The impact of the International Criminal Court's establishment on the further and future development of the crimes within its jurisdiction.

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Abstract

This thesis explored how the establishment of the ICC has had an impact on the development of the crimes within its jurisdiction as well as how it may have a bearing on their further and future development. Development referred to any law-making, whether codification, progressive or even retrogressive development, which may take place on the scope of the crimes as a result of the Court's creation. Research focused on the Rome Statute's negotiating history, first Review Conference and the Court's early jurisprudence. The work undertaken was necessarily forward-looking, largely determined by ongoing events.[1]

The ICC's law-making potential not fixed. It is influenced by events, decisions and omissions, some which are often external to and completely beyond the Court's control. While certain developments could have been anticipated by examining the Rome Statute's negotiating history, others could not have been foreseen before the Court became operational. Nevertheless, these developments, both anticipated and unanticipated, can impact the crimes' development. The ICC 'in action' will continue to 'make' law. It will do so in manners which have yet to arise. Significantly, this thesis ascertained how the ICC's law-making potential is unique and particular to the Court. This quality stems from the ICC's negotiating history and its outcome and it relates both to the crimes' definitions and the wider legal framework established by the Rome Statute.

The Court's quality as the first permanent international criminal tribunal with a non-situation specific mandate forms an indispensable part of its evolving law-making potential. As the Court becomes involved in more situations its law-making potential will become more dependent on its work in practice. Owing to the Rome Statute's quality as a law-making treaty, the backdrop for assessing developments under customary international law, are the ICC crimes' definitions.

[1] The temporal endpoint of this thesis is 1 June 2015.

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Contents

Chapter 1: Introduction

1.1 Outline of research question

The question posed by this thesis is how the establishment of the International Criminal Court ('ICC' or 'Court') has had an impact on the development of the crimes within its jurisdiction as well as how it may have a bearing on their further and future development. Why does this question merit examination? The correlation between the establishment of international criminal courts and the development of norms of international criminal law ('ICL') was also relevant in earlier initiatives such as the *ad hoc* tribunals of former Yugoslavia and Rwanda. This thesis argues that the relationship between the establishment of an international criminal tribunal and the development of the crimes within its jurisdiction is of a different law-making potential in the case of the ICC. This distinction stems from the particularities of the process by which the Rome Statute of the International Criminal Court ('Rome Statute' or 'Statute') was negotiated and adopted as a law-making instrument and from the results of this process.

The ICC's law-making potential is derived from a number of factors which were either absent or non-inexistent in past endeavours. Moreover, already existing factors have acquired a different potential. Thus, the combination of these factors is unique and particular to the case of the ICC and when taken together they endow the institution of the ICC with law-making potential. These factors determine the structure of this thesis as well as the selection and content of its chapters. An outline of the factors is as follows: the codification of the crimes of genocide, crimes against humanity ('CaH') and war crimes ('WC') at the Rome Conference and their interpretation by the Chambers (chapters 2, 3 and 4);[1] the role accorded to the United Nations Security Council ('UNSC') under the Statute and the relevant practice thus far (chapter 5); the work undertaken by the Office of the Prosecutor ('OTP') and the Chambers and the results of their interaction in the evolving case-law (chapter 6);[2] the contribution of the Assembly of States Parties ('ASP') in effecting changes to the Court's material jurisdiction and an assessment of the Statute's first Review Conference in 2010 ('Review Conference') (chapter 7).

[1] An examination of the definitions of the crimes is undertaken in conjunction with an inquiry into the meaning and significance of the Elements of Crimes as well as their relationship with the definitions of the crimes as contained in articles 6, 7 and 8.

[2] While the interaction between the Chambers and the OTP in carrying out their mandate is not a novel feature *per se* in the context of international criminal justice, this relationship has acquired a different potential in relation to the ICC (chapter 6).

The factors mentioned above have been chosen and included in this thesis because of their contribution to the ICC's law-making potential. Nevertheless, these factors do not necessarily augment the Court's law-making potential. Depending on the circumstances, they may limit the ICC's capacity to develop the crimes within its jurisdiction. Moreover, it is not always easy to perceive how they interact. Some of them at times may appear to be irreconcilable or to cancel each other out. They do not have the same nature, some of them being political or legal while others encompass both legal and political traits. Thus, the contribution of each factor identified above needs to be carefully scrutinised in the following chapters. The last chapter of this thesis, chapter 8, will present my findings as to the ICC's overall law-making potential.

In the following chapters I will elaborate on each factor in order to illustrate how they relate to answering my research question. In this chapter I will examine what the establishment of the Court *per se* has entailed as an occasion of law-making. In this respect, I will consider the meaning of 'law-making' in the context of adopting the Statute as a multilateral treaty. This inquiry will enable me thereafter to elaborate on the notion of law-making potential which is of central importance to answering the research question as to how the establishment of the ICC will affect the development of ICC crimes. Thus, here it is pertinent to explain briefly what development of ICC crimes signifies for the purposes of this study.

1.2 What does *development* of ICC crimes signify for the purposes of this study?

Development for the purposes of this thesis relates to any law-making whether in the form of explicit codification in the Statute and/or implicitly via judicial pronouncements in the Court's evolving case-law as a result of which the ICC crimes may develop. The benchmark to be employed for this comparison is the status and content of the ICC crimes under the relevant international instruments and customary international law ('CIL') at the time of their inclusion in the Statute. Thus, in the context of this thesis development has a substantive law character.

Initially I will focus on the scope of the crimes as encapsulated in the Court's Statute. I hypothesise that the scope of ICC crimes as these were finally incorporated in the Statute will in turn influence the future and further development not only of ICC crimes but also of ICL given that the ICC and the crimes within its jurisdiction form part of ICL. Notwithstanding that the ICC has been adopted as part of a multilateral treaty, its role in the development of international crimes will not take place in isolation from developments in ICL. Subsequently, I will scrutinise how the ICC crimes have been interpreted in the Court's early case-law and how these crimes may be amended pursuant to the

procedure prescribed by the Statute. Development for the purposes of this study is a continuously evolving process.

1.3 Significance of undertaking this study

The study's contribution lies in ascertaining the extent to which the ICC, in its capacity as the first permanent international tribunal is to be seen as a "norm entrepreneur" articulating and reinforcing norms of substantive ICL.[3] This argument involves determining whether the crimes which have been included in the Statute have been placed on a different track in terms of their substantive law development compared to the crimes which have been left outside. An underlying theme of the thesis is the impact that any development of ICC crimes may have on the status of these crimes under CIL. Despite attempts to disconnect developments under the Statute from CIL, and vice versa, this is not possible.[4]

Development of the ICC crimes will have a bearing as to which individuals may be tried before the Court. Notably, one of the Court's primary objectives is to try the perpetrators of the worst international crimes which are a concern to the whole international community.[5] Moving to the wider context, as a permanent institution the ICC is expected to be the most authoritative reference point at any given point in relation to the state of the jurisprudence as well as any developments on the scope of the crimes.

As the *ad hoc* tribunals are pursuing a winding down and completion strategy, the ICC is expected to take the lead and build upon their jurisprudence in the development of international crimes. The *ad hoc* tribunals have been instrumental for the 'revival' of ICL. For almost two decades their case-law has been referred to extensively by government officials, practitioners, scholars, activists and others. Now, the ICC has been assigned the most fully-fledged body of ICL rules to date. Moreover, its permanent and non-situation specific character points towards continuity in its jurisprudence which can be expected to add value and weight to its judicial pronouncements.

[3] Rudolph C., Constructing an Atrocities Regime: The Politics of War Crimes Tribunals, vol.55(3) *Int'l Org.* (2001) 655, p.681.
[4] See section 1.9.
[5] Rome Statute of the International Criminal Court, Preamble, paras 4 & 5 <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> ('Rome Statute')

1.4 Law-making in international law

1.4.1 Choice of theoretical framework explained

To understand the ICC's law-making potential it is necessary first to explain the meaning of law-making itself. Significantly, law-making is a controversial concept.[6] This is highlighted by the numerous theoretical approaches which purport to explain the field of international law ('IL') and how IL is made.[7] Moreover, the increasing importance of non-State actors in the international arena challenges the State-centric and consent-based approach that most theories of IL take.[8]

In this thesis I am interested in the creation of legally binding norms entailing individual criminal responsibility as well as any changes to already existing norms as a result of the ICC's establishment. Thus, legal positivism forms the basis of this thesis' theoretical framework where the focus of my inquiry necessarily rests on the formal sources of IL as these are found in article 38(1) of the ICJ Statute.[9] This is because they constitute "one of the most important general concepts […] which deal with certain authoritative procedures of law-making provided by the international legal system."[10]

The weight accorded to the notion of formal sources of law is highly controversial not least because of arguments in the literature that IL is undergoing a deformalisation by moving away "from formal law-ascertainment and the resort to non-formal indicators to ascertainment legal rules."[11] However, despite the diversification of law-making and law-ascertainment of IL, the significance of treaties for the creation of obligations under treaty and possibly as a consequence under CIL has not diminished. In fact, "treaties have emerged as principal vehicles for the codification of existing customary law."[12]

Hence, in order to understand the ICC's law-making potential it is necessary to perceive the process by which the Court was established for what it is, that is, a law-making exercise for the establishment of an international criminal court by the adoption of a multilateral treaty. While legal positivism is not without its limitations, it is the theory which is best suited for the purposes of this thesis for offering an authoritative procedure of law-making via the employment of the concept of sources of law. Only by approaching the treaty which adopted the Statute within a strict contractual sense can we

[6] Danilenko G.M., *Law-Making in the International Community*, Developments in International Law, Volume 15 (Martinus Nijhoff Publishers 1993), p.5.
[7] Ratner S.R. and Slaughter A-M, Appraising the Methods of International Law: A Prospectus for Readers, vol.93 *AJIL* (1999) 291, p.203.
[8] Biersteker T.J. *et al.* (eds), *International Law and International Relations: Bridging theory and practice*, Contemporary Security Studies (Routledge 2007), p.16.
[9] Statute of the International Court of Justice, article 38 <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>
[10] Danilenko, supra n.6, p.24.
[11] D'Aspremont J., The Politics of Deformalization in International Law, vol.3 *GoJIL* (2011) 503, p.507.
[12] Danilenko, supra n.6, p. 47.

appreciate its "extra-contractual effects."[13] The adoption of the Statute brought into play or enhanced certain aspects of ICL, each of which may be traced to particular provision(s) in the Statute. These have been identified in section 1.1 as the factors which when considered together constitute the ICC's law-making potential. Moreover, by looking at the process by which the Statute was adopted I will consider the ICC's law-making potential beyond particular provisions. In this respect, I will examine whether the Statute could be identified as a so-called 'law-making treaty'[14] and whether the mode of the negotiations, participants involved and subject-matter under consideration may have a role to play in this respect.

1.4.2 Legal positivism: the theoretical framework explained

From a legal positivist perspective, all legal norms are derived from treaty and CIL. In this respect, positivist analysis remains an indispensable tool in identifying whether a State might be under a legal obligation, either through treaty or custom.[15] Identifying precise legal obligations is particularly pertinent for the purposes of criminal law where principles such as *nullum crimen sine lege* are designed to protect the accused from unfair prosecution.

Nevertheless, a purely formalist approach to law-making "may result in only a partial picture of the law-making process as it is accepted in the actual practice of the international community."[16] Thus, I will not restrict myself to a strict legal positivist approach by examining exclusively the 'law in the books' through a formalist and black letter lens.[17] Rather, I will undertake a broader study of law-making "with a much closer attention to legal policies of states which influence the actual operation of the formal sources."[18]

A broader approach to law-making is also consistent with the growing participation in contemporary multilateral treaty-making of actors other than States, such as non-governmental organisations ('NGOs'), transnational advocacy networks, global economic players and the media. Notably, the establishment of the ICC took place in the context of an unprecedented participation of non-State actors. Given that the theory has traditionally viewed States as the only authors of IL, the question raised is whether this development negatively impacts on the appropriateness of the theory to explain

[13] Jennings R. and Watts A (eds), *Oppenheim's International Law: Volume 1 Peace* (9th edn OUP 2008), p.1205, § 583 ('Oppenheim').
[14] Ibid.
[15] Sriram C.L., International law, International Relations theory and post-atrocity justice: towards a genuine dialogue, vol.82(3) *Int'l Aff.* (2006) 467, p.471.
[16] Danilenko, n.6, p.6.
[17] Twining W., *General Jurisprudence, Understanding Law from a Global Perspective* (CUP 2009), p.25.
[18] Danilenko, supra n.6, p.6.

the establishment of the ICC. This is not the case since a modern approach to positivism has recognised the growing importance of non-State actors and that the law is not independent of its context.[19] While the contribution of non-State actors in the law-making process must be acknowledged they are still strictly speaking not to be considered as authors of IL by reason of their exclusion from the voting process. Notwithstanding the powerful influence of the NGOs during the drafting process, the successful conclusion of the negotiations could not have been possible but for the converging to the greatest extent possible of widely divergent State interests. In the end, it was the vast majority of participating States who voted to adopt the Rome Statute by dint of the compromises incorporated in the final text. Hence, the adoption of the Rome Statute largely adheres to the positivist conception of States as the only authors of IL.

Legal positivism is an appropriate theory to explain my focus in subsequent chapters on the decisions of the ICC. Judicial decisions are characterised by article 38(1)(d) of the ICJ Statute as "subsidiary means for the determination of rules of law." Strong authority supports the argument that judges do not have the power to make new law.[20] Hence, what is the significance of judicial decisions in the development of legal rules? The answer is to be found in the judges' role in the interpretation of such rules and the nature of ICL. As a body of law, ICL has traditionally consisted of rules, whether of customary or treaty law origin, which were to a large extent not suitably defined for the purposes of individual criminal responsibility. The contribution of the courts to the identification and clarification of international criminal rules was of crucial importance precisely because of "the indeterminacy and consequent legal uncertainty" which has characterised the field as a whole.[21] Thus, judicial decisions despite their formal status as 'subsidiary means' have a role to play as a source of law.[22] Notably, the argument has been raised that where judicial decisions are "used as evidences of customary international law […] they are more appropriately considered under Article 38(1)(b), rather than Article 38(1)(d)."[23]

Judicial interpretation encompasses a creative element "in adapting rules to new situations and needs" provided that the development takes place "within the parameters of permissible interpretation."[24] The 'parameters of permissible interpretation' refer to a concept which is also closely related to legal positivism, that is, the principle of legality. This principle is of central importance for the purposes of

[19] Simma B. and Paulus A., The responsibility of individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, vol.93 *AJIL* (1999) 302, p.306.
[20] Jennings R.Y., The Judiciary, National and International, and the Development of International Law, vol.45 *ICLQ* (1996) 1, p.3; Shahabuddeen M., *Precedent in the World Court* (CUP 1996), p.77.
[21] Cassese A., *International Criminal Law* (2nd edn OUP 2008), p.42.8
[22] Jennings, n.20, pp.3-4.
[23] Borda A.Z., A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals, vol.24(2) *EJIL* (2013) 649, p.657.
[24] Jennings, n.20, p.3.

this thesis because it purports to constrain judicial interpretation within the remits of *existing* law. In other words, "a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission."[25] Significantly, after WWII the *nullum crimen sine lege* principle was incorporated in various human rights and humanitarian law treaties. At the same time, the corpus of ICL underwent an expansion by the adoption of various treaties which criminalised particular types of conduct. Subsequently, the courts clarified key concepts, setting out the objective and subjective elements of crimes. [26] As a consequence, "the doctrine of substantive justice […] was gradually replaced by that of strict legality."[27] Thus, in assessing the ability of the ICC to develop the crimes within its jurisdiction it is necessary to consider the principle of legality, in particular *nullum crimen sine lege.*

There is no question that the principle *nullum crimen sine lege* does not bar progressive development of the law through interpretation and this is supported by a number of cases.[28] Judicial interpretation is consistent with the principle "provided that the resulting development is consistent with the *essence of the offence* and could be reasonably be foreseen."[29] Significantly, the ICC is "the first international tribunal to explicitly contain provisions relating to the different components of the principle of legality."[30] The principle of legality in the ICC is found in articles 22 (*nullum crimen sine lege*), 23 (*nullum poena sine lege*) and 24 (non-retroactivity *ratione personae*). Thus, it may be argued that "[t]he ICC Statute constitutes in that respect, at least in theory, what appears to be a perfect embodiment of the principle of legality in its various components."[31]

While judicial interpretation has played a particularly critical role in the development of ICL norms it is not without its limits. Significantly, these limits have been changing alongside the concomitant gradual evolvement of ICL towards a more fully-fledged body of law. The Rome Statute constitutes a significant leap forward both in terms of the elaborate definitions of the crimes but also as regards its unprecedented focus on the principle of legality. The pertinent question here is the extent to which the strict legalism which characterises the definitions of the crimes may hinder the development of the ICC crimes via judicial interpretation. The elaborate definitions of the crimes signify that the ICC will not be able to undertake the broad interpretative approaches pursued by the *ad hoc* tribunals. Nevertheless, the adopted definitions themselves represent a significant advance as to how the

[25] *Aleksovski* (IT-95-14/1-A), 24 March 2000, para.126. See also: *Delalić* (IT-96-21-A), 20 February 2001, para.173.
[26] Cassese (2008), n.21, p.40.
[27] Ibid.
[28] See generally: Shahabuddeen M., Does the Principle of Legality Stand in the Way of Progressive Development of Law?, vol.2 *JICJ* (2004) 1007.
[29] C.R. v UK, Judgment, 22 November 1995, A335-C, para.34 (emphasis added). See also: S.W. v. UK, Judgment, 22 November 1995, para.36; *Ojdanić* (IT-99-37-AR72), 21 May 2003, para.38.
[30] Jacobs D., Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories in d' Aspremont J. and Kammerhofer J. (eds), *International Legal Positivism in a Post-Modern World*, p.16 (CUP forthcoming).
[31] Ibid.

elements of the crimes are understood and consequently proven. At the same time, one must not forget the nature of the ICC as a permanent penal institution involved simultaneously in a number of situations exhibiting different characteristics. This aspect is expected to have an impact on the gradual elaboration and development of the crimes by means of judicial interpretation.

Although the Rome Statute is a highly legalised instrument its nature is still dominated by substantive justice considerations. As a result, the Statute's strict legalism is in conflict with the treaty's object and purpose, which at least from a substantive justice perspective, calls for a teleological interpretation of the crimes.[32] A teleological interpretation of the crimes is further supported by the Rome Statute's qualification as a law-making treaty.[33] The prominent status accorded to the principle of legality necessitates an assessment as to the appropriate interpretative approach for the ICC crimes. In section 3.6.2.4 I will discuss the extent to which the principle of legality, in particular *nullum crimen sine lege*, can be reconciled with the general rule of interpretation found in article 31(1) of the Vienna Convention on the Law of Treaties ('VCLT').[34]

In order to explore the ICC's law-making potential it is necessary first to understand the Statute' negotiating history with a focus on the nature of the negotiations, the subject-matter under consideration, the participants involved and their approach towards the drafting exercise.

1.5 International law-making in context:

1.5.1 Negotiating history for a draft ICC Statute

The Statute's law-making potential is understood by its negotiating history. As it will be seen in the next sections, the manner and form by which the crimes were included in the Statute will have a bearing on their development. As stated above even legal positivists are now willing to accept that law is not independent of its context. Consequently, an important part of my research is devoted to the actual codification of the crimes of genocide, CaH and WC respectively.[35] The particularities which accompanied the Court's creation and the definitions of the crimes as these were finally included in the Statute will have an impact on the crimes' development because the Court's negotiating history put in place the foundations for the ICC's law-making potential.

[32] Stahn C., Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment, vol.12(4) *JICJ* (2014) 809, pp.815-816.
[33] See section 1.7.
[34] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 by the United Nations Conference on the Law of Treaties, United Nations Treaty Series (UNTS), vol. 1155, p. 331.
[35] The crime of aggression will be discussed when looking at the work of the ASP on the crime and its eventual adoption at the Review Conference. Thus, the crime will be dealt with separately in chapter 7. See also section 1.6 below.

The three crimes as these were finally incorporated in the Statute had already been the subject of codification in one form or another. However, the distinguishing factor here is the extent of their elaboration which refers not only to the detailed provisions eventually adopted but also to the different forums where the discussions were held. This culminated to the Rome Conference which was one of the most inclusive codification undertakings ever to take place.[36] While the views of certain States certainly had greater impact that those of others, still the determination to reach agreement on the Statute, in general, and on the crimes' definitions, in particular, meant that the result was intended to reflect to the greatest extent possible the views held by the greatest number of States. Participants also extended to NGOs which in a very efficient manner turned attention to issues hitherto neglected by ICL. Hence, the procedure followed to adopt the Statute and the participants involved constitute the starting point of the Court's law-making potential on the scope of the crimes.

Sections 1.5.1.1 and 1.5.1.2 provide an overview of the negotiations that took place in different forums prior to the Rome Conference. Section 1.5.1.3 discusses the actual conference.

1.5.1.1 The Work of the International Law Commission

The International Law Commission ('ICL') in preparing a draft Statute for an international criminal court refrained from defining the crimes over which the Court would have jurisdiction stating that the Statute would be "primarily procedural and adjectival."[37] In any case it purported to put forward a proposal which would "satisfy the conflicting demands of political realism and legal principle."[38] In particular, it wanted to gain as much support as possible from the international community, especially from powerful States, while at the same time respecting basic principles of criminal law such as due process and *nullum crimen sine lege.* Thus, one of the ILC's guiding principles was that the future Court would have jurisdiction only over existing IL and treaties.[39] The ILC explicitly recognised this pragmatic approach by stating that "the preparation of the draft statute was, anyway, an unprecedented exercise in creative legislation for the Commission, one that needed to be tempered by

[36] The Rome Conference attended 160 States, 20 intergovernmental organisations, 14 specialised UN agencies, and a coalition of about 200 NGOs. See Lee R.S. (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999), p.14.

[37] Draft Statute for an International Criminal Court with commentaries, 1994, Report of the International Law Commission on the work of its 46th session, *YILC*, 1994, vol.II, Part Two, p.36 <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf>

[38] Crawford J., The Work of the International Law Commission, in Cassese A., Gaeta P., Jones J. (eds), *The Rome Statute of the International Criminal Court: A commentary*, vol.1A (OUP 2002), p.25 ('Cassese, Gaeta, Jones').

[39] Report of the Working Group on the Question of an International Criminal Jurisdiction, Report of the International Law Commission on the work of its 44th session, 4 May – 24 July 1992, A/47/10, Annex, para.4.

a strong sense of practicality."[40] This signified that from early on the drafters were well aware that the negotiations for an ICC were not a typical exercise of law-making in IL.

While, the ILC vacillated for some time whether it would limit the Court's jurisdiction to treaty crimes whilst excluding crimes under general IL, there was never any doubt that a limited core list of crimes under general IL would form part of the Court's jurisdiction *ratione materiae*, these being the crimes of aggression, genocide, CaH and WC. [41] In fact, "it seemed inconceivable to the [ILC] Working Group that [...] the international community would move to create an international criminal court without including [these] crimes...under the Court's jurisdiction."[42]

1.5.1.2 The Work of the Ad Hoc and Preparatory Committees

Once the Draft Statute for an ICC was adopted by the ILC in 1994 the United Nations General Assembly ('UNGA') proceeded to establish an *Ad Hoc* Committee ('AHCom') and later a Preparatory Committee to work on the draft with the intention of producing a generally acceptable statute to be negotiated at a diplomatic conference. The work in the AHCom could be seen to follow the traditional United Nations ('UN') multilateral treaty-making.[43] This meant that the negotiations reproduced the caucuses and consequently the politics of the UNGA.[44]

However, when the Preparatory Committee took over at the end of 1995 the negotiations quickly acquired a different quality and pace. Most importantly, the Preparatory Committee took the decision that both the Statute and the crimes' definitions would be prepared simultaneously. This was a monumental task considering the limited number of time available to the Preparatory Committee.[45] From here on the negotiators really started being faced with a number of factors which were particular to the ICC. Firstly, the Preparatory Committee had to put into practice the long-standing premise that the drafters had no mandate to undertake progressive development of IL and instead should restrict the Court's jurisdiction to crimes under CIL. The Preparatory Committee was faced with a very difficult task given that while the categories of crimes discussed were generally accepted to have acquired customary status they still lacked a precise definition under IL. Secondly, the Preparatory

[40] Report of the Working Group on the Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 46th session, 2 May – 22 July 1994, A/49/10, para.48.
[41] Crawford, n.38, pp.29-33.
[42] Report of the Working Group on a draft statute for an international criminal court, Report of the International Law Commission on the work of its 45th session, 3 May – 23 July 1993, A/48/10, Annex, p.110.
[43] Bos A., From the International Law Commission to the Rome Conference (1994-1998), in Cassese, Gaeta, Jones, n.38, pp.37-38.
[44] Washburn J.L., The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century, vol.11(2) *Pace Int'l L.Rev.* (1999) 361, p.364.
[45] Sadat N.S. and Carden S.R., The International Criminal Court: An Uneasy Revolution, vol.88 *Georgetown L.J.* (1999-2000) 381, p.422 ('Sadat and Carden').

Committee also had to deal with the political agendas of States as well as the growing participation NGOs.[46] By its third session, the Preparatory Committee had not only confirmed an earlier decision granting continuous access of NGOs to the plenary meetings but it also decided that informal working groups would be open to NGOs.[47] Moreover, the caucuses in the UNGA were side-lined by the Like-Minded Group ('LMG'). The LMG was a group of States which had been founded during the first session of the Preparatory Committee. The States involved shared common interests in relation to the ICC.[48]

The increased State and NGO interest in the negotiations was accompanied by a significant decision by the Preparatory Committee. The Preparatory Committee decided that no reports would be required regarding the last nine weeks of its work prior to the Rome Conference.[49] It was to concentrate on the actual text of the articles.[50] Whilst the decision was taken on grounds of expediency, it made it more difficult to identify the causal effects of legalisation that took place during this period. Importantly, this was the time during which the Preparatory Committee had to produce a consolidated version of the ICC Statute, including the definitions of the crimes. Notably, the Preparatory Committee's decision foreshadowed the important role to be played by informal as well as official meetings in the negotiations where a number of proposals put forward and adopted were the result of numerous bilateral and group discussions between diverse participants, both State and non-State.

1.5.1.3 The 1998 Rome Conference

The negotiations which took place during the Rome Conference were markedly different from traditional multilateral treaty-making. Unlike the highly formal events of the past which had been dominated by States, the ICC's establishment involved diverse participants where informal meetings proved as indispensable as the formal ones.[51]

It was to be expected that in order to encourage as many States as possible to join the ICC the codification process would result in a conservative rather than progressive set of norms.[52] Another predictable development was that the views of certain States were reflected to a greater extent than

[46] Ibid.
[47] Benedetti F. and Washburn J.L., Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference, vol.5 *Global Governance* (1999) 1, p.23.
[48] Washburn, n.44, p.367.
[49] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. 22, A/51/22, 1996, para.368.
[50] Bos, n.43, p.51.
[51] Washburn, n.44, p.375.
[52] Sadat L.N., *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers, Inc. 2002), p.261.

those of others. For example, the Rome Conference negotiations were dominated by the USA delegation as a consequence of which the Statute reflects its positions on many important issues.[53] Concessions were not only made to the USA but the Court's establishment was marked by concessions to great power interests where the process of legalisation underwent "softening" in order to mitigate the new regime's political contracting costs.[54]

The process of legalisation that took place at the Rome Conference moreover demonstrated a recent trend in ICL where key State actors insist upon precise and detailed provisions so as to limit the delegation of authority to the new institution.[55] The USA government was very persistent on this issue.[56] Ultimately, the negotiations resulted in a highly legalised institution with a narrowly defined jurisdiction. It may be argued that the manner by which this was achieved improperly politicised ICL.[57] However, there are important indications that the outcome of the Rome Conference should not be interpreted only through a realist lens. Notably, not all of the proposals put forward by powerful participants were adopted. Actually, the Statute also represented an occasion where less powerful States and NGOs worked together to achieve changes in international law-making in the face of forceful USA opposition.[58] USA frustration was exhibited by its last minute attempt to press for sweeping amendments to the text which resulted in the unequivocal rejection of its proposal by the vast majority of States.[59] This further demonstrated that while politics still hold sway over the legalisation of ICL, 'depoliticisation' of ICL is also taking place.[60] Such a development accords an important role to relevant actors beyond States such as NGOs, international officials, scholars etc.

As part of the inclusive character of the negotiations this research must take into consideration the "unprecedented level of integration of NGOs into the process of negotiations."[61] The effect of NGO involvement on the development of IL may be "empirically uncertain,"[62] yet, their considerable influence on the process and outcome in the drafting of the Statute cannot be denied. By the time of the Rome Conference the LMG had grown to more than 60 countries, which included a number of traditional USA allies, such as the UK and most European countries. Twenty more States sympathised

[53] Sadat L.N. and Scharf M.P. (eds), *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008), p.315.
[54] Rudolph, n.3, p.678.
[55] Brown B.S., Depoliticizing Individual Criminal Responsibility in Sadat and Scharf, n.53, pp.81-126, p.113.
[56] Abbott et al, The Concept of Legalization, vol.54 *Int'l Org.* (2000) 401, p.415.
[57] Sadat and Scharf, n.53, p.119.
[58] Boyle A. and Chinkin C., *The making of international law: Foundations of Public International Law* (OUP 2007), p.97.
[59] Committee of the Whole, Summary Record of the 42nd Meeting, 17 July 1998, UN Doc. A/CONF.183/C.1/SR.42, paras.20-31.
[60] Sadat and Scharf, n.53, p.124-126.
[61] Broomhall B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford Monographs in International Law (OUP 2004), p.73.
[62] Boyle and Chinkin, n.58, p.93.

with the LMG on most issues. [63] According to Benedetti and Washburn because this group "was the only one with an "operational strategy" it efficiently led the negotiations to their successful conclusion.[64] Importantly, the LGM came to form an alliance with the Coalition for an International Criminal Court ('CICC') during the Preparatory Committee meetings as a result of which the CICC became stronger. The CICC represents the best example of the power and influence exerted by NGOs during the negotiations. The CICC assisted the LMG during the Preparatory Committee sessions by preparing commentaries on basically every issue discussed. As a consequence, the CICC "helped the Like-Minded Group develop guiding principles to serve as the first unified "position" of the group before the diplomatic conference."[65] This alliance extended during the Rome Conference where the CICC accredited more than 200 NGOs.[66]

What were the results of the process by which the Statute was adopted on the formulation of the crimes within the Court's jurisdiction? As stated above, the drafters strived to remain as close as possible to the content of the crimes under CIL. However, identifying CIL is an arduous exercise which may not always be done with adequate precision in view of its unwritten character and contradictory evidence of State practice and *opinio juris*.[67] The formulation of the crimes as adopted owes a lot to the work of the *ad hoc* tribunals but their jurisprudence needs to be treated with a certain amount of caution for the purposes of this research.

The relevance of the case-law of the *ad hoc* tribunals needs to be qualified by a number of features which are particular to the Statute. For example, crimes under the Statute are much more detailed (with the exception of genocide); they are to be interpreted and applied for the first time in accordance with elements of crimes; they are to be interpreted by elaborate Criminal Principles of Law such as *nullum crimen sine lege* (Part III of the Statute); they are subject to new or reformulated threshold requirements (this is especially relevant to the CaH provision); and admissibility depends among others on the notion of gravity. The latter points stem to a certain extent from the fact that the Statute is targeted towards the prosecution of a particular class of crimes. Thus, a mechanism has been put in place to determine whether a particular conduct rises to a certain level in order to be admissible before the ICC. In this respect, in the next chapters I will not only examine whether the ICC crimes have deviated from CIL but also whether their orientation as categories of crimes has changed due to their formulation in articles 6, 7 and 8. Significantly, in addition to their actual codification in the Statute I will also look how the above features will have an impact on the scope of ICC crimes in the Court's

[63] Washburn, n.44, pp.367-369.
[64] Benedetti and Washburn, n.47, pp.30-31.
[65] Ibid, p.23.
[66] Washburn, n.44, pp.367-368.
[67] Boyle and Chinkin, n.58, p.163.

evolving case-law. Another novel feature of the Statute is the ASP. While this will be discussed in detail in chapter 7 I will highlight in the next section the innovative nature of this organ and its importance in providing the ICC with an explicit law-making power.

1.6 Law-making by the Assembly of States Parties

The ASP is a unique body in the context of international tribunals. Following the exercise of prescriptive jurisdiction in Rome it is responsible for the further exercise of such jurisdiction. As a result, the Court's material jurisdiction is not a self-contained body of law but may be amended by a decision of the States Parties at a regular session of the ASP or a Review Conference. Thus, the ASP can be characterised among others as being a legislative assembly of sorts.

For the purposes of this research, the ASP constitutes an alternative more political route, 'outside' the Court, through which the crimes' scope may be amended. In this way the States Parties have a continuous say on the Court's material jurisdiction. As a counter-balance to a potential monopoly by the ASP in amending the scope the crimes, and in a manner reminiscent to the way negotiations took place at the Rome Conference, a wide range of actors are given a voice but not a vote at the ASP.[68] States which have signed but not ratified the Statute may be represented as observers.[69] The continuous engagement of non-States Parties with the ICC constitutes an implicit recognition that with or without their participation IL continues to be made.[70] Moreover, the presence of NGOs is particularly mentioned in its Rules of Procedure.[71] In fact, NGO participation has not abated. This is illustrated by the CICC involvement in promoting the successful implementation of the Statute[72] and its extensive activity at the Review Conference.[73]

The ASP's potential impact on the ICC crimes became evident even before the Statute had entered into force. The Final Act of the Rome Conference established a Preparatory Commission ('PrepCom') which was mandated among others to prepare draft texts of the Elements of Crimes ('EoC').[74] During the Rome Conference the USA proposed that binding elements of crimes should be adopted as part of

[68] Rome Statute, n.5, article 121(7).
[69] Ibid, article 121(1).
[70] Mc Whinney E., Contemporary Law and Law-Making, vol.40(3) *Int'l J.* (1985) 397, pp.421-422.
[71] Rules of Procedure of the ASP, ICC-ASP/1/3, rule 93 <http://www.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Compendium.3rd.08.ENG.pdf>
[72] Boyle and Chinkin, n.58, p.73.
[73] Review Conference of the Rome Statute, *Coalition for the International Criminal Court* <http://www.iccnow.org/?mod=review>
[74] Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc.A/CONF.183/10, 17 July 1998, Resolution F.

the Statute.[75] Such a proposal was opposed because it would delay the negotiations and it was considered more appropriate to leave to the Court the establishment of the elements in order not to unduly bind the Court beforehand by these elements.[76] The compromise solution reached in the end was that elements would be adopted after the Conference as a non-binding document. [77] According to article 9 the EoC "shall assist the Court in the interpretation and application" of the ICC crimes.

The EoC as adopted refer to the crimes according to their "material" and "mental" elements.[78] Terminologies from old treaties, such as 'declaring that no quarter will be given' are explained in plain and clear language. Thus, it may be argued that by creating "a consistent framework with consistent and modern terminology" the EoC made a valuable contribution in clarifying many aspects of the crimes.[79]

To what extent has this modernising exercise had an impact on the scope of ICC crimes? Prior to their finalisation many States were concerned that they would be used to inappropriately restrict or broaden the application of the crimes.[80] Even if the EoC do not appear to diverge from the Statute their elaboration has an effect on the way the constituent elements of a crime are to be understood and consequently proven in a given case. The EoC are not binding and may be disregarded. However, the Court's early case-law has demonstrated that the Chambers are not expected to conclude easily that there is an "irreconcilable contradiction" between the crime's statutory definition and the EoC.[81]

Following the entry into force of the Statute the most relevant aspect of the work of the ASP, for the purposes of this thesis, relates to the 2010 Review Conference. According to Schabas the amendments agreed at the Review Conference "represent a singular achievement that confirms the continuing dynamism of the Court." [82] At a minimum, the Court's first Review Conference has demonstrated that the amendment route is a workable one in practice. To this effect, the crimes within the Court's jurisdiction may be amended and developed by the ASP. The question which arises is what kind of law-making might be expected via this avenue? This will be answered in chapter 7. For the moment it suffices to say that the ICC's law-making potential is enhanced by the ASP.

[75] USA proposal, A/CONF.183/C.1/L.69, 14 July 1998.
[76] Bos, n.43, p.56.
[77] Kirsch P. and Oosterveld V., The Post-Rome Conference Preparatory Commission, in Cassese, Gaeta, Jones, n.38, p.97.
[78] "Material" elements were understood to consist of "conduct," "consequences" and "circumstances."
[79] Kirsch, n.77, p.97.
[80] Ibid, p.99.
[81] *Bashir* (ICC-02/05-01/09-03), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para.128 ('Bashir First Arrest Warrant Decision').
[82] Schabas W.A., *An Introduction to the International Criminal Court* (CUP 4th ed. 2011), p.146.

1.7 Assessing the Rome Statute as a law-making instrument

In this section I will consider the Statute's quality as a 'law-making treaty.' This concept has been invoked in the literature to distinguish law-making treaties from 'contractual treaties.' Law-making treaties are sometimes also referred to as 'normative treaties.'[83] The notion of law-making treaties presents a number of challenges. To start with, not only it is difficult to distinguish between the two types of treaties but also a treaty can be both law-making and contractual.[84] Significantly, strictly speaking all treaties are law-making as regards the parties to them.[85] Moreover, the law of treaties focuses on the form of treaties rather than their content and does not distinguish between different types of treaties.[86]

Nevertheless, the notion has practical importance especially if we focus less on the form of a treaty and more on its substance.[87] As I stated above, in section 1.4.1 in order to appreciate the Statute's law-making potential it is appropriate to first approach the instrument as a contractual treaty and from there to see whether it has characteristics which "establish for some treaties an influence far beyond the limits of formal participation in them."[88] According to Oppenheim factors such as "extensive participation in a treaty, coupled with a subject matter of general significance and stipulations which accord with the general sense of the international community […] give such a treaty something of the complexion of a legislative instrument, and assist the acceptance of the treaty's provisions as customary international law in addition to their contractual value for the parties."[89] Undeniably, the treaty which adopted the Statute reflects the above characteristics. Importantly, such an approach does not contradict legal positivism because the qualification of a treaty as a law-making treaty does not entail the instantaneous acceptance of any of its provisions as custom but demonstrates a potential towards such direction.

At this point it is necessary to consider the question of the interpretation of law-making treaties. According to Brölmann "[a] special treatment of normative treaties is visible more than anywhere in the field of interpretation."[90] She argues that law-making treaties tend to be interpreted in a teleological manner in accordance with their object and purpose rather than the will of the parties.[91] Jacobs views the broad interpretation based on the object and purpose of the Statute as being in

[83] Brölmann C., Law-Making Treaties: Form and Function in International Law, vol.74 *Nord.J.Int'l L.* (2005) 383, p.388.
[84] Danilenko, supra n.6, p.47.
[85] Oppenheim, supra n.13, p.32.
[86] Brölmann, supra n.83.
[87] Ibid, p.392.
[88] Oppenheim, supra n.13, p.1204, § 583.
[89] Ibid.
[90] Brölmann, supra n.83, p.393.
[91] Ibid.

tension with the rule of strict interpretation in order to safeguard the rights of the accused.[92] Thus, in the next chapters I will examine the extent to which the Court's early case-law reveals a trend of interpreting the Statute having regard to its object and purpose and whether this is done in a way which respects the principle of legality.

The Statute's jurisdictional regime has been also referred to in order highlight the instrument's 'extra-contractual' significance. Notably, the importance of the Court's jurisdictional regime, found in Part Two of the Statute, is demonstrated by the fact that it remained a threat to the viability of the Statute throughout the negotiations. The Bureau of the Conference decided early on that unlike the other parts of the Statute the issues involved in Part Two were too divisive to be delegated for discussion at the coordinator-working group level. Thus, all discussion on Part Two was restricted to the plenary sessions of the Committee of the Whole.[93]

While the Rome Statute was adopted in the same manner as other multilateral treaties, the law-making which took place in Rome is not adequately explained solely with reference to treaty-making. According to Sadat and Carden, to the extent that the Court's jurisdictional regime was adopted by "quasi-legislative" process where the international community "legislated" by a non-unanimous vote, the political legitimacy of the jurisdictional norms is not founded on traditional treaty-making in a contractual sense.[94] Rather, the Court's jurisdictional regime was formulated on the basis of "transformative redefinitions" of jurisdictional principles under IL. What had previously been a case of determining 'which State' has jurisdiction in a particular situation has been transformed into norms that "establish under what conditions *the international community,* or more precisely the States Parties to the Treaty, may prescribe international rules of conduct, may adjudicate breaches of those rules, and may enforce those adjudications."[95] In effect, the application of prescriptive jurisdiction by the international community at Rome is premised on the exercise of "universal international jurisdiction."[96] The novelty of the process by which the Rome Statute was adopted is further confirmed by the possibility to apply the Statute to the entire world via the UNSC referral mechanism. Thus, the Rome Conference was a constitutional moment in international law-making which cannot rest on normal treaty-making.[97]

The authors' view may seem bold but does serve to highlight that the process by which the Statute was adopted and the results of this process have endowed the ICC with a "*potentially* transformative"

[92] Jacobs, supra n.30, pp.33-34.
[93] Washburn, n.44, pp.368-370.
[94] Sadat and Carden, n.45, pp.390-391.
[95] Ibid, p.406.
[96] Ibid, p.458.
[97] Ibid, p.390.

quality.[98] This argument is also supported by "a more conservative and evolutionary" conceptualisation of prescriptive jurisdiction than the one proposed above.[99] According to Gallant, defining the crimes in the Statute represented an evolution in the making of ICL because of the quasi-legislative, non-unanimous process by which they were adopted.[100] Further, such jurisdiction "develops the traditional understanding by recognizing that international organizations- specifically, the ICC and the Security Council-have some prescriptive authority."[101] However, States are still primarily responsible for the making of ICL. Moreover, the UNSC's prior practice of establishing international criminal jurisdiction by the establishment of the *ad hoc* tribunals means that "the process of prescription by Council referral is not a major break in the international lawmaking tradition."[102]

1.8 Methodology informing the study

1.8.1 Temporal scope of the thesis

Before proceeding to discuss the methodology of my work I will set out the temporal scope of the thesis. Locating the research in its time-period facilitates the choice of methodology and evidence used in this respect.

The research centres around three chronological markers/periods: the background to the adoption of the Statute in 1998; the period between its adoption and the Statute's first Review Conference in 2010 in Kampala; and the aftermath of the Review Conference. Hence, the thesis is forward-looking and it is interested on the impact of the ICC post-1998. Thus, chronologically the thesis is effectively set from 1998 onwards and to a considerable extent is to be influenced by current and ongoing events. Therefore, current affairs will be constantly followed. This will include newspapers, as well as press releases issued by the Court itself and other ICC organs, in particular the OTP and the ASP, as well as relevant NGOs. Lastly, the position of key actors; such as that of the UNSC and particular of its five permanent members, States Parties and non-States Parties to the ICC, the African Union ('AU') will be examined to discern their input in the form of public pronouncements, declarations, decisions, reports etc.

[98] Ibid, p.313.
[99] Gallant K.S., Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts, vol.48 *Vill.L.Rev.* (2003) 763, p.792.
[100] Ibid, p.830.
[101] Ibid, p.792.
[102] Ibid, p.830.

1.8.2 Methodology

In order to comprehend how the ICC's establishment will affect the scope of ICC crimes[103] I will examine the scope of the crimes under CIL and compare this with the scope of the crimes under the Statute and see how this interaction plays out in the Court's early jurisprudence. In this respect, my research will focus on the study and interpretation of primary sources which embody the scope of these crimes. Thus, the methodology pursued throughout the thesis will primarily involve doctrinal legal research.

1.8.3 Primary Sources

The following primary sources have been identified as the most important ones in initiating and developing the research question: the Court's Statute and the EoC and any amendments adopted at the Review Conference, as well as the judgements and decisions handed down by the Court thus far. These are the most important sources as they reflect the textual content of each crime (in the Court's Statute) and its application and interpretation (in the Court's decisions).

Other primary sources that form part of my investigation which are of lesser importance but which are still relevant to the extent that they contribute to elaborating the scope of the crimes under IL include the jurisprudence of the *ad hoc* tribunals and relevant national case-law. Furthermore, as regards crimes which are also to be found in treaties, I will be examining the relevant treaties, together with any amendments, travaux préparatoires etc.

1.8.4 Secondary sources

In addition I examine a range of secondary sources. The OTP has issued a number of papers on the main policy and strategy issues which inform its work in selecting cases for preliminary investigation, in taking the decision to proceed with an application for the authorisation of investigation by the Court, in giving its own understanding of provisions from the Statute which are directly relevant to its work. Even though such a material is not binding it may well have an impact on the direction to be taken by the Court, either as being incorporated in its judgements or by shaping future prosecutorial strategy. Therefore, the material issued by the OTP must be thoroughly scrutinised and followed.

I will also consider the documentation pertaining to the diplomatic and negotiating history surrounding the adoption of the Statute in 1998 and the Court's first Review Conference. The thesis

[103] Here once again I am referring to genocide, CaH and war crimes as these are found in articles 6, 7 and 8 of the Rome Statute. The scope of the crime of aggression will be discussed in relation to the Review Conference.

recognises in this respect that in interpreting such sources it will undertake research which is not primarily legal. Thus, it will have to take into consideration the diplomatic and political aspects at play. Nevertheless, such a study is necessary in order to comprehend the manner and form of inclusion of genocide, CaH and WC in the Statute given that this will be a determinant factor in how these crimes will develop following the Court's establishment. Notably, the draft Statute by the time it was adopted in Rome had undergone significant changes as a result of disagreement and coalitions between the participating States.[104]

Both the Rome Conference together with the Review Conference demonstrated that "[o]ther actors than states are assuming growing importance: intergovernmental organizations, as well as nongovernmental organizations, global economic players and the global media."[105] This is most vividly demonstrated by the impressive involvement of the CICC before, during and after the Rome Conference as already mentioned in section 1.5.1.3. This research considers material which will provide an insight of how the CICC, together with other relevant NGOs, sought to influence the outcome of the negotiations.

An investigation of the Review Conference is expected to reveal the possible ways that may be pursued for the adoption of a crime within the court's jurisdiction and/or later on its amendment. Notably, a number of proposals were put forward prior to the Review Conference which did not obtain the requisite support so as to be considered in Kampala.[106]At the Review Conference a definition for the crime of aggression was agreed upon and the WC provision was amended. Of particular importance in this respect is the work of the Special Working Group on the Crime of Aggression ('SWGCA') and of the Working Group on the Review Conference ('WGRC') created by the ASP in 2009 for the purpose of considering amendments to the Statute to be adopted by the ASP.[107]

An indispensable part of this thesis will also be the position of non-States Parties to the ICC - most importantly that of the USA and the other non-party permanent members of the UNSC – in shaping the scope of the crimes, both during the negotiations leading up to the adoption of the Statute in 1998 as well as during the Review Conference. Importantly, non-State Parties are empowered under the Statute to have observers in the ASP. I will be investigating their positions, statements, reports etc.

[104] Boyle and Chinkin, n.58, p.196.
[105] Simma and Paulus, n.19, p.306.
[106] Report of the Working Group on the Review Conference – Eight Session, ICC-ASP/8/20 Volume I, Annex II, 50.
[107] Review Conference Resolution ICC-ASP/8/Res.6, 26 November 2009, quoted in Alamuddin A. and Webb P., Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute, vol.8(5) *JICJ* (2010) 1219, fn.105.

The thesis will also explore the extent to which the UNSC, through the significant statutory functions assigned to it by the Statute, may impact the development of ICC crimes. It must be borne in mind that any discussion on the UNSC involves both legal and political aspects where it is difficult to distinguish between the two. To date this included the referral of the situations in Darfur[108] and Libya.[109] This involves looking at the sessions of the UNSC as well as the positions taken by all its members and in particular its permanent members. Collateral to this is the position of key regional actors, including the AU, in view of the AU's increasingly hostile attitude towards the ICC in relation to the ongoing situations in Darfur, Libya and Kenya which has included non-cooperation decisions as well as threats of mass withdrawal of African countries from the ICC.

As explained above this research will predominantly involve the examination of primary and secondary sources. Moreover, I undertook a two-month internship as a Visiting Professional at the Pre-Trial Division of the ICC during the summer of 2013. Despite my short stay at the ICC this experience gave me the opportunity to observe first-hand how the staff within the Pre-Trial Division interacted in carrying out its duties. Significantly, in chapter 6 I will analyse in detail the extent to which the Pre-Trial Chambers carry out their duties in accordance with their powers under the Statute.

1.9 Conclusion: The 'attempted' divorce between the Rome Statute and customary law

Article 10 of the Statute is a unique provision[110] in multilateral treaty-making and deserves attention because it attempts to define the relationship between 'ICC law' and CIL.[111] Therefore, understanding this provision goes directly to the heart of this thesis. The provision states that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." The provision was adopted to deal with Part Two of the Rome Statute but "for purposes other than this Statute." While no explanation is provided as to the meaning of this phrase it is unproblematic that it refers to CIL.[112]

Article 10 proved to be a very valuable negotiating tool during the drafting process "by reassuring States that they were not engaged in an exhaustive codification of international law."[113] In particular,

[108] S/RES/1593 (2005), 31 March 2005.
[109] *S*/RES/1970 (2011), 26 February 2011.
[110] According to Sadat "[a] survey of recently concluded multilateral treaties reveals no parallels to article 10, and it had no precursors either in earlier drafts of the ICC Statute or in the Statutes of the two ad hoc tribunals." (Sadat L.N., Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute, vol.49 *De Paul L.Rev.* (2000) 909, p.917).
[111] Sadat (Justice for the New Millennium), n.52, p.262.
[112] Schabas W.A., *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010), p.270 ('Schabas (A Commentary)').
[113] Ibid.

the provision was originally proposed during the discussion on WC. It was inserted to appease those States which supported a broader WC definition that the significant omissions from article 8 should not be taken as evidence that they did not constitute WC under CIL.[114]

It may be argued that article 10 serves as an acknowledgement on the part of the drafters that the ICC Statute establishes minimum rules of conduct.[115] The successful outcome of the negotiating process necessitated significant compromises. Hence, article 10 was adopted to ensure that the ICC law "would not negatively impact either the existing customary international framework or the development of new customary law."[116] Therefore, the provision attempts to prevent any developments which may occur in relation to the 'ICC law' from being considered a reflection of CIL.

Despite the intended purpose of article 10, the process by which the Rome Statute was adopted points towards a diametrically opposite result. According to Bennouna the Rome Statute will influence the further development of CIL because it represents the compromise package agreed upon by the majority of the international community "even if the objective is to make clear just what the jurisdiction of the future ICC will be."[117] In a similar vein Schabas considers the influence of the Rome Statute provisions on the evolution of CIL as "inevitable."[118] Consequently, the process by which the Rome Statute was adopted is a strong expression of *opinio juris* as to its material jurisdiction. This position is given further weight by the consideration that the categories of crimes included were largely considered to constitute *jus cogens* norms.[119] Thus, in view of their pedigree the ICC crimes were expected to have the status of CIL. Significantly, during the drafting there was general consensus that the crimes' definitions would "reflect existing customary international law, and not to create new law."[120]

In view of the above premise, the question raised is to what extent the outcome of this process, the crimes' definitions themselves, represents something more than mere codification. As it will become apparent in the subsequent chapters, the process by which the crimes' definitions were negotiated and re-negotiated had an extensive effect on their final form and their normative potential. Hence, while the drafters proceeded on the premise that they were dealing with 'existing' rather than 'new' crimes, the highly legalised and detailed formulation of the crimes, necessarily incorporated a significant

[114] See section 4.4.
[115] Sadat (Justice for the New Millennium), n.52, p.263.
[116] Sadat (Article 10), n.110, pp.910-911.
[117] Bennouna M., The Statute's Rules on Crimes and Existing or Developing International Law in Cassese, Gaeta, Jones, n.38, p.1103.
[118] Schabas (A Commentary), n.112, p.271.
[119] Bassiouni M.C., The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities, vol.8 *Transnat'l L. & Contemp.Probs.* (1998) 199, pp 201-2.
[120] Kirsch P., Foreword, in Dörmann K. (ed.), *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003), p.xiii.

element of progressive development. Therefore, irrespective of the general agreement as to the concept of the crimes included, a lot was achieved in Rome in relation to their precise scope. At the same time, on occasions the Rome Statute exceeds CIL.[121] However, the 'novel' crimes included in the Rome Statute still relate to categories of crimes which are broadly recognised as customary. Therefore, while the customary status of an act might be unclear its adoption in the Rome Statute evinces the existence of significant *opinio juris* that it should be regarded as such or alternatively that it is an emerging norm of CIL. In any case, as a widely-accepted multilateral treaty the ICC Statute may come to be interpreted as evidence of practice for the purpose of identifying CIL, both as regards its progressive as well as its restrictive portions.[122]

In view of the above, article 10 cannot not effectively prevent articles 6, 7 and 8 from having an influence on CIL. Notably, regional and international tribunals have often relied on the ICC crimes to find an 'existing or developing rule.' According to Schabas, "article 10 appears to be largely ignored by the very bodies to whom it is directed, namely specialized tribunals engaged in the interpretation of international law."[123] Hence, even though article 10 facilitated decision-making during the negotiations it has limited legal effect in practice.[124] Still, the provision is very significant for understanding how the Court's establishment has redefined the relationship between treaty law (Rome Statute) and CIL, and how this change relates to the ICC's law-making potential, within and outside the ICC context.

