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The International Criminal Court – An International Criminal World Court?

Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation

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Preface

My interest in International Public Law and Human Rights had already evolved in my youth and was the reason for studying law.

The further Advanced Master's Program (LL.M) at the *Geneva Academy of International Humanitarian Law and Human Rights* reaffirmed my commitment to stand up and fight for those who have suffered from the most serious crimes of concern but who have no means of fighting for justice themselves. It has been a great privilege to study under the best professionals in the fields of International Humanitarian, Criminal, Human Rights and Refugee Law. One of these legendary professors, to whom I owe the topic of my book, as well as my awareness of and special dedication to International Courts and Tribunals, is Professor Nicolas Michel. With his renowned expertise, his exciting and passionate lectures, and a visit to The Hague, he ignited in me a particular interest in and dedication to the International Criminal Court, while never failing to consider the political environment in which International Criminal Law is embedded. Furthermore, I had the opportunity to meet such rare charismatic and passionate individuals during my time at the OHCHR, whose work, along with Prof. Michel's, has encouraged me to take this path no matter how many obstacles need to be overcome along the way.

At my Alma mater, I am especially grateful to my supervisor and mentor, Prof. Dr. Stefan Oeter, from the Faculty of Law of the University of Hamburg, who enabled me to write my PhD thesis about my favourite topic and who supported me with his profound and distinguished competence; his willingness to engage in dialogue and to discuss various legal topics from different angles was more than helpful. With the special expertise of Prof. Dr. Oeter as well as my second supervisor, Prof. Dr. Florian Jeßberger, my PhD defence was one of the most interesting and inspiring discussions I have had about the International Criminal Court.

I am equally grateful to my closest friends and family for their invaluable support. I especially thank my cousin Natalie Haghnazarian for her thorough editing, but first and foremost Tamalin Bolus for her assistance throughout—be it advice on form or substance—from the other side of the world. It was a high workload, but I could always rely on her generous support.

Moreover, I am extraordinarily thankful to Minas Dreyer, who not only supported me during my work on my thesis but also constantly encouraged me to pursue and implement my dreams, no matter to which country or city they would take me, nor how far away the goal seemed to be at a given moment. I thank him for always being by my side.

Most importantly, I would like to express my wholehearted gratitude to my beloved grandmother, Maria Schebesta, and my beloved father, Albert Babajan. They accompanied me throughout the time with their support, counsel, patience, confidence and unconditional love.

For this reason, I would like to dedicate this work to both of them.

Hamburg, Germany Sarah Babaian

Contents

Chapter 1
Introduction

This book will cover the question, whether the International Criminal Court (ICC) can be regarded as an International Criminal World Court, capable of exercising jurisdiction upon every national of the world, despite the fact that the Court constitutes a treaty-based body which at this stage does not include all States of the world. To underline the phenomenal development in international criminal law over the past 50 years and the tremendous progress of the establishment of International Tribunals and in particular the International Criminal Court, a historical excursus will be given. Furthermore, the ICC and its intention and characteristics will be presented to determine the main question, if this permanent and independent Court can be regarded as a Criminal World Court. The analysis will be based on a twin-pillar system consisting of a judicial and an enforcement pillar.[1] While the first pillar is based on the Rome Statute itself, addressing the question whether the ICC has the capability of exercising its strength through the application of its jurisdiction regime, the enforcement pillar contains an analysis regarding the cooperation and judicial assistance mechanism pursuant to the Rome Statute's provisions on the one hand and its practical implementation through States practice on the other hand. The examination of both pillars comprises an analysis regarding the strength of the provisions themselves while simultaneously determining their applicability to Member- as well as Non-Member States to the Rome Statute.

