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International Criminal Court (ICC)

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A. Editor’s Note

1 A different entry under the title ‘International Criminal Court (ICC)’, written in December 2010 by the late Judge Hans-Peter Kaul (1943–2014), appeared as part of the online *Max Planck Encyclopedia of Public International Law* until the publication of this entry in 2020. This new entry has been published at the same web address (URL) as the original entry. The original entry was also published in the 2013 print edition of the Encyclopedia (R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (OUP Oxford 2013) vol V, 667–88).

B. Historical Background and Objectives

2 The International Criminal Court (‘ICC’) is the first permanent international criminal tribunal aimed at addressing accountability for violations of specific international crimes. It is a central institution for → *international criminal law*—those rules of international law concerned with individual criminal responsibility (→ *Individuals in International Law*).

3 Yet international law has traditionally been concerned with relations between States and aimed at enhancing cooperation and ensuring harmonious relations between them. From this traditional perspective of international law, wrongful acts are addressed through the rules of → *State responsibility*. As such international criminal law, and by extension the ICC, concerned as it is with individual criminal responsibility, is a departure from the traditional conception of → *international law*.

4 Gustave Moynier, the President of the → *International Committee of the Red Cross (ICRC)*, is widely recognized as having proposed the first statute for a permanent international criminal court at a meeting of the ICRC in 1872. This proposal was not taken up, either at that meeting or subsequently. In the aftermath of the First World War, there was yet another attempt at the establishment of an international tribunal, albeit one of limited jurisdiction. Under the → *Versailles Peace Treaty (1919)*, Kaiser Wilhelm of Germany was charged with the ‘supreme offence against international morality’, with a ‘special tribunal … constituted’ for that purpose (Treaty of Versailles, Art. 227). Under the Treaty, Germany recognized the right of the Allied Powers to prosecute Germans ‘accused of having committed an act in violation of the laws and customs of war’ (Treaty of Versailles, Art. 228). This experiment was largely unsuccessful, mainly because the Netherlands refused to extradite Kaiser Wilhelm, who had fled there, arguing that such a move would compromise its neutrality. The other trials that did take place under the treaty took place under German jurisdiction with only 17 trials and little punishment—these trials were largely seen as a farce.

5 It was not until the end of the Second World War that foundations were laid for modern international criminal law, and the ICC itself, with the establishment of the Nuremberg and Tokyo Tribunals (→ *International Military Tribunals*). The Nuremberg Tribunal famously stated that ‘[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced’ (*Trial of the Major War Criminals before the International Military Tribunal* vol I Nürnberg 1947, 223). This famous dictum laid the foundation for the idea of direct individual criminal responsibility under international law, a principle that is at the heart of modern international criminal law and of the ICC. Although a permanent international criminal court was not the immediate outcome of the post–Second World War arrangement to deal with those responsible for the commission of crimes, the principles of the international military tribunals would form important foundations for the emergence of what has been termed ‘international criminal law *stricto sensu*’. Many of the principles, including the principle of individual criminal responsibility and the principle that the capacity of a person as a government official does not excuse them from individual

responsibility, were captured in the 1950 ‘Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal’ of the → *International Law Commission (ILC)* ([1950] vol II part III UNYBILC 374), and the 1954 ‘Draft Code of Offences against the Peace and Security of Mankind’ ([1954] vol II UNYBILC). Neither of these instruments was acted upon—with the 1950 principles being referred to States for comment, while the action on the Draft Code was postponed several times—until the Commission transmitted to the UN General Assembly the Draft Code of Crimes against the Peace and Security of Mankind of 1996, which formed the basis of the deliberations that eventually led to the adoption of the Rome Statute of the ICC in 1998 (→ *United Nations, General Assembly*).

6 Events in the 1990s were instrumental to the adoption of the Rome Statute in 1998. First, the end of the → *Cold War (1947–91)* created the political dynamic that allowed for States to agree to such an ambitious project. Second, atrocities committed in the former Yugoslavia and → *Rwanda* led to the establishment of two institutions that would serve as forerunners of the ICC by the UN Security Council (→ *United Nations, Security Council*), namely the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* and the → *International Criminal Tribunal for Rwanda (ICTR)*, in 1993 and 1994 respectively. It is worth mentioning that the establishment of these tribunals by the UN Security Council was probably also made possible by the thaw created by the end of the Cold War. These two tribunals, although forerunners of the ICC, were different from the ICC in that they were territory- and conflict-specific, whereas, as will be illustrated, the ICC as a permanent international tribunal was not limited by geographical scope or specific conflict.

C. Legal Basis

7 The legal basis of the ICC is the Rome Statute of the International Criminal Court (‘Rome Statute’; ‘RS’), adopted on 17 July 1998 during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome and amended in 2010 during the Kampala Review Conference.

8 After the ILC adopted the 1954 Draft Code of Offences, it transmitted these to the UN General Assembly for action. Over the years, for various reasons, the General Assembly did not take action on the 1954 Draft Code. For example, in 1954 it decided to postpone consideration of the Draft Code on the strength of the fact that the Draft Code was closely connected to another topic it was seized with, namely the definition of the crime of → *aggression*. It was only in 1981 that the General Assembly took action, requesting the ILC to review the 1954 Draft Code, taking into account the developments in international law (UNGA Res 36/106 ‘Draft Code of Offences against the Peace and Security of Mankind’ [10 December 1981] GAOR 36th Session Supp 51, 239). In 1991, the Commission adopted, on first reading, the Draft Code of Crimes against the Peace and Security of Mankind. The Draft Code addressed a number of crimes including aggression, colonial domination (→ *Colonialism*) and other forms of alien domination, → *genocide*, → *apartheid*, systematic or mass violations of human rights (→ *Gross and Systematic Human Rights Violations*), exceptionally serious → *war crimes*, and wilful and severe damage to the environment. It noted, however, that there would be a second part of the Draft Code, dealing with the criminal jurisdiction of an international criminal court. The second reading of the Draft Code, which began in 1994, was adopted in 1996 and includes a number of crimes, namely the crime of aggression, the crime of genocide, → *crimes against humanity*, crimes against United Nations and associated personnel, and war crimes (the 1996 ‘Draft Code of Crimes Against the Peace and Security of Mankind’ [1996] vol II, part II UNYBILC 17). In 1994, when it adopted the first reading text of the Draft Code, the Commission also adopted the Draft Statute of the International Criminal Court, which would address the institutional

issues pertaining to a permanent international court with jurisdiction over the violation of international crimes.

9 On the adoption of the Draft Statute in 1994, the Commission recommended to the General Assembly that it convene an international conference of plenipotentiaries to study the Draft Statute and to conclude a convention on the establishment of an international criminal court. In response to the recommendation by the ILC, the General Assembly established an Ad Hoc Committee to consider the Draft Statute prepared by the Commission and with a view to preparing for a diplomatic conference of plenipotentiaries (UNGA Res 49/53 'Establishment of an International Criminal Court' [9 December 1994] UN Doc A/RES/49/53). The following year, the General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court, which was tasked with preparing a consolidated text of a convention for an international criminal court (UNGA Res 50/46 [11 December 1995] UN Doc A/RES/50/46). In 1996, on the basis of the work of the Preparatory Committee, the General Assembly decided to convene, in 1998, a diplomatic conference to finalize and adopt a Statute for the International Criminal Court.