Article 10 supports the conceptualisation of the Rome Statute as an instrument which is substantive in nature, and not merely jurisdictional.[125] In the past, the statutes of the *ad hoc* tribunals were jurisdictional because "the crimes were not enumerated as in a criminal code, but simply as a specification of the jurisdictional authority of the relevant court."[126] Adherence to the principle of legality was assessed with reference to CIL, especially as regards the ICTY. The situation has been reversed in relation to the ICC. In the case of the Rome Statute there is no need to test the definitions of the crimes against the backdrop of CIL in order to determine whether they comply with the principle of legality. The Statute's substantive nature is further supported by article 21 which sets out the applicable law. Article 21(1)(a) provides that the Court shall apply "[i]n the first place" the Rome Statute, the EoC and the Rules of Procedure and Evidence ('RPE'). According to article 21(1)(b), CIL

[121] Milanovic M., Is the Rome Statute Binding on Individuals? (And Why We Should Care), vol.9 *JICJ* (2011) 25, p.30.
[122] Bennouna, n.117, p.1102.
[123] Schabas (A Commentary), n.112, p.271.
[124] Bennouna, n.117, p.1106.
[125] Milanovic, n.121, p.30.
[126] Cassese (2008), n.21, p.5.

will only come into play "[i]n the second place, where appropriate." Significantly, the Chambers will not resort to CIL unless there is a "lacuna" in the aforementioned legal texts.[127]

Milanovic has argued that a substantive reading of the Rome Statute signifies that the crimes' definitions can go beyond CIL but at the risk of violating the *nullum crimen since lege* principle in at least two cases, when the situation in question is the result of a UNSC referral or a referral by a non-State Party. This is because the Statute was not binding on the individuals concerned when the alleged crimes took place.[128] To this effect, it is best for the Court to "(forcibly) read down" the ICC crimes so that they conform to the customary rules allegedly violated.[129]

Any arguments that the application of the Statute can violate the principle *nullum crimen sine lege* in the two scenarios mentioned above fails to give credit to the detailed definitions of the crimes and the elevated status accorded to the principle by the Rome Statute itself. There can be no denying that the Rome Statute provisions are more appropriate for identifying the scope of the crimes than their vague and often indeterminate customary counterparts. Further, the crimes were the result of complex negotiations by the greatest part of the international community. Hence, the Court could defeat defence challenges which may arise in respect of retroactive crimes on the basis that they were both accessible and reasonably foreseeable by the alleged offenders. In this context, the individuals concerned "received sufficient warning" of the possibility of their prosecution by the ICC, whose ambit extents to non-State Parties following a referral by the UNSC or by a non-State Party.[130] Therefore, in such cases the Court will apply the substantive norms found in the Rome Statute.

It is very significant to highlight how the attempted divorce between the Rome Statute and CIL is linked to the principle *nullum crimen sine lege*. In particular, article 22(3) provides that the principle "shall not affect the characterization of any conduct as criminal under international law independently of this Statute." In other words, the omission of an act from the Rome Statute cannot prejudice its status as a crime under IL.[131] Article 22(3) has a similar meaning to article 10 and helps make the purpose of article 10 clearer. Article 10 together with article 22(3) illustrate how the Rome Statute provisions "postulate the future existence of *two possible regimes or corpora of international criminal law*, one established by the Statute and the other laid down in general international criminal law."[132] The combined effect of articles 10 and 22(3) reinforces a substantive reading of the Rome Statute.

[127] Bashir First Arrest Warrant Decision, n.81, para.126.
[128] Milanovic, n.121, p.27.
[129] Ibid, p.34.
[130] Schabas (2011), n.82, p.74.
[131] Schabas (A Commentary), n.112, p.411.
[132] Cassese A., The Statute of the International Criminal Court: Some Preliminary Reflections, vol.10 *EJIL* (1999) 144, p.157 (emphasis in original).

The interaction between ICC and CIL go directly to the heart of the research question undertaken by this study. Article 10 constitutes the most important acknowledgement on part of the drafters as to the ICC's law-making potential. Hence, it supports the view that a paradigm shift took place at the Rome Conference whereby for the first time ICL came closer to a 'developed' legal system with adopted rules of conduct.[133] As the ICTY Trial Chamber ('TC') stated, even before the Statute had entered into force, notwithstanding article 10 "the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law."[134] To this effect, this thesis will investigate how the ICC, in carrying out its mandate in this early years, will have on impact on the scope of international crimes and whether by superimposing itself as a leading tribunal it has brought about a normative change in the further and future development of international crimes.

[133] Sadat (Justice for the New Millenium), n.52, p.263.
[134] *Furundzija* (IT-95-17/1-T), Judgment, 10 December 1998.

Chapter 2: Genocide

2.1 Introduction

In this chapter I examine whether the incorporation of the crime of genocide in the Statute will in any way affect its development under the Statute and under CIL. The crime of genocide as defined in the 1948 Genocide Convention was replicated in article 6 of the Statute. [1] My core argument is that while the text of the crime has remained immutable since its initial formulation, its interpretation has not. The jurisprudence of the *ad hoc* tribunals on genocide charges has foremost contributed to articulating content and meaning to the crime's constituent elements. Importantly, their rich and still evolving body of cases has been handed down in the years following the Statute's adoption. Thus, genocide was incorporated in the Statute at the most critical turning point of the crime's development since 1948. It is therefore significant to comprehend how the ICC as a result of its unique qualities, as these have been set out in chapter 1, will have a bearing on the trajectory of this normative process.

Given my focus on the interpretation of the crime this chapter is structured around the development of the definition and the interpretation of the crime to date. Initially I will deal with the origins of the crime and its eventual formulation in the Genocide Convention. Thereafter, I will look at significant judicial pronouncements by the *ad hoc* tribunals, the negotiations for the Statute and the elaboration of the EoC. The findings of the International Commission of Inquiry in Darfur ('COI') are also relevant because of their interpretation of the crime in the particular context of the conflict. This will also prelude my more detailed analysis of the arrest warrant against Sudanese President Al-Bashir. The way the Prosecutor as well as the Chambers have handled the case so far puts in perspective how the Court will approach the crime in practice.

2.2 The origins of the crime of genocide and the Genocide Convention

In order to understand how the crime of genocide may be affected by its inclusion in the Statute it is necessary to comprehend the origins of the legal term and the way it acquired "independent significance as a distinct crime"[2] with the adoption of the Genocide Convention in 1948. In August

[1] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UNGA Res 260(III)A, 9 December 1948, article 2 <http://www.hrweb.org/legal/genocide.html> ('Genocide Convention').
[2] Cassese A., Genocide, Genocide, in A. Cassese, P. Gaeta, J. Jones (eds), *The Rome Statute of the International Criminal Court: A commentary*, vol.1A (OUP 2002), p.336 ('Cassese, Gaeta, Jones').

1941 Winston Churchill said "[w]e are in the presence of a crime without a name."[3] Within four years Raphael Lemkin created the term 'genocide' by combining the Greek word *genos* (race, tribe) and the Latin word *cide* (killing).[4] Indeed, as Schabas has said "[r]arely has a neologism had such rapid success."[5] The indictment of Nazi criminals by the International Military Tribunal ('IMT') was perhaps the first formal recognition of the concept of genocide as a crime. [6] The IMT referring to the counts under article 6(c) of the IMT Charter (CaH) charged the defendants with "deliberate and systematic genocide."[7]

Lemkin's formulation not only contributed to the definition of the crime but he also embarked on a campaign at the UN which was ultimately successful in leading to the adoption of a convention on genocide. Therefore, Lemkin's conception as to what constitutes genocide is an indispensable part my analysis for understanding the development of the crime of genocide. According to Lemkin genocide means "the destruction of a nation or an ethnic group."[8] He considered that the term included both the "immediate destruction of a nation" by mass killings as well as coordinated planned actions the aim of which was to destroy "essential foundations of live of national groups."[9] Lemkin clearly focused on what he described as 'national groups.' However, his definition did not only contemplate physical genocide. Rather he considered that genocide could be committed in a number of ways which targeted various aspects of the existence of a group. The eight categories of genocide which he identified are political, social, cultural, economic, biological, physical, religious, and moral genocide.[10]

Within the UN, the newly-formed UNGA set in motion the drafting process which led to the adoption of the Genocide Convention. In 1946, the UNGA adopted a resolution which affirmed the status of genocide as a crime under IL. At the same time it requested from the Economic and Social Council ('ECOSOC') "to undertake the necessary studies, with a view to drawing up a draft convention."[11] I will provide an overview of the negotiating process. Given that the text of the crime has remained unchanged, the decisions taken in those early days in relation to its formulation must be taken into account when considering its normative development in terms of its interpretation.

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[3] Quigley J., *The Genocide Convention: A International Law Analysis*, International and Comparative Criminal Justice (Ashgate 2006), p.8, fn.7.
[4] Lemkin R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944), p.79 ('Axis Rule').
[5] Schabas W., Genocide in International Law (2nd ed. CUP 2009), p.17 ('Schabas (2009)').
[6] Kuper L., *Genocide: Its Political Use in the Twentieth Century* (YUP 1983), p.22.
[7] *France et al. v. Goering et al.,* (1945) in Trial of the Major War Criminals before the International Military Tribunal, Volume II, pp.45-46 <https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-II.pdf>
[8] Axis Rule, n.4, p.79.
[9] Ibid.
[10] Ibid, pp.xi-xii.
[11] UNGA Res 96(I), 11 December 1946.

Three main drafts were prepared for the new convention. An initial draft was prepared by the Secretariat ('Secretariat Draft').[12] According to article I of the Secretariat Draft the purpose of the Convention was "to prevent the destruction of racial, national, linguistic, religious or political groups of human beings." Racial, national and religious groups were maintained until the final text while linguistic groups only appeared in this first draft. The inclusion of political groups enjoyed support at this stage.[13] Three types of acts were considered to constitute genocide, physical, biological and cultural. As seen from the commentary to the Secretariat Draft there were doubts as to the propriety of including cultural genocide within the definition. However, in the end the decision was taken to keep it in the draft.[14] The issue resurfaced later on in the negotiations. Hence, in looking at the negotiations it is important to look at the most significant variations that took place on the list of protected 'groups' and the kind of 'acts' which may constitute genocide.

The next draft was produced by the *Ad Hoc* Committee which was created by ECOSOC ('*Ad Hoc* Committee draft').[15] As regards the inclusion of political groups the members of the Committee were seriously divided. A central concern was that political groups lacked the stability of national, racial and religious groups.[16] Despite lack of agreement on the matter in the end only the Soviet Union and Poland voted against its inclusion.[17] Thus, the *Ad Hoc* Committee draft included political groups among the protected groups. The inclusion of cultural genocide was supported by the majority of Committee members.[18] Thus, the *Ad Hoc* Committee draft includes a detailed separate provision which deals exclusively with cultural genocide.

Discussions continued in the UNGA Sixth Committee. Ultimately, the drafters took the clear decision to exclude political groups. According to Schabas such exclusion was "for 'political' reasons rather than reasons of principle."[19] The inclusion of political groups was strongly opposed by the Soviet Union, a view which was also shared by number of other States.[20] Even USA which had led efforts to include political groups in the end was willing to accept their non-inclusion in order to encourage more countries to accede to the convention.[21] The addition of ethnic groups among the protected

[12] UN Doc. E/447, 26 June 1947 cited in Abtahi H. and Webb P., *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff Publishers 2008), p.577.
[13] UN Doc. E/623/Add.1, article 1.
[14] UN Doc. E/447, see in particular pp.17.
[15] UN Doc. E/AC.25/SR.12; UN Doc. E/794, 24 May 1948.
[16] UN Doc. E/AC.25/SR.4, p.10 (Lebanon); UN Doc. E/AC.25/SR.3, pp.5-6 (China); UN Doc. E/AC.25/SR.4, pp.10-11 (Poland). The inclusion of political groups was supported by France and USA. See UN Doc. E/AC.25/SR.3, p.11 and UN Doc. E/AC.25/SR.4, p.12, respectively.
[17] UN Doc. E/AC.25/SR.24, pp.4 and 6.
[18] UN Doc. E/AC.25/SR.14, p.14 (five in favour, two against). Inclusion of cultural genocide was opposed by USA and France.
[19] Schabas (2009), n.5, p.160.
[20] Ibid.
[21] UN Doc. A/C.6/SR.128 (United States), 29 November 1948.

groups in order to avoid any confusion between the terms 'national' and 'political' supports the view that political groups were excluded from the crime's definition.[22]

Eventually the decision was also taken to exclude cultural genocide restricting the five underlying acts to forms of physical and biological genocide. According to Schabas, cultural genocide proved to be sensitive topic for a number of governments which feared that the provision could cause problems in relation to minorities in their own countries.[23] This is perhaps the greatest deviation from Lemkin's conception of genocide. Lemkin himself had advocated for the inclusion of cultural genocide in his writing and during the drafting process.[24]

The UNGA adopted by a roll-call of fifty-six votes to none the resolution containing the Sixth Committee draft.[25] The unanimous adoption of the resolution is a clear message as to the prevailing opinion of the drafters regarding the definition of the crime despite the discrepancies that become apparent when looking at the negotiating process. Moreover, just three years later the International Court of Justice ('ICJ') acknowledged that the major provisions of the Genocide Convention had crystallised into CIL.[26] It was on the basis of its customary status that the crime of genocide was reproduced in the Statutes of the *ad hoc* tribunals.[27] It is particularly relevant for the purposes of this chapter to see how the *ad hoc* tribunals gave content and developed the crime of genocide given that until the 1990s its interpretation was predominantly the subject of scholarly inquiry.

2.3. Interpretation of the crime of genocide by the ICTY and the ICTR

It was not until the creation of the *ad hoc* tribunals in the 1990s that judicial debate about the scope and interpretation of the provisions of the Genocide Convention really started. Previously the first and only significant case to interpret the 1948 definition was the *Eichmann* case. The case did not involve debates as to the identification of the victims which were named by the relevant law and in the charges as the Jewish people.[28] The advent of the *ad hoc* tribunals signified that the interpretation of the crime of genocide was no longer "the province of scholars."[29] In this section I will refer to those

[22] Schabas (2009), n.5, p.144. The addition stemmed from a Swedish proposal. See UN Doc. A/C.6/SR.73 (Sweden); UN Doc. A/C.6/SR.74 (Sweden).
[23] Ibid, p.212.
[24] Axis Rule, n.4, pp.84-85; UN Doc. E/447, p.27.
[25] Schabas (2009), n.5, p.90.
[26] *Reservations to the Convention on the Prevention and Punishment of Genocide,* Advisory Opinion, ICJ Reports 1951 15, 28 May 1951, p.23.
[27] Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), UN. Doc. S/25704, 3 May 1993, para.45. See also: Cassese in Cassese, Gaeta, Jones, n.2, p.340.
[28] Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, section 1(b).
[29] Quigley, n.3, pp.73-74.

judicial findings rendered by these tribunals which have been most relevant to the development of the crime. My inquiry involves looking at the interpretation of specific aspects of the crime.

2.3.1 Protected groups

The *travaux préparatoires* of the Genocide Convention reveal that "there is no question the drafters intended to list the protected groups in an exhaustive fashion."[30] Therefore, how has the meaning of national, ethnical, racial and religious groups under the Genocide Convention developed since 1948? Significantly, these terms were not defined in the Genocide Convention. Academics and the case-law of the *ad hoc* tribunals have recognised that these groups are "social constructs, not scientific expressions"[31] and that "there are no generally and internationally accepted precise definitions thereof."[32]

The *Akayesu* case has put forward an innovative reading of what may come to constitute a protected group under the 1948 definition. Most notably it stated that according to the *travaux préparatoires* of the Genocide Convention the intention of the drafters was to accord protection to "any stable and permanent group."[33] As long as membership to the group was determined automatically by birth in "a continuous and often irremediable manner" then a group could be allowed protection under the Genocide Convention even if the said group was not one of the four designated groups.[34]

The TC's interpretation was at the very least a creative attempt to find an objective meaning as to what constitutes a protected group. This was by no means an easy task given that some terms of the Genocide Convention, in particular the adjective 'racial,' had fallen into disfavour as scientific terms since 1948.[35] While both the *ad hoc* tribunals have stated that identifying a protected group includes both subjective and objective criteria,[36] in practice the subjective approach seems to work all the time.[37]

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[30] Schabas (2009), n.5, p.151.
[31] Ibid, p.129. Similarly, Larry May "does not recognize the independent existence of groups" and "[w]hat matters most is whether individual human persons can, and regularly, recognize certain individuals as members of specific groups." May L., *Genocide: A Normative Account* (CUP 2010), pp.30-31.
[32] *Rutaganda* (ICTR-96-4-T), Judgment and Sentence, 6 December 1999, para.55 (*'Rutaganda* Judgment'). See also: *Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para.70 ('*Jelisić* Trial Chamber').
[33] *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para.515 (*'Akayesu* Judgment*').*
[34] Ibid.
[35] Schabas W., *Unimaginable atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012), p.115 (Schabas (Unimaginable atrocities').
[36] *Stakić* (IT-97-24-A), Judgment, 22 March 2006, para.25; *Semanza* (ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para.317.
[37] Schabas (2009), n.5, pp.124-133, in particular p.128. Similarly see below in section 2.5.2 the approach taken by the International Commission of Inquiry in Darfur.

What is the normative significance of the *Akayesu* judgment in terms of defining the protected groups? The above case has not been confirmed by the ICTR AC nor has it been incorporated at all in the ICTY case-law. According to Schabas it has come to appear increasingly idiosyncratic.[38] Mettraux has said that the TC's proposition is not only unsupported in law but it is also an example of pure judicial law-making.[39] However, it is possible to partly reconcile the ICTR judgment with the traditional definition of the crime. Firstly, the *Akayesu* judgment "brought attention to the importance of the permanence and stability characteristics." [40] Secondly, the TC's progressive interpretation was undertaken in order to overcome the difficulty of determining that the Hutus and the Tutsis were distinct ethnic groups. Hence, the Court's approach was pursued in order to accommodate a group which was anyway covered by the Genocide Convention. Where the judgment clearly deviated from the object and purpose of the Genocide Convention was in failing to acknowledge the clear intention of the drafters for an exhaustive list of protected groups.[41]

Lastly, what is the status of political groups as part of the crime's definition under CIL? According to Nersessian much has changed since the adoption of the Genocide Convention. State practice since then shows that very few States today consider that political groups are protected 'as such' from destruction, including States which had supported their incorporation in 1948.[42] Further, "there is no evidence at all suggesting that the states which criminalize political genocide as a matter of domestic law did so with the requisite *opinio juris*" and "[a]t most, state practice reveals an emergent norm against political genocide."[43] In the context of the *ad hoc* tribunals the ICTY AC has referred to the decision of the UNGA to exclude political groups and to restrict protection only to well-established groups with "immutable criteria."[44]

2.3.2. 'Intent to destroy'

There are two mental elements required to establish criminal responsibility for the commission of the crime of genocide. A general intent to commit the *actus reus* of the crime and an additional 'intent to destroy' in whole or in part one of the protected groups. The former element does not appear pose any particular difficulties.[45] As regards the interpretation of latter element the *Akayesu* case proved to be highly influential for its subsequent development. According the ICTR TC 'intent to destroy' was

[38] Schabas W.A., The ''Odious Scourge'': Evolving Interpretations of the Crime of Genocide, vol.1(2) *Genocide Studies and Prevention* (2006) 93, p.99.
[39] Mettraux G., *International Crimes and the Ad Hoc Tribunals* (OUP 2005), p.230.
[40] Bettwy D.B., The Genocide Convention and Unprotected Groups: is the Scope of Protection Expanding under Customary International Law?, vol.2(1) *Notre Dame Journal of International & Comparative Law* (2011) 167, p.181.
[41] Ibid, p.183.
[42] Nersessian D.L., *Genocide and Political Groups* (OUP 2010), pp.111-112.
[43] Ibid, p.128.
[44] *Stakić,* n.36, para.22. See also: *Akayesu* Judgment, n.33, para.511.
[45] Schabas (2009), n.5, pp.287-294.

understood to entail 'special intent' or '*dolus specialis'* whereby "perpetrator clearly seeks to produce the act charged" or otherwise has "the clear intent to cause the offence."[46] The case-law of the ICTR has consistently followed the *Akayesu* case in this respect.[47] Significantly, the ICTY in *Jelisic* took the same approach.[48]

2.3.3 'In whole or in part'

The above phrase refers to the intent of the perpetrator. The ICTY AC in the *Krstić* case made a significant contribution on this aspect of the crime confirming that it has become a well-established part of the jurisprudence.[49] To this effect, a conviction for genocide must involve an intention to destroy a 'substantial' part of the group. While the numeric size of the part of the group targeted is the necessary starting point of any inquiry it is not always the determinant factor. The number of individuals targeted should also be evaluated in relation to the overall size of the group as a whole. Moreover, the prominence of the targeted part within the group should be taken into consideration especially when it is emblematic or essential to the survival of the overall group. The AC concurred with the TC. Having identified the protected group as the national group of Bosnian Muslims, it concluded that the part targeted was the Bosnian Muslims of Srebrenica. Although this population was not numerically significant compared to the overall Muslim population in Bosnia and Herzegovina its "immense strategic importance" meant that it was essential for the continued survival of the Bosnian Muslims.[50] The AC therefore confirmed that the occurrence of the crime may be geographically limited.[51] Lastly, the AC recognising that only rarely will there be an express intention to commit genocide held that intent may be proven by interference as long as it is "the only reasonable inference available on the evidence."[52]

2.3.4 Ethnic cleansing

There have been a number of attempts to define 'ethnic cleansing.' It is sufficient to refer to the elaboration provided by the Commission of Experts established by the UNSC in relation to violations of humanitarian law in former Yugoslavia: ""ethnic cleansing" means rendering an area ethnically

[46] *Akayesu* Judgment, n.33, paras 498 & 518, respectively.
[47] *Rutaganda* Judgment, n.32, para.61; *Musema* (ICTR-96-13-A), Judgment, 16 November 2001, para.164 ('*Musema* Judgment').
[48] *Jelisic* Trial Judgment, n.32, paras 85 & 108. See also*: Blagojevic and Jokic* (IT-02-60-T), 17 January 2005,para. 656; *Sikirica* (IT-95-8-T) Judgement on defence motions to acquit, 3 September 2001, paras 58 & 59.
[49] Schabas (2009), n.5, p.279.
[50] *Krstić* (IT-98-33-A), Judgment, 19 April 2004, paras.12, 15-16 ('*Krstić* Appeals Chamber').
[51] *Jelisic* Trial Judgment, n.32, para.83.
[52] *Krstić* Appeals Chamber, n.50, para. 41.

homogeneous by using force or intimidation to remove persons of given groups from the area."[53] While the term 'ethnic cleansing' was not mentioned during the drafting of the Genocide Convention, an examination of the *travaux préparatoires* reveals that acts of this nature did not form part of the crime.[54] According to the commentary of the Secretariat draft mass displacements of population were excluded from the ambit of genocide unless they resulted in the death of the whole or part of the displaced population. The example given in the commentary is forcing the displaced population to travel long distances where people are being "exposed to starvation, thirst, heat, cold and epidemics."[55]

The concept of 'ethnic cleansing' has appeared in the ICTY case-law and the judicial pronouncements seem to follow the intention of the drafters of the Genocide Convention. The TC in *Krstić* spoke of the "obvious similarities" between genocide and ethnic cleansing.[56] It noted that several recent attempts interpreted the term 'to destroy' in the genocide definition to include "acts that involved cultural and other non-physical forms of group destruction."[57] However, despite these developments CIL limited the definition of genocide to physical or biological destruction. Therefore, attacking only the cultural or sociological characteristics of a group would not come under the definition of genocide.[58] Nevertheless, the TC accepted a role for cultural genocide. It held that whenever cultural and religious destruction happened simultaneously with physical or biological destruction, such attacks may be considered as evidence of intent to physically destroy the group.[59]

2.3.5 State plan or policy

While the existence of a State plan or policy may seem implicit in the definition of genocide the text of the crime does not contain such a requirement. In any case, the ICTY AC stated in a clear and unambiguous manner that "the existence of a policy or plan is not a legal ingredient of the crime."[60] However, the AC further noted in the context of proving specific intent "the existence of a plan or policy may become an important factor in most cases."[61] I will return to this aspect of the crime later on when I will discuss the contextual requirement included in the EoC for the crime of genocide under the Statute and its bearing, if any, on the interpretation of specific intent.

[53] Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/35374 (1993), para.55.
[54] Schabas (2009), n.5, p.227.
[55] UN Doc. E/447, p.23.
[56] *Krstić* (IT-98-33-T), Judgment, 2 August 2001, para.562 ('*Krstić* Trial Chamber').
[57] Ibid, para.577.
[58] Ibid, para.580.
[59] Ibid. See also: Nersessian D., Rethinking Cultural Genocide under International Law, *Human Rights Dialogue*, 22 April 2005 <http://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139.html>
[60] *Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para.48.
[61] Ibid.

2.4 Negotiating a Statute for an International Criminal Court

2.4.1 Negotiations leading to the 1998 Rome Conference

Long before the negotiations for an international criminal court were to become a foreseeable event the ICJ recognised that the major provisions of the Genocide Convention had become part of CIL law. The pertinent question, for the purposes of my research, is whether the inclusion of the crime of genocide in the Statute will develop the crime *further*, given that in recent times normative changes have been precipitated with the adoption of treaties rather than through the slow evolution of CIL.[62]

In view of the unquestionable status of the crime of genocide under CIL, its inclusion in the statute of any future international criminal court was never a matter of debate. The ILC in its commentary in the 1994 Draft Statute for an International Criminal Court considered that the crime of genocide was the "least problematic" for inclusion since it had been "clearly and authoritatively defined" in the Genocide Convention which was a widely ratified treaty.[63] Therefore, the crime of genocide was not considered to present a difficulty neither under CIL nor as a treaty crime.

Discussion continued in the same vein in the sessions of the AHCom. A number of delegations were of the view that the Genocide Convention provided the authoritative definition of the crime. Some delegations suggested expanding the definition so that it includes social and political groups. However, such an amendment was opposed by other delegations because it would have expanded the definition of the crime of genocide beyond its scope under CIL. The suggestion was made to clarify that a different intent requirement was needed for different categories of perpetrators. In particular, the suggestion was made to distinguish between the specific intent requirement for the decision-makers or planners of genocide from the general intent or knowledge requirement for the physical perpetrators of acts of genocide.[64] The latter suggestion as regards the special intent requirement has been gaining increasing support among scholars in recent years something which has been acknowledged by the PTC in the *Bashir* case.[65] In section 2.4.3 I will examine the potential impact of the contextual requirement as this has been incorporated in the EoC on this innovative understanding of genocidal intent and its potential impact on the development of the crime of genocide. The

[62] Diehl P.F *et al.*, The Dynamics of International Law: The Interaction of Normative and Operating Systems, vol.57 *Int'l Org.* (Winter 2003) 43, p.51.
[63] Draft Statute for an International Criminal Court with commentaries, 1994, Report of the International Law Commission on the work of its 46th session, *YILC*, 1994, vol.II, Part Two, draft article 20, p.38, para.5 <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf>
[64] Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, G.A. 50th Sess., Supp. No. 22, A/50/22, 1995, paras.60-62 See also: Oosterveld V., The Elements of Genocide in Lee R.S. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc. 2001), pp.41-42 ('Lee').
[65] See section 2.6.

discussions in the Preparatory Committee largely reflected the discussions in the AHCom.[66] Thus, it was rather easy for the participants to agree on a consolidated text for the crime of genocide to be forwarded to the Rome Conference.[67]

2.4.2 The adoption of a Statute for an International Criminal Court

2.4.2.1 The crime of genocide as defined in article 6 of the Rome Statute

The crime of genocide was the only crime during the Rome Conference which received "a quick and unanimous consensus."[68] Already by the 17 June 1998 consensus had been reached on the inclusion of the crime and there seemed to be wide support for reproducing the Genocide Convention definition in the draft Statute.[69] The discussion which ensued in the Committee of the Whole also reflected this position. Therefore, the Chairman suggested that the text of the crime was to be referred to the Drafting Committee.[70]

2.4.2.2 The Elements of Crime for the Crime of Genocide

According to the Final Act of the Rome Conference a PrepCom was established which was mandated among others to prepare draft texts of the EoC.[71] In this section I will discuss the process by which the EoC for the crime of genocide were adopted in order to assess the normative importance of this process and its outcome on the development of the crime. The negotiations for the EoC of the crime of genocide were accompanied by a widespread agreement that they should be determined by the strong guidance provided by the Genocide Convention.[72] Thus, the question raised is whether the drafting process eventually followed the codification of the crime or not.

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[66] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Volume II (Compilation of Proposals)*, G.A. 51st Sess., Supp. No. 22, A/51/22, 1996.
[67] Bos A., From the International Law Commission to the Rome Conference (1994-1998), in Cassese, Gaeta, Jones, n.2, p.54.
[68] Arsanjani M.H., The Rome Statute of the International Criminal Court, vol.93(1) *AJIL* (1999) 22, p.30.
[69] See chapter 1 section 1.6. Committee of the Whole, Summary Record of the 3rd Meeting, 17 June 1998, UN Doc. A/CONF.183/C.1/SR.3, para.2.
[70] The only change made in the definition was to replace the word "Convention" with the word "Statute" in its opening clause. Suggestions for expanding the definition in order to include other groups were isolated and not very assertive. E.g. The delegate of Cuba while agreeing that the text of the draft was generally acceptable also thought that it could be expanded to include political and social groups (ibid, para.100).
[71] Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc.A/CONF.183/10, 17 July 1998, Resolution F.
[72] Slade T.N., The Prohibition of Genocide under the Legal Instruments of the International Criminal Court, in Henham R. and Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2007), p. 157 ('Henham and Behrens').

The EoC of genocide adopted at the first ASP session consisted of the following parts: elements which relate to the specific act of genocide; elements common to all forms of *actus reus* (Elements 2 and 3) and the last element which is again common to all forms of genocide and which includes the contextual element of the crime. I will primarily focus on the contextual element. The concept of "contextual elements" arose during the negotiations for the EoC for all the ICC crimes. They are considered as a special class of circumstantial elements and their purpose is to relate the specific act to the broader context of the crime.[73]

The USA and others argued that it was necessary to reflect in the EoC that the crime requires scale or real threat to the group and thus excludes isolated offenses.[74] According to the American proposal the crime was committed "in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such a group."[75] While most States were willing to accept some sort of contextual element they objected to this proposal as going beyond the definition in article 6 of the Statute.[76] In trying to find a language which was more established in the jurisprudence the following wording was agreed to: "The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[77]

Notably, during the time that the PrepCom worked on the EoC the ICTY declared in the *Jelisić* case that the existence of a policy or plan was not a legal ingredient of the crime of genocide but that it could become an important factor in proving specific intent in most cases. This decision highlighted that the crime's 'context' is linked with or alternatively it may have a bearing in interpreting and substantiating specific intent. The PrepCom's approach gives further support to this conclusion. In particular, the States in the PrepCom agreed that the mental element of the contextual requirement was probably subsumed in the specific intent requirement. They decided to omit any reference as to the mental element of the contextual requirement. Instead, they ultimately left the Court to decide "on a case-by-case basis in the rare event that the situation arises where the distinction between the specific intent and general mental requirement matters."[78] This was done as follows:

> Notwithstanding the normal requirement for a mental element provided in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate

[73] Kelt M. and Von Hebel H., What are the Elements of Crimes? in Lee, n.64, p.15.
[74] Oosterveld in Lee, n.64, p.45.
[75] Proposal submitted by the United States of America, Draft elements of crimes, PCNICC/1999/DP.4, 4 February 1999. See last element for each act of genocide.
[76] Proposal submitted by Colombia, Comments on the proposal submitted by the United States of America on Article 6: the crime of genocide (PCNICC/1999/DP.4), PCNICC/1999/WGEC/DP.2, 18 February 1999, para.1; Proposal by Arab Group, PCNICC/1999/WGEC/DP.4, 22 February 1999, p.3. See also: Oosterveld, n.64, p.46.
[77] Elements of Crimes, Element 4 for Articles 6(a)-(b) and Element 5 for Articles 6(c)-(d) <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>
[78] Oosterveld in Lee, n.64, p.49.

> requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.[79]

According to article 9 of the Statute the EoC shall assist the Court in the "interpretation and application of the crimes.[80] Further, as a subordinate legislation the EoC "shall be consistent with this Statute."[81] In section 2.6 I will examine how the PTC in *Bashir*, the first and only case to date to involve genocide charges, has employed the EoC of genocide in order to interpret and apply the crime. In particular, I will explore how the PTC has interpreted the contextual element of the crime and whether such interpretation is consistent with the Statute and with the EoC's status as non-binding albeit authoritative interpretive aid for the ICC crimes. Subsequently, I will reflect on the normative significance of the PTC's approach on the interpretation and development of the crime of genocide.[82]

The 'context' requirement may be difficult to apply in any case due to the fact that its meaning is far from clear. According to Quigley leaving to the Court to decide on a case-by-case basis the mental element, *if any*, for a mental element for this circumstance clearly "violates the concept of trying persons only for crimes previously defined by law.[83] The vagueness of the 'context' elements is exacerbated by the inclusion of "initial acts in an emerging pattern" within its ambit.[84] On the other hand, the text of the elements which are specific to each of the five forms of genocide was drawn without controversy from the text of the Genocide Convention.[85] Hence, the principal question as regards the EoC for the crime of genocide is whether the decision of the PrepCom to draft a contextual requirement is part of the established jurisprudence on the crime? Alternatively, does this element constitute an 'amendment' of the crime of genocide which will affect its development under the Statute and consequently under CIL?

2.4.3 Assessing the role of the contextual requirement on the development of the crime of genocide under the Rome Statute

Given that it is hard to imagine situations where genocide is not planned or organised the practical effect of the contextual element might be expected to be limited. Indeed, it has been argued that this

[79] Elements of Crimes, n.77, Article 6, Genocide, Introduction, paragraph 3.
[80] Rome Statute of the International Criminal Court, article 9 <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> ('Rome Statute')
[81] Ibid, article 9(3).
[82] Grover L., A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court, vol.21 *EJIL* (2010) 543, pp.563-579, in particular pp.573-576.
[83] Quigley, n.3, p.173.
[84] Elements of Crimes, n.77, Article 6, Genocide, Introduction, paragraph 1.
[85] Garraway C., Elements of the Specific Forms of Genocide in Lee, n.64, pp.49-55.

requirement is already part of the genocide definition.[86] The contrary argument has also been raised in that it constitutes a narrowing of the genocide definition both under CIL and when compared to the Genocide Convention.[87] While academics have argued for and against the customary validity of the pronouncement in the *Jelisić* case, it seems to have been taken seriously when drafting the EoC. Arguably the inclusion of the contextual requirement was a reaction to the ICTY decision.[88]

The decision to incorporate a contextual requirement in the crime of genocide and to assume that its mental element is subsumed within specific intent has a bearing on the way that the specific intent itself is interpreted.[89] In other words the contextual requirement has not only gained prominence but it has been endowed with legal significance. State complicity or involvement has accompanied acts of genocide in most of the cases. Nevertheless, "[t]he circumstances [...] remain factual events, not provided for as legal requirements of the crime."[90] Thus, from this perspective the contextual requirement has narrowed the crime of genocide. However, at the same time this element points towards a more lenient interpretation of *mens rea* at least as regards certain types of perpetrators. Schabas takes the view that the emphasis on specific intent is appropriate when an individual is acting alone, without a plan or policy. However, when such a plan or policy exist the relevance of specific intent declines dramatically and the most important question becomes whether the offender had knowledge of the crimes. In this respect, "[r]eliance upon the contextual element set out in the Elements of Crimes focuses the debate about the mental element of the perpetrator on knowledge more than intent."[91]

Like Schabas, a number of scholars in recent years have taken a position in favour of a revised notion of genocidal intent which would also allow a cognitive interpretation to this aspect of the crime. According to Greenawalt a literal and historical interpretation of the Genocide Convention does not support a finding that the concept of 'intent' is limited to a purely volitional and purpose-based interpretation of the kind promulgated and developed by the *ad hoc* tribunals since *Akayesu.* Thus, a case can be made in support of a knowledge-based approach.[92] Similarly, Triffterer has argued that

[86] Schabas W.A., The *Jelisic* Case and the *Mens Rea* of the Crime of Genocide, vol.14 *LJIL* (2001) 125, p.137; Clark, R.S., The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Crimes, vol.12(3) *CLF* (2001) 291, p.326.
[87] Cassese in Cassese, Gaeta, Jones, n.2, p.349; Cryer R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge Studies in International and Comparative Law (CUP 2005), p.246.
[88] Schabas W.A., Has Genocide Been Committed in Darfur? The State Plan or Policy Element in the Crime of Genocide, in Henham and Behrens, n.72, p.45 ('Schabas (Has Genocide Been Committed in Darfur?)').
[89] Slade, n.72, p.159.
[90] Cassese in Cassese, Gaeta, Jones, n.2, p.349.
[91] Schabas W., *The International Criminal Court: A commentary to the Rome Statute* (OUP 2010), p.126. See also: Kress C., The Darfur Report and Genocidal Intent, vol.3 *ICLR* (2005) 562, pp565-573.
[92] Greenawalt A.K.A., Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation!, vol.99 *Colum.L.Rev.* (1999) 2259, at 2270 et seq. See also: Goldsmith K., The Issue of Intent in the Genocide Convention and Its Effect on the Prevent and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach, vol.5(3) *Genocide Studies and Prevention* (2010) 238, pp.247-249.

interpreting the 'intent to destroy' to mean special intent or *dolus specialis* not only goes beyond the wording of the Genocide Convention but that it is also a concept not wholly accepted as such in either common law or civil law jurisdictions.[93]

Proponents of the knowledge-based have also focused their analysis on the double intent structure of the crime of genocide. This structure-based approach distinguishes between the "*collective* level of genocidal activity" and the "*individual* genocidal conduct."[94] According to Ambos the "'intent to destroy' refers to the collective genocidal action and thus encapsulates the context element of the crime of genocide."[95] Consequently, the *ad hoc* tribunals' purpose-based approach remains unchanged for those top- and mid-level perpetrators who were the intellectual and factual leaders of the genocidal campaign. Alternatively, as regards low-level perpetrators knowledge of the collective genocidal activity is sufficient.[96] Significantly, Kress refers to the latter type of perpetrators as the "typical case" of genocide.[97]

The knowledge-based approach might have been rejected by the case-law of the *ad hoc* tribunals but still there are indicia which support such a change of direction in the interpretation of 'intent to destroy.' Firstly, while the TC in *Krstić* followed *Akayesu* it also emphasised "the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration."[98] Secondly, the COI in its finding that the actions of the Government of Sudan ('GoS') did not evince genocidal intent distinguished between the collective level of the central government and the intent of single individuals.[99] Thirdly, article 30 of the Statute clarifies that "[u]nless otherwise provided" the material elements of the crimes within the Court's jurisdiction are "committed with intent and knowledge." Thus, article 30 does not require a special quality for intent and at the same time "shows an obvious move toward a knowledge-based approach."[100]

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[93] Triffterer O., Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such, vol.14 *LJIL* (2001) 399, p.404.
[94] Kress, n.91, p.572 (emphasis added). See also: Vest H., A structure-based concept of genocidal intent, vol.5(4) *JICJ* (2007) 781.
[95] Ambos K., What does 'intent to destroy' in genocide mean?, vol.91 *IRRC* (2009) 833, pp.845-846.
[96] Ibid, pp.846-849.
[97] Kress, n.91, p.577.
[98] *Krstić* Trial Chamber, n.56, p.549.
[99] Report of the International Commission of Inquiry in Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005 <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> paras.518 and 520 ('COI').
[100] Triffterer, n.93, p.399; Goldsmith, n.92, p.254.

The PTC majority in the *Bashir* case when discussing specific intent referred approvingly to the above knowledge-based approach to the subjective elements.[101]Before discussing the ICC genocide proceedings in section 2.6 I will examine the general discourse which accompanied the conflict in Darfur in order to understand its impact, if any, in relation to the ICC's eventual involvement in the crisis.

2.5. The Darfur Conflict

2.5.1 Making sense of the genocide discourse in respect of the Darfur conflict

"'When *I* use a word, it means just what I choose it to mean – neither more nor less', said Humpty Dumpty.
'The question is whether you *can* make word mean so many different things', said Alice.
Lewis Carroll, *Through the Glass,* Ch.6"[102]

The Darfur crisis has demonstrated that even though genocide as a legal concept is framed in a concise and carefully worded manner, disagreements persist as to its precise scope and interpretation.[103] This is because the public dimension of genocide does not coincide with the term's meaning in law. The media's fixation on the COI's no-genocide conclusion demonstrated the public's perception that genocide is 'the crime of crimes' and that any contrary finding was considered as exonerating the GoS of responsibility despite the fact that the Report identified that CaH and WC had occurred and that such crimes were equally heinous and grave.[104] The controversy whether the conflict constituted genocide highlighted that the vocational cleavage between advocacy and scholarship still plays an important role in the way genocide is perceived.[105] In particular, the public dimension of genocide is not only important for the "naming" of genocide but also in relation to the "framing" of the crime.[106] According to Luban a lay understanding of the crime singles out genocide as the ultimate crime "not because of the group mentality element, but that it involves an exterminative attack on a group."[107]

While the "politics of naming"[108] arguably distracted from the complexities of the long-standing conflict in Sudan it reaffirmed at the same time that accusations of genocide have "great demagogic

[101] *Bashir* (ICC-02/05-01/09-03), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, fn.154 ('Bashir First Arrest Warrant Decision').
[102] Cited in Schabas (Unimaginable Atrocities), n.35, p.99.
[103] Ibid, p.104
[104] Luban D., Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report, vol.7(1) *CJIL* (2006) 303, p.306.
[105] Meierhenrich J. (ed.), Genocide: A Reader (OUP 2014), p.8
[106] Ibid, p.254.
[107] Luban, n.104, pp.319-320.
[108]Mamdani M., The Politics of Naming: Genocide, Civil War, Insurgency?, *London Review of Books*, 8 March 2007 <http://www.lrb.co.uk/v29/n05/mahmood-mamdani/the-politics-of-naming-genocide-civil-war-insurgency>

effect."[109] Indeed, the way by which the crime of genocide in the context of the Darfur conflict came before the ICC demonstrates that the appeal of the 'genocide mystique'[110] may affect the trajectory taken by the international community in dealing with such a crisis. The argument has been raised that the decision of the ICC Prosecutor to pursue genocide charges against President Al-Bashir were the result of "external political factors" being "unrelated to matters of law and fact."[111] As it will be seen in the next sub-sections the central point of contention is whether the Al-Bashir regime had the intention to destroy, in part, national, ethnical, racial or religious groups as such in Darfur. The COI and the ICC Prosecutor interpreted this differently. Without passing judgement on the conclusions of either the COI or the Prosecutor both of them contain valuable understandings as to extent to which the current scope of the crime of genocide has developed beyond the concept of mass killings on the scale which took place during the Holocaust.[112] The decision of the Prosecutor to press for charges in the face of the negative finding of the COI is potentially an important step not only in itself but also in relation to future cases involving genocide charges that may come before the Court. The findings of the COI are discussed in detail below.

2.5.2 The findings of the International Commission of Inquiry in Darfur

The COI was established by a UNSC resolution in relation to the situation in Darfur, Sudan. It was mandated among others to determine whether or not acts of genocide have occurred in Darfur.[113] The conclusions of the COI provide an insight in respect to a number of central aspects pertaining to the crime of genocide, including the issue of intent and consequently its relationship to the existence of State plan or policy.

The COI firstly acknowledged that "the most significant element of the conflict has been the attacks on civilians, which has led to the destruction and burning of entire villages, and the displacement of large parts of the civilian population."[114] The targeted tribes in the Darfur conflict, namely the Zaghawa, Masaalit and Fur tribes, were held to subjectively make a distinct group to be accorded protection under the Genocide Convention since they "exhibit the characteristics of one of the four categories of group protected by international law."[115] The COI then proceeded to determine whether there was genocidal intent.

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[109] Schabas (Unimaginable Atrocities), n.35, p.102.
[110] Ibid, chapter 4.
[111] Cayley A.T., The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide, vol.6 *JICJ* (2008) 829, p.830. See also: De Waal A., Moreno Ocampo's Coup de Theatre, *Monthly Review*, 30 July 2008 <http://mrzine.monthlyreview.org/2008/dewaal300708.html>
[112] Luban, n.104, p.308.
[113] S/RES/1564 (2004), 18 September 2004, para.12.
[114] COI, n.99, para.72.
[115] Ibid, paras 497, 509-512.

I reproduce here because of its significance the COI's finding as to whether the GoS entertained genocidal intent:

> the Commission concludes that the Government of Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are: first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led to the perception and self-perception of members of African tribes and members of Arab tribes as making up two distinct ethnic groups. However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.[116]

The Commission concluded that the GoS had not pursued a policy of genocide in the Darfur conflict. This finding has been described as "probably the key sentence" in the Report.[117] If seen in a wider context, the Commission's emphasis on the existence of genocidal policy seems rather surprising. This is because the ICTY's conclusion in *Jelisić* that the existence of a plan or policy does not constitute a legal ingredient of the crime of genocide has become an established position in the case-law of the *ad hoc* tribunals.[118] What comes out of the Committee's conclusion is a confirmation that the crime of genocide is a "systemic crime" which takes place within a collective enterprise.[119] The interaction between the collective and individual aspect of the crime and its influence on the interpretation of genocidal intent was discussed in section 2.4.3.

Consequently, it is important to assess the reasoning followed by the Commission in deciding that the GoS's actions in Darfur did not evince genocidal intent.[120] In this respect, the COI's interpretation of forcible displacement is particularly relevant. It found that forcible displacement "does not evince a specific intent to annihilate, in whole or in part" a targeted group.[121] Rather, it found that the intent of those who forced the people from their homes was "primarily for purposes of counter-insurgency warfare."[122] Reeves is quite critical of the COI's position in this respect. Firstly, he states the COI has

[116] Ibid, para.518.
[117] Kress, n.91, p.563.
[118] Schabas (Has Genocide Been Committed in Darfur?), n.88, pp.41-42.
[119] Kress, n.91, pp.572-573. See also: Schabas (Has Genocide Been Committed in Darfur?), n.88, p.47.
[120] Totten S., The UN International Commission of Inquiry on Darfur: New and Disturbing Findings, vol.4(3) *Genocide Studies and Prevention* (2009) 354, see esp. pp.367-371.
[121] COI, n.99, para.519.
[122] Ibid.

ignored the exceedingly high mortality rates which followed forced displacement.[123] Secondly, the COI does not seem to take into consideration the fact that a very large number of internally displaced people had been forced to flee into "inaccessible rural areas […] beyond the reach of any humanitarian relief efforts."[124]

According to Reeves the COI's report as to the absence of genocidal intent is so badly compromised by this tendentious and poorly reasoned conclusion that one must conclude that the COI "did not feel politically free to make a determination of genocide."[125] It is hardly conclusive that the COI was politically influenced or that there was bias in its findings.[126] However, it does seem fair to state that it exercised undue caution in interpretation of the evidence. In discussing the lack of genocidal intent the COI mentioned that the attackers had refrained from "exterminating the whole population."[127] Not only is this not required by the genocide definition but it also ignores that the intent to destroy may be directed against a part of the group. This also seems to contradict the COI's own finding that the intent to destroy 'in part' a protected group is not necessarily a "very important part" provided that it is "substantial.[128] Moreover, according to Luban the COI's approach did not take into account that the 'in part' aspect of the crime had been interpreted by the ICTY to include an attack against "a group-within-a-territory."[129] He substantiates his argument by undertaking a comparison between the COI's findings and the ICTY's decision in *Krstić* in the light of which "the ICTY and the UN Commission reach opposite conclusions on remarkably similar evidence."[130] Shaw has criticised the COI for restricting itself within "the maximal, Holocaust standard of physical extermination," whereby the identity of genocide was coined with 'physical destruction' and displacement was treated as evidence of CaH. [131]

The ICC Prosecutor disagreed with the COI's interpretation of forcible displacement. In his application for an arrest warrant against Al-Bashir he argued that depending on the circumstances, forcible transfer could constitute evidence of genocidal intention. In relation to genocide by deliberate infliction on each target group of conditions of life calculated to bring about the physical

[123] Reeves E., The Report of the International Commission of Inquiry on Darfur: A Critical Analysis (Part I), 2 February 2005 <http://sudanreeves.org/2005/02/11/report-of-the-international-commission-of-inquiry-on-darfur-a-critical-analysis-part-i-february-2-2005/>
[124] Ibid.
[125] Ibid.
[126] Totten, n.120, p.356-357.
[127] COI, n.99, para.513.
[128] Ibid, para.492.
[129] Luban, n.104, pp.316-316.
[130] Ibid, pp.313-316.
[131] Shaw M. *What is Genocide?* (Polity Press 2007), p.170.

destruction of the group he referred to among others to the forcible displacement of the targeted group "into inhospitable terrain."[132]

The 'disagreement' between the Prosecutor and the COI has highlighted that for the first time both the Prosecutor and the Judges will need to interpret the definition and the available evidence in the midst of ongoing conflict. While this cannot distract from the fact that all the elements of the crime need to be proven, still the conflicting findings have highlighted the need to interpret the definition with some sort of flexibility which had not been necessary in the past. In the next section I will examine how both the Prosecutor and the Chambers have approached the question of specific intent under the Statute and how they have dealt with the 'novel' contextual requirement.

2.6 The *Bashir* case and the relationship between the Rome Statute and the Elements of Crimes

The *Bashir* case although still remaining at the arrest warrant stage, has highlighted a number of noteworthy issues, not least because it is the only case to date to involve genocide charges. The analysis in this section reflects on the PTC's construction of the relationship between the EoC and the Statute and on the normative significance of this approach on the interpretation and development of the crime of genocide. This is a significant question which relates to the broader issue as to what is the proper relationship between the crimes as encapsulated in the Statute and the EoC.

The majority made a number of observations about the contextual element of the crime. The ICC Chambers have often referred to article 10 to state that the Statute and the EoC shall not be interpreted as limiting or prejudicing existing or developing rules of IL other than the Statute. However, in the present case, the majority started its discussion by observing that no such contextual requirement is to be found in either the Genocide Convention or the Statutes of the *ad hoc* tribunals. According to the case-law of these tribunals the crime is completed once genocidal intent materialises, regardless of whether genocidal intent has turned into a concrete threat to the existence of the targeted group. [133] On the contrary, under the Rome Statute, the crime of genocide may only be completed when such a concrete threat arises.[134] Importantly, the majority acknowledged that "there is certain controversy as to whether this contextual element should be recognised."[135]

[132] *Situation in Darfur* (ICC-02/05-157-AnxA), Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, paras 55 & 177.
[133] Bashir First Arrest Warrant Decision, n.101, para.119.
[134] Ibid, para.124.
[135] Ibid, para.125.

The majority considered that the EoC must be applied unless the competent Chamber finds an "irreconcilable contradiction" between them and the Statute. If an irreconcilable contradiction is found, the Statute prevails. In the present case, the majority did not find that an irreconcilable contradiction existed between article 6 and the contextual element. [136] Additionally, it found that this element is "fully consistent with the traditional consideration of the crime of genocide as the "crime of crimes."[137] This statement does not give support to the Chamber's previous elaboration that traditionally the crime of genocide was not considered to encompass such a requirement and it reflects the difficulty on the part of the judges in trying to reconcile the contextual element with the Statute.

Subsequently, the PTC majority applied the notion of proof by inference in order to determine the existence of genocidal intent. It found that establishment of the GoS's genocidal intent by inference must be the only reasonable one on the evidence.[138] The majority analysed the material provided by the Prosecutor and concluded that this was not the case.[139] As a result, it was not satisfied to the required threshold that the GoS acted with *dolus specialis/*specific intent.[140] Thus, it declined to issue an arrest warrant against Al-Bashir in respect of genocide charges.

Judge Anita Ušacka issued a dissenting opinion which referred among others to the consistency of the contextual element with the statutory definition of the crime. She disagreed with the majority that the EoC need to be applied unless the Chamber finds that an irreconcilable contradiction exists between them and the Statute. In any case, she found that "this element is met in the instant case, regardless of whether or not it should be applied."[141] Accordingly, she did not find it necessary, at this stage, to determine whether the contextual element was consistent with the statutory definition of genocide.[142] While the judge left this question open her reasoning suggests that she did not share the majority's view.

The Prosecutor applied for leave to appeal the decision which was granted. The AC determined that requiring that the existence of genocidal intent be the only reasonable one would establish intent beyond reasonable doubt.[143] It determined that the PTC had adopted and applied an erroneous 'reasonable grounds to believe' standard in relation to 'proof by inference.'[144] Thus, the PTC's decision constituted an error of law and was reversed in this respect. The matter was remanded to the

[136] Ibid, paras.128 & 132.
[137] Ibid, paras 132-133.
[138] Ibid, paras156-158.
[139] Ibid, para.205.
[140] Ibid, para.206.
[141] Bashir First Arrest Warrant Decision, n.101, Dissenting Opinion, para.17.
[142] Ibid, para.20.
[143] *Bashir* (ICC-02/05-01/09-73), Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," 3 February 2010, para.33.
[144] Ibid, para.34.

