Chapter I

Historical Overview: The Road from Early Prosecutions of War Crimes to the Creation of the ICC

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A. The Versailles Peace Treaty and Historical Precedents

Crimes against the basic principles of humanity are nothing new to the history of mankind. The Crusades of the 11th century may be considered as early forms of genocide. Their ultimate goal was to force a religion, ideology, or theory upon people with different beliefs, while, at the same time, the appropriation of material wealth and the expansion of the empire played an important role. Other examples are the Spanish and Portuguese Conquista of the Americas accompanied by the extermination of great numbers of the native population, the massacre of thousands of the French Huguenots during St Bartholomew's night 23 August 1572, and the massacre of Glen Coe in 1692. In all these cases, investigations never took place and criminal sentences were never passed on the responsible persons. In the case of Glen Coe, William III of England at least established a parliamentary Commission of Inquiry in 1695. Still, impunity was the rule and punishment the exception.

There was only one conviction in another remarkable case, that of Peter von Hagenbach in 1474.[1] Charles the Bold, Duke of Burgundy—known by his enemies as Charles the Terrible—had placed Landvogt Peter von Hagenbach at the helm of the government of the fortified city of Breisach (located at the French-German Rhine border). In following his master's instructions, the overzealous governor introduced a regime of arbitrariness, brutality, and terror to reduce the population of Breisach to total submission. When a large coalition put an end to the ambitious goals of the powerful Duke, the siege of Breisach and a revolt by both his German mercenaries and the local citizens led to Hagenbach's defeat. Hagenbach was then brought before a tribunal established by the Archduke of Austria and charged, among other crimes, with murder, rape, and perjury. He was found guilty and was deprived of his rank and related privileges and then executed. This trial is often referred to as the first in international criminal law (ICL), or war crimes prosecution. And it kept this doubtful privilege until the 19th century when the first serious efforts to prosecute and punish persons guilty of international crimes began. However, the case of Hagenbach must be evaluated as an isolated case, which—like all isolated cases[2]—does not change the finding that it was not until the 19th century that the first systematic approach to create a duty to prosecute international crime emerged.

At the beginning of the 19th century, the punishability of *piracy* was acknowledged under customary international law.[3] Furthermore, *slavery* was declared a crime of international

[1] cf. Maogoto, *War Crimes* (2004), p. 21; Kemper, *Weg* (2004), pp. 7 ff.; Hofstetter, *Verfahrensrecht* (2005), pp. 26 ff. Going as far back as the ancient times, see König, *Legitimation* (2003), pp. 38 ff.; Cryer, *Prosecuting* (2005), pp. 17 ff.

[2] Bassiouni, *Introduction* (2003), p. 24.

[3] Oehler, *Internationales Strafrecht* (1983), mn. 433; see König, *Legitimation* (2003), pp. 50 ff.

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concern due to numerous international treaties, which had been concluded since 1815.[4] The first efforts towards the creation of a 'Convention of War' began in the middle of the 19th century, trying to achieve the humanization of war,[5] first with regard to the legitimate *means and methods of warfare* (so-called Hague law, see Section C. (2)),[6] and later on with regard to the *protection of victims of conflict* who either do not take part in the fighting (civilians, medics, aid workers) in the first place or—as (former) combatants—can no longer fight (wounded, sick, and shipwrecked troops, prisoners of war) (so-called Geneva law) (see Section C. (2) for more detail).[7] However, the proposal of the president of the International Committee of the Red Cross (ICRC), Gustave Moynier, to set up an International Criminal Court (ICC) after the German-French War in 1870–1, remained without any political resonance.[8]

When the Allied and Associated Powers convened the 1919 Preliminary Peace Conference, the first international investigative commission was established.[9] At the conference, Germany's surrender was negotiated and a peace treaty—the Versailles Peace Treaty[10]—was dictated. This Treaty established a new policy of prosecuting war criminals of the vanquished aggressor state after the end of hostilities. The legal basis of that policy was laid down in 1919 in the Paris Peace Treaties concluded by the victorious Allies (Britain, France, Russia, Italy, the USA, and Japan) and the Central Powers (Germany, Austria, Bulgaria, Hungary, and Turkey). Four groups of offences were created: crimes against the sanctity of the treaties, crimes against the international moral—which were deliberately not defined more precisely[11]—war crimes in a 'narrow sense' (i.e., 'violation of the laws and customs of war' according to Article 228 of the Versailles Treaty),[12] and violations of the laws of humanity. The first three groups of offences were integrated into Articles 227–8 of the Versailles Treaty, while the fourth group, crimes against the laws of humanity, was left out since the USA took the view that this offence could not be exactly defined and thus was too vague as a basis for prosecution.[13] The USA also doubted that there was a universal standard for humanity.

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[4] Bassiouni, *Crimes Against Humanity* (1999), pp. 305 ff.

[5] cf. about the impact of the US-American 'Lieber Code' (USA 1863), see Carnahan, *AJIL*, 92 (1998), 215; König, *Legitimation* (2003), pp. 55, 59; Maogoto, *War Crimes* (2004), pp. 19 ff.; Cryer, *Prosecuting* (2005), p. 28.

[6] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 1868, St Petersburg); Declaration concerning the Laws and Customs of War (adopted 1874, Brussels); The Hague Conventions (adopted 1899 and 1907); cf. Vitzthum, et al., *Völkerrecht* (2010), p. 642; Schindler and Toman, *Armed Conflicts* (1988), pp. 101 ff.; about the enforceability under international customary law and the proscriptions of the Hague Conventions, cf. König, *Legitimation* (2003), pp. 281 ff.

[7] First Geneva Convention (hereinafter: *GC I*) 'for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (first adopted in 1864, revised in 1906 and then lastly in 1949); Second Geneva Convention (hereinafter: *GC II*) 'for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea' (first adopted in 1949, successor of the 1907 Hague Convention X); Third Geneva Convention (hereinafter: *GC III*) 'relative to the Treatment of Prisoners of War' (first adopted in 1929 as 'Convention relative to the Treatment of Prisoners of War', last revision in 1949); Fourth Geneva Convention (hereinafter: *GC IV*) 'relative to the Protection of Civilian Persons in Time of War' (first adopted in 1949, based on parts of the 1907 Hague Convention IV). See also the three additional protocols, Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts; Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem.

[8] cf. König, *Legitimation* (2003), p. 60; Maogoto, *War Crimes* (2004), pp. 21 ff.; Hofstetter, *Verfahrensrecht* (2005), p. 29; Satzger, *Internationales Strafrecht* (2010), § 12 mn. 2.

[9] cf. König, *Legitimation* (2003), pp. 64 ff.; Maogoto, *War Crimes* (2004), pp. 47 ff.; Cryer, *Prosecuting* (2005), pp. 31 ff.

[10] 2 *RGBl.* (1919), 687–1349.

[11] Puttkamer, *AVR*, 1 (1948, 1949), 424.

[12] Based on the Hague Land Warfare Convention of 1899 and 1907. Some criticize the terminology as imprecise because it implies that every violation of established laws of war constitutes a crime; cf. Ahlbrecht, *Strafgerichtsbarkeit* (1999), p. 35.

[13] Bassiouni, *Crimes Against Humanity* (1999), p. 65.

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At the same time, with the Versailles Treaty, individual criminal responsibility for crimes against international law was for the first time recognized on a treaty basis. It was further recognized that such responsibility had no limits of rank or position. Thus, the Allies accused the former German emperor, William II of Hohenzollern, of a supreme offence against international morality and the sanctity of the treaties.[14] However, Emperor William II found refuge in the Netherlands and was never extradited. Moreover, the government failed to hand over 896 persons whom the Allies had intended to prosecute.[15]

Germany, which had previously passed a national law to implement Articles 228 and 229, passed new legislation ('Gesetz zur Verfolgung von Kriegsverbrechen und Kriegsvergehen', 18 December 1919)[16] to be able to prosecute German suspects before its own Supreme Court (the *Reichsgericht*), sitting at *Leipzig*. The German Prosecutor General had the right to decide which cases would be brought to trial, but the Allied Powers reserved the right to bring the accused persons 'before their own tribunal' in case 'the proceedings suggested by Germany would have the effect to avoid the intended *nemesis*'.[17] During a conference of the Allied Powers in 1920, the decision was taken to temporarily abstain from extradition of German soldiers and politicians, and to leave the question of prosecution up to the German entities. This reluctance by the Allies to prosecute accused persons themselves was not only a result of the outcry by the German population,[18] but also from internal conflicts of interests between the Allied Powers. The French position was directed at security issues aimed at weakening Germany militarily and economically, while the British position, which was more pragmatic, did not see any benefit in a permanent degradation of Germany on the continent and did not desire a strong, dominant France.[19] The handing-over of prosecution to Germany was a political compromise: the duty to prosecute was not waived but transferred, and at the same time a 'token gesture' was given. But in fact, only twelve Germans were prosecuted before the German Supreme Court for war crimes.[20] Thus, the so-called Leipzig Trials were widely criticized for the German unwillingness to seriously prosecute the war criminals, thereby leading to their failure. Despite these obvious shortcomings it must not be overlooked that the Versailles prosecutions lacked impartiality and objectivity since only the crimes of the vanquished were dealt with. Further, the impact of the Treaty in general and the prosecutions in particular on the internal German policy were rather counterproductive because it prepared the ground for the revengeful interpretation of the German capitulation (the famous '*Dolchstoßlegende*') and the rise of the Nazi movement.

On 2 December 1914, Turkey joined World War I (WWI). In April 1915, the organized homicide of 600 intellectuals, doctors, priests and lawyers in Constantinople marked the beginning of the *genocide of the Armenians*.[21] The pogroms controlled by the Turkish

[14] cf. Cryer, *Prosecuting* (2005), p. 34, who states that this was not a truly criminal proceeding because of the offence being a 'moral' one.

[15] The extradition request was based on Articles 28–38 of the Versailles Treaty; among the requested persons were important personalities such as von Bethmann Hollweg, von Hindenburg and von Mackensen, who were however never handed over. Moreover, § 9 *RStGB* (from 1871) denied the extradition of German nationals to foreign countries.

[16] *RGBl.* (1919), 2125–6.

[17] Note by the Allied Powers, reprinted in Berber, *Diktat* (1939), pp. 1212 ff.

[18] There were numerous demonstrations all over Germany, especially when the names of accused persons were published in German newspapers. cf. Hankel, *Prozesse* (2003), p. 44 mn. 1.

[19] Steinbach, *Revision* (1972), pp. 8 ff.

[20] Of the persons brought to trial, six were found not guilty and six were found guilty. cf. Ahlbrecht, *Strafgerichtsbarkeit* (1999), pp. 42 ff.; from a critical perspective, Engelhart, *Jura*, 26 (2004), 736; Neubacher, *Grundlagen* (2005), pp. 310 ff.; Menzel, Pierlings, and Hoffmann, *Völkerrechtsprechung* (2005), pp. 768 ff.

[21] The academic literature refers to the events generally as a 'genocide': see Green, *BJC*, 45 (2005), 531; Akcam, *CJCR*, 10 (2008), 233; Lipman, *FloridaJIL*, 12 (1989), n. 11; Gust, *Völkermord* (2005), pp. 108 ff.; Dadrian,

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government had already begun in 1894 with the cruel suppression of a revolt initiated by Armenian mountain farmers. During WWI, the massacre came to its culmination: at least 1.5 million Armenians, which represented two-thirds of the entire Armenian population, were killed by the Turkish forces. The atrocities committed led to a joint declaration of France, Britain, and Russia on 24 May 1915, asserting that all members of the Ottoman government and those of its agents found to be involved in those massacres would be held personally responsible for the crimes. It has been suggested that the term 'crimes against humanity' was used for the first time in the context of international law. The British High Commissioner suggested punishing the Turks for the Armenian massacre by splitting up their empire and prosecuting high officials in an exemplary way. It was believed that the prosecution could be based on the 'common law of war', and the 'customs of war, and rules of international law'. Although the Turkish authorities arrested and detained a couple of their leaders due to the Allies' pressure, many were later released as a result of public demonstrations and other internal pressure. Attempts by Turkish jurists to prosecute the crimes before the national courts were slightly more successful. Prosecuted on the basis of the Turkish penal code, several ministers of the wartime cabinet and leaders of the Ittihad party were found guilty by a court martial of 'the organization and execution of crime of massacre'.[22] At the international level, the *Peace Treaty of Sèvres*, signed on 10 August 1920 between the Ottoman Empire and the Allies (France, Italy, Japan, and Britain), in many aspects similar to the Treaty of Versailles, contained, as a major innovation, offences which were later considered as crimes against humanity (Article 230). The Treaty, however, never took effect.[23] It was replaced by the Treaty of Lausanne of 24 July 1923, which included a 'Declaration of Amnesty' for all offences committed between 1 August 1914 and 20 November 1922.

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B. The First Ad Hoc Tribunals: Nuremberg and Tokyo

During World War II (WWII), the prosecution of 'war crimes' became a primary objective. In 1942 the Allied Powers signed a declaration in St James's Palace in London[24] which established the *UN War Crimes Commission* (UNWCC). Its mission was to document war crimes and crimes against humanity.[25] The 'Declaration of St James' also laid down the foundation for the International Military Tribunal (IMT). This was followed by the Moscow Declaration of 30 October 1943, which confirmed the Allied quest for prosecution.[26] Finally, the 'Declaration of London' of 8 August 1945—concluded by the governments of Britain, the USA, France, and the Soviet Union (USSR)—gave birth to the IMT.

UStThomasJL&PubPol'y, 4 (2010), 60. Some writers are more cautious: see Gleason, *RISK*, 8 (1997), 41: 'Long-standing enmity exists between Armenia and Turkey, as a result of activities (described by the Armenians as "the genocide") directed against Armenians by the Ottoman Empire. During 1915–16, an estimated one million Armenians died or were killed during forced deportation by the Turks.'

[22] Schabas, *Genocide* (2009), p. 25.

[23] See Akçam, *Armenien* (2004), pp. 117 ff.; see also Selbmann, *Genozids* (2003), pp. 21 ff.; Cryer, *Prosecuting* (2005), p. 33; Möller, *Völkerstrafrecht* (2003), pp. 50 ff.; König, *Legitimation* (2003), pp. 69 ff.; Hübner, *Völkermordes* (2004), pp. 34 ff.; Maogoto, *War Crimes* (2004), pp. 42 ff.; Engelhart, *Jura*, 26 (2004), 736; Neubacher, *Grundlagen* (2005), p. 307.

[24] 'Inter-Allied Declaration' (13 January 1942) in Heinze and Schilling, *Rechtsprechung* (1952), p. 309.

[25] UNWCC, 1948; Jescheck, *Verantwortlichkeit* (1952), pp. 126 ff.; König, *Legitimation* (2003), pp. 88 ff.; Maogoto, *War Crimes* (2004), pp. 88 ff.; Ambos, *Der Allgemeine Teil* (2002/2004), p. 140.

[26] Neubacher, *Grundlagen* (2005), pp. 315 ff.

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(1) The trials against the major war criminals of Germany and Japan

The first series of WWII trials, the *Nuremberg Trials*, took place under the terms of a Charter drafted in London between June and August 1945 by representatives of the USA, Britain, the USSR, and France (the 'Nuremberg', or 'London Charter').[27] The Nuremberg Charter contained three categories of offences: crimes against peace, war crimes, and crimes against humanity. As to the defences, Article 7 purposefully omitted official position and Article 8 superior orders as grounds for excluding responsibility.

The Allies set up the IMT to prosecute the 'Major War Criminals'. Twenty-three defendants were initially charged: *Martin Bormann* (Chief of Chancery of the Nazi Party, member of the War Cabinet, General of the SS), *Karl Dönitz* (High Admiral, Commander of The U-Boat Army, Commander in Chief of the Navy), *Hans Frank* (Former Bavarian Minister of Justice, Governor General in Poland), *Wilhelm Frick* (Reich 'Protector' of Bohemia and Moravia, Minister of the Interior, *Reichsleiter* of the Nazi Party), *Hans Fritsche* (head of the press office of the Ministry of Information), *Walter Funk* (Minister for Economics, president Bank of the Reich), *Hermann Göring* (successor-designate to Hitler, president of the Reichstag, Commander of the Air Force, President of the Council of Ministers of Defence of the Reich, General of the SS), *Rudolf Hess* (deputy to Hitler, successor designate after Göring, member of the Secret Cabinet Council, General of the SS), *Alfred Jodl* (Chief of Supreme Staff), *Ernst Kaltenbrunner* (General of Police, head of Reich main Security Office, Chief of Security Police and Security Service), *Wilhelm Keitel* (Field Marshall, Chief of Supreme High Command, member of the Cabinet Council), *Robert Ley* (Leader of the Nazi Labour Front, General of the SS), *Konstantin von Neurath* (professional diplomat, Reich 'Protector' of Bohemia and Moravia, General of the SS), *Franz von Papen* (Vice Chancellor in Hitler's first cabinet, diplomat in Vienna and Ankara), *Erich Raeder* (High Admiral), *Joachim von Ribbentrop* (Reich Minister for Foreign Affairs, member of the Secret Cabinet Council, General of the SS), *Alfred Rosenberg* (Reich Minister for Occupied Eastern Territories, Commissioner for Ideological Education, Reichsleiter), *Fritz Sauckel* (Gauleiter of Thuringia, Plenipotentiary for Man-Power in Germany and Occupied Territories, General of the SS), *Hjalmar Schacht* (President of Reichsbank, Minister for Economy), *Baldur von Schirach* (Reichsleiter of the Nazi Party, Youth Leader, Gauleiter of Vienna), *Arthur Seyß-Inquart* (Deputy Governor of Poland, Reich Commissioner for Occupied Holland, General of the SS), *Albert Speer* (Minister for Armaments, Head of Todt Organization, Reichsleiter of the Nazi Party), and *Julius Streicher* (militant anti-Semite, editor of the periodical *Der Stürmer*, Gauleiter of Franconia). Judgments were passed on twenty-two defendants: twelve defendants were sentenced to death by hanging (*Bormann*, *Frank*, *Frick*, *Göring*, *Jodl, Kaltenbrunner*, *Keitel*, *von Ribbentrob*, *Rosenberg*, *Sauckel*, *Seyß-Inquart*, and *Streicher*). Three defendants (*Funk*, *Hess*, and *Raeder*) were sentenced to life imprisonment, four (*Speer*, *von Schirach*, *Neurath*, and *Dönitz*) to imprisonment, ranging from ten to twenty years. The defendant *Ley* committed suicide shortly before trial. The defendants *Fritzsche*, *von Papen*, and *Schacht* were acquitted. As to crimes against humanity, twenty-two of the defendants were prosecuted for this crime, nineteen were accused of it, and sixteen convicted: *Bormann*, *Frank*, *Frick*, *Funk*, *Göring*, *Jodl*, *Kaltenbrunner*, *Keitel*, *von Neurath*, *Ribbentrop*, *Rosenberg*, *Sauckel*, *von Schirach*,

[27] The Nuremberg Charter is reprinted in *IMG*, i, pp. 7 ff. and Ahlbrecht, *Strafgerichtsbarkeit* (1999), Annex III (402–6). cf. König, *Legitimation* (2003), pp. 92 ff.; Maogoto, *War Crimes* (2004), pp. 98 ff.; Engelhart, *Jura*, 26 (2004), 737; Sellars, *EJIL*, 21 (2011), 1087.

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Seyß-Inquart, *Speer*, and *Streicher*. However, the tribunal did not clearly distinguish between war crimes and crimes against humanity except in two cases: *Streicher* and *von Schirach* were charged with crimes against humanity but not with war crimes. *Streicher* was considered guilty for 'persecution' on political and racial grounds; persecution included murder and extermination. *Von Schirach* was involved in the use of forced labour under disgraceful conditions in Vienna and in the deportation of the Jews from there. His activities covered every element of crimes against humanity in the Charter.

The *Tokyo Trials* were based on the Charter for the Far East, or 'Tokyo Charter', which was proclaimed on 19 January 1946 by the Supreme Commander of the Allied Powers, General Douglas MacArthur.[28] The Charter was, unlike the London Charter, not part of a treaty or an agreement among the Allies. Representatives of the Allied nations which had been involved in the struggle in Asia (the USA, Britain, France, the Soviet Union, Australia, Canada, China, the Netherlands, New Zealand, India, and the Philippines) formed the Far Eastern Commission (FEC), whose main task was to establish a policy of occupation for Japan and to coordinate the Allied policies in the Far East. Part of this policy was the prosecution of the major war criminals. Thus, the International Military Tribunal for the Far East (IMTFE) was created. It was composed of judges, prosecutors, and other staff from the Allied nations. The IMTFE recognized the same offences as the IMT: crimes against peace (as defined in the London Charter), 'conventional war crimes: namely, violations of the laws, or customs of war', and crimes against humanity. The definition of crimes against humanity differed from that of the IMT Charter in two ways: first, the IMTFE Charter expanded the list of crimes to include imprisonment, torture, and rape. Secondly, it eliminated the requirement that 'crimes against humanity' had to be connected to war by omitting the words 'before or during the war'. As to possible defences, the IMTFE Charter excluded—as did the IMT Charter—the official position or a superior order as a ground exempting from criminal responsibility.

The prosecution selected twenty-eight defendants,[29] among them former premiers (*Hiranuma, Hirota*, *Koiso*, and *Tojo*), and foreign ministers (*Matsuoka*, *Shigemitsu*, and *Togo*), and one colonel (*Hashimoto*). Sixteen of the convicted persons were sentenced to life imprisonment, seven were sentenced to death, one was sentenced to seven years' imprisonment and another to twenty years in prison. Two defendants (*Matsuoka Yosuke* and *Nagano Osami*) had died of natural causes during the trial and one had been found mentally incompetent for trial.[30] All of those sentenced to hanging were convicted of one or both of the major counts of war crimes in the indictment, namely Count 54 (ordering, authorizing, or permitting atrocities) and Count 55 (disregard of duty to secure observance of and prevent breaches of the Law of War). Five defendants were convicted for a crime against humanity (Count 54), among them three former generals: *Dohihara*, *Kimura*, *Muto*, *Itagaki*, and *Tojo*.

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[28] 'Proclamation by the Supreme Commander for the Allied Powers' (19 January 1946), reprinted in Prichard and Zaide, *Tokyo*, i (1981).

[29] About the trials, see Pritchard and Zaide, *Tokyo*, xx (1981); Rüter, 'Ahndung', in Friedrich and Wollenberg, *Schatten* (1987), pp. 67 ff.; Tanaka, McCormack, and Simpson, *Victor's Justice?* (2011). cf. the basic work of Osten, *Kriegsverbrecherprozeß* (2003); most recently König, *Legitimation* (2003), pp. 99 ff.; Maogoto, *War Crimes* (2004), pp. 100 ff.; Engelhart, *Jura*, 26 (2004), 738; Menzel, Pierlings, and Hoffmann, *Völkerrechtsprechung* (2005), pp. 778 ff.; Neubacher, *Grundlagen* (2005), pp. 333 ff.; Sellars, *EJIL*, 21 (2011), 1092.

[30] Osten, *Kriegsverbrecherprozeß* (2003), p. 30.

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(2) Post-Nuremberg WWII trials

The Nuremberg and Tokyo Trials were followed by a second series of prosecutions of Nazi leaders, pursuant to Control Council Law (CCL) No. 10.[31] The CCL 10 formed the basis for Allied prosecutions in their respective zones of occupation. The most famous proceedings were the twelve trials before the US-American court in Nuremberg:[32] the 'Doctors Trial',[33] in which twenty-three persons were accused of taking part in the 'euthanasia-program' (*USA v Brandt et al.*); the proceeding against Generalfeldmarschall *Milch* (*USA v Milch*); the trials of the Ministry of Justice Officials[34] ('Trial of Jurists', *USA v Altstoetter et al.*); the proceedings against high SS officials ('W.V.H.A.' trial, *USA v Pohl et al.*); the proceeding against *Friedrich Flick* and five of his employees[35] (*USA v Flick et al.*); the proceedings against twenty-three heads of the IG-Farben-Industrie-AG (*USA v Krauch et al.*);[36] the Balkan Generals trial ('Hostages Trial', *USA v List et al.*); the 'Resettlement or Genocidium Trial' (*USA v Greifelt et al.*); the 'Einsatzgruppen-Trial'[37] (*USA v Ohlendorf et al.*) against twenty-four heads of the task-forces of the *Sicherheitspolizei* (security police) and of the *Sicherheitsdienst* (security service; which joined with the security police in 1939 to form the *Reichssicherheitshauptamt*); the proceeding against *Alfred Krupp von Bohlen* and twenty-four heads of the Krupp-company[38] (*USA v Krupp et al.*); the 'Wilhelmstraßen-Trial' against twenty-one ministers, permanent secretaries, Gauleiter, high-ranked SS-leaders and other leading persons[39] ('Ministries case', *USA v von Weizsäcker et al.*) and the fourteen Generals' trial against fourteen high-ranking officers of the German armed forces ('High Command Trial', *USA v von Leeb et al.*).

Other important cases have been documented by the UNWCC, as already mentioned above.[40] It was formally established on 20 October 1943 and its task was, on the one hand, to investigate war crimes, collect evidence and identify those responsible and, on the other hand, to inform the Allied governments about the cases providing a sufficient basis for prosecution. In total, the UNWCC documented eighty-nine war crimes trials on the basis of protocols of 2111 proceedings. The documentation was published under the name 'Law Reports of Trials of War Criminals' in fifteen volumes in 1947–9. However, there are very few judgments dealing with crimes against humanity. By way of example we refer to the following convictions: *Takashi Sakai* (one of the leaders who was instrumental in Japan's aggression against China, tried before the Chinese War Crimes Military Tribunal of the Ministry of National Defence in Nanking and sentenced to death on 29 August 1946); *Rudolf Höß* (Commandant of the Auschwitz Camp, tried before the Supreme National Tribunal of Poland on 11–29 March 1947 and sentenced to death); *Joseph Buhler* (high official in the German civil administration of the general government in the so-called 'Southern Territories' of Poland, tried before the Supreme National Tribunal of Poland between 17 June and 10 July 1948 and sentenced to death); *Amon Leopold Goeth* (high-ranked member of the NSDAP and 'Waffen-SS', tried before the Supreme National

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[31] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 83 ff.; König, *Legitimation* (2003), pp. 97 ff.; Engelhart, *Jura*, 26 (2004), 737.
[32] cf. US GPO, i–iv (1950–3).
[33] Wille, *NJW*, 57 (2004), 377.
[34] Kirchheimer, *Justiz* (1981), p. 480.
[35] For a detailed summary, cf. Jung, *Rechtsprobleme* (1992).
[36] Jeßberger, *JZ*, 19 (2009), 924.
[37] Streim, 'Beispiel', in A. Rückerl, *NS-Prozesse* (1971), p. 65.
[38] Dix, *NJW*, 2 (1949), 647.
[39] Haensel and Kempner, *Wilhelmstraßenprozeß* (1950), pp. 1 ff.
[40] UNWCC, Vol. 1–15 (1947–9).

