sudanese party refuses to cooperate with the Court. The warrant of arrest against Omar Al Bashir was originally issued for committing the following **five crimes against humanity and two war crimes**:

- Art. 7(1)(a): Murder;
- Art. 7(1)(b): Extermination;
- Art. 7(1)(d): Deportation or forcible transfer of population;
- Art. 7(1)(f): Torture;
- Art. 7(1)(g): Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- Art. 8(2)(e)(i): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities (in internal armed conflict);
- Art. 8(2)(e)(v): Pillaging a town or place, even when taken by assault (in internal armed conflict).

The Prosecutor included in the accusation also the crime of genocide, specifically the responsibility for the attempt to liquidate the members of the Darfur tribes Fur, Masalit and Zaghawa, partly by using the official army units, and partly by the allied *Janjaweed* militias. [8] The majority of the judges of the Pre-Trial Chamber (one of the judges had a dissenting opinion) reached the decision that the Court was not provided with reasonable evidence which would prove that the government intended to destroy totally or partially some of the aforementioned tribes. For that reason the warrant of arrest did not include the crime of genocide.

At the beginning of 2010, the Appeals Chamber ruled that the Pre-Trial Chamber should decide again the content of the warrant of arrest with respect to its possible expansion. It objected that when issuing a warrant of arrest it is necessary to choose a slightly lower standard than during the trial when guilt is being proved. On 12 July 2010, a second warrant of arrest

against Omar Al Bashir was issued. It did not replace the original one, but widened it by three counts with reference to the **crime of genocide**:

- Art. 6 (a): Genocide by killing;
- Art. 6 (b): Genocide by causing serious bodily or mental harm;
- Art. 6 (c): Genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

All States Parties to the Statute are obliged to fully cooperate with the Court and thus, if an accused person enters their territory, they should apprehend him or her. Nevertheless, during July and August 2010, Al Bashir left for Kenya and Chad. He was in Kenya for an official visit and was not arrested. Also, the African Union decided not to cooperate with the International Criminal Court with respect to the extradition of the Sudanese President. Subsequently, the Court officially informed the UN Security Council about the visit and the non-cooperation of the mentioned States with the Court. Later, Omar Al Bashir visited also Djibouti and Malawi which are States Parties to the Rome Statute as well. However, he was not seized there either. [38]

As far as immunities are concerned, according to expert opinions, Art. 27 of the Statute, which regulates withdrawal of immunities, shall apply also to offenders coming from a State not party to the Statute provided that an investigation was commenced by a binding resolution of the Security Council. This should apply also in case of apprehension of an offender in a different state. [7] The question remains **what the possibilities of the Court are with regard to its next action**, and how the case will progress.<sup>41</sup> The Court does not have at its disposal any force which could arrest accused persons, and peace-keeping forces of the UN in Africa do not have the authorization to do so. Al Bashir could be arrested on the territory of another State Party to the Statute. But with regard to the above-mentioned

---

<sup>41</sup> For example, Christopher Gosnell recommended in the *Journal of International Criminal Justice* that the Prosecutor should stop concentrating only on the high-ranking perpetrators because it seems politicised in the public eye. According to him, lower-ranked persons responsible for mass crimes should be accused and brought before the Court. That would reveal the real situation in Darfur and give credibility to the future trials with the highest representatives. [9]

visits of neighbouring countries, it seems that there may not be any apprehension after all. Moreover, in April 2010, presidential elections took place in Sudan after twenty years and Al Bashir was re-elected. [50] So the issued warrant of arrest seems relatively toothless.

Thus the Court has to rely on individual states, or on the UN Security Council which can theoretically impose sanctions on Sudan.<sup>42</sup> Any hardline stand is not likely to have the support of Russia and China, as permanent members of the Security Council. So here it is demonstrated how judicial and political elements and interests mingle in international law. The Court has no specific coercive measure, and thus is dependent partly on the due fulfilment of the obligations of the States Parties, and partly on the possible help and authority of the UN Security Council. But three out of the five permanent members are not States Parties to the Statute, so currently the question is in which direction the situation will develop.

Anyhow, this is the first case commenced at the initiation of the UN Security Council, and also the first case of accusation of a president of a sovereign state before the International Criminal Court. The course of events surrounding the trial with the Sudanese President Omar Al Bashir will become a significant informal precedent. This development will be relevant not only to the consequent attitude of the UN Security Council with regard to analogous cases, but also to the behaviour of the other dictators or authoritarian Heads of States. It is necessary to point out that, in spite of the above-mentioned problems, the general possibility of an initiation of an investigation in a Non-Party State at the initiation of the Security Council is an important option for which the Rome Statute provides. However, for the success of such a trial, it is essential that during an investigation the Court has the full support of the UN Security Council.

---

<sup>42</sup> These can be, according to the UN Charter, of a non-military or, in this case purely theoretically, of a military character. For instance, economic sanctions could represent the sanctions of a non-military character. But the effectiveness of imposing economic sanctions on a specific state is problematic. Sudan is on the list of countries supporting terrorism elaborated by the USA, so economic sanctions are imposed on Sudan. China takes advantage of the Sudan's low business activity with American and European countries. Therefore, China has plentiful business relations with Sudan as it is an important supplier of weapons.

## 6.4 SITUATION IN KENYA

In 1999, Kenya signed the Rome Statute and ratified it six years later. At the end of December 2007, presidential elections took place in which the President, Mwai Kibaki, (*Party of National Unity*, PNU) aspired to be re-elected. His opposing candidate was a leader of the opposition, Raila Odinga (*Orange Democratic Movement*, ODM). According to international observers, during the elections international standards were not observed. When the votes were being continuously counted during the election, the President, Mwai Kibaki, started winning. The attitude of the people regarding the results and legitimacy of the elections escalated in a mass groundswell of violence during which around one thousand people were killed and more than two hundred thousand were forced to leave their homes. [48] After the elections, in which the President Kibaki was re-elected, Odinga became the Prime Minister.

The Kenya National Commission on Human Rights issued a report, according to which the responsibility for the acts of violence extended to governmental circles. The Kenyan government established a commission of inquiry which was led by Philip Waki, a judge, so it was named the **Waki Commission**. The Commission recommended the establishment of a special tribunal but there was not sufficient political support for that solution. [15] Waki passed the information about the main suspects to Kofi Annan who was engaged in calming down the situation in Kenya. Subsequently, the information was handed over to the Prosecutor of the International Criminal Court.

At the end of March 2010, the Pre-Trial chamber granted, by majority, the Prosecution's request to open an investigation. The situation is significant because it was the first time in the almost eight-year long existence of the Court, when a possibility of commencement of an investigation at the Prosecutor's motion was applied. Unfortunately, it was the fifth situation investigated in Africa, so the Court faces a suspicion of being biased. On the other hand, domestic Kenyan law does not comprise a corresponding legal regulation which would enable efficient and fair prosecution of crimes against humanity. [15] Thus, it can be considered right that the Court

played the role given by the Statute, and started to deal with the situation concerned.

In December, the Prosecutor, Luis Moreno-Ocampo, announced that, under the Art 58, par. 7, of the Statute, he submitted to the Pre-Trial Chamber a request for issuing a summons for the six Kenyan nationals who were, according to the Prosecution's investigation up to then, the most responsible for the post-election massacres. Under the Statute, the Prosecutor qualified the massacres as crimes against humanity. [46] The first case concerns three representatives of the political party ODM who collectively organized attacks against the followers of the PNU. According to the Prosecutor, the former Minister and also Member of the Kenyan Parliament, William Samoei Ruto, together with the former Minister and also chairman of ODM, Henry Kiprono Kosgey, organized the plan of attacks against the supporters of the then President and the PNU party. Josua Arap Sang, who is said to have organized the attacks via radio transmission, also played a very important role. In January 2012, the Pre-Trial Chamber confirmed the charges against William Samoei Ruto and Josua Arap Sang. It declined to confirm the charges against Henry Kiprono Kosgey.

In contrast, in the second trial three representatives of the political party PNU were accused. These were Francis Kirimi Muthaura, the Secretary to the Cabinet, Uhuru Muigai Kenyatta, the Kenyan Minister, and Mohamed Hussein Ali, the Chief Executive of the Postal Corporation of Kenya. These purportedly organized the attacks against the followers of the ODM and for that purpose they supposedly even used the Kenyan police force. In January 2012, the Pre-Trial Chamber confirmed the charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, although declined to confirm the charges against Mohamed Hussein Ali.

## **6.5 PRELIMINARY EXAMINATIONS**

As far as investigation of cases in various states is concerned, so-called preliminary examinations should be mentioned. During a preliminary examination the Prosecutor has not yet arrived at a conclusion regarding whether there is a reasonable basis to proceed with an investigation, and to

submit to the Pre-Trial Chamber a request for authorization of an investigation. One case in particular should be mentioned. With respect to the events in Gaza, in January 2009, the Palestinian National Authority (PNA) accepted the exercise of the jurisdiction of the Court in a declaration under Art. 12, par. 3, of the Statute, effective as from 1 July 2002 when the Statute entered into force.

According to the Statute, only a state is authorized to do that. So the question arised as to whether it is possible to consider the PNA to be a state for the purposes of the Statute. Expert opinions argued both for a recognition of the declaration, [16] and against it. The opponents point out a lack of statehood or an impossibility to delegate jurisdiction to the Court that, based on the so-called Oslo Accords, the PNA does not possess. [19] In April 2012 the Prosecutor has rejected the request with an argument that the Office of the Prosecutor has no authority to define, for the purposes of the Rome Statute, the term “state”. In his opinion only the relevant UN bodies or the Assembly of States Parties can do that. [58] So the Prosecutor actually refused to decide this legal and political question. It is apparent that the possible recognition of the declaration could motivate other territories, having the hallmarks of a state and struggling for independence, to use similar course of steps.

As for other preliminary examinations, at the beginning of December 2010, the Prosecutor received a communication from South Korea which is a State Party to the Statute. The notification states that during the bombardment of South Korean Yeonpyeong Island by North Korea in November 2010, and during the submersion of a South Korean ship in March 2010, North Korea committed war crimes. [36] Consequently, the Prosecutor started a preliminary examination in order to find out whether the criteria for the commencement of an investigation are fulfilled. The other cases, subject to a preliminary examination in 2012, concern Afghanistan, Georgia, Guinea, Colombia, Honduras and Nigeria. [60]



## **7. INTERNATIONAL CRIMINAL COURT AND A DEFINITION OF THE CRIME OF AGGRESSION<sup>43</sup>**

After Bangladesh, which ranks among the ten most populous states with its population of 140 million, had become one of the States Parties to the Statute in 2010, several smaller states followed. The Rome Statute has been ratified by more than 120 states out of the 193 Member States of the UN. [61]

Regarding the fact that the Rome Statute itself presumes in Art. 5 a possible expansion of the Court's jurisdiction by the crime of aggression, the attention of the experts turned to the Review Conference, the aim of which was, in accordance with Art. 123, a discussion on relevant amendments to the Statute, with respect to the mentioned crime of aggression. So the characteristic of this crime under international law will be dealt with in this text, and subsequently also the results of the aforementioned Conference.

### **7.1 INTERNATIONAL LAW AND THE HISTORICAL DEVELOPMENT OF THE CRIME OF AGGRESSION**

Before the development of the international law of armed conflicts and a certain separation of international criminal law from traditional public international law during the twentieth century, there was no rule banning the use of force among states. Just as in the animal kingdom, so-called natural selection was applied on an international scale. A war was a legal way

---

<sup>43</sup> The content of this chapter was presented in the international conference Days of Law 2010 organised by the Faculty of Law of the Masaryk University and it was published in a legal journal *The Lawyer* in September 2011.

to deal with international disputes, and a particular state had to withstand the interaction with other states.

### 7.1.1 THE FIRST HALF OF THE 20<sup>TH</sup> CENTURY

In 1928, an international treaty, named after the French and American Ministers of Foreign Affairs, Aristide Briand and Frank B. Kellogg, was created. In the field of international law, the so-called **Kellogg-Briand Pact** represented the first document forbidding war. Specifically, this multi-lateral international treaty condemned recourse to war for the solution of international controversies, with the exception of self-defence. However, its significance is reduced by the fact that the provisions of the treaty did not contain any sanctions, and so the treaty lacked enforceability.

Due to the fact that war was banned, it was also necessary to specify what kind of war is prohibited, that is to define aggression. In 1933, the definition of aggression was drawn up at a conference on disarmament called by the League of Nations. The definition was adopted in bilateral treaties between the Soviet Union and the neighbouring states. And after the Second World War it was applied by military tribunals in Nuremberg and Tokyo. [68, p. 451]

After the Second World War in 1945, an international organization, the United Nations, was established, based on the **UN Charter**, an open international treaty. The Charter states in Art. 2, par. 3: *“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”* It continues in par. 4: *“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”* Just as in the Kellogg-Briand Pact, the UN Charter regulates the way in which states can settle their international disputes. But the difference is that the possibility of enforcement is not missing here any longer.

Within Chapter VII, the Charter regulates actions with respect to a threat to peace, breaches of peace and acts of aggression. Art. 39 determines:

*“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”* So based on the aforementioned provisions, in the field of international law the UN Security Council has a practically exclusive right to determine whether there was an act of aggression in a specific case.

Up to the present time, the only case in which an individual criminal responsibility for the crime of aggression was successfully tried is in international military tribunals after the Second World War, the so-called **Nuremberg and Tokyo Trials**. Within the Trials three crimes were defined – crimes against peace, war crimes and crimes against humanity. At the time the crime which simply means a military attack of a foreign state was called a crime against peace. In contemporary terminology it is called a crime of aggression.

On the basis of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the so-called London Charter, under the Art. 6, par. (a), the then definition of the crime against peace, or the crime of aggression included *planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing*. [44] Among the crimes within the jurisdiction of the Nuremberg Tribunal, it was actually the crime against peace which was declared as “the supreme international crime”. [25]

### 7.1.2 THE SECOND HALF OF THE 20TH CENTURY

In the 1960s, the General Assembly of the United Nations got back to the issue, and in 1974 a new definition of the crime of aggression was adopted. As a resolution of the General Assembly of the UN, this act is not legally binding, but it may gain the necessary authority, primarily with regard to decision making by the UN Security Council. The General Assembly observed that it is one of the competencies of the UN Security Council to determine whether an aggressive act has been committed. But it recom-

mended that while examining whether there has been aggression, the UN Security Council ought to take into consideration not only the circumstances of the case but also the definition.

**The definition of aggression by the General Assembly of the UN** is constituted of several articles and some of them should be mentioned. The Art. 1 says: “*Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.*” The determination of aggression is made according to the first time of use of armed force. Pursuant to Art. 2, the Security Council may, having evaluated relevant circumstances and gravity of the acts, reach a decision that there has been no aggression committed.