PTC for a new decision on the basis of the correct standard of proof.[145] The PTC applying the standard of proof identified by the AC concluded that it was satisfied that there are reasonable grounds to believe that Al-Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masaalit and Zaghawa ethnic groups.[146]

The *Bashir* case indicated the difficult task faced by the Chambers in reconciling as part of their reasoning the contextual requirement in the EoC and the crime's statutory wording. Notably, this issue has arisen at a very early phase of a case, the arrest warrant stage, illustrating the obstacles that may arise in its application and consistency with the Statute (rather than its interpretation *per se*). This addition to the genocide definition is potentially important given that it may become a determining factor for proving specific intent. Moreover, it is expected to play a more central role in the adjudication of a given case, especially as it progresses to more advanced stages which involve increasingly demanding evidentiary standards. Thus, it will also be relevant in relation to the type of evidence to be presented.

The PTC's analysis demonstrates that the practical effect of the contextual requirement is not going to be limited. The contextual element has made the interplay between the collective and individual aspect of the crime "*explicit.*"[147] It is quite possible that this development was inadvertently made by the drafters of the EoC. Nevertheless, it is a step towards a convergence between the interpretation of the mental element of the crime of genocide by international courts to date and the growing support among scholars for a re-consideration of genocidal intent. Thus, while the text of the crime has remained unchanged, genocidal intent, the core element of the crime which separates genocide from other crimes, has been given a revised outlook of great potential as regards its interpretation.

2.7 Conclusion

The aim of this chapter has been to scrutinise whether the inclusion of the crime of genocide within the jurisdiction of the ICC Statute would affect the further and future development of the crime of genocide. What has come out of this chapter is that such a development would be a matter of interpretation rather than amendment of the genocide definition. This view is given support by the fact that despite the frequent calls for amendment of the genocide definition over the years, "when

[145] Ibid, paras 41-42.
[146] *Bashir* (ICC-02/05-01/09-94), Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, para.5.
[147] Kress, n.91, p.575.

presented with the ideal occasion to make the long-awaited changes to the definition, participants at the Rome Conference on the International Criminal Court, in 1998, left the 1948 text intact."[148]

The text of the definition of the crime of genocide might have resisted any kind of change over the years; however its meaning has not. Despite its short and carefully worded definition "even at the legal level, it is imprecise to speak of a single, universally recognized meaning of genocide." [149] Importantly, this has been clearly demonstrated by the conflict in Darfur. Although the future of the case against Al-Bashir before the ICC remains more than uncertain a number of important observations may already be discerned, which may have an impact on the interpretation and thus the development of the crime of genocide under the Statute. The institution of the ICC is often involved in ongoing crises and determinations have to be made all the time whether any of the crimes within the Court's jurisdiction have taken place. While this is the case for all the ICC crimes it is more significant in the context of the crime of genocide. The crime of genocide might have evolved beyond the notion of genocide that has characterised the atrocities of WWII, but still its focus on evidence of physical destruction holds strong. Therefore the Darfur crisis has demonstrated that a certain amount of 'flexibility' might be necessary in this respect. The ICC Prosecutor has attempted to move towards this direction. Whether this may be evidenced 'beyond any reasonable doubt' remains to be seen.

My analysis has also focused on the contextual requirement included in the EoC. The contextual element has put emphasis on a particular way of interpreting genocidal intent in a manner which was either not taken into consideration or was dismissed by the case-law of the *ad hoc* tribunals. On the one hand, this element arguably confirms an implicit feature of the crime, that is, that it is virtually impossible for genocide to be committed in the absence of a plan or policy. On the other hand, the explicit elaboration in a legal document, albeit the non-binding EoC, has implications on the interpretation of genocidal intent as regards certain types of perpetrators. Arguably, the eventual move towards a knowledge-based interpretation of genocidal intent as regards low-level perpetrators would indicate that the outer limits of genocidal intent, or even the genocide definition itself, may not have reached a state that they are completely intractable to change. It may also be perceived as a reaction to the immense difficulties which have been encountered to date to prove specific intent or *dolus specialis* beyond any reasonable doubt. The way by which the PTC has approached the issues of the contextual requirement and specific intent shows that there is fertile ground for development via interpretation.

[148] Schabas, Unimaginable atrocities, n.35, p.106.
[149] Ibid p.104.

Chapter 3: Crimes against Humanity

3.1 Introduction

The central question in this chapter is how the establishment and subsequently the operation of the ICC impacts on the scope of CaH. Article 7 of the Statute is the closest ever that CaH have come to having their own "code" and "may be held to a large extent either to crystallize nascent notions or to codify the bulk of existing customary law."[1] The underlying acts which qualify as CaH comprise both progressive as well as restrictive aspects compared to previous formulations of the crime.[2] In this respect, I will undertake an assessment of the specific acts when discussing the impact of the Court's establishment on the scope of CaH. Nevertheless, as a preliminary question, it is imperative to first consider the Statute's formulation as to what it takes to elevate a crime to the status of CaH. Here I am referring to the contextual requirement of CaH as this is elaborated in the *chapeau* of article 7(1) and explained in paragraph 2(a) of the same provision.

Of the core crimes which are currently within the Court's jurisdiction, CaH have traditionally been the most elusive in terms of their conceptual character.[3] The conceptual character of CaH refers to that aspect of the crime which serves to distinguish CaH from common crimes under domestic law.[4] As explained below, this is particularly germane in relation to CaH as opposed to the other crimes in the Statute.

This conceptual uncertainty permeated the efforts undertaken to define the crime over the years.[5] Notably, of the numerous definitions of the crime no two were alike.[6] In the next section I will discuss how this ambiguousness can be traced back to the first definition of the crime in the Nuremberg Charter. Importantly, this lack of clarity was not resolved in the various definitions of the crime formulated in the following decades. Moreover, unlike the other crimes within the Court's jurisdiction

[1] Cassese A., *International Criminal Law* (2nd edn OUP 2008), p.109.
[2] Schabas W.A., *An Introduction to the International Criminal Court* (4th edn CUP 2011), pp.107-121.
[3] Van den Herik L. and Van Shedregt E., Removing or Reincarnating the Policy Requirement of Crimes Against Humanity: An Introductory Note, vol.23 *LJIL* (2010) 825.
[4] Jalloh C.C., What Makes a Crime Against Humanity a Crime Against Humanity, vol.28(2) *Am.U.Int'l L.Rev.* (2013) 381.
[5] McAuliffe de Guzman M., The Road from Rome: The Developing Law of Crimes against Humanity, vol.22 *HRQ* (2000) 335, p.351; Hwang P., Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court, vol.22 *Fordham Int'l L.J.* (1998) 457, p.487.
[6] Sadat L.N., *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers, Inc. 2002), p.148 ('Sadat (2002)').

the crime's definition was never codified in a comprehensive convention.[7] Recent efforts in this direction are discussed in section 1.7.

Academic discussion has focused on whether the ICC account of the contextual requirement is a deviation from CIL which has raised the threshold for CaH.[8] Such a debate ignores that at no point before the establishment of the ICC had the meaning of the contextual requirement been clear. This is demonstrated with an overview of the most significant formulations and interpretations of the contextual requirement prior to the Statute. The contextual requirement in article 7 has not necessarily narrowed the definition of CaH nor has it clarified its meaning beyond doubt. The wording of article 7 allows equally a conservative and a progressive reading.[9] This latitude for interpretative disagreement has placed the Court in a strong but at the same time difficult position when it comes to defining and clarifying the limits of CaH. The Court's early jurisprudence has already illustrated that the issue as to what is the essence of the crime, that is what distinguishes an ordinary crime from a CaH, has not been resolved. These conflicting judicial findings are invaluable in themselves for understanding the 'options' available to the ICC with respect to CaH. Ultimately, the route(s) taken by the ICC will have a bearing on the scope of the concept of CaH under CIL.

In this chapter I will examine the different understandings of the concept of the crime over the years. I will also take into account the choices made during the negotiations for an international criminal court. In addition to the contextual requirement I will be considering the underlying acts of the crime. The drafters made changes to acts already recognised as CaH. At the same time, they agreed on some noticeable additions. Lastly, I will consider the interpretation of article 7 by the ICC. The centrality of article 7 as regards the Court's law-making potential is arguably more prominent when compared to the other crimes within the Court's jurisdiction given that CaH is the only crime in relation to which charges have been brought in all the situations currently before the Court. Moreover, three out of the nine situations - these being Kenya, Côte d'Ivoire and Libya - have only involved CaH charges.[10]

3.2 Background to crimes against humanity

CaH may be traced back to the 1907 Hague Convention where the term 'humanity' was for the first time introduced as a legal notion. The Preamble stipulates, in the so-called Martens Clause, that, to

[7] Van Schaack B., The Definition of Crimes Against Humanity: Resolving the Incoherence, vol.37 *Colum.J.Transnat'l L.* (1999) 787, p.792.

[8] Schabas W.A., *An Introduction to the International Criminal Court* (2nd edn CUP 2004), p.46; Cassese, n.1, p.125; Cryer R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005), p.254.

[9] Robinson D., Essence of Crimes against Humanity Raised by Challenges at ICC, *EJIL: Talk!,* 27 September 2011 <www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/>

[10] ICC, Situations and cases <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>

the extent that a case is not included in the Hague Convention "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of the public conscience."[11]

The first recorded appearance of the term 'crimes against humanity' came in 1915 in the form of a joint declaration on the part of the governments of Great Britain, France and Russia following the Turkish massacres of Armenians. The joint declaration described these atrocities as "crimes against humanity and civilization" for which all implicated members of the Turkish government and its agents were to be held responsible.[12] A novelty in the statement was the reference to what the Ottoman Empire was doing to its own citizens. The crimes of a country against its own citizens would become the essence of CaH in the Charter of the International Military Tribunal ('IMT Charter').[13] However, the peace treaties did not follow up on the declaration and made no reference to CaH.[14]

CaH were defined and prosecuted for the first time in Nuremberg. CaH were defined in article 6(c) of the IMT Charter.[15] The formulation of CaH in the IMT Charter was designed to avoid a grotesque distinction being drawn between protected victim groups on the basis of nationality.[16] This is evidenced by the reference in the provision to CaH as acts "against any civilian population." The commission of CaH was linked with the other crimes within the IMT's jurisdiction, namely, WC and crimes against peace. Thus, article 6(c) was seen as an extension of international humanitarian law ('IHL'), rather than a new source of law, which would contravene the principle of legality.[17]

Linking CaH with the other crimes within the Court's jurisdiction provided an acceptable albeit not uncontested shield against accusations that article 6(c) violated the principle of legality. However, this linkage meant that there was no pressure on the IMT to clarify the conceptual basis of the crime in its Judgment, including whether the nexus between CaH and armed conflict was particular to the

[11] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Preamble <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument> (emphasis added)
[12] Schwelb E., Crimes Against Humanity, vol.23 *Brit. Y.B. Int'l L.* (1946) 178, p.181 (quoting Armenian Memorandum Presented by the Greek Delegation to the Commission of Fifteen on 14 March 1919).
[13] Clark R.S., History of Efforts to Codify Crimes Against Humanity, in Sadat L.N. (ed.), *Forging a Convention for Crimes Against Humanity* (CUP 2011), p.9 ('Forging a Convention').
[14] Versailles Treaty, 28 June 1919, Part VII: Penalties, articles 227-229 < http://avalon.law.yale.edu/imt/partvii.asp>; Treaty of Lausanne, reprinted in vol.18 *AJIL* (Supp. 1925) 1.
[15] Article 6(c) of the Charter establishing the Nuremberg Tribunal annexed to the London Agreement of 8 August 1945 <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument>. The language of article 6(c) was taken by the Charter of the International Military Tribunal for the Far East. Ultimately there were no convictions for CaH in Tokyo. See Clark (Forging a Convention), n.13, p.12.
[16] Bassiouni M.C., Revisiting the Architecture of Crimes Against Humanity: Almost a Century in the Making, with Gaps and Ambiguities Remaining – the Need for a Specialized Convention, in Forging a Convention, n.13, p.50; Fenrick W., Should crimes against humanity replace war crimes?, vol.37 *Colum.J.Transnat'l L.* (1998-1999) 767, p.773.
[17] Lippman M., Crimes Against Humanity, vol.17 *B.C. Third World L.J.* (1997) 171, p. 202-204.

jurisdiction of the IMT Charter or whether it related to the definition of the crime under general IL.[18] This created further uncertainty as to the status of CaH under CIL.

CaH were also included in article II(2)(a) of Control Council Law No.10 ('CCL No.10').[19] The purpose of this law was to provide the Allies with a "uniform legal basis" for the prosecution of war criminals and other similar offenders in their respective zones of occupation.[20] The CaH provision was similar to the one in the Nuremberg and Tokyo Charters. The most notable change in this definition was the elimination of the war nexus.

The omission is not as unequivocal as it appears to be. Firstly, according to the preamble of CCL No.10 the law was enacted in order to give effect to "the London Agreement of 8 August 1945, and the [IMT] Charter issued pursuant thereto."[21] Secondly, the discrepancy between the IMT Charter and CCL No. 10 was followed by conflicting decisions on the matter. In the two cases, the *Ministries* and *Flick* cases, where peacetime CaH were actually charged the relevant tribunals affirmed the existence of the war nexus requirement.[22] On the other hand, the war nexus requirement was rejected in two other cases, *Justice* and *Einsatzgruppen*.[23] However, both decisions dealt with acts committed after the beginning of war. Thus, they seem to be "mere *obiter dicta."*[24]

On the basis of the above case-law, the omission of the war nexus requirement from CCL No. 10 did not conclusively resolve the question whether the war nexus requirement was a jurisdictional limitation that was specific to the IMT Charter. Nonetheless, despite the contrary decisions, the work of the Nuremberg Military Tribunals under CCL No. 10 "laid the groundwork for the eventual elimination of the nexus requirement."[25] The abandonment of the war nexus requirement was soon given support by the United Nations War Crimes Commission ('UNWCC').

The UNWCC characterised the discrepancy between the IMT Charter and CCL No. 10 as "the most fundamental" and most striking difference" as a result of which the war nexus requirement is "entirely

[18] Roger S. Clark, *Crimes Against Humanity*, in The Nuremberg Trial and International Law 17, at 195-196, cited in de Guzman, n.5, p.347, n.41.
[19] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, article II(1)(c) <http://avalon.law.yale.edu/imt/imt10.asp>
[20] Ibid, preamble.
[21] Ibid.
[22] Ernst von Weizsäcker and Others (The Ministries Case), 26 March 1948, pp.115-7, *reprinted in* Trials of War Criminals Before the Nuernberg Military Tribunals, Vol.XIII ; Flick and Others (The Flick Case), Judgment, 22 December 1947, pp.1212-3, *reprinted in* Trials of War Criminals Before the Nuernberg Military Tribunals, Vol.VI
[23] Alstoetter and Others (The Justice Case), Judgment, 3-4 December 1947, p.974, *reprinted in* Trials of War Criminals Before the Nuernberg Military Tribunals, Vol.III ; Ohlendorf and Others (The Einsatzgruppen Case), Judgment, 8-9 April 1948, p.49, *reprinted in* Trials of War Criminals Before the Nuernberg Military Tribunals, Vol.IV
[24] Van Schaack, n.7, p.809.
[25] Heller K.J., *The Nuremberg Military Trials and the Origins of International Criminal Law* (OUP 2011), p.250.

inapplicable in proceedings under Law No. 10."[26] Moreover, when the UNWCC proceeded to define the concept of CaH it concluded that, among others, the presence of war was "irrelevant" to the commission of CaH.[27]

The significant contribution of the UNWCC to the development of customary ICL has only recently begun to be discerned with the gradual opening of access to its archival records.[28] Its work between 1943 and 1948 was "the first multilateral initiative to successfully conduct widespread investigations into heinous crimes of war and provide structure to prosecute suspected war criminals."[29] In the pursuance of this task the UNWCC's Legal Committee advised the governments on legal questions.[30]

As regards CaH, the UNWCC's analysis points towards the growing understanding, that following the adoption of the IMT Charter a definite stand was taken as to the "existence of crimes against humanity as a separate type of international offence."[31] At the same time, the UNWCC's substantive motion that CaH are "*war crimes* within the jurisdiction of the Commission"[32] demonstrates that the independence and status of CaH under CIL remained contested.

3.3 The work of the International Law Commission and other developments

The evolution towards a clearer CaH definition may be understood by looking at the work of the ILC. In 1950 the ILC distilled the Nuremberg Principles according to which CaH is a crime under IL.[33] Arguably this is the first endorsement by the international community as to the customary status of CaH. The ILC was also mandated by the UNGA to produce a Draft Code of Offences against the Peace and Security of Mankind ('Draft Code').[34] The ILC produced three principal drafts in 1954,

[26] UNWCC (ed.), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationary Office, 1948), Chapter IX, p.213 <http://www.cisd.soas.ac.uk/documents/un-war-crimes-project-history-of-the-unwcc,52439517> ('History of the UNWCC')
[27] Ibid, Chapter VIII, p.178
[28] Schabas W. *et al.*, The United Nations War Crimes Commission and the Origins of International Criminal Justice, vol.25 *CLF* (2014) 1, p.2. See also: Justice Goldstone R., United Nations War Crimes Commission Symposium, vol.25 *CLF* (2014) 9, p.12.
[29] Plesch D., and Sattler S., A New Paradigm of Customary International Criminal Law: The UN War Crimes Commission of 1943-1948 and its Associated Courts and Tribunals, vol.25 *CLF* (2014) 17, p.30.
[30] United Nations Archives, Predecessor Archives Group, United Nations War Crimes Commission 1943-1949, PAG-3/Rev. 1, 1987, p.iii <http://www.legal-tools.org/en/doc/336bd1/>
[31] History of the UNWCC, n.26, Chapter VIII, p.176.
[32] UNWCC, Minutes of Ninety-Third Meeting (M.93), 30 January 1946 <http://www.legal-tools.org/uploads/tx_ltpdb/File_1222-1225_01.pdf>
[33] ILC, Report of the International Law Commission on the Work of its 2nd Session, 5 June – 29 July 1950, UN Doc. A/1316, p.374.
[34] UNGA Res 177(II), 21 November 1947.

1991 and 1996.[35] Although the Draft Code was never formally adopted its different versions are instructive in comprehending the gradual maturing of the concept.[36] By the time of the 1996 draft the war nexus had been eliminated, the list of enumerated acts had been expanded and the widespread or systematic requirement had been introduced ("when committed in a systematic manner or on a large scale").[37] The systematic aspect was understood to mean that the acts were pursuant to a "preconceived plan or policy."[38] This was intended to exclude random acts which were not part of the broader plan or policy. The second alternative referred to the need for the acts to be committed against a "multiplicity of victims" thus excluding isolated inhumane acts of a perpetrator against a single victim.[39] Lastly, it was noted in the commentary that the instigation or direction by "a Government or any organization or group, which may or may not be affiliated with a Government" is what makes an act a CaH.[40] Again this requirement was intended to exclude isolated criminal conduct.

Significantly, even though the aforementioned drafts are not binding they provide indications as to the state of law.[41] In particular, while there was still a lot to be done in terms of clarifying key aspects of the crime; its core elements were discernible. The evolution of the core elements of CaH which together embody the conceptual basis of the crime will be explored below. I will primarily focus on the work of the *ad hoc* tribunals but will also refer to other case-law when necessary.

3.4 The work of the *ad hoc* Tribunals in relation to crimes against humanity

3.4.1 The Legal Framework

Before discussing the interpretation of CaH by the ICTY and the ICTR I will first analyse the statutory definition of the crime in these instruments. The ICTY Statute, drafted by the UN Secretary-General ('UNSG'), was adopted first.[42] According to the UNSG Report the definition should include "rules which are beyond any doubt part of customary law."[43] This would explain the definition's adherence to the IMT definition and the requirement that CaH be committed in the context of an

[35] Draft Code of Offences against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its 6th session, 3-28 July 1954, UN Doc. A/2693; Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its 43rd session, 29 April-19 July 1991, UN Doc. A/46/10; Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its 48th session, 6 May-26 July 1996, UN Doc. A/51/10.
[36] Jalloh, n.4, p.407.
[37] 1996 ILC Draft Code, n.35, article 18.
[38] Ibid, Commentary to article 18, para.3.
[39] Ibid, para.4.
[40] Ibid, para.5.
[41] Mettraux G., Crimes Against Humanity and the Question of a "Policy" Element in Forging a Convention, n.13, p.171.
[42] ICTY Statute, article 5 <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>
[43] Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), UN. Doc. S/25704, 3 May 1993, para.34 ('UNSG Report').

armed conflict.[44] Interestingly, the UNSG Report refers to elements not included in the ICTY definition such as that the acts were committed as part of a "widespread or systematic attack" pursuant to discriminatory grounds.[45] At the very least, this "parallel definition" demonstrated the confusion in relation to the customary scope of the crime when the ICTY definition was drafted.[46]

The ICTR Statute was not elaborated by the UNSG but was adopted directly by the UNSC. The CaH contains a number of important differences when compared to the ICTY definition.[47] It contains a "widespread or systematic" nexus and a requirement that all the acts are committed on discriminatory grounds. Moreover, it drops the war nexus. These two differences can be explained. The armed conflict requirement in the ICTY Statute was due to the fact that there was an ongoing conflict in former Yugoslavia, while the requirement for a discriminatory intent in the ICTR Statute was inserted to reflect the "inherently discriminatory nature" of the Rwandan massacres.[48] This approach supports the conclusion that the Statutes were drafted to deal with particular threats to international peace and security and did not purport to set out a general definition of CaH.[49] This is especially so because they were adopted by the same body within months of each other.[50]

The differences between the Statutes of the *ad hoc* tribunals raise the question as to what is the best way to determine the content of CIL at the time and the contribution of these tribunals in this respect. According to the ICTY AC "as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law" unless there is a contrary intention.[51] However, statements of this kind do not automatically accord to the jurisprudence of the *ad hoc* tribunals relevance and weight in the elucidation and development of the CIL. Assessing the contribution of the *ad hoc* tribunals to the development of CaH should take into consideration the under-defined nature of the crime at the time. Choices had to be made by the judges as to the scope and content of the crime. In the first place, the value of these choices in the development of CaH "ultimately depends on the quality of the methodology applied in discovering and interpreting the law."[52] Subsequently, it is necessary to examine whether their findings were followed in later case-law and subsequent practice. In the sub-section below I discuss the interpretation given to the *chapeau* elements in the various codifications of the crime, with particular attention given to the work of the *ad hoc* tribunals. I will refer to the

[44] Sluiter G., "Chapeau Elements" of Crimes Against Humanity in Forging a Convention, n.13, p.106.
[45] UNSG Report, n.43, para.47.
[46] Sluiter, n.44.
[47] ICTR Statute, article 3 <http://www.un.org/ictr/statute.html>
[48] Van den Herik L., Using Custom to Reconceptualize Crimes Against Humanity, in Darcy S. and Powderly J.(eds), *Judicial Creativity at the International Criminal Tribunals* (OUP 2010), p.83.
[49] Johnson L.D., Ten Years Later: Reflections on the Drafting, vol.2 *JICJ* (2004) 368, p.372.
[50] Sluiter, n.44, p.107.
[51] *Tadić* (IT-94-1-A), 15 July 1999, para.296 ('*Tadić* Appeals Judgment').
[52] Sluiter, n.44, p.109.

customary weight of these elements where this was controversial or because their elaboration was a point of contention during the negotiation of the Rome Statute.

3.4.2 Nexus with armed conflict

Despite the limitation in the ICTY Statute the AC soon declared that CIL does not require an armed conflict nexus for CaH.[53] Accordingly, the nexus was labelled as a "jurisdictional element."[54] While the groundwork for the rejection of the nexus requirement had been laid since the trials of the Nuremberg Military Tribunals, the ICTY's sweeping assertion begs the question as to whether this finding would stand against a thorough analysis of State practice and *opinio juris*. The decisions of the *ad hoc* tribunals have not been immune from criticism that they identified rules of CIL where this was "right/and or logical, instead of having a solid basis in State practice and *opinio juris.*"[55]

The position that certain areas of law are more easily accorded customary status than other areas largely concerns humanitarian law and human rights treaties. This presumption has been contested for failing to account for the repeated violation of rules contained in these treaties as contrary practice. [56] Nevertheless, according to the ICJ, conduct of States which is inconsistent with a rule does not necessarily undermine the rule's customary status as long this is perceived as a breach of the rule.[57] According to the Study of the International Commission for the Red Cross on customary international humanitarian law ('2005 ICRC Study') this is particularly relevant for a number of IHL rules which are repeatedly violated despite "overwhelming evidence of State practice in support of a rule."[58]

In a sense, the ICC is in a much stronger position to influence the development of CIL than the *ad hoc* tribunals. The Rome Statute is the product of a multilateral convention whereby its terms were extensively discussed and amended in order to reach the final result. As mentioned by the ICJ, "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[59] This is especially so because the Statute concerns "a matter of general significance and stipulations which accord with the general sense of the international community."[60]

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[53] *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.141.
[54]. *Tadić* (IT 94-1-T), Judgment, 7 May 1997, p.249 ('*Tadić* Trial Judgment').
[55] Sluiter, n.44, p.111
[56] Weisburd A.M., Customary International Law: The Problem of Treaties, vol.21 *Vanderbilt J.Transnat'l L.* (1988) 1, pp.39-42.
[57] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgment, ICJ Reports 1986, 27 June 1986, p.98, para.186.
[58] Henckaerts J-M, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, vol.87 *IRRC* (2005) 175, p.180.
[59] *Continental Self case (Libyan Arab Jamahiriya v. Malta),* Judgment, ICJ Reports 1985 13, 3 June 1985, p.42, para.27.
[60] Jennings R. and Watts A. (eds), *Oppenheim's International Law: Volume I Peace* (9th edn OUP 2008), p.1205, § 583.

While the ICC judges are considerably more restrained than their colleagues in the *ad hoc* tribunals by the detailed provisions of the Statute, the ICC's foundational instrument rests on a much stronger custom and custom-generating basis than the *ad hoc* tribunals which were adopted by the UNSC. However, it is necessary to point out that the Statute was established at a later stage in the development of ICL and thus is expected to influence the development of CaH in a different way.

3.4.3 Discriminatory intent

The *ad hoc* tribunals' odd treatment of discriminatory intent as an element of CaH reflects the confusion which existed at the time as to its customary status. Notably, the ICTY Statute provides for this requirement only in relation to acts of persecution. Notwithstanding the crime's statutory definition and admitting that this area of law "is quite mixed" the TC decided that all acts constituting CaH had to be taken on discriminatory grounds.[61] Subsequently, the AC reversed this finding.[62] Importantly, the ICTR AC also endorsed this position even though its statute provides for the commission of all acts constituting CaH on the basis of discriminatory intent.[63]

3.4.4 Widespread or systematic

This requirement did not feature in the Nuremberg or Tokyo Tribunals nor was it included in CCL No.10. Nevertheless, the IMT Tribunal had emphasised that CaH were committed as part of a policy of terror where the acts were carried out on a vast scale and were frequently organised and systematic.[64] The Nuremberg Military Tribunals adopted a more stringent approach under CCL No.10.[65] They held that the acts in question were CaH only if they were both large-scale and systematic.[66] The formulation 'widespread or systematic' first appeared in the ICTR Statute. The TC in *Akayesu* defined 'widespread' as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" while it defined 'systematic' as "thoroughly organised and following a regular pattern on the basis of a common policy involving public or private funds."[67] These definitions resemble the commentary in the 1996 Draft Code to 'large scale' and 'systematic.' A similar approach was also taken by the ICTY. The ICTY TC in *Tadić* confirming the disjunctive nature of the requirement further stated that "it is the

[61] *Tadić* Trial Judgment, n.54, paras 644 & 650.
[62] *Tadić* Appeals Judgment, n.51, 297.
[63] *Akayesu* (ICTR-96-4-A), Judgement, 1 June 2001, para.464.
[64] 1996 ILC Draft Code, n.35, Commentary to article 18, paras.3-4.
[65] Heller, n.25, pp.242-244.
[66] *Justice* Case, n.23, p.973; *Einsatzgruppen* Case, n.23, p.498; *Ministries*, n.22, p.522.
[67] *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para.580.

occurrence of the act within the context of a widespread or systematic attack on a civilian population that makes the act a crime against humanity."[68] This is an important statement given that the ICTY Statute does not mention such a requirement. Thus, we see a concurrence between the approach of the ICTY, the ICTR and the ILC where widespread is used interchangeable with 'large scale' and is sometimes interpreted as referring to the number of victims. Alternatively, 'systematic' referred to conduct which is thoroughly organised and follows a regular pattern.[69]

3.4.5 State or organisational policy

As discussed above State or organisational policy was not an explicit requirement of the definition of the Nuremberg or Tokyo Charters. While the IMT Tribunal spoke about the Nazi policy of terror in its judgement, it is not clear whether this was considered as an element of CaH.[70] The CCL No.10 definition did not mention such a requirement either. However, the tribunal in the *Justice* case characterised governmental participation as a "material element" of CaH.[71] More recently, national case-law in France and Canada has supported the argument that State policy is a prerequisite to a finding that CaH were committed,[72] even though neither the French nor the Canadian Criminal Codes explicitly specify that State plan or policy is an element of CaH. [73] However, the contemporary value of these national decisions as evidence of State practice is limited because these courts solely dealt with acts which were committed during WWII.[74] Moreover, the French courts' interpretation of CaH has been criticised as "blatant attempts to exonerate, in advance, the Vichy government from wrong."[75]

The first definition to explicitly refer to a role for a State or organisation in the commission of the crime was the ILC Draft Code.[76] The inclusion of such a requirement was deemed necessary as a means to elevate inhumane acts to the level of CaH following the abandonment of the war nexus.[77] The ICL definition is important in that it indicated that CaH could be instigated by entities other than the State. However, it did not clarify whether this would involve some kind of plan or policy and its

[68] *Tadić* Trial Judgment, n.54, paras 646 & 656.
[69] Byron C., *War crimes and crimes against humanity in the Rome Statute of the International Criminal Court* (Manchester University Press 2009), p.192.
[70] Ibid, pp.202-203.
[71] *Justice* Case, n.23, p.984.
[72] *Barbie*, 100 ILR (1988) 330, p.336; *Touvier*, 100 ILR (1992) 337, p.352; *R v. Finta* [1994] 1 SCR 701, p.725.
[73] Jalloh, n.4, pp.403-404.
[74] Hwang, n.5, p.489.
[75] Wexler L.S., The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, vol.32 *Colum.J.Transnat'l L.* (1994) 289, p.335.
[76] See section 3.3 above.
[77] Notably, the matter arose from the early stages of the work of the ILC see: ILC, Yearbook of the *International Law Commission*, Vol.I (1954), 269th Meeting, 16 July 1954, p.142.

level of formality. While the ILC commentary referred to the issue of policy when explaining the term systematic it did not clarify the status of 'State or organisational policy' as an element of CaH.

Initially both the ICTR and the ICTY, quoting the above ILC definition in support, held that policy was a legal ingredient of CaH.[78] The ICTY's reasoning further indicated that while State involvement was not a prerequisite for the commission of the crime only State-like actors would meet the requirements.[79] Indeed, it was acknowledged that due to "structural factors and organizational and military capabilities" CaH will most often be committed at the behest of a State.[80]

The early position of the *ad hoc* tribunals was emphatically rejected by the ICTY AC in the *Kunarac* case according to which there was nothing in the ICTY Statute or in CIL which would require proof of the existence of such a policy. Hence, a policy or plan is not a legal requirement of the crime but may be evidentiary relevant for establishing that an attack against a civilian population was widespread or systematic, and in particular the latter element.[81] Importantly, this finding has been upheld in subsequent case-law.[82]

The decision of the AC has been the subject of considerable criticism.[83] The AC's interpretation is defensible to the extent that it is one of the various interpretations that could be drawn by looking at the preceding formulations of the crime and the relevant case-law. Sweeping statements that "the overwhelming jurisprudence and legal instruments" do not require an additional policy requirement under IL are not persuasive.[84]Thus, the existence or non-existence of such a requirement was far from clear as a matter of CIL.

The *Kunarac* case decision has been criticised for its sparse analysis and the sources used to support its conclusion. [85] It is striking that the AC's analysis was confined to a footnote. Therefore, one has to focus on the authorities cited in order to understand the strength of its assertion. A review of the sources supports the position that the question as to the role of policy for CaH had not been settled

[78] *Tadić* Trial Judgment, n.54, para.655; *Kayishema and Ruzindana* (ICTR-95-1), Judgment, 21 May 1999, para.125.
[79] Ibid, *Tadić* Trial Judgment, para.654.
[80] *Limaj et al* (IT-03-66-T), Judgment, 30 November 2005, para 191 ('*Limaj* Trial Judgment').
[81] *Kunarac et al.* (IT-96-23 and IT-96-23/1-A), 12 June 2002, para 98 and fn 114 ('*Kunarac* Appeal Judgment').
[82] *Blaškić* (IT-95-14-A), Judgment, 29 July 2004, paras 100 & 120; *Semanza* (ICTR-97-20-A), Judgment, 20 May 2005, para.269.
[83] For a detailed critique of the *Kunarac* finding see: van den Herik, n.48, pp.90-93 and Schabas W.A., State policy as an element of international crimes, vol.98 *JCLC* (2008) 953, pp.958-965.
[84] Mettraux (Forging a Convention), n.13, p.175. See also: Robinson D., Defining "Crimes Against Humanity" at the Rome Conference, vol.93 *AJIL* (1999) 43, p.48 ('Robinson (1999)').
[85] van den Herik, n.48, p.90; Schabas (State policy as an element of international crimes), n.83; Cryer R. *et al*, *International Criminal Law and Procedure* (CUP 2007), pp.197–8; Schabas (2011) n.2, p.112.

before that decision.[86] Bassiouni was highly critical of the ICTY's judgment stating that "there has never been a similar misrepresentation of the law in the history of international criminal law cases."[87]

Several of the sources cited illustrate my argument. Firstly, the AC referred to the IMT Charter definition and judgment, CCL No.10 and the ICL's work on a Draft Code. As stated above, when seen together these developments do not support a definite conclusion as to the existence or not of a separate element of policy. Secondly, it is not clear how some of the national case-law cited relates to the question of policy. For example, a number of Canadian cases on immigration were cited which only incidentally referred to CaH.[88] Thirdly, the ICTY omitted to mention *Finta*, another notable Canadian authority, which as explained above contradicted its conclusion. Fourthly, and perhaps most importantly the AC made no reference to article 7(2)(a) of the Rome Statute. Article 7(2)(a) is the most prominent example of what the international community thinks that the scope of the crime should be even if it this is not actually the case. Thus, the decision of the ICTY to ignore the ICC definition considerably weakens its argument. The ICTY AC should have referred to article 7(2)(a) even if only to contradict it. The above analysis supports the argument that when CaH were negotiated for the purposes of the ICC, the status and content of the policy element was still uncertain.

3.5 Negotiations for an international criminal court

3.5.1 Drafting the provision

While the adoption of a comprehensive convention on CaH was considered as an overdue development[89] it has been argued that the lack of an existing treaty definition during the negotiations "proved liberating in that delegates were not beholden to some past compromise text paraded as sacrosanct and somehow beyond renegotiation,"[90] as was the case in respect of genocide. On the contrary, the drafters had to craft a new definition and the lack of clarity as to the crime's customary status meant that those involved "made choices about the definitions of the crimes that went beyond a simple redaction of existing law."[91]

[86] Jalloh, n.4, p.400.
[87] Bassiouni (Forging a Convention), n.13, p.54.
[88] Ibid.
[89] Bassiouni M.C., "Crimes Against Humanity": The Need for a Specialized Convention, vol.31 *Colum.J.Transnat'l L.* (1994) 457, p.458 ('Bassiouni (1994)').
[90] MacGoldrick D. *et al* (eds), *The Permanent International Criminal Court: legal and policy issues* (Hart 2004) 180–1, cited in van den Herik, n.48, p.104, fn.127.
[91] Sadat L.N. and Scharf M.P. (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008), p.316.

In the AHCom the main issue of contention was the contextual elements.[92] There was "general support" only in relation to the widespread and systematic criteria.[93] During the Preparatory Committee sessions there was considerable consensus in relation to the punishable acts.[94] However, disagreement persisted in relation to the contextual elements. This is evident from the heavy bracketing and options in the Preparatory Committee draft forwarded to the Diplomatic Conference to serve as a basis for discussions:

> For the purpose of the present Statute, a "crime against humanity" means any of the following acts when committed
>
> [as part of a widespread [and] [or] systematic commission of such acts against any population:
>
> [as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic, or religious grounds or any other arbitrary defined grounds].[95]

The above definition contained two very different alternatives for the *chapeau*. This demonstrates that the definition of the crime could potentially have been materially different in many respects from the one eventually adopted. This makes the selection of the elements ultimately included all the more important. Therefore, the unanimous adoption in the end of article 7 by the Committee of the Whole is potentially of great importance for the development of the crime.

The *chapeau* was adopted as article 7(1) as follows:

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

Academics in general have focused to a much greater extent on analysing the *chapeau* elements of the article rather than the individual underlying acts. This is in accordance with the challenges presented at the Rome Conference in agreeing to the final wording of the *chapeau.* The *chapeau* elements establish the jurisdictional regime for CaH. Defining the jurisdictional regime is particularly important in the case of CaH since all of its underlying acts, such as rape and murder, are penalised in most legal systems.[96] Thus, the Rome Conference had to sufficiently address the sovereignty concerns of States.

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[92] Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, G.A. 50th Sess., Supp. No. 22, A/50/22, 1995, para.77.
[93] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. 22, A/51/22, 1996, para.85 ('Preparatory Committee Report 1996, Vol.I').
[94] A/AC.249/1997/WG.1/CRP.5 (20 February 1997) and A/AC.249/1997/WG.1/CRP.5/Corr.I (21 February 1997).
[95] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, U.N. Doc. A/CONF.183/2/Add.1 (1998), Article 5, p.25-27.
[96] de Guzman, n.5, p.338.

Therefore, these contextual elements need to be discussed in detail. I will focus on those elements which have been most challenging in terms of their formulation over the years and their place as constituent elements of CaH.

3.5.2 Nexus with armed conflict

The war nexus had been gradually dropped by the majority of international instruments and case-law.[97] Still, dispensing with this requirement did not go unchallenged and was not resolved before the Rome Conference.[98] Nevertheless, most delegates supported that there is "no sound reason in theory or precedent" to require a war nexus.[99] The silence of the Statute confirmed the important development which had taken place in IL on this issue.[100] This view is confirmed by the introduction of article 7 in the EoC which states that the attack against the civilian population "need not constitute a military attack."[101]

3.5.3 Discriminatory intent

At the Rome Conference the matter was dispensed quickly given that "there was virtual no support for its inclusion."[102] Notably, this development took place before the ICTY AC reversed the TC's decision to extent discriminatory intent to all acts constituting CaH, which confirmed that such a requirement is not found in CIL.[103]

3.5.4 Widespread or systematic

The term did not form part of the definition of CaH until its appearance in the ICTR Statute but was for long considered as an implicit element of the crime.[104] While the inclusion of the term was supported during the drafting of the provision there was some disagreement whether 'widespread' and 'systematic' were conjunctive or disjunctive. This is evident from the Preparatory Committee draft where the words "[and] [or]" appear between the two terms. However, during in the Committee of the

[97] For a number of authorities in support of the above view see de Guzman, n.5, p.358, n.101; Sadat, n.6, pp.149-150.
[98] Preparatory Committee Report 1996, Vol.I, n.93, paras.88-90.
[99] Hall C., The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, vol.91 *AJIL* (1997) 177, p.180.
[100] Schabas W.A., *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010), p.144 ('Schabas (A Commentary)'). See also: Robinson (1999), n.84, p.45.
[101] Elements of Crimes, Crimes against Humanity, Introduction, para.3 <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>. See also Byron, n.69, p.191.
[102] Hwang, n.5, p.496.
[103] Van Schaak, n.7, p.840.
[104] de Guzman, n.5, p.375.

Whole only a handful of States favoured a conjunctive approach.[105] The vast majority of States supported a disjunctive approach.[106] Thus, by 6 July 1998 the disjunctive 'widespread or systematic' formulation was chosen. At the same time, delegations agreed to add to the draft provision a definition as regards another term found in article 7(1), this being an "attack against any civilian population" which was eventually adopted as article 7(2)(a).[107]Article 7(2)(a) provides that:

> 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

In the next section I will examine article 7(2)(a) with a particular focus on the requirement for a 'State or organisational policy' in order to understand its meaning and potential impact on the scope of CaH. An initial reading of the provision suggests that an attack needs to be both widespread and systematic; widespread but unorganised crimes will therefore not amount to CaH.[108] The ICC case-law has already yielded some noteworthy results in this respect.

3.5.5 State or organisational policy - as included in article 7(2)(a)

The inclusion of the policy element in the Statute was a compromise decision to appease certain powerful delegates such as France which insisted on a conjunctive approach.[109] It was proposed by the Canadian delegation to break the impasse on the matter.[110] Thus, the policy requirement was added to the definition in order to achieve agreement among the drafters on the disjunctive relationship between the terms 'widespread' and 'systematic.' The Canadian proposal was elaborated on the basis that these terms were alternatives.[111] Perhaps it is for this reason that many States during the negotiations did not actually address this issue. Only two of them strongly objected to its prospective inclusion.[112] The relative lack of discussion is regrettable since this aspect of the crime has attracted

[105] Committee of the Whole, Summary Record of the 3rd Meeting, 17 June 1998, UN Doc. A/CONF.183/C.1/SR.3, para.90 (UK); para.96 (France), para.108 (Thailand), para.136 (Iran), para.172 (Turkey); Summary Record of the 4th Meeting, 17 June 1998, UN Doc. A/CONF.183/C.1/SR.4, para.5 (Russia), para.15 (Bahrain); Summary Record of the 25th Meeting, 8 June 1998, UN Doc. A/CONF.183/C.1/SR.25, para.27 (Japan), para.46 (Syria).
[106] Arsanjani M.H., The Rome Statute of the International Criminal Court, vol.93 *AJIL* (1999) 22, p.23; de Guzman, n.5, p.376.
[107] Bureau: Discussion paper regarding part 2, 6 July 1998, UN Doc. A/CONF.183/C.1/L.53 ('6 July 1998 Discussion Paper').
[108] Schabas (Commentary), n.100, p.147; van den Herik, n.48, p.94.
[109] de Guzman, n.5, p.372.
[110] Canadian Delegation, Background Paper On Some Jurisprudence On Crimes Against Humanity, 1 July 1998 (On file with the *Fordham Int'l L.J.)*, cited in Hwang, n.5, p.497.
[111] Ibid, p.497.
[112] Committee of the Whole, Summary Record of the 34th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.34, para.15 (Jamaica); Summary Record of the 36th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.36, para.13 (Congo).

extensive attention in the ICC case-law not least because of its impact on the disjunctive nature of 'widespread or systematic.'[113]

As explained in section 3.4.5, academics disagree whether the policy requirement forms part of the customary definition of CaH.[114] The negotiations which preceded the Rome Conference provide no evidence that the inclusion of the policy requirement as an explicit element of CaH was in any way seriously contemplated by the drafters.

Article 7(2)(a) defines the term "attack directed against any civilian population." The plain meaning of the phrase implies the presence of both scale and policy. Such an interpretation also accords with the terms "course of conduct involving the multiple commission of acts" and "State or organisational policy," respectively, as these are found in article 7(2)(a). Has article 7(2)(a) undermined the disjunctive relationship between widespread and systematic? Opinions vary widely in this respect. On one end, article 7(2)(a) has transformed the disjunctive test into a conjunctive one. At the other extreme, the provision does not add anything to the interpretation of the term "attack."[115]

Scrutinising the terms of article 7(2)(a) and reading the provision in conjunction with article 7(1) reveals a middle ground whose eventual impact depends on the interpretation of the provision by the ICC. The requirement for multiple commission of acts does not signify that widespread is a necessary element in all cases. Rather, it imposes a much lower threshold than widespread which was inserted by the drafters in order to exclude isolated or single acts.[116] Likewise, the introduction of policy does not mean that the commission of the crimes must be systematic in all cases. The concept of policy is much more flexible.[117] As stated in *Tadić* "a policy need not be formalized."[118] Overall, to address State objections for "an unqualified disjunctive test," article 7(2)(a) has defined attack on the basis of "a conjunctive but low threshold."[119] Irrespective of the disjunctive criterion that the Prosecutor chooses to substantiate in a given case it is still necessary to show that the attack involves multiple acts and an element of policy. Thus, wholly unrelated acts or acts which are isolated are excluded.[120]

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[113] de Guzman, n.5, p.372; Halling M., Push the Envelope – Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity, vol.23 *LJIL* (2010) 827, p.836.
[114] See also: Mettraux G., Crimes Against Humanity in the Jurisprudence of the International Tribunals for the Former Yugoslavia and for Rwanda, vol.43 *Harv.Int'l L.J.* 237 (2002), p.281; Robinson (1999), n.84, p.48.
[115] Ambos K. and Wirth S., The Current Law of Crimes against Humanity: An Analysis of UNTAET Regulation 15/2000, vol.13 *CLF* (2002) 1, p.3 ('Ambos and Wirth').
[116] Boot M. *et al.*, Article 7: Crimes Against Humanity, in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos 1999), p.127.
[117] Ambos and Wirth, n.115, pp.48-51.
[118] *Tadić* Trial Judgment, n.54, para.653.
[119] Robinson (1999), n.84, p.51.
[120] Ibid.

The definition in article 7(2)(a) is supplemented in the EoC. According to the introduction in the EoC a policy to commit an attack against the civilian population "requires that the State or organization actively promote or encourage such an attack."[121] A footnote to this paragraph states that such a policy may "in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack," although "[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."[122] There is an apparent contradiction between the introduction and the footnote. During the negotiations of the EoC one of the most difficult issues in relation to CaH was whether the Court would have jurisdiction "when the state or organization had consented to or acquiesced in such crimes."[123] The footnote was added as a compromise solution when it became obvious that most States supported the deletion or amendment of the reference in the introduction.[124] Thus, the EoC fail to elucidate further the meaning of the policy element under article 7; instead, they illustrate that key components of the provision are either not clear or controversial.[125]

While the notion of 'State' is clear the meaning of 'organisation' is not. Leaving aside the ambiguity surrounding the term 'organisation' it is worth emphasising that the wording of article 7 allows for non-State actors who pursue an 'organisational policy.'[126] Abandoning the strict "State action" policy may be considered as an important contribution to IHL.[127] According to Schabas such a development is "an example of the influence of the case law of the *ad hoc* tribunals upon the drafters."[128] According to the *Tadić* case non-State actors could commit CaH so long as they exercised *de facto* control over a particular territory.[129]

Given that the textual meaning of the definition allows for the prosecution of non-State actors the pertinent question is what kind of entities would be considered as organisations for the purposes of article 7? The outcome of the judicial debate on the definition of an 'organisation' is of "paramount importance for the future development of the law on crimes against humanity."[130] The early case-law of the ICC provides highly relevant findings in this respect.

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[121] Elements of Crimes, n.101, Crimes against Humanity, Introduction, para.3.
[122] Ibid, fn.6.
[123] Hall C., The first five sessions of the UN Preparatory Commission for the International Criminal Court, vol.94 *AJIL* (2000) 773, p.779.
[124] Ibid, p.780.
[125] Byron, n.69, p.204.
[126] Schabas (2011), n.2, p.111. For a contrary opinion see: Bassiouni M.C., *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol.I (Transnational Publishers 2005), pp.151-2.
[127] Sadat (2002), n.6, p.156.
[128] Schabas (2011), n.2, p.111.
[129] *Tadić* (Trial Chamber Judgment), n.54, para 654.
[130] Kress C., On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision, vol.23 *LJIL* (2010) 855, pp.857-58.

3.6. ICC case-law

In this section I will scrutinise the early case-law of the ICC in order to identify how the Court's initial interpretation of CaH will affect the development of the crime. Particular attention will be given to the *chapeau* elements. Thereafter, I will also consider the underlying acts which may constitute CaH.

3.6.1 Widespread or systematic

The terms 'widespread' and 'systematic' are not defined in the Statute. Therefore, it is interesting to see the interpretation accorded to them by the ICC Chambers. 'Widespread' was taken to refer to "the large-scale nature of the attack and the number of targeted persons." 'Systematic' was found to reflect "the organized nature of the acts of violence and the improbability of their random occurrence."[131] These interpretations support the disjunctive nature of 'widespread or systematic.' However, when the PTC defined for the first time the terms in article 7(1) in light of article 7(2)(a) the picture became confused.

The interpretation of the term 'State or organizational policy' in the ICC case-law will be discussed in the next section. Here it is important to comprehend whether the policy requirement has had an impact on the disjunctive character of 'widespread or systematic.' The findings of the PTCs seem to support this conclusion. In describing organisational policy in the context of a widespread attack the PTC held that even if it is carried out on a large scale in terms of territory and targeted victims the attack "must still be thoroughly organized and follow a regular pattern."[132]Similarly, a systematic attack was understood to require a "multiplicity of victims" and to include "either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as "patterns of crimes" such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis.""[133]

In view of the above formulations the apparent overlap between widespread and systematic appears enhanced by the presence of the policy requirement which has created a common denominator for assessing widespread and systematic. This is mostly relevant in relation to the widespread aspect of the crime since the systematic one anyway included, albeit implicitly, a policy element.[134]

[131] *Katanga and Ngudjolo* (ICC-01/04-01/07-717), Decision of the Confirmation of Charges, 30 September 2008, para.394 ('*Katanga* and *Ngudjolo* Confirmation Decision').
[132] Ibid, para.396.
[133] Ibid, para.397-8 (footnotes omitted).
[134] Ambos and Wirth, n.115, p.30.

Significantly, requiring that a widespread attack is "thoroughly organized" is not a low threshold which solely excludes wholly unrelated acts. Instead, the PTC's interpretation of a widespread attack "seemed to cumulate all the elements of "widespread" "systematic" and "organizational policy.""[135] Moreover, the PTC has found that the two elements in article 7(2)(a), namely, 'multiple commission of acts' and that an attack must be 'pursuant to or in furtherance of a State or organizational policy,' are cumulative.[136] To what extent does the Court's interpretation require a widespread element in the prosecution of systematic attacks? According to the Court the term 'multiple commission of acts' "means more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred."[137] Thus, it imposes a lower threshold than 'widespread' supporting that a form of qualified disjunctive test is retained in this respect. All in all, article 7(2)(a) enabled the Chamber to pursue a "unitary approach" which "takes into consideration all factors laid out in Article 7(1) and 2(a) of the Statute at an equal level and combines them crossways."[138]

In both the *Katanga and Ngudjolo Chui* and *Bemba* confirmation decisions, the first two such decisions, the PTCs found that the attacks were widespread and thus did not have to establish whether they were also systematic, even though in their opinion there was sufficient evidence to this effect.[139] The cases which followed are even more illustrative of the 'holistic' manner by which the PTCs have interpreted 'widespread or systematic.' In authorising the opening of an investigation in the Kenya situation the PTC found that the attack was widespread and did not discuss whether it was systematic.[140] However, when confirming the charges against the accused it concluded that the attack was both widespread and systematic.[141] In the situation in Côte d'Ivoire it found that both requirements had been satisfied when authorising the opening of an investigation and subsequently when confirming the charges against Gbagbo[142] and Blé Goudé.[143] More recently, the PTC was once again satisfied that both requirements had been met in its confirmation of charges decision in the

[135] Sadat L.N., Crimes Against Humanity in the Modern Age, vol.107 *AJIL* (2013) 334, p.359 ('Sadat (Modern Age)').
[136] *Bemba* (ICC-01/05-01/08-424), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para.80 ('*Bemba* Confirmation Decision').
[137] Ibid, para.81. Compare with the Chamber's interpretation of 'widespread' in paragraph 83.
[138] Chaitidou E., The ICC Case Law on the Contextual Elements of Crimes Against Humanity in Bergsmo M. and Tianying S. (eds) *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher 2014), p.72.
[139] Ibid, para.82; *Katanga* and *Ngudjolo* Confirmation Decision, n.131, para.412.
[140] *Situation in the Republic of Kenya* (ICC-01/09-19), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras 94,129-134 ('Authorisation of Investigation in Kenya').
[141] *Ruto et al* (ICC-01/09-01/11-373), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) of the Rome Statute, 23 January 2012, paras176-180, ('*Ruto et al* Confirmation Decision'); *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-382-Red), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para.115 ('*Muthaura et al* Confirmation Decision').
[142] *Situation in the Republic of Côte D'Ivoire* (ICC-02/11-14), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para.52-54,65 ('Côte d'Ivoire Authorisation of Investigation Decision'); *Gbagbo* (ICC-02/11-01/11-656-Red), Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, paras 222-225 ('*Gbagbo* Confirmation Decision').
[143] *Blé Goudé* (ICC-02/11-02/11-186), Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, para.124 ('*Blé Goudé* Confirmation Decision').