The judicial pillar entails first and foremost the examination of two very important articles of the Rome Statute which may underline the power of the Court: article 12 (2) (a) and article 13 (b) ICC Statute.[2] While article 12 (2) sets the conditions for national and territorial jurisdiction and paragraph (a) gives the opportunity to exercise territorial jurisdiction even upon individuals of Non-Party States, article

[1] See Kirsch (2007), p. 4. Unlike the present interpretation, Judge Kirsch defines the twin-pillar system slightly different: While the "judicial pillar" constitutes the "Court itself", thus the Court's strict adherence of the provisions of the Statute, the "enforcement pillar" is dedicated to States, which' responsibility is to cooperate with and support the ICC.

[2] If not stated otherwise, those are articles of the Rome Statute.

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13 (b) triggers the ICC's jurisdiction also upon Non-Member States to the Statute when the United Nations Security Council (SC), acting under Chapter VII of the UN-Charter, refers the situation to the ICC. Both highly criticized articles will be extensively discussed to determine to what extent they give an affirmative response to the question of book, whether the ICC can be designated as an International Criminal World Court. For this reason the explicit accusation that article 12 (2) (a) constituted a violation of article 34 of the Vienna Convention on the Law of Treaties (VCLT) and entails therefore an invalid *Drittwirkung* on Third States, has to be examined. Afterwards attention will be paid on the difficulties arising out of SC referrals of situations of Non-Member States to the ICC; these referrals of the SC do not only trigger the jurisdiction of the Court but may lead for the Non-Member States by virtue of the SC resolution to the applicability of most of the Statute's provisions.[3] This difficult subject of SC referrals can be presented on two already existing examples: the SC referral of the situation in Sudan in 2005 to the ICC[4] and the SC referral of the situation in Libya in February 2011[5] and its decision that Sudan and Libya shall cooperate fully with the Court, even though none of those States are Parties to the Rome Statute.[6] At this stage the highly problematic aspect of personal immunities, especially the applicability of the irrelevance of the official capacity article 27, with all its controversial opinions will be incidentally discussed to determine to what extent the result of article 13 (b) supports or neglects the designation to be a Criminal World Court. The analysis regarding the removal of personal immunities will be pursued in the examination of one of the most important provisions of the Rome Statute, article 27. The article serves the Court's main purpose to end impunity for any perpetrators of Crimes against Humanity, War Crimes and Genocide while it simultaneously contributes to the prevention of these Crimes. Member-States to the Rome Statute waived their immunities when acceding to the Rome Statute. Consequently, it will be analyzed if the Court can equally exercise its jurisdiction by applying article 27 (2) in cases where a Member State referred a situation to the ICC or the Prosecutor initiated investigations *proprio motu* regarding a national of a Non-Member State to whom immunity *ratione personae* is attached. The response to the question will simultaneously contain the important determination regarding the difference between the vertical relationship on the one hand and the horizontal relationship on the other hand. While the first link regulates the relation between the Court and the State, the second relationship determines the connection of States among each other. It will be examined that the vertical as well as the horizontal relationship have to be strictly

[3]Despite the fact that the Court determines that all of the Rome Statute's provisions will be applicability, it has to be emphasized that provisions of part 4 and part 12 of the Statute remain untouched, see Akande (2009), p. 342.

[4]See UN-Security Council Resolution 1593 (2005) UN Doc S/RES/1593.

[5]See UN-Security Council Resolution 1970 (2011) UN Doc S/RES/1970.

[6]See Akande (2009), p. 342; UN-Security Council Resolution 1593 (2005) UN Doc S/RES/1593, para. 7; UN Security Council Resolution 1970 (2011) UN Doc S/RES/1970, para. 8.