Any of the following acts, according to the definition, regardless of a declaration of war, are qualified as acts of aggression, the list being demonstrative:

- 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.*

The following provisions complete the given definition. A determination of aggression can therefore be made also on the basis of other acts. No consideration of whatever nature, whether political, economic, military or otherwise, can serve as a justification for aggression, and no territorial acquisition or special advantage resulting from aggression will be recognized as lawful. However, nothing in this definition could in any way prejudice the right to self-determination, freedom and independence of peoples under colonial and racist regimes.<sup>44</sup> The definition of aggression adopted by the General Assembly of the UN is not legally binding, but nonetheless, it provided the Security Council with a certain legal guideline while making decisions, and it contributed to the development of international law in the field of *ius ad bellum*.

At the turn of the 1980s and 1990s, when the Cold War ended, the attention of the international community was turned to several local conflicts, one of them taking place in Europe itself. To deal with these cases, there were two *ad hoc* international criminal tribunals established (the ICTY and ICTR) and subsequently also so-called mixed criminal tribunals, with an international or national element prevailing. Regarding the fact that the conflicts in question were mostly internal or local, the jurisdiction of these *ad hoc* tribunals covered crimes against humanity, war crimes and mostly also genocide. None of these tribunals covered the crime of aggression. One reason was due to the character of the conflicts, and the other was that at that time aggression was not sufficiently and appropriately defined in terms of the individual criminal responsibility of the offender, or rather there was no consensus on the wording of such a definition within the international community.

This was manifested during the second half of the nineties when in 1995 a Preparatory Committee was founded by the General Assembly of the UN. Its mission was to draw up a generally acceptable draft of an international

---

<sup>44</sup> See the wording of the Definition. [64]

treaty establishing the International Criminal Court. During the negotiations of the Committee, even at the Diplomatic Conference in Rome in 1998, the delegations did not agree on an adequate definition and on the conditions for exercising the jurisdiction of the Court with respect to the crime of aggression.

**The Rome Statute** of the International Criminal Court lists in Art. 1 among the crimes within the jurisdiction of the Court, genocide, crimes against humanity, war crimes and also the crime of aggression. But then paragraph 2 specifies that the Court will exercise jurisdiction over the crime of aggression once a provision is adopted defining the crime and setting out the conditions for the exercise of the jurisdiction of the Court. As provided in Art. 123, seven years after the entry into force of the Statute the Secretary-General of the United Nations will convene a Review Conference to consider any amendments to the Statute, primarily the possible inclusion of the crime of aggression in the jurisdiction of the Court.

## **7.2 POSSIBLE DEFINITIONS OF NEW CRIMES IN THE SITUATION BETWEEN ROME AND KAMPALA**

According to Art. 121 of the Statute, the amendments to the provisions of the Statute may be adopted, including the definition of crimes. The amendment is adopted at the Assembly of States Parties by a two-thirds majority, and will enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them. The amendment to crimes will enter into force for those States Parties which have accepted the amendment. With respect to a State Party which has not accepted the amendment, the Court will not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

### 7.2.1 NEGOTIATIONS ABOUT THE DEFINITION OF THE CRIME OF AGGRESSION AND THE CONDITIONS FOR EXERCISE OF JURISDICTION

With regard to the possible inclusion of more crimes, the most important intent is that of including the crime of aggression in the crimes within the jurisdiction of the Court. The Assembly of States Parties established a Special Working Group on the Crime of Aggression in 2002, the aim of which was to reach a consensus regarding this issue and to submit an acceptable draft during the year 2009. During this period measurable progress was made with respect to the definition of individual behaviour, and the definition of an act of a state, whereas the opinions on the jurisdiction of the Court and its relationship to the UN Security Council differed a lot. The issue in question was whether a decision of the UN Security Council, determining that an act of aggression has been committed, should be a prerequisite for the exercise of the jurisdiction of the Court with respect to the crime of aggression. [80] During the negotiations of the Special Working Group on the Crime of Aggression, it started to be obvious that if the Parties agreed on the definition the jurisdiction of the Court with relation to this matter would be rather limited. [97] Above all, the key question was how the Parties would manage **to balance the role of the Court and the UN Security Council** within the definition.

Let me explain it with an example. There is a state A and a neighbouring state B which has a minority of nationals of the state A. The state B starts to systematically exterminate its own nationals of the A nationality. Incidentally, the state B maintains friendly relations with a state C which is a permanent member of the UN Security Council. So the state C blocks any intervention in state B within the Security Council. The president of the state A issues an order for military intervention in the state B in order to protect its own nationals. Will the president of state A be charged with the crime of aggression?

Then there are other cases like the intervention of NATO in the former Yugoslavia, the war against the Taliban that supported international terrorism or the military intervention of the USA in Iraq. And what about so-

called preventive or pre-emptive self defence, for example the attack of Israel in 1967 against the states that were about to attack it, the attack which set off the so-called Six-Day War? Or another situation when a state bombards another state from its own territory and the wounded state decides to take measures out of its territory?

The formulation of the complex definition of aggression and conditions of its exercise proved to be an extremely challenging task. Especially with respect to the specifics of individual conflicts which should be examined individually. For that reason, it can be concluded that a certain involvement of the UN Security Council would be right. The question as to what the appropriate extent of this involvement is remains the subject of many discussions.

Generally, it is possible to imagine **three models of the jurisdiction of the Court** with respect to the crime of aggression. The first model where the Security Council would be, apart from the States Parties and the Prosecutor, only one of the parties which could report to the Court a certain situation, suggesting the crime of aggression has been committed, without any possibility of further intervention in the case. This is the alternative with the most restricted powers of the Security Council. In the second option the Security Council could, in the case of initiation of a trial, cancel the trial by issuing its resolution. In that case the competence of the Security Council would be a bit wider. On the other hand, the competence would not be unlimited because all the permanent members would have to agree with the suspension.

The third option would be that a trial concerning the crime of aggression could be initiated only with the permission of the UN Security Council. That would leave the Security Council with its currently exclusive right to decide whether an act of aggression within the international community has been committed. As for this option, the possible exercise of the jurisdiction of the Court would be limited by the very important competence of the Security Council. As for an initiation of any trial, it would be necessary for the Security Council to issue a resolution and for all permanent members to agree with the prosecution. It is important to point out that in such a case the five states which are the permanent members of the UN Security Council would be not formally, but de facto, outside the jurisdiction of the

Court. This is because they could exercise their right of veto if there was a proceeding initiated against their nationals.

So much for the original theoretical alternatives. Of course, the Special Working Group on the Crime of Aggression was working with a lot of combinations and alternatives of the aforementioned options. But it is important to mention that many states wanted the jurisdiction of the Court to be influenced by the UN Security Council as little as possible.

### 7.2.2 POSSIBLE INCLUSION OF MORE CRIMES

Apart from the crime of aggression, in the future there may be more crimes added to the crimes under the Statute. For example, it would be appropriate to consider, based on the tragic historical experience from Nazi Germany, the Soviet Union, but even Francoist Spain or Chile in the 1970s and 1980s, whether the crime of genocide should also cover the criminal acts directed against a certain political group as such. [17]

With regard to the current situation in Somalia, a question arises as to how to deal with the situations of mass criminality on the territory within jurisdiction of the states which are not able to effectively ensure order on its territory or in territorial waters. Thus groups of pirates are concentrated there and the state concerned is not able to arrest them. But nobody else is authorized to do so because such behaviour would constitute an infringement of another state's sovereignty. If similar problems persist in the future, one of the possible solutions could be defining such a crime and including it within the jurisdiction of the Court.

Besides the crime of aggression, a possible inclusion of the **crime of terrorism** within the Statute comes into consideration, especially in the case of an international or large-scale attack. It is necessary to say that at the present time there is no generally acceptable definition of terrorism in international law. But terrorism is punishable under the Statute even today provided that a specific terrorist act fulfils the definition of some of the current crimes regulated by the Statute. Due to different intentions, a terrorist attack would probably not fulfil the crime of genocide and its possible qua-

lification as a war crime is also limited. The biggest advantage of punishment of terrorism under the Statute is its procedural aspect. [1]

Out of the current crimes, a terrorist act could probably fulfil the definition of crime against humanity. But it could happen only if it met the general conditions of this crime. It would have to be committed as part of a widespread or systematic attack directed against civilian population, with knowledge of the attack. So it would not concern the cases of individual terrorism but only the gravest forms of international terrorism. It seems that such cases as the attacks of Libyan agents against civil aeroplanes (*Lockerbie*) or the terrorist attacks against the USA on 11 September 2001 could be qualified under the Statute as crimes against humanity. [85]

As far as options for punishment are concerned, it is important to say that a prosecution of persons responsible for terrorist attacks before national courts of their own state does not seem to be ideal, regarding the fact that the persons could often have been acting in the interest of such a state. The objectivity of a trial would not be ensured. On the other hand, to prosecute crimes in a state which has become a victim of terrorist attacks is also not the best idea, regarding the doubts about the trials at the U.S. military base *Guantanamo*. Because of the reasons mentioned, the possible future inclusion of the crime of terrorism within the jurisdiction of the Court or its prosecution as the crime against humanity seems to be a relatively good solution.

### 7.3 REVIEW CONFERENCE IN KAMPALA

As stated above, the Rome Statute itself in Art. 123 determines that seven years after the entry into force of the Statute the Secretary-General of the United Nations will convene a Review Conference to consider any amendments to the Statute. The Statute entered into force in 2002 and in 2009 a Review Conference was convened which took place in Kampala, Uganda from 31 May to 11 June 2010. [54] The Conference had several items on the agenda, the most important of which were the proposals of the Special Working Group on the Crime of Aggression and the possibility of inclusion of the crime of aggression within the jurisdiction of the Court.

But it should be mentioned that on the basis of the opinions of the Parties and non-Parties to the Rome Statute, there was some scepticism about it before the conference.

At the Conference in Kampala there was a meeting of around 4,600 people from the delegations of the States Parties, observer states, international organizations or NGOs. The first week (31/5–4/6) was dedicated to reviewing and during the second one (7–11/6) the negotiations about amendments to the Statute were taking place. [72] Within the reviewing (so-called *stock-taking*), the past eight years of the operation of the Court were evaluated, besides other things, the right of a victim to equal and effective access to justice as a fundamental element of justice was expressed. Also, it was declared that a State has primary responsibility for conducting an investigation and prosecution, so the principle of complementarity was emphasized. And the states which are obliged to cooperate with the Court were challenged to be thorough while doing so, and to be willing to accept possible convicted persons in their own detention facilities. Finally, three resolutions were issued (*Complementarity*, *The impact of the Rome Statute system on victims and affected communities*, and *Strengthening the enforcement of sentences*). [55] The content of several concluding contributions was the relationship between peace and justice and their mutual complementarity.

Then they approached the negotiations about the proposed amendments to the Rome Statute, among which the proposal for inclusion of the crime of aggression within the jurisdiction of the Court attracted the biggest attention. When speaking about this issue, Professor Heller aptly noted: “*It is no doubt true that war crimes and crimes against humanity are particularly likely to be committed in the context of an illegal war. Prevent the illegal war, you prevent the subsequent crimes.*” [27] This idea is part of the foundation of considering the crime of aggression to be the supreme international crime.

After finishing the review of the operation of the International Criminal Court, negotiations concerning several proposed amendments to the Rome Statute began. Among the proposals was also the definition of the crime of aggression in variants and alternatives which were prepared by the Special Working Group on the Crime of Aggression. Before the Review Conference, there was a prevailing scepticism about the adoption of the definition

of aggression. However, after a few days of intensive negotiating the proposed definition was accepted by a consensus after midnight during the last evening of negotiations; that is on 12 June 2010. [30] The adopted amendments, the new definition of aggression, and a compromise solution of conditions to exercise its jurisdiction deserve a detailed analysis which is the subject of the following subchapters.

## **7.4 ADOPTED AMENDMENTS TO THE ROME STATUTE**

Within the Review Conference some proposed amendments to the Statute were discussed, some of which were successfully accepted and others not. The most significant of them was the adoption of the new definition of aggression and the conditions for exercising the jurisdiction of the International Criminal Court with respect to this crime.

### **7.4.1 NEW LEGAL REGULATION OF THE CRIME OF AGGRESSION**

The legal regulation of the crime of aggression is comprised of the inserted Art. 8 bis, which defines the new crime under international law. The actual wording of the definition, on which the Special Working Group on the Crime of Aggression was working for a long time, was not subject to serious disputes for the States Parties. The problem was a determination of the conditions to exercise jurisdiction with respect to the crime of aggression because this issue concerns the politically delicate role of the UN Security Council. The actual definition is contained in the newly inserted Art. 8 bis and conditions to exercise jurisdiction are regulated in the new Articles 15 bis and 15 ter of the Rome Statute.<sup>45</sup> With regard to the wording of the Articles, it is necessary to analyse the text in detail.

---

<sup>45</sup> See original text of the resolution RC/Res. 6. [53] The following citations of the resolution are stated according to the given text.

At the very beginning of the resolution, in Art. 1, there is a provision according to which the Review Conference decided to adopt the amendments to the Statute contained in Annex I of the resolution which are subject to ratification or acceptance, and those amendments should **enter into force in accordance with Art. 121, par. 5**. Here there is one possible inconsistency. As provided in Art. 121, par. 4, of the Rome Statute: *“Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.”* Paragraph 5 then continues: *“Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.”*

So the question is whether an amendment to the Rome Statute should be adopted regarding the incorporation of the crime of aggression under Art. 121, par. 5, or par. 4. On the one hand, the amendment concerns a crime so it falls within the Art. 5. Therefore it seems logical that the amendment enters into force for those States Parties which have accepted the amendment. On the other hand, the amendment contains a regulation of conditions to exercise jurisdiction over the crime of aggression. The conditions are part of the new Articles 15 bis and 15 ter, so they should be adopted, according to a grammatical interpretation of the Rome Statute, under Art. 121, par. 4, and subsequently enter into force after ratification or acceptance by seven-eighths of the States Parties, regarding the fact that then the amendments would apply to all States Parties. This division introduces a certain inconsistency in the Rome Statute. As a result, the question arises whether it is possible to adopt the amendments under Art. 121, par. 5, as provided by the resolution concerned. The adopted resolution also deletes paragraph 2 of Article 5 of the original text of the Rome Statute. This paragraph stated that the crime of aggression will fall within the jurisdiction of the Court after a proper definition and conditions to exercise of jurisdiction are adopted.