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Tribunal of Poland on 27–31 August and 2–4 September 1946, and sentenced to death); *Arthur Greiser* (Gauleiter of Danzig, tried before the Supreme National Tribunal of Poland between 21 June and 7 July 1946, and sentenced to death); and *Wilhelm Gerbsch* (a guard of the penal camp in Zoeschen in Germany, tried before the Special Court in Amsterdam and sentenced to fifteen years' imprisonment on 28 April 1948).

Apart from these rather well-documented cases, there were other national prosecutions in the immediate aftermath of the war both in the occupation zones and in the territory of the Allied countries. To our knowledge, no complete documentation of these cases exists, however in some cases this was certainly done on purpose to avoid subsequent investigations into the fairness of these proceedings. The proceedings instituted by the occupation powers ended a few years after the end of the war. Step by step, the responsibility for the prosecutions was—despite the negative experience with the Leipzig Trials—passed to the German courts. The legal basis of these proceedings soon changed: during its short existence from 9 February 1948 to 30 September 1950, the successor of the Supreme Court for the Reich, the Supreme Court for the British Zone (*Reichsgericht*), applied the CCL 10 in half of all its cases.[41] Its successor, the renamed German Supreme Court (*Bundesgerichtshof*), successfully refused to apply this quite unpopular law by not dealing with any unresolved cases until August 1951 when the CCL 10 practically ceased to exist (it was formally abolished on 30 May 1956 with the German law on the lifting of the occupation).[42] Thus, in fact, the 'new' German criminal justice system did not apply the Nuremberg law but the ordinary Penal Code. In a way this situation was only remedied with the enactment of the German Code of International Criminal Law (VStGB) on 26 June 2002.[43]

Notwithstanding this, the prosecutions of Nazi criminals have still continued in and outside Germany years after the end of the war until today. Possibly the most famous case on the basis of universal jurisdiction was the trial of *Adolf Eichmann*.[44] *Eichmann* was the head of the section IV B 4 of the *Reichssicherheitshauptamt*, an office that resulted from the merger of the security service of the Nazi Party and of the security police of the Nazi state. *Eichmann* organized and coordinated the deportation of Jews to the concentration camps. In 1960 it was discovered that *Adolf Eichmann* was living and hiding in Argentina. The Israeli secret service, *Mossad*, abducted and brought him to Israel to stand trial for charges under the Nazis and Nazi Collaborators (Punishment) Law. On 12 December 1961, he was found responsible for the implementation of the 'final solution' of the Jewish question, which fulfilled the requirements of genocide and crimes against humanity. *Eichmann* was sentenced to death by the District Court of Jerusalem on 15 December of the same year. The special importance of the *Eichmann* trial lies in the fact that the state of Israel did not exist at the time of the crimes committed by *Eichmann*. Thus, Israel's jurisdiction could not be based on the right of a conquering nation to punish—if such a right exists at all.

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[41] About this court, see Storz, *Rechtsprechung* (1969), pp. 2 ff.; Rüping, *NStZ* (2000), pp. 355 ff. On the general part within the judgments of the Supreme Court for the British Zone, cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 163 ff.

[42] 1 *BGBl.* (1956), 437 ff.

[43] See 1 *BGBl.* (2002), 2254; <http://www.gesetze-im-internet.de/bundesrecht/vstgb/gesamt.pdf> accessed 10 October 2011; Werle, 'Einl. VStGB', in Joecks and Miebach, *Münchener Kommentar*, vi/2 (2009), mn. 20 ff.

[44] The original judgment of the Jerusalem District Court can be found in *ILR*, 36 (1968), 5–14. Many documents containing further information on Eichmann, his capture and his trial can be found online at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/Eichmanntoc.html> accessed 10 October 2011. For the complete transcripts of the trial see <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/> accessed 10 October 2011; Powderly, 'Trials', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 33; for a recent interdisciplinary account, see Ambos et al., *Eichmann* (2012).

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Another noteworthy post-WWII trial is that of *Klaus Barbie* in France.[45] *Barbie* was head of the Gestapo in Lyon during Germany's occupation of France. At the end of the war an arrest warrant was issued by the French authorities. *Barbie* was first arrested but managed to escape and then disappeared. He was tried *in absentia* for war crimes and sentenced to death by the *Tribunal Permanent des Forces Armées de Lyon* in two judgments. *Barbie* took refuge in Bolivia and was later extradited to France in 1983, after a long and complicated procedure involving diplomatic pressure. Meanwhile, new proceedings relating to crimes against humanity had been instituted against him in February 1982 in Lyon. He was sentenced to life imprisonment on 4 July 1987.

Other cases include that of *Paul Touvier*[46] in France, sentenced to life imprisonment before a Crown Court in Versailles (20 April 1994), and that of *Imre Finta*[47] in Canada, finally acquitted by the Supreme Court (24 March 1994). Last but not least, the trial against *John Demjanjuk* ('Ivan the Terrible') started after years of legal wrangling about his extradition from the USA on 30 November 2009 before the District Court (*Landgericht*) in Munich; he was sentenced to five years' imprisonment on 15 May 2011 but released pending an appeal (*Demjanjuk* turned 91 years old on 3 April 2011).[48]

(3) The Nuremberg Principles as the immediate consequence of the Nuremberg Trials

The principles resulting from the practical experience of the IMT were an important substructure for the upcoming development in the field of ICL.[49] On 1 December 1946 the UN General Assembly (GA) adopted those principles and established—on the very same day—a committee for the codification of international law, the Committee on the Progressive Development of International Law and its Codification (CPDIL).[50] The assignment of the committee was to codify the 'Nuremberg Principles'.[51] Upon the recommendation of the CPDIL, the International Law Commission (ILC) was founded on 21 November 1947[52] and was immediately instructed to integrate the Nuremberg Principles into a draft code on ICL.[53] The ILC adopted seven principles in its second session in 1950.[54] Those principles, in conjunction with the Nuremberg Charter, the CCL 10 and the adjudication of the Nuremberg courts, are called the '*Nuremberg Law*'. They comprise rules on the general part[55] (Principles I–IV, VI und VII), on international crimes (VI) and a procedural 'fair-trial' norm (V).[56] Their substantial content can be summarized with one sentence. The

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[45] Judgment reprinted in *Le Monde*, 5 and 6 July 1987, 1; see recently Powderly, 'Trials', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 39.
[46] *Cour d'Appel de Paris*, *ILR*, 100 (1995), 338 ff.; *Cour de Cassation*, *ILR*, 100 (1995), 357 ff.
[47] Ontario Court of Appeal, *ILR*, 98 (1994), 520–663; recently Powderly, 'Trials', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 43.
[48] *Landgericht München II*, 1 Ks 115 Js 12496/08 (12 May 2011). See on the trial Prittwitz, *StV*, 30 (2010), 648 ff.; Fahl, *ZJS*, 4 (2011), 229–34.
[49] See Werle, 'Völkerstrafrecht', in Schmid and Krzymianowska, *Erinnerung* (2007), p. 170; Kelly and McCormack, 'Contributions', in Blumenthal and McCormack, *Legacy* (2008), p. 101. Zahar and Sluiter, *ICL* (2007), p. 201 ('jurisprudential weight . . . zero'); Andersen, 'Military Tribunals', in Ryngaert, *Effectiveness* (2009), p. 3; Sadat, *AJCompL*, 58 (2010), 151; Sellar, *EJIL*, 21 (2011), 1085; Gless, *Internationales Strafrecht* (2011), mn. 658.
[50] GA Res. 94 (I), 11 December 1946 in UN-YB (1946–7), 256 ff.; also Mettraux, 'Trial', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 12.
[51] GA Res. 95 (I), 11 December 1946, in UN-YB (1946–7), 254.
[52] GA Res. 174 (II), 21 November 1947.
[53] GA Res. 177 (II), 21 November 1947 in GA ILC, *Charter* (1949), 32 ff.
[54] 2 UN-YB ILC (1950), 374 ff.
[55] The term 'general part' is used throughout the text in the sense of 'general principles' of criminal law.
[56] In detail, see Ambos, *Der Allgemeine Teil* (2002/2004), pp. 384 ff. Crit. König, *Legitimation* (2003), p. 109.

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individual criminal responsibility (Principle I) through participation (VII) with regard to international crimes (VI) is neither opposed by interstate-arranged impunity (II) nor—in principle—by acting in an official capacity (III) nor by grounds of command (IV).

C. The Development of International Criminal Law Prior to the Establishment of the UN Ad Hoc Tribunals

Through the Nuremberg Principles, an inchoate silhouette of a future ICL came into being. The ILC's mission was therefore the continuation of this development, namely the creation of an *International Criminal Code* and an *International Criminal Court* (ICC) (see Section E.). Other essential elements of ICL presently are the *Genocide Convention* (see Section C. (1)) and the *Geneva Conventions* (see (2)). In addition, there have been private initiatives to develop ICL (see Section C. (4)).

(1) The Genocide Convention

Based on thoughts by Rafael Lemkin[57] a draft resolution on genocide was discussed in 1946 and finally, on 11 December 1996, Resolution 96[58] was adopted by the UN GA.[59] Resolution 96 declared genocide to be a *crime of international concern*, leaving the domestic implementation however to the member states,[60] and formed the basis for the drafting of a treaty by a group of experts (of which Lemkin was one of the members). The Genocide Convention was adopted by the GA on 9 December 1948 and came into force on 12 January 1951.[61] As of 19 March 2011, the Convention counts 141 member states[62] and is the most vital legal instrument on the crime of genocide.[63] The definition of genocide in Article II was later not only included in international treaties, for example in Article 6 of the ICC's Rome Statute, but also in national criminal codes such as Article 1(4) of the Crimes Against Humanity and War Crimes Bill (UK) or Article 220(a) of the German Criminal Code, now § 6 VStGB. The elements of the crime will be discussed in detail in Volume II, Chapter IX of this treatise.

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[57] cf. Lemkin, *InternAbl*, 18 (1933), 117, where Lemkin talks of 'acts of barbarianism and vandalism as delicta juris gentium'. The term 'genocide' was used for the first time in his monograph in 1944 (Axis Rule); based on this piece of work, see further Lemkin, *AJIL*, 41 (1947), 145; id, *RDPC* (1946), 186; Folgueiro, 'Crimen', in Parenti et al., *Crímenes* (2007), p. 119; see also Schabas, 'Genocide', in Safferling and Conze, *Genocide Convention* (2010); Barrett, 'Raphael Lemkin', in Safferling and Conze, *Genocide Convention* (2010) and Reginbogin, 'Holocaust', in Safferling and Conze, *Genocide Convention* (2010), pp. 19 ff.

[58] GA Res. 96, 11 December 1946.

[59] On the discussion process within the UN cf. UN-YB (1947), 254 ff.; UN-YB (1949), 595 ff.; UN-YB (1950), 953 ff. Also Selbmann, *Genozid* (2003), pp. 48 ff.; Hübner, *Völkermord* (2004), pp. 63 ff. For further sources, cf. Ambos, *Der Allgemeine Teil* (2002/2004), p. 405 n. 3; Folgueiro, 'Crimen', in Parenti et al., *Crímenes* (2007), p. 137; Dülffer, 'United Nations', in Safferling and Conze, *Genocide Convention* (2010), pp. 55 ff.

[60] From a traditional perspective, Article I only contains—since genocide was a 'crime *under* international law'—a duty to implement the offence on the domestic level (cf. Stillschweig, *Abkommen* (1949), pp. 93, 96; Kunz, *AJIL*, 43 (1949), 742 ff.; Graven, *RdC*, 76 (1950), 433, 491 ff.; Jescheck, *ZStW*, 66 (1954), 203 ff.). From a more modern perspective—taking into account the numerous ICL instruments—a direct responsibility under international law may be inferred (Selbmann, *Genozid* (2003), pp. 140 ff.; see also the decision concerning jurisdiction by the ICJ, 11 July 1996, *Bosnia and Herzegovina v Yugoslavia*, ICJ Rep. 2, 1, 20 ff., paras. 20, 24, 26 (1996); also Selbmann, *Genozids* (2003), pp. 83 ff.; Schabas, *Genocide* (2009), pp. 557 ff.; Hübner, *Völkermord* (2004), pp. 375 ff.); Schabas, *Genocide* (2009), p. 502; Seibert-Fohr, 'Judgment' and Simma, 'Genocide', in Safferling and Conze, *Genocide Convention* (2010), pp. 245 ff.

[61] 2 *BGBl.* (1954) at 730. For the text of the most important drafts, cf. Schabas, *Genocide* (2009), pp. 710 ff.

[62] <http://www.preventgenocide.org/law/convention> accessed 10 October 2011, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=357&ps=P> accessed 10 October 2011, and <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants> accessed 10 October 2011.

[63] Schabas, *Genocide* (2009), pp. 3 ff., 16 ff. About the prevention of genocide cf. the decision of the 'Committee on the Elimination of Racial Discrimination' (CERD), 19 August 2005, UN Doc. CERD/C/67/Misc. 8.

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(2) The Hague and Geneva laws

First efforts to establish a 'law of war' can be traced back to the middle of the 19th century, focusing primarily on the humanization of war, first with regard to the admissible means and methods of warfare (so-called 'Hague Law')[64] and then later increasingly with regard to the protection of the victims of armed conflict (so-called 'Geneva Law'[65]).[66] While the Hague and Geneva laws regulate the situation of an armed conflict, that is the *ius in bello*, laws governing the resort to force are called *ius ad bellum*.[67]

The *Hague Law* has its origin in a conference of fifteen European states convened in Brussels,[68] whose purpose was to confirm the principles underlying the St Petersburg declaration.[69] The Hague Law was then developed in two Hague Peace Conferences of 1899 and 1907. In 1899, it consisted of various Declarations[70] and Conventions[71] (agreed upon by only twenty-six countries) which are generally considered the first modern formulation of the international laws and customs of war.[72] In the 1907 Hague conference, the existing Declarations and Conventions were amended and further Conventions adopted.[73] Although there was never a third Peace Conference, the law of armed conflict

[64] St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868; Project of an International Declaration concerning the Laws and Customs of War, Brussels, 1874; Hague Land Warfare Convention of 1899 and 1907 (cf. Bothe, 'Friedenssicherung', in Vitzthum, *Völkerrecht* (2010), p. 642).

[65] See already note 7. For an overview, see Ahlbrecht, *Strafgerichtsbarkeit* (1999), pp. 23 ff.; Mendes, *Peace* (2010), pp. 3 ff.; Weber, 'Erfahrungen', in Ziegler, Wehrenberg, and Weber, *Kriegsverbrecherprozesse* (2009), pp. 17 ff.; Gless, *Internationales Strafrecht* (2011), mn. 831.

[66] On the distinction between Hague Law and Geneva Law, see Kolb, 'Distinction', in Kolb, *Droit international pénal* (2008), pp. 134 ff.; Alonso, *CPI* (2008), pp. 1 ff.

[67] Jochnick and Normand, *HarvILJ*, 35 (1994), 52; McCoubrey and White, *International Law* (1992), p. 217. See also Werle, 'Zukunft', in Grundmann et al., *FS Humboldt-Universität* (2010), p. 1221.

[68] Green, *Law* (2008), p. 39.

[69] See note 64; Jochnick and Normand, *HarvILJ*, 35 (1994), 67; Sandoz, *JICJ*, 7 (2009), 663. The conference was the first effort to adopt a broad international agreement concerning the law and customs of war (cf. Brown, 'ICL', in *Research Handbook* (2011), p. 7).

[70] The Declarations prohibited, 'for the term of five years, the launching of projectiles and explosives from balloons, and other methods of similar nature', Declaration (IV, 1), available at <http://www.icrc.org/ihl.nsf/FULL/160?OpenDocument> accessed 10 October 2011. This Declaration was replaced in 1907 by Declaration (XIV), 'prohibiting the discharge of projectiles and explosives from balloons', available at <http://www.icrc.org/ihl.nsf/INTRO/245?OpenDocument> accessed 10 October 2011. On both declarations, see Schindler and Toman, *Law* (2004), p. 309. Another Declaration concerned 'asphyxiating gases' (Declaration (IV, 2), available at <http://www.icrc.org/ihl.nsf/INTRO/165?OpenDocument> accessed 10 October 2011), see also Schindler and Toman, *Law* (2004), p. 95. A further Declaration (IV, 3) concerned 'expanding bullets', available at <http://www.icrc.org/ihl.nsf/FULL/170?OpenDocument> accessed 10 October 2011 (expanding bullets are those which 'expand or flatten easily in the human body, such as those with a hard envelope which does not entirely cover the core or is pierced with incisions' such as the 'Dum-Dum bullet', expressly mentioned in the Declaration).

[71] Convention (II) 'with respect to the laws and customs of war on land and its annex: Regulations concerning the Laws and Customs of War on Land', available at <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument> accessed 10 October 2011. This Convention was replaced and amended at the Hague Conference of 1907 as Convention (IV) with nearly the same title, available at <http://www.icrc.org/ihl.nsf/FULL/195> accessed 10 October 2011.

[72] Kolb and Hyde, *Introduction* (2008), p. 40; Singer, *ColJTransnat'lL*, 42 (2004), 526. However, not all powers accepted or even ratified the Declarations, such as the USA (accepted only the 1907 Declaration on Projectiles from Balloons) and Britain (accepted the Balloon Declaration of 1907 but not of 1899, see Green, *Law* (2008), p. 41, since it argued that dum dum bullets, which it manufactured in India and used in colonial wars in Africa, were necessary to disable tenacious 'savages', see Jochnick and Normand, *HarvILJ*, 35 (1994), 73).

[73] These Conventions concerned the 'Opening of Hostilities' (Convention (III), available at <http://www.icrc.org/ihl.nsf/FULL/190?OpenDocument> accessed 10 October 2011), Naval Warfare (Conventions (VI)–(XII), see Schindler and Toman, *Armed Conflicts* (2004), pp. 1059–93) and Neutrality (Convention (V) 'Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land', available at <http://www.icrc.org/ihl.nsf/FULL/200?OpenDocument> accessed 10 October 2011, and Convention (XIII) 'Concerning the Rights and Duties of Neutral Powers in Naval War', available at <http://www.icrc.org/ihl.nsf/INTRO/240?OpenDocument> accessed 10 October 2011).

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has still been amended and updated by various conventions,[74] especially by the 1977 Protocol Additional (PA) I to the Four 1949 Geneva Conventions (GCs),[75] which contains a number of *prima facie* 'Hague' elements.[76] In substance, the Hague Conventions provide for three important principles still valid today.[77] The first principle, the *Martens Clause*, was introduced into the preamble to the 1899 Hague Convention (II) and states that, notwithstanding the absence of specific regulations, in any case 'populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience'.[78] The second and third basic principles are laid down in Articles 22 and 23(e) of the annexed Regulations of the 1899 Hague Convention (II) and the 1907 Hague Convention (IV):[79] on the one hand, the right to injure 'the enemy is not unlimited' (Article 22); on the other, there is the prohibition '[t]o employ arms, projectiles, or material of a nature to cause superfluous injury' (Article 23(e) 1899 Convention) or 'calculated to cause unnecessary suffering' (Article 23(e) 1907 Convention). It is also said that the Hague Law creates direct obligations for individuals.[80]

The *Geneva Law* was inspired by the battle of Solferino and Henry Dunant's moving portrayal of the suffering and bloodshed there[81] and emerged from the GCs of 1864, 1906, 1929, and 1949.[82] In a nutshell, it deals with the protection of non-combatants (civilians) and former combatants who are no longer willing or able to fight.[83] The (modern) 'Geneva law' consists of the *four GCs* (GC I–IV) of 12 August 1949 and the *three Additional Protocols* (AP I, II, III) dated 18 June 1977 (AP I and II) and 8 December 2005 (AP III) respectively.[84] This body of law can rightly be considered modern international

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[74] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, available at <http://www.icrc.org/ihl.nsf/FULL/400?OpenDocument> accessed 10 October 2011. The Convention applies to international armed conflicts (Article 18) and elaborates upon some of the provisions of Article 27 of the 1907 Hague Convention (IV), see Bailey, *Prohibitions* (1972), pp. 65–6. Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, 10 December 1976, available at <http://www.icrc.org/eng/assets/files/other/1976_enmod.pdf> accessed 10 October 2011; see also Schindler and Toman, *Law* (2004), p. 163. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, available at <http://www.icrc.org/ihl.nsf/FULL/500?OpenDocument> accessed 10 October 2011. Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995, available at <http://www.icrc.org/ihl.nsf/FULL/570?OpenDocument> accessed 10 October 2011. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996), available at <http://www.icrc.org/ihl.nsf/FULL/575?OpenDocument> accessed 10 October 2011.

[75] PA to the GC of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> accessed 10 October 2011.

[76] MacCoubrey and White, *International Law* (1992), p. 219.

[77] Bailey, *Prohibitions* (1972), p. 63.

[78] The Clause appears in substantially the same form in the Preamble of the 1907 Hague Convention (IV): '... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.' On the controversial interpretation of the *Martens Clause*, see for example Ticehurst, *IRRC* 317 (1997), pp. 125–34.

[79] See note 71.

[80] Bailey, *Prohibitions* (1972), p. 66; Bindschedler-Robert, *Traité* (1954), p. 7.

[81] *A Memory of Solferino* <http://www.verwonderenenontdekken.nl/uploadedfiles/15-Henri%20Dunant%20%281862%29%20A%20MEMORY%20OF%20SOLFERINO%20%28Pdf%2047%20blz.%29.pdf> accessed 31 October 2011; see also Meron, *AJIL*, 94 (2000), 243.

[82] See note 7.

[83] Kolb and Hyde, *Introduction* (2008), p. 41; Dunoff et al., *International Law* (2006), pp. 527–8.

[84] GC I–IV entered into force on 21 October 1950, AP I and II on 7 December 1978 and AP III on 14 January 2007. For the almost universal acceptance of the four GC and AP I and II, see <http://www.icrc.org> accessed 18 December 2011.

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humanitarian law (IHL).[85] Penal provisions can be found in GC I–IV and AP I, thus in conventions that apply in the case of an international (armed) conflict, in particular the grave breaches contained in common Articles 49 GC I, 50 GC II, 129 GC III, 146 GC IV (more on these in a moment).[86] In contrast, AP II—which, similar to common Article 3 GC I–IV, can be applied in the case of a non-international conflict—contains no penal provisions whatsoever.[87] This distinction reflects the traditional 'two box approach' differentiating between an international and a non-international armed conflict.[88] It has been overcome with the famous interlocutory decision of the *Tadić* Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) where it was held that IHL, in particular common Article 3 GC I–IV, does provide for penal prohibitions in the case of a non-international conflict under certain conditions,[89] namely:

(i) the violation must constitute an *infringement of a rule* of IHL;

(ii) the rule must be *customary* in nature or, if it belongs to *treaty* law, the required conditions must be met;

(iii) the violation must be '*serious*', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;[90]

(iv) the violation of the rule must entail, under customary or conventional law, the *individual criminal responsibility* of the person breaching the rule.[91]

We can thus speak of an *assimilation* between an international and non-international conflict as far as individual criminal responsibility is concerned (*Assimilierungsthese*).[92] In other words, it no longer matters whether the 'serious violation' has occurred within the context of an international or a non-international armed conflict. Individual criminal responsibility also ensues in the former by way of so-called 'civil war crimes'.[93]

As to the *grave breaches regime*, Articles 49 GC I, 50 GC II, 129 GC III, and 146 GC IV provide obligations for the State Parties to penalize conduct amounting to a grave breach of the GC.[94] The 'grave breaches' develop the customary law definition which evolved from

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[85] Sassòli and Bouvier, *Protect* (2006), Part I, Chapter 3, pp. 121 ff. On the importance of IHL, see for example Kälin and Künzli, *Menschenrechtsschutz* (2008), pp. 161 ff.; on the basic principles Robinson, 'War Crimes', in Cryer et al., *Introduction* (2010), pp. 268 ff.

[86] cf. Bothe, *IsYbHR*, 24 (1995), 242, who, however, comes to the conclusion (at 251) that national and international law provide for a broad basis for the punishment of IHL violations.

[87] cf. Bremer, *Strafverfolgung* (1999), pp. 96 ff.; König, *Legitimation* (2003), p. 359.

[88] See on the concept of the (international) armed conflict Sassòli and Bouvier, *Protect* (2006), Part I, Chapter 2, pp. 108 ff.; Ipsen, 'Begriff', in Delbrück et al., *Festschrift* (1975), pp. 420 ff.; Ambos, 'Bestrafung', in Hasse, Müller, and Schneider, *Völkerrecht* (2001), pp. 326 ff.

[89] *Prosecutor v Duško Tadić*, No. IT-94-1-AR 72, Decision on the Defence Motion for Interlocutory Appeal, paras. 71 ff. (10 October 1995); thereto Buchwald, *Tadić* (2005), pp. 153 ff. About the background of the *Tadić* case, cf. Ambos, 'Bekämpfung', in Lüderssen, *Kriminalpolitik* (1998), pp. 401 ff.

[90] Thus, for instance, the case of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law' although it may be regarded as falling foul of the basic principle laid down in Article 46(1) of the Hague Regulations (and the corresponding rule of customary international law), whereby 'private property must be respected' by any army occupying an enemy territory (*Tadić*, No. IT-94-1-AR 72, para. 94).

[91] *Tadić*, No. IT-94-1-AR 72, para. 94 (emphasis added).

[92] cf. Kreß, *EuGRZ* (1996), 645 ff. and Ambos, 'Vor §§ 8–12 VStGB', in Joecks et al., *Münchener Kommentar* (2009), mn. 2. Note however, that this assimilation has not occurred by way of a 'full and mechanical transplant of those rules to internal conflicts', but only as to the 'general essence of those rules' (*Tadić*, No. IT-94-1-AR 72, para. 126).

[93] Kreß, *EuGRZ* (1996), 645 ff.; Werle, *Principles* (2009), mn. 805, 1130, 1132.