10 The Statute of the ICC, adopted in 1998, entered into force in July 2002, with the Court being inaugurated in March 2003. The Statute consists of 131 articles, divided into 13 parts. These articles form the basis of the rules of the ICC to hold individuals accountable for violations of the crimes provided for in the Statute. It is these rules, and some of the controversies created by their interpretation and application, that are discussed in this entry.

D. Structure and Organs of the ICC

11 The ICC, based in The Hague, is established as a permanent international criminal institution (Art. 1 RS) with a separate legal personality (Art. 4 RS). Structurally, the ICC has three organs, namely the Judges, the Office of the Prosecutor ('OTP'), and the Registry. The organ of the Court composed of judges itself has two separate organs, namely the Presidency and three Chambers; for this reason four separate organs are identified by the Statute (Art. 34 RS) (→ *International Courts and Tribunals, Chambers*). In addition to the organs of the Court, another important structure of the ICC is the Assembly of States Parties ('ASP'), which consists of all the State Parties to the Rome Statute.

1. Organs of the Court

12 Art. 34 describes the Court as having four organs, namely the (i) Presidency; (ii) the Appeals Division, a Trial Division and a Pre-Trial Division; (iii) the OTP; and (iv) the Registry. In reality there are only three organs since the first two organs together constitute the judicial branch of the Court and are headed by the President of the Court. The second organ, the OTP, is responsible for prosecutorial decisions and execution. The head of the OTP is the Prosecutor (Art. 42 RS). The final organ is the Registry, headed by the Registrar, and it is responsible for the 'non-judicial aspects of the administration and servicing of the Court' (Art. 43 (1) RS).

13 The three organs of the Court are equal to and independent of one another, and each performs the functions ascribed to it under the Rome Statute and as described below. It may be tempting to cast a spotlight on instances of disagreement between the organs of the Court, especially the OTP and the Judicial Chambers, such as the Court's rebuke of the OTP in several cases such as the *Lubanga*, *Bemba*, *Kenyatta*, and *Ruto* cases. Since these organs are independent, differences and disagreements between them are to be expected.

(a) The Judges

14 The Statute currently provides for 18 judges, although it does make provision for an increase in the number of judges (Art. 36 RS). The judges of the Court are to be persons of 'high moral character, impartiality and integrity' (Art. 36 (3) (a) RS). The ASP elects the requisite number of judges from a list of persons nominated by States Parties (→ *Election of Judges: International Criminal Court [ICC]*; → *International Courts and Tribunals, Judges and Arbitrators*). The election rules for judges of the ICC are some of the most complex in the international system, with several criteria having to be met: (i) there should be a specified number of judges having competence in international law (List B) and a specified number of judges with competence in criminal law (List A); (ii) there is a requirement for equitable regional distribution of judges; and (iii) there is a requirement for equitable gender balance. Elections for judicial positions take place every three years for one third of the judges. In order to establish this rhythm, the judges elected in the first election in 2003 drew lots in order to determine who was to serve an initial term of three, six, or nine years. Except for those judges who were initially elected for a term of three years, judges generally may not be re-elected once their term of office has elapsed. The political nature of the election process has sometimes resulted in the election of judges whose qualification can be questioned. In an attempt to remedy this problem, the Assembly of States Parties adopted the Advisory Committee on Nominations of Judges of the ICC to make recommendations on the suitability of nominated candidates.

15 The criteria against which judges are to be elected are intended to serve particular purposes. The first of these purposes is equity, and this is enhanced by the requirements for equitable regional distribution and gender representation. It will be noted that the Statute does not require equal gender representation or proportional regional representation. On both counts, it sets forth minimum requirements to ensure equity. The result of this approach is that both regional and gender representation on the Court will differ from time to time. Currently, out of the 18 judges on the Court, there are six female judges. In terms of regional representations, there are four judges from Africa, three from Latin America and the Caribbean, three from Eastern Europe, three from Asia, and five from the Western Europe and Others Group. The second purpose is functional and reflects the fact that international criminal law represents an intersection between two fields of law, namely international law and criminal law. It is for this reason that the Statute requires a specified number of judges with competence in criminal law and a specified number of judges with competence in international law.

16 A key component for any judicial body is independence and impartiality. This is provided for in Art. 40 RS, which prohibits judges from engaging 'in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence'. The function of the judicial organ of the Court is to interpret and apply the Statute in specific cases and situations. For this purpose, the Statute provides for different divisions: (i) Pre-Trial Division; (ii) Trial Division; and (iii) Appeals Division.

(i) The Pre-Trial Chamber Division

17 The Pre-Trial Division consists of not less than six judges (Art. 39 (1) RS). Judges of the Pre-Trial Chamber are appointed to chambers of three who hear and decide upon matters in specific cases. Under the Statute a single judge of the Pre-Trial Chamber may carry out the functions of the Chamber. The judges in the Pre-Trial Division should predominantly be from List A, ie should predominantly be criminal law experts (Art. 39 (1) RS). The main functions of the Pre-Trial Chambers are to deal with matters that may arise before the trial begins, ie before the presentation of evidence to determine whether an accused is guilty. These issues

may include questions of jurisdiction, admissibility, cooperation, and the issuance of arrest warrants.

18 More specifically, a Pre-Trial chamber may decide whether there is *prima facie* evidence warranting a trial in order to confirm charges submitted by the OTP (Arts 15 and 61 RS). In some cases, a Pre-Trial Chamber has refused to authorize an investigation initiated by the OTP (*Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* ICC-02/17-33). A Pre-Trial Chamber may also review a decision of the OTP not to initiate an investigation where there are reasons to believe that the initiation of an investigation would not be in the interest of justice (Art. 53 (3) RS). The situation concerning the *Mavi Marmara* incident was one in which the Pre-Trial Chamber reviewed the decision of the OTP (*Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation* [Pre-Trial Chamber I] ICC-01/13-34 [16 July 2015]; → *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*).

(ii) The Trial Division

19 As with the Pre-Trial Division, the Trial Division consists of not less than six judges and should predominantly be composed of judges from List A. However, the Trial Division operates on the basis of chambers which consist of three judges or, in some instances, one judge (Art. 39 (2) RS). The Trial Division's main function is to deal with the main part of the case, namely the determination of whether the accused person is guilty of having committed crimes under the Rome Statute and, in the event of a finding of guilt, to hand down a sentence. Judges serving on both the Pre-Trial Division and the Trial Division may be rotated to other divisions (Art. 39 (3) (a) RS).

(iii) The Appeals Division

20 Unlike the Pre-Trial and Trial Divisions, in which several chambers may be constituted, the Appeals Division constitutes a single Chamber and all members of the Appeals Division are also members of the Appeals Chamber. The Appeals Chamber consists of the President of the Court, elected by all the judges, and four other judges (Art. 39 (1) read with Art. 38 (1) RS). Unlike judges in other divisions, judges in the Appeals Division serve in that division for the duration of their term and are not subject to rotation (Art. 39 (3) (b) and (4) RS).