Ntaganda case.[144] The only conviction to date to involve CaH charges in the *Katanga* case further demonstrates that it is impossible to make a well-reasoned choice between widespread and systematic. While the CaH charges were confirmed on the basis of the widespread character of the attack, the TC majority in convicting the accused for the CaH of murder determined that the attack was systematic.[145]

Schabas has argued that the conjunctive approach suggested by the ICC formulation will not be a significant limitation in practice. Given that 'widespread' or 'systematic' often overlap, the same factors may be used to support a finding for either of the two requirements.[146] It is true that the same factors may support either of the alternative requirements. What article 7(2)(a) has done though is to have enabled the Chambers to shift between widespread and systematic (on occasions choosing both) in an unprincipled way offering little clarity as to their exact relationship or their relationship with the elements in article 7(2)(a). Further, the approach of the Chambers has not shed light as to the meaning and scope of the elements in article 7(2)(a) as distinct terms. The best example is shown by the Court's interpretation of the systematic and policy elements. The Chambers, in elaborating policy, have taken into consideration the same factors which are relevant in proving the existence of the systematic requirement, and vice-versa.[147]

The way the Chambers have treated these two requirements has raised the question whether 'policy' is "an independent contextual requirement.[148] Undoubtedly, the text of article 7 provides that 'policy' is a distinct contextual element something which has been acknowledged by the Chambers. However, at the same time, the conceptual proximity between the notions of 'policy' and 'systematic' is readily apparent in the Chambers' interpretation of these two terms. The consequence of this is not so much the independent status of the policy requirement but rather on the interpretation of the entire *chapeau*. The Chambers only now appear to take into consideration that the interpretation of a particular contextual element, particularly those found in article 7(2)(a), have a bearing on the interpretation and scope of article 7(1) and are thus critical for the development of the CaH provision as a whole. Taking a critical stance the TC in *Katanga* stated that to equate the term 'policy' with the concept of 'regular

[144] *Ntaganda* (ICC-01/04-02/06-309), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para.24.
[145] *Katanga*, Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of The Prosecutor v. Germain Katanga, para.39 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/986/14_0259_ENG_summary_judgment.pdf>
[146] Schabas (Commentary), n.100, p.149.
[147] *Bemba* Confirmation Decision, n.136, para.115; *Harun and Kushayb* (ICC-02/05-01/07-1-Corr) Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para.62; Chaitidou, n.138, pp.66-67.
[148] Hansen T.O., The policy requirement in crimes against humanity: Lessons from and for the case of Kenya, vol.43 *Geo.Wash.Int'l L.R.* (2011) 1 p.9

pattern,' as this was the case in *Bemba* and *Ngudjolo Chui*, gives the term a 'systematic' character which is contrary to the disjunctive formulation between widespread and systematic.[149]

Article 7(2)(a) not only affects the interplay between widespread and systematic but also the type of entities which are capable of committing CaH. The concept of 'State' is generally self-evident. This is not the case for the term 'organisational.' In the next section I will discuss how the ICC in its case-law has struggled to determine what constitutes an organisation for the purposes of article 7. This case-law is normatively significant because it indicates the possible route(s) to be taken by the ICC in developing the 'organisation' aspect of CaH. An overview of this case-law will show that due to the diverse situations that come before the ICC it is not be possible or appropriate to adopt a particular test. The ICC is still at a cross-road in this respect and could end up adopting equally valid but markedly different approaches. Thus, any approach eventually adopted by the Chambers will strongly influence the development of CaH as a result of the Court's establishment.

3.6.2 State or organisational policy

In the first situations to come before the ICC the interpretation of this contextual element did not raise any particular difficulties. The situations in Uganda, Democratic Republic of Congo ('DRC'), Central Africa Republic ('CAR') and Darfur, all involved protracted armed conflicts where the civilian population was often targeted because of perceived affiliation with either side of the conflict. The Chambers, notably the PTCs, did not need to elaborate on the meaning of this requirement and of its individual terms. [150] Difficulties in the interpretation and application of 'State or organisational policy' arose in the Kenya situation. This situation required from the Chambers to examine the contours of an organisation within the meaning of article 7(2)(a) in a very different factual scenario than had hitherto been the case.

From the situation in Kenya and onwards it is apparent that the Chambers are more conscious that the criteria for determining the existence of an organisation are and remain unclear. This has also become particularly obvious in the Côte d'Ivoire situation which bears factual similarities with the situation in Kenya. The Court's quest for definitional clarity has also been demonstrated in the *Katanga* judgment where the TC put forward a new definition of the term organisation.

[149] *Katanga* (ICC-01/04-01/07-3436), Jugement rendu en application de l'article 74 du Statut, 7 March 2014, para.1112 ('*Katanga* Judgment').
[150] Chaitidou, n.138, pp.49, 60 *et seq.*

In this section I will focus on the way the Chambers approached the 'State or organisational policy' requirement. These present conflicting approaches as to what the judges think that this element should entail. Nevertheless, they have also given vital signs how this requirement could be interpreted in future case-law.

3.6.2.1 Situation in Kenya

The majority recognised the lack of clarity regarding the criteria which determine whether a non-State group may qualify as an organisation for the purposes of 'organisational' policy.[151] It took the view that the formal nature of a group and its level of organisation should not be the defining criterion. Rather, its assessment should be based on whether "a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values."[152]

The Chamber took the view that the determination whether a group qualifies as an organisation under article 7 should be made on a case-by-case basis, where:

> In making this determination, the Chamber may take into account a number of considerations, *inter alia:* (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[153]

The Chamber clarified that these considerations are not a rigid legal definition and need not be exhaustively fulfilled.[154] In the present case the majority considered that article 7(2)(a) had been satisfied.[155] Judge Kaul disagreed. In his dissenting opinion he set out his own interpretation of the contextual elements on the basis of which he concluded that the alleged crimes did not qualify as CaH under the Statute.[156] As regards 'organisational policy' the Judge believed that the majority interpreted the term too broadly by not restricting it to State-like actors.[157]

According to the Judge previous findings by the ICC in this respect were made in the context of an armed conflict where the PTCs had found to the required threshold that military-like organised armed

[151] Authorisation of Investigation in Kenya, n.140, para.90.
[152] Ibid.
[153] Ibid, para.93 (footnotes omitted).
[154] Ibid.
[155] Ibid, para.117.
[156] Ibid, Dissenting Opinion of Judge Hans-Peter Kaul, para.4.
[157] Ibid, para.44.

groups allegedly committed crimes over a long period pursuant to a policy.[158] Hence, the Judge proceeded to elaborate his understanding of the term 'organisation'

> I read the provision such that the juxtaposition of the notions "State" and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. […]These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.[159]

Non-State actors which do not reach the level described above are not in a position to carry out a policy under article 7 even if such groups engage in a number of serious and organised crimes.[160] He considered the approach of the majority, to qualify as an organisation a group with the capability to infringe basic human values, unconvincing. Such an approach could expand the scope of CaH to include any violation of human rights.[161] The disagreement between the majority[162] and Judge Kaul[163] persisted also during the confirmation of charges stage in the two Kenyan cases.

3.6.2.2 Situation in Côte D'Ivoire

During the authorisation of investigation proceedings the Chamber agreed with the interpretation given to 'State or organisational policy' by the PTC in the Kenya situation.[164] The main distinction here was that the Prosecutor's account focused on demonstrating a State policy. The PTC concurred with the Prosecutor stating that "there is a reasonable basis to believe that the attack by pro-Gbagbo forces during the post-electoral violence […] was committed pursuant to a state policy."[165] Later on in the arrest warrant stage the Prosecutor submitted that the attacks against the civilian population were committed pursuant to an organisational policy where Gbagbo and his inner circle constituted an organisation under article 7.[166] The Chamber did not discuss whether Gbagbo and his inner circle formed an organisation but found that there was a reasonable basis to believe that the attacks by pro-

[158] Ibid, para.48. Judge Kaul referred to *Katanga* and *Ngudjolo* Confirmation Decision, n.131, para.396 and *Bemba* Confirmation Decision, n.136, para.81.
[159] Ibid, para.51 (footnotes omitted).
[160] Ibid, para.52.
[161] Ibid, para.53.
[162] *Ruto et al* Confirmation Decision, n.141, paras186, 197, 200, 207, 215-219; *Muthaura et al* Confirmation Decision, n.141, paras 190, 201, 204, 207,208, 213, 214, 216-219.
[163] Ruto et *al* Confirmation Decision, n.141, Dissenting Opinion of Judge Hans-Peter Kaul, para.12; Muthaura et al, Confirmation Decision, Dissenting Opinion of Judge Hans-Peter Kaul, n.141, paras 19-20.
[164] Côte d'Ivoire Authorisation of Investigation Decision, n.142, paras 42-46.
[165] Ibid, para.51.
[166] *Gbagbo* (ICC-02/11-01/11-9-Red), Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 November 2011, para.46.

Gbagbo were committed pursuant to an organisational policy.[167] Interestingly, it noted that it may be necessary later on in the proceedings "to revisit the issue of whether the attacks by the pro-Gbagbo forces [...] were committed pursuant to a state policy."[168] This revealed an uncertainty on the part of the PTC as to the nature of the entity which was left undecided for the time being.

The confirmation of charges decision in *Gbagbo* is of particular interest in the interpretation and development of the concept of 'State or organisational policy.' The decision was once again taken by majority. Judge Kaul participated in this case and he was part of the majority. The majority in the present case did not refer to the majority's interpretation of 'organisational policy' in the Kenya case. Instead, it mentions the PTCs' earlier findings from *Bemba* and *Katanga and Ngudjolo Chui* which have consistently been followed by the ICC Chambers.[169] According to the confirmation decisions in the aforementioned cases "[s]uch a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population."[170] Reference was also made to Judge Kaul's interpretation in Kenya as "a view" which has been expressed on the matter. In the present case, the majority took the view that "the available evidence would meet the threshold under either interpretation and that, accordingly, it is unnecessary for the Chamber to dwell any further on this point."[171]

The majority then made the following statement in relation to the notion of organisation

> the Chamber considers that, regardless of the interpretation of the notion of organisation, it is important that, as part of the analysis of the facts before it, the Chamber is able to understand how the organisation operates (for instance in terms of whether a chain of command or certain internal reporting lines exist) in order to determine whether the policy to carry out the attack is attributable to the organisation.[172]

Thus, we see how the majority, including Judge Kaul, downplays the notion of organisation and its characteristics, which had proven a highly contentious aspect of the crime, and how it chooses to focus on a particular aspect of an organisation, that is, how it 'operates.' The majority does not explicitly choose between the approaches that it mentions even though its preference for the former is implicit in the wording. This was a practical decision on the part of the judges on the basis of the evidence available. However, the lack of any reference to the majority position in Kenya suggests that the PTC in *Gbagbo* did not endorse this interpretation.

[167] Ibid, para.47.
[168] Ibid, para.48.
[169] *Gbagbo* Confirmation Decision, n.142, para.217.
[170] *Katanga* and *Ngudjolo* Confirmation Decision, n.131, para 396; *Bemba* Confirmation Decision, n.136, para.81.
[171] *Gbagbo* Confirmation Decision, n.142.
[172] Ibid, para.217.

In a way the majority in the present case distanced itself from the conflicting interpretations which came out of the Kenya situation by referring to those interpretations of the term which were more suited on the facts of the case. This reading is supported by a conclusion subsequently made by the PTC as to the type of entity examined. It found that the entity to which the policy to be attributed constituted part of the State apparatus. Thus, the Chamber considered that the policy to carry out the attack could qualify as a State or organisational policy.[173] The PTC's conclusion in *Gbagbo* was recalled in the confirmation of charges hearing against Charles Blé Goudé.[174]

3.6.2.3 The Katanga Judgment

The *Katanga* Judgment was the first attempt by a trial chamber to define the notion of 'organisation.' The decision of the TC to re-define the concept of 'organisation' when this was not a crucial aspect to the interpretation of article 7 on the facts of the case is telling of the Chambers' growing awareness of the need to clarify the concept in general.[175]

According to the TC the ordinary meaning of the term 'organisation' is too general to properly define the term. In interpreting the term in its context the TC found that it is normatively linked to the existence of an "attack," within the meaning of article 7(2)(a), as opposed to the widespread or systematic character of the attack under article 7(1). Because of this link the organisation exhibits certain features such as capacity for action, coordination, means and resources at its disposal and membership, which enable it to carry the attack against the civilian population. Hence, an organisation need not have State-like characteristics.[176]

As seen in the previous paragraph, the TC focuses on a number of generic criteria. From this perspective its approach is broader and more inclusive approach than the one put forward by the majority in Kenya which proposed a list of specific criteria. Arguably, this interpretation "allows all kinds of "organizations" to come under the purview of the Statute."[177] However, it must be noted that *Katanga* does not refer to the human rights violation approach of the majority in Kenya. In this sense the TC supports a more stringent approach.

The TC's interpretation of the term 'organisation' is a broadly teleological one. This is apparent when it justifies the above interpretation "tout particulièrement dans le contexte des guerres asymétriques

[173] Ibid, paras 220-221.
[174] *Blé Goudé* Confirmation Decision, n.143, para.126.
[175] Chaitidou, n.155, p.139.
[176] *Katanga* Judgment, n.150, paras.1119-1120.
[177] Chaitidou, n.138, pp.98-99. See also: Stahn C., Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment, vol.12(4) *JICJ* (2014) 809, p.817.

d'aujourd'hui."[178] The TC recognised the threat posed by private armed groups today and proceeded to interpret the term accordingly even though it was not necessary in the present case.[179] It remains to be seen to what extent the TC's interpretation will affect the development of this element in subsequent case-law. The meaning and scope of the term is still evolving. Moreover, as seen by the Court's practice to date the interpretation accorded to a particular contextual element is not only relevant as regards that element but may have a bearing on limits of the *chapeau* as a whole. Thus, any interpretation accorded to 'organisation' would need to be assessed together with the other elements in article 7(2)(a) and in conjunction with article 7(1). While the generic criteria advocated in *Katanga* can be criticised for being too broad they are in line with the Court perception of the term in general which "seems to favour a more elastic, inclusive interpretation of the law."[180]

3.6.2.4 Analysis

The Court's early case-law produced widely differing approaches to the interpretation of the term 'organisation.' This lack of consent leaves the meaning of the term unclear and casts doubt as to what is the appropriate method of interpretation in this respect. In order to assess how the Court's interpretation of the term 'organisation' can have a bearing on the further development of CaH we must first explore the interpretative considerations at play. This section considers the extent to which the general rule of interpretation found in article 31(1) of the VCLT[181] as well as the provisions of the Rome Statute circumscribe the interpretation of the term.

The ICC AC has established that the interpretation of its provisions is governed by article 31(1) of the VCLT.[182] It is uncontroversial that the "ordinary meaning" of the term organisation in its "context" does not limit the term to State actors. However, this interpretation does not clarify what types of non-State actors are caught by article 7(2)(a). Is a more satisfactory answer provided by a teleological interpretation of the term organisation in the light of the "object and purpose" of the Statute? As discussed in chapter 1, the Rome Statute's qualification as a law-making treaty arguably has a bearing on the interpretation of its provisions. In particular, law-making treaties tend to be interpreted in a teleological manner in accordance with their object and purpose rather than the will of the parties.[183] At the same time, the Statute contains a highly articulated body of rules which reveal a clear preference for the strict interpretation of its provisions. Most importantly, the ICC is the first

[178] *Katanga* Judgment, n.149, para.1119.
[179] Stahn, n.177.
[180] Chaitidou, n.138, p.100.
[181] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 by the United Nations Conference on the Law of Treaties, United Nations Treaty Series (UNTS), vol. 1155, p. 331.
[182] *Situation in the Democratic Republic of the Congo* (ICC-01/04-168), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, para. 33
[183] Brölmann, supra n.83, p.393. See also: Alvarez J.E., The New Dispute Settlers: (Half Truths) and Consequences, vol. 38 *Texas Int'l L.L.* (2003) 405, p.442.

international court to incorporate explicitly the principle of legality.[184] Thus, the Statute's strict legalism is in conflict with the treaty's object and purpose, which at least from a substantive justice perspective, calls for a teleological interpretation of the crimes.[185]

The ICC Chambers are conscious of the above conflict. In *Katanga* the TC majority noted that a teleological interpretation pursuant to the VCLT "could be considered antithetical to the principle of legality and, more specifically, to the rule of strict construction and the principle of *in dubio pro reo*,"[186] both included in article 22(2). This article provides that "the definition of the crime shall be strictly construed" and "[i]n case of ambiguity, the definition shall be interpreted in favour of the accused." Article 22(2) is the only provision in the Rome Statute which purports to establish rules of interpretation which are specific to the definitions of the crimes.[187]

The TC acknowledged that the Court cannot adopt a teleological approach to create law which is incompatible with a textual reading of the Statute. At the same time, it noted that article 22(2) is applicable only 'in case of ambiguity' when the exact meaning of a term cannot be determined by the general rule or the supplementary means of interpretation.[188] The Chambers must always consider the object and purpose of the Rome Statute when interpreting its provisions "as they are one of the components which make it possible to establish its definitive meaning."[189] The majority concludes its discussion on the principle of legality by stating it will rely on the general rule of interpretation in the VCLT to interpret the definitions of the crimes provided such interpretation adheres to the requirements in article 22(2).[190] Significantly, the *Katanga* judgment provides a fair representation of the interpretative considerations at place, where the VCLT is central to the interpretation of the crimes, albeit with certain limitations.

A number of scholars have identified the difficulties entailed when applying the general rule of interpretation to a criminal law instrument which is subject to the principle of legality.[191] Jacobs argues that the VCLT should not be applied to the Rome Statute. The general rule of interpretation "fundamentally ignores the specific nature of international criminal law and the central role of the

[184] Jacobs D., Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories in d' Aspremont J. and Kammerhofer J. (eds), *International Legal Positivism in a Post-Modern World* (CUP forthcoming), p.16.
[185] Stahn, n.177, pp.815-816.
[186] *Katanga* Judgment, n.149, para.54.
[187] Schabas (A Commentary), n.100, p.410.
[188] *Katanga* Judgment, n.149, paras.52-53.
[189] Ibid, para.55.
[190] Ibid, para.57.
[191] E.g. Jacobs, n.184; Akande D., Sources of International Criminal Law in Cassese A. (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009); Grover L., A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court, vol.21 *EJIL* (2010) 543; Heller K.J., Syria, Chemical Weapons, and the Incoherence of the VCLT, *Opinio Juris*, 23 August 2013 <http://opiniojuris.org/2013/08/23/syria-chemical-weapons-incoherence-vclt/>

principle of legality."[192] He is particularly critical of the frequent misuse of the 'object and purpose' approach by the international criminal tribunals. This approach can justify an expansive interpretation of the crimes and thus contravene the rule of strict construction.[193] According to Akande while the VCLT rules should not apply in their entirety this does not mean that they are altogether inapplicable. Rather, "[i]n strict terms the application of the principle *in dubio pro reo* should modify the application of the Vienna Convention methods of interpretation."[194]

What is significant about the ICC is that its Statute attempts to reconcile the conflict between form and purpose. While it establishes a highly codified regime which explicitly and unequivocally provides for the principle of legality, it is still premised on a highly teleological remit, to prosecute those most responsible. Both the Rome Statute and the Chambers allow the teleological interpretation of the crimes provided this takes place in way which respects article 22. Therefore, the application of the VCLT for the interpretation of the crimes is in accordance with the ICC's nature as an international criminal court which is subject to the principle of legality.

The lack of clarity which has plagued the *chapeau* of article 7 does not relate to standard issues of interpretation. Rather, the lack of consensus between the judges concerns whether, and to what extent, the characteristics of an entity determine whether its conduct can rise to the level of CaH. The interpretative disagreement arose because the evolution of the crime in a modern ICL instrument has not brought about a concomitant clarification of the concept of CaH in today's settings. The underlying rationale of CaH is currently unclear and needs reconsideration particularly because of the groups which come before the Court and the diverse situations in which it is involved. This is vividly illustrated by the fact that while both the majority and the minority in Kenya use similar factors to determine the parameters of an 'organisation' they each do so with the intention of reaching a very different conclusion.[195]

In the past, the focus of the *ad hoc* tribunals on specified situations and actors rendered unnecessary an in-depth comprehensive assessment on the concept of CaH. Moreover, the existence of an armed conflict facilitated the application of CaH since it was easier for the prosecution and the chambers to identify those actors which were capable of committing CaH or to justify their conduct as being CaH. While the crime's definition gradually shed away the war nexus requirement, the contextual elements which evolved to assume its role, did not take into consideration changes in modern warfare. This

[192] Jacobs D., Why the Vienna Convention should not be applied to the ICC Rome Statute: a plea for respecting the principle of legality, *Spreading the Jam*, 24 August 2013 < https://dovjacobs.com/2013/08/24/why-the-vienna-convention-should-not-be-applied-to-the-icc-rome-statute-a-plea-for-respecting-the-principle-of-legality/>
[193] Jacobs, n.184, p.33.
[194] Akande, n.191, p.45.
[195] Chaitidou, n.136, pp.81-82.

persistent ambiguity was still considered adequate in the first situations to come before the ICC. The situation in Kenya called into question this long-term understanding of the concept because it exposed the challenges which are inherent in the application of CaH when the alleged crimes have not been committed in the context of an armed conflict.

Not only have flagrant violations been committed by non-State actors but these actors are sometimes more influential than State entities.[196] While legitimate concerns were raised about the decision of the Prosecutor to proceed *proprio motu* in the Kenyan situation, still, it is not Court's role to reshape the law on CaH in order to regulate its workload or to deal with prosecutorial overreaching.[197] Moreover, Judge Kaul's insistence to restrict the commission of CaH to State-like entities does not take into consideration the diverse ways by which these crimes are committed, especially in non-European contexts.[198] The Kenya situation showed a more inclusive and a more restrictive approach to be followed. In the *Gbagbo* case the PTC opted for a more pragmatic and less contentious approach which allowed the judges to avoid the crux of the issue. The TC in *Katanga* took a pro-active stance on the matter and proceeded to re-define the term.

It is evident from the Court's case-law that the meaning of 'State or organisation policy' remains unsettled. Nonetheless, the lack of clarity surrounding the concept and the fundamentally diverse situations involving equally different warring groups which will come before the ICC have empowered the Court to interpret the concept more creatively as a result of which the ICC will play a significant role in the development of CaH in this respect. What comes out of this early case-law, slowly and incrementally, is a willingness on the part of the judiciary to undertake progressive interpretation, as to the entities which are capable of committing CaH, which at the same time purports to respect the letter of article 7 in order to deal with modern threats. This first became visible in unconventional scenarios, the most prominent one being Kenya, but later also appeared in the Court's reasoning in more typical conflict situations such as those in *Katanga*. The Court's involvement in these markedly different scenarios is redefining the conceptual basis of CaH and the scope of the crime itself as encapsulated in article 7 of the Statute.

The Court's early case-law has demonstrated the great difficulties that would arise by the adoption of a general standard by which to assess this element.[199] Thus, the judges in developing the concept would have to consider the extent to which they will formulate a general standard (albeit a flexible

[196] Drumbl M.A., Judging the 11 September Terrorist Attack, vol.24 *HRQ* (2007) 323, p.327.
[197] Sadat (Modern Age), n.135, p.336.
[198] Ibid.
[199] Werle G. and Burghardt B., Do Crimes Against Humanity Require the Participation of a State or 'State-like' organization?, vol.10(5) *JICJ* (2012) 1151, p.1168.

one) or whether they would ultimately make a decision on a case-by-case basis. The Court is still in the process of striking the balance in this respect.

3.6.3 Underlying acts:

The ICC Statute deserves praise for expanding the list of prescribed acts to include forcible transfer of population, severe deprivation of liberty, gender crimes and apartheid.[200] Moreover, article 7(2) provides definitions for a number of underlying acts, these being, "extermination," "enslavement," "deportation or forcible transfer of population," "torture" and "enforced disappearance of persons."

3.6.3.1 Extermination

The crime of extermination has been incorporated in all the instruments which included CaH since Nuremberg. These instruments did not define the crime. The definition of the crime was developed by both the *ad hoc* tribunals. According to the ICTR AC the only element which distinguishes extermination from murder is the requirement that the latter crime occurs on a large scale.[201] The ICC provides the following definition of the crime: "intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population." The words *'inter alia'* have made the concept considerably more flexible.[202] This is also reflected in the EoC.[203] To date there is no ICC case-law beyond the arrest warrant stage. A charge of extermination has been accepted in the first arrest warrant decision in the *Bashir* case. Notably, the PTC referred approvingly to the case-law of the *ad hoc* tribunals which interpreted the ICC provision.[204]

3.6.3.2 Deportation or forcible transfer of population

The CaH of deportation is derived from the IMT Charter. It was also included in the Statutes of the *ad hoc* tribunals. An important expansion took place during the drafting of the ICC provision where the crime no longer covers actual deportation beyond a State's borders but also 'forcible transfer' within

[200] Rome Statute the International Criminal Court, article 7(d), (g) and (j) <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>
[201] *Ntakirutimana et al.* (ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para.542. See also: *Stakić* (IT-97-24-A) Judgment, 22 March 2006, paras 259-260.
[202] Schabas (A Commentary), n.100, p.160.
[203] Elements, n.101, crime against humanity of extermination, para.1.
[204] *Bashir* (ICC-02/05-01/09-03), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hasan Ahmad Al Bashir, 4 March 2009, para.96.

national borders.[205] Charges under article 7(1)(d) have been confirmed in three cases so far. Importantly, PTC II in *Ruto et al.* deemed it appropriate to make some clarifications about the crime's legal interpretation.[206] The judges adopting a literal interpretation of the *actus reus* of the crime concluded that it is an "open-conduct" crime, that is, it may be committed by "several conducts" which amount to "expulsion or other coercive acts."[207] The majority further took the view that, at this stage, it is not prejudicial for the Defence to formulate this "unique crime" in the alternative. A determination as to the label would be better decided by the TC when presented with more concrete evidence. For the time being, "the Chamber does not and should not indicate with any sort of certainty where the victims ultimately relocated."[208] Thus, pursuant to the PTC's interpretation it is accepted in the earlier stages of a case to charge the crime in the alternative.

3.6.3.3 Torture

The definition of torture under article 7 differs in two ways from the one found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Convention against Torture'). Firstly, under article 1(1) of the Convention against Torture an act of torture is "inflicted by or at the instigation of or with the consent or acquiesce of a public official or other person acting in an official capacity." [209] Secondly, according to the same provision the perpetrator needs to have acted with a specific purpose "or for any reason based on discrimination of any kind." The EoC clarify that "no specific purpose needs to be proven for this crime" requiring instead that the victim is "in the custody or under the control of the accused." [210]

As regards the requirement for the involvement of public officials the ICTY TC has held that this is no longer required under CIL.[211] However, the case-law of the *ad hoc* tribunals has found that the purpose requirement is part of the torture definition.[212] It has been argued that due to the elimination of the purpose requirement that there is an inconsistency between the ICC formulation and the definition of the crime under CIL.[213] It does appear that the ICC formulation is wider than its CIL counterpart. To date only one ICC case, *Bemba,* which involved torture charges, has reached the

[205] 6 July 1998 Discussion Paper, n.108.
[206] *Ruto et al* Confirmation Decision, n.141, para.244.
[207] Ibid, para.245.
[208] Ibid, para.268.
[209] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/51 (1984), article 1(1).
[210] Elements, n.101, crime against humanity of torture, fn.14 and paragraph 2, respectively.
[211] *Kunarac* Appeal Judgment, n.81, para.148.
[212] *Krnojelac* (IT-97-25-T), 15 March 2002, para.180.
[213] Schabas (A Commentary), n.100, p.167.

confirmation of charges stage. The PTC refused to confirm the torture charges on the basis of cumulative charging.[214]

3.6.3.4 Gender Crimes

The most pronounced enlargement of the CaH provision concerns gender crimes.[215] This is particularly evident considering previous formulations of gender crimes. Article 7(1)(g) provides the most comprehensive prescription of gender crimes thus far by including explicitly "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" as well as the catch-all provision of "any other form of sexual violence of comparable gravity." The adoption of this provision not only constitutes a positive progressive development but it is also expected to be a particularly relevant one in the case-law of the ICC. Notably, gender crimes as CaH are among the most frequent charges included in the ICC arrest warrants to date.

Unfortunately, to date the ICC has not convicted any defendant on sexual crimes. More recently, Katanga was acquitted on both rape and sexual slavery charges. This is despite the special rules of evidence in the RPE which are specific to these crimes. For example, corroboration may not be required for "in particular, crimes of sexual violence."[216] The TC majority held that just because an accused is not guilty does not necessarily mean that it considers such a person to be innocent but rather that the evidence furnished was insufficient.[217]

The ICC has been endowed with a strong mandate under article 7(1)(g) Thus, it has the potential to act as a catalyst in the prosecution and development of these crimes. While the Court's role has brought prominence to the plight of victims of these crimes its contribution to the development of article 7(1)(g) largely remains to be seen. Its early jurisprudence has demonstrated that the Prosecutor needs to re-assess the evidentiary approach to gender crimes. There are some encouraging signs in this respect. In June 2014 the OTP finalised its policy paper on sexual and gender-based crimes.[218] In the same month charges of rape and sexual slavery were confirmed in *Ntaganda.*

[214] *Bemba* Confirmation Decision, n.136, para. 193.
[215] Schabas (2011), n.2, p.115.
[216] Rules of Procedure and Evidence, rule 63(4) <http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf>
[217] *Katanga* Judgment, n.149, para.70.
[218] OTP, Policy Paper on Sexual and Gender-Based Crimes, 5 June 2014 <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

3.6.3.5 Inhumane acts

The crime was included in the Nuremberg and Tokyo Charters as well as the Statutes of the *ad hoc* tribunals. The view was expressed that the crime was "deliberately designed as a residual category.[219] During discussions in the Preparatory Committee some delegations expressed the view that the crime should not be included because it "would not provide the clarity and precision required by the principle of legality."[220] Eventually the qualification "of a similar character" was added to the final version of the crime in addition to "*intentionally* causing great suffering, or serious injury to body or to mental or physical health."[221] The provision adopted has been criticised for adding another intent element and for being too vague.[222]

The PTC in *Katanga and Ngudjolo* has already acknowledged that the crime is of "a different scope than its antecedents" specifying that "none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as an other inhumane act encompassed by article 7(l)(k) of the Statute."[223] Moreover, the PTC in the *Muthaura et al* confirmation decision reiterated that as a residual category the provision "must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity."[224] It accepted that the physical injuries cited and the killing of family members in front of their relatives qualified as inhumane acts.[225] Nonetheless, the Chamber was not persuaded, taking into consideration the evidence presented, that the destruction of property "caused injury to mental health" under article 7(1)(k).[226]

In *Katanga and Ngudjolo* the PTC refused to confirm the charge in relation to inhumane acts because it held that these constituted attempted murder and therefore the alleged acts could not be prosecuted under both counts.[227] More recently, in *Gbagbo* the PTC took a completely different position confirming charges for inhumane acts and attempted murder in the alternative and "leave to the Trial Chamber the final determination of the correct legal characterisation of these criminal acts.[228] This is

[219] *Kupreškić* (IT-95-16-T), Judgment, 14 January 2000, para.563 ('*Kupreškić* Trial Judgment'). See also: Cassese (2008), n.1, p.114.
[220] Preparatory Committee Report 1996, Vol.I, n.93, para.101.
[221] Ibid, para 102. See also: 6 July 1998 Discussion Paper, n.101.
[222] Sadat (2002), n.6, p.158.
[223] *Katanga* and *Ngudjolo* Confirmation Decision, n.131, paras 450 & 452.
[224] *Muthaura et al*. Confirmation Decision, n.141, para.269.
[225] Ibid, paras 273-274.
[226] Ibid, para.279.
[227] *Katanga* and *Ngudjolo* Confirmation Decision, n.131, paras 461.
[228] *Gbagbo* Confirmation Decision, n.142, para.203.

part of the Chambers' evolving approach of proceeding on the basis of 'alternatives' leaving a final determination until the later stages of the trial or not making any choice to this effect when this is not deemed necessary.

3.6.3.6 Persecution

According to article 7(1)(h) an act of persecution must be committed "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court." The provision has been criticised as being narrower than CIL.[229] According to an ICTY TC "although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law."[230] This is because it appears to impose a further burden on the Prosecutor, in that in addition to the *actus reus* of persecution, the *actus reus* of another CaH, or that of a WC or genocide count needs to be proven.[231] Despite the criticism that has been levelled on this provision the compromise solution reached by the drafters provided the necessary support for the crime's inclusion in the Statute. Notably, persecution had not been previously defined and many delegations feared the abuse of this provision by an activist court. [232] Moreover, in practice the effects of this qualification appear to be limited since historically acts of persecution have occurred along with other inhumane acts. While the provision imposes a high-threshold limitation, at the same time, article 7(1)(h) considerably expands the discriminatory grounds of persecution by adding "cultural," "gender" as well as "other grounds that are universally recognized as impermissible under international law."[233] In this respect, article 7(1)(h) is broader than the Statutes of the *ad hoc* tribunals.[234] Charges for persecution have been confirmed in a number of cases before the ICC and most recently in *Blé Goudé.* Therefore, the Court is expected to play a significant role in the development of the crime.

3.7 Conclusion

The establishment of the ICC has brought about the most detailed and comprehensive definition of CaH to date. Any discussion as to whether article 7 is consistent with CIL misses the point that the meaning of CaH before the establishment of the Court was far from clear. This is particularly in relation to the *chapeau* elements whose content had been fluctuating since the crime's inception.

[229] Ambos and Wright, n.115, p.71.
[230] *Kupreškić* Trial Judgment, n.219, para.580.
[231] Cassese (2008), n.1, p.125.
[232] Robinson (1999), n.84, p.53-55.
[233] Ibid, p.126.
[234] Ambos and Wright, n.115, p.82.

What is the importance of the renewed efforts to draft a convention for the prevention and punishment of CaH following the adoption of the Statute?[235] The work of the Crimes Against Humanity Initiative in drafting a CaH convention demonstrates how the Statute's law-making potential has already started yielding concrete results which consolidate article 7's status under CIL. The 2010 Proposed Convention explicitly refers to article 7 of the Statute and the draft CaH definition is almost identical to its ICC counterpart.[236] Unlike the Statute, the Proposed Convention aims for national implementation. Thus, "it may have an impact on those countries that have a different definition of crimes against humanity in their national laws"[237] by influencing the existing State practice and *opinio juris.*

A more recent development has been the decision of the ILC to add the topic of "Crimes Against Humanity" to its active agenda and appoint a Special Rapporteur.[238] One of the key elements identified by the Special Rapporteur as being necessary for the purposes of a new CaH convention was to define the crime according to article 7 of the Statute.[239] Moreover, despite the purported intention of article 10 of the Statute, article 7 has increasingly been referred to by a number of international courts and tribunals, as being declaratory of CIL.[240] On the basis of the above, the multilateral treaty adopting the Statute is interacting with custom in different ways in relation to CaH. In the firstly place, it provides evidence of existing custom. In the second place, as a result of the adoption of a 'new' more comprehensive definition for CaH the Statute has a role in the "crystallization" of emerging CIL while at the same time "can provide the impulse or model for the formation of new customary rules through State practice."[241]

While article 7 has clarified certain aspects of the crime the definition in other respects it still unclear. This has already become particularly evident in the Court's case-law especially as regards the 'State or organisational policy' aspect of the crime. The Court's case-law may appear to be confused and not developing in a particular direction. Nevertheless, the ICC will play a vital role in the development of CaH. The CaH's amorphous pedigree and the widely varying situations in which the Court is involved

[235] Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, Washington University School of Law, Whitney R. Harris World Law Institute, Crimes Against Humanity Initiative, August 2010 <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf> ('Proposed Convention').
[236] Chaitidou, n.138, p.47. See Proposed Convention, ibid, preamble para.12 and article 3.
[237] Bergsmo M. and Tianying S., A Crimes Againnst Humanity Convention After the Establishment of the International Criminal Court in Bergsmo and Tianying, n.138, p.7.
[238] ILC, Report of the International Law Commission on the Work of its 66th Session, 5 May to 6 June - 7 July to 8 August 2014, UN Doc. A/69/10, para.266.
[239] ILC, Report of the International Law Commission on the Work of its 65th Session, 6 May to 7 June - 8 July to 9 August 2013, UN Doc. A/68/10, annex B, para.8.
[240] See case-law listed in Sadat (Modern Age), n.135, p.373, fn.269.
[241] ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, London Conference (2000), Principles 21, 24, and 26.

are the most fertile ground for formulating or better said re-formulating the conceptual basis of CaH in order to deal adequately with current atrocities. Thus, even though the decisions of the ICC are subsidiary means for determining rules of law they have a role to play in the development of CaH under article 7 and under CIL. The Court's early case-law already has provided indications in relation to possible approaches by which to interpret CaH.

Chapter 3 examined the ICC's law-making potential in relation to CaH and how this quality can advance the further development of the crime. Firstly, the Court's law-making potential stems from the elaboration of the crime and its incorporation in the Statute, as discussed in detail in chapter 1. Secondly, the particularities entailed in the Court's involvement with CaH signify that the ICC can develop further the crime by aligning the modern formulation of the crime in article 7 with the crime's conceptual basis, that is, what elevates an act to the status of an international crime. The Court's experience has shown that if "amorphous" tribal groups are capable of such conduct there is no valid reason why their acts should not be treated as CaH.[242] In conclusion, the ICC's establishment signifies that the Court is the best placed institution to advance the further development of CaH both under article 7 and under CIL.

[242]Ibid. See also: Werle and Burghardt, n.199, p.1166.

Chapter 4: War Crimes

4.1 Introduction

This chapter explores how article 8 of the Statute will have an impact on the future development of WC. WC have been the subject of long-standing codification in numerous treaties and other instruments, predominantly from the field of IHL. Any discussion on WC cannot ignore their inextricable link to IHL. Thus, IHL forms an indispensable part of this chapter in view of its vital role in determining the existence of rules regulating relations during hostilities, either under conventional law and/or CIL, as well as to whether such rules constitute WC. Indeed, "[w]ar crimes must thus be interpreted with an eye to the international humanitarian law upon which they are based."[1]

Significantly, it is not the purpose of this chapter to undertake a comprehensive analysis of each and every WC included in article 8, assess their status under CIL and the extent to which they accord or deviate from IHL rules. Rather, this chapter approaches article 8 as a whole, as a 'war crimes provision,' and compares this with previous formulations of the crime. Article 8 differs in a number of ways from previous definitions of the crime both in terms of the negotiations which took place in elaborating the crime and the end-result of this drafting exercise. While most of the crimes which have been included in article 8 were considered to have a CIL basis their formulation and the way in which they were set in the aforementioned provision is in itself a development in the law of WC. Multilateral treaties influence CIL in a number of ways. Notably, they can contribute towards the "crystallization" of emerging CIL and at the same time "provide the impulse or model for the formation of new customary rules through State practice."[2] However, as regards existing CIL, treaties "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[3] Article 8 provides a far clearer and comprehensive picture of the law in this area including so to what are the elements of each crime. Thus, the Statute definition affects how the WC are understood and consequently proven.

The greatest achievement as regards the elaboration of article 8 of the Statute *per se* is the effective transition of WC from the decades-long scant elaborations to a fully-fledged definition. In exploring how the codification of WC in the Statute will have a bearing on the development of WC within the

[1] Werle G., *Principles of International Criminal Law* (2nd edn TMC Asser Press 2009), p.281.
[2] ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, London Conference (2000), Principles 21, 24, and 26 ('ILA Report').
[3] *Continental Shelf case (Libyan Arab Jamahiriya v. Malta),* Judgment, ICJ Reports 1985 13, 3 June 1985, p.42, para.27.

Court's jurisdiction and consequently under CIL I will examine the structure and features of article 8 as a WC provision. I will also consider certain omissions whose exclusion from the Statute is potentially significant as regards the outlook of article 8 as a conservative codification of the law of WC. I will explain why those particular omissions have been chosen for discussion. I will also examine those WC whose inclusion and elaboration in the Statute has a *prima facie* law-making potential because of their progressive or regressive character. Lastly, I will refer extensively to the inclusion of 'novel' crimes and the effect by the Court's establishment on their development.

While the Statute has been criticised for adding only but a few new crimes the impact of these 'novel' crimes on the development of article 8, may exceed any original expectations behind their adoption. This is due to the considerable focus by the ICC case-law so far on particular crimes, a number of which were either only implicitly criminalised as WC in the past (e.g. gender crimes) or were classified for the first time as such in the Statute (e.g. child conscription). Thus, in understanding how the Court in carrying out its mandate will develop the WC within its jurisdiction I will consider both the interpretation of the WC charges by the Chambers and the significance of the charges selected. The latter consideration is necessary in order to comprehend how the ICC 'in action' has the capacity to accelerate the development of particular WC and whether the Court's perceived emphasis on them has an effect on the nature, purpose and direction that article 8 is expected to take in the future. Relatedly, I will inquire whether the Court's evolving case-law and its impact on the development of WC is more pertinent as regards particular types of armed conflicts and actors. In particular, I will examine whether the ICC will play a greater role in the context of non-international armed conflicts ('NIAC') as opposed to international ones and in relation to "organized armed groups" rather than "governmental authorities."[4] Such a prospect is very significant considering that traditionally the rules of IHL were far more extensive, in relation to international armed conflicts ('IAC'). Article 8 ameliorates the uneven level of criminalisation to a certain extent. Nevertheless, the discrepancy between the rules which apply in international and non-international conflicts, respectively, is still far from over.

Article 8 was amended at the first review conference of the Statute in Kampala in 2010. While the changes brought about are limited they are informative in understanding how the Court's jurisdiction *ratione materiae* may develop via this avenue. The amendment procedure is more relevant as regards article 8 rather than the other crimes which are currently within the Court's jurisdiction. For example, the list of WC in NIAC could be extended to cover those crimes which are currently only applicable

[4] Terms taken from article 8(2)(f) of the Rome Statute of the International Criminal Court <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> ('Rome Statute')

to IAC. Moreover, article 8(2)(b)(xx) explicitly refers to the Statute's amendment provisions in articles 121 and 123.

In the next section I will refer to the development of WC up until the negotiations for an international criminal court in order to sketch the manner in which they developed whilst being in a state of unclear succinct and open-ended formulations. In particular, I will examine how these provisions were interpreted and developed, most notably by the *ad hoc* tribunals. The kind of development which took place as a result of the work of these tribunals is of a different quality and is not comparable to the development that will take place as a result of the ICC's establishment. Nevertheless, the work of the *ad hoc* tribunals is indispensable in understanding the development of WC from a 'non-definitional' stage towards a definitional provision in the Statute.

4.2 The development of war crimes prior to 1998

4.2.1 World War I

The concept, but not the actual term WC was introduced at the end of WWI in article 228 of the Treaty of Versailles which referred to "acts in violation of the laws and customs of war."[5] The treaty did not define these violations.[6] WC were the first crime to be prosecuted under IL, among the most prominent early examples being the Leipzig trials in the early 1920s.[7] The legal basis for the prosecution of German soldiers was the 1907 Hague Convention and the Regulations annexed to it.[8]

4.2.2 World War II

The atrocities of WWII eventually led to the adoption of the IMT and of the International Military Tribunal for the Far East ('IMTFE'). Their charters explicitly included WC within their jurisdiction. While article 6(b) of the IMT referred to some examples of WC[9] the Tokyo charter was laconic, referring to WC simply as "violations of the laws or customs of war."[10] In general terms both charters still followed the "non-definitional approach" of the Versailles Treaty.[11]

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[5] Versailles Treaty, 28 June 1919: Part VII, Article 228 < http://avalon.law.yale.edu/imt/partvii.asp> (emphasis added).
[6] Bothe M., War Crimes in Cassese A., Gaeta P., Jones J. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Volume 1A) (OUP 2002), p.382.
[7] Hebel von H., Aspects of the Statute in Hebel von H., Lammers J. G. and Schukking J. (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Asser Press 1999), p.16.
[8] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>
[9] Charter of the International Military Tribunal, 8 UNTS 284, Annex, 8 August 1945, article 6(b) <http://avalon.law.yale.edu/imt/imtconst.asp#art6>
[10] Article 5(b), cited in Bothe, n.6, p.383.
[11] Ibid, p.383.

It has been argued that WC were the only crime in article 6 of the IMT which enjoyed customary status at the time.[12] In addition to the IMT certain national tribunals, especially the Nuremberg Military Tribunals working under CCL No.10, prosecuted WC at the time. The non-definitional approach to WC persisted as the relevant provision in CCL No.10 essentially replicated article 6(b) of the IMT.[13] Nevertheless, this period effectively marked the beginning of a process whereby WC were interpreted and applied and as a result of which provided with more precision as to their content.[14] Such interpretation was done with reference to the 1907 Hague Regulations.[15]

4.2.3 The 1949 Geneva Conventions and 1977 Additional Protocols

The next major development came in 1949 with the adoption of the four Geneva Conventions ('GCs'): Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,[16] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,[17] Convention (III) Relative to the Treatment of Prisoners of War[18] Convention (IV) Relative to the Protection of Civilian Persons in Time of War.[19]

The 1949 GCs set out a number of violations, termed "grave breaches," which may take place in the context of IAC.[20] The contracting parties to the GCs have an obligation of *aut dedere aut judicare* for persons who have committed grave breaches irrespective of their nationality or where the crime was committed. The GCs were supplemented in 1977 with two Additional Protocols ('AP I' and 'AP II'). AP I relates to the protection of victims in international conflicts while AP II to the protection of

[12] Jescheck H. H., The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC Statute, vol.2 *JICJ* (2004) 38, p.41. See: International Military Tribunal (Nuremberg): Judgment and Sentences, October 1, 1946, vol.41 *AJIL* (1947) 172, p.218.
[13] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, article II(1)(b) <http://avalon.law.yale.edu/imt/imt10.asp>
[14] On the war crimes case-law of the Nuremberg Military Tribunals see generally: Heller K.J., *The Nuremberg Military Trials and the Origins of International Criminal Law* (OUP 2011), chapter 9.
[15] Bothe, n.6, p.383.
[16] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (1949) ('GC I').
[17] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (1950) ('GC II').
[18] Convention (III) Relative to the Treatment of Prisoners of War 75 UNTS 135 (1950) ('GC III').
[19] Convention (IV) Relative to the Protection of Civilian Persons in Time of War75 UNTS 287 (1950) ('GC IV').
[20] An international armed conflict involves "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Article 2 of GC I, II, III and IV - Application of the Convention.

victims in NIAC.[21] It was not until AP I that it was finally stated that the "grave breaches of these instruments shall be regarded as war crimes."[22]

Notably, AP II and Common Article 3 of the GC ('CA3'), which constitute the regime for violations in NIAC, are not "grave breaches." Thus, these instruments do not impose the obligations mentioned above. The drafters of the GCs were not prepared to extent mandatory universal jurisdiction to NIAC in light of the intrusion on State sovereignty which entailed.[23]

4.2.4 The *Ad Hoc* Tribunals

The establishment of the *ad hoc* tribunals initiated a "synergistic relationship" between their statutes, their case-law and "the growth of customary law."[24] The ICTY Statute was adopted first. Its drafting was the work of the UNSG. The relevant UNSG Report explicitly stated that the new tribunal "should apply rules which are beyond any doubt part of customary law."[25] As regards WC, the UNSG Report identified the 1949 GCs, the 1907 Hague Convention and the Regulations annexed to it and the 1945 IMT Charter, as conventional IHL which had attained customary status beyond doubt.[26]Article 2 of the ICTY Statute refers to the 1949 GCs while article 3 deals with violations of the laws or customs of war.

The drafting history of the ICTY is to be contrasted with the one that took place in relation to the ICTR. The ICTR Statute was not elaborated by the UNSG but was adopted directly by the UNSC. According to the UNSG the UNSC had chosen "a more expansive approach to the choice of the applicable law" than the one underlining the ICTY Statute.[27] To this effect, article 4 of the statute includes "violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions."[28] Notably, the atrocities in Rwanda were generally taken to have occurred within the context of a NIAC.

[21] Protocol Additional I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979), 1125 UNTS 3; Protocol Additional II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts1125 UNTS 3 (1979).
[22] Ibid, Article 85(5).
[23] *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.80 ('*Tadić* Interlocutory Appeal Decision').
[24] Meron T., War Crimes Law Comes of Age, vol.92(3) *AJIL* (1998) 462, p.464.
[25] Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), UN. Doc. S/25704, 3 May 1993, para. 34.
[26] Ibid, paras 35, 42, 44.
[27] Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995, para.12.
[28] Ibid.

While the intention in setting up the ICTY was to stay within the strict limits of what was considered as customary IHL at the time the Court's creation provided an unprecedented impetus for the revival of IHL. Meron writing as early as 1998 stated that the pace of development of IHL norms has been faster since the beginning of the conflict in former Yugoslavia than in the forty-five years since the Nuremberg Tribunals.[29]

The ICTY, in its first major ruling in the *Tadić* case, interpreted article 3 in such a way so as to enable the tribunal to find that violations of IHL which were not mentioned in the provision entailed international criminal responsibility. Notably, the AC's innovative interpretation extended the application of article 3 beyond the 1907 Hague Convention and Regulations and their interpretation by the IMT. The enumeration of the violations in article 3 was deemed to be "merely illustrative."[30] According to the AC this interpretation was justified on the basis of a literal interpretation of article 3 which stated that the violations "shall include, but not limited to." Further, the AC referred to article 89 AP I according to which the contracting parties undertake to act in situations of "serious violations" of the GCs and AP I (thus, not being restricted only to grave breaches). In concluding its interpretation of article 3 the AC stated that the said provision had endowed the Tribunal with the power to prosecute all "serious violations" of international humanitarian law" and it set out the requirements that are to be met for an act to qualify as a 'serious violation.'[31]

On the basis of the above interpretation, the ICTY proceeded to convict individuals for crimes not listed in its statute, such as "unlawful attacks on civilians" when these were not justified by military necessity.[32] Significantly, both the TC and the AC found that AP I was the applicable law and that it was "beside the point" whether the aforementioned instrument reflected customary or treaty law at the time of the case.[33]

The non-exhaustive enumeration of the prescribed acts in article 3 and the "opening" in the system of IHL provided by AP I facilitated the dynamic reform of the conventional law of armed conflict in the context of both IAC and NIAC Most notably, the AC in *Tadić* confirmed the applicability of some provisions of the GCs to NIAC as well the criminalisation of breaches of CA3.[34] Arguably at the time the tribunal's decision went beyond the jurisdictional regime prescribed in its statute and constituted

[29] Meron, n.24, p.463.
[30] *Tadić* Interlocutory Appeal Decision, n.23, para.87.
[31] Ibid, para.94.
[32] *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, para. 40.
[33] Ibid, paras 41-42.
[34] *Tadić* Interlocutory Appeal Decision, n.23, paras 86-93.

ex post facto law.[35] Nevertheless, before long this conclusion "helped to create the environment for some of the developments in the Preparatory Committee on the establishment of an International Criminal Court."[36]

In order to understand the contribution of the *ad hoc* tribunals, in particular the ICTY, to the development of WC, it is necessary to contrast how they perceived their jurisdiction *ratione materiae vis-à-vis* the statutory formulations of WC. The latter provided the starting point for determining the former. These formulations were not the centrepiece in the development of WC; rather, the wider field of IHL provided the impetus. In this respect, serious violations of IHL which entailed individual criminal responsibility were considered to be within the ICTY's jurisdiction. This is to be contrasted with the kind of development that may take place as result of the establishment of the ICC. Under the Statute, the starting point and the main focus of any interpretative exercise is the crime's definition in article 8 of the Statute while the applicable law is elaborately set out in article 21.

The Rome Statute incorporates other important findings from the case-law of the *ad hoc* tribunals. For example, it adopted almost verbatim the definition of NIAC from *Tadić*.[37] This approach illustrates the "precedential value" of judicial decisions by international courts and tribunals in contributing to the development of CIL even though they cannot create laws themselves *per se*.[38] According to the ILA while it is not appropriate to consider such decisions as evidence of State practice "their persuasive force can be considerable – depending on the status of the tribunal, the quality of its reasoning, the terms of the *compromis* or Statute by which it is set up, etc."[39] The ILC has often relied on the judicial pronouncement of international courts and tribunals "in support of the existence or non-existence of a rule of customary international law."[40]

As regards article 8 of the Statute, it is significant to explore the 'synergistic relationship' between the conventional law encompassed in the Statute, the ICC's case-law and the development of CIL. However, as stated in chapter 1, the dynamism of this relationship has been fundamentally re-defined because of the extensive treaty-proper negotiations which took place during the adoption of the Statute, the participants involved and the end-result of this process. Significantly, it was the first time that WC, along with the other crimes within the Court's jurisdiction, were negotiated as part of a

[35] Schabas W., *An Introduction to the International Criminal Court* (4th edn 2011), p.124. For a contrary opinion see: Roberts A. and Guelff R., *Documents on the Laws of War,* OUP (OUP 2000), pp.566-567.
[36] Meron, n.24, p.464.
[37] *Tadić* Interlocutory Appeal Decision, n.23, para.70. Compare with Rome Statute, n.4, article 8(2)(e).
[38] ILA Report, n.2, Principle 10, pp.18-19. See also: Cryer R., Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Law Study, vol.11(2) *JCSL* (2006) 239, p.246.
[39] Ibid.
[40] ILC, Formation and evidence of customary international law – Elements in the previous work of the International Law Commission that could be particularly relevant to the topic: Memorandum by the Secretariat, 14 March 2013, A.CN.4/659, Observation 16, p.25.

multilateral treaty-making for the purpose of setting up an international judicial institution to deal with individual criminal responsibility. Thus, the Statute's negotiating history and the crimes' definitions, as eventually adopted, are extremely important in reflecting the will of the drafters, the scope of the crimes and their status under CIL.[41] While a treaty "does not "make" customary law, […] it may both codify existing law and contribute to the process by which new customary law is created and develops."[42] The latter scenario is particularly pertinent as regards the so-called 'law-making' treaties, as discussed in chapter 1. Alternatively, a treaty provision may attain CIL status when it relates to "a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[43]

4.3 Customary International Humanitarian Law

Due to the close relationship between IHL and WC, it is necessary to inquire how the former attain CIL status in order to understand how the latter may develop as a result of the ICC's establishment. The 2005 ICRC Study provides the most important field-specific work on IHL and CIL.[44] While the Study is not the result of a State-sponsored initiative, given the status of the ICRC in relation to IHL "it is undoubtedly a quasi-official codificatory text in a broad sense."[45] The Study relies heavily on the Statute and case-law of the ICC.[46] Significantly, the Study notes that there was general agreement as to the customary status of the definitions of the crimes in the Statute.[47]

In addressing the requirement of *opinio juris* the Study notes that "[i]t appears that international courts and tribunals on occasion conclude that a rule of customary law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is not important contrary *opinio juris.*"[48] According to the Study, this approach of assessing CIL is particularly relevant in the context of IHL.[49] This thesis was predicated on and developed on the basis of this position. The development of international crimes, particularly from Nuremberg and onwards, reflects a desire to establish individual criminal responsibility for particularly heinous conduct. One of

[41] ILC, Third report on identification of customary international law by Michael Wood, Special Rapporteur, 27 March 2015, A/CN.4/682, para.33 ('Third report by Special Rapporteur').
[42] Boyle A. and Chinkin C., *The making of international law: Foundations of Public International Law* (OUP 2007), p.234.
[43] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969 3, 20 April 1969, , pp.41-42, para.72.
[44] Henckaerts J.M. and Doswald-Beck L., *Customary International Humanitarian Law: Volume I: Rules* (CUP 2005).
[45] Scobbie I., The approach to customary international law in the Study in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Wilmshurst E. and Breau S. (eds), British Institute of International and Comparative Law – Chatham House (CUP 2007), p.17. See also: ILC, Report of the International Law Commission on the Work of its 65th session, 6 May to 7 June and 8 July to 9 August 2013, A/68/10, para.89.
[46] Cryer (2006), n.38, p.241.
[47] Henckaerts and Doswald-Beck, n.44, pp.xliv-xlv.
[48] Ibid, p.xlii.
[49] Ibid.

the criticisms levelled against declarations of customary status of norms, such as those by the *ad hoc* tribunals, is that they often failed to take into account the violations of rules as contrary practice. However, the *raison d'être* of ICL is to deal with the violations of these rules. Thus, conduct which can be considered as contrary practice, thus undermining the customary status of a norm, is not necessarily considered as such in this field or alternatively it does not have the same impact. At the same time, this particularly of ICL does not mean that the requirements of State practice and *opinio juris* are dispensed in any way.