[94] cf. Gasser, 'Völkerrecht', in Haug, *Menschlichkeit* (1993), pp. 590 ff. On the 'grave breaches regime' in detail, see the special issue no. 4 of *JICJ*, 7 (2009) with papers on the customary international law character of this regime (Henckaerts, *JICJ*, 7 (2009), 683 ff.; Kreß, *JICJ*, 7 (2009), 789 ff.), on the implementation (Dörmann and Geiß, *JICJ*,

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the Hague Convention of 1907.[95] The following acts are covered (Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV): wilful killing, torture, or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; unlawful deportation or transfer, or unlawful confinement of a protected person; compelling a prisoner of war to serve in the forces of the hostile Power; wilfully depriving a prisoner of war of his right to a fair and regular trial; and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. The State Parties have either to prosecute these acts before national courts or extradite those responsible to another State Party (*aut dedere aut iudicare*).[96]

It is controversial whether the 'grave breaches' norms provide for direct *individual criminal responsibility*[97] since they are only addressed to the State Parties, requiring them to enact the respective penal prohibitions and ensure criminal prosecution. A purely literal interpretation might therefore stand against direct criminal responsibility under international law.[98] Yet with Article 85(5) AP I, a semantic change occurred qualifying grave breaches against the Protocol as 'war crimes'.[99] In addition, if one takes into consideration recent ICL instruments such as the ICTY, ICTR, and ICC Statutes, a direct responsibility seems well founded. These statutory sources use the Geneva Law to substantiate exactly such a responsibility and are applied by the courts in this spirit. If one were to subject its application to domestic implementation, the efficiency of the grave breaches regime would be severely diminished. In fact, individual criminal responsibility for 'war crimes' was already acknowledged in the Leipzig Trials.[100] Individual responsibility can also be implicit in the 'grave breaches' provisions if they define a responsible person as someone 'committing, or ordering to be committed, any of the grave breaches'.[101] Therewith not only individual criminal responsibility is recognized, but the superior is put on a par with the subordinate. The order to commit such a violation constitutes in itself a violation and therefore establishes the direct responsibility of the superior.[102]

More detailed provisions concerning individual criminal responsibility can be found in AP I. According to Article 85 AP I, the provisions of the Conventions relating to the repression of breaches and grave breaches shall apply to the breaches under AP I. Grave breaches are regarded as such when committed wilfully, in violation of the relevant provisions of AP I, and causing death or serious injury to body, or health; the particular acts are enumerated in Articles 11, 85(3)–(4) AP I.[103] Articles 86 and 87 AP I provide

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7 (2009), 703 ff.), the national prosecution (Ferdinandusse, *JICJ*, 7 (2009), 723 ff.), on the ICTY's contribution (Roberts, *JICJ*, 7 (2009), 743 ff.), on shortcomings (Fleck, *JICJ*, 7 (2009), 833 ff.), and on the future development (segregation from other war crimes, abandonment or assimilation: Stewart, *JICJ*, 7 (2009), 855 ff.). Stewart, *JICJ*, 7 (2009), 653 ff.

[95] In detail, see Ahlbrecht, *Strafgerichtsbarkeit* (1999), pp. 147 ff. On customary international law and the *status quo* cf. ICRC Study I, *passim*.

[96] See for example Article 49(2) GC I ('bring such persons . . . before its own courts' or 'hand such persons over for trial'). See also Pictet, 'Article 72', in Pilloud et al., *Commentary* (1952), pp. 351 ff.; Kreß, *EuGRZ* (1996), 789 ff.; Akhavan, *JICJ*, 8 (2010), 1254 ff.; Fabbri and Noto, 'Kooperation', in Ziegler, Wehrenberg, and Weber, *Kriegsverbrecherprozesse* (2009), p. 265.

[97] Generally in favour: Jescheck, *GA* (1981), 56; Schutte, 'Repression', in Delissen and Tanja, *Humanitarian Law* (1991), p. 188; Green, *Law* (2008), pp. 290 ff.; König, *Legitimation* (2003), pp. 274, 275 ff.

[98] cf. Simma and Paulus, *AJIL*, 93 (1999), 310 ff.; further Graefrath, *Strafsanktionen* (1956), pp. 853 ff.

[99] cf. Simma and Paulus, *AJIL*, 93 (1999), 311; Bremer, *Strafverfolgung* (1999), pp. 97 ff.; König, *Legitimation* (2003), p. 274.

[100] McCormack, 'Sun Tzu', in McCormack and Simpson, *War Crimes* (1997), pp. 48 ff.

[101] See for example Article 49(2) GC I.

[102] cf. Green, *Law* (2008), p. 292.

[103] For more detail on the grave breaches and there recognition in customary law, see König, *Legitimation* (2003), pp. 304 ff.

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for the highly relevant *command or superior responsibility*, in fact codifying the jurisprudence that had existed since the famous *Yamashita* case.[104] According to Article 86(1) AP I, an omission is punishable if one fails to act when under a duty to do so. Article 86(2) AP I points out that if a breach against the Conventions or the Protocol was committed by a subordinate (whose responsibility is implicit)[105] the superior incurs criminal responsibility if he knew, or had information which should have enabled him to conclude in the circumstances at the time, that the subordinate was committing or was going to commit such a breach and if he did not take all feasible measures within his power to prevent or repress the breach. Thus, superior responsibility has basically three requirements:[106]

- the breach was committed by his subordinate;
- he knew or had reason to know of the perpetration;[107]
- he omitted to take feasible measures to prevent, or repress the breach.

In subjective terms then at least a kind of negligence is necessary, the official commentary on AP I speaks of 'negligence so serious that it is tantamount to malicious intent'.[108] What this means exactly will have to be clarified in Chapter V (Section C.) when we analyse the command responsibility doctrine as a form of 'omission liability proper'.

With regard to *grounds excluding responsibility*, the traditional military defences of *military necessity* and *reprisal* need our further attention. With the Geneva Law's call for a humanization of armed conflicts, these defences have been increasingly restricted. Thus, the recourse to military necessity is only possible in exceptional cases, namely if the actions taken were necessary and proportional. This will rarely be the case if international crimes are concerned.[109] The reprisal defence was declared entirely unacceptable with a view to the protection of certain groups and objects.[110] While such an absolute ban on reprisals does not seem to be supported by customary international law, clearly the use of reprisals is predicated on very stringent conditions. We will come back to both defences in Chapter VIII.[111] Concerning grounds excluding responsibility in general, the Geneva Law rejects the exclusion of criminal responsibility pursuant to a *superior order* implicitly, since it results from the (coequal) responsibility of the subordinate and the superior that the latter cannot invoke superior orders.[112]

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[104] For more detail about this process and the adjudication on superior responsibility, see Ambos, *Der Allgemeine Teil* (2002/2004), § 7; id, 'Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 1003.

[105] More precisely, if Article 86(2) AP I speaks of a breach committed by the subordinate, it can be inferred that this subordinate shall be liable in addition to the superior (see also Wolfrum, 'Durchsetzung', in Fleck, *Handbuch* (1994), p. 423).

[106] cf. De Preux, 'Article 86', in Sandoz, Swinarski, and Zimmermann, *Commentaire* (1986), Article 86, mn. 3543 ff.

[107] On the controversy about the interpretation of the second alternative ('reason to know'), see Ambos, *Der Allgemeine Teil* (2002/2004), pp. 390 ff.

[108] De Preux, 'Article 86', in Sandoz, Swinarski, and Zimmermann, *Commentaire* (1986), Article 86, mn. 3541.

[109] cf. already Ambos, *Der Allgemeine Teil* (2002/2004), pp. 395 ff.; from a different perspective van Sliedregt, *Responsibility* (2003), pp. 295 ff.; Cryer, 'Defences', in Cryer et al., *Introduction* (2010), p. 423.

[110] *Prosecutor v Zoran Kupreškic et al.*, No. IT-95-16-T, Judgment (14 January 2000), for more details see Ambos, *Der Allgemeine Teil* (2002/2004), pp. 305 ff. See already *Prosecutor v Milan Martic*, No. IT-95-11-R 61, Decision, paras. 8 ff., 15 ff. (8 March 1996) claiming an absolute prohibition of reprisals with regard to the civilian population. Conc. Jescheck, *JICJ*, 2 (2004), 51 ff.; also Quéguiner, *IRRC*, 850 (2003), 293 ff.; Ipsen, *Völkerrecht* (2004), § 70 mn. 13; crit. Greenwood, 'Reprisals', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 546 ff.; van Sliedregt, *Responsibility* (2003), p. 293.

[111] Differentiating Kreicker, 'Deutschland', in Eser and Kreicker, *Strafverfolgung* (2003), pp. 407 ff.; Kreicker, *Exemtionen* (2007), p. 407; Cryer, 'Defences', in Cryer et al., *Introduction* (2010), p. 422; also Ambos, *Der Allgemeine Teil* (2002/2004), pp. 395 ff.; basically concurring König, *Legitimation* (2003), pp. 400 ff.

[112] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 394 ff.

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The Geneva Law also recognizes, at least partially, the *principles of legality and culpability*. Article 67 GC IV states that the courts of the Occupying Power 'shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence'. Thus, the provision recognizes on the one hand, in its first part, the principle of non-retroactivity (*nullum crimen sine lege praevia*)—albeit limiting it by apparently accepting 'general principles of law' as a basis for criminal responsibility; on the other hand, it links the penalty to the offence, thereby taking up the sentencing element of the principle of culpability (the punishment must conform to the actual culpability of the convicted person). Similarly, Article 68 GC IV says that the duration of an internment or imprisonment has to be proportionate to the offence committed, that is here again the sentence is linked to actual culpability. Admittedly, these provisions only refer to the situation of occupation (Part III of GC IV) but this should arguably not call into question their general importance for the IHL regime. Indeed, as will be shown in Chapter III (Section C.), they constitute fundamental principles of ICL.

(3) The Draft Codes of the International Law Commission

As mentioned in Section B. (3), in 1947 the ILC was assigned to prepare a 'Draft Code of Offences/Crimes against the Peace and Security of Mankind'.[113] The first Draft Code was adopted in the 6th session in 1954 (*Draft Code 1954*), yet the competent UN bodies postponed dealing with the issue until the achievement of a definition of the crime of aggression. After a definition was agreed upon by the GA in 1974,[114] the ILC was again instructed to draft a code in 1981.[115] The second Draft Code was adopted in 1991 (*Draft Code 1991*), and a third one in 1996 (*Draft Code 1996*). However, prior to this in 1994, the ILC had submitted a *Draft Statute* for an International Criminal Code.

The *Draft Code 1954* got caught up early in the East–West-conflict, resulting in a very 'politicized' negotiation process, characterized in particular by long-lasting discussions over which crimes should be included.[116] The definition of aggression by the GA did not bring the expected breakthrough since—from the point of view of the 'Western' states—it was still too wide and indefinite. Also, the question was raised how a code without a court could at all be realized and make an impact. Actually, the East–West-Conflict also eclipsed the Draft Code 1991 and it was only the fall of the Berlin Wall coupled with the end of the socialist Warsaw Pact alliance that changed the political landscape.[117] In fact, it was the call of the former President of the Soviet Union, Mikhail Gorbachev, to set up an ICC for the prosecution of terrorism and a similar request by the government of Trinidad and Tobago with regard to the prosecution of drug trafficking that made a fresh start possible, taking the groundbreaking decision to bring the work on the code and the statute for an ICC together. This resulted, within the framework of the ILC, in the 1994 Draft Statute and 1996 Draft Code which were both very influential in the negotiations on an ICC Statute which had

[113] GA Res. 177 (II), 21 November 1947, in GA ILC, *Charter* (1949), 32 ff.

[114] GA Res. 3314, 14. December 1974. Thereto Jescheck, *JICJ*, 2 (2004), 54 ff.; Mueller, *ConnJIntL*, 2 (1987), 501; crit. Baxter, 'Effects', in Faculté de Droit de L'Université de Genève/Institut Universitaire de Hautes Études Internationales, *Études* (1968), pp. 159 ff.; cf. also Ahlbrecht, *Strafgerichtsbarkeit* (1999), pp. 193 ff.

[115] GA Res. 36/106, 10 December 1981; also in UN-YB ILC 1983 II 2, 12 ff.; 1984 II 2, 9 ff.; 1985 II 2, 9 ff.

[116] Crit. Tomuschat, 'Arbeit', in Hankel and Stuby, *Strafgerichte* (1995), pp. 279 ff., 291. See also the critical statements of the governments in Bassiouni, *Commentaries* (1993), pp. 213 ff. In general on the influence of the 'Cold War' Neubacher, *Grundlagen* (2005), pp. 338 ff.

[117] In great detail on the impact of the *Fall of the Wall* and the ensuing developments in ICL see Neubacher, *Grundlagen* (2005), pp. 372 ff.

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actually started already in New York in 1995 and finally led to the adoption of the Statute in 1998 in Rome (on this process, see Section E. (1)).

The Draft Code 1954 is composed of only four articles which contain provisions on general principles and some criminal offences. Within the general part[118] the principle of individual criminal responsibility is acknowledged (Article 1), the punishability of incitement (Article 2(13)(ii)) and participation (Article 2(13)(i–iv)) regulated, the responsibility expanded by criminalizing conspiracy and attempt (Article 2(13)(i–iv)), and defences ruled out in the case of acting in an official position or acting under orders by the government or a superior if non-compliance was possible (Article 4). As crimes, a war of aggression and milder forms of intrusion in internal affairs, genocide, crimes against humanity, and war crimes have been included (Article 2(1–12)).

The discussions on the *Draft Code 1991* started in the 35th session (1983) of the ILC[119] and terminated in the 43rd session (1991) with a provisional adoption in the 2,241st meeting.[120] The provisions on the general part were discussed in the 38th session (1986) for the first time and then—apart from the 41st session (1989)—addressed in more detail in the 43rd session (1991).[121] The following provisions were included:[122]

- Recognition of individual criminal responsibility under international law (Article 3 (1))[123] disregarding the motives for the conduct (Article 4);
- Broad criminal liability for participation through the inclusion of 'aiding and abetting', 'providing the means', and 'inciting' (Article 3(2));
- Expansion of responsibility through the doctrine of command responsibility (Article 12), by criminalizing conspiracy and attempt (Article 3(3)) and conspiracy (Article 3(2));
- Defences: no lapse of time (Article 7), *ne bis in idem* (Article 9), principle of non-retroactivity (Article 10); no recognition of acting in an 'official position' (Article 13), or acting on orders if non-compliance was reasonably possible (Article 11); further defences according to common principles of law (Article 14).

The crimes received in-depth attention during sessions 35–7 (1983–5).[124] In the end twelve offences were included, some of which show the political nature of the 'Draft Code 1991': aggression, intervention, (Article 15 et seq.), colonial domination (Article 18), genocide (Article 19), apartheid (Article 20), systematic or mass violations (Article 21), exceptionally serious war crimes (Article 22), recruitment, use, financing, and training of mercenaries (Article 23), international terrorism (Article 24), illicit traffic in narcotic drugs (Article 25), wilful, and severe damage to the environment (Article 26).

The *Draft Code 1996* basically rests upon the draft of 1991.[125] It contains the following provisions on the general part:[126]

[118] See Ambos, *Der Allgemeine Teil* (2002/2004), pp. 444 ff.

[119] UN-YB ILC 1983 I, 2 ff.; II 2, 10 ff.

[120] UN-YB ILC 1991 II 2, 94 (para. 176). On the statements of the governments, cf. Bassiouni, *Commentaries* (1993), *passim*. On the earlier Draft Code 1987, cf. UN-YB ILC 1987 II 1, 2 ff.

[121] cf. UN-YB ILC 1986 I, 85 ff.; II 2, 40 (47 ff.); 1987 I, 4 ff.; II 2, 7 (10 ff.); 1988 I, 59 (287 ff.); II 2, 55 (69 ff.); 1990 I, 5 ff.; II 2, 10 (11 ff.); 1991 I, 187 ff.; II 2, 79 (98 ff.).

[122] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 449 ff.

[123] Crit. Weigend, 'Responsibility', in Bassiouni, *Commentaries* (1993), p. 113: 'In its present form, sect. 1 states the obvious.'

[124] UN-YB ILC 1983 I, 2 (5 ff.); II 2, 10 (14); 1984 I, 4 (5 ff.); II 2, 7 (15 ff.); 1985 I, 4 (6 ff.); II 2, 7 (15 ff.). cf. also Tomuschat, 'Arbeit', in Hankel and Stuby, *Strafgerichte* (1995), pp. 278 ff.; McCormack and Simpson, *CLF*, 3 (1994), 13 ff.; Ambos, *ZRP* (1996), 263.

[125] Crit. Allain and Jones, *EJIL*, 8 (1997), 100 ff., 117; Rayfuse, *CLF*, 8 (1997), 43 ff., 85. For a positive assessment, on the other hand, ILC-members Rosenstock, *AJIL*, 91 (1997), 365 ff. and Tomuschat, *EuGRZ* (1998), 1 (who, however, having been involved in the drafting may not be fully impartial).

[126] Detailed in Ambos, *Der Allgemeine Teil* (2002/2004), pp. 460 ff.

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- recognition of individual criminal responsibility under international law (Article 2(1));
- broad criminal liability for participation: direct perpetration (Article 2(3)(a)); ordering the perpetration with respect to completed or attempted acts (Article 2(3)(b)); assistance ('aiding', 'abetting', 'otherwise assisting, including providing the means', Article 2(3)(d)) and direct and public incitement (Article 2(3)(f));
- expansion of responsibility through the doctrine of command responsibility (Article 2(3)(c) in connection with Article 6), attempt (Article 2(3)(g)), and direct participation to plan or conspire (Article 2(3)(e));
- for the *mens rea* element intention in its core sense is needed (Article 2(3)(a), (d));
- defences: principle of non-retroactivity (Article 13); no recognition of acting in an 'official position' (Article 7) or on orders; in the latter case only mitigation of sentence (Article 5); further defences according to common principles of law (Article 14).

The real changes were undertaken in the special part, particularly by a sharp reduction of the former twelve offences to only five:[127] aggression, genocide, crimes against humanity, war crimes, and crimes against the UN and associated personal. Apart from the last crime, this is exactly the catalogue of offences which was later included in the ICC Statute as the so-called 'core crimes'.

The *Draft Statute 1994* was adopted in 1994 by the ILC. It consists of eight parts: establishment of the Court (Articles 1–4), composition and administration of the Court (Articles 5–19), jurisdiction (Articles 20–4), investigation and prosecution (Articles 25–31), the trial proceedings (Articles 32–47), appeal and revision (Articles 48–50), international cooperation and judicial assistance (Articles 51–7), and enforcement of sentences (Articles 58–60). A more detailed description is dispensable[128] since the Draft Statute has become obsolete with the Rome Statute.

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(4) Private initiatives

The various 'unofficial' proposals for the development of ICL may be subdivided into substantive law 'Draft Codes' and procedural law 'Draft Statutes'.[129] In the process, the substantive law norms were separated from the procedural law and only incorporated within the preparatory work for the Rome Conference.[130] It is needless to say that not each and every initiative can be mentioned or even be evaluated here in an appropriate way.[131] The most influential ones have maybe been the Association International de Droit Pénal (AIDP) draft initiated by M. Cherif Bassiouni and the International Law Association (ILA) draft.[132] Thus, they will be looked at in more detail.

Bassiouni was asked in 1976 by the executive board of the *AIDP* to elaborate an International Criminal Code. In 1979 he submitted a first draft, the so-called

[127] cf. the 13th report by the Special Rapporteur, (24 March 1995) UN Doc. A/CN. 4/466, para. 4, where besides the 'extreme severity' of the crime the intention of the state is mentioned. From a comparative view with regard to Draft Code 1991 Ambos, *EJIL*, 7 (1996), 534 ff.

[128] Ambos, *EJIL*, 7 (1996), 521 ff.; id, 'Bekämpfung', in Lüderssen, *Kriminalpolitik* (1998), pp. 384 ff.

[129] Ambos, *Der Allgemeine Teil* (2002/2004), p. 474.

[130] AIDP/ISISC/MPI, et al., *Siracusa-Draft* (1995); AIDP/ISISC/MPI, et al., *Updated Siracusa-Draft* (1996); Sadat Wexler, *Model Draft Statute* (1998).

[131] See for example, apart from the ones mentioned in the main text, the ones coordinated by Bassiouni on procedural law: 'ISISC, Draft Statute, 1990' in *NLR*, 15 (1991), 385 ff.; updated and revised: Bassiouni, *Commentaries* (1993), pp. 33 ff. For further supporting documents, see Bassiouni, *Commentaries* (1993), pp. 30 ff.; Ahlbrecht, *Strafgerichtsbarkeit* (1999), pp. 46 ff., 215 ff.

[132] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 475 ff.

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'Draft International Criminal Code', which was presented at the 6th UN Congress on Crime Prevention in Caracas in 1980. In 1987 a revised, but only marginally amended version was submitted. After, the above-mentioned ILC Draft Statute was submitted in 1994, Eser, Shibahara, and Bassiouni initiated an alternative draft in Siracusa (Italy), the 'Siracusa Draft 1995' ('Siracusa Draft I'). One year later an 'updated Siracusa Draft' ('Siracusa Draft II') was submitted to the ICC Preparatory Committee (PrepCom). Finally in 1998, once more initiated by Bassiouni, a working group made up of American scholars and practitioners brought up a 'Model Draft Statute' based upon the Draft Statute 1998 prepared by the PrepCom. In essence this new Draft Statute was a later version of the Draft Statute 1998, abandoning all the multiple options and proposing only very few substantial changes.

The *ILA* efforts led to various Draft Statutes and, at the substantive law level, to the adoption of a third protocol on the 'Statute of an International Criminal Court and an international criminal law fact-finding committee' during its 63rd session in 1988. This protocol contains regulations on individual criminal responsibility. In addition, a second protocol on defences was adopted. A slightly modified version was presented during the 64th session in 1990.

While the drafts based on Bassiouni's initiative mainly follow the Nuremberg law and are in accordance with ICL decisions, the ILA drafts are predominantly based on principles and findings of comparative criminal law. They are more precise and sophisticated—at least with regard to the rules of a general part—and therefore from a more theoretical perspective and are, in any case, more convincing.[133] However, they lacked by far the influence of the Bassiouni drafts.

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D. The UN Ad Hoc Tribunals

(1) The International Criminal Tribunal for the Former Yugoslavia

In Europe, WWII was followed by a long and stable period of peace that was interrupted by massive violations of IHL and human rights in the Former Yugoslavia beginning in 1991. In reaction to this situation the UN established the 'United Nations Commission of Experts Pursuant to Security Council Resolution 780'.[134] The Commission submitted a first Interim Report on the basis of which the Security Council (SC) decided to establish an ad hoc International Criminal Tribunal. In *Resolution 827 of 25 May 1993*, the SC approved this report and established the International Criminal Tribunal for the Former Yugoslavia (ICTY).[135] In its annex, it sets out the Statute of the ICTY (ICTYS).[136] The court was established as a subsidiary body of the SC according to Article 29 of the UN Charter for an indefinite time.[137] While the work of the court was initially supposed to last until the reconstitution of peace and security, and the pacification of the situation in the Former

[133] Ambos, *Der Allgemeine Teil* (2002/2004), p. 496.

[134] UN Doc. S/RES/780 (1992); Bassiouni, *AJIL*, 88 (1994), 789 ff.

[135] UN Doc. S/RES/827 (1993), in *HRLJ* (1993), 197; Hazan, *Justice* (2004), pp. 23 ff., 26 ff.; Maogoto, *War Crimes* (2004), pp. 152 ff.; Scharf and Day, 'Ad hoc Tribunals', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 51 ff.; Gless, *Internationales Strafrecht* (2011), mn. 673; a good chronological account of the conflict in the Former Yugoslavia can be found in Ziegler, Wehrenberg, and Weber, *Kriegsverbrecherprozesse* (2009), pp. 290 ff.; crit. Mégret, *GoJIL* 3 (2011), 1011 ff.; Scheffer, *All the Missing Souls* (2012), pp. 19–21.

[136] Last amended by SC Res. 1660, 28 February 2006.

[137] cf. *Report ICTY* (1993) paras. 18 ff. This strategy has been criticized, but was ultimately approved by most scholars (cf. Oellers-Frahm, 'Einsetzung', in Beyerlin, et al., *FS Bernhardt* (1995), pp. 736 ff.; König, *Legitimation* (2003), pp. 163 ff.; Buchwald, *Tadić* (2005), pp. 78 ff.) and by the ICTY itself (*Tadić*, No. IT-94-1-AR 72, paras. 13 ff.); thereto Meron, *AJIL*, 90 (1996), 238 ff.; critically Caeiro, *RPCC* (2002), 573 ff.; Kreß, 'Witness', in Fischer, Kreß, and Lüder, *Prosecution* (2001), pp. 18 ff.). Swart, *GoJIL* 3 (2011), 985 ff. Trial Chamber II declared itself not competent to decide on this matter (*Prosecutor v Duško Tadić*, No. IT-94-1, Judgment, paras. 1 ff., (10 August 1995)).

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Yugoslavia,[138] the SC has in the meantime set up a so-called 'completion strategy' that fixed a time limit of 31 December 2004 for the end of investigations, 31 December 2008 for the end of trials of first instance, and 31 December 2010 for the end of trials on appeal. The first target date was met with the completion of all investigations by 31 December 2004, but the SC was informed by the Tribunal's President on 28 August 2003 that the majority of trials will not be completed before 2009 and that, due to the complexity of certain cases and the late arrests of accused, some cases will even continue into the first part of 2010. On 22 December 2010, the SC adopted Resolution 1966 (2010) establishing the International Residual Mechanism for Criminal Tribunals with two branches, one for the ICTY and one for the ICTR; they will commence to operate on 1 July 2013 and 1 July 2012, respectively.[139] According to the latest completion strategy, the Tribunal continues its downsizing process.[140] All trials are expected to be completed by mid-2012, except for the case of *Radovan Karadžić*, which is expected to be completed in late 2013. Most appellate work is scheduled to be finished by the end of 2014.[141]

Since the beginning of its *operations* in 1993, the ICTY has indicted 161 persons for serious violations of IHL committed in the territory of the Former Yugoslavia.[142] It is interesting to note that there has been only one conviction by a Trial Chamber for genocide[143] and even this one was turned into aiding and abetting genocide on appeal. The prison sentences imposed range from three to forty-six years. If one adds up all of the sentences and divides them by the number of convicted persons, the average sentence is seventeen-and-a-quarter years. Only five defendants were sentenced to life imprisonment (*Stakic*, *Galic*, *Lukic*, *Popovic*, and *Beara*).[144]

The *ICTY Statute* contains thirty-four articles dealing with questions of substantive law (Articles 2–7, 24 ICTYS), procedural law (Articles 1, 8–10, 18–23, 25–30 ICTYS) as well as the organization of the court (Articles 11–17, 31–4 ICTYS).[145] Besides the Statute itself, several other legal instruments such as the Rules of Procedure and Evidence (RPE) have been adopted by the court.[146] The Residual Mechanisms adopted new RPE on 8 June 2012 (corrigendum on 17 August 2012), which have been prepared by the tribunals.[147]

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[138] cf. *Report ICTY* (1993) para. 28; Cryer, 'Ad Hoc Tribunals', in Cryer et al., *Introduction* (2010), pp. 125 ff.; about the impact on the domestic legal system of Bosnia and Herzegovina see Kirs, *GoJIL* 3 (2011), 397 ff.