distinguished from each other due to the fact that article 27 is part of the jurisdiction mechanism, therefore only regulating the vertical relationship. The conclusion is, firstly with regard to the judicial strength of the Court in applying the article also to Non-Member States of paramount importance and, secondly, does it provide clarification with regard to the accusation that article 27 constituted a contraction to article 98 (1), which triggers the triangular relationship between the Court, the requested—as well as third State.[7] As article 98 is part of the cooperation mechanism of the Court, it will be extensively portrayed in the enforcement pillar. A further significant determination relates to the in 2010 incorporated articles 15 *bis* and 15 *ter*, which regulate the exercise of jurisdiction regarding the Crime of Aggression pursuant to State referrals and *proprio motu* investigations as well as with regard to SC referrals. That States reached a consensus with regard to the definition of the Crime of Aggression as well as on the conditions with respect to the jurisdiction mechanism at the 16th Assembly of States Parties, activated at the 20th anniversary of the Rome Statute on 17 July 2018, constitutes one of the greatest and historic achievements in international criminal law.[8] It took the international community over 60 years to establish an International Criminal Court which makes individuals criminally responsible for the commitment of a Crime of Aggression. Nevertheless, the incorporation of articles 15 *ter* but first and foremost 15 *bis* involves several difficulties. Therefore, a comprehensive analysis will respond to the allegations that these new incorporated jurisdiction regimes are contrary to the jurisdiction mechanism anchored in article 12. Furthermore, the problems surrounding the clash of article 15 *bis* (4), (5) with the new applied paragraph (5) of the Amendment article 121 will be discussed to determine in how far the combination of both articles might restrict the exercise of jurisdiction of the Court to an extent that the ICC will be practically incapable to exercise this new jurisdiction. In addition, the role of the SC regarding the determination of an act of aggression will be examined which is with respect to the ICC, as an independent legal institution, of paramount importance. The analysis of the judicial pillar closes with the examination of articles such as 16, dealing with the deferral of the Court's proceedings, articles 17, 18 and 19 regulating challenges to the jurisdiction of the Court or the admissibility of a case and, finally, the Transitional Provision, article 124, which grants Member States the opportunity to declare their unacceptance of the jurisdiction of the Court regarding War Crimes for 7 years after ratifying the Statute. The interim result of the foregoing articles will determine whether these provisions bar the Court from exercising its jurisdiction or whether they constitute only a balance to States sovereignty and to the international peace component versus the justice mandate.

To fulfill the whole picture and to maintain the credibility of the ICC by enforcing the decisions made by the Court, an analysis of the enforcement pillar and its

[7] See Pedretti (2015), p. 272; Triffterer and Burchard (2016), p. 1040, para. 5.

[8] See Coalition for the International Criminal Court (2017), Press Release, available at: http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICCPR_ASP2017_CrimeofAggression_15Dec2017_final.pdf (Last accessed 18 Dec 2017).

effectivity will be carried out. The fact that the Court itself does neither dispose over executive powers nor over own police forces, makes the Court fully dependent on States motivation to comply with its requests. Consequently, the analysis of the enforcement pillar begins with an examination of the provisions regarding the cooperation and judicial assistance Part 9 of the Rome Statute to determine how much discretion the Court is given pursuant to its own provisions. The most important articles of Part 9 will be highlighted in order to, firstly, verify the Member States obligations stemming from the surrender of persons and other forms of cooperation articles, secondly the mechanisms the Court could apply in cases in which either Member- or Non Member States refuse to comply with its requests and lastly the determination of articles which might bar the Court from exercising its jurisdiction. Emphasis will be put on the general provision regulating requests for cooperation, article 87 and especially its paragraphs (5) and (7), which set the requirements for the procedures resulting from the non-compliance of Party and Non-Party States with respect to requests of the Court. Due to the fact that the non-cooperation of States prevents the Court from exercising its functions and powers under the Statute, both the measures of the executive organs of the Court, the Assembly of States Parties and the Security Council, will be examined to verify whether there exist possible sanction mechanisms with respect to the obligation-breaching State. Subsequently to the determination of the articles relating to arrest and surrender as well as the other forms of cooperation, which might entail possible restrictions for the Court's exercise of jurisdiction, the important and disputed article 98 will be extensively analyzed. Of special focus will be the analysis of article 98 (1), which comprises the prohibition of the Court to proceed with a request for surrender or assistance if such a request required the requested State to infringe its obligations under international law with respect to immunities towards the third State. To determine to what extent article 98 (1) leads to a reduction of the Court's capability to exercise its jurisdiction and therewith undermines the authority of the Court to constitute a Criminal World Court, the problems arising out of the literal interpretation of the paragraph will be examined but, first and foremost, its relationship to article 27 (2) in respect to the different jurisdiction trigger mechanisms.