As mentioned in chapter 3, the case-law of the *ad hoc* tribunals has not been immune to criticism that these chambers have been often "too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion."[50] The ILC throughout its ongoing work on the topic has maintained that both State practice and *opinio juris* are necessary for the formation and identification of a rule of CIL. Significantly, it concluded that the "two-element approach" also applies in the fields IHL and ICL. At the same time, it conceded that

> There may, on the other hand, be a difference in application of the two-element approach in different fields (or perhaps more precisely, with respect to different types of rules): for example it may be that "for purposes of… [a specific] case the most pertinent State practice" would be found in one particular form of practice that would be given "a major role".[51]

Significantly, the ILC referred, among others, to the *Tadić* case which stated that when assessing the existence or not of a customary rule in the law of armed conflict it is extremely difficult to find positive practice in this respect.[52] The Court concluded that because of "the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions."[53] Therefore, the judges emphasised *opinio juris* over practice.[54] Such developments, at the very least, point towards the conclusion that judicial assertions by international criminal tribunals as to the state of law which may lack firm State practice and *opinio juris* may still be normatively significant. This is usually overcome by emphasising *opinio juris* over State practice and vice-versa.[55] Such issues are not so relevant in relation to the Rome Statute whose provisions, especially the definitions of the crimes, are characterised by a strict legalism and are expressly subject to detailed legality provisions. Nevertheless, the Rome Statute still concerns an area of law which is inherently teleological. Therefore, the pertinent question in this thesis is how the

[50] Mettraux G., *International Crimes and the* ad hoc *Tribunals* (OUP 2005), p.15. See also chapter 3, section 3.4.2.
[51] ILC, Second report on identification of customary international law by Michael Wood, Special Rapporteur, 22 May 2014, A/CN.4/672, para.28. See also: Third report by Special Rapporteur, n.41, para.17.
[52] Ibid, fn.52. See also: *Tadić* Interlocutory Appeal Decision, n.23, para.99.
[53] Ibid.
[54] Cryer R., International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon, vol.10(5) *JICJ* (2012) 1045, p.1049.
[55] Kirgis F., Custom on a Sliding Scale, vol.81 *AJIL* (1987) 146.

tension between the Rome Statute's strict legalism and teleological nature will promote the further development of the crimes under CIL. However, before considering the interpretation of the crimes by the ICC Chambers it is necessary to examine the drafting and incorporation of the WC in the Rome Statute and article 8's relationship vis-à-vis CIL.

4.4 The Rome Statute and its relationship with Customary International Law

The drafters of the Statute intended the definitions of the crimes to be declaratory of CIL and not create new law.[56] However, article 8 is a peculiar provision in this respect. The bulk of the acts within its scope are based on widely ratified conventions many of which are considered to be part of CIL. The added detail in relation to a number of crimes in article 8 was to remedy the rather scant and vague wording of some primary rules of IHL in order to ensure their compliance with the principle of legality.[57] As a consequence the delegates at Rome when drafting the WC provision had to "be specific as to the content of the underlying primary rules" or as to what they "thought that the primary rules were."[58] This meant that choices had to be made regarding a given provision's scope and wording. As a result of the calculated precision exhibited in drafting the WC definition under the Statute, article 8 cannot be considered as a mere codification exercise.

The 'novel' crimes adopted were considered to be politically viable for inclusion in that their prosecution was supported by the prominence they had achieved in recent years in the context of human rights advocacy and civil societies while at the same time their incorporation in article 8 did not generate such controversy so as to undermine the adoption of the Statute. Whether this constitutes a relaxation of the rules of custom formation, the delegates at Rome certainly did not view it in this way. What is certain however is that their inclusion within the Statute has kicked-off a more transparent process as to their development as substantive rules of ICL.

Lastly, the negotiation and adoption of article 8 of the Statute highlighted the close relationship between treaties and custom and the effect of the former in the development of the latter.[59] This issue is more visible and relevant in relation to WC than any other ICC crime. Article 8 of the Statute was not intended to be an exhaustive codification of WC and this is explicitly reflected in article 10.[60] Article 10 of the Statute was introduced in order "to preserve the role of custom" in the development

[56] Kirsch P., Foreword, in Dörmann K. (ed.), *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003), p. xiii.
[57] Bothe, n.6, p.381.
[58] Ibid.
[59] For a recent overview as to the role of treaties in the formation and identification of CIL see: Third Report by Special Rapporteur, n.41, paras.31-43.
[60] Schabas W., *The International Criminal Law: A Commentary on the Rome Statute* (OUP 2010), p.270.

of ICL norms.[61] Notably, it was originally proposed during the negotiations on WC.[62] Article 10 was vehemently supported by the ICRC which stated that "[i]t is essential that the Statute of the Court indicate that it in no way affects existing humanitarian law nor impede its development."[63] The ICRC was particularly concerned that omissions from article 8 should not be taken as evidence that they did not constitute WC.

4.5 War Crimes after the 1998 Rome Conference

Article 8 as this was finally adopted at the Rome Conference is a highly complex combination of customary and treaty law. In order to understand better how the ICC's establishment impacts on the development of WC it is necessary to examine the structure, character and scope of article 8 as a WC provision. Article 8 of the Statute retains a separate set of rules for WC in IAC and NIAC, the former being included in articles 8(2)(a) and 8(2)(b) while the latter are to be found in articles 8(2)(c) and (2)(e). Article 8(1) sets out the ICC's jurisdiction for WC in respect of both international and internal conflicts. It states:

> The Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes.[64]

The *chapeau* constitutes a compromise between States favouring a high threshold and the position of the 'like-minded' States which supported that the Court should have jurisdiction over any individual WC.[65] The end result is that a 'guideline,' a 'non-threshold threshold,' was adopted whereby isolated acts will not normally be adjudicated before the ICC.[66]

Article 8 is by far the longest provision in the Statute dealing with a crime within the Court's jurisdiction. Its detailed definitions and precision has been the subject of considerable commentary as to their advantages and disadvantages. The WC provision has been criticised for being a

[61] Sadat L. N., *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers, Inc. 2002), p.263.
[62] Schabas (A Commentary), n.60, p.272.
[63] International Committee of the Red Cross Statement of 8 July 2008 Relating to the Bureau Discussion Paper in Document A/CONF.183/C.1/L.53, UN Doc. A/CONF.183/INF/10, para.4 <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf>
[64] Emphasis added.
[65] Hebel von H. and Robinson D., Crimes within the Jurisdiction of the Court, in Lee R. S., ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, and Results* (Kluwer Law International 1999), pp.107-108.
[66] Bothe, n.6, p.380. See also: *Bemba* (ICC-01/05-01/08-424), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para.211 ('*Bemba* Confirmation of Charges').

"retrenchment" in IL.[67] Unlike the *ad hoc* tribunals, article 8 "contains a closed list of war crimes."[68] Moreover, the detail in the provision "has the virtue of making it more complete" than its predecessors and "the defect of expressly excluding certain serious threats to international peace and security."[69]

Overall, the elaboration of WC in article 8 constitutes "important progress, though certainly not a linear one."[70] The provision is undoubtedly more restrictive than the equivalent ones in the statutes of the *ad hoc* tribunals. Also, the creation of two separate regimes for WC in international and non-international conflicts did not take into account the progressive merging of the rules pertaining to the two types of conflicts.

Nevertheless, as opposed to the other ICC crimes, article 8 reflects to a much greater extent the ICC's nature as the first permanent tribunal of its kind with a non-conflict specific jurisdiction. The text agreed in Rome represents the first attempt to formulate a comprehensive, albeit not complete, WC provision. This involved an exercise by the drafters of choosing which rules of IHL were sufficiently important to be included or were not that controversial so as to endanger the successful outcome of the negotiations. Moreover, the drafters had to deal with the difficulty that the provisions of the GCs were not "self-executing" but in need of elaboration and clarification.[71]

The drafters by choosing a relatively modest regime for the Court's early years they have put in place a solid foundation for expanding its mandate in the future and contributing to the substantive scope of WC. Further, the comprehensive elaboration of the crimes in article 8 mitigates to a certain extent the limiting nature of the closed list. In this respect, a very significant development was the drafters' decision to upgrade the status of WC in internal conflicts by their explicit elaboration in the provision.

Article 8(2) enumerates the proscribed acts. In sections 4.6 and 4.7 I will examine the crimes in article 8(2) focusing on the following: crimes whose recognition and definition proved controversial during the Rome Conference and later on in the elaboration of the EoC and the resulting compromises reached (if any); to point out differences between the scope of these WC and their previous formulation under treaty or CIL; discuss the innovations made and the consequences of notable

[67] Cryer R., *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge Studies in International and Comparative Law (CUP 2005), p.275.
[68] Ibid.
[69] Sadat, n.61, p.160.
[70] Condorelli L., War Crimes and Internal Conflicts in Politi M. and Nesi G. (eds), *The Rome Statute of the International Criminal Court: A challenge to impunity* (Ashgate 2001), p.111.
[71] Bothe, n.6, p.392.

exclusions. Section 4.6 will deal with WC committed in IAC while section 4.7 will be concerned with WC in NIAC.

4.6 War crimes in international armed conflicts

4.6.1 Article 8(2)(a)

Article 8(2)(a) criminalises violations of the grave breaches of the 1949 GCs. An analysis of article 8(2)(a) is relatively straightforward given that its wording corresponds exactly to the relevant provisions in the GCs. Notably, during the negotiations of the EoC initial progress was made firstly in relation to article 8(2)(a) the discussion of which was easier compared to the longer and more contentious list found in article 8(2)(b).[72] While the provision itself is clear as to the acts included it makes no reference to those grave breaches which were established later on by AP I. Among other things, article 85 of AP I established certain new grave breaches,[73] but only some of these have been incorporated in article 8(2)(b). However, article 8(2)(a) is identical to article 2 of the ICTY Statute.

Many of the crimes in article 8(2)(a) had only been the subject of limited case-law prior to the adoption of the Statute. Thus, their precise content is still far from clear. Future ICC case-law would need to clarify what is the difference between ordinary 'killing'[74] and 'wilful killing.'[75] Also, it is not clear what is meant by 'appropriation of property' carried out not only 'unlawfully' but also 'wantonly.'[76] The PrepCom when drafting the EoC tried to clarify the scope of these provisions. It was mainly guided by the Commentaries to the GCs.[77] These commentaries were largely based on the *travaux préparatoires* of the GCs and "constitute the principal interpretative source thereof."[78]

4.6.2 Article 8(2)(b)

Article 8(2)(b) is far more complicated. Article 8(2)(b) refers to serious violations of the laws and customs of war in IAC. Its provisions are drawn from both customary (mainly the 1907 Hague

[72] Discussion paper for article 8 is reproduced from PCNICC/1999/WGEC/RT.2 as orally amended by the Coordinator containing the elements of War Crimes for Articles 8(2)(a)(i),(ii) and (iii), Proceedings of the Preparatory Commission at its first session, 16–26 February 1999, PCNICC/1999/L.3/Rev.1, 2 March 1999 <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N99/057/64/PDF/N9905764.pdf?OpenElement>
[73] AP I, Article 85(3) & (4).
[74] Rome Statute, n.4, article 8 (2)(a)(i)
[75] Ibid, article 8 (2)(b)(vi). See: Byron C., *War crimes and crimes against humanity in the Rome Statute of the International Criminal Court* (Manchester University Press 2009), p.28.
[76] Ibid, article 8(2)(a)(iv).
[77] Pictet J. (ed.), *Commentary on the Geneva Conventions of 12 August 1949,* Volumes I-IV (ICRC 1952-1958).
[78] Schabas (2011), *An Introduction*, n.35, p.133.

Regulations) and widely accepted treaty law such as AP I. While article 8(2)(b) is predominantly based on AP I and the Hague Regulations, none of the twenty-five acts that are contained in this list explicitly refer to their origin, like article 8(2)(a). Sometimes while a WC under article 8(2)(b) is clearly based on these previous instrument(s) its adoption in the Statute was not done without changes. Moreover, article 8(2)(b) has not incorporated all serious violations of AP I. The separation of the crimes committed in international conflicts in two lists seems artificial especially as regards the crimes which are duplicated in substance in the two lists[79] and considering that the main distinguishing factor between the two lists – the classification of the former list of acts as grave breaches and the ensuing legal obligations – is not relevant under the Statute. Nonetheless, pursuing a 'unitary approach' by putting all the WC in the same provision, for the first time ever, is one of the greatest achievements of the Statute.[80]

How does the drafters' approach in relation to article 8 the impact on the development of WC? As explained above, the structure and features of article 8 as a WC provision *per se* contribute to the development of WC. Below I will consider certain omissions whose exclusion from the Statute is potentially significant as regards the outlook of article 8 as a conservative codification of the law of WC. I will also examine those WC whose inclusion and elaboration in the Statute has a *prima facie* law-making potential because of changes in their scope. This assessment relates to both crimes under CIL and crimes which were not considered to have attained such status in 1998. While the customary status of the Hague Regulations has long been asserted this is not the case in relation to some of the provisions of AP I. To complicate matters even further, article 8(2)(b) also contains some 'novel' crimes. I will refer extensively to these crimes and the effect by the Court's establishment on their development.

4.6.2.1 *Article 8(2)(b) particular provisions*

Article 8(2)(b)(iii) states:

> Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[81]

[79] Rome Statute, n.4, article 8(2)(b)(xiii), (xv) and (xxi) duplicate in substance article 8(2)(a)(ii), (iv) and (v).
[80] Venturini G., War Crimes in International Armed Conflicts in Politi and Nesi, n.70, p.97.
[81] Duplicated in the context of non-international conflicts as article 8(2)(e)(iii) (Rome Statute, n.4).

This provision is based on the 1994 Convention on the Safety of United Nations and Associated Personnel. The development of this WC has been remarkable considering that the 1994 Convention on which it is based was not even in force at the time the Statute was adopted. [82] Notably, the UNSG in his report on the establishment of the Special Court of Sierra Leone ('SCSL') stated that the prohibition became an international crime for the first time with the adoption of the Rome Statute.[83] This unexpected development has not abated with the crime's adoption given that the ICC has already had the opportunity to give flesh and meaning to this provision in two cases involving three individuals.[84]

This prohibition is also found in article 8(2)(e) as regards NIAC. Article 8(2)(e)(iiii) is significant because it is "one of the few international criminal law prohibitions in respect of civilian objects in non-international armed conflict."[85]

Article 8(2)(b)(xx) states:

> Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.

The definition of indiscriminate attacks is to be found in article 51(4) of AP I while weapons and methods of warfare which cause superfluous injury or unnecessary suffering are prohibited under article 35(2) of AP I. According to the ICJ such prohibition encompasses a number of "cardinal principles" of IHL. Firstly, it prohibits the use of weapons which cause unnecessary suffering to combatants.[86] Secondly it establishes a distinction between combatants and non-combatants (civilians), prohibiting the use of weapons which are incapable of distinguishing between civilians and combatants. [87] Importantly, given that such rules are fundamental to the respect of the human person they are to be "observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[88]

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[82] Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363, 9 December 1994.
[83] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, p.4, para.16.
[84] See chapter 6, section 6.7.
[85] Sivakumaran S, War Crimes before the Special Court for Sierra Leone, vol.8(4) *JICJ* (2010) 1009, p.1024 (footnote omitted).
[86] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996 226, 8 July 1996, para.78 ('ICJ AO').
[87] Ibid.
[88] Ibid, para.79.

Article 8(2)(b)(xx) has been described as the "only really important provision dealing with prohibited weapons."[89] Notably, it does not adopt a closed list of weapons thus leaving open the possibility of covering both conventional and non-conventional weapons within its ambit.[90] However, the Statute provides that the use of such weapons may only be prosecuted following an amendment to the Statute which will adopt an annex setting out the prohibited weapons. Given that such a prospect is extremely unlikely it would seem that "the two principles are deprived of their overarching legal value."[91] The provision's 'dormancy' pending agreement on an annex appears to signify that even weapons which have been the subject of a long-standing prohibition, such as biological weapons,[92] might be used without entailing individual criminal responsibility given that they are not covered at all in the Statute.[93] Article 8(2)(b)(xviii) may only be used in relation to chemical weapons but such codification is incomplete. This is because the Chemical Weapons Convention was excluded at the last moment and article 8(2)(b)(xviii) provides jurisdiction for chemical weapons only in respect of violations of the 1925 Gas Protocol.[94]

The eventual compromise was the result of a lack of agreement at the Rome Conference where certain major powers were concerned that the provision might be used to cover nuclear weapons.[95] The drafters' inability to include within the Rome Statute nuclear weapons resulted in objections from developing countries to also exempt the 'poor man's atomic bomb', that is, chemical and biological weapons.[96] As a result, the Chemical Weapons Conventions was excluded from the final package even though its inclusion throughout the Conference seemed certain.[97] Thus, article 8 has been criticised as dealing only with obsolete weapons, such as poisoned arrows and hollow bullets, instead of modern weapons of mass destruction such as nuclear, biological, chemical weapons and anti-personnel mines.[98]

The absence of nuclear weapons from the WC is considered as one of the most controversial omissions.[99] Even though the ICJ refrained from recognising that nuclear weapons are prohibited *per se* under current CIL[100] it took the view that "there can be no doubt as to the applicability of

[89] Schabas W., Prohibited Weapons and the Belgian Amendment: Symbolic, but of What?, *The ICC Review Conference: Kampala 2010*, 22 May 2010 <http://iccreviewconference.blogspot.com/2010/05/prohibited-weapons-and-belgian.html>
[90] Bothe, n.6, p.409.
[91] Cassese A., *International Criminal Law* (2nd edn OUP 2008), p.95.
[92] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction,1015 UNTS 163, 10 April 1972.
[93] Cryer (2005), n.67, p.280.
[94] Ibid, p.279.
[95] Schabas W., Unimaginable Atrocities (OUP 2012), p.37.
[96] Schabas (An Introduction), n.35, p.138.
[97] Cryer (2005), n.67, p.279.
[98] Schabas (An Introduction), n.35, p.138.
[99] Bothe, n.6, p.396.
[100] ICJ AO, n.87, p.266.

humanitarian law to nuclear weapons."[101] Moreover, due to the "unique characteristics" of nuclear weapons, the use of such weapons "in fact seems scarcely reconcilable" with respecting IHL. Still, the ICJ acknowledged the fundamental right of every State to defend itself.[102] According to Bothe, this signifies that resorting to using nuclear weapons will always be a violation of the rules of armed conflict, in particular those relating to the protection of civilians and the fact that it was not explicitly included in the Statute does not mean that is not covered by article 8(2)(b)(i), (ii) or (iv).[103] The same holds true for biological weapons.[104] On the basis of this interpretation, article 8 may still deal with prohibited weapons.

Article 8(2)(b)(xxii) deals with sexual violence:

> Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

Sexual crimes were described as the "forgotten crimes" of IL.[105] This characterisation stemmed from the fact that despite evidence of widespread sexual violence during WWII in both Europe and Asia, the Nuremberg and Tokyo Charters did not explicitly criminalise sexual violence and their case-law dealt with them only incidentally, mainly in the context of rape.[106] The turning point in the overdue development of providing explicit criminalisation to sexual violence as a separate WC came as a result of the atrocities committed in former Yugoslavia and Rwanda.[107]

The mandate and case-law of the *ad hoc* tribunals demonstrates how the criminalisation of sexual and gender-based crimes advanced. *The ad hoc* tribunals have jurisdiction over these crimes as follows: the ICTY Statute listed rape as a CaH[108] while the ICTR Statute provided that rape is a CaH,[109] and classified rape, enforced prostitution and indecent assault of any kind as a serious violation of CA3 and of AP II.[110] Nevertheless, the *ad hoc* tribunals entered convictions for a far wider range of sexual offences. The case against *Tadić* was hailed as "the first international war crime trial involving charges

[101] Ibid, para.85.
[102] Ibid, paras 95-96.
[103] Bothe, n.6, p.397. See also: Burroughs J., The French "Interpretative Declaration" Regarding Nuclear Weapons, *Lawyers' Committee on Nuclear Policy Inc.*, 5 July 2000 <http://lcnp.org/global/french.htm>
[104] Bothe, ibid.
[105] Chinkin C., Gender-related Violence and International Criminal Law and Justice in Cassese A. (ed.),*The Oxford Companion to International Criminal Justice* (OUP 2009), p.76.
[106] Sellers P.V., The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation, *OHCHR* (2008), pp.7-8 <http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf>
[107] Sexual Violence and Armed Conflict: United Nations Response, *Women2000, United Nations Division for the Advancement of Women*, April 1998 <http://www.un.org/womenwatch/daw/public/cover.pdf>
[108] ICTY Statute, article 5(g) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>
[109] ICTR Statute, article 3 (g) <http://www.un.org/ictr/statute.html>
[110] Ibid, article 4.

of sexual violence."[111] The accused was found guilty for cruel treatment (violation of the laws and customs of war) and inhumane acts (CaH).[112] On appeal he was also found guilty for the grave breaches of inhumane treatment and wilfully causing great suffering or serious injury to the body or health.[113] In the *Čelebići* case the ICTY TC recognised that rape can constitute a form of torture and thus qualify both as a grave breach of the GCs and a violation of the laws and customs of war.[114] The *Kunarac* case was one of the first cases to deal exclusively with charges of sexual violence where the Court "broadened the acts that constitute enslavement as a crime against humanity to include sexual enslavement."[115] It was also the first ICTY case to convict someone of rape as a CaH. Another landmark precedent was also set in the *Akayesu* case which held that acts of rape carried out with the required specific intent amount to genocide.[116]

Article 8(2)(b)(xxii) contains six types of prohibited conduct (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions). The provision represents a shift from previous implicit criminalisation of acts of sexual violence which focused on the honour and integrity of the woman[117] towards recognition of an explicit separate category in its own right.[118] Notably, the draft provision which was forwarded by the Preparatory Committee to the Rome Conference contained no brackets.[119] The consensus among delegates continued during the Rome Conference, where all types of prohibited conduct, aside enforced pregnancy, were adopted without any serious opposition "reflecting the widespread acceptance of the fact that listing of these crimes was merely codifying the current state of international law."[120]

Sexual slavery and enforced sterilisation are 'novel' crimes to the extent that their incorporation in the Statute is the first time that these crimes have been the subject of explicit prohibition as WC (and CaH) by an international criminal court. Sexual slavery is a particular form of enslavement which is not only prohibited under CIL but is also considered to be a *jus cogens* norm.[121] Enforced sterilisation

[111] ICTY, Landmark cases <http://www.icty.org/sid/10314>
[112] *Tadić* (IT-94-1-T), Judgement, 7 May 1997.
[113] *Tadić* (IT-94-1-A), Judgement, 15 July 1999.
[114] Landmark cases, n.111.
[115] Ibid.
[116] *Akayesu* (ICTR-96-4-T), Judgement, 2 September 1998, para. 731.
[117] GC IV n.19, article 27; AP I, n.21, article 75(2)(b).
[118] Ambos K., Sexual Offences in International Criminal Law, With a Special Focus on the Rome Statute of the International Criminal Court in Bergsmo M. *et al.* (eds), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012), pp.143-145.
[119] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, U.N. Doc. A/CONF.183/2/Add.1 (1998), pp.18-19 ('Draft Statute').
[120] Steains C., Gender Issues in Lee, n.65, p.365.
[121] Luping D., Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court, vol. 17(2) *JGSPL* (2009) 431, p.462.

was prosecuted under CCL No.10, and may constitute genocide when committed with the requisite intent.[122]

Enforced pregnancy became a highly contentious issue at the Rome Conference not least because of fears by a number of delegates that it might interfere with national laws on abortion. In the end, intensive informal negotiations smoothed the way for a compromise definition of 'enforced pregnancy' and the development of the law in this respect.[123] The crime of enforced pregnancy is a new crime when compared to the other crimes in article 8(2)(b)(xxii). Nevertheless, the conflict in former Yugoslavia brought to prominence its occurrence in the context of collective sexual violence along with other crimes such as rape and (sexual) enslavement.[124]

Of particular importance is the last form of conduct which refers to "any other form of sexual violence also constituting a grave breach of the Geneva Conventions." It not only reflects the growing recognition accorded to crimes of sexual nature but it also attempts create a residual non-exhaustive provision for the prosecution of sexual crimes.[125] While the minimum threshold of comparable gravity would mean that lesser forms of sexual violence are excluded,[126] the EoC in defining the objective element[127] take a broad view of coercion similar to that taken in *Akayesu.*[128]

The crime of rape had for long been the subject of explicit prohibition and prosecution. Nevertheless, until the adoption of the EoC "there was no explicitly stated definition of rape under international humanitarian or human rights law instruments."[129] Rape as defined in the EoC follows the jurisprudence of the *ad hoc* tribunals, especially the elements of the crime as these were set out by the TC in *Furundžija.*[130]

To date no successful conviction has been reached in respect of the crime of rape before the ICC. In *Ngudjolo Chui* the defendant was acquitted in relation to the charges that he faced because the prosecution had not proven beyond reasonable doubt that he had committed the crimes as an indirect

[122] Ibid, p.464.
[123] Steains (Lee), n.65, pp.365-368.
[124] *Kunarac et al.* (IT-96-23-T& IT-96-23/1-T), Judgment, 22 February 2001, para.541, fn.1333.
[125] Elements of Crimes, Element 2 for article 8(2 (b)(xxii)-6 <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>
See: Ambos (2012), n.118, p.166.
[126] Ibid, p.167.
[127] Elements of Crimes, n.125, Element 1 for article 8(2) (b)(xxii)-6, p.30.
[128] *Akayesu*, n.116, para. 598.
[129] Luping, n.121, p.473.
[130] *Furundžija* (IT-95-17/1-T), Judgment, 10 December 1998, para.185. See also: Ambos (2012), n.118, p.154.

co-perpetrator under article 25(3)(a).[131] In *Katanga* the defendant was likewise acquitted in relation to the specific charge since the evidence provided was found to be insufficient.[132]

The lack of any convictions pertaining to sexual and gender-based crimes in general is part of the wider criticism in relation to the manner and quality of the OTP's investigations which has been chastised both by the Chambers and commentators for its deficiencies on a number of levels. The matter has already been referred to briefly in chapter 3 and is discussed in more detail in chapter 6 from the perspective of its potential impact on the interpretation and development of ICC crimes. The Statute itself recognises the inherent challenges posed by sexual and gender-based crimes and provides that the Prosecutor shall "in particular" take appropriate measures for the effective investigation and prosecution of these crimes.[133]

Significantly, both substantively and as a matter of prosecutorial policy, the Court is in a position to render rich jurisprudence on the matter. The Court's activity in this respect remains unabated. For example, as regards the WC of rape the PTCs have confirmed charges in *Ntaganda*[134] and *Bemba*,[135] in addition to the summonses/arrest warrants issued for a number of individuals. Hence, it is of great interest to see whether the Prosecutor, and consequently the Chambers, take heed of the lessons learned so far in order to render successful prosecutions and convictions of those responsible for these crimes.

Article 8(2)(b)(xxvi) states:

> Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

Because of the growing prevalence of child soldiers in armed conflicts all around the world, both international and non-international, there have recently been important developments on the normative level towards more a robust protection of children in hostilities.[136] Article 8(2)(b)(xxvi) and its counterpart in non-international conflicts, article 8(2)(e)(vii), are part of this advancement.

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[131] *Ngudjolo* (ICC-01/04-02/12-3-tENG), Judgment pursuant to article 74 of the Statute, 18 December 2012, para.110 ('*Ngudjolo* Judgment').
[132] *Katanga* (ICC-01/04-01/07-3436), Jugement rendu en application de l'article 74 du Statut, 7 March 2014, para.70 ('*Katanga* Judgment').
[133] Rome Statute, n.4, article 54(1)(b).
[134] *Ntaganda* (ICC-01/04-02/06-309), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014 ('*Ntaganda* Confirmation Decision').
[135] *Bemba* Confirmation of Charges, n.66.
[136] Drumbl M., *Reimagining Child Soldiers in International Law and Policy* (OUP 2012), p.5. E.g. Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, article 38, p.56.

Article 8 is based on article 77(2) AP I and article 4 AP II and thus protects children in both IAC and NIAC. It represents a significant advance in the protection accorded to children under humanitarian law.[137] For the first time, an international tribunal has included within its scope of jurisdiction such a violation of IHL. Article 8, AP I and AP II are not the same. Article 8 refers to 'conscription or enlistment' while the APs refer to 'recruitment.' The former words were chosen as to include both the active efforts of armed forces to draft children as well as situations where the children themselves joined out of their own volition.[138]

Article 8 speaks about using the children to "participate actively in hostilities" while AP I refers to children taking "a direct part in hostilities." As regards the AP II provision, there is no qualification that participation in hostilities be either direct or active. It has been argued that 'participating actively' in hostilities is broader than 'direct part' in hostilities while at the same time the article 8 formulation affords a narrower scope of protection to children in internal conflicts when compared to the AP II provision.[139] Significantly, the ICRC Commentary to AP I concluded that even though the text refers to taking 'direct' part in hostilities, "indirect acts of participation" are also covered by the provision given that the intention of the drafters was to "keep children under fifteen outside of armed conflict."[140] The ICRC Commentary to AP II also refers to the same indirect activities and purpose.[141] Thus, the test provided for in both APs is the same.[142] The adoption of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) has "standardised" the wording of the crime as regards both IAC and NIAC which "clears any ambiguity surrounding the different wording in the Additional Protocols and reflects the purpose of the prohibition."[143] This was a logical choice considering the need for correlation between the protection of children under both international and internal conflicts, which will also ultimately be beneficial for the development of the crime under the Statute.

Importantly, all the ICC judgments so far have involved charges in relation to child soldiers. These judgments, along with any relevant decisions by the PTCs, will be discussed in detail in section 4.9.

The impact of the establishment of the ICC on the development of the crimes within its jurisdiction is also observed in other fora. The SCSL delivered the first international prosecution for child conscription. The relevant provision of the SCSL Statute, which was drafted after the adoption of the

[137] Holmes J. T., The Protection of Children's Rights in the Statute of the International Criminal Court in Politi and Nesi, n.70, p.120.
[138] *Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of the Charges, 29 January 2007, para.246 ('*Lubanga* Confirmation of Charges').
[139] Holmes (Politi and Nesi), n.137, p.121.
[140] Sandoz Y. *et al.* (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987), p.901, para.3187.
[141] Ibid, p.1380, para.4557.
[142] Smith A., Child Recruitment and the Special Court of Sierra Leone, vol.2(4) *JICJ* (2004) 1141, p.1145.
[143] Ibid.

Rome Statute, was based on the aforementioned instrument. During the drafting the UNSG opposed reproducing the provision of the Rome Statute on the ground that it had a "doubtful customary nature."[144] Interestingly, the UNSC did not share the same opinion suggesting an adjustment of the relevant provision of the SCSL Statute so as to conform with the Rome Statute and thus with the law currently accepted by the international community.[145] The SCSL dismissed a defence challenge arguing that the provision should not apply to acts perpetrated prior to the adoption of the Rome Statute on the grounds that they could not be considered part of CIL and would therefore breach the principle of retroactivity.[146] While the customary status of the prohibition was not beyond doubt the prosecution by SCSL of several individuals for recruiting child soldiers demonstrated that "some crimes are international even if they are not recognized in a universally applicable treaty."[147] The 2005 ICRC Study cited the inclusion of the offence in the statutes of both ICC and SCSL as evidence of its customary status.[148]

The drafters in Rome did not only resort to compromises but also agreed to adopt highly controversial provisions.[149] Article 8(2)(b)(viii) is one of the most notable examples. It deals with the transfer of settlers into occupied areas and the transfer or deportation of all or parts of the population of the occupied territory. Israel strongly opposed this provision as it felt that it targeted its settlement policy.[150] Israel voted against the adoption of the Statute because of the inclusion of article 8(2)(b)(ii)[151] and "expressed its deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political agenda of certain states."[152]

The following provisions while already prohibited under AP I have been codified as WC for the first time: misuse of civilians or other protected persons (article 8(2)(b)(xxiii), intentionally using starvation of civilians as a method of warfare (article 8(2)(b)(xxv).

[144] UNSG Report on the establishment of a SCSL, n.84, para.18.
[145] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, p.2 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/812/77/PDF/N0081277.pdf?OpenElement>
[146] *Norman* (SCSL-04-14-AR72(E)), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004.
[147] Schabas (Unimaginable Atrocities), n.95, p.36.
[148] Henckaerts and Doswald-Beck, n.44, Rules 136 (p.482) and 137 (p.485) respectively.
[149] Dörmann K., Preparatory Commission for the International Criminal Court: the Elements of War Crimes, Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflict, 83 No.842 *IRRC* (June 2001) 461, p.481.
[150] Bothe, n.6, p.413; Schabas (An Introduction), n.35, p.136.
[151] Summary Record of the 9th Plenary Meeting, 17 June 1998, UN Doc. A/CONF.183/SR.9, para.34.
[152] Israel, Declarations, endnote 3 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#3>

4.7 War crimes in non-international armed conflicts

Article 8 also deals with conflicts of not an international character. The main humanitarian law provisions dealing with internal conflicts are CA3 and AP II. The establishment of the *ad hoc* tribunals signified the beginning of an increasing assimilation between the law of IAC and NIAC. The developments brought about by the establishment and case-law of the *ad hoc* tribunals were to a significant extent incorporated in the Rome Statute whose lists on NIAC have been characterised as a "big leap forward."[153]

Still, the degree of assimilation is far from complete and this may be easily observed by the fact that articles 8(2)(c) and 8(2)(e) are much shorter than their counterparts for crimes committed during an IAC. Also, the proscribed acts under article 8(2)(e) rather than being based on only on AP II, have been incorporated to the extent that they also appear in article 8(2)(b).[154] This list includes notable omissions such as collateral damage, prohibition of certain weapons and intentionally using starvation of civilians as a method of warfare. Notably, throughout the work of the AHCom and the Preparatory Committee there was a divergence of views as to whether the ICC should have jurisdiction over WC committed in NIAC.[155] A small but influential number of States maintained their opposition towards the inclusion of these crimes during the Rome Conference as well.[156] Nevertheless, the Court's work to date has unequivocally demonstrated that despite the narrower regime as regards internal conflicts, the ICC's law-making potential is predominantly found in NIAC. All the situations currently before the Court involve internal conflicts. The few cases which involved the prosecution of WC in IAC were eventually re-classified to non-international by the Chambers.[157]

In view of the central role played by WC in NIAC as regards the ICC's law-making potential I will elaborate on the threshold requirement set in place by articles 8(2)(d) and 8(2)(f) for the application of articles 8(2)(c) and 8(2)(e), respectively. Article 8(2)(c) deals with "serious violations" of CA3 while

[153] Bothe, n.6, p.420.
[154] Ibid, p.420.
[155] Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, G.A. 50th Sess., Supp. No. 22, A/50/22, 1995, para.74; Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. 22, A/51/22, 1996, para.78. See also: Draft Statute, n.120, p.24.
[156] E.g. Summary Record of the 33rd Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.33, para.37 (India); Summary Record of the 34th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.34, para.48 (Turkey); Summary Record of the 35th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.35, para.31 (Algeria), para.54 (Pakistan), para.57 (Qatar); para.64 (Iraq); Summary Record of the 36th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.36, para.6 (Libya) and para.20 (Oman).
[157] See section 4.9.1.1. The only final judgment to date to involve war crime charges allegedly committed in an international armed conflict is *Ngudjolo.* See *Ngudjolo* Judgment, n.131. Notably, the accused was acquitted of all charges and therefore the Trial Chamber made no findings beyond any reasonable doubt in relation to the crimes charged. Moreover, this approach was "all the more justified as such findings could affect the continuation of the trial against Germain Katanga." Ibid, para.112.

article 8(2)(e) refers to "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." The negotiations leading up to the Rome Conference reveal that the drafting and possible inclusion of articles 8(2)(c) and 8(2)(e) were predicated on the incorporation of a uniform threshold for both sub-paragraphs, based on article 1(2) of AP II. A different threshold in relation to article 8(2)(e) was only proposed well into the Rome Conference as a means of bridging differences of opinion on the inclusion of WC in non-international armed conflicts in the Court's jurisdiction. [158] The stalemate was overcome by a proposal from Sierra Leone according to which article 8(2)(e) applies "when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."[159] This amendment proposal appears to have been taken directly from the *Tadić* case and the definition of non-IAC included therein.[160] While some States expressed their support for the Sierra Leonean proposal[161] it was not extensively discussed as it was tabled towards the end of the Conference where numerous pressing issues still had to be resolved. The proposal was incorporated in the draft statute which was adopted four days later.[162]

Article 8(2)(c) is applicable "to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[163] This provision inspired by article 1(2) of AP II provides for a negative definition of a NIAC, that is, it applies to all situations not covered by the GCs and AP I in relation to IAC. In addition to the aforementioned requirement, article 8(2)(e) is further limited by the positive restriction for a "protracted armed conflict."[164]

The central question is whether article 8(2)(f) "impl[ies] a new category of non-international armed conflict, one that had previously not existed in IHL, or does it represent another codification of an existing threshold?"[165] There are valid arguments for[166] and against[167] in this respect. The Court's early jurisprudence demonstrates the Chambers' approach in interpreting article 8(2)(f). According to

[158] See generally: Cullen A., The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f), vol.12(3) *JCSL* (2008) 419. See also: Draft Statute, n.119, pp.22-24.
[159] Summary Record of the 35th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.35, para.8 (Sierra Leone).
[160] *Tadić,* Interlocutory Appeal Decision, n.23, para.70; Cullen, n.158, p.432.
[161] Summary Record of the 35th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.35, para.23 (Uganda), para.80 (Solomon Islands); Summary Record of the 36th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.36, para.30 (Slovenia), para.42 (Bosnia and Herzegovina).
[162] Cullen, n.158, pp. 434-435.
[163] Rome Statute, n.4, article 8(2)(d).
[164] Ibid, article 8(2)(f). Bothe, n.6, p.423.
[165] Cullen, n.158, p.435.
[166] Ibid, pp.435-445; Bothe, n.6, p.423; Meron T., The Humanization of Humanitarian Law, vol.94 *AJIL* (2000) 239, p.260; Schabas (An Introduction), n.35, p.143.
[167] Cassese (2008), n.91, p.96; Sassoli M. and Bouvier A. (eds), *How Does Law Protect in War*, vol.I (2nd edn ICRC 2006), p.110.

the PTC in the *Lubanga* case this provision "focuses on the need for the armed groups in question to have the ability to plan and carry out military operation for a prolonged period of time."[168] When applying the relevant provision to the conflict in question the PTC focused more on whether the armed conflict had "a certain degree of intensity" rather than on its duration.[169] The PTC's interpretation of article 8(2)(f) has also been followed by the TC.[170] Thus, the Chambers whilst recognising the different wording between articles 8(2)(d) and 8(2)(f) they have not accorded any real weight to it.

Of significance are the PTC's findings in *Bemba.* According to the PTC the stipulation for "protracted" armed conflict "may be seen to require a higher or additional threshold to be met."[171] At the same time, the PTC raises the argument whether this requirement may also be applied in relation to article 8(2)(d)."[172] While the PTC finds it unnecessary to address this argument, given that the period in question was in any case "protracted," the way the Chamber intermingles the scope of the threshold requirements in articles 8(2)(d) and 8(2)(f) is telling of its uniform interpretation of these provisions. This conclusion is further reinforced by the PTC's interpretation of "organised armed groups." The Chamber notes that this element is expressly mentioned only in article 8(2)(f) but not article 8(2)(d). Nevertheless, given it is well established as a principle in the law of armed conflict "to which the Statute refers in article 8(2)(c) and (d) […] the Chamber holds that this element also applies to article 8(2)(c)."[173]

4.8 War Crimes at the Review Conference

In preparing for the Review Conference, the ASP decided that proposals for amendments to the Statute should be discussed at its session immediately preceding the Review Conference, and such proposals should "focus on amendments likely to command very broad, preferably consensual

[168] *Lubanga* Confirmation of the Charges, n.138, para.234.
[169] Ibid, para.235.
[170] *Lubanga* (ICC-01/04-01/06-2842), Judgement pursuant to Article 74 of the Statute, 14 March, 2012, paras.535-538 ('*Lubanga* Judgement'); Katanga Judgment, n.132, paras.1185-1187.
[171] *Bemba* Confirmation of Charges, n.66, para.235.
[172] Ibid.
[173] Ibid, para.232.

support."[174] To this effect, a WGRC was established.[175] The WGRC considered a number of matters including amendments to article 8.[176]

Two main proposals were put forward prior to the Review Conference in relation to amendments to article 8. The first one was introduced by Belgium and referred to three amendments.[177] Amendment 1 sought to expand prohibition on poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, bullets which expand or flatten easily in the human body to NIAC. Amendment 2 proposed prohibition on the use of biological, chemical and anti-personnel mines and amendment 3 was intended to prohibit use of non-detectable fragments and blinding laser weapons. Both amendments 2 and 3 sought to extend the Court's jurisdiction in respect to both IAC and NIAC. Belgium circulated the above amendment proposals more than two years before the Review Conference.[178] This enabled Belgium to assess the amount of support that these amendments would garner. While numerous delegations supported amendment 1 or did not have strong views in this respect this was not the case in relation to amendments 2 and 3 where the general view was that "they were not mature enough."[179] To this effect, Belgium decided to withdraw amendments 2 and 3 from the proposed Review Conference agenda.[180] The Mexican proposal had the same fate as the Belgian amendments 2 and 3. Mexico proposed that the use or threat of use of nuclear weapons be prohibited in the context of IAC.[181]

At the Rome Conference amendment 1, initially proposed by Belgium, was adopted by consensus. [182] Thus, WC, unlike genocide and CaH, were amended at the Review Conference. Indeed, this amendment *prima facie* demonstrates that it is possible for crimes over which the Court has jurisdiction to evolve. Moreover, the amendments that took place had the result of "creating a symmetry between the texts governing non-international and international armed conflict with respect to three categories of prohibited weapons."[183]

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[174] Report of the Bureau on the Review Conference, Eight Session, ICC-ASP/8/43, 18-26 November 2009, p.3, para.2 <http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-43-ENG.pdf>
[175] Eight session,, ICC-ASP/8/20, *ASP Official Records*, Volume I, 18-26 November 2009, p.4, para.15 <http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.I.pdf>
[176] Report of the Working Group on the Review Conference, Eight Session, ICC-ASP/8/20 Volume I, Annex II, 50 <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf> ('WGRC Report').
[177] Ibid, p.59-63.
[178] Ibid, p.53, para.27.
[179] Ibid, p.53, para.30.
[180] Ibid, p.53, para. 33.
[181] Ibid, pp.53-54.
[182] RC/Res.5, Amendments to Article 8 of the Rome Statute, 10 June 2010 <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf>
[183] Schabas (An Introduction), n.36, pp.145-6.

Nevertheless, such an amendment has been hailed as 'symbolic' whose real importance lies in creating a 'procedural precedent' for future amendments to the Statute.[184] Rather than representing an achievement, the amendment, merely highlights the fact that the Statute does not deal with non-conventional weapons, such as nuclear weapons, which are a matter of grave concern for the international community. The same holds true for biological, chemical weapons and anti-personnel mines, whose omission is all the more striking given that the Conventions dealing with these crimes are almost universally ratified.[185]

The States' individual concerns which have led to the current form of article 8 were highly political, both in Rome and at the Review Conference. Proposals for a broader provision have been sacrificed for political expediency. The Review Conference demonstrated that long preparation, solid proposals, strong support and the ability to assuage the concerns of certain powerful States are necessary before a proposal is to be entertained as an agenda item to be considered at a future review conference. This is demonstrated not only by Belgium's methods and approach in amending article 8 but also and more importantly by the work behind the adoption of a definition for the crime of aggression.[186] Both amendments reveal the role to be played by the ASP and its Working Groups in the development of ICC crimes. Of particular importance in this respect is the work of the SWGCA[187] and of the WGRC created by the ASP in 2009 for the purpose of considering amendments to the Statute at the Review Conference. Effectively, the latter development has made the amendment procedure as regular item at the ASP sessions "more concrete."[188] The process by which the definition for the crime of aggression was adopted is extensively discussed in chapter 7. In this respect the approach undertaken in amending article 8 and in adopting a definition for the crime of aggression are considered to provide indications as the route(s) to be followed for future amendments to the Court's material jurisdiction.

4.9 ICC case–law on war crimes

In this section I will examine the ICC's case-law in relation to the WC of conscripting, enlisting and using child soldiers under the age of fifteen. To date, the ICC has rendered the richest jurisprudence on this crime when compared to the other crimes included in article 8. In the first place this case-law reveals the Prosecutor's and the Chambers' approach towards a 'novel' crime and how this crime may

[184] Alamuddin A. and Webb P., Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute, vol.8(5) *JICJ* (2010) 1219, pp.1236-1237.
[185] WGRC Report, n.176, pp.60-61.
[186] RC/Res.6, The crime of aggression**,** 11 June 2010 < http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf>
[187] Report of the Special Working Group on the Crime of Aggression, ASP/7/SWGCA/2, 20 February 2009 <http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-SWGCA-2%20English.pdf>
[188] Alamuddin and Webb, n.184.

develop as a result of its incorporation in the Statute. Secondly, and perhaps more importantly, the Court's work on this particular crime is informative of how the WC provision as a whole will develop as a result of the establishment of the ICC.

4.9.1 The *Lubanga* Judgment

4.9.1.1 The Lubanga Judgment and article 8

The *Lubanga* judgment marked the ICC's first guilty verdict and has been welcomed as the "coming of age of the ICC."[189] As the ICC's first judgement expectations had been running exceptionally high.[190] The *Lubanga* case was compared to the *Tadić* case, the most prominent case of the ICTY's early practice which elaborated some of the most influential *dicta* ever to be pronounced by an international criminal tribunal.[191] Therefore, it is imperative to assess the contribution of the *Lubanga* case to the interpretation and elaboration of charges before the Court.[192]

The primary focus is the OTP's selection of and the Chambers' interpretation of article 8(2)(e)(vii) which deals with the WC of conscripting, enlisting and using child soldiers under the age of fifteen. Importantly, Lubanga is not the only individual accused or for whom an arrest warrant has been issued with respect to the aforementioned crime. In fact, article 8(2)(e)(vii) relates to one of the most common charges presented before the ICC, given that the arrest warrants issued against seven other people have included the same crime.[193] From a substantive criminal law point of view this is a remarkable development for a crime whose customary status was unclear during the Rome Conference.[194] It signifies that the Court will adjudicate, gain expertise and develop IL within a very narrow scope of charges thus 'ignoring' other grave crimes. Indeed, the Court's first verdict "underscores the importance of prosecuting others for a fuller range of serious crimes."[195] This criticism is particularly obvious in *Lubanga* given that the accused was only prosecuted as regards one crime, namely child soldiers. The narrowness of the charges came under considerable criticism by

[189] UN Human Rights chief Navi Pillay cited in ICC finds Congo Warlord Thomas Lubanga guilty, *BBC*, 14 March 2012 <http://www.bbc.co.uk/news/world-africa-17364988>
[190] Schabas W. and Stahn C., Introductory Note: Legal Aspects of the Lubanga Case, vol.19 *CLF* (2008) 431, p.431.
[191] Liefländer T. R., The Lubanga Judgment of the ICC: More than just the First Step?, vol.1(1) *CJICL* (2012) 191, p.192.
[192] Furthermore, the case has raised a number of other significant issues such as the relevance of confirmation decisions to the development of ICC crimes, the re-characterisation of the conflict and the application of Regulation 55, and the quality of the Prosecutor's investigation. These will be considered in detail in chapter 6 where I will discuss the importance of the 'dialogue' between the OTP and the chambers in relation to the above issues and how such interaction may impact the development of ICC crimes.
[193] Landmark Verdict a Warning to Rights Abusers, *Human Rights Watch*, 14 March 2012 <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers> ('Landmark Verdict')
[194] Werle, n.1, p.331.
[195] Landmark Verdict, n.193.

academics, court observers and human rights groups.[196] This was partly because there were serious allegations against Lubanga of having committed other WC and CaH, including an attack against UN peacekeepers in the Ituri region[197] and acts of sexual violence.[198]

The way by which both the Prosecutor and the Chambers have 'self-limited' the jurisdiction *ratione materiae* scope of WC at their disposal is further evidenced by the Prosecutor's practice of pursuing WC charges in the alternative as well as by the Chambers' practice of confirming charges in the alternative.[199] Confirming charges in the alternative signifies that the charges are selected and confirmed on the basis that they may have been committed either in an IAC and/or NIAC. Moreover, the confirmation of WC charges with equivalent provisions in both IAC and NIAC has enabled the TCs in both *Lubanga,* and later on *Katanga,* to re-characterise the nature of the conflict from international to non-international via the Regulation 55 avenue.[200]

The TC was quick to affirm the "overall control" test developed by the ICTY AC in *Tadić* case as to when a conflict may become "internationalised."[201] This step is significant for two reasons. Firstly, neither the Rome Statute nor its *travaux préparatoires* provide for a definition of an IAC which would distinguish it from an internal conflict.[202] Secondly, the TCs' insistence on the *Tadić* test, in both in *Lubanga* and *Katanga,* following its rejection by the ICJ in *Bosnia v. Herzegovina*[203] "indicates that the 'overall control' test emerges as a specific test in international criminal law/international humanitarian law to judge the necessary degree of foreign involvement in internationalization of armed conflict"[204] which is distinct from the question of attributing State responsibility.

The Court's work in *prima facie* NIAC has favoured the 'default' finding that the armed conflict in relation to the charges is non-international. This is clearly illustrated in *Lubanga.* The TC starts its reasoning by accepting that "depending on the actors involved, conflicts taking place on a single territory at the same time may be of a different nature."[205] In this context, the TC needs to consider "whether the criminal acts under consideration were committed as part of an international or a non-

[196] Schabas W., Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, vol.6 *JICJ* (2008) 731, pp.744-745.
[197] UN Press Release, Security Council Condemns Murder of Nine UN Peacekeepers, UN Doc.SC/8327/Rev.1, 2 March 2005 <http://www.un.org/News/Press/docs/2005/sc8327.doc.htm>
[198] Graf R., The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment, vol.10(4) *JICJ* (2012) 945, p.2.
[199] See chapter 6, section 6.4.
[200] See chapter 6, section 6.3.
[201] *Lubanga* Judgement, n.170, para.541.
[202] *Lubanga* Confirmation of Charges, n.138, para.205.
[203] *Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, ICJ Reports 2007 43, 26 February 2007, p.210, para.404.
[204] Stahn C., Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment, vol.12(4) *JICJ* (2014) 809, p.819.
[205] *Lubanga* Judgement, n.170, para.540.

international conflict."[206] This "relational" [207] approach has enabled the TC to conclude that the conflict is non-international despite evidence of occupation by Uganda[208] and after concluding that ""international armed conflict" includes a military occupation."[209]

4.9.1.2 The Lubanga Judgment and article 8(2)(b)(xxvi)/8(2)(d)(vii)

In addition to the Court's focus on the said crime the Chambers have accorded a broad understanding of the temporal scope which can form part of the charges, which arguably extends beyond the Court's temporal jurisdiction under the Statute.[210] The TC majority confirmed the PTC's finding that the offences of conscription and enlistment of children under the age of fifteen are "continuous in nature" ending only when a child reaches fifteen years of age or leaves the force or group.[211] This interpretation could have far reaching consequences in relation to the temporal jurisdiction of the ICC over these crimes as well as other crimes such as the CaH of enforced disappearance and the WC of taking hostages.[212]

However, one of the most notable aspects of the TC's interpretation of the crime related to the meaning of "using [children] to participate actively in hostilities." The Court held that the prohibition is "generally intended to protect children from the risks that are associated with armed conflict"[213] including "not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment."[214] In this respect the Chamber confirmed the PTC's determination that

> "Active participation" in hostilities means *not only direct participation in hostilities*, *combat* in other words, *but also covers active participation in combat-related activities* such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.[215]

Accordingly, excluded from the provision's ambit are those activities which are "*clearly unrelated* to hostilities."[216] In this respect, both the PTC and TC referred to and agreed with the Preparatory

[206] Ibid, para.551.
[207] Liefländer, n.191, p. 196.
[208] *Lubanga* Judgment, n.170, para.565.
[209] Ibid, para.542.
[210] Ambos K., The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues, vol.12 *ICLR* (2012) 115, p.133 ('Ambos (Lubanga)').
[211] *Lubanga* Judgment, n.170, para.618.
[212] Ochoa Juan Carlos S., The ICC's Pre-Trial Chamber I Confirmation of Charges Decision in the *Case of Prosecutor v. Thomas Lubanga Dyilo:* Between Application and Development of International Criminal Law, vol.16 *Eur.J.Crime Cr.L.Cr.J* (2008) 39, p.45.
[213] *Lubanga* Judgement, n.170, para.619.
[214] Ibid, para.605.
[215] Ibid, para.622 (emphasis added).