[139] SC Res. 10141 (22 December 2010) including a Statute of the International Residual Mechanism for Criminal Tribunals, <http://www.un.org/News/Press/docs//2010/sc10141.doc.htm> accessed 19 December 2011; on the necessity of the mechanisms: Acquaviva, *JICJ* 9 (2011), 793 ff., Denis, *JICJ* 9 (2011), 819 ff.; from a victims' view, Frisso, *GoJIL* 3 (2011), 1093 ff.; crit. McIntyre, *GoJIL* 3 (2011), 923 ff.; Pittman, *JICJ* 9 (2011), 797 ff.; diff. Riznik, *GoJIL* 3 (2011), 907 ff. For further information on the Residual Mechanism, especially the appointment of the President, the Prosecutor and the Registrar, the elected Judges and the adoption of the Rules of Procedure and Evidence, see <http://www.unmict.org/index.html> accessed 13 July 2012.

[140] ICTY President, Letter dated 15 May 2012 from the President of the ICTY, addressed to the President of the Security Council, S/2012/354, 23 May 2012, para. 69.

[141] See <http://www.icty.org/sid/10016> accessed 17 October 2011; also Gless, *Internationales Strafrecht* (2011), mn. 676.

[142] For more details, see 'Key Figures of ICTY Cases', <http://www.icty.org/sections/TheCases/KeyFigures> accessed 5 March 2012; Scharf and Day, 'Ad hoc Tribunals', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 52.

[143] *Prosecutor v Radislav Krstic*, No. IT-98-33-T, Trial Chamber Judgment (2 August 2001).

[144] See <http://www.icty.org/sections/TheCases/KeyFigures> accessed 17 October 2011.

[145] cf. for the wording *Report ICTY* (1993) para. 32 ff.; reprinted in: *HRLJ* (1996), 211 ff.; *ZaöRV*, 54 (1994), 434 ff. cf. also Oellers-Frahm, *ZaöRV*, 54 (1994), 416 ff.; Blakesley, 'Atrocity', in McCormack and Simpson, *War Crimes* (1997), pp. 198 ff.; Ahlbrecht, *Strafgerichtsbarkeit* (1999), pp. 280 ff., 291 ff.

[146] The instruments can be found at <http://www.icty.org/sections/LegalLibrary> accessed 19 December 2011. Other instruments are: 'Registry Guidelines on Site Visits', 22 March 2010; 'Directive on allowances for Witnesses and Expert Witnesses', 10 March 2011; 'The Code of Professional Conduct for Defence Counsel appearing before the International Tribunal', revised a third time on 22 July 2009.

[147] *ICTY* Completion Strategy 15 November 2011, para. 67.

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The Tribunal is composed of different Chambers—the three Trial Chambers and the Appeals Chamber, the Office of the Prosecutor, and the Registry (Article 11 ICTYS).[148] The Chambers have sixteen permanent Judges and up to twelve so-called *ad litem* Judges (Article 12(1) ICTYS), or ad hoc Judges who can be appointed by the Secretary General upon request of the President of the Tribunal to serve for one or more trials (cf. Article 13*ter*, and *quater* ICTYS). Three permanent Judges are members of each Trial Chamber, and seven of the permanent Judges are members of the Appeals Chamber (Article 12(2) and (3) ICTYS). The Office of the Prosecutor (OTP)—though formally part of the Tribunal—shall act independently as a separate organ and shall not seek, or receive instructions from any government, or from any other source (Article 16 ICTYS). Its autonomy vis-à-vis the Chambers is indicated by the fact that their staff may not enter the rooms of the Chambers and *vice versa*. The Registry 'serves' both the Chambers and the Prosecutor (Article 1 (c) ICTYS). One of its functions (Article 17 ICTYS) is also the setting-up of an adequate Defence for the accused by providing them an assigned council and providing for the payment.[149] Notwithstanding this assistance, the Defence is in an inferior position to the OTP as far as resources are concerned. For example, in 2004 while the prosecution counted with many offices within the ICTY building, well equipped with personal computers, printers, and photocopy machines, the defence counsels had only one room within the ICTY building, sharing one photocopy machine, four computers, and two printers.[150] While the situation has slightly improved, in 2010 the Defence still counts only two printers but at least three rooms and twenty-six computers. Furthermore, it receives funding to rent premises outside the Tribunal.

The Tribunal's *jurisdiction* extends to all (natural) persons responsible for serious violations of IHL committed in the territory of the Former Yugoslavia since 1991 (Articles 1, 6 ICTYS).[151] According to Articles 2–5 of the ICTYS the Tribunal exercises jurisdiction *ratione materiae* over grave breaches of the four GCs, violations of the laws or customs of war, genocide,[152] and crimes against humanity. The underlying offences of the later crime include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhumane acts.

The rule on *individual criminal responsibility* covers persons 'who planned, instigated, ordered, committed, or otherwise aided, and abetted in the planning, preparation, or execution of a crime referred to in Articles 2 to 5 of the present Statute' (Article 7(1) ICTYS). Thereby three groups of perpetrators are included: the politically responsible official person, the (military) superior, and the (committing) subordinate.[153] The superior is responsible by virtue of omission if he knew or had reason to know that the subordinate was about to commit such acts, or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof (Article 7(3) ICTYS, Superior/Command Responsibility).[154] Neither the official position of the accused nor the action pursuant to an order shall relieve a person from criminal

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[148] About these organs, see Safferling, *YbIHL*, 5 (2002), 222 ff.; also Montoliu, *Tribunales* (2003), pp. 32 ff.; on the Registry Rohde and Toufar, 'Internationale Strafgerichtshof', in Kirsch, *Strafgerichtshöfe* (2005), pp. 89 ff.

[149] cf. the Directive on Assignment of Defence Counsel, last amended 29 June 2006 (IT/73/Rev. 11); cf. also Rohde and Toufar, 'Internationaler Strafgerichtshof', in Kirsch, *Strafgerichtshöfe* (2005), pp. 99 ff.

[150] Those were the circumstances when the author visited ICTY on the 20 May 2004. In the same vein Robinson, 'Lawyer', in Kirsch, *Strafgerichtshöfe* (2005), pp. 113 ff.

[151] Scharf and Day, 'Ad hoc Tribunals', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 52 ff.

[152] Committing genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide.

[153] cf. Lescure and Trintignac, *Justice* (1996), pp. 29 ff.

[154] Scharf and Day, 'Ad hoc Tribunals', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 57.

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responsibility (Article 7(2), (4) ICTYS), but this fact may be considered in mitigation of punishment if the International Tribunal determines 'that justice so requires' (Article 7(4) ICTYS).[155]

(2) The International Criminal Tribunal for Rwanda

The other ad hoc tribunal, the International Criminal Tribunal for Rwanda (ICTR), was established by *SC Resolution 955 of 8 November 1994*.[156] Its establishment was also prepared by a Report of a UN Commission of Experts[157] dealing with the genocide in Rwanda.[158] The *Statute* of the ICTR (ICTRS) resembles largely the ICTYS—it was referred to as the 'adjustment of the ICTYS to the circumstances in Rwanda'.[159] It is particularly remarkable that Judges from both tribunals are assigned to the Appeals Chamber of both tribunals. Two Judges from the ICTR shall be appointed to sit in the ICTY Appeals Chamber (Article 13(3) ICTRS, Article14(4) ICTYS) together with five from the permanent Judges of the ICTY. The members of the Appeals Chamber of the ICTY shall also serve as the members of the Appeals Chamber of the ICTR (Article 13(4) ICTYS).

The competence of the ICTR embraces the prosecution of serious IHL violations committed in the territory of Rwanda and by Rwandan citizens in the territory of neighbouring states between 1 January 1994 and 31 December 1994[160] (Article 1 ICTRS). The ICTR exercises *jurisdiction*, similar to the ICTY, over genocide, crimes against humanity, and internal armed conflict crimes.

One of the first genocide cases was the case of *Jean Paul Akayesu*.[161] *Akayesu* was bourgmestre in a local community called Taba and as such enjoyed a great authority. He was responsible for maintaining law and public order in Taba. At least 2,000 Tutsis were killed in Taba in 1994 while *Akayesu* was still in power. The Tribunal considered that *Akayesu*, in his specific function, must have known about the crimes. In not preventing the killings, *Akayesu* was responsible for an omission. More specifically, his liability was based on the doctrine of superior responsibility (its 'civilian side') with regard to the genocide committed by his subordinates. As to the specific mental or subjective element, the Chamber held that for complicity in genocide within the meaning of Article 2(3)(e) ICTRS the mere knowledge as to the genocidal intent of the direct perpetrators is sufficient, while general participation in genocide (Article 6(1) ICTRS) requires the specific intent of destroying the targeted group. Although this differentiation is not convincing it shows that the difficulty of

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[155] On the case law regarding the general part, see in detail Ambos, *Der Allgemeine Teil* (2002/2004), pp. 263 ff.

[156] On the development see Blakesley, 'Atrocity', in McCormack and Simpson, *War Crimes* (1997), pp. 196 ff.; Ahlbrecht, *Strafgerichtsbarkeit* (1999), pp. 302 ff.; Des Forges, *Zeuge* (2002), pp. 863 ff.; König, *Legitimation* (2003), pp. 118 ff.; Maogoto, *War Crimes* (2004), pp. 185 ff.;. Montoliu, *Tribunales* (2003), pp. 21 ff.; Mandel, *America* (2004), pp. 129 ff.; Neubacher, *Grundlagen* (2005), pp. 387 ff.; Beigbeder, *Justice* (2005), pp. 93 ff.; Behrendt, *Verfolgung* (2005), pp. 192 ff. On the controversial role of Shraga and Zacklin, *EJIL*, 7 (1996), 507, 508, 511; Akhavan, *AJIL*, 90 (1996), 504 ff.; Des Forges, *Zeuge* (2002), pp. 872 ff.; Maogoto, *War Crimes* (2004), p. 187. On the transitional justice mechanisms in Rwanda, including the so-called Gacaca proceedings Behrendt, *Verfolgung* (2005), pp. 163 ff.; Scharf and Day, 'Ad hoc Tribunals', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 58 ff.; Cryer, 'Ad Hoc Tribunals', in Cryer, et al., *Introduction* (2010), pp. 135 ff.; Scheffer, *All the Missing Souls* (2012), pp. 69 ff.

[157] cf. Maogoto, *War Crimes* (2004), pp. 185 ff.; UN Doc. S/Res/935 (1994).

[158] For a good chronological account, see Ziegler, Wehrenberg, and Weber, *Kriegsverbrecherprozesse* (2009), pp. 287 ff.

[159] *Report ICTR,* 1995, 491. The text of the Statute can be found in *ILM*, 33 (1994), 1598 ff. On the procedural law cf. above all the Rules of Procedure and Evidence (RPE), dated 29 June 1995, last amended 1 October 2009 as well as other legal materials on <http://www.unictr.org/Legal/tabid/92/Default.aspx> accessed 17 October 2011.

[160] About the possibility to enlarge the temporal jurisdiction, see Shraga and Zacklin, *EJIL*, 7 (1996), pp. 506 ff.

[161] *Prosecutor v Jean Paul Akayesu*, No. ICTR-96-4-T, Judgment (2 September 1998).

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the crime of genocide lies in the subjective side. Indeed, the specific genocidal intent (*dolus specialis*) is difficult to prove and we will have to return to this issue in Chapter IX.

Just like the ICTY, the ICTR introduced a first draft for a 'completion strategy' in 2003. An up-dated and amended version, which was based on SC Resolution 1503, was submitted to the SC on 29 September 2003.[162] The Tribunal President *Mose* stated that the end of proceedings is difficult to predict, and he estimated that a completion of all cases could be reached by 2009–10. The completion strategy has been continuously updated, and developed since 2003.[163] The latest report was submitted 22 May 2012. The Tribunal's president, Vagn Joensen, informed that 'nearly all trial work is complete and only one trial judgment in an ongoing case will remain to be delivered in the second half of 2012. Moreover, despite minor setbacks in trial judgment projections, all appeal judgments remain on track for completion by the end of 2014.'[164] As already mentioned above the ICTR will then, like the ICTY, be transferred into the Residual Mechanism, which is supposed to start operating on 1 July 2012.[165] According to the latest completion strategy, as at 11 May 2012, the Tribunal rendered fifty-two first-instance judgments involving seventy-two accused.[166] Appellate proceedings have been concluded in respect of forty-three persons, and two of the three remaining trial judgments will be delivered prior to 30 June 2012.[167]

E. The International Criminal Court

(1) Negotiating history

In 1994 the UN GA referred the ILC Draft Statute to the 'Ad Hoc Committee on the Establishment of an ICC'.[168] This Committee presented a final report after two sessions in 1995.[169] Then, the *PrepCom*, established by the GA just after the 1995 report, took over. Its task was to prepare for the Rome Conference.[170] Both committees were open to UN member states, but the attendance was, with more than 100 state delegations, much higher in the PrepCom. The increasing interest may be explained by the fact that the PrepCom's purpose was 'to complete the drafting of a widely acceptable consolidated text of a convention', taking into account the comments submitted by states and interstate organizations.[171] From the very beginning procedural, substantive, and organizational questions were dealt with together.[172] In particular, the ILC Draft Code 1996 was dealt with in the PrepCom although it was not formally transferred to it by the GA.

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[162] Letter dated 3 October 2003 from the Secretary General addressed to the President of the Security Council (International Criminal Tribunal for Rwanda), 6 October 2003, S/2003/946.

[163] Completion Strategy reports were submitted to the President of the Security Council on 30 April 2004, 19 November 2004, 23 May 2005, 30 November 2005, 29 May 2006, 8 December 2006, 31 May 2007, 20 November 2007, 13 May 2008, 21 November 2008, 14 May 2009, 12 November 2009, 28 May 2010, 5 November 2010, 18 May 2011, and 16 November 2011.

[164] Letter dated 22 May 2012 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, S/2011/349 (22 May 2012), para. 100.

[165] SC Res. 10141 (22 December 2010). On 5 October 2012, the Mechanism for International Criminal Tribunals issued its first appeal decision upholding a decision of the ICTR to transfer the case of Phénéas Munyarugarama to Rwanda, see Prosecutor v. Phénéas Munyarugarama, No. MICT-12-09-AR14, Decision on appeal against the referral of Phénéas Munyarugarama's case to Rwanda and Prosecution motion to strike (5 October 2012).

[166] Letter dated 22 May 2012 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, S/2011/349 (22 May 2012), para. 2.

[167] Ibid. See also <http://www.unictr.org/Cases/tabid/204/Default.aspx> accessed 13 July 2012.

[168] GA-Res. 49/53, 9 December 1994; Mendes, *Peace* (2010), pp. 15 ff.

[169] Report Ad Hoc Committee on the Establishment of an ICC, 1995.

[170] GA-Res. 50/46, 11 December 1995. All PrepCom documents can be found in Bassiouni, *Statute* (1998), pp. 1 ff. cf. also Bassiouni, *ICC* (1997); Bassiouni, *History* (2005).

[171] GA-Res. 51/207, 17 December 1996.

[172] cf. Report PrepCommis. I and II as well as UN-Doc. A/AC.249/1997/L.5, with regard to the decisions made within the session of 1997 in Bassiouni, *ICC* (1997), pp. 343 ff.

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The PrepCom held altogether six meetings from 25 March 1996 until 3 April 1998. Already in the first session the participants could largely agree on the competence of the Court regarding the core crimes—genocide, crimes against humanity, and war crimes.[173] The second session dealt basically with the principles of substantive criminal law, procedural norms, and the question concerning cooperation between states and the ICC.[174] The third session addressed nearly exclusively substantive law questions of general principles (the 'general part') as well as the elements of crime (the 'special part'), whereas the fourth session—just like the first session—dwelled on the subject of complementarity and jurisdictional boundaries between the ICC and national criminal courts.[175] This major problem was only resolved ultimately by the Rome Conference itself.[176] The fifth session dealt with the issues of the definition of 'war crimes', substantive law principles, sentence, proceedings, and state cooperation.[177] In the sixth session—the last one before the Rome Conference—the Draft Statute 1998 and the Draft Rules of Procedure were adopted.[178] Between the sessions, less formal meetings by states and delegations of states took place to smooth out possible points of conflict before the actual sessions. Without these 'intersessionals' it would have been impossible to submit a reasonable final report and a draft statute. In fact, in an 'intersessional' convened between the 5th and 6th PrepCom sessions in the beautiful Dutch provincial town of Zutphen on 19–30 January 1998, the important 128-pages-long *Zutphen Report*, the most important basis for the Rome negotiations, was compiled.[179]

On 15 December 1997 the GA decided to arrange a *State Conference* for the establishment of the ICC in *Rome*.[180] The conference was not only open to states but also to non-governmental organizations (NGOs).[181] It commenced on 15 June 1998 and ended on 17 July 1998 with the adoption of the ICC Statute. 159 governmental delegations, and 250 delegations of NGOs which had merged into the 'Coalition for an ICC', attended the conference.[182] Until the cessation of the conference it was not entirely clear whether the ultimate goal—namely the adoption of an ICC Statute—could be reached. The opposition of important states, most vocally the USA, was too strong, the legal and political questions were too complex, and the interests of states and groups of states respectively were too opposing. Taking into consideration the fact that the *Draft Statute 1998* contained more square brackets than consolidated text,[183] it is quite astonishing that the bureau of the conference was able to present a final, inter-coordinated draft on the morning of the last day of the conference, 17 July 1998. Complicated and intense negotiations between the permanent SC members (the USA, China, Russia, Britain, and France), discussions with a view to find a common position within certain groups of states (EU; like-minded states;[184] non-aligned African states), and bilateral approaches to influence single states, especially by

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[173] Bassiouni, *HarvHRJ*, 10 (1997), 13 ff.
[174] Hall, *AJIL*, 91 (1997), 177 ff.
[175] Hall, *AJIL*, 92 (1998), 331 ff.
[176] Hall, *AJIL*, 92 (1998), 130 ff.
[177] Hall, *AJIL*, 92 (1998), 331 ff.
[178] In Bassiouni, *Statute* (1998), pp. 7 ff., 129 ff.
[179] Bassiouni, *Statute* (1998), pp. 7 ff., 129 ff.
[180] GA-Res 52/160, 15 December 1997.
[181] In detail, see Hall, *AJIL*, 92 (1998), 556; also Neubacher, *Grundlagen* (2005), pp. 399 ff.; Wilmshurst, 'ICC', in Cryer et al., *Introduction* (2010), pp. 146 ff.; Schabas, *ICC Commentary* (2010), pp. 21 ff.; on the influence of the NGOs see Ellis, 'Contribution', in Brown, *Research Handbook* (2011), pp. 146 ff.
[182] Kemper, *Weg* (2004), p. 251. Däubler-Gmelin, 'Stärke', in Arnold et al., *FS Eser* (2005), p. 721 speaks of about 162 governmental delegations and 124 NGOs; Mendes, *Peace* (2010), pp. 16 ff.
[183] According to Gilbert Bitti, former French delegate to the Rome negotiations and currently Senior Appeals Counsel at the ICC, the draft contained approx. 1,500 square brackets (Lecture, held at the University of Göttingen, 24 June 2005).
[184] On the importance of the like-minded group, cf. Deitelhoff, *PVS*, 36 (2006), Sonderheft, 471.

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the USA and France, preceded this final consolidated draft.[185] On the evening of 17 July, the Committee of the Whole and the Plenary of the Conference had to approve the Statute. First of all, two attempts for amendment by India and the USA had to be rejected in the Committee of the Whole by non-action motions.[186] The Plenary then reassembled for the last time a few hours later—it was indeed already the 18 July—and the conference adopted the Court's Statute by a vote of 120 in favour to seven against, with twenty-one abstentions. A non-recorded vote was requested by the USA (by the head of the US delegation, former Ambassador-at-Large for War Crimes David Scheffer).[187] The USA voted against the Statute and thereby, ironically, sided with states[188] which later President George W. Bush called the 'Axis of Evil' and 'rogue states'.[189]

The Statute *entered into force* just four years afterwards, quicker than expected, on *1 July 2002* after the deposit of the 60th instrument of ratification (cf. Article 126). By the time the Statute was closed for signature on 31 December 2000, 139 states had signed and, by 1 July, it had been ratified by 121 states.[190] Following the Rome Conference, a *Preparatory Commission* (PrepCommis) was established[191] to compile further legal instruments and to prepare the first meeting of the Assembly of States Parties (ASP).[192] In addition, a working group on the crime of aggression was set up to reach a consensus on the definition and the conditions of jurisdiction pursuant to Article 5(2) of the ICC Statute (see on the result Section E. (2)(f)).

(2) The Rome Statute, the structure of the Court and other legal instruments

(a) General

The ICC Statute[193] consists of thirteen parts and 128 articles:

- Part 1: Establishment of the Court (Articles 1–4);
- Part 2: Jurisdiction, Admissibility and Applicable Law (Articles 5–21);

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[185] For example, the USA (then Secretary of Defense Cohen) threatened Germany (then Minister of Defence Rühe) with withdrawal of their troops from Europe if the principle of universal jurisdiction was supported (see *The Guardian,* 15 July 1998).

[186] One amendment proposed by India concerned provisions in the Statute allowing the UN SC, under its Chapter VII powers, to refer situations to the Court and/or to defer their consideration for a period of twelve months (UN-Doc. A/Conf. 183/C.1/L.79; A/Conf. 183/C.1/L.80). The other would have added to the list of weapons whose use is considered a serious IHL violation, language referring to 'weapons of mass destruction, ie nuclear, chemical and biological weapons' (A/Conf.183/C.1/L.72). The non-action motion was proposed by Norway and supported by Malawi and Chile. It was adopted by a vote of 114 in favour to sixteen against, with twenty abstentions. The US proposal concerned the issue of jurisdiction of the Court with respect to states not party to the Statute, which would be allowed only if the state had accepted that jurisdiction (A/Conf. 183/C.1/L.90). The non-action motion was also proposed by Norway, Sweden, and Denmark speaking in favour and Qatar and China against. It was adopted by a vote of 113 in favour to seventeen against, with twenty-five abstentions (cf. *UN-Press Release* L/Rom/22).

[187] For a personal history, see Scheffer, *All the Missing Souls* (2012), pp. 227 ff.

[188] Besides the USA, China, Israel, Yemen, Iraq, Qatar, and Libya voted against the Statute.

[189] cf. also Nolte, 'United States', in Foong and Khong, *Unilateralism* (2003), p. 71.

[190] cf. <http://www.iccnow.org> accessed 17 October 2011; regarding the ratification of African states, see Jallow and Bensouda, 'ICL', in Du Plessis, *Guide* (2008), p. 41.

[191] Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC, UN-Doc. A/CONF. 18 333/10 (17 July 1998); thereto Beigbeder, *Justice* (2005), pp. 162 ff.

[192] On this institution, see Section E. (2)(d). For a reflection and a suggestion for improvement of a trial judge, see Fulford, *CLF* 22 (2011), 215 ff.

[193] For an overview, see Tomuschat, *Friedens-Warte*, 73 (1998), 335 ff.; Ambos, *ZStW*, 111 (1999), 175; Triffterer, 'IStGH', in Gössel and Triffterer, *Gedächtnisschrift* (1999), pp. 493 ff.; Kirsch and Holmes, *AJIL*, 93 (1999), 2 ff.; Arsanjani, *AJIL*, 93 (1999), 22 ff.; Riezu and Colome, *La Ley XX*, 4724 (1999), 1 ff.; Kirsch, *LCP*, 64 (2001), 3 ff.; Ragués I Vallés, *La Ley*, 5289 (2001), 3 ff. and 5290, 1 ff.; Beigbeder, *Justice* (2005), pp. 153 ff.; Wilmshurst, 'ICC', in Cryer et al., *Introduction* (2010), pp. 144 ff.; Mendes, *Peace* (2010), pp. 20 ff.; Gless, *Internationales Strafrecht* (2011), mn. 682 ff.

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- Part 3: General Principles of Criminal Law (Articles 22–33);
- Part 4: Composition and Administration of the Court (Articles 34–52);
- Part 5: Investigation and Prosecution (Articles 53–61);
- Part 6: The Trial (Articles 62–76);
- Part 7: Penalties (Articles 77–80);
- Part 8: Appeal and Revision (Articles 81–5);
- Part 9: International Cooperation and Judicial Assistance (Articles 86–102);
- Part 10: Enforcement (Articles 103–11);
- Part 11: Assembly of States Parties (Article 112);
- Part 12: Financing (Articles 113–18);
- Part 13: Final Clauses (Articles 119–28).

Reservations must not be made to the Statute (Article 120).[194] Amendments may be proposed seven years from the entry into force of the Statute (Article 121),[195] amendments to provisions of an institutional nature may be proposed at any time (Article 122). If a consensus cannot be reached the amendments then have to be adopted by a two-thirds majority of the ASP.

The ICC was established as a permanent institution in The Hague (Articles 1, 3). While it is not an organ of the UN, it is linked to the latter by a 'relationship agreement' (Article 2).[196] As per Figure 1, the Court is made up of a Presidency, a Pre-Trial Chamber (PTC), a Trial Chamber (TC) and an Appeals Chamber (AC), an Office of the Prosecutor (OTP) and a Registry (Articles 34).[197] Although the Defence is not an organ of the Court, an Office of Public Counsel was set up at the Registry (Regulation 77 of the Regulations of the Court).

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(b) *The judges*

The judges are elected from two lists (Article 36(5)): List A shall consist of candidates with established competence in criminal law and procedures, and the necessary relevant experience, whether as Judge, Prosecutor, advocate, or in another similar capacity in criminal proceedings. List B shall consist of candidates with established competence in relevant areas of international law, such as IHL and human rights law, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. In

[194] On the difficult distinction between reservations and interpretative declarations by many States Parties, see Stein, 'Erklärungen', in Triffterer, *Gedächtnisschrift* (2004), pp. 183 ff.; crit. also Schabas, *EJIL*, 15 (2004), 711; Souza, 'Reservas', in Ambos and Japiassu, *TPI* (2005), pp. 90 ff.

[195] About the first Review Conference on the Rome Statute, see in this section infra (f).