Even if it is considered that the Rome Statutes provisions relating to cooperation and judicial assistance have an authoritative character in giving the ICC the strength to exercise its powerful jurisdiction, the determination of the international cooperation and judicial assistance analysis with respect to States practice will examine whether this strength can likewise practically be implemented. States practice with regard to the 11 investigations conducted by the Prosecutor will be evaluated, comprising, *inter alia*, Non-Member States like Sudan and Libya, referred to the ICC by the SC, self-referrals of States such as the Central African Republic, Mali and Uganda and the initiations of investigations *proprio motu* regarding States like Kenya, Côte d'Ivoire and Georgia. The analysis primarily focuses on the States' willingness or reluctance to cooperate with the Court but will also entail an examination of the Court's practice in applying its provisions in order to present its authoritative strength as a legal institution. The determination of the cooperation and judicial assistance in practice is very important with respect to the question of the

book, whether the ICC can be regarded as an International Criminal World Court. The solution of the book will contain possible improvements which might strengthen the Court and its credibility to underline the main purpose of the Statute to put an end to impunity of the defendants responsible for the perpetration of the most crucial crimes of mankind. The conclusion will entail all the important issues already thoroughly examined in each of the analyses to conclude with a result, which will neither violate international law, respectably international criminal law nor State sovereignty, but which will respect and, first and foremost, underline the main intention of the establishment of the International Criminal Court: to end impunity. The statement that the Court is only as strong as States authorize it to be,[9] may give an answer to the mightiness or weakness of the enforcement pillar and therefore the final decision to determine the effectiveness and credibility of the Court. The final conclusion to the question whether the ICC can be regarded as an International Criminal World Court constitutes a snapshot of the present situation. The Court's judicial strength assigned to it by the Rome Statute's provisions constitutes a substantial loss with regard to State sovereignty and entails an affirmative response to the question of the book; to what extent the reluctance of State's cooperation and the deficiency of an effective panel mechanism to enforce the compliance of States will lead to the circumstance that the enforcement pillar could not only be regarded as the main weakness of the Rome Statute but may currently destroy the strength of the Court to exercise its jurisdiction, will be presented. To be honored as an International Criminal World Court, States have to comply with the requests of the Court, in awareness of the sanctions which could be imposed on them in the case of a breach of their treaty obligations, as long as the community of States will not take the responsibility on their own. If the compliance of States, acting as the enforcement arm of the Court, either through the SC or the Assembly of States Parties, is not able to be achieved, the ICC will constitute nothing else than a repetition of what *Cassese* called once the International Criminal Tribunal for the Former Yugoslavia "a giant without arms or legs".[10]

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[9] See Kaul (2007), p. 580.

[10] Cassese (1998), p. 13.

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Chapter 2
Historical Excursus

The initiation of international trials and the intention to create an International Criminal Court, with the aim to end impunity of those perpetrators responsible for the most serious crimes in world history, is not a new phenomenon and did not find its origins with the establishment of the International Criminal Court in 1998. Already hundreds of centuries before, international criminal justice began to evolve.