Committee's understanding as to the interpretation of "using" and "participate."[217] The SCSL had also reached a similar conclusion.[218]

The controversial aspect of the judgment related to the remainder of the Chamber's analysis. In the first place, the Chamber held that "to participate actively in hostilities," in contrast to the term "direct participation" (as found in AP I) "was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence."[219] Thereafter, the Chamber made the following statement

> All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to *real danger* as *a potential target*.[220]

'Direct participation in hostilities' is a fundamental principle of distinction between combatants and civilians.[221] Civilians are accorded protection under IHL "unless and for such time as they take direct part in hostilities."[222] The jurisprudence of the *ad hoc* tribunals considered 'direct participation' and 'active participation' as being synonymous.[223] On the contrary, the majority in *Lubanga* implicitly accepted that they involve different meanings. [224]

From a substantive law perspective, the Court's interpretation of 'active participation' is the most problematic aspect of the TC's judgement.[225] Protection of children in hostilities encompasses the tension between two divergent goals. On one hand, IHL strives to protect persons not taking direct part in hostilities. On the other hand, ICL sanctions those who use children in hostilities. The former endeavours to provide for a narrow application of the concept of direct participation so as to provide a broad protection to civilians. The latter is aimed towards the wide application of the term active participation in order to provide a broad protection to children.[226] The TC's judgement has been criticised for failing to distinguish between IHL and ICL and that its "well-meaning...human-rights and child-rights approach may have possible unintended – yet potentially dangerous –

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[216] Ibid (emphasis added).
[217] Draft Statute, n.119, p.21, fn.12. See also: *Lubanga* Confirmation of Charges, n.138, para.261; *Lubanga* Judgment, n.170, paras.621-622.
[218] *Brima et al.* (SCSL-04-16-T), Judgment, 20 June 2007, paras.736-737 ('AFRC Trial Judgment').
[219] *Lubanga* Judgment, n.170, para.627.
[220] Ibid, para.628 (emphasis added, footnotes omitted)
[221] Graf, n.198, p.8.
[222] AP I, n.21, article 51(3); AP II, n.21, article 13(3).
[223] *Strugar* (IT-01-42-A), 17 July 2008, para.173; *Akayesu*, n.116, para.629.
[224] Harwood C., A Matter of Distinction: 'active' and 'direct participation in hostilities and the war crime of using child solders, *Spread the Jam* (Guest Post), 14 July 2014 <http://dovjacobs.com/2014/07/14/guest-post-a-matter-of-distinction-active-and-direct-participation-in-hostilities-and-the-war-crime-of-using-child-soldiers/>
[225] Graf, n.198, p.8; Urban N., Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC's decision in Lubanga, *EJIL: Talk!*, 11 April 2012 <http://www.ejiltalk.org/direct-and-active-participation-in-hostilities-the-unintended-consequences-of-the-iccsdecision-in-lubanga/>
[226] Graf, n.198, p.8.

consequences."[227] These consequences would signify that "whomever 'directly participates in hostilities' in an armed conflict loses one's protection from direct attack, and becomes a legitimate potential target."[228] According to Graf, this unwelcome development may be avoided by acknowledging that in the context of child protection from hostilities active and direct participation are not synonymous, given that they address different kinds of protection.[229]

The above view is given support by the Statute's drafting history. According to the Preparatory Committee's draft Statute"[t]he words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat.[230] All the above suggests that 'active participation' was intended to be broader and more inclusive than 'direct participation.'[231]

The TC's interpretation of the crime seems to deviate from previous jurisprudence in that it clearly shifts the focus of the inquiry to determine whether an activity constitutes active participation in hostilities. As regards indirect participation the decisive factor, in the words of the TC, is exposure of the child to danger as a real target, rather than some connection to the conduct of hostilities, as had hitherto been the case. According to Liefländer, "[i]n effect, the TC replaced the notion of "participation in hostilities" with the notion of "exposure to danger.""[232]

4.9.1.3 The Lubanga Judgment and Sexual Violence

While the OTP referred to sexual violence in both its opening and closing submissions it did not include the commission of acts of sexual violence in the context of article 8(2)(e)(vii) at the confirmation of charges stage.[233] On the basis of this the majority did not consider whether sexual violence can be included within the concept of active participation.[234] At the same time, the majority's position implicitly suggests that were the OTP to have included sexual violence in its submissions it would have been in a position to contemplate whether sexual violence falls within article 8(2)(e)(vii). Judge Odio Benito dissented in this respect stating that the factual allegations of the present case are independent of the legal concept of the crime and that it is necessary to include sexual violence within

[227] Aptel C., Lubanga Decision Roundtable: The Participation of Children in Hostilities, *Opinio Juris*, 18 March 2012 <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-the-participation-of-children-in-hostilities/>
[228] Ibid.
[229] Graf, n.198, p.10.
[230] Ibid, p.18 and fn.19.
[231] Ibid, p.10
[232] Liefländer, n.191, p. 202.
[233] *Lubanga* Judgement, n.170, para.629.
[234] Ibid, para.629.

the legal concept of the crime regardless of the impediment of the Chamber to take it into consideration in the present case.[235]

The above-mentioned intermingling of sexual violence and child soldiers demonstrates the extraordinary development of these two offences within the regime of the Statute as a result of the efforts of child-right proponents in recent years.[236] The judgment showed that the Court was still undecided as to the contour of its judicial function and purpose, that is, "whether its function is limited to adjudicating upon the guilt *vel non* of the accused or whether it should seek to fulfill other functions as well" such as pronouncing *obiter dicta* on issues not directly relevant for the trial.[237] At the same time, the majority's cautiousness is qualified by the very broad interpretation accorded to term "active participation in hostilities." Moreover, the majority opted for flexibility by stating that "the Chamber's determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis."[238]

4.9.1.4 The Lubanga Trial Chamber Judgment and Preliminary Remarks

Has *Lubanga* lived up to the expectations? According to Liefländer it is clear that *Lubanga* is not *Tadić* and that this should have been obvious from the start.[239] While this is a valid argument it seems overly strict if viewed without taking into consideration the wider context. The ICTY in its early case-law was empowered with much greater leeway both in terms of its statutory powers and also by the lack of clarity which characterised many of the provisions it was called to interpret. The TC in the *Lubanga* case was by large building on existing jurisprudence. Moreover, the charges against Lubanga were restricted to child soldiers. Thus, the TC in *Lubanga* engaged in "an incremental development of the law" rather than "propelling International Criminal Law or the ICC in a new era."[240] Nevertheless, it must not be ignored that it undertook to adjudicate in relation to a 'novel' international crime and that it did produce significant pronouncements in this respect, the most notable being the expansion of the notion of "active participation in hostilities." Importantly, due to the Court's focus on this particular crime further judicial pronouncement soon followed which further elaborated the crime's meaning. These are discussed below.

[235] Ibid, Separate and Dissenting Opinion of Judge Odio Benito, paras.16-17.
[236] Aptel, n.227.
[237] Liefländer, n.191, p. 212.
[238] *Lubanga* Judgment, n.170, para.628.
[239] Liefländer, n.191, 212.
[240] Ibid, 212.

4.9.2 The Katanga Judgment and the Ntaganda Confirmation Decision

On 7 March 2014 the TC delivered its judgement against Katanga. While the defendant was found not guilty in respect of the charge of using children under the age of fifteen to participate actively in hostilities it proceeded to interpret the relevant provision. The TC explicitly sided with the findings in *Lubanga* in interpreting "active participation in hostilities."[241] The Chamber found that the use of children on the front line as porters could amount to active participation. Significantly, the *Katanga* judgment became final following the discontinuance of the respective appeals by the Prosecutor and the Defence.[242]

On 9 June 2014 the PTC proceeded to confirm the charges against Ntaganda. The Prosecutor in addition to charging Ntaganda with the WC of rape and sexual slavery, charged him with WC for acts of rape and sexual slavery against female child solders. In confirming the charges the PTC concluded that sexual violence forms part of the legal concept of the crime of child soldiers, an issue in relation to which the TC had refrained from making a finding in *Lubanga*. According to the Defence this interpretation contravened the principle of legality because "[i]international humanitarian law is not intended to protect combatants from crimes committed by combatants within the same group."[243] The PTC's disagreed and further stated

> those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature […] The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time.[244]

The PTC's construction of the charges has been welcomed as "important steps forward for gender justice."[245] In the meantime, the AC had the opportunity to further discuss the crime during the appeal proceedings in *Lubanga.* Notably, Lubanga appealed his conviction on a number of grounds including that active participation should only involve direct participation.[246] The AC judgment is discussed below.

[241] Katanga Judgment, n.132, para.1045.
[242] Defence and Prosecution discontinue respective appeals against judgment in Katanga case (ICC-CPI-20140625-PR1021), Press Release, 25 June 2014 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1021.aspx>
[243] ICC-01/04-02/06-T-10-Red-ENG, 13 February 2014, p.27, lines 22-25 <http://www.icc-cpi.int/iccdocs/doc/doc1738359.pdf>
[244] Ntaganda Confirmation Decision, n.134, para.79.
[245] Grey R., The Ntaganda confirmation of charges decision: A victory for gender justice?, *Beyond the Hague*, 12 June 2014 <http://beyondthehague.com/2014/06/12/the-ntaganda-confirmation-of-charges-decision-a-victory-for-gender-justice/>
[246] *Lubanga* (ICC-01/04-01/06-2948-Red), Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du « Jugement rendu en application de l'Article 74 du Statut » rendu le 14 mars 2012, 18 December 2012, para.259.

4.9.3 The *Lubanga* Appeals Chamber Judgment and Final Remarks

The AC in *Lubanga* largely agreed with the TC's findings but did make an important clarification on the central issue as to what is the meaning of "active participation in hostilities."[247] The AC noted that the expression is not defined in the Statute or the EoC. Nevertheless, the *chapeau* of article 8(2)(e)(vii) refers to "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, *within the established framework of international law*."[248] Thus, the provision must be interpreted in accordance with IHL. Turning to IHL, and in particular CA3, the AC acknowledges that 'active' and 'direct' participation are "used interchangeably" for distinguishing between combatants and non-combatants.[249] Nonetheless, the interpretation given to CA3 in the context of the principle of distinction "cannot be simply transposed to that of article 8(2)(e)(vii)."[250] This is because article 8(2)(e)(vii) serves a different purpose, to protect children under the age of fifteen from taking active part in hostilities, and must be interpreted in accordance with this purpose.[251] According to the Chamber the above reading is supported by the relevant IHL provisions on children in armed conflict, discussed in section 4.6.2.1, as well as by articles 8(2)(b)(xxvi) and 8(2)(e)(vii). In particular, the wording of the aforementioned provisions does not suggest that they should be interpreted in accordance with the principle of distinction.[252]

The AC found that the TC had erred in deciding that the decisive criterion for determining whether an indirect activity constituted active participation in hostilities was the child's exposure to risk.[253] The exposure to risk requirement set out by the TC is not found either in the wording of articles 8(2)(e)(vii) and 8(2)(b)(xxvi) or the applicable IHL provisions. Rather,

> A plain interpretation of the relevant provisions in their context reveals that the crime of using children to participate actively in hostilities requires the existence of a *link* between the activity and the hostilities. Although the extent to which the child was exposed to risk due to the activity in which he or she was engaged may well be an indicator of the existence of a sufficiently close relationship between the activity of the child and the hostilities, an assessment of such risk cannot replace an assessment of the relationship itself.[254]

Notwithstanding the above conclusion, the AC agreed with the TC that the expression "to participate actively in hostilities" conveys a broad interpretation as regards the activities and roles which are caught by article 8(2)(e)(vii).[255] Relatedly, the AC agreed with the TC in not pre-empting these

[247] *Lubanga* (ICC-01/04-01/06-3121-Red), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, see generally paras.314-340.
[248] Ibid, para.322 (emphasis in original).
[249] Ibid. para.323.
[250] Ibid, para.324.
[251] Ibid.
[252] Ibid, paras.325-327.
[253] Ibid, para.332.
[254] Ibid, para.333 (emphasis added).
[255] Ibid, para.340.

activities and roles but to determine on a case-by-case basis whether a particular activity comes within the definition. This was considered more appropriate "in view of the complex and unforeseeable scenarios presented by the rapidly changing face of warfare in the modern world."[256]

The AC judgment has resolved a number of issues which arose on the trial level. Nevertheless, articles 8(2)(b)(xxvi) and 8(2)(e)(vii) are still in need of further clarification. For example, the question remains whether these articles consist of three distinct crimes or of one crime which can be committed by three separate conducts.[257] The PTC and the TC opted for the former interpretation while the AC did not consider the matter as it had not been challenged by either party on appeal, proceeding on the understanding that 'enlistment,' 'conscription' and 'use' are separate crimes. Judge Song in his partly dissenting opinion disagrees with the AC majority on this particular issue. He takes the view that the AC should have reviewed the matter *proprio motu*.[258] He concludes that article 8(2)(e)(vii) "contains three separate *conducts* of one offence."[259] Thus, the AC should have vacated the three convictions against Lubanga and entered one instead. Significantly, Judge Song's position is also supported by the case-law of the SCSL.[260] Moreover, the PTC in *Ntaganda* confirmed that the crime of child soldiers can have a "gendered-form"[261] pointing towards further interpretation of the crime of child soldiers and its relation to crimes of sexual violence.

Hence, the ICC's focus on the crime of child soldiers has generated significant advance on the normative level and has paved the way for further development. It demonstrates the Court's 'fast-track' law-making potential when it focuses on particular crimes. While the adjudication and development of any crime is to be welcomed – especially as regards crimes which have been traditionally neglected and under-prosecuted – it can lead to the uneven development of crimes under the Statute and consequently under CIL.

4.10 Conclusion

The Statute "must be considered as a codification or crystallisation of the results of a customary process that took place at exceptional speed in the past years."[262] The drafters of the Statute had little time themselves, especially at the later stages of the negotiations to make critical decisions involving

[256] Ibid, para.335.
[257] A third position proposed is that the provision consists of *two* crimes: 1) recruitment which encompasses both enlistment and conscription and 2) use. See: Sivakumaran, n.85, pp.1011-1013.
[258] *Lubanga* (ICC-01/04-01/06-3121-Anx1), Partly Dissenting Opinion of Judge Sang-Hyun Song, 1 December 2014, para.1.
[259] Ibid, para.3 (emphasis in original).
[260] AFRC Trial Judgment, n.218, para.733.
[261] Luping, n.121, p.472.
[262] Condorelli (Politi and Nesi), n.70, p.117.

what was to be incorporated in article 8 from the huge corpus of IHL. Moreover, the delegates had to take into consideration the competing and sometimes irreconcilable State interests.

The omissions may be taken as evidence that certain crimes have not achieved CIL status. However, this should not be assessed out of the wider context that the adoption of the Statute would not have been possible otherwise. Therefore, in the end it was a matter of choosing between a modest regime which can be expanded incrementally through future review conferences and judicial interpretation of article 8 or jeopardising the eventual adoption of a more assertive regime. Article 8 has demonstrated that both of these can be done. Moreover, it must be borne in mind that even though the explicit criminalisation of certain crimes was not possible - the most prominent example being nuclear weapons - the Statute is still able when the time is ripe to prosecute such weapons implicitly through a number of article 8 provisions.

Most importantly, rather than focusing on the particular WC included or otherwise within the Court's jurisdiction, it is imperative to assess article 8 as a 'war crimes provision' and compare it with previous formulation of the crime. A lot has been achieved in terms of the structure, features, comprehensiveness of WC included therein. Article 8 is a modern WC provision for a number of reasons. It has placed considerable emphasis on general principles of law such as *nullum crimen sine lege*. It was the result of a multilateral treaty-making where the drafters proceeded on the assumption that they were codifying rather than making 'new' law. The value of treaties in the development of CIL is extensively discussed in section 4.2.4. This is especially relevant when 'law-making' treaties are concerned. The Statute fits perfectly with the characteristics of these treaties.[263] The elaborate definitions of the crimes included in article 8 and the EoC have brought about a new understanding in how the individual elements of a crime are understood and consequently proven. This is also the case as regards crimes which have been the subject of long-standing prohibition such as pillaging.[264]

The adjudication of WC before other international fora has already demonstrated how the Statute's law-making potential has started yielding concrete results which further consolidate the adopted definition's status and prevalence under ICL. In particular, the drafters of the SCSL Statute took into consideration the definitions in article 8 of the Rome Statute in formulating the international crimes within its jurisdiction. Intentionally attacking personnel and objects involved in a peacekeeping mission in accordance with the UN Charter entitled to the protection given to civilians or civilian objects under the IL of armed conflict and conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, are two prominent

[263] See chapter 1, section 1.7.
[264] Van den Herik L. and Dam D., Revitalizing the antique war crime of pillaging, vol.22(3) *CLF* (2011) 237.

examples.[265] Thereafter, the *Lubanga* case meant that the ICC exercised immediate jurisdiction over the latter crime. In particular, the Statute entered into force on 1 July 2002 and Lubanga was prosecuted for acts committed from July 2002. Compared to the history of the vast majority of international crimes this is a "remarkable feat."[266] Moreover, *Lubanga* marked only the beginning of the Court's interpretation and application of the crime.

The ICC has thus far in practice focused on a certain range of crimes, many of which were not prosecuted until recently, at least not in an explicit manner. Besides recruitment of child soldiers and attacks against peacekeeping mission, crimes of a sexual nature have been repeatedly included in the arrest warrants/summonses to appear for a number of individuals. As already mentioned above in the context of the *Lubanga* case this is a remarkable development if one takes into consideration that some of the crimes in article 8, which have been the subject of a long-standing prohibition have rarely or even never been prosecuted. In addition to these 'novel' crimes, other crimes to have been chosen by the OTP for prosecution are targeting the civilian population, wilful killing, destruction of property, pillaging, murder, torture, mutilation. These crimes are just but a fraction of the crimes that are included in article 8. All the aforementioned factors direct the WC provision towards an unexpected direction in that in the near future, these provisions are expected to be the ones which will experience the greatest amount of development through the ICC's case-law.

The way by which both the Prosecutor and the Chambers have 'self-limited' the jurisdiction *ratione materiae* scope of WC at their disposal is further evidenced by the Prosecutor's practice of pursuing WC charges in the alternative as well as by the Chambers' practice of confirming charges in the alternative. This practice is possible because of the existence of equivalent provisions in IAC and NIAC, respectively, which has enabled the TCs to re-characterise the nature of the conflict from international to non-international in two out of the three judgments handed down to date. What clearly comes out of the Court's work to date is that its involvement in situations concerning *prima facie* NIAC has favoured the 'default' finding that the armed conflict in relation to the charges is non-international. Thus, the Court's evolving case-law has shown that its law-making potential is more pertinent as regards NIAC and more often than not it relates to organised armed groups.[267] Concluding, the ICC's law-making potential, at least to date, predominantly concerns NIAC which have been accorded prevalence and visibility both in the Statute and the evolving case-law.

[265] SCSL Statute <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>

[266] Graf, n.198, p.12.

[267] This conclusion is also in accordance with the findings in chapter 3 according to which both article 7 and the Court's work on CaH has focused on crimes allegedly committed by organised armed groups, rather than State authorities.

Chapter 5: The contribution of the UNSC to the development of ICC crimes

5.1 Introduction

The UNSC holds a unique role within the Rome Statute system. The Rome Statute provides that the UNSC, in discharging its primary responsibility of maintaining international peace and security, can avail of the ICC in two ways. In particular, when making a determination as to the existence of a threat to international peace and security under article 39 of the UN Charter, the UNSC can refer a situation to the ICC or request from the Court to defer an investigation or prosecution. Therefore, whilst pursuing its mandate under the Chapter VII of the UN Charter, the UNSC is in a position to contribute immensely to the further development of ICC crimes by virtue of the referral and deferral provisions in articles 13(b) and 16 of the Rome Statute, respectively. Admittedly the ICC's law-making potential is difficult to pinpoint in this context. Because the UNSC is a political, as opposed to a judicial body, its actions are less obvious in terms of their legal significance, but at the same time more influential. Moreover, unlike the *ad hoc* tribunals, the ICC will always be haunted by previous situations and how the UNSC dealt with them.

The UNSC has been instrumental in setting up the *ad hoc* tribunals and determining their mandate. Its role in putting the groundwork for the development of international crimes which took place as a result of the establishment of the *ad hoc* tribunals is undeniable. As regards the ICC, the UNSC is not going to develop international crimes in the sense of deciding or influencing the Court's substantive law mandate. Thus, the Court's jurisdiction *ratione materiae* is a fixed consideration.

Under article 13(b) the UNSC "creates jurisdiction" by referring a situation to the Prosecutor. Hence, the UNSC can determine the situations in which the Statute's jurisdiction *ratione materiae* is to be exercised.[1] This is one of the most noteworthy ways by which the ICC differs from its predecessors. The jurisdictional opening provided by the referral system is tremendously significant because it applies equally to both States and non-States Parties. The decision to endow the ICC, via the UNSC referrals, with a potentially universal reach supports the argument, set out in chapter 1, that the Court's establishment did not rest on normal treaty-making but was a constitutional moment in international law-making.[2] In particular, the Statute was adopted by "quasi-legislative" process where

[1] Trahan J., The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices, vol.24 *CLF* (2013) 417, p.419.
[2] Sadat N.S. and Carden S.R., The International Criminal Court: An Uneasy Revolution, vol.88 *Georgetown L.J.* (1999-2000) 381, p.390.

the international community "legislated" by a non-unanimous vote.[3] In an analogous manner to the non-unanimous vote by which the Statute was adopted, a UNSC referral is "extending ICC jurisdiction and thus overcoming the requirement of "state consent" and imposing obligations that go beyond the ICC Statute."[4] Thus, it reflects the instrument's characterisation as a law-making treaty. Similarly, the UNSC's deferral powers can extend to all situations before the ICC, irrespective of the manner by which they were referred to the Court.

In order to retain a focused perspective on the way that the referral and deferral avenues can have an impact on the ICC's law-making potential it is necessary to understand the mechanism set in place and thereafter to focus on the interaction between the ICC and the UNSC to date. This involves navigating through the political wrangling of the UNSC (especially the P-5 due to their veto powers) to locate and assess the impact on the Court's law-making potential as a result of the referral and deferral mechanisms.

While the UNSC is an inherently *political* body the activation of the above mechanisms has consequences of a profoundly *legal* character. The UNSC may initiate/amend/hinder the Court's involvement in a situation, that is, it affects the 'ICC in action.' In this chapter I explore the extent to which the UNSC by reason of its ability to influence proceedings before the Court will contribute to the development of ICC crimes and consequently what form this influence will take.

The UNSC cannot shed its political character. In examining its role for the development of ICC crimes "the question would not be what role politics play in the shaping of international criminal justice, but whether in playing its role, politics corrupts the integrity of the judicial process and compromises its independence."[5] I will start the discussion by examining the institutional links between the UNSC and the ICC. In particular, I will consider their drafting history and intended purpose. This approach was necessary in order to choose the parameters on the basis of which this chapter is structured.

[3] Ibid.
[4] Aloisi R., A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court, vol.13 *ICLR* (2013) 147, p.150.
[5] Shraga D., Politics and Justice: The Role of the Security Council, in Cassese A. (ed.),*The Oxford Companion to International Criminal Justice* (OUP 2009), p.168.

5.2 Institutional Framework

The formal institutional links between the ICC and the UNSC are to be found in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations[6] and articles 13(b) and 16 of the Statute. This is a unique relationship not least because the ICC, whilst being the first permanent international criminal tribunal, recognises an important role for the UNSC on two levels. Pursuant to article 13(b) of the Statute, the UNSC, acting under Chapter VII of the UN Charter may refer a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed. According to article 16 of the Statute, the UNSC, acting under Chapter VII of the UN Charter may request the ICC to defer an investigation or prosecution. As a consequence of such a request "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months." The deferral request is subject to renewal under the same conditions.

An overview of the drafting of the two provisions is carried out in order to comprehend their intended purpose and whether this has been reflected in practice. The experience accumulated so far in this context sheds light as to how the UNSC may contribute to the development of ICC crimes.

5.2.1 Rome Conference

5.2.1.1 Referral

Triggering the Court's jurisdiction by the UNSC featured in the discussions from the beginning of the work of the ILC, through the sessions in the AHCom and PrepCom. The ILC 1994 Report as well as the discussions in the AHCom reveal that several delegations supported the option of empowering the UNSC to refer situations to the Court.[7] Arguments in favour included that it would obviate the need to create more *ad hoc* tribunals, referrals under Chapter VII of the UN Charter would enhance the effectiveness of the Court, such a role was consistent with the primary role of the UNSC to maintain international peace and security and it avoided a complex State consent regime depended on the political agenda of individual States.[8] Moreover, such an option would not undermine the Court's

[6] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, article 17 <http://www2.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf> ('Relationship Agreement')

[7] Report of the Working Group on the Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 46th session, 2 May – 22 July 1994, A/49/10 ('ILC 1994 Final Report'), para.65; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, G.A. 50th Sess., Supp. No. 22, A/50/22, 1995 ('Ad Hoc Committee Report'), para.120.

[8] Ad Hoc Committee Report, ibid.

independence and autonomy since the UNSC would merely refer a situation to the Court, rather than cases against particular individuals.[9]

Nevertheless, a number of delegations opposed granting such a power to the UNSC. They argued that it would undermine the credibility and independence of the Court, introduce inappropriate political influence over its functioning, and endow the UNSC with powers not provided for in the UN Charter, which would also enable the P-5 to use their veto powers to interfere with the work of the Court.[10] Persisting disagreement was reflected in the Preparatory Committee draft, where the UNSC referral provision was in square brackets.[11]

A UNSC referral extends the Court's jurisdiction over situations in any State; irrespective of whether the State in question is a State Party to the ICC or it has accepted the Court's jurisdiction on an *ad hoc* basis.[12] According to Schabas, while this is not explicitly mentioned in the Statute, "[i]t seems to be presumed that the Court may exercise jurisdiction anywhere to the extent that the 'exercise of jurisdiction' is authorized by the Security Council."[13] This is reflective of the all-encompassing breadth of UNSC referrals, whose authority stems from the significant prerogatives enjoyed by the aforementioned institution under articles 39 and 41 of the UN Charter. Indeed, there was general agreement among delegations that "the powers of the Security Council were determined by the Charter of the United Nations and could be neither restricted nor expanded by the statute."[14]

5.2.1.2 Deferral

The incorporation of a deferral mechanism in the Statute had a clear purpose. It was considered as necessary to acknowledge in a formal institutional way that while in theory peace and justice are complementary and may coexist in a symbiotic manner, in practice "judicial intervention could potentially compromise or foster peace, depending on the circumstances."[15]

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[9] Ibid. See also: Kirsch P. *et al.*, International Tribunals and Courts, in Malone D. M. (ed.), *The UN Security Council: from the Cold War to the 21st century (*Lynne Rienner Publishers 2004), p.288.
[10] Ibid (Ad Hoc Committee Report), para.121.
[11] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, A/CONF.183/2/Add.1 (1998), p.30, article 6(1).
[12] Rome Statute of the International Criminal Court, article 12 <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.
[13] Schabas W.A., *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010), p.300 ('Schabas (A Commentary)').
[14] ILC 1994 Final Report, n.7, para.65.
[15] The UN Security Council and the International Criminal Court: How should they relate? Report of the Twenty-Ninth United Nations Issues Conference, Sponsored by the Stanley Foundation, 20-22 February 1998, p.18.

The negotiations which led to article 16 of the Statute reflected the challenges posed to draft a provision which not only enabled the UNSC to carry out its primary responsibility, namely to maintain or restore peace and security in an uninterrupted manner, but that it did so in a balanced manner not undermining the independence of the Court. Striking the aforementioned balance did not prove to be an easy task. While its inclusion was supported by a number of States[16] there was also strong opposition towards the proposed provision.[17] Unease on the part of many States went deeper than concerns about political interference by the Council. Rather, most objections related to the privileged status enjoyed by the P-5 as a result of their veto powers, which could be employed to shield from the ICC a situation in their countries or which involved their nationals.[18]

5.3 Structure of the chapter

In the sections below I focus on the most representative areas/examples of the UNSC's involvement with the 'ICC in action' and assess their impact on the ICC's law-making potential. By large these occasions relate to the way the UNSC has affected the ability of the ICC to carry out its functions under the Statute. That is, they concern how the UNSC by promoting or hindering ICC action has had an *indirect* but still significant impact on the development of the crimes within the Court's jurisdiction. The case-studies were chosen on the basis of the following parameters:

- They have been criticised as examples where the UNSC acted beyond its powers under the UN Charter;
- Instances where the UNSC was accused of inappropriately using or not using articles 13 and 16 of the Statute;
- Instances where the UNSC appropriately used the provisions of the Statute;
- Instances where the UNSC's involvement with the ICC was viewed as a selective application of justice;
- Unjustified interference on the activities of the Court by Council members not parties to the Statute, especially the P-5;
- Lack of effective follow-up on referrals by the Council.

[16] ILC 1994 Final Report, n.7, p.45, para.12; Ad Hoc Committee Report, n.7, para.124; Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. 22, A/51/22, 1996 ('Preparatory Committee 1996 Report, Vol. I'), para.141.
[17] ILC 1994 Final Report, ibid; Ad Hoc Committee Report, ibid, para.125; Preparatory Committee 1996 Report, Vol. I, ibid, paras.142-143.
[18] Kirsch *et al.*, n.9, p.289.

5.4 Practice: Case-studies

5.4.1 Peacekeepers exemption resolutions

The peacekeeper exemption resolutions brought to the fore the paradox embedded in article 16 which has the potential to profoundly affect the ICC's exercise of jurisdiction and its ability to develop the crimes within its jurisdiction. On the one hand, the authority of the UNSC to defer an investigation or prosecution is based on Chapter VII of the UN Charter. The Rome Statute neither has an impact nor does it limit in any way the powers of the UNSC under the UN Charter.[19] On the other hand, the obligation on the Court to follow a deferral request flows from article 16 of the Rome Statute. The ICC is an independent institution with an international legal personality which must act in accordance with the framework of the Rome Statute.[20] The obligation to follow a deferral request flows from article 16 of the Rome Statute. Therefore, the Court is "*not directly bound* by resolutions of the Council addressed to United Nations Member States."[21] Significantly, article 25 of the UN Charter only establishes a duty on the UN Member States to accept and carry out its decisions. No such duty is imposed on other international organisations. A foremost issue which has arisen following these resolutions is whether the ICC is able to ignore a deferral request which may contradict article 16 of the Rome Statute.[22]

Notably, the issue arose even before the Court had become operational and any situations had come before it. It occurred in anticipation of the entry into force of the Statute, when the USA intensified its efforts to secure immunity from prosecution for USA peacekeepers serving in UN operations across the world. This confrontation reached a climax in relation to the renewal of the UN peacekeeping mission in Bosnia-Herzegovina ('UNMIBH'). The USA attempted to secure the passing of a generic, non-situation specific resolution which granted "immunity from arrest, detention, and prosecution with respect to all acts arising out of the operation."[23] The reported text of the proposal neither limited such immunity to a particular time period nor did it distinguish between the legal obligations of States Parties and non-States Parties to the Statute.[24]

The UNSG reaction to the USA position is telling of the extent to which the American proposal sought to construe and apply article 16 in a completely different manner than its intended purpose

[19] Stahn C., The Ambiguities of Security Council Resolution 1422, vol.4 *EJIL* (2002) 85, p.97.
[20] Rome Statute, n.12, article 4.
[21] Stahn, n.19, p.88.
[22] See generally: Deen-Racsmány Z., The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?, vol.49 *Nether.Int'l L.R.* (2002) 353.
[23] Compilation of Documents on UN Security Council Resolutions 1422/1487, Coalition for the International Criminal Court, May 2004, p.3 < http://coalitionfortheicc.org/documents/1422DocumentCompilation.pdf>
[24] Ibid.

under the Statute. In a letter sent to the USA Secretary of State, the UNSG stated that the American suggestion "flies in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty."[25]

The continuing embarrassing stalemate prompted Canada to request an open meeting in the UNSC.[26] The open debate revealed USA's isolation on the matter. Around 40 State representatives, many of which represented regional organisations, took the floor.[27] Even traditional USA allies, such as France and the UK, did not share its concerns. These two countries, the only P-5 to have acceded to the Statute, appeared willing to entertain a compromise revolving around article 16 of the Statute to the extent it did not amend its provisions.[28] Nevertheless, the vast majority of participants opposed the USA proposal, including States which were not known supporters of the ICC.[29]

Most States considered that any use of article 16 in the context of exempting peacekeepers from the jurisdiction of the ICC was irreconcilable with its intended purpose. Article 16 was only intended to be applied on a case-by-case basis as an exceptional temporal measure where a situation warrants a deferral.[30] The legality of the proposed UNSC action was also questioned.[31] The provision represented "a fine and delicate balance" which had been achieved at Rome which "the Council cannot and must not alter."[32] Indeed, it was cited by a number of delegates as one of the safeguards embedded in the Statute against politicised prosecutions.[33]

On 12 July 2002, the UNSC unanimously adopted resolution 1422 acting under Chapter VII of the UN Charter.[34] The numerous closed-door sessions which took place during this whole impasse at the UNSC do not elucidate how despite the widespread and open opposition from many States until the last moment,[35] both UNSC members and non-members, the UNSC finally unanimously adopted resolution 1422. Consequently, on the same day the UNSC also renewed the mandate of UNMIBS.[36] The French and British initiative in bridging a solution around article 16 and the rather indifferent

[25] Letter by UN Secretary General Kofi Annan to US Secretary of State Colin Powell, 3 July 2002 <www.amicc/org/docs/SG_SC.pdf>
[26] S/PV.4568, 10 July 2002; S/PV.4568 (Resumption 1), 10 July 2002 ('S/PV.4568 (Res.1)').
[27] E.g. S/PV.4568, ibid: the Denmark delegate spoke on behalf of the EU and countries associated with the EU (p.7) while the Costa Rican delegate spoke on behalf of the Rio Group (p.14).
[28] S/PV.4568, ibid, p.11 (France); S/PV.4568 (Res.1), n.26, p.16 (UK).
[29] S/PV.4568, ibid, p.14 (Iran); S/PV.4568 (Res.1), ibid, p.5 (Malaysia).
[30] S/PV.4568, ibid, p.4 (Canada), p.5 (New Zealand), p.22 (Brazil), p.25 (Mauritius), p.26 (Mexico); S/PV.4568 (Res.1), n.26, p.9 (Germany).
[31] S/PV.4568, ibid, p.3 (Canada), p.6 (New Zealand), p.16 (Jordan), p.20 (Liechtenstein); S/PV.4568 (Res.1), ibid, p.7 (Samoa).
[32] S/PV.4568, ibid, p.24 (Mexico).
[33] S/PV.4568, ibid, p.3 (Canada), p.11 (France), p.18 (Ireland), p.21 (Brazil); S/PV.4568 (Res.1), n.26, p.11 (Cameroon).
[34] S/RES/1422 (2002), 12 July 2002.
[35] Letter dated 12 July 2002 from the Permanent Representatives of Brazil, Canada, New Zealand and South Africa to the United Nations addressed to the President of the Security Council, S/2002/754, 12 July 2002.
[36] S/RES/1423, 12 July 2002.

approach from China and Russia,[37] meant that at least the P-5 were not among the most staunch opponents of such an interpretation of article 16 of the Statute. The original USA proposal may have been narrowed down but still article 16 of the Statute was potentially used to exempt from prosecution a particular class of people which signified that "the Council reserves the right to specify in detail the ICC's jurisdiction *ratione personae*."[38] While this exemption was more theoretical than real, its connotations have far reaching ramifications.[39] It also appeared to gain precedential value when it was renewed a year later.[40] In 2004 Washington was unable to garner sufficient support for a further renewal because of widespread outrage over the treatment of prisoners in Iraq and Guantánamo Bay by USA troops.

The invocation of article 16 as regards resolutions 1422 and 1487 is problematic for a number of reasons not least because the presence of a threat to international peace and security was highly questionable.[41] Further, while resolutions 1422 and 1487 were formally in line with the text of the provision it is obvious that the *ex ante* application of the provision by the UNSC, does not accord with its drafting history and intended purpose, this being an exceptional measure to be applied on a case-by-case basis.[42] Moreover, the expressed intention to renew the request contradicts with the temporary nature of the provision since it accords a "quasi-permanent nature" to the deferral request.[43] According to article 12(2) the Court may exercise jurisdiction on two bases, nationality and territoriality. Significantly, the request in resolutions 1422 and 1487 "severely limits the territorial jurisdiction of the Court for a specific group of persons, namely peacekeepers from non-states parties to the Statute."[44] Such a limitation is not provided in the Rome Statute. It is unequivocal that the ICC may exercise jurisdiction over peacekeepers who commit crimes in the territory of a State Party. The immunity of peacekeepers may arise in the context of cooperation to surrender person to the Court and the relevant provision in this respect is article 98. In essence, the request treats an issue of cooperation as a limitation to the ICC's jurisdictional ambit.[45]

The UNSC enjoys broad powers and a wide measure of discretion when deciding whether a situation constitutes a threat to international peace and security under article 39 of the UN Charter and on the

[37] S/PV.4568, n.26, pp.17-18.
[38] Jessberger F. and Geneuss J., The Many Faces of the International Criminal Court, vol.10 *JICJ* (2012) 1081 p.1092.
[39] A chart produced by the CICC, based on current UN data, showed that USA peacekeepers at the time had no exposure to ICC jurisdiction. See: Zero US Exposure to ICC <http://www.iccnow.org/documents/USexposurechartexplanation.pdf>
[40] S/RES/1487 (2003), 12 June 2003.
[41] S/PV.4568, n.26, p.3 (Canada), p.5 (New Zealand), p.16 (Jordan), p.20 (Liechtenstein); S/PV.4568 (Res.1), n.26, p.9 (Germany), p.7 (Samoa).
[42] Jain N., A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, vol.16 *EJIL* (2005) 239, p.247.
[43] Stahn, n.19, pp.91-93.
[44] Ibid, p.93.
[45] Ibid, p.94.

measures taken to deal with a threat.[46] However, at the same time the UN is a creature of a treaty, and the UNSC, as one of its organs, is bound by this treaty. According to article 25 of the UN Charter the UN Member States have agreed to accept and carry out the decisions of the Security Council *in accordance with the present Charter."*[47] During the open debate it was widely discussed whether resolutions 1422 and 1487 gave rise to binding obligations on the basis that they are *ultra vires* the powers of the UNSC.[48] Irrespective of the validity of these resolutions, and how the UN Member States may choose to act in relation to them if the UNSC adopts a similar deferral request in the future, "the Court is the final arbiter over the interpretation of the Statute."[49] Hence, the Prosecutor may choose to proceed and request an authorisation from the PTC in order to open an investigation. The PTC would have to determine whether it has jurisdiction in the case before it, and this would involve determining whether the resolutions are binding on it because of article 16.[50]

Following resolutions 1422 and 1487, the UNSC adopted resolution 1497, which exempted peacekeepers from the jurisdiction of the ICC in relation to the UN peace support mission in Liberia.[51] Resolution 1497 differs from the above resolutions for a number of reasons. In the first place, it does not constitute a request under article 16 of the Rome Statute.[52] The UNSC *decided* to grant exclusive jurisdiction to the contributing States which are not States Parties to the Rome Statute over the acts and omissions of their personnel, unless expressly waived by the contributing State.[53] In the second place, it was not controversial that the conflict in Liberia constituted a threat to international peace and security. Hence, on what basis does resolution 1497 purport to prevent the ICC from exercising jurisdiction over personnel from contributing States which are not States Parties to the ICC?

Under article 89(1) the Court may make a request to a State Party for the arrest and surrender of a person to the Court. According to article 98(2) the Court "may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements" where the consent a sending State is necessary in order to surrender a person from that State to the ICC. In these circumstances, it is necessary for the Court to first obtain the consent of the sending State.

The text of article 98(2) is not limited to particular types of agreements but the most obvious example, in particular when considering the peacekeeping exemption resolutions, are 'Status of Forces

[46] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[47] Ibid (emphasis added).
[48] Stahn, n.19; Jain, n.42; Deen-Racsmány, n.22.
[49] Stahn, n.19, p.102.
[50] Schabas (A Commentary), n.13, p.332.
[51] S/RES/1497 (2003), 1 August 2003.
[52] Jain, n.42, p.247.
[53] S/RES/1497, n.51, para.7.

Agreements' ('SOFAs'). The exclusive jurisdiction of contributing States forms part of the UN Model Status of Forces Agreement for Peacekeeping Operations.[54] Granting exclusive jurisdiction to contributing States over the acts of their nationals forms an integral part of UN peacekeeping missions and it is considered as necessary for their effective and smooth functioning.[55] However, these agreements, SOFAS, as well as other agreements pertaining to peacekeeping operations, such as 'Status of Mission Agreements' are concluded between the host State and the United Nations "but not directly under Chapter VII of the Charter."[56]

As already discussed above, the UNSC cannot directly bind the ICC. Therefore, the pertinent question is whether the UNSC decision to grant exclusive jurisdiction to the contributing States which are not States Parties to the ICC brings article 98(2) into play, as a consequence of which the Court may not proceed with a request for surrender. The answer lies in determining whether the UNSC's decision is an 'international agreement' which is compatible with article 98(2) and must thus be respected by the Court.

It is for the Court and not on the States Parties concerned to decide whether to proceed with a request for surrender under article 89(1) and whether it is precluded from doing so by virtue of the applicability of article 98(2). Practice has shown that the Court will not make a determination whether or not an international agreement is compatible with article 98(2) in the abstract by reason of the fact that a State Party has entered into an agreement. A concrete case has to arise where a State Party seeks to apply article 98(2) for not surrendering an individual to the ICC.[57] To date there has been no case involving peacekeepers before the ICC. Thus, the Court has yet to examine the compatibility of the UNSC's decision to grant exclusive jurisdiction in resolutions 1497 (the same paragraph is also included in the two referral resolutions). The Court has adopted the same approach as regards the so-called 'Article 98 Agreements.' Following the adoption of the Rome Statute the USA proceeded to conclude numerous bilateral non-surrender agreements. A state party to such an agreement undertakes not to surrender a citizen of the other state party to international tribunals or the ICC, subject to a waiver by both parties.[58]

[54] Memorandum of Understanding, A/C.5/66/8, 27 October 2011, article 7.22 <http://www.un.org/en/peacekeeping/sites/coe/referencedocuments/COE_manual_2011.pdf>
[55] Jain, n.42, p.245.
[56] Stahn, n.19, p.86.
[57] Crawford J *et al.,* Joint Opinion in the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute, 5 June 2003, para.59 <http://www.amicc.org/docs/Art98-14une03FINAL.pdf>
[58] Arieff A. *et al.*, International Criminal Court Cases in Africa: Status and Policy Issues, *Congressional Research Service*, 22 July 2011, p.3.

While the Court has not examined the compatibility of the UNSC resolutions the argument has been raised that the grant of exclusive jurisdiction is not a valid agreement under article 98(2) because it contradicts the object and purpose of the Rome Statute. In particular, given that the purpose of the Rome Statute is to put an end to impunity, an agreement which fails to provide adequate guarantees of investigation and prosecution, is inconsistent with this purpose.[59] A similar position has also been expressed as regards the 'Article 98 Agreements.'[60] Notably, in 2002 the Council of the European Union issued 'Guiding Principles' with respect to the agreements entered into by the USA. According to the Guiding Principles these agreements in their current form "would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute."[61] Significantly, the Guiding Principles further state that "any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity."[62]

Lastly, resolution 1497 and the two referrals subsequently adopted were formulated as *decisions.* Thus, these decisions (assuming their legal validity under the UN Charter) create binding obligations for the UN Member States under article 25 of the UN Charter. In the event that a case involving a peacekeeper caught by the referral resolutions reaches the Court, States Parties to the Rome Statute could refuse to cooperate with a request for surrender on the ground that they are bound to follow the decisions of the UNSC and that their obligations under the UN Charter take precedence over any other inconsistent international agreement.[63] In this respect, resolution 1497 and the two referrals represent a potentially more worrying development than resolutions 1422 and 1487. In particular, the decisions granting exclusive jurisdiction could be interpreted to reflect the hierarchical superiority of the UNSC "to the extent that its actions concerning the Court are not necessarily governed by the provisions of the *Rome Statute.*"[64]

5.4.2 Darfur

During 2004 Darfur became a regular agenda item in the UNSC. It first appeared in a presidential statement where the UNSC expressed its deep regret for the violations of human rights and IHL and demanded those responsible to be held accountable.[65] The UNSC's treatment of the Darfur conflict in 2004 gradually but steadily provided the groundwork for the first referral to the ICC less than a year

[59] Jain, n.42, p.249.
[60] Crawford *et al.*, n.57, para.52.
[61] EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, Annex, 30 September 2002, p.3 <https://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf>
[62] Ibid. See also: Crawford *et al.*, n.57, paras.46-52.
[63] United Nations Charter, n.46, article 103.
[64] Schabas (A Commentary), n.13, p.330 (emphasis in original).
[65] S/PRST/2004/18, 25 May 2004.

later. The introduction of sanctions and the adoption of a firmer position on the part of the UNSC, paved the way for the establishment of the COI. Following the COI's findings, the high stakes which had been put by the USA, among the COI's main advocates, meant that one of the ICC's main opponents at the time was outmanoeuvred into at least not vetoing the referral resolution.

I will be examining the referral of the situation in Darfur to the ICC. I will assess how the UNSC interpreted and applied article 13 of the Statute. Thereafter, I will be focusing on the aftermath of the referral to understand how the UNSC may hinder or promote the Court's work after the decision to bring a situation within the Court's jurisdiction. While this analysis will not involve a particular crime it will show the referral's impact on other provisions of the Statute and on the Court's ability to carry out its mandate and develop the ICC crimes.

5.4.2.1 UNSC refers situation in Darfur

The decision of the UNSC to establish the COI to investigate violations of IHL and human rights law allegedly committed in Darfur provided the immediate background to the referral of the situation to the ICC. Significantly, the UNSC requested from the UNSG to

> [R]apidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.[66]

It is noteworthy that the COI was given an unprecedented mandate, which was both "focused and accountability driven."[67] Its tasks included *the identification of perpetrators* for violations of IHL and human rights law by all parties in Darfur. Thus, the COI decided not to restrict itself to material perpetrators but also to look at those who bear the greatest responsibility, which "normally are the persons who are in command, and who either plan or order crimes, or knowingly condone or acquiesce in their perpetration."[68] This resonated with the Statute mandate to deal with the perpetrators of the most serious crimes of concern to the international community. The COI *strongly recommended* that the UNSC refers the situation in Darfur to the ICC stating that the alleged crimes "meet all the thresholds of the Rome Statute."[69] Lastly, it found that "[t]he Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these

[66] S/RES/1564 (2004), 18 September 2004, para.12.
[67] Frulli M., Fact-Finding or Paving the Road to Criminal Justice?, vol.10 *JICJ* (2012) 1323, p.1329.
[68] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para.8. See generally: paras 6-9.
[69] Ibid, para.647.

crimes."[70] Accordingly, the COI also played an important role in making a preliminary assessment as to the willingness and/or ability of the Sudanese justice system, one of the admissibility conditions before the ICC.[71]

Resolution 1593 represents a turning point on many levels. The UNSC initiated its involvement with the Statute referral system. This act was important not only in itself but also as regards its scope and content. One may argue that it is not easy to pinpoint accurately the extent to which referrals would affect the development of ICC crimes. Nevertheless, the act of bringing instantaneously a situation within the remit of ICC jurisdiction and subsequently the extent to which the UNSC facilitates and/or hinders the role it chooses to assign to the ICC has "considerable *indirect* influence" on the ability of the ICC to carry out its mandate and develop international crimes.[72] This is particularly so since UNSC referrals are in any case expected to be politically-charged acts given that they will always more than likely involve non-States Parties.[73]

Of particular importance was the USA's decision not to veto resolution 1593, although this was achieved as a result of a number of compromises which have potentially created a precedent for future referrals. The USA continued to "fundamentally object" to the exercise of jurisdiction by the ICC over nationals of non-States Parties to the Statute.[74] Nevertheless, it decided not to object because "the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-state parties."[75] This included the UNSC's decision to exempt from the jurisdiction of the ICC peacekeepers from States not parties to the ICC. The USA was also pleased by the fact that the resolution recognised that the referral expenses would not be borne by the UN. Lastly, the USA was satisfied that the resolution took note of 'Article 98 Agreements.'[76] Article 98(1) allows a State Party not to proceed with a request for surrender which would make such State to act inconsistently with its obligations under IL with respect to the diplomatic immunity of a person from a third State. The above compromises ensured that the USA did not veto the referral of the Darfur situation to the ICC.

The meeting records during which resolution 1593 was adopted reveal a division and diversity of opinion among UNSC members. The UK and France pursued a pragmatic approach in order to secure

[70] Ibid.
[71] Frulli, n.67, p.1331.
[72] Forsythe D., The UN Security Council and Response to Atrocities: International Criminal Law and the P-5, vol.34 *HRQ* (2012) 840, pp.855-856.
[73] Letter on the October 17 Thematic Debate at the Security Council on the Council's Relationship with the ICC, *Human Rights Watch*, 16 October 2012 <http://www.hrw.org/news/2012/10/16/letter-october-17-thematic-debate-security-council-councils-relationship-icc>
[74] S/PV.5158, 31 March 2005, p.3 (USA).
[75] Ibid, p.3 (USA).
[76] Ibid, p.4 (USA).

the adoption of the resolution. The UK welcomed the referral as "the most efficient means available to deal with impunity"[77] and France expressed the belief that it was "the only solution."[78] Their leading role in the resolution's adoption indicates a choice for flexibility in order to ensure their intended goal. Most UNSC non-permanent members to vote in favour decided that it was better to have a resolution with limitations than no resolution at all.[79] Brazil supported the referral but decided to abstain because "the referral should not be approved at any cost."[80]

The end-result was that the majority of non-permanent UNSC members were prepared to support such a resolution. Among P-5 members who are not States Parties to the ICC, the division seemed to run even deeper. Russia, in a laconic and not very enlightening statement decided to support the resolution.[81] China, abstaining, pointed out that it had serious reservations towards certain provisions of the Statute, and in particular, that it could not accept the exercise of jurisdiction against the will of non-States parties.[82]

Despite the confusing message sent by the UNSC and the caveats which were incorporated in the resolution, the referral demonstrated that at least it was possible for the Council members to find a common ground. Criticisms aside it was a positive development given that "[t]here was without a doubt a strong factual basis for the Council's first referral."[83]

5.4.2.2 The UNSC and the arrest warrant against Omar Al-Bashir

The UNSC's involvement came again into play when the Prosecutor proceeded to apply for an arrest warrant for Sudanese President Omar Al-Bashir. One week after the Prosecutor's application before the PTC, the AU Peace and Security Council ('PSC') adopted a Communiqué, requesting from the UNSC to defer the ICC proceedings, in accordance with article 16 of the Statute "taking into account the need to ensure that the ongoing peace efforts are not jeopardized."[84] Subsequently, the AU Assembly decided that its Member States shall not cooperate for the arrest and surrender of Al-Bashir on the basis of article 98 of the Rome Statute relating to immunities.[85] Over the years, the AU has

[77] Ibid, p.7 (UK).
[78] Ibid, p.8 (France).
[79] Ibid, p.6 (Philippines), pp 7-8 (Argentina), p.9 (Greece), p.9 (Tanzania), p.10 (Benin).
[80] Ibid, p.11 (Brazil).
[81] Ibid, p.10 (Russia).
[82] Ibid, p.5 (China).
[83] Moss L. The UN Security Council and the International Criminal Court: Towards a More Principled Relationship, *UN Security Council in Focus*, March 2012, p.5 <http://library.fes.de/pdf-files/iez/08948.pdf>
[84] African Union Peace and Security Council, Communiqué of the 142nd Meeting of the Peace and Security Council, 21 July 2008, PSC/MIN/Comm(CXLII), para.11(i).
[85] Assembly of the African Union, Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), 13th Ordinary Session, 1-3 July 2009, Assembly/AU/Dec.245(XIII), para.10.

frequently reiterated its requests for deferral and non-cooperation in relation to the Sudanese President.[86]

The AU's deferral request highlighted the lack of clarity embedded in the text of article 16. Scheffer, who headed the USA delegation at the Rome Conference, stated that article 16 was drafted to enable the UNSC to act pre-emptively to suspend investigation or prosecution "before either is launched if priorities of peace and justice compelled a delay of international justice."[87] Nevertheless, he admitted that the text of article 16 "technically empowers the Security Council to intervene at this late date."[88] While this has not occurred to date it demonstrates the wide-ranging powers with which the UNSC has been provided with. Notably, as seen below in section 5.4.4, another attempt was made to invoke article 16 at an even later stage of proceedings in the situation in Kenya.