[196] The relationship agreement was signed 4 October 2004, thereto: Fixson, 'IstGH', in Kirsch, *Strafgerichtshöfe* (2005), pp. 220 ff., see for the agreement itself: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Negotiated+Relationship+Agreement+between+the+International+Criminal+Court+and+the+United+Nations.htm> accessed 17 October 2011. See also ICC Resolution of the GA Sixth Committee of 19 November 2004 in which the ICC is granted permission to attend and participate in the work of the General Assembly in the capacity of observer (UN-Doc. A/59/512). On the legal relationship and the relationship between the UN and the ICC cf. also Fixson, pp. 213 ff. Further agreements were made, among others, with the African Union in May 2005 and with the EU in April 2006; see <http://www.iccnow.org/?mod=agreementsorgs> accessed 17 October 2011. Furthermore some memoranda of understanding were arranged with, for example, the Asian-African Legal Consultative Organization (AALCO) in February 2008 (<http://www.iccnow.org/documents/ICC-Pres-05-01-08-ENG.pdf> accessed 17 October 2011) and particular countries, for example the DRC in October 2004.

[197] On the structure of the ICC in general: Scheffer, 'ICC', in Schabas and Bernaz, *Routledge Handbook* (2011), p. 68. Crit. on the organization and the competences of the organs Muller, 'Establishing', in Ratner and Bischoff, *War Crimes* (2003), pp. 143 ff. He fears that the ICC will have more than 1,000 communications in a week in the long term which will require the extension of its capacity.

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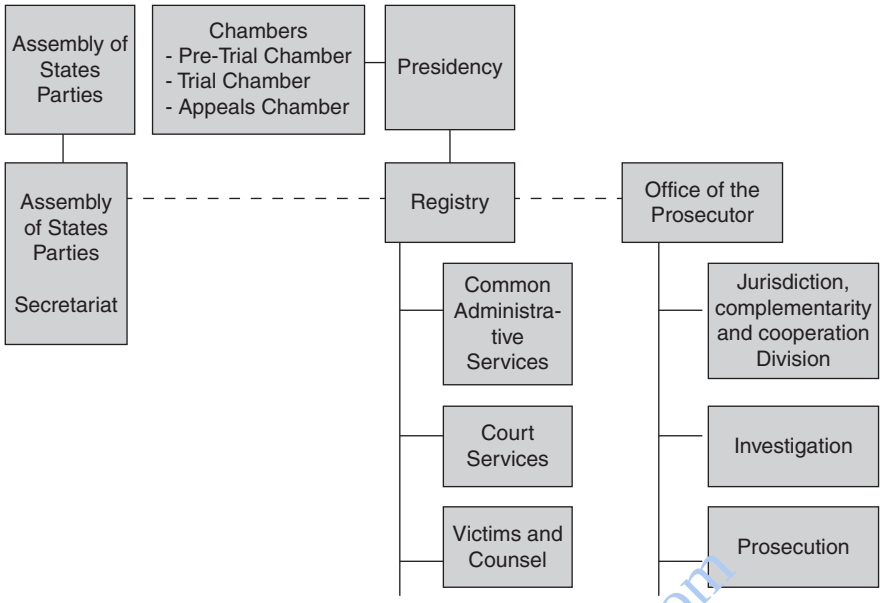

Figure 1. General structure of the ICC

Source: CICC, *Insight on the ICC* 2 (September 2004), 5

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addition, the candidates shall be of 'high moral character, impartiality and integrity' and 'possess the qualifications of their national law for appointment to the highest judicial offices' (Article 36(3)(a) ICC-Statute). They must also 'have an excellent knowledge of and be fluent in at least one of the working languages of the Court', that is English or French (Article 36(3)(c)). The judges shall be selected by lot to serve three, six, or nine years (Article 36(9)(b)). Only the judges elected for a term of three years are eligible for re-election (Article 36(9)(c)). Judicial impartiality shall be secured by not engaging in any other occupation of professional nature. The judges shall represent the main legal systems of the world. The ASP adopted on 10 September 2004 a resolution on the 'Procedure for the Nomination and Election of Judges of the International Criminal Court'[198] providing for quite precise rules for the nomination and election of the judges. However, the 'Advisory Committee on Nominations' of the ASP (Article 36(4)(c) ICC Statute) has not yet been established.

The first eighteen full-time judges were elected in a very complicated procedure by the ASP in February 2003 for three, six, and nine years respectively. On 26–27 January 2006 in a second election, six new judges were elected; of these six, five former judges were re-elected. On 30 December 2007 two new ICC judges were elected in a third election. On 19–20 January 2009, in a fourth election, six new judges were elected for nine-year terms. One of the judges submitted his resignation for personal reasons on 16 February 2009. On 24 April 2009, Japanese Judge Fumiko Saiga passed away. On 18 November 2009, during the 8th ASP session, the ASP elected two new judges for nine years to fill these vacancies. The last election of six new judges took place during the 10th ASP session in December 2011.[199]

[198] Resolution No. ICC-ASP/3/Res.6 (10 September 2004), available at <http://www.icc-cpi.int/Menus/ASP/Sessions/Documentation/4th+Resumed+Session/accessed> 19 December 2011.

[199] All relevant information, including a list of the current judges, can be found at the NGO coalition's website: <http://www.iccnow.org/?mod=judgespresidency> accessed 17 October 2011. On the role of female judges, see Wald, *ICLR* 11 (2011), 402 ff.

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The Rome Conference was very keen to provide for an election system which guarantees that only sufficiently qualified jurists become judges at the ICC. After all, courts are only as good as the people sitting on the bench. Unfortunately, so far the elections practice does not live up to the high expectations created by the Rome Statute drafters; it is even questionable whether all ICC judges meet the formal requirements provided for in the Statute. Thus, it is not surprising that there is increasing criticism, especially because of the List B judges who are basically diplomats without any criminal trial experience.[200] In a recent (for the first time) comprehensive study of the selection of international judges with a focus on the ICJ and the ICC, the authors conclude that the nomination and election processes are characterized by a high degree of politicization, a lack of transparency, and a lack of minimum standards which would guarantee a minimum qualification of the judges so elected.[201] While the authors recognize the formal differences between the ICJ and ICC selection procedure,[202] they conclude that the selection procedures of both courts are 'in very broad terms the same'[203] and doubt 'whether the ICC approach has led to any overall improvement in the make-up of the bench'.[204] With regard to ICC nominations through national procedures, they complain that

> . . . the picture is even more confused [as compared to the ICJ-nomination procedure] and it is often unclear what, if any, process is being followed. The result is a fragmented, inconsistent and highly variable approach to ICJ and ICC nominations. Some candidates may be selected through a transparent and consultative process that focuses on merit, whilst their competitors may have emerged because they were the best friend of the minister, or they were the minister him or herself.[205]

All this means that improvements are urgently needed. Mackenzie et al. rightly point to the 'Burgh House Principles on the Independence of the International Judiciary' which provide for certain minimum conditions which can easily form the basis of the selection of international judges.[206] Furthermore, the transparency and accountability of the nomination and election procedure must be improved, going beyond the unofficial, albeit

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[200] Bohlander, *NCLR*, 12 (2009), 532 ff.; Bohlander, *IndYbILPol'y*, 1 (2009), 326; see also Ambos, *LJIL*, 21 (2008), 915 with n. 22 and *CLF* 23 (2012), 225–7; Swart, *LJIL* 24 (2011), 789 with further references.

[201] Mackenzie et al., *Selecting* (2010), especially p. 173: 'Evidence of politicization is apparent at both the nomination and election stages. For both courts [ICJ and ICC], nomination practices are fragmented, lacking in transparency, and highly varied. At one end of the spectrum, a few candidates emerge following a transparent and formal consultative process that focuses on merit; at the other end, it is not unusual for individuals to be selected as a result of overtly political considerations or even nepotism. Whatever form of nomination process is adopted, all nominated candidates must work their way through a highly politicized election process.'

[202] Ibid, pp. 174 and 187 ff. [203] Ibid, p. 23.

[204] Ibid, pp. 174–5. [205] Ibid, p. 98.

[206] The principles, reprinted ibid, p. 178, deserve to be quoted:

> 2.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness, who possess the appropriate professional qualifications, competence and experience required for the court concerned.
>
> 2.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be overriding consideration in the nomination, election and appointment of judges.
>
> 2.3 Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations.
>
> 2.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organization or other body responsible for the nomination, election and appointment process.

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important, screening of the ICC candidates by the NGO coalition.[207] A presentation and examination of the candidates in a more formal setting, similar to the procedure used with regard to candidates to the US Supreme Court, would be desirable, for example before the—already mentioned, but not yet established—'Advisory Committee on Nominations'. Given the strong politicization of the national nomination procedures, a quality control can occur only at the international level via the nomination and election procedures for the international courts themselves. Public hearings in the sense just mentioned may be helpful in at least preventing the least qualified candidates from becoming judges. In any event, it is clear that the legitimacy of the ICC depends to a large degree on the quality of its judges and thus on a more rational and objective selection procedure.[208] One can only agree with Mackenzie et al. when they demand 'urgent steps (. . .) to limit the growing and pervasive role of extraneous political factors in order to ensure that politics does not overwhelm the prospects for selecting the very best judges for the international courts.'[209]

(c) The Office of the Prosecutor (OTP)

The OTP shall act independently and as a separate organ of the Court. Its first head was the Argentinean Luis Moreno-Ocampo—he was 'The Prosecutor' (cf. Article 42).[210] He was elected on 21 April 2003 and took office on 16 June 2003. The ASP also elected two Deputy Prosecutors, Mr Serge Brammertz (Investigations) and Mrs Fatou Bensouda (Prosecutions).[211] After Brammertz' leave to Lebanon in January 2006[212] (before assuming the office of Chief Prosecutor of the ICTY in January 2008),[213] only Fatou Bensouda from Gambia stayed on as Deputy Prosecutor. On 1 February 2011 Phakiso Mochochoko from Lesotho was appointed as Head of the Jurisdiction, Complementarity, and Cooperation Division. The actual power now resides in an Executive Committee, composed of the Prosecutor, the Deputy Prosecutor and the heads of the different sections (JCCD, Investigation and Prosecution) and supported by some external consultants.[214] Moreno-Ocampo's mandate expired in June 2012, Deputy Prosecutor Bensouda was elected unanimously as his successor on 12 December 2011 at the ASP's 10th session.[215] She took office on 16 June 2012. Moreno-Ocampo's performance has generally been criticized as being of little success. In maybe the most representative and informed account, David Kaye[216] has summarized the critique as follows:

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[207] See <http://www.iccnow.org/?mod=electionjudges> referring to <http://www.icc-cpi.int/Menus/ASP/Elections/Judges/2011/Alphabetical+listing-2011.htm>.

[208] See the foreword of Lord Woolf, at VIII: 'The legitimacy of the court will be damaged or even destroyed if it is perceived that the court's membership is largely the product of political bargaining between the states which are subject to the jurisdiction of the court.' In a similar vein Swart, *LJIL* 24 (2011), 792. From a gender-perspective, Grossman, *ICLR*, 11 (2011), 643 argues that the under-representation of women judges undercuts the legitimacy of the courts 'because men and women bring different perspectives to judging. Consequently, without both sexes, adjudication is inherently biased' (643).

[209] Mackenzie et al., *Selecting* (2010), p. 179.

[210] For more detail on the structure and organization, cf. Olásolo, *Corte* (2003), pp. 281 ff.; also UN-GA UN Doc. A/60/177, 1 August 2005, paras. 26 ff. (hereinafter: ICC Report GA 2005).

[211] cf. ICC Report GA 2005, paras. 27, 29; see also <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> accessed 18 October 2011.

[212] <http://www.icty.org/sid/99> accessed 18 October 2011.

[213] <http://www.icty.org/sid/99> accessed 18 October 2011.

[214] Baltasar Garzón Real (since May 2010), Tim McCormack (since March 2010), Benjamin Ferencz (since November 2009), Juan Méndez (since June 2009), Catharine A. MacKinnon (November 2008 – August 2012), Brigid Inder (since August 2012).

[215] See <http://www.icc-cpi.int/Menus/ASP/Elections/Prosecutor/> accessed 16 December 2011.

[216] Kaye, *ForAff*, 90 (2011), 118, here at 119, 123, and 125–6; in a similar vein Ambos, *SZ*, 12 December 2011, p. 2; English version on <http://www.spiegel.de/international/world/0,1518,803796,00.html> accessed 22 December 2011.

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Thanks partly to a management and decision-making style that has alienated subordinates and court officials alike, he has been dealt repeated judicial setbacks, which have overshadowed his office's modest gains.

Moreno-Ocampo, interpreting the independence of the OTP broadly, challenged the registrar not to raid his bailiwick and continually picked battles with the registrar's staff on everything from human resources to witness protection. He also resisted coordination with the president. These petty battles over turf and resources undermined the sense that the court's leaders were sharing a historic mission. Meanwhile, many of the ICC'S prosecutors and investigators chafed under what they perceived to be Moreno-Ocampo's micromanaging and erratic decision-making. Some of the OTP'S most experienced staffers quit; those who remain say that low morale continues to plague the court.

By commission and omission alike, the OTP has repeatedly made itself a target for charges of politicisation.... Moreno-Ocampo has undoubtedly faced significant pressure to go after senior leaders, but having chosen to pursue the big fish and failed to catch many, now he does not have much to show for his efforts. Particularly during its nascent phase, the ICC needed a more effective operator, institution builder, and diplomat.

The detailed structure of the OTP can be found in Figure 2, as follows:

The OTP concluded several agreements with other organizations and persons. Thus, a cooperation agreement between the OTP and the International Criminal Police Organization (Interpol) was signed in Lyon on 22 December 2004.[217] The UN-ICC agreement

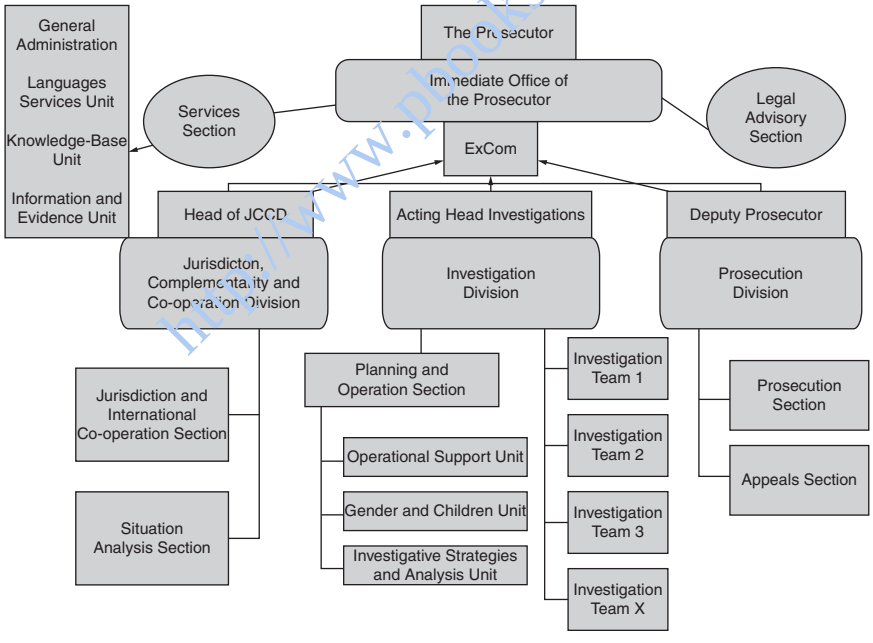

Figure 2. The structure of the ICC-OTP

Source: ICC-OTP

[217] cf. Press Release dated 22 December 2004, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/cooperation%20agreement%20between%20the%20office%20of%20the%20prosecutor%20and%20interpol> accessed 18 October 2011.

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also provides for cooperation between the UN and the Prosecutor.[218] Similar to this is the MONUC Memorandum of the ICC.[219] Recently, the agreements of the OTP with so-called 'intermediaries' came under heavy criticism. Intermediaries are local organizations and/or private persons supporting the OTP by assisting in the collection of evidence and the communication with potential witnesses given their familiarity with the cultural, geographic, and other characteristics of the region where crimes took place.[220]

(d) Registry, and Assembly of States Parties

The Registry is responsible for the administration and servicing of the Court and is headed by the Registrar (Silvana Arbia, Italy, successor of Bruno Cathala, France).[221] It consists of the Immediate Office of the Registrar, the Security and Safety Section, the Common Administrative Services Division, the Division of Court Services, Public Information, the Documentation Section, and the Division of Victims and Counsel.[222]

The Assembly of States Parties (ASP, Article 112)[223] is composed primarily of representatives of the states that have ratified and acceded to the Rome Statute. Other states which have signed the Statute or the Final Act may be observers in the Assembly (Article 112(1)). The ASP is supposed to meet annually and under special circumstances, extraordinary meetings may be called. The sessions shall be held in The Hague and in New York. To this date (December 2011) the ASP has met ten times.[224] The ASP decides on various issues, such as the adoption of legal texts and of the budget, the election of the judges, and of the Prosecutor and the Deputy Prosecutor(s). The ASP is, in short, the political, decision-making organ of the Court. Any dispute between two or more States Parties relating to the interpretation or application of the Statute shall be referred to the ASP. 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 (ICJ) in conformity with the Statute of that Court (Article 119(2)).[225] The ASP shall also supervise the State Parties' compliance with their cooperation obligations under the Statute (Article 112(2)(f) in relation to Article 87(5)(b) and (7)). Indeed, it is the only enforcement organ of the Rome system in this respect, unless the UN SC has referred a situation to the Court (Article 87(5)(b) *in fine*).

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[218] Article 18 of the Negotiated Relationship Agreement between the ICC and the UN, available at <http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf> accessed 18 October 2011.

[219] Memorandum of Understanding between the UN and the ICC concerning Cooperation between the UNO Mission in the DRC (MONUC) and the ICC, available at <http://www.legal-tools.org/en/doc/e1d7f7/> accessed 18 October 2011.

[220] See ICC Monitor 41st November 2010 – April 2011, 9. In the case against *Thomas Lubanga Dyilo* about twenty-three intermediaries assisting the OTP, see *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2434, Decision on Intermediaries, para. 3 (31 May 2010).

[221] cf. in more detail ICC Report 2005, para. 41 ff.; Pikis, *Rome Statute* (2010), pp. 33 ff.

[222] For more detail, see Lachowska, 'Work', in Doria, Gasser, and Bassiouni, *Legal Regime* (2009), p. 398.

[223] For more detail, see ICC Report GA 2005, para. 53 ff.

[224] 1st session: 3–7 February 2003—New York, USA; 2nd session: 8–12 September 2003—New York, USA; 3rd session: 6–10 September 2004—The Hague, the Netherlands; 4th session: 28 November – 3 December 2005—The Hague, the Netherlands; 5th session: 23 November – 1 December 2006—The Hague, the Netherlands; 6th session: 30 November – 14 December 2007—New York, USA; 7th session: 14–22 November 2008—The Hague, the Netherlands; 8th session: 18–26 November 2009—The Hague, the Netherlands; 9th session: 6–10 December 2010 <http://www.icc-cpi.int/Menus/ASP/Sessions/Documentation> accessed 18 October 2011, see CICC, Report on the Ninth Session of the Assembly of States Parties to Rome Statute 6–10 December 2010, <http://coalition-fortheicc.org/documents/CICC_Report_on_the_9th_Session_of_the_ASP.pdf> accessed 18 October 2011; 10th session: 12–21 December 2011 <http://www.iccnow.org/?mod=asp10> accessed 16 December 2011.

[225] cf. on the relationship between the ICJ and ICC Höpfel, 'Beitrag', in Arnold et al., *FS Eser* (2005), pp. 767 ff.

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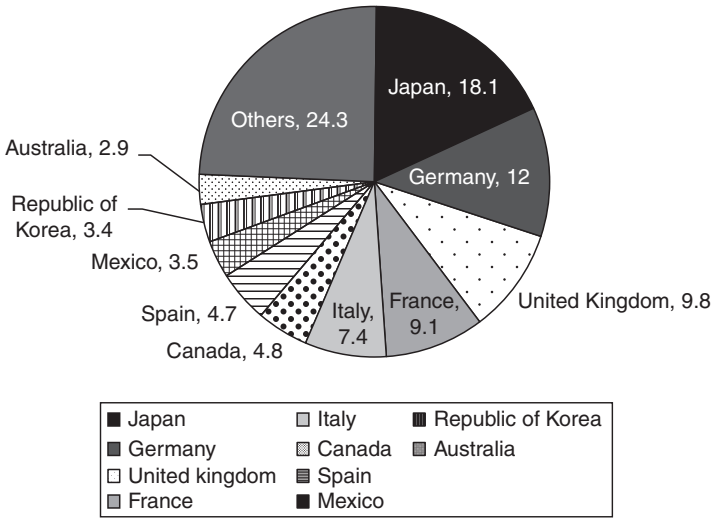

Figure 3. Financing of the ICC (2010)

Source: Own elaboration on the basis of ICC numbers

The financing of the Court (Articles 113–18) is mainly provided for by contributions of States Parties, as per Figure 3, of which Japan, Germany, the UK, and France[226] presently make the highest contributions.[227]

(e) Legal sources

Apart from the Statute itself, the two most important secondary legal sources of the ICC are the *Elements of Crimes* and the Rules of Procedure and Evidence. In accordance with Article 9 of the ICC Statute, the Elements of Crimes shall assist the Court in the interpretation and application of the articles concerning the core crimes (Articles 6, 7, and 8). The Elements were passed in the 5th session of the PrepCommis and were finally adopted in the first session of the ASP.[228] They are a subsidiary source with regard to the Statute, and so have to be consistent with the Statute (Article 9(3)) and are subject to the legal interpretation of the Court.[229] They fulfil on the one hand a declaratory function, and on the other hand a methodological function. The Elements systematize Articles 6–8 of the ICC Statute

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[226] See for further information 'Report of the Committee on Budget and Finance on the Work of its Seventeenth Session' <http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-15-ENG.pdf> accessed 5 March 2012.

[227] The system resembles the UN allocation key, cf. Assessment of Member States' contributions to the United Nations regular budget for 2012, 27 December 2011, <http://www.un.org/ga/search/view_doc.asp?symbol=ST/ADM/SER.B/853> accessed 5 March 2012. (cf. for a detailed survey Report of the Committee on Budget and Finance, No. ICC-ASP/10/15, 18 November 2011). This distribution is also reflected in the numbers of personal employed from the countries (cf. Insight 5/2005, 5). In 2011, the total budget of the ICC was 103,607,900 euros. Among the ten first paying countries, the distribution was as follows (in €): Japan with 19,273,408 (18.6 per cent of total budget), Germany with 12,333,135 (12 per cent), the UK with 10,158,147 (9.8 per cent), France with 9,418,282 (9.1 per cent), Italy with 7,689,367 (7.4 per cent), Canada with 4,932,947 (4.8 per cent), Spain with 4,886,801 (4.7 per cent), Mexico with 3,623,954 (3.5 per cent), the Republic of Korea with 3,476,289 (3.4 per cent) and Australia with 2,973,304 (2.9 per cent). The potential costs at the ICC for 2012 are 128,570,900 euros.

[228] Report PrepCommis. II; ASP to the Rome Statute of the ICC, first session, New York (3–7 February and 21–3 April 2003), Official Records, UN-Doc. No. ICC-ASP/1/3, 108 ff. <http://www.icc-cpi.int/Menus/ASP/Sessions/Official+Records/1st+session.htm> accessed 18 October 2011.

[229] Dörmann and Kreß, *HuV-I*, 12 (1999), 203; Lindenmann, *HuV-I*, 12 (1999), 213.

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by enumerating the elements of the relevant crimes (genocide, crimes against humanity, and war crimes). According to the introduction of the Elements they are generally structured in accordance with the following principles: as the Elements of Crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order; when required, a particular mental element is listed after the affected conduct, consequence, or circumstance; contextual circumstances are listed last.[230] Due to the practical importance of the Elements of Crimes, a Digest is being developed within the ICC Legal Tools Project that shall facilitate access to the relevant case law.[231]

The *RPE* were also prepared by the PrepCommis and adopted at the first session of the ASP.[232] Thus, in both cases the states rejected the 'Judge-Legislator'[233] model known from the ad hoc tribunals where everything, except the Statute itself, has been drafted and adopted by the judges.[234] In this way, legal certainty and transparency was to prevail over legislative flexibility and judge-made law.[235] In any case, however, the judges retain the possibility to issue provisional rules—'in urgent cases where the Rules do not provide for a specific situation before the Court'—with a two-thirds majority (Article 51(3)). The RPE also have—as the Elements of Crimes—to be consistent with the Statute (Article 51 (4)). In the event of conflict, the latter shall prevail (Article 51(5)). The explanatory note[236] moreover states that the Rules do not affect the procedural rules for any national court or legal system for the purpose of national proceedings. Basically, the Rules concretize and enhance the norms of the Statute which concern the Court's competence, organization, and procedure. The 225 Rules are subdivided into twelve chapters.[237] We will come back to

[230] For more detail, see Ambos, *NJW*, 54 (2001), 406 ff. Hum. *JICJ*, 2 (2004), 59 ff., 65 ff., who sees in the 'elements' an exaggerated exercise in legal positivism which will soon be overtaken by the developments in ICL. Also, the 'elements' appear in some respects to have been tailored to facilitate conviction.

[231] Bergsmo, Bekou, and Jones, *GoJIL*, 2 (2010), 804 ff.; Bergsmo, Bekou, and Jones, *HRLR*, 10 (2010), 715 ff.; <http://www.ltop-network.org/> and <http://www.department-ambos.uni-goettingen.de/index.php/Forschung/elements-of-crime-digest.html> accessed 18 October 2011.

[232] Report PrepCommiss. II, <http://www.icc-cpi.int/Menus/ASP/Sessions/Official+Records/1st+session.htm> accessed 18 October 2011, 10 ff.; regarding inquisitorial and adversarial features in the RPE see Kirchengast, *Trial* (2010), pp. 138 ff.

[233] Guariglia, 'Rules', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 1116. The term 'Judge-Legislator' seems to be slightly misleading. At first glance, one may think of judge-made law as typical for the Common Law tradition, see Malleson and Padfield, *System* (2007), pp. 70, 71 ('judicial law making'), who argue that it is impossible for judges to avoid law making since 'the distinction between the creation and interpretation of law is so difficult to draw as to be almost meaningless'. For a more nuanced approach to judge-made law, see the references in Elliott and Quinn, *System* (2008), pp. 22 ff.; for a complete denial of judge-made law, see Reid, *JSPTL (NS)*, 12 (1972–73), 22–9. However, the term 'legislator' is apparently understood differently in English doctrine. Partington clearly separates the legislative process (distinguishing between primary and secondary legislation) and judge-made law (see Partington, *Introduction* (2008), pp. 36–68). Moreover, Bailey et al. state: 'In medieval England there was no clear distinction between legislation and other forms of governmental action' (Bailey et al., *System* (2007), p. 291); thus, they seem to put on an equal footing the legislative and executive functions. They only relate judges to legislation if they are members of the House of Lords (ibid, p. 269). Against this background, the 'Judge-Legislator' cannot be regarded as so typical for Common Law. The question then is whether 'Judge-Legislator' in this context means judicial lawmaker or something else? Guariglia, op. cit., 1115 speaks of the Judge-Legislator when referring to the creation of procedural rules (see also Boas, 'Code', in Boas and Schabas, *Developments* (2003), p. 1). Indeed, especially the creation of procedural rules is a classical field of judge-made law (see Partington, *Introduction* (2008), 67). Therefore, the term Judge-Legislator in this context means nothing different than judicial lawmaker in the Common Law sense.