During the Middle Ages, in 1268, one of the first international prosecutions is said to be the execution of *Konradin von Hohenstaufen*, who was sentenced to death for treason by King *Charles d'Anjou,* after the attempt to reconquer the Hohenstaufen heritage; the attack ended up in the battle of Tagliacozzo and the defeat of *von Hohenstaufen*.[1]

The groundbreaking precedent for international criminal justice manifested itself only 200 years later with the Breisach trial in 1474. Governor *Peter von Hagenbach,* who served Duke Charles of Burgundy, was convicted by an *ad-hoc* tribunal for the commitment of various atrocities, including confiscation of private property, murder, rape and pillage.[2] The Breisach proceeding is not just said to be the first international war crimes trial, in which, inter alia, present issues such as superior orders and sexual offences were dealt with, but also constitutes a phenomenon with regard to the establishment of an international[3] *ad-hoc* Tribunal, consisting of 28 Germanic and Swiss judges, *von Hagenbach* was fighting against.[4]

The first serious proposal for the establishment of an independent International Criminal Court was, with regard to the problem of partiality in criminal proceedings, made by *Gustave Moynier*, one of the founders of the International Committee of the

[1] See Von Flocken (2007).

[2] See Schwarzenberger (1968), pp. 462–466; McGoldrick (2004), p. 13.

[3] It is controversial, if the criminal process was international, due to the question, if the Swiss Confederation successfully seceded from the Holy Roman Empire. But the prevailing opinion affirms the international character. For more information on this issue see Schwarzenberger (1968), pp. 463–464.

[4] See Cryer et al. (2014), p. 115; Gregory Gordon (2012).

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Red Cross. In 1872, *Moynier* suggested that there should be an International Court due to the lack of impartiality by national judges, who, according to *Moynier*, were not capable to judge upon offences committed in the Franco-Prussian-War in which their own countries were involved.[5] This serious proposal, however, failed to be executed. But it was followed by the next important attempt to establish an International Criminal *ad-hoc* "Allied High Tribunal" after the incidents of the First World War in 1919; all those responsible for violations of the laws of war, customs of war and the laws and principles of humanity should be tried.[6] Nevertheless, the penalty provisions of the Treaty of Versailles and especially article 227 (1), which contained the public arraignment of the former German Kaiser *Wilhelm II von Hohenzollern* for "a supreme offence against international morality and the sanctity of treaties" became obsolete because they were neither implemented nor was the Court ever established.[7] Reasons for that were on the one hand the reluctance of the Netherlands to extradite the former German Kaiser, who had found asylum in the Netherlands, and on the other hand the German government which did not surrender the remaining accused persons. Eventually only 22 persons out of 895 were tried by Germany through the Leipzig Supreme Court during 1921 and 1923.[8]

The assassination of King *Alexander* of Yugoslavia and *Louis Barthou* on 9 October 1934 entailed a further attempt to establish a permanent International Criminal Court; under the auspices of the League of Nations, the Convention for the Prevention and Punishment of Terrorism as well as the Convention for the Creation of an International Criminal Court were concluded.[9] The Convention for an International Criminal Court required the ratification of the Terrorism Convention, so that any offences referred to in article 2, 3, 9 and 10 of the Convention on Terrorism, could be tried by the International Criminal Court in case the ratifying State wanted to exempt itself from the obligation to prosecute and extradited the convicted person to the Court.[10] Even though the Convention on the Creation of an International Criminal Court was well elaborated and appeared to be a genuine Statute, the required numbers of ratifications and accessions of either of these two Conventions were never reached, so that none of them came into force.[11]

The real breakthrough or "Birth of the international criminal law", as some call it,[12] could be manifested after the Second World War. The International Military Tribunals at Nuremberg in 1945 and Tokyo in 1946 were established as an answer to the war and its tremendous atrocities; for the first time, international crimes at an

[5] See Hall (1998), p. 59; See Cryer et al. (2014), p. 146; McGoldrick (2004), p. 40.

[6] See Mangold (2007), p. 6; See Cryer et al. (2014), p. 116.

[7] McGoldrick (2004), pp. 13–14.

[8] See Cryer et al. (2014), p. 116.