**The actual definition of the crime of aggression is contained in the new Art. 8 bis**, following Art. 8 which regulates war crimes. The first paragraph defines aggression in terms of individual criminal responsibility for this crime: *“For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”*

It is partly based on the Nuremberg definition. But it was completed by the Special Working Group on the Crime of Aggression so that it met the requirements of the Court and the States Parties could agree with the given definition. The definition has a few components which should be further specified:

- As far as committing the crime is concerned, the planning, preparation, initiation or execution of an act of aggression fall within the jurisdiction of the Court
- There is a so-called *leadership clause*, which means that an offender must be a person in a position to effectively exercise control over or to direct political or military action of a State
- An act of aggression by its character, gravity and scale, must constitute a manifest violation of the Charter of the UN

In terms of determination of individual criminal responsibility, the Court has to qualify a potential act under the given criteria. As for the so-called *leadership clause*, it is obvious that in the case of relevant military action, primarily a Head of a State or another significant top politician or military representative could fall within the jurisdiction of the Court. The need to fulfil all three characteristics of an act of aggression (character, gravity and scale) is specified in Annex III of the resolution in so-called *Understandings*. But the question is how widely or narrowly should the term “manifest violation” be understood in connection with the Charter of the UN.

Paragraph 2 then follows, which defines an act of aggression for the purposes of paragraph 1, not in terms of individual criminal responsibility

but as an act of a state. This definition was adopted from resolution 3314 of the General Assembly of the UN of 1974. An act of aggression is:

- *the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State,*
- *or in any other manner inconsistent with the Charter of the United Nations.*

The definition is not limited only to the three named attributes of a state but there is a certain space left for qualification of other acts as the crime of aggression provided that the act is inconsistent with the Charter of the UN. The definition is supplied with a non-exhaustive list of acts which are, independently of a formal declaration of war, in accordance with the mentioned resolution of the General Assembly of the UN, qualified as acts of aggression. The list is adopted from the original resolution. However, theoretically an act which is not mentioned in the list could also be considered aggression.<sup>46</sup>

The most relevant reason why the crime of aggression was not already included in the jurisdiction of the International Criminal Court at the Conference in Rome in 1998 was a disagreement of the States on the conditions to exercise jurisdiction. In the cases of genocide, crimes against humanity and war crimes, a report stating that there is a situation suggesting that one of the given crimes has been committed can be submitted by the Security Council, a State Party or the Prosecutor. In the case of the crime of aggression, some states were of the opinion that an initiation of an investigation should be enabled only if the situation is reported by the UN Security Council. [34] But this would lead to politicisation of the exercise of jurisdiction over the crime concerned, simply because the Court would hear only the cases that all permanent members of the Security Council agree on.

With regard to independence of exercise of jurisdiction over the crime of aggression, it should be evaluated positively that eventually the States agreed that all three types of so-called trigger mechanism remain the same also for the crime of aggression. But it is necessary to point out that the regulation of the trigger mechanism concerning the crime of aggression dif-

---

<sup>46</sup> The aforementioned non-exhaustive list is stated in subchapter 7.1.2.

fers from the other three crimes. After Article 15, regulating the position of the Prosecutor, **Article 15 bis was inserted, which governs the conditions to exercise jurisdiction over the crime of aggression if a motion for an investigation is made by a State Party or the Prosecutor.**

As provided in paragraph 1 of this Article, the Court exercises jurisdiction over the crime of aggression in accordance with Article 13, paragraphs (a) and (c), subject to the provisions of the new Article 15 bis. Article 13 of the Rome Statute regulates the so-called trigger mechanism, which, according to par. (a) concerns a situation when one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party, or under Art. 13, par. (c), the Prosecutor has initiated an investigation in respect of such a crime. So Article 15 bis does not apply to possible investigations initiated by the UN Security Council.

In accordance with paragraph 2 of this Article, contained in the provisions of the Review Conference, it will be possible for the Court to exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. So the crime of aggression is far from being automatically included in the Rome Statute just because the definition of the crime was adopted at the Review Conference. Thus, the jurisdiction of the Court has not yet been widened to the crime of aggression.

There is a second condition for exercise of the jurisdiction of the Court over the new crime. After the beginning of the year 2017, the Assembly of the States Parties will have to accept the definition and conditions to exercise jurisdiction again by the same majority of States Parties as is required for the adoption of an amendment to the Rome Statute. That majority is defined in Art. 121, par. 3, that if a consensus cannot be reached the majority is two-thirds of the States Parties. In effect it means that, barring the first essential condition of ratification by at least 30 States Parties, the real decision about the fact regarding whether the Court will be empowered to exercise its jurisdiction over the newly defined crime of aggression has been postponed by a couple of years until after 1 January 2017.

Article 12 par. 2 of the Rome Statute provides that in the case of an initiation of an investigation by a State Party or the Prosecutor, the Court may exercise its jurisdiction over the crime provided that the State on the

territory of which the conduct in question occurred, or the State of which the person accused of the crime is a national is a State Party to the Statute. In accordance with this Article, on the basis of par. 4 of the newly inserted Article 15 bis, the Court exercises jurisdiction over the crime of aggression, arising from an act of aggression committed by a State Party. So it is evident that the aggressor has to be a State Party to the Rome Statute, otherwise the Court does not have jurisdiction to investigate the crime.

The jurisdiction of the Court, with regard to the crime of aggression is also weakened by the possibility that a State Party can declare that it does not accept such jurisdiction by lodging a declaration with the Registrar. By such an act the State Party is released from jurisdiction over the crime of aggression (so-called *opt-out*). Of course, the State may withdraw this declaration at any time.

Moreover, it would be interesting to examine the situation when an act of aggression was committed on the territory of a State Party and the aggressor was a State Party which opted out. Would it be possible to consider that, under Art. 12, par. 2, of the Rome Statute to which Art. 15 bis, par. 4, makes reference, the situation would fall within the jurisdiction of the Court by virtue of territorial jurisdiction of the attacked state? Or the State that opted out would be subject to Art. 15 bis, par. 5, which states that the jurisdiction of the Court covers an act of aggression committed by a State Party unless it has opted out. There is a certain contradiction in terms within one paragraph. But the expert debate which followed after the Review Conference quite clearly accepts the opinion that the given case does not fall within the jurisdiction of the Court. [27] If the aggressor was a State Party which has not accepted the amendment at all and thus has not opted out either, the current Art. 121, par. 5, would apply to such a situation and the Court would have no jurisdiction over such a case. The position of a State Party that has opted out and one that has not accepted the amendment is certainly going to be subject to many expert debates after the Conference.

As provided in Art. 5, in respect of a State that is not a party to the Statute, the Court will not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory. This provision represents a **very substantial limitation to exercise of the Court's juris-**

**diction with respect to the crime of aggression**, as opposed to the original three crimes (genocide, crimes against humanity and war crimes). In accordance with Art. 12, par. 2, of the Statute, if one of the three crimes mentioned has been committed by a national of a Non-Party State on the territory of a State Party, the Court will deal with the case, on the grounds of territorial jurisdiction. As for the crime of aggression, pursuant to Art. 15 bis, par. 5, if the crime is committed by a national of a Non-Party State, that is by an act of aggression of a state against another state which is a State Party to the Rome Statute, the Court cannot investigate the case. To sum up, this provision brings a considerable asymmetry between the first three crimes mentioned and the newly adopted crime of aggression.

In the following paragraphs are mentioned the key procedural rules for an initiation of an investigation. When the Prosecutor comes to a conclusion, initiated by a State Party or *proprio motu*, that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she has to first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor will also notify the Secretary-General of the UN about the situation, including any relevant information. When the Security Council has made such a determination, the Prosecutor may proceed with the investigation of the crime of aggression.

These provisions introduce a certain political issue in the jurisdiction of the Court, and regarding the independence of the Court and the equal access to all relevant crimes they may be seen as negative. On the other hand, the Security Council has had the exclusive right to determine an act of aggression since the year 1945 within international law. And concerning the development since the Conference in Rome, it could not have been expected that the situation would change radically. The final compromise is, with respect to what has been mentioned, more optimistic than what could have been realistically expected shortly before the Conference in Kampala.

Where no such determination is made by the Security Council within six months after the date of notification, the Prosecutor can proceed with the investigation in respect of a crime of aggression provided that the Pre-Trial Division has authorized the commencement of the investigation, and the

Security Council has not decided otherwise in accordance with Article 16 of the Rome Statute.

Considering the independence of the Court, this provision represents an optimistic result of the Review Conference. Unless the UN Security Council makes such a determination, the investigation of the Court can proceed, independently of any external power, provided that the majority of judges of the Pre-Trial Division authorize it. In the case of a potential suspension of an investigation, the Security Council has only Art. 16 of the Rome Statute left, which was already contained in the original text. Under this provision, the Security Council can stay the investigation or the prosecution for a period of 12 months by adopting a resolution under Chapter VII of the Charter of the UN, and this measure can be renewed under the same conditions.

The last two paragraphs of Art. 15 bis have a rather explanatory character. The first one provides that a determination of an act of aggression by an organ outside the Court – that is the UN Security Council – will be without prejudice to the Court's own findings. Then the second one states that Art. 15 bis is without prejudice to the jurisdiction over the crimes referred to in Art. 5; thus it applies only to the crime of aggression.

As opposed to the crime of genocide, crimes against humanity and war crimes, the crime of aggression has relatively complicated conditions for the exercise of the Court's jurisdiction with respect to this crime. Art. 15 bis is analysed above, which regulates the conditions for investigation at the initiation of a State Party or the Prosecutor. On the basis of a resolution of the Review Conference, Art. 15 bis is followed by **Art. 15 ter which governs the conditions of the Court's jurisdiction, provided that the motion for an investigation was made by the UN Security Council.**

According to paragraph 1 of this Article, the Court exercises jurisdiction over the crime of aggression in accordance with Art. 13, par. (b), subject to the provisions of the new Art. 15 ter. It is referring to a situation in which the crime of aggression 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. Just as in the case of an investigation on a motion made by a State Party or the Prosecutor, also in this case a condition for the exercise of jurisdiction over the newly defined crime of aggression must be

fulfilled that the amendment has been ratified or accepted by 30 States. No sooner than a year later can the Court exercise its jurisdiction.

The jurisdiction can also be exercised only after the Assembly of the States Parties decides again to adopt the amendment by at least two-thirds of the members after 1 January 2017. An explanation follows that a determination of an act of aggression by an organ outside the Court will be without prejudice to the Court's own findings. Also mentioned is that Art. 15 ter does not apply to the jurisdiction over the other crimes referred to in Art. 5 of the Statute, thus it applies only to the crime of aggression. So the Article 15 ter analogically resembles Article 15 bis, it is just slightly less complicated. If an investigation is initiated by the Security Council, it is supposed that the Security Council is of the opinion that an act of aggression has been committed. Therefore, it is not necessary to regulate the process of determination of an act of aggression by the Security Council, or to involve the Pre-Trial Division in a decision about an initiation of an investigation.

At this point it is important to emphasize that in the case of Art. 15 bis the position of the States Parties which have opted out of the jurisdiction of the Court with regard to the crime of aggression is regulated, and also the position of the Non-Party States which do not fall within the jurisdiction of the Court provided that an act of aggression has been committed on their territory or by their nationals. Article 15 ter does not regulate this issue, because in the case of an investigation initiated by the UN Security Council, according to Art. 12, par. 2, of the Statute the act can be investigated without regard to the fact whether a State is party to the Rome Statute or not.

Regarding the amendment, also Art. 25 of the Statute, which defines the individual criminal responsibility of a perpetrator, is partly newly formulated. Article 3 is followed by a new Article 3 bis which states that the provisions of this Article apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State. A so-called *leadership clause*, or *leadership position*, is incorporated in this way. This condition applies only to the crime of aggression. There are two more amendments concerning legal technicality, namely Art. 9, par. 1, and Art. 20, par 3, of the Statute. The purpose of these adjustments is only to correct the provisions which refer to articles concerning the crimes, so the

aim is the inclusion of Art. 8 bis, regulating the crime of aggression, among these provisions.

Annex I of the resolution about the new crime of aggression contains the wording itself, that is relevant modifications and amendments to the original text of the Rome Statute. Then follows Annex II which contains amendments to the Elements of Crimes with respect to the newly incorporated crime. Finally, Annex III contains so-called *Understandings*, [53] which are explanatory notes for the interpretation of the adopted provisions. They should be analysed in detail.

According to clause 1 and 3, regarding all the three options of an initiation of an investigation (a State Party, the Prosecutor, the UN Security Council), the Court may exercise its jurisdiction with regard to the crime of aggression, in accordance with Art. 15 bis, par. 2 and 3, and also Art. 15 ter, par. 2 and 3, only after the potential new adoption, no sooner than in 2017, and provided that the amendment is ratified by 30 States. On the basis of these paragraphs, it is understood that the Court will gain the jurisdiction after it fulfils that condition that comes about later.

Then clause 2 explicitly specifies a rule, which is contained in the Rome Statute not especially clearly, referring to the territorial jurisdiction of the Court with respect to an initiation of an investigation by the Security Council. The comment specifies that the Court can exercise jurisdiction over the crime of aggression on the basis of a Security Council referral under Chapter VII of the Charter of the UN irrespective of whether the State concerned is a party to the Rome Statute or not.

Within clause 4, it is explained that the adopted amendments with regard to an act of aggression and the crime of aggression serve only for the purpose of the Rome Statute of the International Criminal Court. The amendments should not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than the Statute. According to clause 5, amendments should not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.<sup>47</sup>

---

<sup>47</sup> See more about the relation of the newly defined crime of aggression and the principle of complementarity. [11]

Clause 6, in the spirit of the Nuremberg approach to the crime against the peace as “the supreme international crime”, [25] considers aggression the most serious and dangerous form of the illegal use of force. Then it explains that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations. Just the emphasizing of the individual circumstances of a particular case can be an adequate guideline for the right qualification, as the crime of aggression cannot be examined in a schematic way and therefore it is necessary to carefully evaluate all relevant facts and circumstances.

The content of clause 7, which was enforced mainly by the USA, [63] limits in a certain way the jurisdiction of the Court over the crime of aggression. The actual definition, according to Art. 8 bis, par. 1, states that to fall within the jurisdiction of the Court, an act of aggression has to constitute a manifest violation of the Charter of the UN by its character, gravity and scale. Thus, not simply any act of aggression is sufficient, but only one which causes that manifest violation. The last item of the *Understandings* lays down that while determining whether a manifest violation has been constituted by the character, gravity and scale of the act of aggression, the three components should not be understood alternatively, but cumulatively. It is not sufficient when an act of aggression constitutes a manifest violation of the Charter of the UN by its character, gravity or scale. It would have to be by the combination of the mentioned components.