[234] See regarding the RPE Boas, 'Code', in Boas and Schabas, *Developments* (2003), pp. 1 ff.

[235] cf. also Guariglia, *Concepto* (2005), pp. 1115 ff.; Kreß and Wannek, 'Ad-Hoc-Tribunalen', in Kirsch, *Strafgerichtshöfe* (2005), pp. 241 ff.

[236] See asterisk on the title page of the RPE, available at <http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf> accessed 18 October 2011.

[237] General provisions (Rules 1–3); composition and administration of the Court (4–43); jurisdiction and admissibility (44–62); provisions relating to various stages of the proceedings (63–103); investigation and prosecution (104–30); trial procedure (131–44); penalties (145–8); appeal and revision (149–61); offences and misconduct against the Court (162–72); compensation to an arrested or convicted person (173–5); international cooperation and judicial assistance (176–97), and enforcement (198–225).

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both the Elements of Crimes and the RPE when analysing and discussing in detail the crimes (Vol. II) and international criminal procedure (Vol. III).

In addition, the judges adopted on 26 May 2004 the *Regulations of the Court* (At. 52) consisting of 126 provisions.[238] The Regulations were developed to fulfil the goal of speedy trials—at least speedier ones than those held at the ad hoc tribunals—and to secure a fair trial for the accused. Another legal source is the *Agreement on Privileges, and Immunities* (Article 48) which grants certain immunities and privileges to the judges, the Prosecutor and its staff, the Registrar and its staff as well as to counsels, experts, witnesses, or any other person required to be present at the seat of the Court.[239] On 3 March 2006 the *Regulations of the Registry* were adopted and entered into force on the same day.[240] On 23 April 2009 the *Regulations of the OTP* were adopted and entered into force on the same day.[241] Other legal sources are, inter alia: the Code of Professional Conduct for Counsel, the Code of Judicial Ethics, the Agreement between the International Criminal Court and the UN and the agreement with the EU on cooperation and assistance.[242]

(f) The first Review Conference in Kampala

As previously mentioned, amendments may be proposed seven years from the entry into force of the Statute at a Review Conference (Article 121), that is in 2009. Yet, the first Review Conference took place only one year later in Kampala, Uganda from 31 May to 11 June 2010.[243] ICC States Parties, observer states, international organizations, NGOs, and other participants discussed proposed amendments to the Rome Statute and took stock of its impact to date.

Thus, during the first week of the Conference, a stocktaking exercise evaluating the general success and impact of the Rome Statute took place. Debates focused on the impact

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[238] Regulations of the Court, Doc No. ICC-BD/01–01–04, 26 June 2005; <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Regulations+of+the+Court.htm> accessed 18 October 2011, No. ICC-BD/01-01-04/Rev.01-05. See also on the Regulations Insight 3/2004, 5. cf. furthermore ICC Report GA 2005, para. 22, in the same para. see also on the Code of Judicial Ethics, No. ICC-BD/02-01-05, 22 July 2004.

[239] See Zahar and Sluiter, *ICL* (2007), pp. 25 ff. On the status of ratifications, see <http://www.iccnow.org/?mod=apic> accessed 18 October 2011.

[240] Regulations of the Registry, 3 March 2006, No. ICC-BD/03-01-06, <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Regulations+of+the+Registry.htm> accessed 18 October 2011; first revision dated 25 September 2006, No. ICC-BD/03-01-06-Rev1. They contain five chapters with several sections and subsections (General Provisions, Proceedings before the Court, Responsibilities of the Registrar relating to Victims and Witnesses, Counsel Issues and Legal Assistance, Detention Matters).

[241] Regulations of the Office of the Prosecutor, 23 April 2009, No. ICC-BD/05-01-09, <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Regulations+of+the+OTP.htm> accessed 18 October 2011. They contain three chapters with several sections and subsections (General Provisions, Administration of the Office, Operation of the Office).

[242] Agreement between the ICC and the EU on Cooperation and Assistance, 1 May 2005, No. ICC-PRES/02-01-06, <http://www.icc-cpi.int/menus/icc/legal%20texts%20and%20tools/official%20journal/agreement%20between%20the%20international%20criminal%20court%20and%20the%20european%20union%20on%20cooperation%20and%20assista> accessed 18 October 2011; see also the statement of the Council of the EU from 21 March 2011, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/120084.pdf> accessed 18 October 2011.

[243] For general information, see <http://www.icc-cpi.int/Menus/ASP/ReviewConference/> accessed 18 October 2011 and <http://www.iccnow.org/?mod=review> accessed 18 October 2011; for a general overview, see also Marschner and Olma, *ZIS*, 9 (2010), 529 ff.; CICC, Report on the first Review Conference, <http://www.coalitionfortheicc.org/documents/RC_Report_finalweb.pdf> accessed 18 October 2011; FIDH, *ICC Review Conference*, June 2010.

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of the Rome Statute on victims and affected communities,[244] complementarity,[245] cooperation,[246] and peace and justice.[247] Apart from these rather general but still useful discussions, the Conference took also three concrete decisions which at this point at least deserve to be mentioned:

- States Parties rejected a proposal to delete Article 124[248]—the opting-out provision for war crimes for a seven-year period; they only agreed to review it again in five years.[249]
- States Parties accepted a proposal by Belgium, supported by various groups of 'co-sponsors',[250] to amend Article 8 extending the war crime of employing certain poisonous weapons and expanding bullets, asphyxiating or poisonous gases, and all analogous liquids, materials and devices to armed conflicts not of an international character (Article 8(2)(e)(xiii)–(xv)).[251]
- Most importantly, the States Parties agreed, in fact a few hours after the close of the conference, on a definition of the crime of aggression pursuant to the mandate contained in Article 5(1)(d)(2) of the Statute.[252] Needless to say that this decision was the result of complicated negotiations relying on seven years of preparatory work of the 'Special Working Group on the Crime of Aggression'.[253] The final result will be analysed in more detail later (Vol. II, Chapter XII).

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(3) Current investigations

(a) Situations and triggers

The OTP first initiated investigations mid-2004 with regard to two *situations*.[254] One was the situation in *Uganda* closely connected with the activities of the so-called 'Lord's

[244] ICC, Review Conference of the Rome Statute, Stocktaking of international criminal justice—Impact of the Rome Statute system on victims and affected communities—Draft informal summary by the focal points, RC/ST/V/1 (10 June 2010); Resolution RC/Res.2 The impact of the Rome Statute system on victims and affected communities (14 June 2010).

[245] ICC, Review Conference of the Rome Statute, Stocktaking of international criminal justice—Taking stock of the principle of complementarity: bridging the impunity gap—[Draft] Informal summary by the focal points, RC/ST/CM/1 (22 June 2010); Resolution RC/Res.1, Complementarity (14 June 2010).

[246] ICC, Review Conference of the Rome Statute, Stocktaking of International Criminal Justice—Cooperation—Summary of the Roundtable Discussion, RC/ST/CP/1/Rev.1 (28 June 2010).

[247] ICC, Review Conference of the Rome Statute, Stocktaking of International Criminal Justice—Peace and Justice—Moderator's Summary, RC/ST/PJ/1/Rev.1 (22 June 2010).

[248] The Article itself provides that it must be reviewed at the upcoming Review Conference with a view to a possible revision. Thus, the ASP at its 8th plenary meeting, on 26 November 2009 decided to forward a proposal for an amendment of Article 124 to the Review Conference, see Resolution No. ICC-ASP/8/Res.6, Annex I, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf> accessed 18 October 2011.

[249] Resolution RC/Res.4, Article 124 (16 June 2010).

[250] Clark, *GoJIL*, 2 (2010), 709; the proposal was co-sponsored by states including Austria, Argentina, Bolivia, Bulgaria, Burundi, Cambodia, Cyprus, Germany, Ireland, Latvia, Lithuania, Luxemburg, Mauritius, Mexico, Romania, Samoa, Slovenia, and Switzerland and by NGOs including the ICRC, see CICC, Report on the first Review Conference <http://www.coalitionfortheicc.org/documents/RC_Report_finalweb.pdf> accessed 18 October 2011, p. 22.

[251] Resolution RC/Res.5, Amendments to article 8 of the Rome Statute (16 June 2010).

[252] Resolution RC/Res.6, The Crime of Aggression (28 June 2010). For a detailed analysis, see Ambos, *GYbIL*, 53 (2010), 463 ff.

[253] Barriga, Danspeckgruber, and Wenaweser, *Princeton* (2009).

[254] cf. <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> accessed 18 October 2011; Beigbeder, *Justice* (2005), pp. 173 ff. On the prosecutorial strategy cf. OTP, Report on Prosecutorial Strategy, 14. 9. 2006; Sarooshi, *JICJ*, 2 (2004), 940 ff. On the DRC Obembo, *HuV-I*, 18 (2005), 11 ff.; on Uganda El Zeidy, *ICLR*, 5 (2005), 83 ff.

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Resistance Army' (LRA);[255] the other one concerns crimes committed on the territory of the *Democratic Republic of Congo* (DRC) since 1 July 2002. In both situations the respective governments made use of the possibility of a state referral in accordance with Articles 13(a) and 14 of the ICC Statute. In June 2004 (DRC) and July 2004 (Uganda) the OTP determined that there is a reasonable basis to open a formal investigation into the situations (Article 53(1)). On 21 December 2004, a further African state, the *Central African Republic* (CAR), referred a situation to the ICC and requested an investigation by the OTP into the crimes committed on its territory since 1 July 2002, and the OTP opened investigations on 22 May 2007.[256]

While in all these situations the Court's jurisdiction was triggered—not at all uncontroversially[257]—by state self-referrals under Articles 13(a) and 14 of the Statute, the two other triggers of Article 13 have also been activated in three further situations, namely that of *Darfur (Sudan)*, *Kenya*, and *Libya*. The Darfur-situation was referred to the ICC by the UN SC on 31 March 2005 by a Chapter VII Resolution 1593 pursuant to Article 13(b), and the OTP decided to open formal investigations on 6 June 2005.[258] As to the situation in Kenya, the Prosecutor informed the ICC Presidency on 5 November 2009 of his intention to request authorization to commence an investigation pursuant to Articles 13(c) and 15(3) into the post-election violence of 2007–08. On 6 November 2009, the situation was assigned to PTC II[259] which authorized the Prosecutor, on 31 March 2010, to open the investigation pursuant to Article 15(4) with regard to crimes against humanity committed between 1 June 2005 and 26 November 2009.[260] Last but not least, as to *Libya*, SC Resolution 1970 of 26 February 2011, referred the situation in this country with regard to possible crimes committed since 15 February 2011 to the Court pursuant to Article 13(b). Interestingly, this Resolution, which also contained various sanctions against the Gaddafi regime, was adopted unanimously, supported not only by States Parties but also by important non-States Parties, that is China, India, Russia, and the USA (two of which—China, and the USA—abstained in the Darfur resolution).[261] Only a few days later, on 3 March 2011, the Prosecutor announced that he would open a formal investigation.[262]

Apart from these formal trigger mechanisms, Article 12(3) of the Statute offers non-States Parties the possibility to accept the jurisdiction of the Court by a kind of *ad hoc declaration* 'with respect to the crime in question'. So far, this provision has been invoked in

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[255] Peschke, 'Investigation', in Brown, *Research Handbook* (2011), pp. 178 ff.; Mendes, *Peace* (2010), pp. 97 ff.; Nouwen and Werner, *EJIL*, 21 (2010), 946 ff.; Fish, *YaleLJ*, 119 (2010), 1703 ff.; Jurdi, *ICC* (2011), pp. 135 ff.; particularly on the LRA Titeca, 'Order', in Allen and Vlassenroot, *Resistance Army* (2010), pp. 59 ff.; Finnström, 'African', in Allen and Vlassenroot, *Resistance Army* (2010), pp. 74 ff. and Brubacher, 'Investigation', in Allen and Vlassenroot, *Resistance Army* (2010), pp. 262 ff.

[256] cf. Press Release dated 22 May 2007, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic> accessed 18 October 2011.

[257] For a discussion, see Chapter XVII B.

[258] Press Release, The Prosecutor of the ICC opens investigation in Darfur, 6 June 2005, No. ICC-OTP-0606-104-En; Mendes, *Peace* (2010), pp. 49 ff.; Nouwen and Werner, *EJIL*, 21 (2010), 954 ff.; Jurdi, *ICC* (2011), pp. 199 ff.

[259] <http://icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/icc%20judges%20grant%20the%20prosecutor%E2%80%99s%20request%20to%20launch%20an%20investigation%20on%20crimes%20against%20humanity%20with> accessed 18 October 2011.

[260] PTC II, Situation in the Republic of Kenya, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, No. ICC-01/09, 31 March 2010. Judge Kaul dissented as to the qualification of the conduct in question as crimes against humanity.

[261] See for Res. 1970 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement and for Res. 1593> accessed 31 October 2011.

[262] <http://www.icc-cpi.int/NR/exeres/3EEE2E2A-2618-4D66-8ECB-C95BECCC300C.html> accessed 18 October 2011; <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> accessed 18 October 2011.

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two cases.[263] First, on 15 February 2005, the *Ivory Coast* accepted the jurisdiction of the ICC with respect to alleged crimes committed from 19 September 2002, which was recently renewed by both the former president Laurent Gbabo (transferred to the ICC on 30 November 2011) and by current President Alassane Ouattara.[264] On 3 October 2011, Pre-Trial Chamber III authorized the Prosecutor to open an investigation into war crimes and crimes against humanity allegedly committed following the presidential election of 28 November 2010.[265] On 22 February 2012, this authorization was extended to include crimes allegedly committed between 19 September 2002 and 28 November 2010.[266] Secondly, on 22 January 2009, the *Palestinian National Authority* lodged a declaration with regard to acts committed on the territory of Palestine since 1 July 2002, especially during the 2008–09 Gaza war. On 3 April 2012, the OTP issued a statement declaring that it 'it is for the relevant bodies of the UN or the ASP to make the legal determination whether Palestine qualifies as a state' and thus halted its preliminary analysis into alleged Israeli war crimes in the Palestinian territories until such a determination has been made.[267]

All in all, this means that the OTP is carrying out (formal) investigations into seven situations (Uganda, the DRC, the CAR, Sudan, Kenya, Libya, and the Ivory Coast).[268] All these investigations are taking place in Africa and, except for one, all referred to the Court by the territorial states or the SC. Thus, one wonders what happened to the hundreds of communications submitted to the Court[269] under the *proprio motu* procedure of Article 15 (see figures 4 and 5). While the OTP has decided not to proceed in three situations (Venezuela, Palestine, and Iraq), there remain many situations (Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, and Nigeria)[270] where a decision to open a formal investigation (Article 53) or to terminate the proceedings has not yet been taken.[271]

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(b) From situations to cases

If an investigation is formally opened, several *cases* arise from the respective situation, persons are targeted and, if they do not voluntarily surrender to the Court, arrest warrants

[263] See <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.html> accessed 18 October 2011.

[264] See UN News Centre, 'Côte d'Ivoire: International Criminal Court may initiate probe into alleged crimes', 6 April 2011, available at <http://www.un.org/apps/news/story.asp?Cr1=&NewsID=38025&Cr=ivoire> accessed 18 October 2011.

[265] PTC III, Situation in the Republic of Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, No. ICC-02/11-14, 3 October 2011.

[266] PTC III, Situation in the Republic of Côte d'Ivoire, Decision on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010', No. ICC-02/11-36, 22 February 2012.

[267] OTP, Update on Situation in Palestine (3 April 2012). The OTP's explanation concerning why it did not have the 'competence' to define what is a state (Update on Situation in Palestine, para 5) could also be understood as an *interpretation* of various acts of the Secretary-General and the GA to the extent that Palestine is indeed *not* 'a State' within the meaning of Article 12(3)).

[268] See for a continuous update <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> accessed 5 March 2012. On Libya, see Domestici-Met, *GoJIL* 3 (2011), 861 ff.

[269] By February 2006 the ICC had already received 1732 communications from 103 different countries (Update on Communications received by the Office of the Prosecutor of the ICC, 10 February 2006, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> accessed 18 October 2011).

[270] See <http://us2.campaign-archive1.com/?u=8758bcde31bc78a5c32ceee50&id=cd51556438> accessed 22 April 2012.

[271] General Assembly, 66th session, Report of the ICC, 19 August 2011, UN Doc. A/66/309, para. 15 ff. (hereinafter: ICC Report GA 2011).

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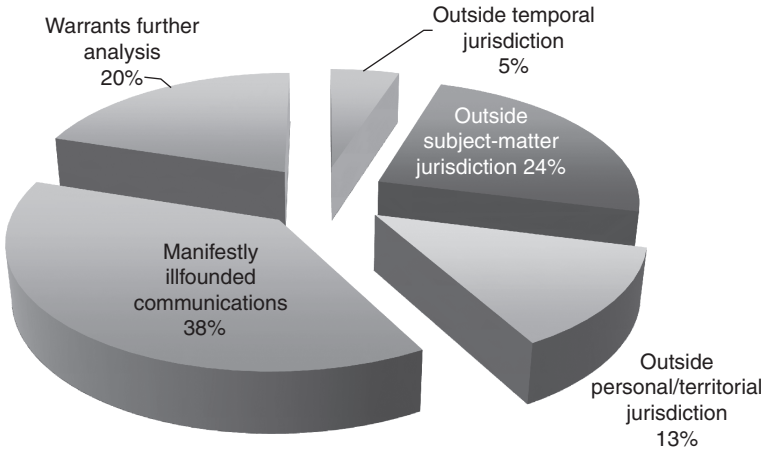

Figure 4. Analysis of the 1,732 complaints received before 1 February 2006
Source: ICC-OTP 2006

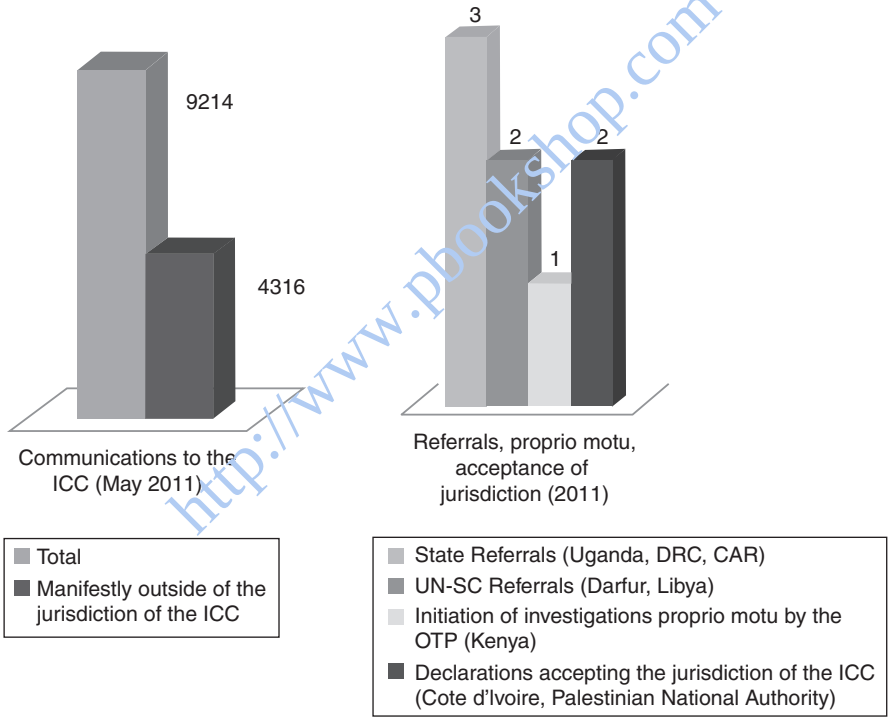

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Figure 5. Communications to the ICC
Source: Own elaboration on the basis of ICC figures

are issued. Thus, in the *Uganda situation*, arrest warrants against the five senior leaders of the LRA have been issued for crimes against humanity and war crimes at the request of the Prosecutor;[272] with regard to *Darfur/Sudan*, arrest warrants have been issued against

[272] These arrest warrants were issued on 8 July 2005 by PTC II for Joseph Kony (*Prosecutor v Joseph Kony*, No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony (8 July 2005)), Vincent Otti (*Prosecutor v Vincent Otti*, No. ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti (8 July 2005)), Okot Odhiambo (*Prosecutor v Okot*

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Ahmad Muhammad Harun ('*Ahmad Harun*'), and *Ali Muhammad Ali Abd-Al-Rahman* ('*Ali Kushayb*') in 2007,[273] against the Sudanese president, *Omar Hassan Ahmad Al Bashir*, in 2009 and 2010,[274] and against the Minister of National Defence *Abdel Raheem Muhammad Hussein* in 2012;[275] with respect to the *DRC situation*, against *Bosco Ntaganda* and *Sylvestre Mudacumura*;[276] and, last but not least, as to the *Libya* situation, against *Saif Al-Islam Gaddafi*, *Abdullah Al-Senussi* and, most prominently, *Muammar Mohammed Abu Minyar Gaddafi*.[277] While all these warrants have not yet been executed,[278] the arrest warrant issued against *Jean-Pierre Bemba Gombo* on 23 May 2008,[279] regarding the *CAR situation*, led to his detention in Belgium on 24 May 2008;[280] the charges were confirmed on 15 June 2009.[281] Trial Chamber III was constituted for trial on 18 September 2009 and the trial finally started on 22 November 2010. With regard to the *DRC situation*, *Thomas Lubganga Dyilo* was surrendered to the Court in March 2006 as its first suspect; the charges were confirmed on 29 January 2007[282] and the trial started on 26 January 2009.[283] On 14 March 2012, TC I delivered a guilty verdict against Lubanga as the first judgment of the ICC. Lubanga was found guilty of having committed the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the DRC between September 2002 and August 2003.[284] On 10 July 2012, he

Odhiambo, No. ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo (8 July 2005)), Dominic Ongwen (*Prosecutor v Dominic Ongwen*, No. ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen (8 July 2005) and Raska Lukwiya (*Prosecutor v Raska Lukwiya*, No. ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya, 13 October 2005). On 30 September 2005, media reports indicated that Dominic Ongwen had been killed. On 6 July 2006, ICC PTC II unsealed results of DNA tests rejecting this claim, see <http://www.iccnow.org/?mod=northernuganda> accessed 18 October 2011. On 11 July 2007, the proceedings against Raska Lukwiya were terminated following his death. Media have also reported LRA leader Vincent Otti's alleged death, see <http://www.iccnow.org/?mod=northernuganda> accessed 18 October 2011); about Joseph Kony, see also Schomerus, 'Chasing', in Allen and Vlassenroot, *Resistance Army* (2010), pp. 93 ff and Iya, 'Encountering', in Allen and Vlassenroot, *Resistance Army* (2010), pp. 177 ff.

[273] *Prosecutor v Ahmad Harun*, No. ICC-02/05-01/07-2, Warrant of Arrest for Ahmad Harun (27 April 2007); *Prosecutor v Ali Kushayb*, No. ICC-02/05-01/07-3-Corr, Warrant of Arrest for Ali Kushayb (27 April 2007).

[274] *Prosecutor v Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 March 2009). The warrant of arrest for Al-Bashir is the first ever issued for a sitting head of state by the ICC. On 3 February 2010, the ICC Appeals Chamber unanimously reversed PTC I's decision not to include the crime of genocide in the arrest warrant against President Bashir (*Prosecutor v Omar al Bashir*, No. ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' (3 February 2010)). The PTC was directed to decide anew whether a warrant of arrest should be extended to cover the crime of genocide based on the correct standard of proof. In its new decision of 12 July 2010 PTC I issued then an arrest warrant for genocide (*Prosecutor v Omar al Bashir*, No. ICC-02/05-01/09, Second Arrest warrant, (12 July 2010)).

[275] *Prosecutor v Abdel Raheem Muhammad Hussein*, No. ICC-02/05-01/12-2, Warrant of Arrest for Abdel Raheem Muhammad Hussein (1 March 2012).

[276] *Prosecutor v Bosco Ntaganda*, No. ICC-01/04-02/06-2; Warrant of Arrest (7 August 2006, unsealed 28 April 2008); *Prosecutor v Sylvestre Mudacumura*, No. ICC-01/04-01/12-1-Red, Warrant of Arrest (31 July 2012).

[277] Warrants of arrest: 27 June 2011. The case against Muammar Gaddafi was terminated on 22 November 2011, following his death (PTC I, No. ICC-01/11-01/11).

[278] See <http://www.iccnow.org/?mod=darfur> accessed 18 October 2011.

[279] *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-1, Warrant of Arrest for Jean-Pierre Bemba Gombo (23 May 2008).

[280] *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 2, 3 (15 June 2009).

[281] *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08, Decision on the confirmation of charges (15 June 2009). Jean-Pierre Bemba Gombo is allegedly responsible as military commander of two crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging); see <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Case+The+Prosecutor+v+Jean-Pierre+Bemba+Gombo.htm> accessed 18 October 2011.

[282] *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Decision on the confirmation of charges (29 January 2007).

[283] On the complicated disclosure issue in this case, see Ambos, *NCLR*, 12 (2009), 543 ff.

[284] *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute (14 March 2012). For a comprehensive analysis, see Ambos, *ICLR*, 12 (2012), 115–53.

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was sentenced to a total period of fourteen years' imprisonment.[285] *Germain Katanga* and *Mathieu Ngudjolo Chui* were arrested by DRC authorities and their trial started on 24 November 2009.[286] More recently, *Callixte Mbarushimana*, a leading figure of the rebel group Forces Démocratiques de la Libération du Rwanda (FDLR), was arrested by French authorities pursuant to an ICC arrest warrant;[287] he was surrendered to the Court on 25 January 2011 but charges were not confirmed by PTC I and he was released from ICC custody on 23 December 2011.[288] On 1 March 2012 PTC I granted the prosecution leave to appeal,[289] which was dismissed on 30 May 2012.[290] With respect to the situation in the *Ivory Coast*, *Laurent Gbagbo* was transferred to the ICC's custody on 30 November 2011.