21 The Appeals Chamber hears and decides on appeals brought to it in accordance with the provisions of the Statute (→ *Appeal: International Criminal Courts and Tribunals*). The specific matters over which appeals may be submitted are identified in the Statute. The most important decisions that may be the subject of an appeal are decisions on conviction, acquittal, and sentence (Art. 81 and Art. 84 RS). The Statute does, however, provide a list of 'other decisions' that may be subject to appeals (Art. 82 RS). These include decisions concerning admissibility, a decision granting or refusing the release of a person, a decision of a Pre-Trial Chamber concerning the preservation of evidence (Art. 82 read with Art. 56 (3) RS), a decision permitting the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State Party (Art. 82 (2) read with Art. 57 (3) (d) RS), and a decision that 'may affect the fair and expeditious conduct of the proceedings or the outcome of the trial' (Art. 82 (1) (d) RS). An example of the latter type is the appeal concerning the appearance or not at the trial of the President and Vice-President of Kenya (*Prosecutor v William Samoei Ruto and Joshua Arap Sang [Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a) of 18*

June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'] [Appeals Chamber] ICC-01/09-01/11-OA 5 [25 October 2013]).

22 While technically the cases which may be subject to appeal are those indicated in the Statute, the Court itself has taken a generous approach to the material scope of appeals and has heard appeals on matters that do not, on a strict reading of the Statute, fall within the scope of matters that are subject to appeal. The Appeals Chamber, for example, has considered and decided on an appeal by the Hashemite Kingdom of Jordan on whether there was a duty to arrest Mr Al Bashir, then President of Sudan, notwithstanding immunity *ratione personae* that may have covered him (*Judgment in the Jordan Referral Re Al Bashir Appeal* ICC-02/05-01/09 OA2).

(iv) The Presidency

23 The Presidency of the Court consists of the President of the ICC and two vice-Presidents elected by the judges (Art. 38 (1) RS). The Presidency is responsible for the administration of the judicial activities of the Court (Art. 38 (3) RS). As an example, the Presidency assigns cases to the Trial and Pre-Trial Chambers (Art. 38 (3) (a) RS) and decides on requests from judges to be excused from cases (Art. 41 RS).

24 The President of the ICC is seen as the head of the Court and serves representational functions on behalf of the ICC. For example, it is the President that provides a report to the UN General Assembly.

(b) The Office of the Prosecutor

25 The OTP is an independent organ of the Court, which is headed by the Prosecutor (Art. 42 (1) RS) (→ *Office of the Prosecutor: International Criminal Court [ICC]*). According to the Rome Statute, the 'Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases' (Art. 42 (3) RS). According to the Rome Statute, the Prosecutor is to be elected by an absolute majority of the ASP. However, although there were formal elections, in the practice neither the first prosecutor, Mr Luis Moreno Ocampo, nor the second, Ms Fatou Bensouda, took place through an election. In the case of the second Prosecutor, for example, the Bureau put together a Search Committee made up of a group of persons, namely Ambassador Baso Sangqu, the Permanent Representative of South Africa to the United Nations, Prince Zeid bin Ra'ad Al Hussein, Ambassador of Jordan to the United States (later to become High Commissioner for Human Rights; → *Human Rights, United Nations High Commissioner for [UNHCHR]*), Sir Daniel Bethlehem, formerly Legal Adviser of the UK Foreign and Commonwealth Office, Ambassador Joel Hernández, Permanent Representative of Mexico to the United Nations, and Ambassador Miloš Koterec, Permanent Representative of Slovakia to the United Nations. This Search Committee invited applications, screened applications, and held interviews before submitting one name for the consideration by the ASP.

26 The OTP is primarily responsible for prosecuting those suspected of having committed crimes under the Rome Statute. It performs this function by conducting investigations (Art. 53 RS), determining whether to indict suspects, and presenting evidence to prove the commission of crimes. Other aspects of the OTP's role will be referred to in later sections, including on jurisdictional scope, complementarity, and cooperation.

(c) The Registry

27 The Registry is responsible for the non-judicial aspects of the administration and servicing of the ICC (Art. 43 RS). The head of the Registry is the Registrar, who is the principal administrative officer of the ICC. The Registrar is elected by an absolute majority of the judges for a five-year term on the recommendation of the ASP. The person so elected may be re-elected once. It will be recalled that the Presidency is also responsible for the administration of the Court. For this reason, the Registrar performs his or her functions under authority of the President (Art. 43 (2) RS).

28 The main functions of the Registry can be divided into two general categories: the first includes a wide variety of functions within the general administration of the ICC, such as personnel (Art. 44 RS) and budget and finance questions. Second, the Registry provides assistance in the actual judicial work of the ICC, such as maintenance of official case records, circulation of information and official documents among parties, and staff or translation services. The Registry is also concerned with matters concerning the defence of victims and, therefore, comprises sections concerned with victim participation in trials and support and protection for victims and witnesses (Art. 43 (6) RS) (→ *Victim Participation in International Criminal Proceedings*).

2. Assembly of States Parties

29 The ASP, though not an organ of the Court, is an important body in the structural make-up of the ICC. It is a body comprising all of the States Parties to the ICC. As of July 2019, the ASP is composed of 122 States, 33 from Africa, 18 from the Asia-Pacific region, 18 from Eastern Europe, 28 from Latin America and the Caribbean, and 25 from Western Europe. The ASP exercises the main legislative and oversight functions: it adopts most of the fundamental legal texts, provides for management oversight regarding the administration of the ICC, and considers and decides on the budget. It elects the judges (Art. 36 RS), the prosecutor, and the deputy prosecutor(s) (Art. 42 (4) RS) and can, under specific circumstances, decide upon their removal from office (Art. 46 RS). In the context of its legislative functions, the ASP also serves as a forum for the interpretation of the Rome Statute. A possible example of such an interpretative function is the adoption, by the ASP, of the amendments to the rules of procedure, introducing Rule 134 *quater* (Rule 134 *quater* para. 1 of the Rules of Procedure and Evidence in ICC Resolution ICC-ASP/12/Res.7 'Amendments to the Rules of Procedure and Evidence'), in which the ASP sought to interpret the content of Art. 63 on the presence of the accused at trial.

30 ASP holds an annual session, normally at the end of the calendar year, alternately in New York and The Hague. Between the sessions, the work of the ICC is carried on under the stewardship of the Bureau, composed of a President and 20 other States, elected on the basis of equitable regional distribution. Much of the work is carried out by working groups functioning under the authority of the Bureau. As an example, the Working Group on Amendments deliberates and considers proposals for amendments to the Rome Statute until there is sufficient consensus to permit more formal consideration by the ASP. In addition to the working groups, the Bureau also appoints facilitators and focal points on specific topics such as cooperation and complementarity. It is the consultations undertaken by these facilitators that form the basis of resolutions and other decisions adopted by the ASP at the annual sessions.