Individual aspects and connections between various parts of the newly adopted definition of the crime of aggression will have to be clarified over the following years when the Court will not have jurisdiction over the crime yet. There was a good reason for Professor William A. Schabas from the National University of Ireland to remark after the end of the Conference: “*Legal academics like myself will be eternally grateful to the Review Conference for providing us with such complicated and at times incoherent provisions. They will provide us with fodder for journal articles, books and conferences for many years to come.*” [32]

## 7.4.2 THE OTHER AMENDMENTS

Although the adoption of the definition of the crime of aggression and the conditions for exercise of jurisdiction with respect to this crime is undoubtedly the most significant amendment and the culmination of the whole Review Conference, it is not the only amendment to the Rome Statute which was adopted at the Conference in Kampala. The next adopted amendment was the proposal of Belgium which represents an **amendment to the Art. 8 of the Statute** by criminalizing the use of certain weapons in armed conflicts not of an international character, that is in so-called internal armed conflicts. The use of these weapons is forbidden even in the text or the Rome Statute of 1998 in the case of international armed conflicts, so by this amendment it is extended to internal conflicts.

The resolution of the Review Conference about the extension of jurisdiction by certain war crimes paraphrases Art. 121, par. 5, of the Rome Statute which states that the amendments to Articles 5, 6, 7 and 8, which regulate the crimes, will not be accepted under Art. 121, par. 4, according to which an acceptance of seven-eighths of the States Parties is needed for adoption, but will enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court will not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.<sup>48</sup>

This introduces again a certain **asymmetry** in the jurisdiction of the Court **in respect of various war crimes**. As for the original war crimes contained in the Statute, according to Art. 12, par. 2, the Court has jurisdiction if the crime concerned has been committed by a national of a Non-Party State on the territory of a State Party. In contrast to this, in the newly incorporated crimes, according to the Art. 121, par. 5, if a perpetrator is a national of a State Party which has not accepted the amendment and the crime has been committed on the territory of a State Party, such a case falls outside the jurisdiction of the Court. Moreover, the regulation specifies that

---

<sup>48</sup> See resolution RC/Res. 5. [52]

the same principle applies in respect of a State that is not a party to the Statute. So the aforementioned asymmetry between the original crimes and the newly incorporated ones is quite significant in respect of the scope of the jurisdiction of the Court.

The resolution adopted an amendment to Art. 8, par. 2 (e), which is contained in Annex I of the resolution. It also declares that the provision concerned will be subject to ratification or acceptance by individual States and will enter into force in accordance with Art. 121, par. 5, of the Statute. It is important to mention that, as opposed to the same provision regarding the entrance into force of the new crime of aggression where the matter in dispute is whether the amendment can enter into force under Art. 121, par. 5, and not under Art. 121, par. 4, even in case of Art. 15 bis and ter, with respect to the extent of the jurisdiction of the Court by new war crimes, the chosen procedure is undoubtedly correct.

As mentioned above, Annex I contains the extension of war crimes within conflicts not of an international character. Within internal conflicts, the Court has jurisdiction over *employing poison or poisoned weapons, employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, and also 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*.<sup>49</sup> This new amendment enters into force for the States Parties which have ratified it, and its legal force is not conditioned by a minimum number of ratifications.

However, it can be said that the amendment to the Art. 8 of the Statute regarding war crimes is, rather than a significant modification, a correction of a certain omission or oversight made in 1998. According to the opinion of Professor Schabas, the amendment is more of a symbolic nature. No case has been brought before an international court based on the use of such weapons yet although, for example, poison gas was used by Saddam Hussein against Kurdish inhabitants in 1988. Such acts can be prosecuted even under the current text of the Statute as crimes against humanity. Schabas also adds that the attention should be turned to the regulation of

---

<sup>49</sup> In terms of content, in the original text of the Rome Statute the use of aforementioned weapons was forbidden only with respect to international conflicts.

the use of modern weapons such as anti-personnel mines, cluster munitions, depleted uranium weapons and also nuclear weapons. [31] On the other hand, it should be mentioned that a certain shortage of the original text was relieved by including those acts within war crimes not only in international armed conflicts, but also in internal conflicts, which should be evaluated positively.

The next item on the agenda was a **proposal to delete Art. 124 of the Rome Statute**. According to this provision, a State, on becoming a party to the Statute, may declare that, for a period of seven years after the entry into force of the Statute for the State concerned it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 (war crimes) when a crime is alleged to have been committed by its nationals or on its territory. The Art. 124 itself also declares, besides establishing that such a declaration can be withdrawn at any time, that this provision will be reviewed at the Review Conference.

Although on the part of some nongovernmental organizations the provision was perceived very negatively, surprisingly it was not deleted after all. Article 124 has been used by only two States so far, France and Colombia. As its perniciousness has never been empirically proved it is supposed to be rather useful for some states while deciding whether to join the Statute or not, and in this way it helps with a smooth ratification. At the Review Conference a resolution was adopted, according to which Art. 124 was preserved, but the provision will be re-examined in the future. [88]

Besides the new definition of aggression, amendments to war crimes and the decision about not deleting Art. 124, there were other proposed amendments to the Statute. [23] Mexico wanted to include in the jurisdiction of the Court the use of nuclear weapons, a joint proposal of Trinidad and Tobago and Belize suggested an inclusion of drug trafficking and the Netherlands wanted to adapt the Statute for the future inclusion of the crime of terrorism in the Court's jurisdiction. The mentioned proposals were not supported enough but a special working group is going to deal with them. [72] After the experience with the Review Conference it can be concluded that negotiating amendments to the Rome Statute and their adoption is rather lengthy and complicated but feasibly possible. It can be expected that in the near and remote future, international criminal law will be

further developing in this way and new crimes may be included in the jurisdiction of the Court.

## 7.5 EXPERT REACTIONS ON THE RESULTS OF THE REVIEW CONFERENCE

The Review Conference was an evident success, at least on the face of it, because eventually the definition of the crime of aggression was adopted. Based on this amendment, the International Criminal Court should exercise jurisdiction over this crime. After the end of the Conference there will be space and time for sober critics of the results. For that reason, some space should be devoted to the expert reactions on the results of the Review Conference which was held in Kampala, Uganda.

The Professor of International Criminal Law at Melbourne Law School, Kevin Jon Heller, is **mainly critical**. He refers in the first place to Art. 15 bis, concretely paragraphs 4 and 5 which regulate the jurisdiction of the Court in the case of an initiation of an investigation by a State Party or the Prosecutor. According to the provisions, the Court can exercise jurisdiction over the crime of aggression if a crime has been committed by a State Party unless a State Party has officially declared that it does not accept the jurisdiction of the Court with respect to this crime. This would be the already mentioned *opt-out*. In respect of a state which is not a party to the Statute, the Court will not exercise jurisdiction over the crime of aggression if the crime has been committed by its nationals or on its territory.

For lucidity, he made a diagram which represents the theoretical possibilities of committing an act of aggression. There are three types of states (a State Party, a Non-State Party and a State Party that has opted out). Their combination corresponds with the following possibilities of an attack: [27]

<i>State Party</i> → <i>State Party</i>	<i>Jurisdiction</i>
<i>State Party</i> → <i>State Party OO</i>	<i>Jurisdiction</i>
<i>State Party</i> → <i>Non-State Party</i>	<i>No Jurisdiction</i>
<i>State Party OO</i> → <i>State Party</i>	<i>No Jurisdiction</i>

<i>State Party OO</i> → <i>State Party OO</i>	<i>No Jurisdiction</i>
<i>State Party OO</i> → <i>Non-State Party</i>	<i>No Jurisdiction</i>
<i>Non-State Party</i> → <i>State Party</i>	<i>No Jurisdiction</i>
<i>Non-State Party</i> → <i>State Party OO</i>	<i>No Jurisdiction</i>
<i>Non-State Party</i> → <i>Non-State Party</i>	<i>No Jurisdiction</i>

Based on this analysis of Art. 15 bis, the Court has jurisdiction over the crime of aggression only provided that it has been committed by a State Party which has accepted its jurisdiction and the State Party has committed the act against another State Party. If a State Party is attacked by a Non-Party State, the case does not fall within the jurisdiction of the Court. So it seems that the possibility of an initiation of an investigation by a State Party or the Prosecutor, regarding the jurisdiction of the Court over this area, is very low.

Professor Heller proceeds from the given scheme with nine possible combinations of an attack. Based on the analysis of the Statute, he names the main reasons for his criticism. They can be summarized into the following points:

### **1. Asymmetry of jurisdiction between a State Party and a State Party that has opted out**

A State Party which has opted out cannot be prosecuted for the crime of aggression provided that the crime was committed against a State Party which has not opted out. But it does not work reversely. A State Party which has not opted out can be prosecuted for the crime of aggression committed against an opting-out State Party. Thus, a State which has opted out is protected against aggression by other States Parties, but a possible act of aggression on its part falls outside the jurisdiction of the Court. Also, it is quite likely that a state which is going to use force against other states will opt out of the jurisdiction over the crime of aggression. It is possible to imagine what impact it has on the reputation of a state if the state refuses to become a State Party to the Rome Statute. But it is hardly possible to imagine a considerable impact on the reputation of a state which joins the Statute but

limits the jurisdiction of the Court only to genocide, crimes against humanity and war crimes.

## 2. Asymmetry of jurisdiction between the original crimes and the crime of aggression

The Court will have no jurisdiction over a State Party's act of aggression against a Non-Party State even though it would have jurisdiction over war crimes and crimes against humanity committed as a result of that act. Also, the Court will have no jurisdiction over a Non-Party State's act of aggression against a State Party committed on a State Party's territory, even though the Rome Statute recognizes territorial jurisdiction over genocide, crimes against humanity and war crimes. To sum up, the States Parties adopted a provision stating that if there is a Non-Party State's act of aggression against a State Party, the Court will have no jurisdiction over such a case, which seems to be quite irrational.

So the core of the author's critique of the regulation of the crime of aggression is not its definition or institutional conditions for exercise, but mainly the very limited jurisdiction of the Court over this crime. On the other hand, Professor Greg Gordon of the University of North Dakota is generally of a different opinion and he **finds** the results of the Review Conference **positive**. Based on his own participation in the Conference and with respect to the complexity of the negotiations, he was satisfied with the fact that at the end of the Conference the amendment was adopted. To support this conclusion the following arguments can be mentioned: [26]

### 1. Preservation of all the three options of an initiation of an investigation

During the Conference it was rationally expected that if a definition of a new crime was accepted, an investigation of the crime could be initiated only by the UN Security Council. But the conditions laid down in Art. 15 bis also regulate the possibility of an initiation of an investigation by a State Party or the Prosecutor.<sup>50</sup>

---

<sup>50</sup> According to his own words, the author, under the circumstances of complicated negotiations, considers it "a minor miracle".

## 2. Existence of the so-called *green light option*

In the case that an investigation is not initiated by the UN Security Council, firstly, the Prosecutor has to submit the case concerned to the Security Council. But if the Security Council does not determine that an act of aggression has occurred, it is not the end of the investigation. If the Pre-Trial Division of the Court grants the Court to proceed with an investigation after the expiration of the period, the Prosecutor can proceed with a trial even without the permission of the Security Council. If the Security Council did not agree with an investigation, it can use Art. 16 of the Rome Statute and suspend it for 12 months, but it has no competence to definitely stop the investigation.

Many authors deal with the issues relating to the method of adoption of the new amendment to the Rome Statute. The question is whether it should be adopted under Art. 121, par. 4, or Art. 121, par. 5, of the Statute. The first option is intended for amendments to the Statute in general. An amendment will enter into force after it has been ratified by seven-eighths of the States Parties, then the amendment applies to all States Parties. The second variant of adoption is meant, as is explicitly stated in the Statute, for amendments to Articles 5, 6, 7 and 8. Subsequently, that amendment will enter into force for those States Parties which have ratified it. The crime of aggression was already mentioned in the original text of the Rome Statute in Art. 5, par. 1, within the enumeration of the crimes over which the Court has jurisdiction. But the crime is further specified in Art. 8 bis, and the conditions in Art. 15 bis and 15 ter. During the negotiations a question arose as to whether in such a case it is possible to adopt amendments under Art. 121, par. 5, although it does not make reference to the new Articles.

The opinion that all amendments regarding the crime of aggression should be adopted under Art. 121, par. 4, did not have many supporters. The co-called ABS proposal which was named after the initials of the states which submitted it (Argentina, Brazil, Switzerland) was discussed more. According to the proposal, the Court would have jurisdiction over the crime of aggression one year after the ratification of an amendment provided that an investigation was initiated by the UN Security Council. So in this case the adoption under Art. 121, par. 5, of the Statute would be applied. The other two trigger mechanisms would be activated after an amendment has

been ratified by seven-eighths of States Parties; that is under Art. 121, par. 4, of the Statute. Primarily due to its complexity this variant did not receive sufficient support and **the final text presumes an adoption under Art. 121, par. 5.**<sup>51</sup>

But this does not remove doubts about whether it is possible. Art. 121, par. 5, clearly states that amendments to Art. 5, 6, 7 and 8 are adopted in this way. Using a grammatical interpretation, we reach the conclusion that Articles 8 bis, 15 bis and 15 ter cannot be adopted in this way. The Japanese delegation especially expressed a deep disagreement with this technical imperfection.<sup>52</sup> Japan was of the opinion that any amendment, functioning as a selective instrument for jurisdiction, should be adopted under Art. 121, par. 4, and should enter into force for all States Parties after the amendment has been ratified by seven-eighths of them. A contrary opinion says that the purpose of the amendments concerned is to ensure exercise of jurisdiction over the crime of aggression, so their adoption falls within Art. 121, par. 5. But the actual question remains whether this method of adoption would not be attacked by the defenders of persons potentially accused of the crime of aggression. [33]

Although the Japanese delegation decided not to stay in the way of a unanimous adoption, it commented that in the future it will be necessary to clarify the inconsistency. [30] The method of ratification and entrance into force of the amendments adopted at the Review Conference will be definitely subject to expert discussions during the following years. With regard to this issue, Robert Manson, a British lawyer engaging in international criminal law, suggests an adoption of a new resolution which would delete Art. 8 bis, 15 bis and 15 ter and transfer them under Art. 5 as its three new provisions. [30] That would harmonize the adopted amendments with the current version of Art. 121, par. 5, and the amendments could be ratified under that Article. On the other hand, it can be rationally presumed that based on teleological or systematic interpretation we reach the conclusion that

---

<sup>51</sup> Another proposal on the part of Canada was the co-called *Menu Approach*, according to which each individual State could choose which trigger mechanism, out of the three possible, it will accept. This proposal did not get the needed support either.

<sup>52</sup> With respect to this issue, it is important to mention that due attention is paid to the Japanese attitude because currently Japan contributes to the Court's budget by almost a quarter.

the provisions concerned can be adopted in the current version under Art. 121, par. 5, regarding the fact that they put Art. 5 in concrete terms.