In other cases there was no need to issue arrest warrants: a summons to appear was considered sufficient in the case of *Bahar Idriss Abu Garda*,[291] *Abdallah Banda Abakaer Nourain*, and *Saleh Mohammed Jerbo Jamus* (Darfur, Sudan).[292] With regard to the *Kenya situation* the so-called 'Ocampo six' also appeared voluntarily before the Court on the basis of a summons to appear.[293]

F. The 'Mixed' Tribunals

(1) The legal bases

As a result of the increasing internationalization of prosecution of serious human rights violations, many so-called 'mixed' or hybrid tribunals have been established in several

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[285] *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (10 July 2012).

[286] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, No. ICC-01/04-01/07-T-80, Trial Chamber II, Transcript (24 November 2009). *Germain Katanga* and *Mathieu Ngudjolo Chui* allegedly jointly committed through other persons, within the meaning of Article 25(3)(a) war crimes and crimes against humanity; see <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0107/Democratic+Republic+of+the+Congo.htm> accessed 18 October 2011.

[287] *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10-2, Warrant of Arrest for Callixte Mbarushimana (11 October 2010). In a parallel move, German authorities arrested two other leaders of the FDLR (*Ignace Murwanashyaka* and *Straton Musoni*) on 17 November 2009; they were charged on 8 December 2010, see <www.generalbundesanwalt.de> accessed 18 October 2011.

[288] *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10, Decision on the confirmation of charges (16 December 2011). The appeal of the Prosecutor against this decision was dismissed and a request for suspensive effect of the Prosecutor's appeal rejected, see *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10-476, Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation (20 December 2011).

[289] The leave referred to the standard of proof applied in the confirmation decision, the proper interpretation of scope and nature of a confirmation hearing and the issue of the mode of participation under Article 25(3)(d) of the ICC Statute (*Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10-487, Decision on the 'Prosecution's Application for Leave to Appeal the "Decision on the confirmation of charges"', 1 March 2012).

[290] *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10-514, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges' (30 May 2012).

[291] It was the first time ICC judges issued a summons to appear instead of an arrest warrant as they considered it a sufficient measure to ensure that the suspect would appear before the Court. Abu Garda appeared before the ICC on 18 May 2009. On 19–29 October 2009, ICC PTC I held a public hearing to examine the available evidence against Abu Garda.

[292] *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, No. ICC-02/05-03/09-89, Decision on Victim's Participation at the Hearing on the Confirmation of the Charges, para. 8 (10 October 2010).

[293] *Prosecutor v Kirimimuthaura et al.*, No. ICC-01/09-02/11-01, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (8 March 2011); *Prosecutor v Samoeiruto et al.*, No. ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (8 March 2011). Ruto, Kosgey and Sang appeared voluntarily before the Court on 7 March 2011, Muthaura, Kenyatta and Ali on 8 March 2011.

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states.[294] These tribunals are called '*mixed*' because they have a mixed national-international legal basis and recruit national and international (foreign) prosecutors and judges. The tribunals are either part of a *transitional UN administration* (Kosovo, East Timor), or based on a *bilateral agreement with the UN* (Sierra Leone, Cambodia, Lebanon), or on legislative provisions adopted by an *occupying power* (Iraq). A purely *national tribunal* for international crimes was recently created in Bangladesh.[295] For that purpose the International Crimes (Tribunals) Act (ICTA) 1973[296] was amended by the International Crimes (Tribunals) (Amendment) Act 2009.[297] The new Act became relevant in 2010 when four leading politicians of the opposition Jamaat-E-Islami party were arrested for their alleged participation in the Independence War in 1971.[298]

(a) Kosovo

Following the armed conflict between Serb authorities and the Kosovo Liberation Army, Kosovo was placed under the interim administration of the UN on 10 June 1999.[299] The competence of the transitional UN administration (UNMIK) in Kosovo for 'maintaining civil law and order', and the representation by a Special Representative of the Secretary-General (SRSG)[300] derives from SC Resolution 1244(6) and (11(i)).[301] On this basis numerous 'regulations' and 'administrative directions' have been enacted to define the applicable law.[302] As a result, the Provisional Institutions of Self-Government (PISG) were established, including a government, a president, a parliament, and a court system.[303] As to criminal justice, there exists three instances[304] for the adjudication of crimes of international concern. The attempt to set up a special tribunal ('Kosovo War Crimes and Ethnic Crimes Court') failed;[305] instead, international prosecutors and judges were assigned to all district courts in a 2:1 proportion (two international, one local judge).[306] The court system includes a constitutional court, a supreme court, five district courts, a commercial court, twenty-five municipal courts, twenty-five minor offence courts, and an appellate court for

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[294] cf. Bassiouni, *Introduction* (2003), pp. 545 ff.; Ambos and Othman, *Approaches* (2003); Höpfel and Angermaier, 'Adjudicating', in Reichel, *Handbook* (2005), pp. 327 ff.; Ambach, *HuV-I*, 18 (2005), 107 ff.; Sriram, *IntAff*, 80 (2004), 975 ff.; Egonda-Ntende, *HuV–I*, 18 (2005), 24 ff. Bohlander and Winter, 'Strafgerichte', in Kirsch, *Strafgerichtshöfe* (2005), pp. 261 ff. In general on 'justice under transitional administration' see Stahn, *HoustonJIntL*, 27 (2005), 311 ff.; Njikam, Pirmurat, and Stegmiller, *ZIS*, 9 (2008), 426 ff.; Friman, 'Courts', in Cryer et al., *Introduction* (2010), pp. 181 ff.; Donlon, 'Hybrid', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 65 ff.

[295] See Kay, 'Bangladesh War Crimes Tribunal—A Wolf in Sheep's Clothing?' (Lecture in London), <http://www.internationallawbureau.com/blog/?p=1927> accessed 18 October 2011.

[296] See <http://www.internationallawbureau.com/blog/wp-content/uploads/2010/07/The-International-Crimes-Tribunals-Act-1973.pdf> accessed 18 October 2011.

[297] According to information from the Bangladesh government, the Pakistani troops killed three billion people during the Independence War in 1971.

[298] See <http://www.bdnews24.com/details.php?cid=37&id=177615&hb=5> accessed 18 October 2011.

[299] Muharremi, *ZaöRV* (2010), 359.

[300] The final legislative and executive authority, see UNMIK Regulation No. 2001/9, Chapter 12.

[301] SC Res. 1244, 10 June 1999, reprinted in Ambos and Othman, *Approaches* (2003), p. 208. See also UNMIK: <http://www.unmikonline.org/> accessed 18 October 2011.

[302] In detail, see Bohlander, 'Kosovo', in Ambos and Othman, *Approaches* (2003), pp. 24 ff. and the annex pp. 213 ff.; Bohlander and Winter, 'Strafgerichte', in Kirsch, *Strafgerichtshöfe* (2005), pp. 262 ff.; Bantekas and Nash, *ICL* (2007), pp. 568 ff.; Donlon, 'Hybrid', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 86 ff.

[303] UNMIK Regulation No. 2001/9, as amended, available at <http://www.unmikonline.org> accessed 18 October 2011.

[304] cf. Bohlander, 'Kosovo', in Ambos and Othman, *Approaches* (2003), p. 23.

[305] Ibid, pp. 32 ff.

[306] cf. UNMIK Regulations 2000/6, 2000/64, 2001/34, in Ambos and Othman, *Approaches* (2003), pp. 216 ff.; also Risch, 'Practical', in Ambos and Othman, *Approaches* (2003), pp. 61 ff. and 64 ff.

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minor offences.[307] Following discussions about the Comprehensive Proposal for the Kosovo Status Settlement of the UN Special Envoi Martti Ahtisaari (the 'Ahtisaari Plan') and shortly before the declaration of independence by Kosovo on 17 February 2008, the European Union Rule of Law Mission in Kosovo (EULEX) was established in February 2008[308] and became fully operational in December 2008. The task of EULEX is to 'monitor, mentor, and advise Kosovo institutions in all areas related to the rule of law, and to investigate, prosecute, adjudicate, and enforce certain categories of serious crimes'.[309] In addition, EULEX assumes further responsibilities like ensuring the 'maintenance, and promotion of the rule of law, public order, and security'.[310] Through EULEX, thirty-one international judges and fifteen international prosecutors support local judges and prosecutors. There is one state public prosecutor's office, five district prosecutors' offices, and seven municipal prosecutors' offices. EULEX exercises its executive authority over a special prosecutor's office, which includes eight international prosecutors focusing on serious crimes, including human trafficking, money laundering, war crimes, and terrorism.[311] In criminal cases, EULEX international judges sit on mixed panels with local judges. EULEX judges have the majority on these panels, with one EULEX judge serving as the presiding judge. The president of the Assembly of EULEX Judges has the authority to create a panel solely of or with a majority of local judges, or 'can decide for grounded reasons that an EULEX judge is not assigned to the respective stage of the criminal proceeding'.[312]

However, both the declaration of independence and the establishment of EULEX did not limit the legal capacity of UNMIK, and the SRSG retained the 'exclusive executive, and legislative authority in Kosovo'.[313] In contrast, the legality of EULEX is controversial and not consistent with the three 'legal foundations of the Republic of Kosovo'—the Declaration of Independence, the Constitution of the Republic of Kosovo (15 June 2008) and the Ahtisaari Plan (26 March 2007).[314]

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(b) East Timor

In East Timor—in accordance with SC Resolution 1272 (1999) of 25 October 1999—the 'United Nations Mission in East Timor' (UNTAET) had overall responsibility for the administration of East Timor and was empowered to exercise all legislative and executive authority, including the administration of justice.[315] The organization of the courts in

[307] See <http://www.state.gov/j/drl/rls/hrrpt/2010/eur/154432.htm> accessed 18 March 2012.

[308] Council Joint Action 2008/124/CFSP of 4.2.2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, amended by Council Joint Action 2009/445/CFSP of 9 June 2009.

[309] Article 3(a) and (d) of the Council Joint Action 2008/124/CFSP.

[310] Article 3(b) of the Council Joint Action 2008/124/CFSP.

[311] See <http://www.state.gov/j/drl/rls/hrrpt/2010/eur/154432.htm> accessed 18 March 2012.

[312] Article 3.2 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, Law No. 03/L-053. For more information on serious crime cases, see EULEX Programme Report 2012, p. 22, available at <http://www.eulex-kosovo.eu/docs/Accountability/2012/EULEX_Programme_Report_2012-LowQuality.pdf> accessed 13 July 2012.

[313] Muharremi, *ZaöRV* (2010), 368.

[314] Muharremi, *ZaöRV* (2010), 378 points out that (apart from many legal problems 'especially in the area of justice', p. 374) the 'Constitution explicitly states that Kosovo's sovereignty is indivisible with the exception of the powers of the international presences as set out in the Ahtisaari Plan' and that EULEX is 'not mandated under Resolution 1244'. He concludes that Kosovo has 'two mutually exclusive legal authorities, each of them considering a different set of rules'.

[315] cf. in more detail Othman, 'Framework', in Ambos and Othman, *Approaches* (2003), pp. 85 ff.; Statutory Sources in Othman, 'Framework', in Ambos and Othman, *Approaches* (2003), pp. 220 ff.; cf. compare also von Braun, *HuV-I*, 18 (2005), 93 ff.; Bohlander and Winter, 'Strafgerichte', in Kirsch, *Strafgerichtshöfe* (2005), pp. 275 ff.; Bantekas and Nash, *ICL* (2007), pp. 564 ff.

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East Timor was reorganized,[316] and at the same time panels with exclusive jurisdiction over serious criminal offences were established within the District Court in Dili.[317] The panels had exclusive jurisdiction only for offences committed in the period between 1 January 1999 and 25 October 1999. The serious criminal offences included have been the following: genocide, war crimes, crimes against humanity, murder, sexual offences, and torture (s. 1.3 as well as ss. 4–9 Regulation 2000/15). Moreover, within the Office of the General Prosecutor, there was a 'Special Prosecutor' called the Deputy General Prosecutor for Serious Crimes.[318] After independence on 20 May 2002, the UNTAET laws have remained in effect and the judges have been appointed by the Supreme Council of the Judiciary of East Timor.[319] In 2005, the mandate of the Serious Crimes Unit expired and its investigative functions were resumed by the Serious Crimes Investigation Team, assisting the Office of the Prosecutor-General of East Timor. Until the expiration of its mandate, the Serious Crimes Unit had indicted 391 people.[320] While eighty-four defendants were convicted, three were acquitted in trials before the Special Panels and more than 300 indictees remained at large, almost all of them in Indonesia.[321]

(c) Sierra Leone

In UN SC Resolution 1315 (2000),[322] the SC asked the UN Secretary General to negotiate an agreement with the government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of IHL and crimes committed under Sierra Leonean law during the country's devastating civil war. But after a series of discussions, it was agreed to establish a court that should fulfil some of the same functions as the ad hoc tribunals for Rwanda and the Former Yugoslavia, but at a much lower cost.[323] On 16 January 2002, such an agreement with an annexed Statute of the Special Court for Sierra Leone (SCSLS) was signed.[324] Thus, the Court is based upon a bilateral, international law agreement between an international organization and a state and not solely upon a UN SC Resolution. It has the power to prosecute persons who bear the greatest responsibility for serious violations of IHL and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 (Article 1 SCSLS). This covers precisely crimes against humanity (Article 2 SCSLS), war crimes (Article 3 SCSLS), and certain other international crimes (Article 4 SCSLS) as well

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[316] UNTAET Reg. 2000/11, see: <http://www.un.org/peace/etimor/UntaetN.htm> accessed 18 October 2011.

[317] cf. primarily UNTAET Reg. 2000/15, in Ambos and Othman, *Approaches* (2003), pp. 231 ff.; in detail, see Othman, 'Framework', in Ambos and Othman, *Approaches* (2003), pp. 90 ff.; also Linton, *CLF*, 12 (2001), 204; Langston, *ICLR*, 4 (2004), 166 ff.

[318] cf. Othman, 'Framework', in Ambos and Othman, *Approaches* (2003), pp. 87 ff. as well as UNTAET Reg. 2000/16, in Ambos and Othman, *Approaches* (2003), pp. 243 ff.

[319] von Braun, *Internationalisierte Strafgerichte* (2008), pp. 137 ff.

[320] *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, UN Doc. S/2006/580, 26 July 2006, para. 9.

[321] *Report of the Secretary-General on Justice and Reconciliation for Timor-Leste*, UN Doc. S/2006/580, 26 July 2006, para. 9.

[322] Reprinted in Ambos and Othman, *Approaches* (2003), pp. 250 ff.; cf. also <http://www.sc-sl.org> accessed 18 October 2011.

[323] Kelsall, *Culture* (2009), p. 31.

[324] Reprinted in Kelsall, *Culture* (2009), pp. 254 ff. (agreement), 259 ff. (Statute). See also Jallow, 'Framework', in Kelsall, *Culture* (2009), pp. 149 ff.; Schabas, *CLF*, 15 (2004), 15 ff.; Beigbeder, *Justice* (2005), pp. 114 ff.; Deen-Racsmány, *LJIL*, 18 (2005), 397 ff.; Ambach, *HuV-I*, 18 (2005), 109 ff.; Bohlander and Winter, 'Strafgerichte', in Kirsch, *Strafgerichtshöfe* (2005), pp. 271 ff. From the point of view of the defence crit. Jones et al., *JICJ*, 2 (2004), 211 ff.; Bantekas and Nash, *ICL* (2007), pp. 557 ff.; in detail, see Da Silva, 'Experience', in Brown, *Research Handbook* (2011), pp. 232 ff.; Crane, 'Dancing', in Brown, *Research Handbook* (2011), pp. 391 ff.; on the evolution of the SCSL, see Wharton, *ICLR*, 11 (2011), 217 ff.

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as certain crimes under Sierra Leonean law (Article 5 SCSLS).[325] The Special Court and the national courts shall have concurrent jurisdiction. The Special Court has primacy over the national courts of Sierra Leone and may at any stage of the procedure request a national court to defer to its competence in accordance with the SCSLS and the RPE (Article 8 SCSLS).

The cultural context in which the Court operates poses some peculiar challenges, since the way local people think about rights, mystical powers, and truth-telling normally differs radically from the Western way of thinking.[326] This calls into question whether Western legal concepts and procedures are suited at all to judging adequately the actions of men whose power stems from occult beliefs.[327]

In 2003, the Prosecutor issued thirteen indictments, two of which were withdrawn due to the deaths of the accused in December 2003. Thus far, the trials of three former leaders of the Armed Forces Revolutionary Council (AFRC), of two members of the Civil Defence Forces (CDF), and of three former leaders of the Revolutionary United Front (RUF) have been completed, including appeals.[328] The judgment against former Liberian President Charles Taylor was rendered on 26 April 2012.[329] In a unanimous judgment (the 'dissenting opinion' of the alternate Judge El Hadji Malick Sow from Senegal, expressed after the verdict, does not count as a vote),[330] Taylor was found guilty on all accounts[331] of aiding and abetting the RUF and AFRC rebel groups and/or Liberian fighters operating in Sierra Leone and of having planned attacks on civilians.[332] He was sentenced to a term of fifty years' imprisonment.[333]

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(d) Cambodia

In Cambodia, after long-lasting negotiations a bilateral agreement with the UN was signed on 6 June 2003 'concerning the prosecution in Cambodian law of crimes committed during the period of democratic Kampuchea' during the period from 17 April 1975 to 6 January

[325] Such national crimes are: offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31): abusing a girl under 13 years of age, contrary to section 6; abusing a girl between 13 and 14 years of age, contrary to section 7; abduction of a girl for immoral purposes, contrary to section 12. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861: setting fire to dwelling-houses, any person being therein, contrary to section 2; setting fire to public buildings, contrary to sections 5 and 6; setting fire to other buildings, contrary to section 6.

[326] Kelsall, *Culture* (2009), p. 105.

[327] Kelsall, *Culture* (2009), p. 255.

[328] See <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> accessed 22 April 2012.

[329] *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, Judgment Summary (26 April 2012).

[330] Justice Sow addressed the Court with the following words:

> The only moment where a Judge can express his opinion is during the deliberations or in the courtroom, and, pursuant to the Rules, when there are no serious deliberations, the only place left for me is the courtroom. I won't get – because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof, the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.

According to Article 12(4) SCSLS and Rules 16(C), 16 *bis* RPE SCSL the President may assign an 'alternate' judge who attends trial sessions from the beginning and attends the judges' deliberations, but 'shall not be entitled to vote thereat'.

[331] Charles Taylor was indicted for crimes against humanity and war crimes on eleven counts, *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-PT-263, Prosecution's Second Amended Indictment (29 May 2007).

[332] *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, Judgment Summary, para. 180 ff. (26 April 2012).

[333] *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, Sentencing Judgment (30 May 2012).

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1979).[334] On 29 April 2005, the agreement entered into force. Parallel to the negotiations with the UN a 'Law on the Establishment of the Extraordinary Chambers' was prepared to prosecute these crimes by national institutions. The Law was first adopted on 10 August 2001 and later amended on 5 and 27 October 2004 (hereinafter: ECCC-Law).[335] The extraordinary chambers have the power to bring trials against suspects who committed genocide, crimes against humanity, grave breaches of the GC as well as certain other enumerated international and national crimes (Articles 2–8 ECCC-Law). The chambers are established within the existing court structure; they operate as a court of first instance, the Supreme Court being an appellate court and final instance.[336]

On 4 May 2006 the Judges of the Extraordinary Chambers were elected and appointed three days later on 7 May 2006.[337] The Extraordinary Chambers are unique in structure and composition. The TC is composed of five professional judges, of whom three are Cambodian judges, with one as President, and two are foreign judges (Article 9(1) ECCC-Law). The AC is composed of seven judges, of whom four are Cambodian judges, with one as President, and three are foreign judges (Article 9(2) ECCC-Law). While the courts in East Timor and Sierra Leone take their decisions with a simple majority, in the ECCC, national judges dominate and a supermajority[338] is necessary (Article 14 ECCC-Law).[339] Personal jurisdiction is limited since only the 'senior leaders of Democratic Kampuchea and those who were most responsible' shall be brought to trial. Those leaders are, according to an important survey, seven former heads of the Khmer Rouge.[340] After several delays the judges agreed on rules of procedure on 12 June 2007.[341]

As to the *actual proceedings* the situation is as follows:[342] *Kaing Guek Eav alias Duch*, the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh, was the first defendant before the ECCC (*Case 001*). *Duch* was indicted by the Co-Investigating Judges

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[334] 'Agreement between the UN and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the period of Democratic Kampuchea', <http://www.unhcr.org/refworld/country,,UN,,KHM,,4ba8e2ea9dc,0.html> accessed 24 October 2011. For details of the negotiations, see Kashyap, 'Framework', in Ambos and Othman, *Approaches* (2003), pp. 191 ff.; see also Beigbeder, *Justice* (2005), pp. 129 ff. Ambach, *HuV-I*, 18 (2005), 110; Bohlander and Winter, 'Strafgerichte', in Kirsch, *Strafgerichtshöfe* (2005), pp. 267 ff.; Bantekas and Nash, *ICL* (2007), pp. 570 ff.; Donlon, 'Hybrid', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 90 ff.

[335] 'Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea', original version printed in Ambos and Othman, *Approaches* (2003), pp. 267 ff. Also <http://www.derechos.org/human-rights/seasia/doc/krlaw.html> accessed 24 October 2011.

[336] In more detail, see Kashyap, 'Framework', in Ambos and Othman, *Approaches* (2003), pp. 192 ff.; Aßmann, 'Challenges', in Safferling and Conze, *Genocide Convetion* (2010), pp. 184 ff.; Kroker, *ZStW*, 122 (2010), 691 ff.; Shahabuddeen, *Chinese JIL*, 10 (2011), 470.

[337] Royal Decree NS/RKT/0506/214, (<http://www.eccc.gov.kh/sites/default/files/legal-documents/Royal_Decree_appointing_Judicial_Officers.pdf> accessed 24 October 2011). Of the elected judges seventeen are national and twelve international 'Judicial Officers'; they are assigned to different chambers or to the Prosecution as 'Co-Prosecutors'. See also Acquaviva, *JICJ*, 6 (2008), 134 ff.

[338] That is a simple majority plus one. Thus, decisions of the PTC and of the TC need four affirmative votes, while decisions of the Supreme Court Chamber require five. This requirement also means that at least one international ('foreign') judge has to agree to any decision, see De Bertodano, *JICJ*, 4 (2006), 289 ff.; Acquaviva, *JICJ*, 6 (2008), 141–2.

[339] De Bertodano, *JICJ*, 4 (2006), 289 ff. Concerning the safeguarding of the judge's independence Linton, *JICJ*, 4 (2006), 327 ff.

[340] cf. Heder and Tittemore, *Candidates* (2004); Kroker, *ZStW*, 122 (2010), 686 ff., 696 ff.

[341] Internal Rules, 8th revision on 12 August 2011 (<http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8> accessed 05 March 2012). See also Acquaviva, *JICJ*, 6 (2008), 129 ff.; on the applicable procedural law see Sluiter, *JICJ*, 4 (2006), 318 ff.; Jain, *DukeJComp&IL*, 20 (2010), 256 ff.; Aßmann, 'Challenges', in Safferling and Conze, *Genocide Convetion* (2010), pp. 187 ff., 190.

[342] For detailed information, see the ECCC's website <http://www.eccc.gov.kh/>. There are also regular reports by the Open Society Justice Initiative, see <http://www.soros.org/initiatives/justice/articles_publications> accessed 20 December 2011.

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on 8 August 2008, the trial commenced on 30 March 2009, and the judgment was delivered on 26 July 2010. *Duch* was found guilty of crimes against humanity (persecution on political grounds with regard to human extermination, including murder, enslavement, imprisonment, torture, and other inhumane acts), grave breaches of the GC (wilful killing, torture, and inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of a civilian). He was sentenced to thirty-five years' imprisonment (with a reduction of five years as a remedy for his unlawful detention by the Cambodian Military court between May 1999 and 31 July 2007). Granting the appeal by the Co-Prosecutors, on 3 February 2012 the Supreme Court Chamber quashed the thirty-five-year sentence and sentenced *Duch* to life imprisonment (the maximum possible term under the law).[343]

In *Case 002* there are four defendants: *Nuon Chea*, aged 84, former Deputy Secretary of the Communist Party of Kampuchea; *Ieng Sary*, aged 85, former Deputy Prime Minister for Foreign Affairs; *Khieu Samphan*, aged 79, former Head of State; and *Ieng Thirith*, aged 78, former Minister of Social Affairs.[344] The four defendants were initially indicted and ordered to be sent for trial in a Closing Order issued by the Co-Investigating Judges on 15 September 2010. Following appeals from all four defendants, the PTC confirmed and partially amended the indictments, and ordered the case to be sent for trial on 13 January 2011. The defendants are indicted on charges of crimes against humanity, grave breaches of the GCs of 1949 and genocide. The trial commenced with the start of the initial hearing on 27 June 2011, and the opening statements took place on 21 November 2011. The ECCC TC ordered the division of Case 002 into a series of smaller trials which will be tried and adjudicated separately. It also announced that the first trial will mainly focus on the forced movement of population.

On 7 September 2009, the international Co-Prosecutor filed two Introductory Submissions, requesting the Co-Investigating Judges to initiate investigation of five additional suspected persons. These two submissions have been divided into what is known as *Case files 003 and 004*. The Co-Investigating Judge notified the Co-Prosecutors pursuant to ECCC Internal Rule 66(1) about conclusion of investigation in Case 003 on 29 April 2011. Case 004 is currently under investigation by the Co-Investigating Judges. Thus far, no persons have been charged.

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(e) Iraq

The Iraqi Special Tribunal (IST) was established by the US Coalition Provisional Authority; its Statute was issued 10 December 2003 by the Iraqi Governing Council.[345] The Statute was approved on 18 October 2005 in law No. 10 by the first freely elected Parliament. The name

[343] *Prosecutor v Kaing Guek Eav*, Case File 001/18-07-2007/ECCC/SC, Summary of Supreme Court Chamber Appeal Judgment in Case 001 (3 February 2012).

[344] There is a controversy about Ieng Thirith's fitness to stand trial. On 17 November 2011, the TC decided that she is unfit to stand trial. The Supreme Court Chamber has, however, granted by supermajority an immediate appeal from the Co-Prosecutors, thereby setting aside an order to unconditionally release Ieng. The Chamber directed the TC to request, in consultation with appropriate medical and psychiatric experts, additional treatment for Ieng which may help improve her mental health to such extent that she becomes fit to stand trial. No later than six months after the commencement of this treatment, she shall undergo a medial, psychiatric and/or psychological expert examination on the basis of which the TC shall determine her fitness to stand trial. Finally, on 16 September 2012, the ECCC Supreme Court ordered Ien Thirith's immediate release subject to conditions of residence, the surrender of travel documents, an an order to resond to any summons issued by the Court, see Prosecutor v Ieng Thirith, Case File 002/19-09-2007-ECCC-TC/SC(16), Decision on Co-Prosecutor's Request for Stay of Release Order of Ieng Thirith (16 September 2012).