31 The ASP is also empowered to provide oversight over the functioning of the Court and, to this end, has established the 'Independent Oversight Mechanism' as provided for under Art. 112 (4) RS (Resolution ICC-ASP/8/Res.1). While the establishment of the Oversight Mechanism has raised questions about its impact on the judicial independence of the Court, these concerns are largely overstated. The fact is that the same Statute that provides for

the independence of the Court also provides for checks and balances to ensure the credibility of the Court. Oversight does not extend to the judicial decisions of the Court, which could raise questions of independence. Rather, the functions of the Independent Oversight Mechanism are primarily 'to conduct investigations on allegations of misconduct' and 'to ensuring [*sic*] effective and meaningful oversight' of such investigations (ICC-ASP/8/Res.1 Annex, para. 7). Other competencies of the ASP include the election of the judges and the Prosecutor as described above, dealing with cases of non-cooperation referred to it by the Court (Art. 87 (7) RS), and the settlement of disputes between States Parties (Art. 119 (2) RS).

E. Jurisdiction

32 The idea behind the establishment of the ICC was to establish a permanent court, with a broad jurisdictional base, to hold those accountable for crimes under international law, whoever the perpetrators were and wherever those crimes may have been committed. However, the jurisdictional reach of the ICC is not limitless. In this section of the entry the jurisdictional rules governing the reach of the ICC are discussed.

1. Crimes under the Statute

33 The material jurisdiction of the ICC extends to crimes listed in Art. 5 RS. These crimes are those deemed by the drafters of the Rome Statute as the 'most serious crimes of concern to the international community as a whole' (Art. 5). These crimes are: (i) the crime of genocide; (ii) crimes against humanity; (iii) war crimes; and (iv) the crime of aggression. Although some States had sought transnational crimes to form part of the list of crimes over which the ICC would have jurisdiction, the drafters of the Statute decided to limit the scope to these four crimes. The seriousness of the crimes listed in the Statute of the ICC is reflected in that they have all been included in the list of norms identified by the ILC as peremptory norms of general international law (ILC 'Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*)'; → *Ius cogens*).

34 The crime of genocide is defined in Art. 6 RS. The definition of the crime of genocide under the Statute follows, verbatim, the definition of genocide in the Genocide Convention (Art. II Convention on the Prevention and Punishment of the Crime of Genocide [adopted 9 December 1948, entered into force 12 January 1951] 78 UNTS 277).

35 Crimes against humanity are provided for and defined in Art. 7 RS. The Statute identifies a series of individual crimes, the commission of which may constitute the crime of apartheid (Art. 7 (1) RS). These include murder, rape, enslavement, torture, the crime of apartheid, and enforced disappearance of persons (→ *Gender-Based Crimes*; → *Torture, Prohibition of*; → *Disappearances*). The list also includes the catch-all '[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. In order to constitute crimes against humanity, however, the individual acts listed in Art. 7 (1) RS have to be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. The phrase 'attack directed against any civilian population' itself is defined in the Statute as being 'pursuant to or in furtherance of a State or organizational policy to commit such attack' (Art. 7 (2) (a) RS). This would exclude isolated and unconnected acts. The ILC has also, in its Draft Articles on Prevention and Punishment of Crimes Against Humanity, followed the same criteria (Art. 2 (2) (a) Draft Articles).

36 War crimes are defined for the purposes of the Rome Statute in Art. 8 RS. The term ‘war crimes’ is generally used to refer to crimes against the laws of war. Different terms have been used to refer to these crimes. In addition to war crimes, for example, the terms ‘serious breaches of international humanitarian law’ and ‘grave breaches’ have been used. The ILC, in its Draft Conclusions on Peremptory Norms of General International Law, referred to ‘the basic rules of international humanitarian law’ (→ *Humanitarian Law, International*). These crimes prohibited by the laws of war have been defined in a variety of instruments, most notably the Geneva Conventions and Additional Protocols thereto (→ *Geneva Conventions I–IV [1949]*; → *Geneva Conventions Additional Protocol I [1977]*; → *Geneva Conventions Additional Protocol II [1977]*). Art. 8 RS contains the most comprehensive treaty provision defining war crimes and it is worthwhile mentioning that it takes into account the jurisprudence of the ICTY and the ICTR.

37 The Statute provides that the Court is to have jurisdiction over war crimes ‘*in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes’ (emphasis added). While this language might suggest being ‘part of a plan or policy’ or being ‘part of a large-scale commission of such crimes’ is a definitional requirement or an element of the crime, the words ‘in particular’ suggests this not to be the case. That these elements are not requirements, and that the Court can exercise jurisdiction over war crimes in the absence of such policy or plan and in the absence of a large-scale commission of such crimes is borne out by the jurisprudence of the Court (*Situation in the Democratic Republic of the Congo [Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’]* [Appeals Chamber] ICC-01/04-169 [12 July 2006]).

38 The Statute enumerates four categories of war crimes over which the Court will have jurisdiction. The first of these are grave breaches of the Geneva Conventions, which are enumerated in Art. 8 (2) (a) RS. The second category of war crimes over which the Court can exercise jurisdiction are ‘[o]ther serious violations of the laws and customs applicable in international armed conflict’, which are similarly enumerated (Art. 8 (2) (b) RS). These two categories of war crimes apply in circumstances of international armed conflicts (→ *Armed Conflict, International*). The third category of crimes enumerated in the Rome Statute are ‘serious violations of article 3 common to the four Geneva Conventions’ committed in non-international armed conflicts (Art. 8 (2) (c) RS; → *Armed Conflict, Non-International*). Finally, the fourth category is ‘[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character’ (Art. 8 (2) (e) RS). Amendments adopted at the Kampala Review Conference introduced new crimes concerning the use of particular weapons such as poisoned weapons, asphyxiating, poisonous or other gases, and bullets which expand or flatten easily in the human body (Art. 8 (2) (e) (xiii)–(xv)).

39 The exercise by the Court of jurisdiction over the crime of aggression had been subject to a condition that the ASP adopt a definition of the crime. This definition was adopted by the Kampala Review Conference in 2010 and entered into force in 2017. The definition of the crime of aggression consists of two parts (Art. 8 *bis* RS). The first part defines the crime of aggression as ‘the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression’ (Art. 8 bis (1) RS). The second part defines the act of aggression as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’, and proceeds to enumerate particular acts the commission of which would constitute acts of aggression (Art. 8 *bis* (2) RS). The latter part was based on the definition

of the crime of aggression adopted by the General Assembly and annexed to UNGA Resolution 3314 (XXIX) of 14 December 1974 (GAOR 29th Session Supp 31 vol 1, 142).

40 It was neither the definition of the act of aggression nor the definition of the crime of aggression that created the most difficulty for States. The difficult issue concerned the triggering of jurisdiction (→ *Exercise of Jurisdiction over the Crime of Aggression: International Criminal Court [ICC]*). For the permanent members of the UN Security Council and a few States, the Court's jurisdiction over the crime of aggression had to be conditioned on a decision by the UN Security Council, effectively granting each permanent member a veto over the exercise of such jurisdiction. For the majority of States Parties—and other non-Party States—the Court's exercise of jurisdiction could not be dependent on prior authorization by the UN Security Council. In the end, the compromise arrived at required that the UN Security Council be notified of any impending exercise of jurisdiction in order for the Council to make a determination that an act of aggression has occurred (Art. 15 *bis* (6) and (7) RS). Where the Council makes the determination, the Court may continue with the matter. Where the Council has not made a determination within six months, the Court may also proceed (Art. 15 *bis* (8)) subject to the requirement that the Pre-Trial Chamber has authorized the commencement of investigation into the crime of aggression.