Following up the reaction to the Review Conference in Kampala, it is certainly interesting to summarize also **the official reaction of the USA, with respect to the amendments adopted at the Conference.** The United States of America has been in considerable opposition to the Court since its establishment, primarily due to the fact that they did not want the Court to assert jurisdiction over American troops deployed abroad. But the initial strategy of rejection of the Court was replaced by the policy of positive engagement when the USA as a Non-Party State engaged in negotiations about the development of the Court. [29]

As an observer state the USA sent a delegation led by Harold H. Koh and Stephen J. Rapp to the Conference in Kampala. After the end of negotiations in Kampala they expressed satisfaction about the adopted amendments, primarily emphasizing the fact that the jurisdiction of the Court over the crime of aggression is not too wide.<sup>53</sup> They also commented on the *Understandings* which the American delegation pushed through. It clause 7 of the Understandings, the possibility of determining a “manifest violation” to the Charter of the UN in a way that an act of aggression constitutes a violation not only by its character, gravity or scale, but by the combination of the mentioned components is specified. Later they expressed satisfaction about the fact that “*with respect to the ICC, the USA was once again seen as part of the solution and not the problem*”. [63]

For the USA, the policy of positive engagement is advantageous for two reasons. Firstly, it has increased the prestige of the USA around the world as its initial, considerably negative attitude towards the institution whose aim is to punish crimes under international law noticeably damaged the reputation of the USA. Secondly, the USA is now able to control the wide-

---

<sup>53</sup> Harold H. Koh: “*We think that with respect to the two new crimes, the outcome protected our vital interests. The court cannot exercise jurisdiction over the crime of aggression without a further decision to take place sometime after January 1st, 2017. The prosecutor cannot charge nationals of non-state parties, including U.S. nationals, with a crime of aggression. No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party. And if we were to become a state party, we’d still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.*” [63]

ning of the jurisdiction of the Court better, and enforce its interests during individual negotiations. It corresponds with the new regulation of the crime of aggression when, as opposed to the three original crimes, it is no longer possible to initiate an investigation on the grounds of territorial jurisdiction of a State in the case that the crime of aggression has been committed by a national of a Non-Party State on the territory of a State Party.

## 7.6 SUMMARY OF THE NEW REGULATION OF THE CRIME OF AGGRESSION

Although everyone surely wished that the International Criminal Court did not have to exist at all and that the definition of the crime of aggression was not necessary, we have to proceed from the real situation. This suggests that at the beginning of the twenty-first century, based on much experience, the existence of such a judicial body is legitimate. The crime of aggression has been successfully tried only in the second half of the forties so far. Robert H. Jackson, Chief U.S. Prosecutor at the Nuremberg Trial, said during his opening statement:

*“The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”* [28]

More than fifty years later, the International Criminal Court began to operate, and its jurisdiction was activated in 2002. During the following years it initiated an investigation of situations in a number of states. [60] The development of the Court’s functioning was supported by the Review Conference in Kampala where the new definition of the crime of aggression was adopted. It was difficult to reach an agreement on the definition and the conditions for exercise of jurisdiction over the new crime. The adopted

proposal is a compromise solution which seeks a certain balance between the role of the International Criminal Court and the UN Security Council. As Professor Šturma of the Faculty of Law at Charles University in Prague observed, **the Court and the Council have different priorities** which result from their very nature. [88] While the purpose of the International Criminal Court is the attainment of justice and punishment of crimes under international law, the role of the UN Security Council is the maintenance of international peace and security. From a long-term perspective these interests should be complementary. [93] However, in certain situations it does not have to be like this. The inclusion of the crime of aggression in the jurisdiction of the Court is an example of a situation when international law meets international politics.

The Review Conference in Kampala, Uganda, besides extending the jurisdiction over war crimes in internal conflict, accepted the new definition of the crime of aggression, which is characterized by specific conditions to exercise jurisdiction. And that distinguishes it from the original three crimes which fall within the jurisdiction of the Court. While summing up the given matter, the following conclusions should be accented:

**1. The Court will be able to exercise jurisdiction over the newly defined crime of aggression no sooner than in the year 2017**

Even after the adoption of the new definition of aggression, the Court has no jurisdiction over this crime. First of all, two conditions must be fulfilled. The jurisdiction over the crime of aggression can be exercised a year after the amendment has been ratified by 30 states, and also after it has been readopted by the Assembly of States Parties, some time after 1 January 2017. The later date is decisive. There will probably be some pressure on the part of some states and non-governmental organisations for the necessary ratifications to be completed before the end of the year 2015 so that the jurisdiction over the new crime can be activated at the beginning of the year 2017.

From today's point of view, the conditions may seem to be achievable. Regarding the fact that the Rome Statute itself has reached 60 ratifications during four years,<sup>54</sup> there is a good reason for the presumption

---

<sup>54</sup> The Rome Statute was signed in 1998 after 60 ratifications entered in force in 2002.

that the new amendment will get the 30 ratifications needed within six years. Equally, it seems to be realistic that if the amendment was adopted unanimously by the Assembly of States Parties at the Review Conference, it is likely that after 2017 it will be accepted by the necessary two-thirds majority of the Assembly of States Parties. On the other hand, considering the fact that in such a case the crime of aggression would be put into practice, the attitude of some States may be more reserved.

## **2. Narrow definition of aggression with regard to the term “manifest violation” of the UN Charter**

If an act of aggression has been committed and the perpetrator was in a so-called *leadership position*, for the exercise of the jurisdiction of the Court it is also necessary that the act constitutes by its character, gravity and scale a “manifest violation” of the UN Charter. To constitute the violation, one component is not enough. There must be a combination of all the three mentioned components. The definition lacks an interpretation of the term “manifest violation”, so it will depend on how extensively or restrictively the Court interprets it.

So it can be concluded that the definition covers only clear cases of aggression. [34] The actions of the Security Council under Chapter VII of the UN Charter, and, of course, self-defence, either individual or collective logically stand outside the scope of the definition. The advantage of the narrow definition of aggression is the fact that probably no humanitarian intervention would fall within it. A conclusion can be drawn that out of the international conflicts which occurred during last decades a typical example of an act of aggression, which would fulfil the adopted definition, is the invasion of Kuwait by Iraq in 1990.

## **3. Preserving an initiation of an investigation by a State Party or the Prosecutor**

During the negotiations it seemed realistic that, provided that the new definition of the crime of aggression is adopted, the conditions would be regulated in such a way that an investigation could be initiated only by the UN Security Council. But the adopted amendment does not contain such a limitation and, as in the case of the original

three crimes which fall within the jurisdiction of the Court, in the case of the crime of aggression the two possibilities of an initiation of an investigation outside the Security Council are preserved.

**4. Possibility to grant an investigation by the Pre-Trial Division of the Court, instead of the UN Security Council (preservation of so-called *green light*)**

In case of an initiation of an investigation by the Prosecutor or a State Party, the Prosecutor must submit the case to the UN Security Council to determine whether an act of aggression has occurred. If the Council determines it, the Prosecutor may proceed. However, if the Council does not do so, after a lapse of six months the Prosecutor can proceed with an investigation, but on condition that the investigation has been authorised by majority of the six judges of the Pre-Trial Division of the Court.

This provision should be evaluated positively. For one thing, the need of a determination by the Pre-Trial Division represents a certain selective tool against politically contingent trials. And for another, the Prosecutor is not entirely dependent on the Security Council's positive opinion on the investigation, so the decision concerned pertains to an independent court instead of a political body.

**5. Restrictions for the UN Security Council resulting from Art. 16 of the Statute (non-existence of so-called *red light*)**

Among the variants how to regulate conditions was also a possibility to give the Security Council competence, under Chapter VII of the UN Charter, to stop a certain investigation or prosecution of a person once for all. In other words, a certain "granting pardon in international law". However, according to the adopted amendment, the Security Council does not have this possibility. If the Council wanted to intervene in an investigation in any way, it would be reliant on Art. 16 of the original text of the Statute.

According to the provisions, the Council may adopt a resolution under Chapter VII of the UN Charter to suspend an investigation or prosecution for 12 months, and such a resolution can be adopted repeatedly. With regard to the aforementioned priorities of the Court and the

Security Council, the provision concerned should be evaluated rather positively. A situation could occur when a certain investigation could endanger a running peace process, and in such a case the use of Article 16 of the Statute would be adequate.

#### **6. Interpretive problem regarding the method of adoption under Art. 121, par. 5, of the Statute**

The adopted amendment of the Rome Statute presumes, according to its preamble, its adoption in accordance with Art. 121, par. 5, of the Statute, which specifically provides that amendments to Art. 5, 6, 7 and 8 of the Statute should be adopted under this Article. With regard to the fact that the adopted amendments are located in Articles 8 bis, 15 bis and 15 ter, the question is whether this contradiction can be overcome by the argument that they only specify the application of Art. 5, so there is no need to adopt them under Art. 121, par. 4.

#### **7. Dual jurisdiction – while the original crimes can be prosecuted on grounds of territorial jurisdiction, the crime of aggression can not**

The developing duality of jurisdiction over different crimes should be seen as a negative attribute of a new definition of the crime of aggression.<sup>55</sup> In accordance with Art. 12, par. 2, of the Statute, the jurisdiction of the Court over genocide, crimes against humanity and war crimes applies to crimes committed by nationals of a State Party and also to the offenders who have committed a crime on the territory of a State Party, even though they are nationals of a Non-Party State. However, in the case of the newly adopted crimes this does not apply, according to Art. 15 bis, par. 5.

Thus, if a State Party to the Statute is attacked by a Non-Party State, paradoxically in such a case the Court has no jurisdiction over the crime of aggression. The State concerned is in no way protected by the Court in such a situation, and the case would fall within the jurisdiction of the Court only if the aggressor was a State Party. The considerable asymmetry then arises from the fact that possible crimes against huma-

---

<sup>55</sup> The source of the duality can be found already in the original text of the Rome Statute, specifically in Art. 121, par. 5, clause two.

nity, war crimes or genocide resulting from the act of aggression would fall within the jurisdiction of the Court, but not the actual crime of aggression.<sup>56</sup>

## **8. Preventive function**

It is also important to point out that, if the Court has jurisdiction over the crime of aggression, this fact itself can result in more restrained behaviour of certain leaders. In a situation when there is no individual criminal responsibility for an attack of a sovereign state within international law, the person concerned does not have to fear any judicial power. At the most, he or she can be afraid of the failure of a military operation concerned.

But if the jurisdiction over the crime of aggression is activated, on the basis of a resolution of the Security Council it would be possible to investigate the relevant crime, although the state concerned would not be a State Party. And with respect to the fact that, as opposed to common perpetrators, Heads of States or high-ranking persons have a tendency to rationally consider their decisions, it is probable that the jurisdiction of the Court over the crime of aggression will also have a preventive function. If so, it would be the greatest success of the Kampala Conference.

## **9. In the case of an initiation of an investigation by the UN Security Council the Court has universal competence.**

As opposed to the original crimes included in the Rome Statute, which are genocide, crimes against humanity and war crimes, in the case of the crime of aggression the conditions for the exercise of jurisdiction are more complicated and the jurisdiction itself more narrow.

---

<sup>56</sup> Furthermore, it should be pointed out that, with respect to Art. 121, par. 5, clause two, if any other amendment is adopted in the future, the same will apply to a State Party to the Statute which has not accepted the amendment. Supposing there is no analogical provision to Art. 15 bis, par. 5, in the future amendments (according to which the Court has no jurisdiction over crimes committed by a Non-Party State provided that the crime has been committed by its nationals or on its territory), the Court would be able to exercise jurisdiction over new crimes which may be adopted in the future on condition they have been committed by a national of a Non-Party State on the territory of a State Party, that is, on the grounds of territorial jurisdiction of the State concerned.

However, these differences are not relevant in the situation when an investigation is initiated by the Security Council under Chapter VII of the UN Charter. In such a case the conditions of Article 15 bis are not activated and the Court will have jurisdiction over the crime of aggression irrespective of whether the aggressor is a State Party or not.

In reality, it can be assumed that, regarding the narrow jurisdiction over the crime concerned, the current definition does not provide much space for the cases when an investigation could be initiated by a State Party or the Prosecutor. The aggressor would have to be a State Party, and supposing that a Head of a State planned to attack another state, he or she would probably not join the Rome Statute or the new amendment, or the possibility of opting out would be used. The biggest advantage of adopting the definition of the crime of aggression can be seen in the fact that the Court can be provided with the jurisdiction over the crime of aggression through the initiation of an investigation by the UN Security Council when the crime has been committed by a State not Party to the Rome Statute.<sup>57</sup> In such a case, the competence of the Court over the crime of aggression will be universal, or rather it will not be limited to the States Parties.

With respect to the analysis introduced above and the conclusions drawn out of it, it can be observed that the adopted definition of the crime of aggression has unquestionable strengths and also certain weaknesses. The considerable asset is mainly the very fact that it has been accepted, although the exercise of jurisdiction over that crime is conditioned by two important requirements so it can be activated no sooner than 2017. Among the weaknesses can be named, besides possible substantive objections, mainly the complexity of the adopted amendment which, unfortunately, in certain cases gives rise to a non-consistent interpretation of certain provisions, such as the regulation governing adoption of amendments under Art. 121, par. 5. The possible date for the jurisdiction over that crime coming into operation

---

<sup>57</sup> Although in such a case the Court has jurisdiction over the state concerned, regarding the current investigation of the situation in Sudan, it should be mentioned that in the case concerned, a real obstacle for the exercise of jurisdiction of the Court can be the State's refusal to cooperate. In such cases it is essential that the Court has full support of the UN Security Council.

provides sufficient time to clarify the adopted definitions with respect to the relationship of the Court towards the State Parties, Non-Party States and opted-out State Parties. For that reason, there is no need to see the postponement of the jurisdiction by seven years negatively, but on the contrary, as an opportunity for a discussion and clarification of certain provisions.

Although it is far too early for a true evaluation of the impact that the Conference in Kampala has had on international criminal judiciary and justice, it is undoubtedly positive that within international law the definition of the crime of aggression has been adopted, which has the potential to gain necessary authority within the international community. And together with it also the International Criminal Court which is currently hearing the first cases against the perpetrators of crimes under international law.

Professor of international law, Benjamin B. Ferencz, who was born in 1920 and was the American Prosecutor at the Nuremberg Trial, dedicated his professional life to the pursuit of criminalization of international aggression and the emphasis of the role of international law for a peaceful coexistence of states. In 2010, he participated at the Review Conference to the Rome Statute, and in an academic article published less than a year before the Conference, he wrote: *“Insisting that wars cannot be prevented is a self-defeating prophecy of doom that repudiates the rule of law. Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason.”* [25]

After the Review Conference, it must be said that we are one step closer to the inclusion of aggression in the Statute among the crimes under international law. But no sooner than in 2017 will we know whether the Court will really have jurisdiction over that crime. A successful completion of the implementation will to a significant extent depend on what reputation the International Criminal Court will earn based on its functioning during the following years.