The UNSC referral and the arrest warrant against the Sudanese President have shown that any action on the part of the UNSC under the referral mechanism has an impact on the interpretation of other provisions of the Statute. A representative example concerns the immunities that a sitting Head of a non-State Party to the Statute, such as Al-Bashir, is entitled to. The silence of the referral resolution on the matter was a complicating factor which brought to the fore the need to interpret the relevant provisions of the Statute. In paragraph 2 of the referral resolution the UNSC 'decided' under Chapter VII of the UN Charter that Sudan "shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution." Therefore, Sudan is clearly bound by article 25 of the UN Charter to accept and carry out the decision of the UNSC.

When PTC I issued the first arrest warrant against Al-Bashir, it decided that, in accordance with article 27 of the Statute, his position as Head of a State not Party to the Statute had no effect on the

[86] Assembly of the African Union, Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC) DOC. Assembly/AU/8(XIV), 14th Ordinary Session, 31 January – 2 February 2010, Assembly/AU/Dec.270(XIV), para.10; Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV), 15th Ordinary Session, 25-27 July 2010, Assembly/AU/Dec.296(XV), paras 4-5; Assembly/AU/Dec.334(XVI), Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), 16th Ordinary Session, 30-31 January 2011, Assembly/AU/Dec.334(XVI), para.3 ('Assembly/AU/Dec.334(XVI), 16th Ordinary Session'); Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc. EX.CL/670(XIX), 17th Ordinary Session, 30 June - 1 July 2011, Assembly/AU/Dec.366(XVII), para.3 ('Assembly/AU/Dec.366(XVII), 17th Ordinary Session'); Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX), 18th Ordinary Session, 29-30 January 2012), Assembly/AU/Dec.397(XVIII, paras 3 & 8; Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/731(XXI), 19th Ordinary Session, 15-16 July 2012, Assembly/AU/Dec.419(XIX), para.4 ('Assembly/AU/Dec.419(XIX), 19th Ordinary Session'); Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) Doc. Assembly/AU/18(XXIV), 24th Ordinary Session, 30-31 January 2015, Assembly/AU/Dec.547(XXIV), para.17(e) ('Assembly/AU/Dec.547(XXIV), 24th Ordinary Session').

[87] Scheffer D., 'The Security Council's Struggle over Darfur and International Justice,' *Jurist*, 20 August 2008 <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>

[88] Ibid.

Court's jurisdiction over the case.[89] Further, the Chamber stated that by referring the situation to the ICC, the UNSC had accepted that any investigation and prosecution "will take place in accordance with the statutory framework provided for in the Statute."[90] Pursuant to article 27(2) of the Statute, immunities attached to the official capacity of a person "shall not bar the Court from exercising its jurisdiction over such a person." According to the interpretation of the PTC all the provisions of the Rome Statute, including article 27, were implicitly applicable to Sudan. In essence, the decision of the UNSC "puts Sudan in an analogous position to a party to the Statute."[91]

As regards the obligations of States Parties to cooperate with the ICC for the arrest and surrender of Al-Bashir, the Court is bound to consider article 98(1) before making a cooperation request. In relation to cooperation requests which concern two States Parties, a State Party would not be acting contrary to its obligations under IL by cooperating with the Court. This is because immunities of State officials are removed by virtue of article 27. However, the request to cooperate for the arrest and surrender of Al-Bashir concerned the Head of State of a non-State Party, Sudan.

As discussed above, the PTC decided that as a result of the UNSC referral the whole statutory framework is applicable for any investigations and prosecutions that may take place, implicitly treating Sudan as a State Party. Consequently, States Parties would not be acting contrary to their obligations under IL concerning immunities by cooperating with the ICC. On the basis of this interpretation States Parties are not entitled to rely on article 98(1) to avoid cooperating with the Court.[92] Regrettably, the PTC did not address the inherent tension between articles 27 and 98. The above interpretation is merely implied from the Chamber's reasoning. Addressing the relationship between articles 27 and 98 was particularly important in this context because the obligations of States Parties to cooperate with the Court were created by virtue of the UNSC referral, not directly from the Rome Statute, and they involved a non-State Party. Significantly, if State Parties are able to rely on article 98(1) to refuse to cooperate with the Court this would render the referral avenue futile.

Since the issuance of the arrest warrants against him, President Al-Bashir has visited a number of States, mainly in the African continent, including States Parties to the ICC. States Parties to the Statute are under an obligation to cooperate with the Court and this includes an obligation to comply with requests for arrest and surrender.[93] According to article 87(7) of the Statute when a State Party fails to comply with the Court's cooperation requests, the Court may make a finding to that effect and

[89] *Bashir* (ICC-02/05-01/09-3), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para.41.
[90] Ibid, para.43.
[91] Akande D., The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities, vol.7 *JICJ* (2009) 333, p.342.
[92] Ibid, p.340-342.
[93] Rome Statute, n.12, articles 86 and 89.

refer the matter to the UNSC, where the UNSC referred the situation to the Court. Significantly, the Court has made numerous such referrals of non-compliance which involved Chad, Malawi, Djibouti, Kenya and more recently the DRC. The UNSC has not taken any action in this respect.[94]

The question of immunities and the applicability of article 27 to non-States Parties featured prominently in the non-compliance decisions. For example, as a justification for not arresting Al-Bashir, Malawi invoked the immunities of Heads of States that are not Parties to the Statute and the AU decisions issued in relation to the ICC arrest warrant for Sudan's President.[95] Malawi also argued that article 27(2) of the Statute, as a treaty provision, was not applicable to officials of non-States Parties.[96]

The Chamber found that the principle in IL was that immunity of either former or sitting Head of State cannot be invoked to oppose a prosecution by an international court.[97] This time the Chamber acknowledged the "inherent tension" between the article 27(2) and 98(1).[98] Still, according to the PTC, Malawi (as well as the AU) is not able to rely on article 98(1) as a justification for refusing to comply with the Court's cooperation request. The Chamber described how the prosecution of Heads of States was gradually rejected by international courts over the years. Moreover, States Parties to the ICC, including Malawi, by joining the Rome Statute, are deemed to have ratified article 27(2). [99] In view of the above, the PTC concluded that "customary international law creates an exception to Head of State immunity when international courts seek the arrest of a Head of State for the commission of international crimes."[100] Thus, no conflict existed between Malawi's obligations to cooperate with the ICC and its obligations under IL to respect the immunity of Al-Bashir.

Subsequently, in the non-compliance decision against the DRC the Court discussed how the UNSC referral itself affects the immunity enjoyed by Al-Bashir. In particular, the PTC stated that by issuing the referral resolution and by requiring Sudan to "cooperate fully" the UNSC had "implicitly waived" the immunities that Al-Bashir enjoys as a Head of State.[101]

It is obvious that the UNSC's failure to provide on the issue of immunities and cooperation obligations in the referral resolution has had an impact on the interpretation of article 27(2) and on the

[94] Trahan, n.1, p.466.
[95] *Bashir* (ICC-02/05-01/09-139-Corr), Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011, para.8.
[96] Ibid.
[97] Ibid, paras 22-36.
[98] Ibid, para.37.
[99] Ibid, paras 37-43.
[100] Ibid, para.43.
[101] *Bashir* (ICC-02/05-01/09-195), Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, para.29 ('DRC Non-Compliance Decision').

implementation of the cooperation requests by States Parties to the Statute. True, on its face the referral resolution does not legally oblige States Parties to cooperate with the Court, which might justify the UNSC's inaction despite the numerous occasions of non-compliance. Irrespective of whether or not the UNSC referrals create binding obligations on the States Parties to cooperate with the Court, the UNSC's pervasive inaction is very problematic as regards the ability of the ICC to contribute to the further development of the crimes within its jurisdiction. UNSC referrals are expected to involve non-State Parties, where the issue of cooperation is paramount to the viability of any investigations or prosecutions. Further, if it were accepted that the referral resolution does not in any way bind the States Parties to cooperate with the Court, the referral option would be deprived completely of its purpose. UNSC referrals would contribute nothing more to the ICC's jurisdictional reach than what is already provided in the context of State referrals and *proprio motu* investigations by the Prosecutor.

Lastly, the UNSC referral also relates to the obligations of non-States Parties, as UN Member States, under resolution 1593. The UNSC in referring to the ICC the situation in Darfur merely "urged" other States to cooperate with the Court.[102] The Council did not make a 'decision' which the UN Member States would be bound to accept and carry out by reason of article 25 of the UN Charter. In particular, the UN Member States are not *obliged* under the UNSC resolution to cooperate with the Court for the arrest and surrender of Al-Bashir.[103] However, even in the absence of binding obligations the UN Member States are arguably "*permitted* to arrest persons who would ordinarily possess immunity under international law."[104] In particular, article 27 of the Rome Statute which removes Al-Bashir's immunities under IL is binding on Sudan by reason of the referral resolution, and not by treaty. Hence, UN Member States may rely on the implicit removal of immunity effected by the UNSC's decision to impose binding obligations on Sudan.[105]

5.4.2.3 The Court's changing approach towards referrals

The second decision on non-compliance by Chad is significant because the Court, for the first time, sent an explicit message to the UNSC showing its dissatisfaction towards the Council's passive stance. The Chamber stated the following:

> When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under

[102] S/RES/1593 (2005), 31 March 2005, para.2.
[103] Gaeta P., Does President Al Bashir Enjoy Immunity from Prosecution vol.7 *JICJ* (2009) 315, pp.323-324.
[104] Akande, n.91, p.343 (emphasis in original).
[105] Ibid, p.345.

> Chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.[106]

Notably, the PTCs took the same stance in subsequent findings of non-compliance.[107] The PTCs' reaction demonstrates that the relationship between the two institutions is not constant. The ICC Chambers, and as seen below the Prosecutor, have slowly started showing their frustration and to distance themselves from the UNSC's failure to follow-up on referrals. UNSC's failure in relation to the situation in Sudan is all-encompassing, it relates to Sudan, ICC States Parties and UN member states. Indeed, UNSC's approach "can be considered something of a *de facto* deferral of the prosecution."[108]

As shown by recent developments in the Darfur situation, the lack of effective reciprocity from the UNSC, and the resulting stalemate in the court proceedings, cannot continue indefinitely. Consequently, the dynamic of the relationship between the ICC and UNSC in the context of referrals has evolved. The ICC appears to try to shield itself, to the extent possible, from the negative repercussions on the ability of the ICC to carry out its mandate as a result of the UNSC's failure to adequately support the Court following a referral.

The ICC Prosecutor, during her twentieth briefing before the UNSC for the situation in Darfur announced that she was shelfing the investigations

> It is becoming increasingly difficult for me to appear before you to update you when all I am doing is repeating the same things I have said over and over again […]. Not only does the situation in Darfur continue to deteriorate, the brutality with which crimes are being committed has become more pronounced. […] But this Council is yet to be spurred into action. […] We find ourselves in a stalemate that can only embolden perpetrators to continue their brutality. […] Faced with an environment where my Office's limited resources for investigations are already overstretched, and given this Council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases […].[109]

To date, the UNSC has not only failed to act upon the non-compliance decisions against ICC States Parties but also those concerning the referred State itself, Sudan. The only exception was a presidential statement back in 2008 which took note of the arrest warrants and urged the GoS to "cooperate fully" with the ICC.[110]

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[106] *Bashir* (ICC-02/05-01/09-151), Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013, para.22.
[107] DRC Non-Compliance Decision, n.101, para.33. See also: *Bashir* (ICC-02/05-01/09-227), Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, 9 March 2015, para.17.
[108] Moss, n.83, p.8.
[109] OTP, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 December 2014, paras.2-4 <http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf> ('OTP Statement to the UNSC (December 2014)').
[110] S/PRST/2008/21, 16 June 2008.

Significantly, there is "a silver lining" to Bensouda's decision to hibernate the investigations.[111] The Prosecutor's move means that her Office will not continue to investigate *ad infinitum* and get the blame for the stalemate in the investigations and the failure to arrest the suspects, in particular Al-Bashir. Instead, she "cleverly shifted the terrain, making it clear that the problem is the Security Council, not the ICC."[112] In essence, the Prosecutor diverted her Office's limited resources to those situations which are actually progressing. This decision does not diminish the possibility to develop ICC crimes via the referral mechanism. However, the Court's experience to date has demonstrated that the ICC's law-making potential, in the context of UNSC referrals, is conditioned on the ability of the Chambers and the Prosecutor to carry out their mandate, at least in a manner reminiscent to State referrals and *proprio motu* investigations. Therefore, further involvement of the UNSC in the work of the ICC without a "dramatic shift" in the UNSC's approach undermines the Court's work and its ability to develop the crimes within its jurisdiction.[113] Another example of the OTP's changing approach concerns the situation in Libya and is discussed in section 5.4.2.2.

5.4.3 Libya

5.4.3.1 UNSC refers situation in Libya

On the 26 February 2011 the UNSC decided to refer the situation in Libya since 15 February 2011 to the ICC.[114] The unanimous and swift adoption of the referral resolution was impressive when compared to the lengthy background before the referral of the Darfur situation. The UNSC in a matter of less than two weeks considered that "the widespread and systematic attacks currently taking place in the Libya Arab Jamahiriya against the civilians may amount to crimes against humanity."[115]

The amount of consensus among the UNSC members is evident by the meeting records. The text of the draft resolution was submitted by 11 out of 15 council members, including the USA.[116] As a result of the rapid and united action on the part of the UNSC the issue of exempting from the Court's jurisdiction peacekeepers from States which are not parties to the ICC or putting on the ICC the financial burden of referrals did not raise the opposition that it would have otherwise most probably have done so.[117] Only Brazil mentioned the former issue while the latter one was not raised at all.[118]

[111] Heller K.J., OTP Suspends Darfur Investigation, *Opinio Juris*, 12 December 2014 <http://opiniojuris.org/2014/12/12/otp-suspends-darfur-investigation/>
[112] Ibid.
[113] OTP Statement to the UNSC (December 2014), n.109, para.13.
[114] S/RES/1970 (2011), 26 February 2011, para.4.
[115] Ibid, preambular para.6.
[116] S/PV.6491, 26 February 2011, p.11.
[117] S/RES/1970 (2011), n.114, paras 6 & 8.
[118] S/PV.6491, n.116, p.7 (Brazil).

However, the fact that these issues reappeared in the second UNSC referral does point towards the establishment of a particular pattern for framing referrals in the future.

In order to comprehend the UNSC's later reaction in relation to the Libya referral it is necessary to acknowledge that the referral to the ICC formed part of the wider efforts of the UNSC to deal with the conflict in country. However, it only occupied the attention of the UNSC during a finite point in time, at the beginning of the conflict, which was soon superseded by other developments, most notably the NATO strikes pursuant to resolution 1973. [119]

5.4.3.2 The UNSC and the arrest warrants in the situation in Libya

Libya's referral has been criticised by Human Rights Watch as an "emblematic" example of the UNSC's inconsistent approach in ICC referrals.[120] While the referral had been prompt and unanimous, "once political circumstances changes in Libya, the Security Council no longer actively supported the ICC investigation and failed to press Libya's new government to cooperate with the court."[121] The lack of support by the UNSC became evident early on when it did not comment on the AU's non-cooperation decision or the Interim Transitional Council's statement that it will try Gaddafi in Libya.[122]

The ICC Prosecutor in her eight briefing before the UNSC on Libya referred to the worsening situation in Libya and stated that there are "indications that crimes that fall within the jurisdiction of the International Criminal Court are being committed."[123] In spite of the aforementioned statement the Prosecutor informed the Council that she was decreasing the funds allocated for investigations in Libya and explained her decision

> the combined effect of instability and lack of resources has severely undermined my Office's investigative efforts in Libya. This means that we have been obliged to scale down resources for investigations in the country, in effect, limiting our ability to investigate, amongst others, new instances of mass crimes allegedly committed by the rebel forces. My Office will have to prioritize its work and divert the limited resources at its disposal as it strives to complete its investigations to be trial ready in other cases […].[124]

[119] S/RES/1973 (2011), 17 March 2011, para.6.
[120] UN Security Council: Address Inconsistency in ICC Referrals, *Human Rights Watch*, 16 October 2012 <http://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals-0>
[121] Ibid.
[122] Assembly/AU/Dec.366(XVII), 17th Ordinary Session, n.86, para.6; Libya insists Saif al-Islam Gaddafi should be tried at home, *The Guardian*, 29 October 2011 <http://www.theguardian.com/world/2011/oct/29/libya-saif-gaddafi-justice>
[123] OTP, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), Mrs Fatou Bensouda, Prosecutor of the International Criminal Court, 12 November 2014 <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-12-11-2014.aspx>
[124] Ibid.

She further stated that "the continuing disparity between resources and expectations, risks *systematic underperformance*" which is detrimental both to the Court and the UNSC, in particular as regards situations which have been referred to by the UNSC.[125] The decision of the Prosecutor reduce the funding available is not but an implied response to the UNSC's practice of burdening the Court with the expenses of referrals. Thus, in the budget for 2015, the amount assigned for the conduct of investigations in Libya, "on an anticipated per case basis, it is the smallest allocation ever made by the court."[126]

The Court's creation as a permanent institution signifies that it will have to conduct its work in ongoing conflicts with all the consequences that this entails on the ability of the Prosecutor to conduct adequate investigations. This issue is far more relevant in the context of UNSC referrals. In order for the UNSC to step in and make a referral it has to determine that there is a situation which is a threat to international peace and security under Chapter VII of the UN Charter. Thus, the issue of instability on the ground should not come as a surprise.

New approaches could potentially be followed by the Court itself in order to overcome the difficulties. For example, the ICC could explore the possibility of holding trials in Libya. Nevertheless, the Court's practice to date has highlighted that in the context of referrals, the UNSC's one-off activation of jurisdiction, without further assistance towards the ICC, either in the form of political support and/or financial contribution, is a determining factor whether the Court will be able to carry out its mandate in any meaningful way.

The recent developments are significant on many levels. On 10 December 2014, the PTC issued a finding of non-compliance by Libya for failing to comply with requests for cooperation by the Court and referred the matter to the UNSC in accordance with article 87(7) of the Statute.[127] Nevertheless, Libya still ignores its outstanding obligation to hand Gaddafi over to the ICC and is proceeding with domestic proceedings.[128] This is unfortunate given that Libya's conduct demonstrates how a State which is the subject of a UNSC referral has the ability to 'pre-empt' the Court's determination as to the admissibility of a case and the way to do so. On 27 March 2015, the UNSC adopted resolution 2213 on the situation in Libya. While "*emphasizing strongly* the importance of the Libyan government's full cooperation with the ICC," the UNSC's reaction to the non-compliance decision

[125] Ibid (emphasis added).
[126] Ebbs T. and Saudi E., The ICC in Libya – justice delayed and denied, *Open Democracy*, 25 February 2015 <https://www.opendemocracy.net/openglobalrights/thomas-ebbs-elham-saudi/icc-in-libya-%E2%80%93-justice-delayed-and-denied>
[127] *Gaddafi* (ICC-01/11-01/11-577), Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 December 2014.
[128] *Gaddafi and Al-Senussi* (ICC-01/11-01/11-547-Red), Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 21 May 2014.

consisted only of "*noting*" the decision in the resolution's preamble.[129] The resolution did not specify that the Court's decision concerned a finding of non-compliance against Libya.

The Libyan authorities have submitted that they do not dispute to be bound by resolution 1970.[130] Unlike Sudan, Libya is in communication with the ICC, employing the provisions of the Statute which it considers as appropriate while ignoring others. However, Libya's ability so far to work with the ICC system selectively has worryingly shown the visible risk of manipulating the principle of complementarity.[131] The conduct of the Libyan government in the case against Gaddafi to date has been successful in its attempt to reverse the roles as to who may determine the admissibility of a given case before the ICC. This may have significant repercussions for the interpretation and application of the principle of complementarity. An assessment whether the subject-matter of a domestic investigation is the same as that which is before the ICC is directly relevant to the question of interpreting the crimes within the Court's jurisdiction. Practice has shown that States which are the subject of a UNSC referral or the Prosecutor's *proprio motu* powers are more likely to challenge the admissibility of a case before the Court by invoking the principle of complementarity. This has been reflected in the Libya and Kenya admissibility challenges.

5.4.4 Kenya

The Kenyan situation was initiated by the ICC Prosecutor acting *proprio motu* and not by a UNSC referral. Still, it is worth considering because Kenya has attempted to affect the progress and the very future of the cases before the ICC by involving the UNSC on the basis of article 16 of the Rome Statute.

The AU Assembly has issued decisions endorsing Kenya's request for the UNSC to defer the ICC investigations and prosecutions under article 16 of the Statute, to allow for national prosecutions in line with the principle of complementarity.[132] Notably, such requests have not stopped following the rejection of the admissibility challenge by the ICC AC.[133] In fact, following the election of Kenyatta

[129] S/RES/2213 (2015), 27 March 2015, preambular para. 8.
[130] *Gaddafi and Al-Senussi* (ICC-01/11-01/11-264), Response of the Libyan Government to the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC," 1 February 2013, para.22.
[131] Robertson G. QC, *Crimes Against Humanity: The Struggle for Global Justice* (4th edn Penguin Books 2012), p.779.
[132] Assembly/AU/Dec.334(XVI), 16th Ordinary Session, n.86, para.6; Assembly/AU/Dec.419(XIX), 19th Ordinary Session, n.86, para.4; Assembly of the African Union, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) Doc. Assembly/AU/13(XXI), 21st Ordinary Session, 26-27 May 2013, Assembly/AU/Dec.482(XXI), para. 7.
[133] *Ruto et al.* (ICC-01/09-01/11-307), 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," 30 August 2011; *Muthaura et al.* (ICC-01/09-02/11-274), Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled

and Ruto as President and Deputy-President respectively, in April 2013, both Kenya and the AU have stepped up their opposition towards the ICC proceedings. In early May 2013, the newly-elected Kenyan Government sent a letter to the UNSC asking not merely for deferral of the cases, but actually for their "immediate termination."[134]

On 23 May 2013, an informal interactive dialogue took place between UNSC members and Kenyan representatives on the issue of ICC proceedings against Kenyan nationals, following Kenya's request.[135] Due to the fact that the dialogue took place in the context of an informal session,[136] the meeting was "both closed to any non-members and completely off the record."[137] Third sources reveal that the majority of the UNSC rejected the Kenyan proposal.[138]

In principle, the UNSC was "entirely correct" in rejecting the deferral given that article 16 would have required a finding that the ICC investigation was a threat to international peace and security under Chapter VII of the UN Charter.[139] Hence, a public record of the meeting or an official reaction by the UNSC would have been a most appropriate opportunity for the UNSC to clarify its role under the deferral mechanism and to provide a firm and properly justified reply not only to Kenya but other States as well. While Kenya's request was fraught with legal complexities, and is not provided for under the Statute, the lack of transparency on the part of the UNSC is highly detrimental to the Court itself giving leverage to the arguments of its opponents.

In November 2013 came the biggest challenge to date in relation to the situation in Kenya. African countries had proposed a resolution in the UNSC which would defer the trials of Kenyatta and Ruto. The resolution only got seven votes, two less than the number needed. Russia and China voted in favor. All other countries abstained.[140] The initiative was strongly criticised.[141] Notably, it was the first time in decades that a UNSC resolution failed to pass in this way without a veto from one of the P-5.[142] The lack of veto from the P-5 or of a negative vote from the non-permanent members meant

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"Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," 30 August 2011.

[134] Note verbale from the Permanent Mission of Kenya to the United Nations addressed to the President of the Security Council, 2 May 2013, p. 13 <http://councilandcourt.org/files/2012/11/KenyaNoteVerbale.pdf>.

[135] Informal Interactive Dialogue with Kenya on ICC Issue, *What's in Blue,* 22 May 2013 <http://www.whatsinblue.org/2013/05/informal-interactive-dialogue-with-kenya-on-icc-issue.php>

[136] Ibid.

[137] Reid N., Informal Consultations: a Summary, *Global Policy Forum* <http://www.globalpolicy.org/security-council/32943.html>. See also: Working Methods Handbook, Security Council Handbook Glossary <http://www.un.org/en/sc/about/methods/glossary.shtml>

[138] Kenya, Chronology of Events, May 2013, *Security Council Report* <http://www.securitycouncilreport.org/chronology/kenya.php>; Security Council reject's Kenya's request on ICC, *Diaspora Messenger,* 28 May 2013 <http://diasporamessenger.com/security-council-rejects-kenyas-request-on-icc/>

[139] Moss, n.83, p.11.

[140] S/PV.7060, 15 November 2013.

[141] E.g. Guatemala, ibid, p.3.

[142] African Union urges united stand against ICC, *Al Jazeera,* 1 February 2014 <http://www.aljazeera.com/news/africa/2014/02/african-union-urges-united-stand-against-icc-20142111727645567.html>

that the UNSC did not provide an unequivocal and conclusive reply on the matter. Nevertheless, Kenya's interaction with the UNSC in respect of the ICC proceedings demonstrates that the UNSC is in a position to have an impact on the outcome of the cases before the Court, notwithstanding the manner by which the ICC's jurisdiction has been triggered. In essence, the UNSC can 'take away' the ICC's jurisdiction as regards in any ongoing situation around the world.

The UNSC has yet to employ article 16 in respect of active situations before the Court. The wording of article 16 does not prevent such an interpretation. Indeed, such an action might be an appropriate course of conduct on the part of the UNSC under certain circumstances. Nevertheless, the Kenyan situation has highlighted how article 16 can potentially be manipulated not only by powerful non-State Parties in the UNSC but also by the States Parties themselves which are the subject of investigation and prosecution by the ICC.

The Government of Kenya is still opposed to the ICC cases following the termination of proceedings against Kenyatta.[143] In particular, Kenya along with the AU, are pursuing for the termination of the remaining Kenyan cases, in particular the proceedings against Ruto. To this effect, the AU has reiterated its call towards the UNSC to terminate the prosecution of Ruto pursuant to article 16 of the Statute.[144]

5.4.5 Syria

Since the beginning of the conflict in Syria the UNSC, especially the P-5, has been unable to agree upon a course of action in respect of the situation. The stalemate has also extended to the issue as to whether the UNSC should refer the situation in Syria to the ICC. The situation in Syria is not the only situation in relation which to a referral is not forthcoming. Nevertheless, the Syrian conflict is particularly important because it represents more than just a failure by the UNSC to act. Rather, the UNSC's conduct is better characterised as an 'active occasion' of non-referral. In 2014, Russia and China vetoed a draft French resolution backed by all the other members of the UNSC which would have given the Court jurisdiction to investigate the crimes committed in Syria since March 2011.[145] Notably, 58 States issued a letter calling on the UNSC to adopt the proposed resolution.[146] Russia, the most vocal opponent of a potential referral to the ICC has previously stated that a referral would be

[143] *Kenyatta* (ICC-01/09-02/11-1005 1), Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015.
[144] Assembly/AU/Dec.547(XXIV), 24th Ordinary Session, n.86, para.3.
[145] S/PV.7180, 22 May 2014.
[146] Syria: 58 Countries Urge ICC Referral, *Human Rights Watch*, 20 May 2014 <http://www.hrw.org/news/2014/05/20/syria-58-countries-urge-icc-referral>

"ill-timed and counterproductive."[147] On the other hand China has refrained from making a public statement on the issue.

How is the UNSC's inertia in respect of the situation in Syria affecting the ability of the ICC to develop the crimes within its jurisdiction? On the one hand, linking the ICC with the UNSC means that both the successes and/or failures of the UNSC in dealing with a particular conflict have a bearing on any assessment of the Court's performance in this respect no matter how the ICC acted. The Court itself appears to have been growing more sensitive to the UNSC's inconsistent approach towards referrals. The Prosecutor, when discussing the crimes alleged to have been committed by the Islamic State in Syria and Iraq, clarified that the ICC has no relation to a decision of the UNSC to make a referral.[148] This statement puts emphasis on the fact that the Court, which includes both the Prosecutor and the Chambers, can only act within and in accordance with the legal framework of the Statute.

The Court's attitude towards and interaction with the UNSC has been evolving. This is by itself an implicit but clear recognition from the ICC that the UNSC behaviour does have an impact on the ability of the Court to undertake its mandate and on the institution's credibility, legitimacy and very raison d'être, and consequently, on the Court's law-making potential. The UNSC's impact on the ability of the ICC to develop the crimes within its jurisdiction permeates all aspects of the Court's work 'in action.'

The Prosecutor recently decided to downgrade her investigations in Libya, despite the deteriorating situation, because of lack of resources and security considerations. Therefore, what should she do were the UNSC to refer the situation in Syria to the Court? A referral of the situation in Syria which would follow the UNSC's practice of no real follow-up action and of burdening the Court itself with the incurring expenses poses significant challenges for the Court's ability to undertake its mandate and develop ICC crimes. Heller stated that "the Prosecutor should *refuse to* act on any Syria referral unless it is accompanied by the necessary funding."[149] He explains that "an inadequate investigation because of lack of resources" by the OTP would not serve "the interests of justice," in particular of the victims, as it constitutes "a recipe for impunity."[150] According to the 2013 OTP Paper on Preliminary Examinations "it should not be assumed that a referral […] will automatically lead to the opening of

[147] Russia opposes Syria crisis war crimes court referral, *Reuters*, 15 January 2013 <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6N0AKCNB20130115>

[148] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8 April 2015 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx>

[149] Heller K.J., A Few Thoughts on a Syria Referral, *Opinio Juris*, 14 January 2013 <http://opiniojuris.org/2013/01/14/a-few-thoughts-on-a-syria-referral/> (emphasis in original) ('Heller (2013)')

[150] Ibid.

an investigation."[151] The Prosecutor will still need to consider whether there is a reasonable basis to proceed with an investigation under article 53(1)(a)-(c), including whether such an investigation would be in the interests of justice.

The ability of the UNSC to contribute to the development of ICC crimes is undeniable. Nevertheless, the UNSC's conduct has been detrimental for the Court as regards both the referred situations as well as other situations, such as Syria, for which there have been unheeded calls for a referral. The occasions where the UNSC has facilitated the ICC were peripheral and non-politically sensitive. However, the interaction between the ICC and the UNSC has reached a turning point. This is illustrated by the calls to re-define the relationship between the two institutions in section 5.5.1. The way that the relationship evolves, on the basis of the lessons learned so far, will have an impact on the ICC's law-making potential in the future, as a result of the UNSC's referral and deferral role.

5.5 Looking forward

According to Bassiouni "[t]he United Nations has been at the forefront of trying to advance international criminal justice."[152] In particular, the UNSC has played a vital role not only in establishing the various international courts and tribunals but at times also promoting progressive mandates and provisions, even though its intervention was "a statement of policy rather than the state of the law."[153] For example, the ICTR Statute, which was adopted by the UNSC, included violations of AP II "which as a whole, ha[d] not yet been recognized as part of customary international law."[154]

The Statute has provided the UNSC with a permanent and continuous reach in the further development of international criminal justice and international crimes. Below I will assess how the UNSC could influence the 'ICC in action' in the future on the basis of lessons learned and considering the proposals which have been put forward as a means of re-defining the relationship between the two institutions.

5.5.1. Lessons learned: assessing the UNSC's work with the Court to date

During the heated open debate at the time of the adoption of the peacekeeping exemption resolutions a number of State representatives, both UNSC members and non-members, asserted that the UNSC

[151] OTP, Policy Paper on Preliminary Examinations, November 2013 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf>. See also: Trahan, n.1, pp.423-424.
[152] Bassiouni M. C., The Perennial Conflict between International Criminal Justice and Realpolitik, vol.22 *Georgia St.U.L.Rev.* (2006) 541, p.558.
[153] Shraga, n.5, p.172.
[154] Report of the Secretary-General Report to Paragraph 5 of Security Council Resolution 955 (1994), S/1995/134, 13 February 1995, para.12.

was acting *ultra vires* under the UN Charter and that it was violating the terms of the Statute. A distinction should be made between the UNSC acting *ultra vires* under the UN Charter and the UNSC violating/amending the provisions of the Statute. While both aspects affect the ability of the ICC to undertake its mandate and to contribute to the development of the crimes within its jurisdiction, the latter aspect is more directly relevant because it stems from the legal framework established by the Statute. The Court's constitutive instrument sets out the role accorded to the UNSC, which as explained in chapter 1, forms part of the ICC's law-making potential.

The experience with the referral and deferral system to date has demonstrated that inherent within the workings of the UNSC are State-specific problems, especially those pertaining to P-5, as well as wider institutional problems. The borderline along which the UNSC has ventured so far is of being responsible for those 'politicised' prosecutions the ICC has been accused of by its opponents. Thus, in the absence of re-defining the relationship between the ICC and the UNSC, under the Statute or otherwise, there will always be political interferences which will affect the strength of its message.

Calls for reform of the UNSC in the context of situations involving the ICC are an indicator that under its current form the UNSC is not deploying its mandate under the Statute as intended. A pertinent example is the aborted attempt by the Small Five group[155] to put to vote before the UNGA a draft resolution aimed at "enhancing the accountability, transparency and effectiveness of the Security Council."[156] The draft resolution contained a number of recommendations including one which called on the P-5 in "[r]efraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity."[157] France has also supported this course of action.[158] More recently, during an open debate of the UNSC on the institution's working methods, a considerable number of UN member states supported France's proposal to persuade the P-5 "to collectively and voluntarily suspend their use of the veto when a situation of mass crimes was under consideration."[159] According to the French representative "[t]hree times, the Syrian crisis has highlighted an impasse in which the Security Council has found itself when faced with the excessive use of the right of veto."[160]

[155] Switzerland, Costa Rica, Jordan, Liechtenstein, and Singapore.
[156] A/66/L.42/Rev.2, 15 May 2012. See: Switzerland withdraws draft resolution in General Assembly aimed at improving Security Council's working methods to avoid 'politically complex' wrangling, GA/11234, 16 May 2012.
[157] Ibid, recommendation 20.
[158] S/PV.6849, 17 October 2012, p.23 (France.).
[159] S/PV.7285, 23 October 2014, p.24 (France), p.8 (Australia), p.9 (Chile), p.14 (Rwanda), p.17 (Lithuania), p.19 (Luxembourg), p.26 (Switzerland), p.29 (Costa Rica), p.30 (Liechtenstein); S/PV.7285 (Resumption 1), 23 October 2014 ('S/PV.7285 (Res.1)'), p.7 (Sweden), p.8 (Mexico), p.9 (Netherlands), p.10 (Italy), p.11 (Pakistan), p.15 (Uruguay), p.17 (Estonia), p.22 (Malaysia), p.24 (Peru), p.26 (Maldives), p.27 (Bosnia and Herzegovina), p.28 (Ireland), p.32 (Côte d'Ivoire), p.32 (New Zealand), p.33 (Botswana), p.35 (Poland), p36 (Ukraine), p.37 (Montenegro).
[160] Ibid.

5.5.2. Way forward: re-assessing the UNSC's relationship with the Court

The Guatemalan UNSC presidency convened in October 2012 the first open debate "to examine how the relationship between the two bodies has developed over the past decade and, more important, to consider the way forward in strengthening their linkages."[161] It provided an opportunity to a large number of participating States to air their views as to the main problems and achievements in the relationship between the ICC and the UNSC so far and to make recommendations for the future. Going through these statements gives one an idea as to the issues which have mostly affected the ICC's work to date.

A large number of States recommended consistent and full cooperation between States and the ICC, including situations referred by the UNSC.[162] A central aspect in this regard was the prompt execution of arrest warrants.[163] Particular mention was made to the lack of implementation of arrest warrants in relation to the Darfur situation.[164]

The UNSC was widely criticised for not following-up on its referrals, particularly instances of non-cooperation, "behaving as if referral was an end in itself."[165] The Council was urged to follow up closely and consistently cases arising out of referrals[166] and to "actively take note of such a breach of States' obligation to cooperate and clearly express its views on the matter."[167] The UNSC was advised to use the sanction mechanisms in its interactions with the Court.[168]

The idea of a more formalised interaction between the Court and the Council was put forward to "avoid using informal mechanisms and arrangements that run the risk of bypassing transparency or control and open the way to arbitrariness."[169] For example, the UNSC could establish a committee or working group on the ICC to better monitor the relations between the two institutions, thus systemising cooperation and follow-up.[170]

[161] S/2012/731, Concept Note: Open debate of the Security Council on "peace and justice, with a special focus on the role of the International Criminal Court," 17 October, 1 October 2012, para.6.
[162] S/PV.6849, n.158, p.24 (UK); S/PV.6849 (Resumption 1), 17 October 2012, p.11 (Slovenia), p.11 (Argentina), pp.21-22 (Mexico), p.29 (Austria) ('S/PV.6849 (Res.1)').
[163] S/PV.6849 (Res.1), ibid, p.8 (Mr. Thomas Mayr-Harting (Head of the Delegation of the European Union to the United Nations).
[164] Ibid, p.8 (USA), pp.18-19 (Germany).
[165] Ibid, p.16 (South Africa). See also: S/PV.6849 (Res.1), n.162, p.17 (Lesotho).
[166] S/PV.6849 (Res.1), ibid, p.4 (Brazil), p.11 (Slovenia), pp.16-17 (Costa Rica), p.20 (Switzerland), p.31 (Czech Republic).
[167] S/PV.6849, n.158, p.19 (Germany).
[168] See statement of Ms. Intelmann (Estonia) speaking in her capacity as President of the Assembly of States Parties, S/PV.6849, ibid, p.28. See also: S/PV.6849 (Res.1), n.162, p.7 (Australia), p.17 (Costa Rica).
[169] S/PV.6849, ibid, p.22 (Togo).
[170] S/PV.6849, ibid, p.22 (Togo), p.28 (Estonia); S/PV.6849 (Res.1), n.162, p.5 (New Zealand), p.14 (Lithuania), p.17 (Costa Rica), p.24 (Spain).

The issue of financing trials arising out of referrals was a recurrent issue during the debate. Many States took the view that these costs should be borne by the UN.[171] The then-President of the ICC, Judge Sang-Hyun Song, expressed the concern shared by many ICC States Parties about the financial implications of referrals stating it would be difficult to sustain a system where the costs are met exclusively by these States.[172]

The Libya and Darfur referrals were mentioned as examples where the UNSC appropriately invoked article 13 of the Statute.[173] Still, the UNSC by adopting different tactics for similar conduct had made the ICC a target to accusations of politicisation and manipulation by powerful non-States Parties.[174] Language in both referrals which exempted from the ICC's jurisdiction nationals from non-States Parties to the ICC participating in peacekeeping missions in situation countries was also criticised in this context.[175] Therefore, "the observance by the Council of certain conditions when referring a case" was proposed as a way to avoid accusations of double standards and selectivity and to develop a coherent approach to referrals.[176]

The representative of Tanzania made an appropriate appeal to the UNSC in relation to past attempts to invoke article 16 of the Statute. The UNSC was urged "to be more transparent by providing clear explanations to States that request deferrals. That would enhance cooperation and help offset some of the negative discourse against the ICC."[177] Putting in place consistent parameters would demonstrate that its decisions to (not) defer situations are not arbitrary.[178] Participants seemed to focus on the inappropriate involvement or non-involvement of the UNSC in the affairs of the ICC which did not respect the spirit and letter of the Statute and undermined its independence. There was widespread concern about the situation in Syria with many participating States supporting a UNSC referral to the ICC.[179]

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[171] S/PV.6849, ibid, p.10 (Colombia), p.14 (Portugal), p.16 (South Africa), p.19 (Germany), p.27 (Finland), p.28 (Estonia), p.29 (Peru); S/PV.6849 (Res.1), ibid, p.4 (Brazil), p.16 (Costa Rica), p.17 (Lesotho), p.20 (Switzerland), p.21 (Belgium), p.31 (Czech Republic). For an opposite view see statement of American representative, S/PV.6849, ibid, p.9.

[172] Judge Sang-Hyun Song, President of the International Criminal Court, Remarks at United Nations Security Council Open Debate: "Peace and Justice, with a Special Focus on the Role of the International Criminal Court," 17 October 2012, p.4 <http://www.icc-cpi.int/NR/rdonlyres/EED16C4A-2A29-4B17-83C3-94F898335E59/285016/121017ICCPresidentremarkstoUNSCFINAL.pdf>. According to Jessberger and Geneuss, "in the budget for 2012 the expenses for the investigation of the situation in Libya are estimated to amount to 7.2 million euros," n.38, p.1092.

[173] S/PV.6849, n.158, p.18 (Germany), p.22 (France), p.24 (UK), p.26 (Luxemburg); S/PV.6849 (Res.1), n.162, p.24 (Spain), p.11 (Czech Republic).

[174] S/PV.6849, ibid, p.11 (India); S/PV.6849 (Res.1), ibid, p.2 (Liechtenstein), p.30 (Ecuador).

[175] S/PV.6849, ibid, p.16 (South Africa); S/PV.6849 (Res.1), ibid, p.3 (Liechtenstein); p.5 (New Zealand).

[176] S/PV.6849 (Res.1), ibid, p.4 (Brazil). See also: S/PV.6849 (Res.1), ibid, p.17 (Lesotho), pp.16-17 (Costa Rica).

[177] Ibid, p.19 (Tanzania).

[178] Ibid, p.27 (Chile).

[179] S/PV.6849, ibid, p.9 (USA), p.23 (France), p.24 (UK), p.27 (Finland); S/PV.6849 (Res.1), n.158, p.6 (Australia), p.7 (Japan), p.11 (Slovenia), p.15 (Uruguay), p.20 (Switzerland), p.28 (Austria), p.31 (Netherlands).

The move "[t]owards a more principled relationship"[180] between the ICC and the UNSC and the elaboration of "parameters and best practices"[181] is not a purely academic matter. It has immense relevance in practice on the ability of the ICC to conduct its mandate and consequently to develop the crimes within its jurisdiction. In 23 October 2014 the UNSC conducted a debate on the UNSC's "working methods."[182] The participants were invited to discuss "the establishment of a mechanism to demonstrate the Security Council commitment to an effective follow-up of its referrals to the Court."[183] The vast majority of the 55 participants, some of which represented regional blocs and organisations, were in favour of a more responsible follow-up by the UNSC.[184] Indeed, the general impression that comes out of the participants' statements is that "the link between the Council and the ICC demands a fresh look and new ideas."[185]

5.6 Conclusion

In assessing the UNSC's influence on the development of crimes by the ICC it was necessary to comprehend that the role given to the UNSC enhances the ICC's crucial place as an actor on the supranational level. Fletcher and Ohlin have concluded that the ICC is best understood as two distinct courts in one.[186] On the one hand, when acting pursuant to State referrals, or under the prosecutor's *proprio motu* powers the ICC is an independent judicial body. On the other hand, when acting pursuant to a UNSC referral the Court becomes a different entity, subject to a different jurisdictional regime and, at least in theory, a different funding system.[187] Thus, cases emanating from UNSC referrals are placed on a separate judicial track.[188]

In essence, as a result of articles 13(b) and 16 "the UNSC seems to be something in between a "triggering institution" and a "gatekeeper institution". On the one hand, it promotes investigations and, on the other, can stop them based on concerns of security."[189] Has the UNSC acted in accordance with the provisions' intended purpose? The role accorded to the UNSC is in tension with the Court, whose

[180] Moss, n.83, p.1. The author sets outs a list of suggestions in relation to UNSC. See: ibid, p.13.
[181] Trahan, n.1, p.417. The author sets out in Appendix A her conclusions and recommendations.
[182] S/PV.7285, n.159; S/PV.7285 (Res.1), n.159.
[183] S/2014/725, Concept paper: Open Debate of the Security Council on the theme "Working methods of the Security Council", 23 October 2013, 8 October 2014, p.7.
[184] S/PV.7285, n.159, p.7 (Republic of Korea), p.8 (Australia), p.9 (Chile), p.13 (Nigeria), p.15 (Rwanda), p.17 (Lithuania), p.19 (Jordan), p.20 (Luxembourg), p.22 (UK), p.23 (France), p.25 (Argentina), p.26 (Switzerland), p.30 (Liechtenstein), p.31 (Japan); S/PV.7285 (Res.1), n.159, p.3 (Romania), p.4 (Guatemala), p.5 (Brazil), p.7 (Sweden), p.8 (Mexico), p.9 (Netherlands), p. 10 (Italy); p.11 (Germany), p. 12 (Pakistan), p.15 (Uruguay), p.16 (Czech Republic), p.17 (Estonia), p.18 Portugal), p.24 (Spain), p.27 (Bosnia and Herzegovina), p.33 (Botswana), p.35 (Poland), p.38 (Hungary).
[185] S/PV.7285, ibid, p.17 (Lithuania).
[186] Fletcher G. P. and Ohlin J. D., The ICC – Two Courts in One?, vol.4 *JICJ* (2006) 428, p.429.
[187] Ibid.
[188] Ibid, p.432.
[189] Aloisi, n.4.

fundamental goal as a criminal court *senso stricto* is to prosecute individual suspects.[190] The Statute gives a unique role to UNSC, as a political body, to refer and defer cases to the ICC. This relationship between the two institutions is influential in itself, within its defined legal parameters - on the further development of international crimes.

The political dimension of the UNSC's role under the Statute was never in doubt. This chapter explored whether this has unduly undermined the Court's work. Significantly, the impact of the UNSC is not limited to the legal parameters of its institutional role; accumulated experience so far has demonstrated that equally important is how this delicate relationship between them is being implemented in practice. The UNSC's role under the Statute, more so than any of the other factors which contribute to the ICC's law making-potential, as these have been elaborated in chapter 1, permeates *all* aspects of the Court's work in practice. While the UNSC has no direct impact on the interpretation and development of the crimes within the Court's jurisdiction it has a profoundly direct influence with what I have referred throughout as the 'ICC in action.'

The UNSC referrals have "*de facto* helped create the basis for the enforcement of a selective justice—one in which individuals may not be indicted, states may not cooperate, and crimes may not be investigated."[191] Notably, until recently the UNSC had not taken any position as to whether itself to have an obligation to follow-up on its referrals.[192] On 12 February 2013, the UNSC "expresse[d] its commitment to an effective follow up of Council decisions"[193] in a presidential statement. On the other hand, the employment of article 16 to shield certain categories of individuals from the Court's jurisdiction "establishes a distinction between individuals from states parties and third states not provided for under jurisdictional regime of the ICC."[194] The peacekeeper exemption resolutions, reinsert the element of State consent as a prerequisite for the exercise of the Court's jurisdiction. This distinction goes against the spirit and letter of the Statute which has accorded to the UNSC, an inherently political body, an all-empowering role for the purpose of achieving and not undermining universal justice. Both referrals contained elements which rendered them political at the expense of impartial and independent justice.[195]

What are prospects for future referrals? The UNSC's referral record shows that "the likeliest course is that the Security Council will only make future referrals in extraordinary circumstances" such as those

[190] Jessberger and Geneuss, n.38, p.1091.
[191] Aloisi, n.4, p.164.
[192] Trahan, n.1, p.465.
[193] S/PRST/2013/2, 12 February 2013, para.9.
[194] Stahn, n.19, p.102.
[195] Aloisi, n.4, pp.160-164.

witnessed in Darfur and Libya.[196] Therefore, "the problem of Security Council referrals continues to be under-inclusiveness rather than over-inclusiveness."[197] This issue also relates to the support, or the lack of it, given to the ICC by the UNSC in the aftermath of referrals. In this respect, the overall assessment as to how the UNSC has contributed to the development of ICC crimes is not encouraging. At the same time, the experience gained from the two referrals has shown that the relationship between the ICC and the UNSC is not constant and that the ICC will not always be a passive receptor of UNSC referrals. Moreover, the way this relationship has been evolving, as well as the widespread calls about to improve it, has provided clear signs as to what is needed so that the UNSC actually performs the privileged role accorded to it under the Statute, according to which it can contribute immensely to the development of ICC crimes.

[196] Moss, n.57, p.12.
[197] Ibid.

Chapter 6: The ICC in Action – Part I

Action 'within' the ICC

6.1 Introduction

This chapter examines the practice of the Court and how this may develop the crimes within its jurisdiction. For the purposes of this chapter the Court refers to the Chambers – the PTC, the TC and the AC – and the OTP. The work of the Court in practice consists of numerous stages. They begin with an assessment on the part of the Prosecutor to initiate a preliminary examination and end with the enforcement of a sentence against a convicted person or his/her release from custody if acquitted.

Following the establishment of the ICC the interaction between the Chambers and the OTP is the main avenue via which the Court develops the crimes within its jurisdiction. Their work determines which individuals are to be tried before the Court, the charges against them, and eventually, the outcome of the proceedings, the substantive law scope of the decision and the interpretation of the crimes. This chapter explores how the Chambers and the OTP in carrying out their mandate, impact on the interpretation of the crimes.

I will examine how the Chambers have responded to the Prosecutor's work and the extent to which they have influenced it and have been influenced by it. I will assess how the Chambers have been able to work side-by-side an independent Prosecutor with *proprio motu* powers, and the extent to which, if any, they have interfered with the Prosecutor's mandate. When looking at the Chambers it will be necessary to distinguish between them in view of their different functions under the Statute and their role at each particular stage in the proceedings. In this respect, it is significant to consider to what extent the PTCs in interpreting their pre-trial mandate under the Statute determine the subject-matter of the trial and the TCs' interpretation of the crimes.[1] The establishment of a Pre-Trial Division has meant that the interaction between the Chambers and the OTP is well under way before the beginning of the trial stage.

The selection of cases for prosecution may be the greatest challenge to be faced by international bodies.[2] In the context of the ICC, this issue has been amplified by the non-situation specific character of the Court. As a result of the ICC's potentially universal reach "more difficult choices have to be

[1] Nerlich V., The Confirmation of Charges Procedure at the International Criminal Court, vol.10(5) *JICJ* (2012) 1339, pp.1349-1351.
[2] Schabas W., *Unimaginable atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012), p.4.

made and selectivity plays an important role. The function of the court, and its legitimacy, stand and fall with such decisions."[3] The complexities entailed are demonstrated by the fact that a paper on case selection by the OTP is still pending after all these years.[4] Within a selected case, the starting point of my inquiry is on the crimes chosen (or not chosen) by the OTP to form part of the charges and how the charges are actually formulated. The manner in which the Chambers choose to act in relation to a particular case (and a situation when this is relevant) is largely determined by what is brought before them by the Prosecutor during the confirmation process, which is adversarial in nature.[5] The Chambers' law-making potential in the first instance refers to the interpretation of the statutory formulations of the crimes. However, as discussed in this chapter the Court's early case-law has revealed a number of other issues which may equally affect the development of the crimes. Notably, these have often included the controversial application of regulation 55 of the Regulations of the Court on a number of occasions by the TCs. Regulation 55 is thoroughly discussed in section 6.3.

It is significant to understand the meaning of regulation 55 and its application in the diverse situations where it was invoked in order to assess its impact on the outcome of proceedings and the development of ICC crimes. Some of the other issues to be discussed have also arisen in the context of regulation 55. Nevertheless, they will be discussed separately in order to analyse properly their impact on the development of ICC crimes. These include: the practice of prosecuting WC in the alternative (that is prosecuting the same conduct irrespective of the nature of the conflict); the Chambers' approach towards the perceived deficiencies in OTP investigations; the modes of liability and their impact on the nature of the crime prosecuted; the importance of confirmation decisions in the interpretation of the crimes; and lastly, the PTCs' rejection of cumulative charging.

The issues to be discussed are predominantly unique and particular to the ICC. Their significance is two-fold. They can determine the outcome of the proceedings in any given situation and/or case and the interpretation accorded to the crimes. At the same time, they relate to the quality of the judicial reasoning and they have an impact on the legitimacy of the ICC case-law. The comprehensiveness and legitimacy of a given decision affects the weight accorded to the findings included therein in terms of clarifying and developing the crimes within the Court's jurisdiction. As discussed in previous chapters, while the "precedential value" of judicial decisions by international courts and tribunals can

[3] Ambos K. and Stegmiller I., Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?, vol.59(4) *CLSC* (2013) 415, p.416.
[4] OTP, Policies and Strategies <https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx> ('OTP Policies and Strategies')
[5] Nerlich, n.1, p.1342. See also: Rome Statute of the International Criminal Court, article 61(3)-(5) <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> ('Rome Statute'); Regulations of the Court, ICC-BD/01-03-11, regulation 52 ('Court Regulations'); Rules of Procedure and Evidence rule 121(3) & (4) <https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf> ('RPE')

be considerable, it is not assumed; rather, it depends among others on the quality of the judicial decisions.[6]

I start my discussion by examining the OTP's strategy and policy papers to date. These papers are significant because they reflect the Prosecutorial Strategy[7] on the basis of which individuals and charges are selected. Moreover, following the evolution of the Prosecutorial Strategy over the years provides a crucial signpost for the Court's growing jurisprudence. In considering the work of the OTP I have decided to split my discussion in two parts. In the first place, I will discuss the earlier OTP strategy (section 6.2) before proceeding to examine in practice the interaction between the Chambers and the OTP (sections 6.3-6.10). Thereafter, I will assess the latest change in Prosecutorial Strategy in October 2013 (section 6.11), which arguably marked, at least in theory, the most significant deviation to date. It reflects that the law-making potential of the ICC 'in action' is not immutable and can fluctuate, depending on how the Chambers and the OTP perceive and carry out their mandate, and consequently, how they respond to each other's work.