41 Subsequent to the adoption of the amendment, a debate arose as to whether the Court is competent to exercise jurisdiction over the crime of aggression in respect of acts committed by a State that has not ratified the amendment. It should be mentioned that the amendment's provisions on the crime of aggression are subject to an opt-out provision, ie any State Party can declare that it does not accept the jurisdiction of the Court over the crime of aggression by lodging a declaration with the Registrar to that effect (Art. 15 *bis* (4) RS). It is only in such situations that the jurisdiction over the Court is curtailed beyond the normal rules provided for in the Rome Statute. It is to these rules that this entry will now turn.

2. The Pre-Conditions and Triggers for the Exercise of Jurisdiction

42 The Rome Statute of the ICC is based on the principle of individual criminal responsibility. The driving force behind the Statute was thus to ensure that those who have committed crimes are held accountable for the commission of such crimes. Yet, the ICC does not have absolute, or universal, jurisdiction over the commission of all acts that constitute crimes under the terms of its statute. In order for the ICC to exercise jurisdiction over the crimes, certain conditions have to be present. The first condition is that there should be nexus between the crime concerned and a State Party. Second, the jurisdiction of the Court has to be triggered by one of the recognized trigger mechanisms.

43 With respect to the first condition, the Statute provides two grounds for the exercise of jurisdiction by the ICC. First, the ICC can have jurisdiction over crimes committed in the territory of a State Party (Art. 12 (2) (a) RS) (the territoriality nexus). This includes crimes committed on a vessel or aircraft registered to a State Party. Second, the ICC can have jurisdiction over the national of a State Party (Art. 12 (2) (b) RS) (the nationality nexus). This means that for the ICC to have jurisdiction over a Rome Statute crime, one of these jurisdictional bases must be present. However, it is not necessary for both to be present. For example, the ICC can exercise jurisdiction over nationals of a non-Party State committed on the territory of States Parties. The basis of jurisdiction in this instance will be territoriality. At the same time, the ICC will have jurisdiction over acts committed by

nationals of States Parties in the territory of a State that is not party to the Rome Statute. The basis of jurisdiction in this latter instance will be nationality.

44 While this double basis for jurisdiction extends the potential jurisdiction far more widely than if the Rome Statute only provided for a single basis, this arrangement still leads many situations beyond the scope of the ICC. There remain many crimes committed by nationals of States that are not party to the Rome Statute on territories of States that are not party to the Statute. Such crimes remain uncovered under the jurisdictional basis just described. In an attempt to address this gap, the Rome Statute provides two ad hoc possibilities for the establishment of jurisdiction over crimes that do not have a nexus with a State Party. First, any State that is not a party can declare that it recognizes the jurisdiction of the Court over crimes committed on its territory. Such declarations would permit the ICC to exercise jurisdiction over acts committed on the territory of the State that authored the declaration, even though it is not a State Party and even though the crimes in question were not committed by a State Party. → *Côte d'Ivoire* and → *Palestine* have both submitted such declarations. Both States have since acceded to the Statute.

45 The second possibility for the existence of jurisdiction without the connection between the crimes in question and a State Party is through a UN Security Council referral (→ *Referral by the United Nations Security Council: International Criminal Court [ICC]*). One of the trigger mechanisms—these are discussed below—permits the UN Security Council, acting under Chapter VII of the Charter of the United Nations (→ *United Nations Charter*), to refer any situation to the ICC. Where the Council has made such a referral, the ICC would have jurisdiction over any situation even if the situation occurs in the territory of a State that is not party to the Rome Statute and the alleged offenders are not nationals of a State Party (Art. 13 (b) RS). To date, two situations have been referred to the ICC by the UN Security Council, namely the situation in Darfur (→ *Sudan*), by UN Security Council Resolution 1593 (2005), and the situation in Libya, by UN Security Council Resolution 1970 (2011).

46 The fact that the ICC has jurisdiction by virtue of the territoriality or nationality nexus, a declaration by a non-Party State of the recognition of the jurisdiction of the ICC, or a referral of a situation by the UN Security Council does not mean that the Court will exercise jurisdiction. In addition to the presence of the conditions for the exercise of jurisdiction, the Court's jurisdiction must be triggered. The Security Council as a trigger for the exercise of the ICC's jurisdiction has already been discussed above.

47 The second trigger mechanism is referral by a State Party (→ *Referral by a State Party: International Criminal Court [ICC]*). Under Art. 14, a 'State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed' (Art. 14 (1) RS). Although this trigger mechanism is often referred to as 'self-referral' on account of the fact that often this trigger mechanism entails a State referring a situation in its own territory to the ICC, there is no requirement in the Statute that a referral be in relation to the situation in the territory of the State making the referral. Many of the situations of which the ICC is currently seized have been referred to the ICC by a State Party. These are the situations in the Democratic Republic of the Congo ('DRC'; → *Congo, Democratic Republic of the*), Uganda, Central African Republic, Mali, and the Central African Republic (II). Where a State Party refers a situation to the ICC, the Prosecutor can 'investigate the situation for the purpose of determining whether one or more specific persons should be charged' with crimes under the jurisdiction of the ICC (Art. 14 (1) RS).

48 The third trigger mechanism for the ICC's exercise of jurisdiction is the *proprio motu* powers of the Prosecutor (→ *Proprio Motu Investigation: International Criminal Court [ICC]*). Under Art. 15, the Prosecutor of the ICC may, *proprio motu*, initiate investigations into situations where crimes under the jurisdiction of the Court may have been committed (Art. 15 (1) RS). The decision to initiate, *proprio motu*, an investigation may be based on information obtained from a variety of sources (Art. 15 (2) RS). However, the *proprio motu* initiation of an investigation is subject to the authorization of the Pre-Trial Chamber (Art. 15 (3) RS). In other words, the Prosecutor may not proceed with an investigation initiated under Art. 15 without the authorization of the Pre-Trial Chamber. Authorization was provided to the Prosecutor to proceed with investigations in the situations in Kenya, Georgia, Côte d'Ivoire, and → *Burundi*. However, the Pre-Trial Chamber declined to authorize investigations in the situation in Afghanistan.

49 These rules concerning the pre-conditions of ICC jurisdiction apply, with some modification, to the crime of aggression. Thus, as a rule the Court will have jurisdiction over the crime of aggression where there is jurisdictional nexus with a State Party, ie where the crime has been committed by a national of a State Party or is committed on the territory of a State Party. The territorial jurisdictional nexus is present where acts of aggression either are launched from the territory of a State Party or are completed on such territory. In other words, the jurisdictional nexus pre-condition is met where the State Party is either the aggressor or the victim State. However, under the opt-out clause provided for in Art. 15 *bis* (4), a State Party may declare that it does not recognize the jurisdiction of the Court in respect of the crime of aggression. In such an event, even where there is some other nexus between the crime of aggression and a State Party, the Court will not have jurisdiction over a crime of aggression the basis of which is an act of aggression by a State Party that has lodged such a declaration. Thus, under normal circumstances, the fact that a State which is a victim of an act of aggression is a State Party would fulfil the jurisdictional nexus and thereby fulfil the pre-condition for jurisdiction. However, where the alleged aggressor State has made the declaration under Art. 15 *bis* (4), the pre-condition for the exercise of jurisdiction over the crime of aggression would be nullified.