## CONCLUSION

Under the moral foundations of the creation of the International Criminal Court undoubtedly falls the idea of universality of human rights. Thus, it is unjust that the gravest mass crimes which have been committed in a certain place are investigated, and the persons responsible for it tried in a fair process, while the same crimes which have been committed in a different place are not. A human life, in spite of differences in culture, does not have a different value in Europe or Africa, or wherever else. The Rome Statute is an instrument that protects the most fundamental human rights by fighting impunity, and by increasing the number of the States Parties on a voluntary basis it approaches the coveted universality.

The Rome Statute of the International Criminal Court is a result of a certain compromise. The core of the criticism primarily consists in the limitation of sovereignty of a traditional state. By joining the Statute, a State accepts the jurisdiction of the Court over crimes under international law. Some states disagree with the fact that the Court has jurisdiction over a national of a State not party to the Statute provided that the crime has been committed on the territory of a State Party. They also worry about possible extensive interpretations and a misuse of its authority. But the Court operates on the basis of the principle of complementarity, according to which those crimes should be investigated primarily by the state concerned. Only in cases when this is not possible for some reason does the Court initiate an investigation.

This text concentrates on the analysis of the Rome Statute as the founding document of the International Criminal Court, and also on practical questions connected with its functioning. It should be admitted that the aim of the Rome Statute, by the creation and operation of the International Criminal Court to sufficiently fill the deficit of international criminal justice has not been accomplished yet. This conclusion can be drawn mainly when considering the factual universality of jurisdiction of the Rome Statute at the present time.

Four reasons lead to this conclusion. Firstly, the fact is that many states of the world, including some world powers, are still not States Parties to the

Statute. Secondly, it is problematic to initiate an investigation in Non-Party States because to achieve that it is necessary to firstly reach a consensus in the UN Security Council. Thirdly, although an investigation is initiated in a Non-Party State, with regard to the situation in Sudan, insufficient enforceability of cooperation with the Court on the part of the accused is evident. The fourth reason is the fact that currently the Court does not have jurisdiction over the crime of aggression yet. In the future, the inclusion of international terrorism should be considered in respect of this issue. With reference to the adoption of the definition of the crime of aggression, it must be said that it is relatively narrow, and it may be activated no sooner than in the year 2017.

It is clear from the above-mentioned that the Court primarily needs sufficient support from the countries which are permanent members of the UN Security Council to perform its objective of pursuing international criminal justice. However, as for the above-mentioned critical comments, it should be added that through the creation and operation of the International Criminal Court a significant contribution to justice in international criminal law has been made.

The most important assets of the Statute are the core of this progress, among which it is necessary to name mainly the effort to punish perpetrators and incapacitate them from committing other criminal acts, to describe reality and publicize events, and primarily, the resulting preventive function, when the existence of the Court could deter certain potential perpetrators from committing crimes under international law. For these reasons the aforementioned attributes were chosen as part of the motto of this publication. The Review Conference in Kampala then clearly proved that the Statute can develop in terms of its content, and thus further contribute to international criminal justice.

The jurisdiction of the court suitably combines a possible accession of states to the Statute on the basis of their voluntary consideration with the possibility of initiating an investigation into a Non-Party State by the UN Security Council. In the general view, the creation of the International Criminal Court is a revolutionary event which changes the traditional view on a state's sovereignty. And based on historical experience, it says that there are such crimes which can be successfully fought only on the condition that

they will be treated in accordance with principles of a fair criminal trial by the international community as a whole.

Long-time fighter against apartheid in South Africa and winner of the Nobel Peace Prize, Desmond Tutu says: “*As painful and inconvenient as justice may be, we have seen that the alternative – allowing accountability to fall by the wayside – is worse.*” [35] For the first time in history we have a chance to get an efficient instrument whose aim is to ensure that nobody in the world, irrespective of their position, could commit the most serious crimes under international law. Only the long-term functioning of the Court will decide whether the key states will join it, and thus it will take a large step towards achieving one of its main objectives – universal competence. In that connection, the 20<sup>th</sup> century can be seen as an era when humankind started to leave the culture of impunity. Let’s make the 21<sup>st</sup> century the period when humankind fully accepts the culture of responsibility.



## **SUMMARY**

The purpose of the monograph is to discuss and analyse the relatively recently established international institution in terms of its proposed role as the guardian of international criminal justice. The creation of the International Criminal Court was a message of the international community to all possible perpetrators of crimes under international law that they cannot rely on their national immunities anymore and in case of a committed crime they will be brought before justice and bear responsibility for their behaviour. Thus the aim of the research is to analyse whether the Court is successful in accomplishing its purpose.

The work is composed of seven chapters, each of them dealing with different aspects of the Court's characteristics. Firstly, the circumstances are introduced that led the international community to the idea of a systemic development of international criminal law. During the twentieth century several situations of mass violation of fundamental human rights occurred that required international judiciary solutions. After World War II the military tribunals in Nuremberg and Tokyo were established, followed more than forty-five years later by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Afterwards several courts were created that combined the elements of national and international law. The passage argues that based on the experiences a need for the creation of a permanent International Criminal Court arose.

Furthermore the content of the Rome Statute is discussed. This open international treaty was accepted in 1998 and on grounds of obtaining the required amount of ratifications it entered into force in 2002. The text explains the jurisdiction of the Court that at the present time covers genocide, crimes against humanity and war crimes. It concerns the complementarity principle, which means that if a crime defined in the Statute is committed, the relevant state is primarily responsible for the trial with the perpetrator. Only under condition that it is not capable of guaranteeing a fair trial, the Court initiates the investigation. The jurisdiction of the Court respects the territorial principle and the principle of active personality. That means the

Court can initiate an investigation if the perpetrator is a national of a state party or the crime was committed on the territory of the state party. The investigation can be initiated by an independent prosecutor or by a state party, and only the UN Security Council has the right to initiate investigation of crimes committed in a non-party state.

The subsequent chapter discusses the relevant arguments of the states that are in opposition of the Court because of concerns of its possible political manipulation. Three of the five UN Security Council permanent members did not join the agreement and at least in the case of the USA the main reason for this was the potential abuse of the Court against American forces abroad, based on the territorial principle. However, the existing experience does not confirm the concerns. Moreover a critical analysis of the advantages and disadvantages of the Rome Statute follows, based on the arguments that are most often used by its critics and supporters.

The next chapter provides an insight into the current investigations of the Court, in particular in several African countries. Above all the text focuses on the circumstances and procedure of two interesting cases that concern the Congolese warlord Thomas Lubanga and the issue of an arrest warrant for the Sudanese president Omar Al Bashir.

The content of the last chapter is devoted to the Review Conference and the new definition of the crime of aggression that was accepted by the states parties and should be activated after the beginning of 2017. The text firstly discusses the development of the crime of aggression in international law and further provides a view into the discussions and results of the review conference in Kampala. Next, the analysis of the amendment concentrates on problems resulting from the narrow jurisdiction of the new crime and the specific role of the UN Security Council in its exercise. Furthermore, it summarises the key features of the newly accepted definition of the crime of aggression.

Based on the overall analyses from the previous chapters it is appropriate to conclude that although the Court is at the time not able to investigate all committed crimes under international law in a universal view, its establishment has contributed substantially to the strengthening of justice in the international criminal law. The moral essence of the Court is the conviction that the value of a human life is equal no matter the place or culture. One of

the biggest ambitions of the Statute is the achievement of a universal scope of jurisdiction. To date almost two-thirds of all states in the world are states parties to the Statute. It would be of significant importance for the future if the USA and other influential states joined as well, followed by others. With strong support of the international community the International Criminal Court would become a unique institution that contributes meaningfully to the building and development of the international criminal justice.



## **LIST OF ABBREVIATIONS**

ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
JEM:	Justice and Equality Movement
ODM:	Orange Democratic Movement
UN:	United Nations
PNA:	Palestinian National Authority
PNU:	Party of National Unity
SCSL:	Special Court for Sierra Leone
SLM/A:	Sudan Liberation Movement/Army
Court:	International Criminal Court
Statute:	Rome Statute of the International Criminal Court
STL:	Special Tribunal for Lebanon
UPC:	Union des Patriotes Congolais



## LIST OF REFERENCES

### Literature in English

#### Books

- [1] ARNOLD, R. *The ICC as a New Instrument for Repressing Terrorism*. New York: Transnational Publisher, 2004. 382 p.
- [2] BROOMHALL, B. *International Justice and the International Criminal Court: between Sovereignty and Rule of Law*. Oxford: Oxford University Press, 2003. 215 p.
- [3] CASSESE, A. *International Criminal Law*. 2. edition. Oxford: Oxford University Press, 2008. 455 p.
- [4] DE THAN, C.; SHORTS, E. *International Criminal Law and Human Rights*. London: Sweet & Maxwell, 2003. 550 p.
- [5] SCHABAS, W. A. *An Introduction to the International Criminal Court*. 3. edition. Cambridge: Cambridge University Press, 2007. 548 p.
- [6] ZAHAR, A.; SLUITER, G. *International Criminal Law*. Oxford: Oxford University Press, 2008. 530 p.

#### Journal articles

- [7] AKANDE, D. The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities. *Journal of International Criminal Justice*. 2009, i. 7, p. 333.
- [8] CAYLEY, A. T. The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide. *Journal of International Criminal Justice*. 2008, i. 6, p. 829.
- [9] GOSNELL, CH. The Request for an Arrest Warrant in Al Bashir. *Journal of International Criminal Justice*. 2008, i. 6, p. 841.
- [10] JESSBERGER, F.; GENEUSS, J. On the Application of a Theory of Indirect Perpetration in Al Bashir. *Journal of International Criminal Justice*. 2008, i. 6, p. 853.
- [11] KRESS, C.; HOLTZENDORFF, L. The Campala Compromise on the Crime of Aggression. *Journal of International Criminal Justice*. 2010, i. 8, p. 1216–1217.
- [12] LAWRENCE J.; HELLER K. J. The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute. *Georgetown International Environmental Law Review*. 2007, i. 1, p. 61–95.
- [13] MIRAGLIA, M. Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga. *Journal of International Criminal Justice*. 2008, i. 6, p. 489.

- [14] NASH, W. L. The ICC and the Deployment of U.S. Armed Forces. In *The United States and the International Criminal Court. National Security and International Law*. Lanham: Rowman & Littlefield Publisher, 2000, p. 163.
- [15] OKUTA, A. National Legislation for Prosecution of International Crimes in Kenya. *Journal of International Criminal Justice*. 2009, i. 7, p. 1063–1076.
- [16] PELLET, A. The Palestinian Declaration and the Jurisdiction of the International Criminal Court. *Journal of International Criminal Justice*. 2010, i. 8, p. 981–999.
- [17] POTOČNÝ, M. First World Permanent International Criminal Court for the 21st Century. In *Implementation of Human Rights and International Control Mechanism*. Praha: Vodnář, 1999, p. 102–103.
- [18] ROTHE, D.; MULLINS, CH. W. The International Criminal Court and the United States Opposition. *Crime, Law & Social Change*. 2006, i. 45, p. 213.
- [19] SHANY, Y. In Defence of Functional Interpretation of Article 12(3) of the Rome Statute. *Journal of International Criminal Justice*. 2010, i. 8, p. 329.
- [20] SCHABAS, W. A.; STAHN, C.; EL ZEIDY, M. M. The International Criminal Court and Complementarity, Five Years On. *Criminal Law Forum*. 2008, i. 19, p. 1.
- [21] SCHARF, M. P. The ICC's Jurisdiction over the Nationals of Non-Party States. In *The United States and the International Criminal Court. National Security and International Law*. Lanham: Rowman & Littlefield Publisher, 2000, p. 230.
- [22] SWART, B. Cooperation Challenges for the Special Tribunal for Lebanon. *Journal of International Criminal Justice*. 2007, i. 5, p. 1160–1163.
- [23] WEIGEND, T. The ICC Review Conference at Kampala: Mission Accomplished or Unfulfilled Promise? *Journal of International Criminal Justice*. 2010, i. 5, p. 1177.
- [24] ZAPPALA, S. Lubanga Before the ICC. *Journal of International Criminal Justice*. 2008, i. 6, p. 467.

### **Internet sources**

- [25] FERENCZ, B. B. *Ending Impunity for the Crime of Aggression* [online]. [retrieved 2012-06-21]. Accessible at: <http://www.benferencz.org/index.php?id=4&article=1>.
- [26] GORDON, G. *On the Review Conference and Aggression* [online]. Opinio Juris [retrieved 2012-06-21]. Accessible at: <http://opiniojuris.org/2010/06/15/greg-gordon-on-the-review-conference-and-aggression>.
- [27] HELLER, K. J. *The Sadly Neutered Crime of Aggression*. [online]. Opinio Juris [retrieved 2012-06-21]. Accessible at: <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression>.
- [28] JACKSON, R. H. *Opening Statement before the International Military Tribunal* [online]. [retrieved 2012-06-21]. Accessible at: <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal>.

- [29] LOBE, J. *Washington Urged to seek "Positive Engagement" with ICC* [online]. [retrieved 2012-06-21]. Accessible at: <http://www.ipsnews.net/2009/03/us-washington-urged-to-seek-positive-engagement-with-icc>.
- [30] MANSON, R. *Smoothing out the rough edges of the Kamapala Conference* [online]. [retrieved 2012-06-21]. Accessible at: <http://iccreviewconference.blogspot.com>.
- [31] SCHABAS, W. A. *An Assessment of Kampala* [online]. [retrieved 2012-06-21]. Accessible at: <http://iccreviewconference.blogspot.com/2010/06/assessment-of-kampala-final-blog.html>.
- [32] SCHABAS, W. A. *The Result: Prosecuting Aggression at the International Criminal Court* [online]. [retrieved 2012-06-21]. Accessible at: <http://iccreviewconference.blogspot.com/2010/06/result-prosecuting-aggression-at.html>.
- [33] SCHEFFER, D. *Adoption of the Amendments on Aggression to the Rome Statute of the International Criminal Court* [online]. [retrieved 2012-06-21]. Accessible at: <http://iccreviewconference.blogspot.com/2010/06/david-scheffers-analysis-of-amendments.html>.
- [34] TRAHAN, J. *The New Agreement on the Definition of the Crime of Aggression* [online]. [retrieved 2012-06-21]. Accessible at: <http://blogs.ubc.ca/ligi/files/2010/06/aggression-Kampala-op-ed.trahan.pdf>.
- [35] TUTU, D. *Choose justice, Africa* [online]. The New York Times [retrieved 2012-06-21]. Accessible at: <http://www.ihf.com/articles/2009/03/03/opinion/edutuocopy.php>.
- [36] *Alleged war crimes in the territory of the Republic of Korea under preliminary examination* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/NR/rdonlyres/40BB19F9-3193-4A76-9E70-EB8BE39363B3/282744/KoreaEng1.pdf>.
- [37] *Case Information Sheet* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>.
- [38] *Case The Prosecutor v. Omar Hassan Ahmad Al Bashir* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050109/Press+Releases>.
- [39] *Case 001* [online]. Extraordinary Chambers in the Courts of Cambodia [retrieved 2012-06-21]. Accessible at: <http://www.eccc.gov.kh/en/case/topic/1>.
- [40] *Case 002* [online]. Extraordinary Chambers in the Courts of Cambodia [retrieved 2012-06-21]. Accessible at: <http://www.eccc.gov.kh/en/case/topic/2>.
- [41] *Cases* [online]. International Criminal Tribunal for Rwanda [retrieved 2012-06-21]. Accessible at: <http://www.unict.org/Cases/tabid/204/Default.aspx>.
- [42] *Einstein Quotes* [online]. Einstein Quotes [retrieved 2012-06-21]. Accessible at: <http://www.einstein-quotes.com/War.html>.
- [43] *Hategekimana Convicted and Sentenced to Life Imprisonment* [online]. International Criminal Tribunal for Rwanda [retrieved 2012-06-21]. Accessible at: <http://www.unict.org/tabid/155/Default.aspx?id=1181>.