[9] See Historical Survey on the Question of International Criminal Jurisdiction- Memorandum submitted by the Secretary-General (New York 1949) UN Doc A/CN.4/7/Rev.1, p. 16 et seq.

[10] See Mosler (1938), p. 104 et seq.

[11] See Marston (2002), p. 293.

[12] Mangold (2007), p. 6; Werle and Jeßberger (2016), p. 17, para. 15.

international level were prosecuted. They were based on the Moscow Declaration of 30 October 1943, which addressed the individual responsibility of those who had committed war crimes and should therefore be tried and punished "by the joint decision of the Governments of the Allies".[13] The initiation for the creation of the International Criminal Tribunals was set. The ultimate manifestation of the establishment of the Nuremberg International Military Tribunal was realized on the 8 August 1945 through the London Agreement between the United States of America, the United Kingdom, France and the United Soviet Socialist Republic to which in the end 19 other States acceded.[14]

The International Military Tribunal for the Far East (Tokyo Tribunal) was not based on a multilateral treaty but on an executive decree issued on 19 January 1946 by the Supreme Commander for the Allied Powers in Japan, General *Douglas MacArthur*, who was acting pursuant to the orders of the occupying power of the US.[15] Both Charters of the Tribunals covered in their jurisdiction Crimes against Peace, War Crimes and Crimes against Humanity, whereas the Tokyo Charter made some modifications; in comparison to the Nuremberg Charter, Crimes against Peace constituted a prerequisite for the prosecution and the concept of command responsibility, which was totally disregarded by the Nuremberg Tribunal, was applied.[16]

In this context the important "Nuremberg Principles" accrued from the work of the United Nations International Law Commission (ILC); at this time it was not foreseeable what significant contribution they would have to further drafts in the following years.

Despite the more symbolic character of the Breisach trial and the Leipzig Supreme Court, together with the International Military Tribunals they can be regarded as the precedents for ending impunity. The circumstance that they only constituted *ad-hoc* and not permanent Tribunals and that they were harshly criticized for being too biased in only prosecuting the defeated, bearing the title of "victor's justice", cannot obscure the fact that they marked the initial beginning of the concept of individual criminal responsibility.[17]

Notwithstanding the years of the Cold War, which lead to a suspension of the creation of a permanent International Criminal Court and the fact that it took nearly 40 years until the General Assembly, at the instigation of Trinidad and Tobago, requested the ILC to resume its Draft Statute on the Establishment of an International Criminal Court, some mentionable attempts were done.[18] In 1947, on the basis of the Nuremberg Principles, the ILC started its work on the Code of Crimes against the Peace and Security of Mankind and presented its first Draft to the General Assembly four years later as well as a revised version in 1954. At the same time the 1948

[13] McGoldrick (2004), p. 14.

[14] See Mangold (2007), pp. 10–11.

[15] See Zahar and Sluiter (2007), p. 5.

[16] See Cryer et al. (2014), p. 122.

[17] See Cryer et al. (2014), p. 119; Bassiouni (2009), pp. 133–134.

[18] See Mangold (2007), p. 27; McGoldrick (2004), p. 41.

Genocide Convention was concluded with the tremendous new provision, article VI: next to domestic courts, an international penal tribunal should prosecute the perpetrators for the commitment of Genocide, even though such a Tribunal did not exist at that time.[19] With regard to article VI of the Genocide Convention, the General Assembly appealed to the ILC to draft a Statute for an international judicial organ, which is capable to prosecute crimes like Genocide, and a few years later the Draft Statute for the Establishment of an International Criminal Court was submitted.[20] But neither the Draft Code Crimes nor the Draft Statute for an International Criminal Court were permuted. Instead, the General Assembly postponed the matter with the explanation that no agreement could be found, especially as long as no definition of the Crime of Aggression exists; despite the acceptance of such a definition in 1974, the time did not permit the establishment of an International Criminal Court for which States would have abandoned their sovereignty.[21]