50 Similarly, the rules concerning the trigger of jurisdiction of the ICC over the crime of aggression apply, with some modification, to the crime of aggression. As with other crimes, the jurisdiction of the Court can be triggered by a State Party referral, UN Security Council referral, or *proprio motu* referral. In respect of UN Security Council referrals, the rules operate in the same way as for other crimes. However, for *proprio motu* initiation and State referrals, the UN Security Council is given six months to make a determination that an act of aggression has been committed. Where the Council does not make such a determination, the Prosecutor can only proceed with an investigation into the crime of aggression where authorization has been granted by the Pre-Trial Division under Art. 15 (8).

51 In addition to situations in which the Court is exercising jurisdiction, either in the sense that the OTP is investigating the situation or in the sense that the indictments have been issued against specific individuals for specific crimes, there are some situations under preliminary analysis. These are cases, regardless of the trigger mechanism, that the OTP is studying to determine whether there is a sufficient basis to open active investigations. These situations are Afghanistan, Colombia, Nigeria, Guinea, Iraq/UK, Palestine, the Philippines, Bangladesh/Myanmar, Ukraine, and Venezuela.

F. The Nuts and Bolts of the System

52 The Rome Statute is a system, with a number of elements that make it work. These may be termed the nuts and bolts of the system. These nuts and bolts concern both institutional and normative rules. This section of the entry will consider the following nuts and bolts of the Rome Statute system:

(i) complementarity;

(ii) immunity and irrelevance of official capacity; and

(iii) cooperation.

1. Complementarity

53 Under the general rules of international law, subject to the domestic law, jurisdiction over crimes, including Rome Statute crimes, lies principally in the State of the territory where the crimes were committed. Yet, subject to the rules concerning pre-conditions for the exercise of jurisdiction and the triggering of jurisdiction, the ICC may exercise jurisdiction over such crimes committed in the territory of States Parties or by their nationals. Complementarity is a tool through which the jurisdictional competence between the national system and the ICC is mediated to avoid conflict. Under the international military tribunals, jurisdiction rested with the tribunals. Under the ICTR and ICTY, primary jurisdiction rested with the international tribunals with national jurisdiction being activated when cases were transferred to the national system by the tribunals themselves. The principle of complementarity is one which recognizes the important role of national systems for accountability in the fight against impunity (→ *International Criminal Courts and Tribunals, Complementarity and Jurisdiction*).

54 The Rome Statute does not use the word ‘complementarity’. It does, however, use the word ‘complementary’ on two occasions, when it refers to the jurisdiction of the ICC as ‘complementary to national jurisdiction’ in the tenth preambular paragraph and in Art. 1 RS. The word, however, does not appear in the provisions of the Rome Statute that operationalize the concept, namely Art. 17. Complementarity, as a legal concept, means that the jurisdiction of the Court is complementary to that of national systems. In other words, it is primarily the domestic legal systems that should exercise jurisdiction over international crimes. To this end, the sixth paragraph of the preamble recalls ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. The result of this understanding of the legal concept of complementarity is that the ICC only exercises jurisdiction where jurisdiction is not being exercised by a State with jurisdiction. It is this conception of complementarity that is the heart of the admissibility requirement in Art. 17 RS.

55 Admissibility under the Rome Statute is provided for in Art. 17, which, signifying its basis on complementarity, qualifies the admissibility requirements as having ‘regard to paragraph 10 of the Preamble and article 1’. Art. 17 RS provides that a case will be inadmissible before the ICC where ‘[t]he case is being investigated or prosecuted by a State which has jurisdiction over it’ (Art. 17 (1) RS). This inadmissibility applies also where the State in question, having investigated the matter, has decided not to prosecute the person concerned (Art. 17 (1) (b)) and where the person in question has already been tried (Art. 17 (1) (c)). For complementarity to apply, however, both the person and the conduct which is the subject before the ICC must have been the subject of national proceedings or investigations (*Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the application by the*

Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute' ICC-01/09-02/11-274).

56 The principle of complementarity will not, however, prevent the ICC from exercising its jurisdiction where the State concerned is unwilling or unable genuinely to carry out investigations and prosecutions. The factors that indicate unwillingness are reflected in Art. 17 (2) and relate to proceedings or investigations taking place in the national system designed to shield the person accused of having committed crimes under the Rome Statute, where the exercise of jurisdiction is the subject of an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and where proceedings are not conducted independently or impartially. Inability is a factual question and is addressed in Art. 17 (3). The cases identified in the Statute include cases where the State in question cannot find the accused in question or cannot obtain evidence. Other factors that may be considered include those situations where the State does not have the necessary legislation or lacks the resources to investigate and/or prosecute.

57 It is important to emphasize that under Art. 17, it is for the Court to determine whether a State is willing and able to exercise its jurisdiction and, therefore, whether a case is inadmissible. Thus, while the Statute places the preference for the exercise of jurisdiction with States, such preference applies only when the conditions in Art. 17 are met. It is for the Court, and the Court alone, to determine whether the elements for the inadmissibility of a case have been met. In this sense, the Statute strikes a delicate balance between, on the one hand, the right of the State to exercise its jurisdiction when it is able and willing and, on the other hand, the duty of the Court to exercise its complementarity jurisdiction when the State with jurisdiction is unwilling or unable to exercise its jurisdiction.

58 Art. 17 RS provides the framework for complementarity in the narrow technical sense as a legal rule for admissibility. Complementarity, however, has also come to be understood in a grander fashion, as an idea to enhance the fight against impunity by enabling States to exercise jurisdiction over Rome Statute crimes. This is in recognition of the fact that the ICC, even in those instances where it does have jurisdiction, will not have the capacity to act against all crimes within its jurisdiction. As a consequence, the OTP has adopted a policy under which it will only investigate and prosecute those 'most responsible' for the commission of crimes, a term that can be loosely defined as the most senior persons responsible for crimes. For this grand conception of complementarity to become a reality, it is necessary for States to be in a position to exercise their jurisdiction. This requires, inter alia, the existence of legislation and resources to enable domestic exercise of such jurisdiction. This grand conception of complementarity, concerned with fostering the ability and willingness of States to exercise jurisdiction, has been termed as → *positive complementarity*.

59 Two recent initiatives have been developed with the purpose of promoting positive complementarity. The first, which concerns only crimes against humanity, is the ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity. If, as is recommended by the ILC, the Draft Articles are turned into a Convention by States, States Parties to that Convention will be obliged to enact laws criminalizing and providing for the punishment of crimes against humanity. The Convention would also provide for a wide-ranging mutual legal assistance framework (→ *Mutual Legal Assistance in Criminal Matters*) and the → *aut dedere aut iudicare* obligation, with a view to enhancing the successful investigation and prosecution of crimes against humanity. The second initiative, the Mutual Legal Assistance initiative, is one led by a group of ICC States, initially led by Belgium, the Netherlands, and → *Slovenia*. Like the ILC initiative, it is intended to result in the adoption of a treaty. The main difference between the Mutual Legal Assistance initiative and the ILC initiative is that

while the latter’s scope is limited to crimes against humanity, the former includes also the prohibition of war crimes and the prohibition of genocide.