- [44] *Charter of the International Military Tribunal* [online]. [retrieved 2012-06-21]. Accessible at: <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html>.
- [45] *ICC Pre-Trial Chamber III authorises the Prosecutor to launch an investigation in Côte d'Ivoire* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://icc-cpi.int/NR/exeres/2DC90BA3-7F59-4C59-A394-C5EC125821C1.htm>.
- [46] *ICC Prosecutor presents cases against six individuals for crimes against humanity* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm>.
- [47] *In the dock, but for what?* [online]. The Economist [retrieved 2012-06-21]. Accessible at: <http://www.economist.com/node/17572645>.
- [48] *International Criminal Court to investigate violence after 2007 Kenya election* [online]. The Guardian [retrieved 2012-06-21]. Accessible at: <http://www.guardian.co.uk/world/2010/mar/31/international-criminal-court-kenya-violence>.
- [49] *Liberia ex-leader Charles Taylor get 50 years in jail* [online]. BBC [retrieved 2012-06-21]. Accessible at: <http://www.bbc.co.uk/news/world-africa-18259596>.
- [50] *Omar Al Bashir election in Sudan is a farce* [online]. The Guardian [retrieved 2012-06-21]. Accessible at: <http://www.guardian.co.uk/commentisfree/2010/apr/27/omar-al-bashir-election-in-sudan-a-farce>.
- [51] *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* [online]. UN Treaty [retrieved 2012-06-21]. Accessible at: [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf).
- [52] *Resolution RC/Res.5* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf).
- [53] *Resolution RC/Res.6* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).
- [54] *Review Conference Invitation Letter* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: [http://www.icc-cpi.int/NR/rdonlyres/7D67278B-C8C2-4777-BBEE-28D0D7007341/0/IC\\_CASPRReviewConference2010InvitationENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/7D67278B-C8C2-4777-BBEE-28D0D7007341/0/IC_CASPRReviewConference2010InvitationENG.pdf).
- [55] *Review Conference – Resolutions* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Resolutions+and+Declarations/Resolutions+and+Declarations.htm>.
- [56] *Rome Statute of the International Criminal Court* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).
- [57] *Security Council Resolution 1757* [online]. Special Tribunal for Lebanon [retrieved 2012-06-21]. Accessible at: <http://www.stl-tsl.org/en/documents/un-documents/un-security-council-resolutions/security-council-resolution-1757>.

- [58] *Situation in Palestine* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.
- [59] *Situation in the Libya* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111>.
- [60] *Situations and Cases* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases>.
- [61] *The States Parties to the Rome Statute* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: <http://www.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm>.
- [62] *Tribunal to Debut with Congo Case* [online]. The Washington Post [retrieved 2012-06-21]. Accessible at: [http://www.washingtonpost.com/wp-dyn/content/article/2006/11/04/AR2006110400947\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/11/04/AR2006110400947_2.html).
- [63] *U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference* [online]. US Mission Geneva [retrieved 2012-06-21]. Accessible at: <http://geneva.usmission.gov/2010/06/15/u-s-engagement-with-the-icc>.
- [64] *United Nations General Assembly Resolution 3314 (XXIX)* [online]. [retrieved 2012-12-21]. Accessible at: <http://jurist.law.pitt.edu/3314.htm>.

## Literature in Czech

### Books

- [65] ČEPELKA, Č.; ŠTURMA, P. *Mezinárodní právo veřejné*. 1. edition. Praha: C. H. Beck, 2008. 881 p.
- [66] HENDRYCH D. a kol. *Právní slovník*. 3. edition. Praha: C. H. Beck, 2009. 1459 p.
- [67] MALENOVSKÝ, J. *Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému*. 5. edition. Brno: Masarykova univerzita, 2008. 551 p.
- [68] POTOČNÝ, M.; ONDŘEJ, J. *Mezinárodní právo veřejné – Zvláštní část*. 6. edition. Praha: C. H. Beck, 2011. 533 p.
- [69] SUDRE, F. *Mezinárodní a evropské právo lidských práv*. 2. edition. Brno: Masarykova univerzita, 1997. 364 p.
- [70] ŠTURMA, P. *Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva*. Praha: Karolinum, 2002. 311 p.

### Journal articles

- [71] BÍLKOVÁ, V. Afrika: laboratoř mezinárodního trestního soudnictví. *Mezinárodní politika*. 2007, i. 5, p. 18.

- [72] BÍLKOVÁ, V. Z Říma do Kampaly a kam dále? *Mezinárodní politika*. 2010, i. 8, p. 37.
- [73] BUREŠ, P. Znásilnění Římského statutu. *Mezinárodní politika*. 2006, i. 9, p. 33.
- [74] KRATOCHVÍL, J. Římský statut Mezinárodního trestního soudu není v rozporu s ústavou. *Právní rozhledy*. 2007, i. 15, p. 537–543.
- [75] KURANIAN, A. První genocida XX. století. *Mezinárodní politika*. 2000, i. 3, p. 32–34.
- [76] MAJERČÍK, L. Jaký soud pro Saddáma Husseina? *Mezinárodní politika*. 2004, i. 8, p. 29–31.
- [77] MALENOVSKÝ, J. Zapomenuté a falzifikované, známé a ještě nenapsané kapitoly šedesátileté epopeje Všeobecné deklarace lidských práv. *Právník*. 2009, i. 1, p. 44.
- [78] PĚNKAVA, P. Mezinárodní trestní soud pro bývalou Jugoslávii. *Bulletin advokacie*. 2006, i. 6, p. 41.
- [79] PIPEK, J. Jurisdikce Mezinárodního trestního soudu a princip ne bis in idem. *Právník*. 2003, i. 12, p. 1265.
- [80] POPENKOVÁ, M. Aktuální vývoj v otázce definice zločinu agrese ve smyslu čl. 5 Římského statutu Mezinárodního trestního soudu. *Právník*. 2008, i. 5, p. 584–585.
- [81] POPENKOVÁ, M. Mezinárodní trestní soud. Reálně fungující instituce. *Mezinárodní politika*. 2006, i. 5, p. 39–40.
- [82] SUNARDI, T. Mezinárodní trestní soud a jeho předchůdci. *Mezinárodní vztahy*. 2000, i. 1, p. 39–41.
- [83] ŠTURMA, P. Definice zločinů a další hmotněprávní aspekty v Římském statutu Mezinárodního trestního soudu. *Trestněprávní revue*. 2002, i. 2, p. 44–47.
- [84] ŠTURMA, P. Historie a charakter mezinárodního trestního soudu. In *Problémy implementace Statutu Mezinárodního trestního soudu do právního řádu*. Praha: C. H. Beck, 2006, p. 1–25.
- [85] ŠTURMA, P. Odpověď mezinárodního práva na hrozbu mezinárodního terorismu. *Právník*. 2003, i. 2, p. 177–179.
- [86] ŠTURMA, P. Princip komplementarity a spouštěcí mechanismus Mezinárodního trestního soudu. In *Medzinárodný trestný súd na začiatku 21. storočia*. Bratislava: Slovenská spoločnosť pre medzinárodné právo pri Slovenskej akadémii vied, 2006, p. 36–37.
- [87] ŠTURMA, P. Procesní aspekty v Římském statutu Mezinárodního trestního soudu. *Trestněprávní revue*. 2002, i. 4, p. 98.
- [88] ŠTURMA, P. Změny Římského statutu Mezinárodního trestního soudu. *Trestněprávní revue*. 2010, i. 8, p. 250.
- [89] TOMÁŠ R. USA versus Mezinárodní trestní soud. *Mezinárodní politika*. 2002, i. 7, p. 22.
- [90] ULÍK, K. Schválí Spojené státy americké statut Mezinárodního trestního soudu? *Mezinárodní politika*. 2009, i. 1, p. 34.

- [91] VÁLEK, P. Mezinárodní reziduální mechanismus pro trestní tribunály: nový soud v „pohotovostním“ režimu. *Mezinárodní politika*. 2011, i. 4, p. 20.
- [92] ZBOŘIL, Z. Východní Timor – nejmladší stát z vůle OSN. *Mezinárodní politika*. 2008, i. 4, p. 11.

### **Internet sources**

- [93] KI-MOON, B. *Čas odpovědnosti* [online]. OSN [retrieved 2012-06-21]. Accessible at: <http://www.osn.cz/zpravodajstvi/zpravy/zprava.php?id=1615>.
- [94] PARKANOVÁ, V. *Mezinárodní trestní soud utopii?* [online]. [retrieved 2012-06-21]. Accessible at: <http://hn.ihned.cz/c1-22283870-mezinarodni-trestni-soud-utopii>.
- [95] *Předkládací zpráva pro Parlament ČR k návrhu na ratifikaci Římského statutu Mezinárodního trestního soudu* [online]. Senát Parlamentu ČR [retrieved 2012-06-21]. Accessible at: <http://www.senat.cz/xqw/webdav/pssenat/original/45754/38912>.
- [96] *Studie Parlamentního institutu k Mezinárodnímu trestnímu soudu* [online]. Poslanecká sněmovna Parlamentu ČR [retrieved 2010-12-10]. Accessible at: <http://www.psp.cz/kps/pi/PRACE/pi-5-276.pdf>.

### **Literature in Slovak**

- [97] GALDUNOVÁ, K. Trestný čin agresie. In *Medzinárodný trestný súd na začiatku 21. storočia*. Bratislava: Slovenská spoločnosť pre medzinárodné právo pri Slovenskej akadémii vied. 2006, p. 104.

### **Literature in German**

- [98] SATZGER, H. *Internationales und Europäisches Strafrecht*. 2. edition. Baden-Baden: Nomos, 2008. 298 p.
- [99] DIETELHOFF, N. Zu(m) Recht überzeugt – Die Errichtung des Internationalen Strafgerichtshofs im Spannungsverhältnis zwischen Recht und Politik. *Politische Vierteljahresschrift*. 2006, Sonderheft 36, p. 461.



## **LIST OF ANNEXES**

Annex No. 1: The Rome Statute of the International Criminal Court

Annex No. 2: The Crime of Aggression



## **Annex No. 1: The Rome Statute of the International Criminal Court**

### **Rome Statute of the International Criminal Court<sup>58</sup>**

#### **Preamble**

*The States Parties to this Statute,*

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

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

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

*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

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

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

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

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

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

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

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

---

<sup>58</sup> *Rome Statute of the International Criminal Court* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

*Have agreed as follows:*

### ***Part I. Establishment of the Court***

#### Article 1

##### **The Court**

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

#### Article 2

##### **Relationship of the Court with the United Nations**

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

#### Article 3

##### **Seat of the Court**

1. The seat of the Court shall be established at The Hague in the Netherlands ('the host State').
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

#### Article 4

##### **Legal status and powers of the Court**

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

**Part II. Jurisdiction, admissibility and applicable law**

Article 5

**Crimes within the jurisdiction of the Court**

1. 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:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. 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.

Article 6

**Genocide**

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:

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

Article 7

**Crimes against humanity**

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) '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;
- (c) '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;
- (d) '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;
- (e) '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;
- (f) '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;
- (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) '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;

- (i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or 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.
3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

#### Article 8

#### **War crimes**

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, 'war crimes' means:
  - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
    - (i) Wilful killing;
    - (ii) Torture or inhuman treatment, including biological experiments;
    - (iii) Wilfully causing great suffering, or serious injury to body or health;
    - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
    - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
    - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
    - (vii) Unlawful deportation or transfer or unlawful confinement;
    - (viii) Taking of hostages.
  - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
    - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
    - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
    - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) 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;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) 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;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) 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;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (v) Pillaging a town or place, even when taken by assault;
  - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
  - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
  - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - (ix) Killing or wounding treacherously a combatant adversary;
  - (x) Declaring that no quarter will be given;
  - (xi) Subjecting persons who are in the power of another party to the conflict 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;
  - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9

**Elements of Crimes**

1. 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.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

**Jurisdiction *ratione temporis***

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

**Preconditions to the exercise of jurisdiction**

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

## Article 13

**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) 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;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

## Article 14

**Referral of a situation by a State Party**

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

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

## Article 15

**Prosecutor**

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor 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.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, 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.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

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

#### Article 16

### **Deferral of investigation or prosecution**

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

#### Article 17

### **Issues of admissibility**

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

#### Article 18

#### **Preliminary rulings regarding admissibility**

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

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

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

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

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

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

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

**Challenges to the jurisdiction of the Court or the admissibility of a case**

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.

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

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be

appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

- (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
- (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
- (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

#### Article 20

##### *Ne bis in idem*

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

#### Article 21

##### *Applicable law*

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles

are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

### ***Part III. General principles of Criminal Law***

#### Article 22

#### ***Nullum crimen sine lege***

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

#### Article 23

#### ***Nulla poena sine lege***

A person convicted by the Court may be punished only in accordance with this Statute.

#### Article 24

#### **Non-retroactivity *ratione personae***

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

#### Article 25

#### **Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
  - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

#### Article 26

##### **Exclusion of jurisdiction over persons under eighteen**

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

#### Article 27

##### **Irrelevance of official capacity**

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

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

Article 28

**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) 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:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), 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:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

**Non-applicability of statute of limitations**

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

## Article 30

**Mental element**

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

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

## Article 31

**Grounds for excluding criminal responsibility**

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

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

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

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

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

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

#### Article 32

##### **Mistake of fact or mistake of law**

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

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

#### Article 33

##### **Superior orders and prescription of law**

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

### ***Part IV. Composition and administration of the Court***

#### Article 34

##### **Organs of the Court**

The Court shall be composed of the following organs:

- (a) The Presidency;
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
- (c) The Office of the Prosecutor;
- (d) The Registry.