[345] cf. <http://www.preventgenocide.org/law/domestic/iraqispecialtribunal.htm> accessed 24 October 2011; Donlon, 'Hybrid', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 99 ff.

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of the court was changed to the 'Iraqi Higher Criminal Court'.[346] It is now financed exclusively by the Iraqi government.[347] The IST is not part of the regular Iraqi judicial system but an autonomous organ with its own rules and an own administrative capacity. It is a 'hybrid institution with a hybrid procedural system'.[348] The IST has jurisdiction over any Iraqi national or resident of Iraq accused of the core crimes (Articles 11–13: genocide, crimes against humanity, and war crimes) committed since 17 July 1968 (takeover of the Ba'ath Party) and up until and including 1 May 2003 (official ending of acts of war) in the territory of the Republic of Iraq, or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the state of Kuwait (Article 1(b)). Moreover, the tribunal has the power to prosecute certain violations of Iraqi laws, for example the wastage of national resources and the squandering of public assets and funds (Article 14). The IST consists of the Tribunal Investigative Judges, one or more TCs, and an AC (Article 3). The Statute resembles the ICC Statute in its substantive law and procedural law provisions.[349]

Besides former President Saddam Hussein,[350] several high-ranking Iraqi officials were tried or are being tried, including *Abid Hamid al-Tikriti*, a former presidential secretary, *Ali Hassan al-Majid* ('Chemical Ali'), Saddam's cousin and adviser, and *Tariq Aziz*, the former deputy prime minister.[351] On 19 October 2005 the first criminal counsel of the Iraqi High Tribunal held its first session of the *Al-Dujail* case, and therewith opened the proceedings against the accused *Saddam Hussein Al-Majeed*, *Barzan Ebraheem Al-Hassan*, *Taha Yasin Ramadan*, *Awad Hamed Al-Bander*, *Mezhir Abd Allah Kadhem Ruaid*, *Abd allah Kadhem Ruaid*, *Ali Daeeh Ali*, and *Mohammed Azawi Ali*.[352] On 5 November 2006, *Saddam Hussein* was found guilty of crimes against humanity for ordering the deaths of 148 Shi'ite villagers in the town of Dujail in 1982, and sentenced to death by hanging.[353] His half-brother and the Judge at the trial of the original case in 1982 were also convicted of similar charges.[354] On 3 December 2006, the defendants lodged an appeal on points of law against this judgment, which was declined by the Appeals Chamber on 26 December 2006.[355] But the prosecution's appeal against the sentence was successful. The AC remanded the action to the Iraqi High Tribunal, where the accused *Ramadan* was also sentenced to death on 12 February 2007.[356] All death sentences were enforced. Three other defendants were sentenced to fifteen years' imprisonment, and one was acquitted.[357]

On 24 June 2007, in a second case (*Al Anfal*) against members of the former Ba'ath regime al-Majid (also referred to as 'Chemical Ali'), a cousin of Saddam Hussein, was sentenced to death because of the commission of genocide in the context of the Anfal campaign, together with the former Minister of Defence *Sultan Hashim* and the army

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[346] cf. ICTJ 2005, 2 ff.; Mettraux, *JICJ*, 5 (2007), 287 ff. For the Statute, see <http://law.case.edu/saddamtrial/documents/ist_statute_official_english.pdf> accessed 31 October 2011.
[347] ChatHouseILDG, *The Iraqi Tribunal* (4 December 2009), p. 8; <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il041208.pdf> accessed 24 October 2011.
[348] cf. Zappalà, *JICJ*, 2 (2004), 855 ff.; ChatHouseILDG, *The Iraqi Tribunal* (4 December 2009), p. 7.
[349] Critically, see Heller, *CWRJIL*, 39 (2006–2007), 261.
[350] See Mosa, *Hussein* (2010).
[351] cf. <http://www.law.case.edu/saddamtrial/> accessed 24 October 2011.
[352] Ambos and Pirmurat, *JZ*, 62 (2007), 822 ff.
[353] See Sissons and Wierda, 'Pedagogy', in Lutz and Reiger, *Prosecuting* (2009), pp. 233 ff.
[354] cf. 'Saddam Hussein Sentenced to Death', *BBC News* (5 November 2006), <http://news.bbc.co.uk/1/hi/world/middle_east/6117910.stm> accessed 22 April 2012.
[355] cf. <http://law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf> accessed 24 October 2011. Crit. Bhuta, *JICJ*, 6 (2008), 61 ff.
[356] cf. <http://law.case.edu/saddamtrial/entry.asp?entry_id=242> accessed 24 October 2011.
[357] cf. 'Saddam Hussein Sentenced to Death', *BBC News* (5 November 2006), <http://news.bbc.co.uk/1/hi/world/middle_east/6117910.stm> accessed 22 April 2012.

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commander *Hussein al-Raschid*. Two co-defendants were sentenced to imprisonment for life, and the former governor of Mosul was acquitted.[358]

The third trial started in August 2007, relating to the brutal crushing of a Shiite rebellion in 1991. The judgment was delivered on 1 December 2008.[359] Three of the defendants were acquitted, four were sentenced to life imprisonment, six were given a long prison sentence and two of the defendants (*al-Majid*, '*Chemical-Ali*', and *Abdul-Ghani Abdul-Ghafur*) were sentenced to death. *Al-Majid* was executed on 24 January 2010. The fourth trial dealt with the execution of forty-two merchants who were accused of raising their prices during the period when UN sanctions had been imposed against Iraq. The defendants were *Wetban Abraheem Alhasan*, *Sebayi Abrahem Al Hassan*,[360] *Ali Hassan Al Majeed*, *Tariq Aziz Isa*, and *Mizban Khider Hadi*,[361] *Abed Hameed Mahmood*,[362] *Ahmed Hussein Khudair*,[363] and *Isam Rasheed Hweish*.[364] The indictment was issued on 1 July 2008 and the judgment was rendered on 11 March 2009. Further proceedings were initiated, concerning an indictment of 4 November 2008, against fourteen accused (inter alia Ali Hassan al-Majid, Hashim Hassan al-Majid, and Tarik Aziz Issa, members of the former Ba'ath regime and of the militia) for the deportation and forced movement of families in 1984. The judgment was rendered on 2 August 2009.[365] In another case, an indictment was issued against fourteen persons (inter alia against the former Minister for the Interior Sadun Shaker) for the killing and forced displacement of Falili-Kurds. The judgment was rendered on 29 November 2010. Furthermore, in the Al Jeboor case four accused were found guilty of crimes against humanity.[366]

(f) Lebanon

On 13 December 2005, the government of the Republic of Lebanon requested the UN to establish a tribunal of an international character to try all those who are alleged responsible for the attack of 14 February 2005 in Beirut that killed the former Lebanese Prime Minister Rafiq Hariri, and twenty-two others.[367] Pursuant to SC Resolution 1664,[368] the UN and the Lebanese Republic negotiated an agreement on the establishment of the Special Tribunal for Lebanon (STL).[369] The STL was created by UN SC Resolution 1757 (2007) of 30 May

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[358] See 'Iraqi court seals fate of Saddam henchmen', *International Herald Tribune*, 5 September 2007, p. 7; see also Trahan, *MichJIL*, 30 (2009), 305.

[359] See ChatHouseILDG, 'The Iraqi Tribunal', pp. 3 ff.; <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il041208.pdf> accessed 31 October 2011.

[360] Both convicted to death by hanging for murder (conviction for torture, imprisonment, severe deprivation of physical freedom, and other inhuman acts) on 11 March 2009, 'Summary of the IHT Merchants Case', pp. 21 ff., 39 ff. <http://law.case.edu/grotian-moment-blog/documents/IHT_Merchants_Case.pdf> accessed 24 October 2011.

[361] All three of them were convicted to fifteen years' imprisonment for participation in the crime of murder, torture, imprisonment, severe deprivation of physical freedom, and other inhuman acts; 'Summary of the IHT Merchants Case', pp. 61 ff., 70 ff., 80 ff.

[362] Sentenced to life imprisonment for murder (conviction for participation in torture, imprisonment, severe deprivation of physical freedom, and other inhuman acts) on 11 March 2009, 'Summary of the IHT Merchants Case', pp. 49 ff.

[363] Sentenced to six years in prison for his participation in other inhuman acts on 11 March 2009; 'Summary of the IHT Merchants Case', p. 91.

[364] Charges were dropped on 11 March 2009, 'Summary of the IHT Merchants Case', p. 95.

[365] Beside the acquittal of some accused, Ali Hassan al-Majid and Tarik Aziz were found guilty of crimes against humanity and sentenced to seven years' imprisonment.

[366] The judgment was rendered on 19 June 2011. See generally <http://www.iht.iq/decisions.html> accessed 21 April 2012.

[367] UN SC Res. 1757 (30 May 2007) UN Doc. S/RES/1757; Yun, *SantaClaraJIL*, 7 (2010), 181.

[368] UN SC Res. 1664 (26 March 2006) Un Doc. S/Res/1664.

[369] About legitimacy and legality of the creation of the Tribunal see Wierda, Nassar, and Maalouf, *JICJ*, 5 (2007), 1065 ff.; Fassbender, *JICJ*, 5 (2007), 1091; Cassese, *LJIL*, 25 (2012), 496–9; from a Lebanese point of view

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2007. The provisions of the document annexed to it, and the Statute of the Special Tribunal thereto attached, entered into force on 10 June 2007.[370] The STL is based in The Hague. As a treaty-based organ, the STL is neither a subsidiary organ of the UN, nor is it a part of the Lebanese court system.[371] Rather, it supersedes the national courts within its jurisdiction (Article 4(1)). The STL is a hybrid court in the sense that it is composed of both national and international judges.[372] It is unique in that the applicable law is national in character, while ad hoc international tribunals for the Former Yugoslavia and Rwanda are limited to prosecuting crimes in violation of international law,[373] and the (other) hybrid tribunals prosecute crimes under both domestic and international law.[374] In addition, the STL is the first UN-assisted tribunal to combine substantial elements of both a common law and a civil law legal system.[375] Furthermore, it is different from other international criminal tribunals established or assisted by the UN in two respects: (a) the trial process is more akin to the civil law than common law system; and (b) the investigative process conducted by the International Independent Investigation Commission[376] constitutes, in fact, the core nascent Prosecutor's office.[377]

The Statute stipulates that the Special Tribunal shall apply provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism (a crime that so far has not been within the province of an international tribunal)[378] and crimes and offences against life and personal integrity, among others.[379] The Lebanese penal code encompasses the crime of terrorism, which allows Lebanon to prosecute those responsible for the assassination of Hariri under its domestic law using the existing Lebanese judicial system.[380] According to Article 1 of the Statute of the Special Tribunal for Lebanon (STLS): '[T]he Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons.' However, the temporal jurisdiction was extended to include other attacks bearing the same, or similar, characteristics of the Hariri

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Sader, *JICJ*, 5 (2007), 1083; crit. about the cooperation regime, created by the Res., Swart, *JICJ*, 5 (2007), 1154 ff.; about the transfer of the investigations to the STL, cf. Kolb, 'Tribunal', in Kolb, *Droit international pénal* (2008), pp. 238 ff.

[370] UN SC Res. 1757 (30 May 2007) UN Doc. S/RES/1757; Annex, 'Agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon', SC Res. 1757 (2007), pp. 4 ff. About innovations of the Statute Aptel, *JICJ*, 5 (2007); about the adaptability of international forms of participation to national elements of a Milanovic, *JICJ*, 5 (2007), 1139 ff., about the responsibility of a superior 1142 ff., about the joint criminal enterprise 1144 ff.; about a trial *in absentia* Gaeta, *JICJ*, 5 (2007), 1165 ff.; Donlon, 'Hybrid', in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 94 ff.; crit. concerning the development ICG, *Trial by Fire* (2010), pp. 1 ff., 26, 27.

[371] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, para. 6, UN Doc. S/2006/893 (15 November 2006).

[372] About the cooperation of the tribunal with Lebanon cf. Swart, *JICJ*, 5 (2007), 1154 ff., with third countries 1157 ff., especially about Syria 1161 ff.; annual report on 'Special Tribunal For Lebanon', p. 11 <http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf> accessed 24 October 2011.

[373] Article 1 ICTYS, Article 1 ICTRS.

[374] Yun, *SantaClaraJIL*, 7 (2010), 181.

[375] Report of the Secretary-General, UN Doc. S/2006/893 (15 November 2006).

[376] The International Independent Investigation Commission was established by SC Resolution 1595 (7 April 2005) to help to investigate the assassination of the former prime minister of Lebanon, Rafik Hariri, that took place on 14 February 2005. Its mandate expired in 2009 and it was superseded by the Special Tribunal for Lebanon.

[377] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, para. 8, UN Doc. S/2006/893 (15 November 2006).

[378] Annual report on 'Special Tribunal For Lebanon', p. 11 <http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf> accessed 24 October 2011.

[379] cf. also Jurdi, *JICJ*, 5 (2007), 1125 ff. (crit. about the missing codification of crimes against humanity 1127 ff. and about crimes of terrorism 1129 ff.).

[380] United Nations Legislative (Legis.) Series: National Laws & Regulations on the Prevention and Suppression of International Terrorism Part II (A-L) at 320, UN Doc. ST/LEG/SER. B123, U.N. Sales No. E/F.05.V.7 (2005).

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assassination. Thus, the Tribunal has established jurisdiction over three attacks relating to *Marwan Hamadeh*, *George Hawi*, and *Elias El-Murr*.[381] The reasons for the inclusion of these other attacks are officially as follows: (a) as the investigation of the assassination of Hariri has advanced, potential links have emerged between this crime and other attacks; (b) the expansion of the mandate of the Commission to provide technical assistance to the Lebanese authorities in respect of the fourteen other attacks is an indication of interest on the part of the SC in judicial accountability going beyond the Rafiq Hariri assassination; and (c) singling out for prosecution one attack in a context of other similar attacks is bound to create a perception of selective justice.[382] The prosecutor submitted an indictment against *Salim Jamil Ayyash*, *Mustafa Amine Badreddine*, *Hussein Hassan Oneissi*, and *Assad Hassan Sabra* to the pre-trial judge on 17 January 2011[383] and amended it three times (11 March, 6 May, and 10 June 2011).[384] This indictment was confirmed on 28 June 2011. The indictment and accompanying arrest warrants[385] were transmitted to the Lebanese authorities on 30 June 2011.

Moreover, decisions concerning, inter alia, the right of access to investigative files of an accused, the authorization of photography and video-recording to public court sessions, and some substantive criminal law issues, in particular the applicable definition of 'terrorism' have been rendered.[386]

(g) Bangladesh

The jurisdiction of the Bangladesh Tribunal (Bangladesh is the first South Asian state to become party to the ICC) includes crimes against humanity, crimes against peace, genocide, war crimes, and 'violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949' and 'any other crimes under international law'.[387] Common law and customary international law are treated as primary sources of law[388] and the tribunal resembles the existing tribunals,[389] but it conducts a purely domestic process under domestic law.[390] The 1872 Evidence Act and 1898 Criminal Procedure Code (largely based on English statutes) form—at least in part—the procedural

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[381] STL-11-02/D/PTJ, Orders Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Elias El-Murr on 12 July 2005, George Hawi on 21 June 2005 and Marwan Hamadeh on 1 October 2004 to Defer to the Special Tribunal for Lebanon (19 August 2011).

[382] Report of the Secretary-General, UN Doc. S/2006/893 (15 November 2006).

[383] Press release 2011/001, 17 January 2011 see <http://www.stl-tsl.org/sid/240> accessed 24 October 2011. Only the pre-trial judge may submit to the AC any preliminary question on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that may have to be resolved in order to rule on the indictment (RPE 68 (G)); on any question the AC issues an interlocutory decision without prejudging the rights of any accused (Rule 176 *bis*).

[384] Latest version: *Prosecutor v Salim Jamil Ayyash et al.*, STL-11-01/I/PTJ, Indictment, Public redacted version (10 June 2011).

[385] *Prosecutor v Salim Jamil Ayyash et al.*, STL-11-01/I, Warrants to arrest Salim Jamil Ayyash et al. including transfer and detention order (28 June 2011).

[386] cf. STL, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's order regarding jurisdiction and standing (10 November 2010); STL-11-01/I, Order authorizing Photography and Video-Taping prior to public sessions of the AC (4 February 2011); STL-11-01/I, Interlocutory Decision on the applicable law: Terrorism, Conspiracy, Homicide, Perpetration, cumulative Charging (16 February 2011). Crit. on the terrorism decision: for a critical review of the decision, see Ambos, *LJIL*, 24 (2011), 655; Saul, *LJIL*, 24 (2011), 677.

[387] Article 3(2)(a)–(f) International Crimes (Tribunals) Act 1973 (ICTA).

[388] Linton, *CLF*, 12 (2001), 221 ff.

[389] Linton, *CLF*, 12 (2001), 233 ff.

[390] Linton, *CLF*, 12 (2001), 310 cautions: 'We have the precedents of Ethiopia, East Timor, Indonesia, Iraq and Cambodia, all also burdened by weak criminal justice systems but proceeding with accountability for international crimes, to stand as cautionary tales for Bangladesh as it tries to do it alone.'

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framework of the Tribunal. Thus, for example, after formal charges have been submitted, the Court decides upon their confirmation (framing) or non-confirmation (discharge).[391] However, both the Act and the Code are not applicable in their entirety; in particular there are certain fairness restrictions.[392]

On 20 November 2011, the first person was charged (*Delwar Hossain Sayedee*, a leader of Jamaat-e-Islami, an Islamist party opposed to Bangladesh's independence). Subsequently, the charges were 'framed' (i.e., confirmed) by the Tribunal. Further investigations are being conducted against ten other suspects, including another six members of the Jamaat and two of the Bangladesh Nationalist Party. So far, apart from *Saydee* and after their arrest, charges have been submitted against *Maulana Matiur Rahman Nizami*, *Ali Ahshan Mohammad Mujahid*, *Abdul Kader Mollah*, *Abdul Alim*, *Muhammad Kamaruzzaman* and *Salahuddin Quader Chowdhury*. Charges were 'framed' against *Kamaruzzaman* on 4 June 2012 (the trial started on 2 July 2012), *Nizami* and *Mollah* on 28 May 2012, and *Chowdhury* on 4 April 2012.[393]

(2) Comparative analysis

All these tribunals can be characterized as 'mixed' not only because of their composition but also because of their organization, structure, and the applicable law.[394] The tribunals apply *national and international law*. While there was first, in line with the ICTY and ICTR precedent, a certain preference for the common law system, in particular in terms of the applicable procedure, the Cambodia Extraordinary Chambers introduced an inquisitorial-like French procedure, and the STL, as the first UN tribunal, combines elements of both legal systems.[395]

It is common to all tribunals (with the exception of the STL) that they are *situated* in the state where the crimes of their subject matter jurisdiction took place. Thereby a certain proximity to the local, crime-affected population is ensured. Either the tribunals are part of the local justice system (Kosovo, East Timor, Cambodia), or, though special tribunals, somehow affiliated with the national system (Sierra Leone, Iraq, Lebanon). Contrary to the ICTY, and ICTR, which have had no less than fifteen years to terminate their proceedings, the mixed tribunals have a significantly *shorter time period* to conclude their work. For instance, the Special Court for Sierra Leone (SCSL) originally had only three years to fulfil its mandate. The problems become even more apparent if one looks at the *organizational problems* and the *tight resources* compared with the high operative cost they are bound to combat. Their budgets are remarkably lower than the ones of the ad hoc tribunals.[396] This may be the main reason why the mixed tribunals face difficulties in obtaining highly

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[391] See s. 265D and C of the 1898 Criminal Procedure Code, available at <http://bdlaws.minlaw.gov.bd/pdf_pArticlephp?id=75> accessed 28 March 2012.

[392] For example, there are insufficient disclosure rules—should a decision of the Tribunal be challenged, the same judges review the decision; the defence is denied privileged communication with counsel; individuals can be arrested and questioned before formal charges are brought (see, e.g., Huskey, 'Bangladesh Tribunal'; Cadman, 'Bangladesh Tribunal').

[393] For further information, see <http://bdnews24.com/newslist.php?cid=37> accessed 13 July 2012.

[394] Ambos and Othman, *Approaches* (2003), p. 3.

[395] Report of the Secretary-General, UN Doc. S/2006/893 (15 November 2006).

[396] According to Sriram, *IntAff*, 80 (2004), 976 the SCSL costs US$57 million. The ICTR will cost approximately US$1.2 billion in the end. According to Raab, *JICJ*, 3 (2005), 95 ff. the ICTY has cost (until 2005) almost US$1 billion. Cf also Egonda-Ntende, *HuV-I*, 18 (2005), 25 ff.

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qualified staff. In turn, the lack of adequately trained personnel results in the *poor legal quality* of the decisions and judgments they render.[397]

The crimes falling within the subject matter *jurisdiction* of the mixed tribunals are the *core crimes*: genocide, crimes against humanity, and war crimes. The elements of the crime of these core crimes are related to the ICC Statute, but war crimes are in the majority of cases not as codified as in Article 8 of the ICC Statute. In addition, all tribunals apply *specific violations of national law* depending on the situation: in East Timor torture was added as an offence; in Kosovo incitement to national, racial, religious, or ethnic hatred, discord, or intolerance ((1) of Regulation 4 (2000)), the illegal possession of weapons ((8) of Regulation 7 (2001)) and unauthorized border crossing ((3) of Regulation 10 (2001)) are criminal offences; in Cambodia the destruction of cultural property during armed conflict can be prosecuted; in Sierra Leone offences relating to the abuse of girls and setting fire to dwelling-houses were included; and in Iraq the wastage of national resources is a violation; the STL even applies exclusively national law. Furthermore, in Sierra Leone adolescents between 15 and 18 years old can be brought to trial (Article 7 SCSLS).[398] The criminal process of the tribunals is dominated either by adversarial features (SCSL), or inquisitorial (accusatorial) features (ECCC/STL).[399]

The existence of *extrajudicial mechanisms* for dispute resolution, for instance through '*truth and reconciliation commissions*',[400] leads to concurrent jurisdictions, or at least entails difficulties of delimitation. There is no problem if a truth commission, like the one in East Timor, is not authorized to sanction, and in addition is not entitled to investigate the respective offences.[401] In Sierra Leone, overlapping jurisdiction was meant to be avoided by prosecution of only the persons most responsible by the Special Court itself, basically leaving children and adolescents to the competence of the truth commission.[402] The legitimacy of the Iraqi Court has been highly criticized from the outset due to its establishment by the US occupying power and its legal source.[403] While the acceptance of the court by the Iraqi people may indeed be questioned, this fact is not an anomaly but lies at the heart of an international criminal justice system dominated by ad hoc tribunals.[404] In fact, in this respect, all these tribunals face a *tricky dilemma*: on the one hand, the national judiciary is generally not able and very often unwilling to carry out proceedings for internationalized core crimes, on the other hand, the 'internationalization' of the courts and procedures gives rise to a deficit in its legitimacy in relation to the local population.

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[397] Crit. also de Bertodano, *JICJ*, 1 (2003), 244: 'little legal reasoning'.

[398] Crit. thereto Hall and Kazemi, *HarvLJ*, 44 (2003), 296 ff.

[399] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, para. 6, UN Doc. S/2006/893 (15 November 2006).

[400] cf. in general Bassiouni, *Introduction* (2003), pp. 711 ff.; Bantekas and Nash, *ICL* (2007), pp. 580 ff.; on Sierra Leone Schabas, *JICJ*, 2 (2004), 1082 ff.; Boister, *JICJ*, 2 (2004), 1100 ff.; on El Salvador, Bosnia and Herzegovina, and South Africa, cf. Schlunck, *Amnesty* (2000), pp. 87 ff.; on the South African 'TRC' as a model, compare Dugard, 'Conflicts', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 700; Möller, *Völkerstrafrecht* (2003), pp. 158 ff., 617 ff.; Neubacher, *Grundlagen* (2005), pp. 456 ff., 459 ff.; on the jurisdiction of the South African Supreme Court, Hoffmann, 'Amnestien', in Menzel, Pierlings, and Hoffmann, *Völkerrechtsprechung* (2005), pp. 791 ff.; from a comparative perspective, see the contributions in *CLF*, 15 (2004), 1–246. About the development of equitable proceedings at truth commissions, see Freeman, *Truth* (2006), pp. 159 ff.; also Schabas, Parmentier, and Wierda, 'Truth', in Genugten, Scharf, and Radin, *Jurisdiction* (2009), pp. 112 ff.; Schabas, 'Amnesties', in Brown, *Research Handbook* (2011), pp. 385 ff.; Clark, *ICLR*, 11 (2011), 241 ff.; about reconciliation from a victim's perspective, see Doak, *ICLR*, 11 (2011), 263 ff.

[401] Linton, *CLF*, 12 (2010), 223 ff.; Burgess, *CLF*, 15 (2004), 143 ff.

[402] cf. Wetzel, *HuV-I*, 16 (2003) 154 ff.; Schabas, *CLF*, 15 (2004), 3 ff.

[403] cf. Megally and van Zyl, *IHT* (2003); Zolo, *JICJ*, 2 (2004), 313 ff.; Alvarez, *JICJ*, 2 (2004), 319 ff.; Scharf, *JICJ*, 2 (2004), 330 ff.; Shany, *JICJ*, 2 (2004), 338 ff.; Zappalà, *JICJ*, 2 (2004), 855 ff. On the applicability of the death penalty, cf. Bohlander, *JICJ*, 3 (2005), 463 ff.

[404] Convincingly, see Alvarez, *JICJ*, 2 (2004), 321 ff.

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Even more of an impediment with reference to Iraq is the fact that the USA did not act in compliance with international law standards[405] and therefore the inherent competence (as an occupying power) to establish such a Court may be challenged.[406] As to the STL, it has been said that it is a one-case Court (perception of selective justice) established with a clear political agenda with regard to the power relations in the Middle East.[407]

[405] cf. Kreß, *JICJ*, 2 (2004), 351.

[406] In general, the occupying power is responsible for the occupied territory and its population and exercises sovereign power, including jurisdiction (Articles 29, 47 ff. GC IV; Gasser, 'Artikel 5', in Fleck, *Handbuch* (1994), pp. 193 ff.).

[407] See Wierda, Nassar, and Maalouf, *JICJ*, 5 (2007), 1072 ff.

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