2. Immunity and Irrelevance of Official Capacity

60 One of the fundamental rules of international law concerns immunity of officials from the jurisdiction of foreign criminal jurisdiction. Yet immunity may constitute a hurdle to the fight against impunity. The Rome Statute addresses this question in Art. 27, which contains two paragraphs.

61 Art. 27 (1), having stated that the Statute applies to all persons without distinction based on official capacity, states that that official capacity does not ‘exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence’. This first paragraph is not, as such, concerned with immunity, which is a procedural rule. Rather, it is concerned with whether, once the ICC is already exercising its jurisdiction, an accused could raise, as a substantive defence, official capacity. The answer emphatically is that the official capacity cannot be raised as a substantive defence to avoid individual criminal responsibility or even to reduce sentence.

62 Immunity, which is different from the question of criminal responsibility, is a procedural rule which prevents the exercise of jurisdiction in the first place. Immunity is dealt with in Art. 27 (2), which provides that immunities ‘shall not bar the Court from exercising its jurisdiction over’ an accused person. Art. 27 (2) excludes the application of the rules on immunity in respect of jurisdiction of the Court. It thus concerns the relationship between an accused person and the ICC. By its terms, Art. 27 is not concerned with immunity from national jurisdiction. Art. 27 thus leaves the → *customary international law* pertaining to immunity from foreign criminal jurisdiction unaffected. The jurisprudence of the ICC, however, has not accepted this distinction and has seemed to favour an interpretation that would include immunity from national jurisdiction in the scope of the phrase ‘shall not bar the Court from exercising its jurisdiction over’ an accused person (*Judgment in the Jordan Referral Re Al Bashir Appeal* ICC-02/05-01/09 OA2).

3. Cooperation

63 Cooperation is a critical element of the functioning and effectiveness of any international criminal tribunal, including the ICC. It has often been said that international criminal tribunals, like the ICC, are like giants without limbs. This metaphor is meant to illustrate that like giants, international criminal tribunals can be very powerful and can produce significant achievements. However, they are constrained in achieving their purposes by the fact that they do not have authority over territories to carry out the functions necessary to be effective (lack of limbs). Cooperation by States and other entities thus serves the crucial function of giving the giant the limbs needed to carry out its functions.

64 The importance of cooperation for the ICC is signified by the fact that the Rome Statute, in Part 9, provides a detailed framework for cooperation. In addition to providing a general duty of States Parties to cooperate with the Court (Art. 86 RS), the Statute also identifies specific forms of cooperation (Art. 93 RS). These include identification of the whereabouts of suspects, provision of documents, seizure and freezing of assets, protection of witnesses, and service of documents. The Statute also provides details on how the cooperation should be effected, including how the request for cooperation should be made as well as acceptable justifications for not acceding to requests for cooperation.

65 Perhaps the most far-reaching form of cooperation is the duty to arrest persons under arrest warrants from the ICC. The duty to effect arrests pursuant to ICC requests is the subject of a detailed set of provisions (Arts 89–92 RS). The duty to cooperate, particularly as it pertains to effecting arrests, has the potential to conflict with the customary international law on immunities. In the case of arrest warrants for officials of States Parties no problem arises since States Parties are deemed, in their relations *inter se*, to have waived immunities when ICC arrest warrants are at issue. In respect of officials of non-Party States, the drafters of the Rome Statute included Art. 98, which provides that the Court should not request cooperation if such cooperation would require a State to act in conflict with its obligation on immunities under international law. As discussed below, the application of this provision has been the subject of some controversy over the last few years.

G. Challenges and Future Prospects

66 The ICC has come under severe strain and has faced some challenges over its short existence. Some of the tensions have been caused by factors external to the ICC, whereas others have been the result of differing interpretations of law, and still others have been multi-dimensional.

67 Perhaps the most intense challenge that the ICC has faced has concerned its relationship with the → *African Union (AU)* and some African States. The tension with the AU arose as a result of the issuance of an arrest warrant for the then–President of Sudan, Omar Al Bashir. Given that Sudan was not party to the Rome Statute, the question arose whether other States had a duty to arrest and surrender Al Bashir to the ICC in accordance with Art. 89 RS or whether, on the basis of Art. 98, States Parties were entitled not to arrest and surrender. The legal issues were complex and involved the interpretation, not only of the Rome Statute, but also of the rules of customary international law and UN Security Council Resolution 1593 (2005).

68 There are several possible ways to see the legal situation. First, it is possible that there is simply a conflict of rules, which is unresolved by the Rome Statute, between the customary international law on immunities and the duty to cooperate. Seen from this perspective, not complying with the arrest warrant would result in a breach of the obligations under the Rome Statute, while effecting arrest would result in a breach of the rules of customary international law. This interpretation, which has attracted little support, is possible only if the words ‘State immunity’ in Art. 98 are interpreted restrictively to exclude immunity *ratione personae*. A second possibility is to see the duty on Sudan to cooperate with the ICC pursuant to the UN Security Council resolution as an implicit → *waiver* of the immunities of Sudanese officials, such that no conflict of obligations arises. This approach was followed by ICC Pre-Trial Chamber II (*Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court* ICC-02/05-01/09-195). Under a third possible approach, also linked to the UN Security Council referral, the referral of the situation in Darfur by the UN Security Council places Sudan in the position of a State Party. As a result, the implicit waiver operating between States Parties discussed above applies also to Sudan (*Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court of the Arrest and Surrender of Omar Al Bashir* ICC-02/05-01/09-302). A fourth perspective is to see the rules on immunity from foreign criminal jurisdiction as not being applicable when the exercise of jurisdiction pertains to an arrest warrant from an international criminal court, such as the ICC. Seen from this perspective, there is no conflict of obligations and States should comply with the arrest warrant. It is this fourth approach that was apparently adopted by the ICC Appeals Chamber (*Judgment in the Jordan Referral Re Al Bashir Appeal* ICC-02/05-01/09 OA2). A final view is that neither the fact of the arrest

warrant being issued by the ICC nor the fact of the UN Security Council referral has any effect at all on the immunities of States that are not party to the RS. It is this last interpretation that is supported by the author of this entry.

69 The recent coup in Sudan, resulting in the ouster of Al Bashir coupled with the judgment by the Appeals Chamber of the ICC, may lead to the conclusion that the issue is passé. After all, since Al Bashir is no longer a head of State, the problem about his absolute immunity falls away (→ *Heads of State*). At any rate, as a factual matter, he is now not likely to visit foreign States. Moreover, it has been reported that the Government of Sudan has decided to cooperate with the ICC, including by possibly surrendering Al Bashir to the ICC —although a Government spokesperson has since said questions surrounding Sudan's → *sovereignty* create an obstacle to Al Bashir's surrender.