### Article 35

#### **Service of judges**

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

### Article 36

#### **Qualifications, nomination and election of judges**

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2.
  - (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
  - (b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.
  - (c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;
    - (ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.
- 3.

- (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
- (b) Every candidate for election to the Court shall:
  - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
  - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
- (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4.

- (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
  - (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
  - (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.
- (b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.
- (c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3

(b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3

(b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6.

- (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

- (b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8.

- (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
  - (i) The representation of the principal legal systems of the world;
  - (ii) Equitable geographical representation; and
  - (iii) A fair representation of female and male judges.
- (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9.

- (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.
- (b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.
- (c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

#### Article 37

#### **Judicial vacancies**

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38

**The Presidency**

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

- (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and
- (b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39

**Chambers**

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2.

(a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3.

- (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.
- (b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

#### Article 40

##### **Independence of the judges**

- 1. The judges shall be independent in the performance of their functions.
- 2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
- 3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
- 4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

#### Article 41

##### **Excusing and disqualification of judges**

- 1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
- 2.
  - (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
  - (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
  - (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

## Article 42

**The Office of the Prosecutor**

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the

Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the ground set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

### Article 43

#### **The Registry**

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for reelection once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

### Article 44

#### **Staff**

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or nongovernmental organiza-

tions to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45

**Solemn undertaking**

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

**Removal from office**

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

- (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
- (b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

- (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
- (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
- (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47

**Disciplinary measures**

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

## Article 48

**Privileges and immunities**

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

- (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;
- (b) The Registrar may be waived by the Presidency;
- (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
- (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

## Article 49

**Salaries, allowances and expenses**

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

## Article 50

**Official and working languages**

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51

**Rules of Procedure and Evidence**

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

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; or
- (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

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

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

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

Article 52

**Regulations of the Court**

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

## ***Part V. Investigation and prosecution***

### **Article 53**

#### **Initiation of an investigation**

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3.

- (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
- (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54

**Duties and powers of the Prosecutor with respect to investigations**

1. The Prosecutor shall:
  - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
  - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
  - (c) Fully respect the rights of persons arising under this Statute.
2. The Prosecutor may conduct investigations on the territory of a State:
  - (a) In accordance with the provisions of Part 9; or
  - (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).
3. The Prosecutor may:
  - (a) Collect and examine evidence;
  - (b) Request the presence of and question persons being investigated, victims and witnesses;
  - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
  - (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
  - (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
  - (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55

**Rights of persons during an investigation**

1. In respect of an investigation under this Statute, a person:
  - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
  - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

- (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
- (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

#### Article 56

#### **Role of the Pre-Trial Chamber in relation to a unique investigative opportunity**

1.

- (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.
- (b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.
- (c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

- (a) Making recommendations or orders regarding procedures to be followed;
- (b) Directing that a record be made of the proceedings;
- (c) Appointing an expert to assist;
- (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such

an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

- (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
- (f) Taking such other action as may be necessary to collect or preserve evidence.

3.

- (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

- (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

#### Article 57

#### **Functions and powers of the Pre-Trial Chamber**

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2.

- (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.
- (b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

- (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
- (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
- (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

- (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9;
- (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

#### Article 58

##### **Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear**

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
  - (i) To ensure the person's appearance at trial;
  - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
  - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
- (c) A concise statement of the facts which are alleged to constitute those crimes;
- (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
- (e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.

#### Article 59

##### **Arrest proceedings in the custodial State**

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with the proper process; and
- (c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

#### Article 60

##### **Initial proceedings before the Court**

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

#### Article 61

##### **Confirmation of the charges before trial**

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
  - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
  - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

## ***Part VI. The trial***

### Article 62

#### **Place of trial**

Unless otherwise decided, the place of the trial shall be the seat of the Court.

### Article 63

#### **Trial in the presence of the accused**

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

### Article 64

#### **Functions and powers of the Trial Chamber**

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

- (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
- (b) Determine the language or languages to be used at trial; and
- (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

- (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
- (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
- (c) Provide for the protection of confidential information;
- (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
- (e) Provide for the protection of the accused, witnesses and victims; and
- (f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8.

(a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

- (a) Rule on the admissibility or relevance of evidence; and
- (b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

#### Article 65

##### **Proceedings on an admission of guilt**

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

- (a) The accused understands the nature and consequences of the admission of guilt;
- (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
- (c) The admission of guilt is supported by the facts of the case that are contained in:
  - (i) The charges brought by the Prosecutor and admitted by the accused;
  - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
  - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

- (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
- (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

#### Article 66

##### **Presumption of innocence**

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

**Rights of the accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;
- (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (h) To make an unsworn oral or written statement in his or her defence; and
- (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

## Article 68

**Protection of the victims and witnesses and their participation in the Proceedings**

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

## Article 69

**Evidence**

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

#### Article 70

#### **Offences against the administration of justice**

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4.

(a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

#### Article 71

##### **Sanctions for misconduct before the Court**

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

#### Article 72

##### **Protection of national security information**

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

- (a) Modification or clarification of the request;
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
  - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings *in camera* and *ex parte*;
  - (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and
  - (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

- (b) In all other circumstances:
- (i) Order disclosure; or
  - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

#### Article 73

##### **Third-party information or documents**

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

#### Article 74

##### **Requirements for the decision**

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

#### Article 75

##### **Reparations to victims**

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court

may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

#### Article 76

#### **Sentencing**

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

#### ***Part VII. Penalties***

#### Article 77

#### **Applicable penalties**

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
  - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
  - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

#### Article 78

##### **Determination of the sentence**

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

#### Article 79

##### **Trust Fund**

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

#### Article 80

##### **Non-prejudice to national application of penalties and national laws**

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

**Part VIII. Appeal and Revision**

## Article 81

**Appeal against decision of acquittal or conviction or against sentence**

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
  - (a) The Prosecutor may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact, or
    - (iii) Error of law;
  - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact,
    - (iii) Error of law, or
    - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.
2.
  - (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
  - (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;
  - (c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).
3.
  - (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
  - (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;
  - (c) In case of an acquittal, the accused shall be released immediately, subject to the following:
    - (i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

#### Article 82

##### **Appeal against other decisions**

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

- (a) A decision with respect to jurisdiction or admissibility;
- (b) A decision granting or denying release of the person being investigated or prosecuted;
- (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
- (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

#### Article 83

##### **Proceedings on appeal**

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber. For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person

convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

#### Article 84

##### **Revision of conviction or sentence**

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

- (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
- (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter, with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

#### Article 85

##### **Compensation to an arrested or convicted person**

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

### ***Part IX. International cooperation and judicial assistance***

#### Article 86

#### **General obligation to cooperate**

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

#### Article 87

#### **Requests for cooperation: general provisions**

1.

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession. Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession. Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be

necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5.

(a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

#### Article 88

##### **Availability of procedures under national law**

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

#### Article 89

##### **Surrender of persons to the Court**

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the

execution of the request for surrender of the person until the Court makes a determination on admissibility.

3.

- (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
- (b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:
  - (i) A description of the person being transported;
  - (ii) A brief statement of the facts of the case and their legal characterization; and
  - (iii) The warrant for arrest and surrender;
- (c) A person being transported shall be detained in custody during the period of transit;
- (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
- (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

#### Article 90

#### **Competing requests**

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

- (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
- (b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed

to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined

that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

- (a) The respective dates of the requests;
- (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
- (c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

- (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
- (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

## Article 91

### **Contents of request for arrest and surrender**

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

- (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
- (b) A copy of the warrant of arrest; and
- (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

- (a) A copy of any warrant of arrest for that person;
- (b) A copy of the judgement of conviction;
- (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
- (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

## Article 92

### **Provisional arrest**

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

- (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

- (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
- (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
- (d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

#### Article 93

##### **Other forms of cooperation**

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) The questioning of any person being investigated or prosecuted;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that precluded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (1), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7.

(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8.

(a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9.

(a)

(i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10.

(a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b)

(i) The assistance provided under subparagraph (a) shall include, *inter alia*:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

#### Article 94

#### **Postponement of execution of a request in respect of ongoing investigation or prosecution**

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone,

the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

#### Article 95

##### **Postponement of execution of a request in respect of an admissibility challenge**

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

#### Article 96

##### **Contents of request for other forms of assistance under article 93**

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

- (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
- (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
- (c) A concise statement of the essential facts underlying the request;
- (d) The reasons for and details of any procedure or requirement to be followed;
- (e) Such information as may be required under the law of the requested State in order to execute the request; and
- (f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

#### Article 97

##### **Consultations**

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult

with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

#### Article 98

##### **Cooperation with respect to waiver of immunity and consent to Surrender**

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

#### Article 99

##### **Execution of requests under articles 93 and 96**

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

- (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
- (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

#### Article 100

##### **Costs**

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

- (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
- (b) Costs of translation, interpretation and transcription;
- (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
- (d) Costs of any expert opinion or report requested by the Court;
- (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
- (f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

#### Article 101

##### **Rule of speciality**

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102

**Use of terms**

For the purposes of this Statute:

- (a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.
- (b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

***Part X. Enforcement***

Article 103

**Role of States in enforcement of sentences of imprisonment**

- 1.
  - (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
  - (b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
  - (c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.
- 2.
  - (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.
  - (b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.
- 3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
  - (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
  - (b) The application of widely accepted international treaty standards governing the treatment of prisoners;
  - (c) The views of the sentenced person;
  - (d) The nationality of the sentenced person;

- (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

#### Article 104

##### **Change in designation of State of enforcement**

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.
2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

#### Article 105

##### **Enforcement of the sentence**

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

#### Article 106

##### **Supervision of enforcement of sentences and conditions of imprisonment**

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

**Transfer of the person upon completion of sentence**

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

**Limitation on the prosecution or punishment of other offences**

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109

**Enforcement of fines and forfeiture measures**

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

#### Article 110

##### **Review by the Court concerning reduction of sentence**

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
  - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
  - (b) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
  - (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

#### Article 111

##### **Escape**

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

### ***Part XI. Assembly of states parties***

#### Article 112

##### **Assembly of States Parties**

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and

advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

- (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
- (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
- (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
- (d) Consider and decide the budget for the Court;
- (e) Decide whether to alter, in accordance with article 36, the number of judges;
- (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
- (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3.

- (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
- (b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
- (c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

- (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
- (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

## ***Part XII. Financing***

### Article 113

#### **Financial Regulations**

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

### Article 114

#### **Payment of expenses**

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

### Article 115

#### **Funds of the Court and of the Assembly of States Parties**

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

### Article 116

#### **Voluntary contributions**

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corpo-

rations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117

**Assessment of contributions**

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118

**Annual audit**

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

***Part XIII. Final clauses***

Article 119

**Settlement of disputes**

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

**Reservations**

No reservations may be made to this Statute.

Article 121

**Amendments**

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether

to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

## Article 122

### **Amendments to provisions of an institutional nature**

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

## Article 123

### **Review of the Statute**

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article

5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

#### Article 124

##### **Transitional Provision**

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

#### Article 125

##### **Signature, ratification, acceptance, approval or accession**

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### Article 126

##### **Entry into force**

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

## Article 127

**Withdrawal**

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

## Article 128

**Authentic texts**

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

*Inwitness whereof*, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

*Done* at Rome, this 17th day of July 1998.

## Annex No. 2: The Crime of Aggression

### Resolution RC/Res.6<sup>59</sup>

*Adopted at the 13th plenary meeting, on 11 June 2010, by consensus.*

#### RC/Res.6

#### The Crime of Aggression

*The Review Conference,*

*Recalling* paragraph 1 of article 12 of the Rome Statute,

*Recalling* paragraph 2 of article 5 of the Rome Statute,

*Recalling* also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

*Recalling* further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

*Taking note* of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

*Resolved* to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;
2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;
3. *Also decides* to adopt the understandings regarding the interpretation of the abovementioned amendments contained in annex III of the present resolution;
4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;
5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

---

<sup>59</sup> *Resolution RC/Res.6* [online]. International Criminal Court [retrieved 2012-06-21]. Accessible at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

## Annex I

### *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*

1. *Article 5, paragraph 2, of the Statute is deleted.*
2. *The following text is inserted after article 8 of the Statute:*

#### Article 8 bis

#### **Crime of aggression**

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- 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.

3. *The following text is inserted after article 15 of the Statute:*

Article 15 *bis*

**Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*4. The following text is inserted after article 15 bis of the Statute:*

Article 15 *ter*

**Exercise of jurisdiction over the crime of aggression (Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*5. The following text is inserted after article 25, paragraph 3, of the Statute:*

*3 bis.* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

*6. The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

*7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

## **Annex II**

### ***Amendments to the Elements of Crimes***

#### **Article 8 bis**

#### **Crime of aggression**

##### **Introduction**

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

##### **Elements**

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

## **Annex III**

### ***Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression***

##### **Referrals by the Security Council**

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect

to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

### **Jurisdiction *ratione temporis***

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

### **Domestic jurisdiction over the crime of aggression**

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

### **Other understandings**

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.



Vědecká redakce MU:

prof. PhDr. Ladislav Rabušic, CSc., Mgr. Iva Zlatušková,  
prof. RNDr. Zuzana Došlá, DSc., Ing. Radmila Droběnová, Ph.D.,  
Mgr. Michaela Hanousková, doc. PhDr. Jana Chamonikolasová, Ph.D.,  
doc. JUDr. Josef Kotásek, Ph.D., Mgr. et Mgr. Oldřich Krpec, Ph.D.,  
doc. PhDr. Růžena Lukášová, CSc., prof. PhDr. Petr Macek, CSc.,  
PhDr. Alena Mizerová, Mgr. David Povolný, doc. RNDr. Lubomír Popelínský, Ph.D.,  
Mgr. Kateřina Sedláčková, Ph.D., prof. MUDr. Anna Vašků, CSc.,  
prof. PhDr. Marie Vítková, CSc., doc. Mgr. Martin Zvonař, Ph.D.

## **INTERNATIONAL CRIMINAL COURT**

*Jurisdiction over Genocide, Crimes against Humanity and War Crimes,  
including the Legal Regulation of the Crime of Aggression*

**JUDr. Ing. Jan Lhotský**

Překlad: Lucie Kyselovská

Jazyková korektura: Ailsa Randall

Odborná korektura: Jan Lhotský

Vydala Masarykova univerzita roku 2012

Spisy Právnické fakulty MU č. 430 (řada teoretická)

Ediční rada: J. Kotásek (předseda), J. Bejček, V. Kratochvíl,  
N. Rozehnalová, P. Mrkývka, J. Hurdík, R. Polčák, J. Šabata

Tisk: TRIBUN EU s.r.o., Cejl 32, 602 00 Brno

1. vydání, 2012

ISBN 978-80-210-6065-4