After the Cold War the developments of the creation of a permanent International Criminal Court grew with enormous pace: on the proposal of Trinidad and Tobago, to establish a permanent Criminal Court to prosecute drug offences, the General Assembly requested the ILC in 1989 to draft a Statute for such a permanent Court and the Commission responded to that request in 1994 with the ILC Draft Statute. The Statute was not yet fully matured and many critical points had to be solved, but this draft set the groundwork for the upcoming processes. In addition to this, the incidents in the Balkans in the early 1990 and the Rwandan Genocide in 1994 encouraged the procedure by creating two *ad-hoc* Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR), which were established by the SC acting under Chapter VII of the UN-Charter. The main intention of the SC acting under Chapter VII UN-Charter was on the one hand to contribute to the restoration and the maintenance of peace and on the other hand to "put an end to such crimes and take effective measures to bring justice the persons who are responsible for them".[22]

The progress made by the fast creation of the ICTY and ICTR, the continuing working process of the ILC in the 1990s as well as the final drafting of the Preparatory Committee from 1996 onwards, lead 2 years later to the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" in Rome. 160 States participated and on 17 June 1998 the "Rome Statute of the International Criminal Court" was adopted by a vote of 120 States.[23]

[19] See Cryer et al. (2014), p. 146.

[20] *Idem*, pp. 144–145.

[21] See Mangold (2007), p. 28; McGoldrick (2004), p. 41.

[22] UN Security Council Resolution 827 (1993) UN Doc S/RES/827, Preamble.

[23] See McGoldrick (2004), p. 42.

The Rome Statute came into force on 1 July 2002 with the 60th ratification pursuant to article 126 (1) Rome Statute and reduplicated itself 14 years later to 123 States.[24]

Even after the creation of the two *ad-hoc* Tribunals and the permanent ICC, the intention to combat impunity for crimes committed either in the past or at present further increased, so that additional internationalized/ hybrid bodies started to evolve. These hybrid courts, which were predominantly established by virtue of agreements with the affected State and the UN, are a combination of domestic law and international elements and address specific historical incidents in between a particular timeframe.[25] *The Special Court for Sierra Leone*, which prosecutes serious violations committed in the territory of Sierra Leone since 30 November 1996, *The Extraordinary Chambers of Cambodia*, which are responsible for the trial of atrocities committed by the Khmer Rouge regime in between 17 April 1975 to 6 January 1979 and *The Special Tribunal for Lebanon*, established by the SC acting under Chapter VII to examine the perpetrators for the assassination of Rafiq Hariri and the incidents in Lebanon between 1 October 2004 and 12 December 2005, are only a few to mention.[26]

As portrayed in this brief historical excursus, the willingness and intention to create an International Criminal Court, even only on an *ad-hoc* basis, it not a new phenomenon. The need to publicly expose the terrible commission of crimes, to bring justice to the victims and to end impunity of those responsible for the most serious crimes in world history, even if Head of States, has a long history but started to be implemented only 50 years ago. Even though there are many critical aspects of the Nuremberg and Tokyo trials, this cannot conceal the fact that those Tribunals laid down the groundwork of the creation of the International Criminal Court. Furthermore, the creation of many different Human Rights Doctrines over the past 50 years and the establishment of the two *ad-hoc* Tribunals, ICTY and ICTR, by the SC acting under Chapter VII, manifested once more the need for a permanent criminal entity, which not only enforces respect for those rights by prosecuting the perpetrators violating them but which will at the same time contribute to the prevention of such crimes.[27] *Kofi Annan* anchored this expectation at the ceremony for the opening of signatures of the Rome Statute in saying: "The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law".[28]

[24]See Homepage of the International Criminal Court, State Parties to the Rome Statute, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (Last accessed 07 Dec 2017).

[25]See Shaw (2017), p. 305 et seq.