70 However, the issue is not passé. First, the AU is still considering sponsoring a UN General Assembly resolution requesting an advisory opinion from the → *International Court of Justice (ICJ)* (→ *Advisory Opinions*). Second, although the legal issue arose because of the Al Bashir situation, the Appeals Chamber decision, which eroded the immunity *ratione personae* beyond the narrow limits of the UN Security Council referrals, would entail that more non-party States will be affected by the decision.

71 Another important challenge for the ICC, for which it has also been criticized, is its focus on Africa. To date, the ICC is seized with eleven situations. Only one of these, Georgia, concerns a situation outside of Africa. Moreover, to date, more than 40 individuals have been indicted by the ICC, all of whom are Africans. Of course, there are explanations for this fact, but it will be important for the ICC to ensure wider geographical coverage to avoid an appearance of bias. In fact there are a number of situations under preliminary analysis by the ICC that are outside the African continent, including Colombia, Venezuela, Iraq/UK, and Palestine. In 2017, the Prosecutor requested authorization from Pre-Trial Chamber II to open investigations into the situation in Afghanistan, which has been under preliminary analysis since 2007. Notwithstanding that the situation meets all the jurisdictional requirements of the ICC Statute, Pre-Trial Chamber II decided not to authorize the opening of the investigations because, in its view, 'the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited' (*Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* ICC-02/17-33). The decision has been interpreted in some quarters as a response to the threats of the United States against the ICC should it proceed, and this interpretation has strengthened arguments of bias against African States.

72 The ICC's relationship with the UN Security Council has also not been ideal. The Rome Statute establishes a fundamental relationship between the ICC and the UN Security Council. The powers of the UN Security Council to refer situations to the ICC under Art. 13 RS have already been discussed. In addition, the UN Security Council is empowered under Art. 16 to defer investigations or proceedings for a period of twelve months if it is necessary to maintain or restore international peace and security (→ *Deferral Requested by the United Nations Security Council: International Criminal Court [ICC]*). The relationship between the ICC and the UN Security Council has always carried with it the risk of the politicization of the work of the ICC. The refusal of the UN Security Council to refer the situation in Syria to the ICC has been advanced as an illustration of such politicization. The two resolutions referring the situations in Darfur and Libya respectively have themselves raised certain concerns. First, these resolutions have only established a duty to cooperate on the countries that are the locations of the situations, thereby negatively impacting the effectiveness of the referrals. Second, the resolutions have purported to exclude the possibility of the use of the regular budget of the United Nations to fund investigations and/or prosecutions connected

to the referrals. Finally, both resolutions have purported to exclude the jurisdiction of the ICC in respect of nationals of non-Party States, contrary to the provisions of the Statute. These aspects of the referrals might suggest that the UN Security Council has used the ICC as a tool for political ends, rather than to secure accountability for crimes that would otherwise be beyond the reach of the ICC.

73 Over and above its relationships with the AU and the UN Security Council, the ICC has faced other issues, including the following:

- Because of the tensions between the ICC and the AU, one State, Burundi, has withdrawn from the Statute. Two other States, South Africa and the Gambia, had withdrawn, but subsequently withdrew their notices of withdrawals.

- Since the request to authorize investigations into the situation in Afghanistan, the ICC has faced threats from the United States, ranging from the possible arrest of ICC officials to the denial of visas and entry into the United States.

- The consideration of the situation in Palestine is also likely to create similar tensions with the world's remaining superpower.

- The ICC has been criticized for the fact that in nearly two decades of operations and more than 1 billion Euros, it has been able to secure only four core crime convictions (Al Mahdi, Katanga [→ *Katanga Case*], Lubanga [→ *Lubanga Case*], and Ntaganda).

- In 2019 the ICC was also the subject of criticism for internal squabbles, including judges suing the institution for more pay.

74 The issues faced by the ICC are growing pains afflicting an institution in its nascent years, relatively speaking. These challenges should be faced head-on and addressed; they should not be swept under the proverbial carpet. This is so particularly because the ICC serves an extremely important function of ensuring accountability.

H. Conclusion

75 Having been established to ensure individual criminal responsibility for those committing serious crimes under international law, the ICC is the symbol of an important departure from a traditional perspective of international law. While it has faced many challenges and will, no doubt, continue to face more challenges, the ICC is an important institution whose survival will contribute to the building of a better world for humanity. It is thus crucial for the ICC to address the challenges confronting it, consistent with its Statute and other rules of international law. In particular, the ICC will need to strengthen its prosecutorial policies, to ensure a greater level of success in cases that it does prosecute and to address the perception of bias against African States. It will also be important, in the coming years, to be resolute in the application of the Statute in the face of threats of reprisals for decisions on prosecutions.

Select Bibliography

G Moynier 'Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève' (1872) 11 Bulletin international des Sociétés de secours aux militaires blessés 122–31.

N Boister ‘The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics’ (1998) 3 JC&SL 27–43.

CK Hall ‘The First Proposal for a Permanent International Criminal Court’ (1998) 38 No 322 IRRC 57–74.

D Akande ‘The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’ (2009) 7 JICJ 333–52.

WA Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP Oxford 2010).

C Stahn and L van den Herik *Future Perspectives on International Criminal Justice* (TMC Asser Press The Hague 2010).

M Bergsmo and L Yan (eds) *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher Beijing 2012).

SMH Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP Cambridge 2013).

G Werle L Fernandez and M Vormbaum (eds) *Africa and the International Criminal Court* (Asser Press The Hague 2014).

C Kreß and S Barriga (eds) *The Crime of Aggression: A Commentary* (CUP Cambridge 2017).

D Tladi ‘Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited’ (2017) 60 GYIL 43–70.

D Guilfoyle ‘Part II – This is Not Fine: The International Criminal Court in Trouble’ (22 March 2019) EJIL:Talk!, available at <https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/> (30 June 2020).

D Tladi ‘Sudan Agrees to Send Al Bashir to the ICC: What Now for the Law?’ (12 February 2020) Opinio Juris, available at <http://opiniojuris.org/2020/02/12/sudan-agrees-to-send-al-bashir-to-the-icc-what-now-for-the-law/> (30 June 2020).

Select Documents

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court) (Pre-Trial Chamber II) ICC-02/05-01/09-195 (9 April 2014).

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (Pre-Trial Chamber II) ICC-02/05-01/09-302 (6 July 2017).

Prosecutor v Omar Hassan Ahmad Al Bashir (Judgment in the Jordan Referral Re Al Bashir Appeal) (Appeals Chamber) ICC-02/05-01/09 OA2 (6 May 2019).

Prosecutor v Uhuru Muigai Kenyatta (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' (Appeals Chamber) ICC-01/09-02/11-274 (30 August 2011).

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) (Pre-Trial Chamber II) ICC-02/17-33 (12 April 2019).

Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188.

UN ILC 'Draft Articles on Prevention and Punishment of Crimes against Humanity' (Report of the International Law Commission 71st Session 29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 11.

UN ILC 'Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*)' (Report of the International Law Commission 71st Session 29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 142.

UNSC Res 1593 (2005) 'Reports of the Secretary-General on the Sudan' (31 March 2005) SCOR [1 August 2004–31 July 2005] 131.

UNSC Res 1970 (2011) 'The Situation in Libya' (26 February 2011) SCOR [1 August 2010–31 July 2011] 382.