[26]See Shaw (2017), p. 305 et seq.; Cryer et al. (2014), p. 188 et seq.

[27]See Cassese (2009), p. 123.

[28]Annan (1998), p. xiii.

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Chapter 3
Intention and Structure of the ICC

In conformity with the historical excursus, the present chapter will briefly describe the specific intention of creating an institution like the ICC. Apart from the determination of the core principles, the structure as well as the key characteristics of the Court will be highlighted.

I. Intention

With the foundation of the International Criminal Court and the adaption of the Rome Statute

> [A] clarion call has gone out to potential perpetrators of unspeakable atrocities that the world is not going to stand silently and watch the commission of outrageous violations of international law, such as genocide or crimes against humanity. The world has decided that 'enough is enough'.[1]

For this purpose, 160 States, 33 intergovernmental organizations and 236 nongovernmental organizations participated at the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" in Rome in 1998 and with the above mentioned words, the Chairman of the Committee *Kirsch* spoke out, what ultimately 120 States decided to change.

The creation of the ICC will not be a patent remedy against the "ills of humankind", but as *Bassiouni* further stated

> it can help avoid some conflicts, prevent some victimization and bring to justice some of the perpetrators of these crimes. In doing so, the ICC will strengthen world order and contribute to world peace and security.[2]

[1] Kirsch (1998), p. xix.

[2] Bassiouni (1998), p. xxi.

S. Babaian, *The International Criminal Court – An International Criminal World Court?*, https://doi.org/10.1007/978-3-319-78015-3_3

These expectations are anchored in the Preamble of the Rome Statute which determines that

> "the most serious crimes of concern to the international community as a whole must not go unpunished and [that] their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"- [. . .] -"to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes."

For the implementation of these core values of the Court, the ICC is surrounded by three main principles: the principle of complementarity, the principle to deal only with the most serious crimes of international concern and the principle of legality.[3]

The principle of complementarity constitutes one of the most important maxim of the Statute, despite the fact that the Court was also established as an answer to the failures and omission of national courts to prosecute those responsible for international crimes[4]; the problem that the perpetrators of those offences were in most of the cases State officials who acted "with support, connivance or at least acquiescence of the whole state apparatus or at least segments of it", constituted a perpetual obstacle.[5]

This principle manifests the maintenance of national sovereignty and respects the integrity of States. As propounded in article 1 and 17, the ICC is only intended to supplement national jurisdiction which means that the Court only has jurisdiction in case the State is unwilling or unable to carry out the investigation or prosecution. The ICC has therefore to be seen as a Court of last resort.[6] Moreover, also with regard to the effectiveness of criminal proceedings, in gaining evidence, in arresting the accused persons or in summoning witnesses, national courts will be the appropriate institutions.[7] So the principle of complementarity grants the Court an additional monitoring function, in putting pressure on national courts to punish the perpetrators themselves.

The second and the third principle are closely related. The ICC has only jurisdiction over the most serious crimes listed in article 5 of the Rome Statute. The limitation of jurisdiction up to just four crimes was, with regard to the credibility and effectiveness of the Court, of paramount importance to circumvent an overloading of "cases that could be dealt with adequately by national courts".[8] Moreover, with the concentration on only four crimes, the Court should compose a unique and stringent jurisprudence, which is also with regard to customary law greatly important.[9]

To comply with the principle of legality and to prevent former failures of the *ad-hoc* Tribunals with regard to this, the Elements of Crimes were not only exorbitantly detailed to avoid uncertainties but tried to remain within the realm of

[3] See Arsanjani (1999), p. 24; Sok Kim (2007), p. 12.

[4] See Sok Kim (2007), p. 11.

[5] Cassese (2009), p. 124.

[6] See Cryer et al. (2014), p. 154.

[7] *Idem,* p. 154.

[8] Arsanjani (1999), p. 25.

[9] *Idem,* p. 25.