6.2 Office of the Prosecutor – Formulation of Prosecutorial Strategy

It is necessary to consider the Prosecutor's strategy in order to understand the OTP's approach to the selection of particular situations, cases, suspects and eventually crimes charged. Significantly, the OTP is the organ which is foremost responsible (at least according to the terms of the Statute) as to which crimes are to be adjudicated, interpreted and thus developed by the ICC Chambers.

The OTP addressed a number of issues in its first Policy Paper which was published in 2003 prior to the opening of any investigations. As a general rule it stated that the OTP investigations and prosecution should focus "on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes."[8] The Office would extend its attention beyond high-ranking officers "if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case."[9]

[6] ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, London Conference (2000), Principle 10, pp.18-19.
[7] Regulations of the Office of the Prosecutor regulation 14 <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Regulations+of+the+OTP.htm> ('OTP Regulations').
[8] OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003, p.7 <http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf>
[9] Ibid.

The Office's first Report on Prosecutorial Strategy set out its principles, which included "focused investigations and prosecutions."[10] In this respect it stated that it had adopted "a "sequenced" approach to selection, whereby cases inside the situation are selected according to their gravity."[11] According to the Office the following factors are relevant in assessing gravity: "the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes."[12] The incidents will be selected on the basis of providing a representative sample of the gravest incidents and main types of victimisation.[13]

My discussion on the interaction between the OTP and the Chambers will start with regulation 55 in the context of which a number of the issues discussed in the subsequent sections arose.

6.3 Regulation 55

In 2004, the judges adopted by absolute majority the Regulations of the Court, which are "necessary for its routine functioning."[14] Regulation 55 grants the TC the authority, in its decision under article 74, to change the legal characterisation of facts or the mode of liability "without exceeding the facts and circumstances described in the charges."[15] Moreover, the regulation provides "at any time during the trial," if it "appears to the Chamber that the legal characterisation of facts may be subject to change," for the TC to give notice to the participants of such a possibility.[16]

I next turn to the most significant examples which involved the application of regulation 55. This will provide in the first place a comprehensive analysis of the interpretation accorded to the provision by the Chambers. Secondly, my discussion will illustrate the different contexts and consequently the numerous ways by which regulation 55 may impact the outcome of the proceedings.

6.3.1 Lubanga

The application of regulation 55 highlighted early on, in the *Lubanga* case, the 'power struggle' not only between the Prosecutor and the Chambers, but also between the Chambers themselves, in what

[10] OTP, Report on Prosecutorial Strategy, 14 September 2006, p.5 <http://www.fidh.org/IMG/pdf/OTPProsecutorialStrategy_2006-2009.pdf> ('Three Year Report (2006)').
[11] Ibid.
[12] Ibid.
[13] Ibid, pp.5-6.
[14] Rome Statute, n.5, article 52.
[15] Court Regulations, n.5, regulation 55(1).
[16] Ibid, regulation 55(2).

they considered should be the parameters of a given case, and who had the final say in this respect. This was reflected in their differing opinions as to what the content of the charges should be and how they interpreted the legal texts of the Court in order to substantiate their position.

In *Lubanga,* regulation 55 was invoked on two occasions during the trial. Firstly, by the legal representatives of the victims who sought a legal re-characterisation of the facts, and secondly, by the TC in re-classifying the conflict when rendering its judgment. These will be considered turn.

6.3.1.1 Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55

Article 61(9) of the Statute provides that once the trial has commenced the Prosecutor may only withdraw charges, with the permission of the TC. Other than that, neither the Statute nor the RPE provide for any authority on the part of the Chambers or the Prosecutor to amend the charges. Despite the (lack of a) statutory framework the Chambers have amended charges after the initiation of trial proceedings with the application of regulation 55. The regulation was interpreted for the first time in *Lubanga.*

The regulation was initially invoked by the victims' legal representatives. They filed a request before the TC seeking a legal re-characterisation of the facts. They submitted that the existing charges should be supplemented to include sexual slavery (both as a WC and a CaH) and inhuman and/or cruel treatment (as a CaH). They based their submission on the numerous evidence raised during the presentation of the prosecution's case which attested to the subjection of child conscripts to the aforementioned crimes.[17]

The majority found that the "legal characterisation of the facts may be subject to change."[18] It submitted that a legal re-characterisation at the decision stage is limited to the facts and circumstances described in the charges.[19] However, such a limitation does not concern regulation 55(2) which may

[17] *Lubanga* (ICC-01/04-01/06-1891-tENG), Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, 22 May 2009, paras 15, 32-34.
[18] *Lubanga* (ICC-01/04-01/06-2049), Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009, para.33.
[19] Ibid, para.28.

also be applied at any time during the trial.[20] Judge Fulford, dissenting, argued that the addition of new charges requires a new confirmation hearing pursuant to article 61(9).[21]

The AC unanimously upheld the legality and compatibility of regulation 55 with the Statute. It stated that to hold otherwise, "bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect."[22] Article 61(9) was found not to be inherently incompatible with regulation 55 as they "address different entities at different stages of the procedure."[23] Hence, the AC dismissed arguments that regulation 55 is *ultra vires* as it does not involve a 'routine function' of the Court. However, as discussed below, the main criticisms pertaining to regulation 55 arise from its interpretation and application rather than its existence.[24]

The AC found that the TC's decoupled approach was at odds with the text of article 74(2) whose purpose was "to bind the Chamber to the factual allegations in the charges."[25] Nevertheless, it concluded that article 74(2) does not exclude a modification of the legal characterisation of the facts and circumstances.[26]

While granting such a power to the TC appears to be justified, it is still the case that no such option is explicitly provided for in the Statute. Moreover, the statutory framework is clear as to when a charge may be amended. Georgios Pikis, former ICC judge, has argued that since the provision relates to the legal re-characterisation of facts "this is not equivalent to the amendment of a charge, importing the commission of a crime other than the one charged."[27] Similarly, Stahn argues that a change to the legal characterization of facts does not amend the charges given that the factual component is not changed. Further, he clarifies that this interpretation is implicitly recognised by the wording of article 74(2) which distinguishes between "the charges" and the "facts and circumstances described in the charges."[28] Consequently, the TC is only bound by the facts and circumstances in the charges. Thus,

[20] Ibid, para.31.
[21] *Lubanga* (ICC-01/04-01/06-2069-Anx1), Second Corrigendum to "Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009," 31 July 2009, para.13.
[22] *Lubanga* (ICC-01/04-01/06-2205), Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," 8 December 2009, para.77 ('Judgment on Regulation 55(2) of the Regulations of the Court').
[23] Ibid, para.77.
[24] Heller K.J., A Stick to Hit the Accused With: The Legal Recharacterisation of Facts Under Regulation 55, *SSRN*, 23 May 2014, pp 3-4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370700> ('Heller – Regulation 55').
[25] Judgment on Regulation 55(2) of the Regulations of the Court, n.22, paras 89-91.
[26] Ibid, para.93.
[27] Pikis G.M., *The Rome Statute of the International Criminal Court* (Martinus Nijhoff Publishers 2010), pp141-2.
[28] Stahn C., Modification of the Legal Characterization of the Facts in the ICC System: a Portrayal of Regulation 55, vol.16 (2005) *CLF* 1, pp.16-17 ('Stahn (Regulation 55)').

the adoption of regulation 55 did only "crystallize and refine" a power already implanted in article 74(2).[29]

Despite the above analysis, it is difficult to accept that a modification of the crime does not constitute an amendment of the charge or that at the very least does not contradict article 61(9) of the Statute.[30] This is substantiated by the approach taken so far by the PTCs in confirming the charges. The Statute and the RPE do not provide a definition of a 'charge.' However, regulation 52 of the Regulations of the Court refers to the Document Containing the Charges ('DCC') and specifies that it will include a "statement of the facts" together with their legal characterisation (crimes plus mode of participation). It appears that the Chambers have followed this format during the confirmation proceedings. Hence, regulation 55 is an example of judicial law-making in the form of secondary legislation, as it must be consistent with the Statute and the RPE, which has empowered the TCs to amend the legal characterisation of the charges – and consequently the interpretation of the crimes - right up to the decision stage.

Even though the AC has pursued a more conservative approach than the TC its interpretation of regulation 55 is still a broadly teleological one. This view is supported by the AC's finding that "a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute."[31] Moreover, in deciding that regulation 55 did not violate article 52 of the Statute, the AC noted that while the term "routine functioning" has not been defined in the Statute or the RPE, it has been characterised as a "broad concept" which also related to issues of "practice and procedure."[32] On the other hand, the AC decision indicated that regulation 55 is "not an avenue for circumventing the charging document" and in this respect it is a victory for the Prosecutor.[33]

Jacobs takes the view that the practice of the Chambers in relation to the charges "especially the adoption of Regulation 55, essentially shifts the balance away from an adversarial approach to an inquisitorial approach to international criminal procedure."[34] It may be discerned, from the early case-law that the PTC at the confirmation of charges, and the TC via regulation 55, "have increased their

[29] Ibid, p.31.
[30] Heller – Regulation 55, n.24, p.5.
[31] Judgment on Regulation 55(2) of the Regulations of the Court, n.22, para.77 (footnote omitted).
[32] Ibid, para.69 (citing Behrens H.-J. and Staker C., Article 52 – Regulations of the Court in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn Beck/Hart 2008), pp. 1053 et seq., at margin number 11.
[33] Senier A., The ICC Appeals Chamber Judgment on the Legal Characterisation Facts in *Prosecutor v. Lubanga:* A Commentary, *The Hague Justice Portal*, p.9 <http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Senier_Lubanga_EN.pdf>
[34] Jacobs D., A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court? in Schabas W.A. *et al.* N. (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate 2013), p.216 ('Ashgate Research Companion').

control over the charges beyond what was initially envisioned by the Statute."[35] The intent of the drafters was to reserve procedural law-making to the States Parties. Thus, the Statute restricted judicial law-making to the drafting of the regulations. Given that the Court Regulations are subordinate to the Statute and the RPE it was considered that they "cannot meaningfully alter the procedural law of the ICC."[36] The Court's early case-law points to the contrary conclusion. Regulation 55 has already been applied in a number of cases. These will be discussed below to illustrate the many ways by which this provision can affect the outcome of the proceedings as well as the very scope and content of the charges.

6.3.1.2 Re-classification of the conflict

Shortly after the confirmation of charges against Lubanga the TC gave notice under regulation 55 that the legal characterisation of the facts may be subject to change. Thus, the parties were instructed to "prepare their cases on the basis that the Bench may decide that the […] charges encompass both international and internal armed conflicts."[37] This early notice is to be contrasted below with the notice given in *Katanga* during the deliberations stage. To this effect, in convicting the defendant the TC applied regulation 55 and changed the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international.[38] This issue will be analysed further in section 6.4 which deals with the OTP's and the Chambers' practice of oscillating as to the nature of the conflict when dealing with WC which are considered identical under either scenario.

6.3.2 Bemba

In confirming the charges against the defendant, the PTC determined that Bemba had "knew" that his forces were committing or were about to commit the crimes.[39] Two years after the beginning of the trial the TC gave notice under regulation 55(2) of a possible change to the mental element under article 28(a)(i), namely that the defendant "should have known" that his forces were committing

[35] Ibid, p.220.
[36] Sluiter G., Procedural Lawmaking at the International Criminal Tribunals in Darcy S. and Powerly J., *Judicial Creativity at the International Criminal Tribunals* (OUP 2010), p.321.
[37] *Lubanga* (ICC-01/04-01/06-1084), Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, para.49 ('*Lubanga* Decision on the status of the evidence').
[38] *Lubanga* (ICC-01/04-01/06-2842), Judgment pursuant to Article 74 of the Statute Lubanga Judgment, 14 March 2012, para.566 ('Lubanga Judgment').
[39] *Bemba* (ICC-01/05-01/08-424), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para.478 ('Bemba Confirmation Decision').

crimes.[40] The Defence protested stating that it prepared its case on the basis of one theory of liability and that it "never prepared for or sought to meet an alternative theory of liability (nor was it required to)."[41] The TC suspended the trial proceedings in order to ensure that the Defence was given adequate time and facilities for the effective preparation of its case whilst also ensuring that the trial is fair and expeditious.[42]

Ultimately the Defence informed the Chamber that it did not intend to conduct any further investigation requesting for the trial to recommence as soon as possible.[43] The Defence cited lack of resources for further investigations and the questionable level of State cooperation on the part of both DRC and the CAR.[44] At the same time, the Defence maintained that the proposed re-characterisation would "result in manifest unfairness and actual prejudice" to the defendant.[45]

It is difficult to see how the proposed re-characterisation "is not a substantial departure from the findings in the confirmation decision."[46] It has certainly made it easier for the OTP to obtain a conviction since the re-characterisation of the mental element would involve proving that the defendant should have known instead of that he actually knew that his troops were committing the alleged crimes.[47]

6.3.3 Katanga

Upon examining the evidence it appeared to the majority that Katanga's mode of participation under article 25(3)(a) is likely to be changed to that under article 25(3)(d).[48] Thus, it proceeded to inform

[40] *Bemba* (ICC-01/05-01/08-2324), Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 21 September 2012. See also: Heller – Regulation 55, n.24, p.24.
[41] *Bemba* (ICC-01/05-01/08-2365-Red), Defence Submissions on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, 18 October 2012, para.43.
[42] *Bemba* (ICC-01/05-01/08-2480), Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, 13 December 2012.
[43] *Bemba* (ICC-01/05-01/08-2490-Red), Defence Motion to Vacate Trial Chamber's "Decision on the temporary suspension of the proceedings" of 13 December 2012 and Notification Regarding the Envisaged RE-qualification of Charges Pursuant to Regulation 55, 28 January 2013, para.24.
[44] Ibid, para.18.
[45] Ibid, para.9.
[46] *Bemba* (ICC-01/05-01/08-2334), Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court, 8 October 2012, para.3.
[47] Heller – Regulation 55, n.24, pp25-26.
[48] *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-3319-tENG/FRA), Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, paras 6-7 ('Decision severing charges'). The decision did not affect the mode of liability in relation to the charges referring to the use of children under the age of fifteen years to participate actively in hostilities.

the parties as to the application of regulation 55. The proposed change related only to Katanga. Thus, the decision also severed the charges against the two accused, Katanga and Njudgolo.[49]

The judges acknowledged that the proceedings are "at a very advanced stage" and proceeded to assess the compatibility of applying the regulation with the right to a fair trial.[50] Following a literal reading of regulation 55 the TC was entitled to take the above decision. Nevertheless, taking into consideration the stage of the proceedings this development is an example of judicial activism in an attempt to ensure a conviction. While it relates to the mode of participation, rather than the crimes themselves and their interpretation, it is not possible to disconnect one from the other. This is particularly so given that article 25(3)(d) requires a lesser form of participation.[51]

Interestingly, the majority underscored that re-characterisation tends to occur when the Chambers are in possession of all the evidence and the submissions of the parties and participants.[52] This approach could signify the frequent implementation of regulation 55(2) whenever the TC considers that a change in the legal characterisation of facts would contribute towards a stronger case against an accused.

The contemplated re-characterisation involved setting aside the common plan to "wipe out" Bogoro village and determining whether Katanga "contributed" in another way to the commission of the crimes by a group of persons (Walendu-Bindi combatants) acting with a common purpose to attack Bogoro.[53] The majority noted that it had "simply extracted a narrative specific to the co-perpetration and the common plan" which existed between the two accused to concentrate only on those facts relevant to Katanga.[54] Thus, it had not exceeded the facts contained in the confirmation decision.

The majority held that the requirement of a "significant and important contribution" under article 25(3)(d) is an integral part of the mode of participation under article 25(3)(a) which requires an "essential" contribution from the accused in committing the crime.[55] The majority's interpretation of

[49] Ibid, para.9.
[50] Ibid, paras 13-14.
[51] In Mbarushimana the PTC interpreted article 25(3)(d) recalling that that it constitutes "a residual form of accessorial liability" encapsulating contributions to crimes that cannot come under article 25(3)(a)-(c) (para.278).The Chamber further reiterated that the level of contribution under article 25(3)(d) cannot be as high as that required under article 25(3)(a) which requires an "essential contribution." (para.279, fn.660) While the PTC acknowledged that not any contribution would give rise to responsibility – bearing in mind among others the issue of gravity – given the provision's residual nature and its focus on group criminality, it found that such contribution "be at least significant." (para.283) (*Mbarushimana* (ICC-01/04-01/10-465-Red), Decision on the confirmation of charges, 16 December 2011 ('Mbarushimana Confirmation Decision')). For an interpretation of the 'hierarchy' between the different modes of liability under article 25 also see: Werle G., 'Individual Criminal Responsibility in Article 25 ICC Statute', vol.5 *JICJ* 953 (2007), p. 957.
[52] Decision severing charges, n.48, para.17.
[53] Ibid, paras 24 & 26.
[54] Ibid, para 31.
[55] Ibid, para.33.

article 25(3) points towards a development according to which, whenever a mode of liability or crime is subsumed in another, regulation 55 might be activated. The TC considered that the modalities under regulation 55(2) and (3) provided protection to the accused for the preparation of his defence even at an advanced stage in the proceedings.[56] Still, it is doubtful whether they could compensate for the fact that the parties argued their case on the basis of another mode of liability.

The majority considered that the parties were fully aware of the existence of regulation 55 because it was mentioned in a previous decision of the Chambers in anticipation, among others, of a possible change in the nature of the armed conflict.[57] Also, it had previously been elaborated by the AC in *Lubanga* case.[58] Both arguments are weak. The shortcomings of these arguments are further exposed by the majority's insistence that Katanga elected of his own free will to testify being fully aware of the existence of regulation 55. Importantly, during his testimony Katanga had conceded that he had knowledge of his subordinates' criminal activities. He had no reason to deny this at the time as he was being prosecuted for common-purpose liability under article 25(3)(a).[59] Heller considers the majority's interpretation of 'free will' as "exceedingly narrow […] which reduces it to the absence of physical coercion."[60] Relatedly, Judge Van Den Wyngaert in her strong dissenting opinion considered that the majority's decision goes well beyond of what is permitted as a reasonable application of regulation 55 and fundamentally undermines the accused's right to a fair trial.[61]

Katanga appealed against the TC decision. The AC concluded that while it would have been preferable to give notice under regulation 55(2) as early as possible, the TC's timing was not automatically incompatible with the regulation or Katanga's right to a fair trial.[62] It was also not immediately apparent that the contemplated legal re-characterisation would exceed the facts and circumstances described the charges. Nevertheless, it stressed that any conclusion on the matter would be premature at this stage, given that the TC had yet to give its interpretation of article 25(3)(d).[63] Importantly, the AC expressed its concern that the decision was given almost six month into the TC's deliberations. While it was not clear that this would result in undue delay the TC would need to be particularly vigilant "to ensure that the proceedings, taken as a whole, are fair and expeditious."[64]

[56] Ibid, paras 38, 55-57.
[57] Ibid, para.52.
[58] Ibid.
[59] Heller – Regulation 55, n.24, p.27.
[60] Ibid, p.31.
[61] Decision severing charges, n.48, Dissenting Opinion of Judge Van Den Wyngaert, para.1.
[62] *Katanga* (ICC-01/04-01/07-3363), Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", 27 March 2013, paras 24 & 94.
[63] Ibid, para.56.
[64] Ibid, para.99.

The TC majority partially granted the Defence's request to conduct further investigations in order to fully safeguard the accused's rights.[65] Subsequently, the Defence submitted that it had found it impossible to conduct further investigations in the DRC due to the deteriorating security situation.[66] On the basis of this development the TC majority proceeded to request the Defence to submit observations on article 25(3)(d) by reason of the existing evidence.[67]

Judge Van den Wyngaert in her dissenting opinion, found it improper to ask the Defence to submit additional evidence on the basis of existing evidence without first determining whether Katanga could "meaningfully defend himself against the charges under article 25(3)(d) without further investigations."[68] In the absence of such a finding the Chamber should not re-characterise the charges and should immediately render judgment on the basis of article 25(3)(a).[69] The dissenting judge expressed the same opinion when the majority convicted Katanga on the basis of the re-characterised charges. In particular, she stated that the application of regulation 55 at such a late stage contravened both article 74 and regulation 55. In doing so "the Majority has substantially exceeded the scope of the facts and circumstances as confirmed by the Pre-Trial Chamber."[70] For this reason alone she considered the judgment invalid as a matter of law.

6.3.4 Ruto

In *Ruto et al*, the OTP formally requested from the TC to give notice under regulation 55(1) in order "to re-characterize the form of individual criminal responsibility pled in relation to Ruto under Articles 25(3)(b), (c) or (d)."[71] Previously, the PTC in confirming the charges against the accused determined that he is responsible under article 25(3)(a).[72]

[65] *Katanga* (ICC-01/04-01/07-3388-tENG), Decision on the Defence requests set forth in observations 3379 and 3386 of 3 and 17 June 2013, 26 June 2013. See in particular paras 21-43 were the TC set out its observations as to whether the topics raised by the Defence necessitated more information.
[66] *Katanga* (ICC-01/04-01/07-3397), Defence Second Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013, 17 September 2013 cited in *Katanga* (ICC-01/04-01/07-3406), Décision relative aux observations de la Défense (document 3397-Conf du 17 septembre 2013), 2 October 2013, para.7.
[67] Ibid, para.18.
[68] Ibid, Dissenting opinion of Judge Christine Van den Wyngaert, para.2.
[69] Ibid, para.5.
[70] *Katanga* (ICC-01/04-01/07-3436-AnxI), Minority Opinion of Judge Cristine Van den Wyngaert, 7 March 2014, para.12 ('Katanga Judgment Minority Opinion').
[71] *Ruto et al* (ICC-01/09-01/11-433), Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, 3 July 2012.
[72] *Ruto et al* (ICC-01/09-01/11-373), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) of the Rome Statute, 23 January 2012, para.349 ('Ruto et al Confirmation of Charges').

Ruto's Defence objected to the Prosecutor's request arguing that it was "too hypothetical" and that it sought "to have the Chamber refer, in a general manner, to the Chamber's capacity to recharacterise."[73] The TC disagreed. Admittedly, the Prosecution was seeking "a broader invocation of Regulation 55" when compared to the application of the provision in the other cases thus far.[74] Nevertheless, regulation 55 contained no limit as the number of prospective re-characterisations which may be contemplated by the Chamber.[75] Hence, the TC granted the OTP's request to give notice that there is a possibility that the mode of participation is subject to change.[76]

6.3.5 Analysis

As discussed above, the selection and formulation of charges is central to the ability of the Court to develop the crimes within its jurisdiction. According to Stahn, regulation 55 represented an attempt, on the part of the judges, "to enhance the efficiency of proceedings through the encouragement of a precise charging strategy from the very beginning of the proceedings."[77] An overview of the ICC case-law brings this view into question. Regulation 55 has been invoked in most of the cases to reach the trial stage and the application of this provision has generated a significant amount of litigation.[78] Notably, "the actual impact of Regulation 55 has been to bring about substantial *delays* in almost every trial that has gone before the ICC to date."[79]

In *Bemba*, the PTC rejected the Prosecutor's approach of pursuing cumulative charges against the accused.[80] The PTC stated that due to the possibility to re-characterise a crime under regulation 55 "there is no need for the Prosecutor to adopt a cumulative charging approach."[81] As discussed in section 6.3.2, long after the trial had commenced, the TC notified the parties under regulation 55 that the accused would have to defend himself not only against that allegation that he "knew" that his subordinates were committing crimes but also that he "should have known" that they were acting in such a manner, despite the decision of the PTC to limit the mode of liability to the former one. Subsequently, in *Ruto*, the accused was placed on notice that he may be convicted under *any* mode of liability under article 25(3). Therefore, while the Chambers have opted not to follow a practice of

[73] *Ruto et al* (ICC-01/09-01/11-442), Defence Response to Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, 24 July 2012, paras.32 & 34.
[74] *Ruto et al* (ICC-01/09-01/11-1122), Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, 12 December 2013, para.40.
[75] Ibid.
[76] Ibid, para.44.
[77] Stahn (Regulation 55), n.28, p.30.
[78] Regulation 55 and the rights of the accused at the International Criminal Court, *War Crimes Research Office*, October 2013, p.43 <https://www.wcl.american.edu/warcrimes/icc/documents/Report17.pdf> ('WCRO Report')
[79] Ibid, p.54 (emphasis in original).
[80] Section 6.8.
[81] Bemba Confirmation Decision, n.39, para.203.

cumulative charges, the application of regulation 55, has enabled the TCs to pursue a practice of alternative charging post-confirmation, especially as regards the mode of liability and to a lesser extent the nature of the conflict.

The Court's case-law to date has shown how this practice can affect the interpretation and development of the crimes themselves. Most notably, in *Katanga* the re-characterisation of the mode of liability revealed the fundamental disagreement between the majority and Judge Van den Wyngaert as regards the assessment of the evidence. As a result, the judgment presented "distinct narratives and assessment of facts."[82] The majority described Katanga as the "President" of the Ngiti militia who had formed the common purpose to attack the Hema civilian population of Bogoro, which formed part of the broader military offensive in Ituri against the UPC.[83] On the contrary, Judge Van den Wyngaert took the view that it had not been established that Katanga had "contributed to a group acting with a common purpose rather than to a legitimate military operation."[84] Moreover, she presented Katanga as "the 'middle man' between Beni and the local Ngiti commanders" whose contribution was too remote from the actual commission of the crimes and thus did not reach the required level of contribution under article 25(3)(d)(ii).[85] Most significantly, the dissenting judge argued that "the Majority has introduced totally new factual elements into the charges under article 25(3)(d)(ii)."[86]

The latest invocation of regulation 55 came in the *Gbagbo* case. The PTC had confirmed that there were substantial grounds to believe that the accused was criminally responsible under article 25(3) of the Statute. Nevertheless, it declined to confirm Gbabgo's responsibility under article 28 because this mode of liability "would require the Chamber to depart significantly from its understanding of how events unfolded in Cote d'Ivoire during the post-electoral crisis and Laurent Gbagbo's involvement therein."[87] In May 2015, the OTP requested from the TC to give notice to the parties under regulation 55 that the legal characterization of facts may be subject to change to correspond with a further mode of liability against the accused, namely article 28.[88] On the basis of the Chambers' practice so far, the TC will grant the Prosecution's request. According to Heller, this practice is gradually rendering the confirmation process irrelevant given that in fact nothing is "confirmed."[89]

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[82] Stahn C., Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment, vol.12(4) *JICJ* (2014) 809, pp.828-829 ('Stahn (Katanga Judgment)').
[83] *Katanga* (ICC-01/04-01/07-3436-tENG), Judgment pursuant to article 74 of the Statute, 7 March 2014, para.1419 ('Katanga Judgment').
[84] Katanga Judgment Minority Opinion, n.70, para.289.
[85] Ibid, paras.302 & 305.
[86] Ibid, para.19.
[87] *Gbagbo* (ICC-02/11-01/11-656-Red), Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, para.265 ('Gbagbo Confirmation Decision').
[88] *Gbagbo and Blé Goudé* (ICC-02/11-01/15-43), Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2), 24 April 2015, para.38.
[89] Heller K.J., Regulation 55 and the Irrelevance of the Confirmation Hearing, *Opinio Juris*, 19 May 2015 <http://opiniojuris.org/2015/05/19/regulation-55-and-the-irrelevance-of-confirmation-hearings/> ('Heller (OJ)')

The Court's limited jurisprudence has demonstrated the 'unlimited' ways by which regulation 55 may be employed to advance the proceedings and secure conviction when this would have been very difficult if not impossible. The starkest example to date is the re-characterisation of the mode of participation in *Katanga.* The discontinuance of the appeal by the defence can only render speculative the AC's view on the matter.[90] Nevertheless, the legally shaky foundations of the *Katanga* judgment, especially in terms of respecting the fair trial rights of the accused, highlighted that the "decisional legitimacy"[91] of the ICC judgments can be undermined by the inappropriate application of regulation 55. Significantly, the ability of the Court 'in action' to develop the crimes within its jurisdiction also depends on the legitimacy of its judgments.

Regulation 55 has assumed a prominent position in the work of the Court so far. As stated above, the main concerns are not about the adoption of this provision; rather, they concern the manner and timing of its application. In this respect, addressing the problems which have arisen so far will impact on the weight accorded to the ICC judgments in terms of clarifying and developing the scope of the crimes. Moreover, it will have an effect on the ability of the PTCs to make their own contribution to the development of the ICC crimes. While the PTCs have shown their willingness to provide elaborate interpretations to the crimes before them,[92] their role in contributing to the substantive law scope of the trial has been challenged by the TCs' use of regulation 55. [93] Even Stahn, a strong proponents of regulation 55 has stated that "the use of the regulation in *Katanga* […] defeats some of the premises of the regulation, namely to reconcile targeted charging and judicial management with fairness towards the defendant."[94]

In the sections below I will go through the other issues identified in the introduction. Notably, a number of them arose in connection with regulation 55.

[90] Defence and Prosecution discontinue respective appeals against judgment in Katanga case (ICC-CPI-20140625-PR1021), Press Release, 25 June 2014 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1021.aspx>. In any case, the appeal's outcome would have lied outside the temporal scope of this thesis.
[91] Powderly J., Distinguishing Creativity from Activism: International Criminal Law and the 'Legitimacy' of Judicial Development of the Law in Ashgate Research Companion, n.34, p.225.
[92] Section 6.7.
[93] WCRO Report, n.78, p.55.
[94] Stahn (Katanga Judgment), n.82, p.829.

6.4 Prosecutor's practice of charging war crimes in the alternative regarding the nature of the conflict

The OTP has repeatedly charged WC in the alternative. For example, in the *Katanga* and *Ngudjolo* case, the Prosecutor submitted that the alleged crimes were associated with an armed conflict, irrespective of whether the conflict could be characterised as international or non-international.[95] He opined that this was the case given that the counts arose from conduct which qualified as a WC, regardless of the nature of the conflict.[96] Despite this assertion the OTP during the confirmation hearing proceedings stressed at all times that the conflict was international.[97] Thus, it was up to the PTC to decide on the nature of the conflict.[98] The Prosecutor's oscillation as to the nature of the conflict became even more evident during the trial stage when he submitted that the conflict was non-international.[99] While the list of crimes that may be committed under article 8 in the context of an IAC is more extensive and elaborate that the equivalent provision for non-international conflicts, the OTP seems to have self-limited the scope of jurisdiction *ratione materiae* at its disposal to those crimes that may be committed in both contexts.[100]

Charging in the alternative or re-characterising the nature of the conflict under regulation 55 where the underlying crimes are the same may lead to insufficient attention as regards elements of the crime which may be distinct under each provision. This is what occurred in *Lubanga.* The defendant had initially been charged by the Prosecutor for child recruitment in a non-international conflict. The PTC issued an arrest warrant in respect of the crime in the context of either an international or non-international conflict.[101] The PTC at the confirmation hearing found that there were two phases in the conflict, the first part being international (due to the involvement of Uganda) and another non-international (following Uganda's withdrawal). Thus, the PTC reclassified the charges, under article 8(2)(b)(xxvi) for the first phase and article 8(2)(e)(vii) for the second phase. The judges decided not to invoke article 61(7)(c)(ii).The Chamber stated that the purpose of article 61(7)(c)(ii) is to protect the rights of the Defence. During the confirmation hearing, the PTC may confirm or decline to confirm charges, or adjourn the hearing in order to request the Prosecutor to *consider* providing further

[95] *Katanga and Ngudjolo* (ICC-01/04-01/07-717), Decision of the Confirmation of Charges, 30 September 2008, para.15 ('*Katanga* and *Ngudjolo* Confirmation Decision'). Also, in the *Mbarushimana* case, PTC I did not find necessary in the arrest warrant decision to determine whether the conflict was international or not given that the conduct in the proposed charges was criminalised irrespectively (Mbarushimana Confirmation Decision, n.51, para.98).
[96] Ibid, para.234.
[97] Ibid, para.235.
[98] Ibid, paras 233-241.
[99] *Ngudjolo* (ICC-01/04-02/12-3-tENG), Judgment pursuant to article 74 of the Statute, 18 December 2012, para.74 ('*Ngudjolo* Judgment').
[100] See chapter 4, section 4.9.1.1.
[101] *Lubanga* (ICC-01/04-01/06-8-US-Corr), Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, para.185 & p.63 ('Lubanga Arrest Warrant Decision').

evidence in relation to a particular charge or to amend a charge.[102] Thus, the PTC may invite the Prosecutor to amend the charges but cannot do so on its own initiative. In the present case the PTC decided that given that both articles criminalise the "same conduct" adjournment of the hearing was not necessary,[103] without clarifying though whether the PTC has the power to amend the charges *proprio motu.*[104] While the Chamber's view is understandable it is not supported by the Statute or its negotiating history.[105] Also, the two provisions may be similar but they are not identical[106] and are technically distinct crimes. Nevertheless, the PTC, and later on the TC in its guilty verdict, adopted a teleological reading of article 61(7)(c) and did not pay sufficient attention to this difference.[107] Namely, for international conflicts the crime speaks about conscription into "the national armed forces" while in non-international conflicts it refers to conscription into "armed forces or groups."

The TC, concluding that the alleged crimes were committed in the context of an internal conflict, found it unnecessary to interpret article 8(2)(b)(xxvi), despite acknowledging the existence of this "one significant difference" between the two provisions.[108] This approach may lead to confusion and in this respect Judge Benito was right to disagree with the majority on this issue. Given that the confirmed charges encompassed both types of conflicts, the parties and participants alike argued their case on this basis.[109] Thus, it was "a live issue" in the present decision to undertake a discussion of the concept of "armed national forces."[110] In particular, the TC needed to address whether the notion encompasses non-State actors.[111] As a consequence of its decision to move to a non-international conflict, the TC avoided "the tricky issue whether paramilitary-like armed groups like the UPC can be equated to 'national armed forces', unconvincingly affirmed by the PTC."[112]

In the next section I will evaluate the perceived shortcomings in the OTP's investigative and prosecutorial performance given the argument that "the ICC's judges have allowed Regulation 55 to metastasise into the ultimate judicial hammer – a one-size-fits-all tool for saving the OTP from its own poor charging decisions and ineffective trial advocacy."[113]

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[102] Rome Statute, n.5, article 61(7)(c).
[103] *Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, 27 January 2007, paras 203-204.
[104] Ambos K. and Miller D., Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective, vol.7 *ICLR* (2007) 335, pp.349.
[105] Ibid, p.359.
[106] Akande D., ICC Delivers its First Judgement: The Lubanga Case and Classification of Conflicts in Situations of Occupation, *EJIL: Talk!*, Mar.16, 2012 <http://www.ejiltalk.org/icc-delivers-its-first-judgment-the-lubanga-case/>
[107] Jacobs, n.34, p.210.
[108] Lubanga Judgment, n.38, para.568.
[109] Ibid, Separate and Dissenting Opinion of Judge Odio Benito, para.12.
[110] Ibid.
[111] Ibid, para.9.
[112] Ambos K., The First Judgment of the International Criminal Court (*Prosecutor v. Lubanga*): A Comprehensive Analysis of the Legal Issues, vol.12 *ICLR* (2012) 115, p.132.
[113] Heller (OJ), n.89.

6.5 OTP investigation

6.5.1 Deficiencies of OTP investigation

The *Mbarushimana* confirmation decision is an early-on critical stance by the Chambers in relation to the quality of the Prosecutor's work. The PTC remarked on the specificity of the DCC.[114] The PTC expressed its concern by the Prosecution's effort "to keep the parameters of its case as broad and general as possible" without justification. The Chamber pointed out that "[t]he Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing."[115]

In analysing the specific WC counts, the PTC highlighted that the charges in the DCC had often been formulated in such vague terms that it "cannot properly assess, let alone satisfy to the required threshold" the commission of the purported crimes.[116] Consequently, it did not proceed to assess the alleged attacks in most of the locations mentioned in the DCC. Eventually, it determined that there was sufficient evidence that WC were committed in only five out of the twenty-five occasions alleged by the Prosecutor.[117]

The ICC in *Lubanga* was highly critical of the OTP's conduct in relation to the use of intermediaries. In fact, this issue occupied a significant part of the ICC's first verdict.[118] The TC stated that as a result of the prosecution's negligence in verifying the actions of the three principal intermediaries a number of witnesses were deemed unreliable. This entailed a considerable period of time spent by the Chamber in order to investigate whether the evidence provided by a number of individuals was inaccurate or dishonest. Lack of proper oversight of the intermediaries also meant that they were potentially able to take advantage of the former child soldier witnesses who "given their youth and likely exposure to conflict, […] were vulnerable to manipulation."[119] Notably, following *Lubanga,* the Chambers have increasingly become more assertive towards what they perceive as insufficiencies in the OTP's investigation, both in terms of their rhetoric and the actions they are willing to take to this effect.

[114] Mbarushimana Confirmation Decision, n.51, para.79.
[115] Ibid, para.82.
[116] Ibid, paras 100 &113.
[117] Ibid, paras 133, 151, 160, 164, 168, 175, 178, 191, 192, 196, 200, 208, 219, 225.
[118] Lubanga Judgment, n.38, pp90-220.
[119] *Lubanga* (ICC-01/04-01/06-2843), Summary of the "Judgment pursuant to Article 74 of the Statute," 14 March 2012, paras 17-18.

In the *Ngudjolo* judgment, the TC stated that the criteria applied for its evaluation of the evidence will follow "for the most part" those applied by the TC in the *Lubanga* judgment.[120] Therefore, we see a concurrence between the PTCs and TCs in both cases, respectively. The TC was evidently critical of the evidence provided by the Prosecutor. It was the Chambers' position that a finding that an accused is not guilty does not necessarily mean that it considers such a person to be innocent. On the contrary, it merely signifies that "insufficiently reliable evidence" has been provided so that the Chamber cannot be satisfied of the accused's guilt beyond any reasonable doubt.[121]

In the *Lubanga* case the TC stated the following:

> ...the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence "freely". Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. [...] For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict...[122]

The TC quotes this passage in *Ngudjolo.*[123] On the basis of the above passage, the Chambers have been arguing for flexibility in terms of the evidence to be admitted. Nevertheless, at the same time they have explicitly put forward their preference for certain types of evidence both at the pre-trial and trial stages. They appear to be more assertive in this respect when they are unsatisfied with the Prosecution case. In particular, the Chambers have been alternating between the adversarial and inquisitorial approach in support of their findings. When they have found themselves unable to convict an individual and/or confirm the charges against him or her they have adopted a more strict pedagogic approach encompassing recommendations to guide future prosecutorial actions in terms of investigations and prosecutions.

The TC in *Ngudjolo* notes that several witnesses confirmed that the accused was the leader of the Lendu militia from Bedu-Ezekere who committed the attack against Bogoro village. However, their testimony was based on hearsay evidence. The judges emphasised that such evidence could only have a very low probative value, especially because it related to a central aspect of the Prosecutor's case.[124] While the Chamber could not discount the possibility that at the time of the attack, he was a senior military commander among the Bedu-Ezekere militia, it was not in a position to make a finding

[120] *Ngudjolo* Judgment, n.99, para.33.
[121] Ibid, para.36.
[122] *Lubanga*, (ICC-01/04-01/06-1399-Corr), Decision on the admissibility of four documents, 13 June 2008, para.24.
[123] *Ngudjolo* Judgment, n.99, para.54.
[124] Ibid, para.496.

beyond any reasonable doubt.[125] Consequently, the TC could not determine beyond reasonable doubt that Ngudjolo committed the crimes as an indirect co-perpetrator under article 25(3)(a).[126]

The Chamber made a number of findings in relation to the conduct of the Prosecution's investigation which focused on the issues of collecting evidence and selecting witnesses.[127] It noted the importance of collecting testimony and forensic evidence as opposed to relying primarily on witness statements and UN and NGO reports. One of the most important findings was in relation to the specific witnesses called by the Prosecution. According to the Chamber it would have been worthwhile to call as witnesses a number of commanders who played a key role in the events surrounding the attack.[128] It mentioned the names of four military officials as a way of example. This is a particularly bold move given that it also noted that calling witnesses rested foremost with the Prosecutor and its expressed intention to fully respect the adversarial principle.[129]

While not mandatory in principle, the Chamber undertook a lengthy analysis of the credibility of specific witnesses called by the parties, particularly in view of the fact that the Prosecution's case was foremost based on the testimony of three "key witnesses" (P-250, P-279 and P-280).[130] All three witnesses who alleged to have been former militia members were found to be unreliable as the Chamber was not convinced that either of them were part of the militia at the material time.[131]

Later on, the TC in the *Katanga* judgment essentially reproduced large parts from the *Ngudjolo* judgment which criticised the deficiencies of the OTP's investigation. Jacobs notes that highlighting where the Prosecutor has got it wrong has become a regular feature of both confirmation decisions and judgments.[132] It has been convincingly argued by Heller that had the TC not proceeded to the controversial re-characterisation under regulation 55 then the Chambers would have to acquit Katanga.[133]

[125] Ibid, para.501.
[126] Ibid, para.110.
[127] Ibid, paras 115-123.
[128] Ibid, para.119.
[129] Ibid, para.59.
[130] Ibid, para.124.
[131] Ibid, paras 159, 189 and 218.
[132] Jacobs D., The ICC Katanga Judgement: A Commentary (part 1): Investigation, Interpretation and the Crimes, *Spreading the Jam*, 10 March 2014 <http://dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/>
[133] Ibid. See also: Heller K.J., Another Terrible Day for the OTP, *Opinio Juris*, 8 March 2014 <http://opiniojuris.org/2014/03/08/another-terrible-day-otp/>

What is striking, not least from a fair trial perspective, is the TC's insistence on convicting Katanga despite its strong criticism of the Prosecution's case.[134] The majority made a similar statement as the one referred to above in the *Ngudjolo* acquittal decision. It held that finding that a defendant is not guilty does not necessarily mean that he is innocent. Rather it means that the evidence presented do not permit for a conviction beyond any reasonable doubt.[135] Interestingly, the majority in its concurring opinion further stated that "excessive rigidity" when evaluating the evidence was not compatible with "cases of the kind brought before the Court in particular," adding in this respect that "we must not forget that Ituri is a district which for years has lived with war."[136] According to Stahn the majority's approach is problematic as it "could be read to infer that the majority used a lower standard of proof than would be applied in a domestic criminal proceeding because of the difficulties the Prosecution had in gathering evidence."[137]

6.5.2 Relationship between the OTP investigation and the interpretation of the contextual elements of crimes against humanity

The Court's approach towards the OTP investigations and the evidence furnished in this respect has had an impact on the interpretation of the contextual elements of CaH. This is most obvious in the situations in Kenya and Côte d'Ivoire. These two situations share a number of features. Firstly, they are the two occasions for which the Prosecutor had to apply for a PTC authorisation to open an investigation. Secondly, both of them focused on crimes committed during post-election violence. Thirdly, they concern situations for which the Prosecutor ultimately proceeded only in respect of CaH.

These two situations demonstrate that neither the Prosecutor nor the pre-trial judges have been able to establish a principled, consistent approach in interpreting and applying the contextual elements of CaH. This mainly relates to the formulation of the policy requirement and which groups have the means to adopt and implement such a policy. The uncertainty which complicated the Kenya proceedings continued in the Côte d'Ivoire situation, where the PTC majority taking a more decisive stance, and arguably acting beyond its powers, decided to give 'instructions' to the Prosecution as a way to overcome the difficulties encountered. Importantly, these instructions arose in the context of discussing the sufficiency of the evidence provided by the OTP for the purposes of confirmation

[134] McDermott Y., Some Thoughts on the Katanga Judgment, *Human Rights Doctorate,* 17 March 2014 <http://humanrightsdoctorate.blogspot.com/2014/03/some-thoughts-on-katanga-judgment.html>
[135] *Katanga* (ICC-01/04-01/07-3436), Jugement rendu en application de l'article 74 du Statut, 7 March 2014, para.70.
[136] *Katanga* (ICC-01/04-01/07-3436-AnxII-tENG), Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte, 13 March 2014, para.5.
[137] Stahn (Katanga Judgment), n.82, p.828.

decisions. In this respect, I will focus on the decision of the PTC to adjourn the confirmation hearing in *Gbagbo* pursuant to article 61(7)(c)(i).

6.5.2.1 Gbagbo

Following the completion of the confirmation hearing, PTC I by majority decided to adjourn the hearing on the basis of article 61(7)(c)(i) under which the Chamber may request from the Prosecutor to consider "providing further evidence or conducting further investigation with respect to a particular charge."[138] In reaching this decision the majority concurred with an earlier adjournment decision in *Bemba* case which stated the following:

> In its determination, pursuant to article 61(7)(c)(i) of the Statute, the Chamber adjourns the hearing because the evidence presented does not meet the required threshold for confirming the charges as required by article 61(7)(a) of the Statute, and because such evidence is not irrelevant and insufficient to a degree that merits declining to confirm the charges under article 61(7)(b) of the Statute. In this case the Chamber decides that some further evidence is needed. Only after this evidence is provided will the Chamber be in a position to make its final determination on the merits.[139]

The majority in explaining its approach to evidence stated that although at this stage the Prosecutor is only required under article 61(5) to support each charge with "sufficient evidence," "the Chamber must [also] assume that the Prosecutor has presented her strongest possible case on a largely completed investigation."[140] It was referring to a recent finding of the AC in *Mbarushimana*.[141] The Chamber deemed it useful to express its preference towards certain type of evidence (e.g. forensic and first-hand witness observations) while highlighting the problems which arise from the heavy reliance on hearsay evidence, particularly anonymous ones.[142] Being mindful of the Prosecutor's right at this stage to "rely on documentary or summary evidence," it expressed its serious concern that in the present case the Prosecutor relied heavily on documentary evidence "with regard to key elements of the case, including the contextual elements of crimes against humanity."[143]

The Chamber's approach to evidence might not at first sight be seen to affect the interpretation of the crimes within the Court's jurisdiction. Nevertheless, the majority's interpretation of the contextual

[138] *Gbagbo* (ICC-02/11-01/11-432), Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013 ('Gbagbo Adjournment Decision').
[139] *Bemba* (ICC-01/05-01/08-388), Decision Adjouming the Hearing pursuant to Article 61(7)(c)(iü) of the Rome Statute, 3 March 2009, para.37 ('Bemba Adjournment Decision'). Ibid, para.13.
[140] Gbagbo Adjournment Decision, n.139, para.25.
[141] *Mbarushimana* (ICC-01/04-01/10-514), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges," 30 May 2012, para. 44 ('Mbarushimana Appeal Judgment').
[142] Gbagbo Adjournment Decision, n.139, paras 26-30.
[143] Ibid, paras 31,32,35.

elements below demonstrates how the Chambers' preference for particular types of evidence has a direct bearing on its perception of what it takes to substantiate the contextual requirement to the required threshold.

The majority referred to the Prosecution's submission during the confirmation hearing that in addition to the four charged incidents, she was relying on further 41 incidents to establish the existence of an "attack" under article 7. Most of these incidents are proven solely by anonymous hearsay evidence from NGO and UN reports as well as press articles. Thus, their probative value is low.[144] Interestingly, the majority notes that while it is not prepared to accept this type of evidence, past jurisprudence "may have appeared more forgiving" in this regard.[145] Consequently, the Prosecutor "may not have deemed it necessary to present all her evidence or largely complete her investigation."[146] Hence, "out of fairness" it is prepared to give an additional amount of limited time to the Prosecutor to do so.

In the last section of the decision, the judges requested from the Prosecutor "to *consider* providing, to the extent possible, further evidence or conducting further investigation with respect to the [...] issues" set out subsequently in great detail.[147] Such issues refer to the positions, movements and activities of the armed groups opposed to the pro-Gbagbo forces; the organisational structure of the pro-Gbagbo forces; details as to how, when and by whom the alleged plan/policy to attack the pro-Quattara civilian population was adopted. Also, in relation to the incidents which constituted the aforementioned attack the majority mentioned whether the alleged physical perpetrators acted pursuant or in furtherance to the alleged policy and to which sub-groups of pro-Gbagbo forces they belonged; and information as to the real or perceived political, ethnic, religious or national allegiance of the victims. Lastly, it requested more specific evidence and any forensic evidence in relation to specific incidents. In view of the above, the majority found it appropriate that the Prosecutor submits a new Amended DCC "setting out in detail and with precision, the facts of the case, including all incidents forming the contextual elements of crimes against humanity."[148]

The PTC's decision to take into consideration *all* 'contextual' incidents, irrespective of whether they formed part of the "facts and circumstances" under article 74(2), was to subject these incidents to the relevant evidentiary standard. This reasoning follows the approach taken by the AC in the *Kenya*

[144] Ibid, para.36.
[145] Ibid, para.37.
[146] Ibid.
[147] Ibid, para.44 (emphasis added).
[148] Ibid, para.45. But also see part b) of the operative part of decision which "[r]equests the Prosecutor to *consider* providing further evidence or conducting further investigation with respect to all charges, mindful of the questions in paragraph 44 of the present decision." (emphasis added) Thus, I do not agree with Judge Fernández that the majority's request is *ultra vires* and it amounts to a request from the Prosecutor to amend the charges (*Gbagbo* (ICC-02/11-01/11-432-Anx-Corr), Dissenting Opinion of Judge Silvia Fernández de Gurmendi, 6 June 2013, paras 5 & 51 ('Judge Fernández Dissenting Opinion – Adjournment Decision').

cases.[149] Thus, irrespective of the jurisdictional nature of the contextual elements during the 'situation' stage of the proceedings, once a 'case' was opened the interpretation and existence of the contextual elements related to the merits of the case.[150] Significantly, while "each incident underlying the contextual elements must be proved to the same threshold that is applicable to all other facts" this does not necessarily mean that there is no difference between them.[151] In particular, the information required to prove the contextual incidents "may be less specific than what is needed for the crimes charged but is still required to be sufficiently probative and specific so as to support the existence of an "attack" against a civilian population."[152] In sum, it seems "the Chamber would accept less detailed information as long as it reveals in a generic fashion the groups to which the perpetrators and the victims belonged."[153]

Judge's Fernández dissenting opinion revealed the division among judges as to the proper role of PTCs which in turn has an impact on how the pre-trial phase is to be conducted, what it required from the Prosecution's side and their understanding of the applicable law as regards CaH, in particular the contextual elements.

While it is desirable to complete the investigations to the greatest extent possible before the confirmation stage, it is problematic that the majority has turned a policy objective into legal requirement, in the absence of an amendment to the legal framework.[154] Recent decisions do not seem to support such a firm stance. In particular, the AC in *Mbarushimana* had referred to earlier findings from *Lubanga* which held that while "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing [...] this is not a requirement of the Statute."[155]

The above development is given further weight by the majority's expressed preference for certain types of evidence. According to Judge Fernández this undermines the possibility to rely on documentary and summary evidence at this stage which also affects the flexibility to assess the

[149] Chaitidou E., The ICC Case Law on the Contextual Elements of Crimes Against Humanity in Bergsmo M. and Tianying S. (eds) *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher 2014), p.91.
[150] *Ruto et al.* (ICC-01/09-01/11-414), Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, para.30; *Kenyatta et al.* (ICC-01/09-02/11-425), Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, para.36.
[151] Gbagbo Adjournment Decision, n.138, para.22.
[152] Ibid.
[153] Chaitidou, n.149, p.93.
[154] Judge Fernández Dissenting Opinion – Adjournment Decision, n.148, para.15.
[155] *Lubanga* (ICC-01/04-01/06-568), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence,' 13 October 2006, para.54.

evidence in all trial stages.[156] The judge avers that the majority's approach "may end up introducing through the back door the "mini trial" or "trial before the trial"" where PTCs exceeding their mandate enter into an in-depth analysis as regards the guilt of the suspect.[157]

The judge takes the view that the majority by introducing the notion of "incidents" and holding that they need to be proven to the relevant evidentiary standard misinterpreted article 7.[158] According to the judge, the 41 incidents are not contextual elements or underlying acts but merely subsidiary evidence.[159] She emphasised the need to distinguish between facts and circumstances described in the charges – which need to be proven to the required threshold – and facts which although contained in the DCC or discussed at the confirmation hearing are not described in the charges ("subsidiary facts").[160] The latter need not to be proven to the substantial grounds to believe threshold but are relevant in that facts and circumstances described in the charges may be inferred from them. This view is supported by the language of article 7 which does not require that the attack against the civilian population is composed of a "sufficient number of incidents," as mentioned by the majority.[161]

The Prosecutor appealed the adjournment decision. Leave for appeal was granted by the PTC majority.[162] The Chamber was particularly critical towards the sufficiency of evidence provided by the Prosecutor.[163] Nevertheless, it held that the manner in which the contextual elements are assessed in the present case could affect the outcome of the trial since "it requires the Prosecutor to prove certain allegations, which, if she fails to do so, may be fatal to the charges."[164] The AC dismissed the Prosecutor's appeal stating among others that the Prosecutor's argument that she had relied on the four incidents did not accurately reflect the charges contained in the DCC.[165] The AC found that in addition to the four incidents with which Gbagbo was charged, the OTP had also relied on the other 41 incidents in order to prove the existence an attack against the civilian population.[166] In this respect, the Prosecutor did not explain that there was a distinction between the charged incidents and the other 41 incidents.[167] Moreover, the AC did not agree with the characterisation of the contextual incidents

[156] Judge Fernández Dissenting Opinion – Adjournment Decision, n.148, para.23.
[157] Ibid, paras.25 & 28.
[158] Ibid, para.37.
[159] Ibid, para.41.
[160] Ibid, paras 33-34.
[161] Ibid, para.43.
[162] *Gbagbo* (ICC-02/11-01/11-464), Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, 31 July 2013, paras 27, 33-39.
[163] Ibid, para.37.
[164] Ibid, para.38.
[165] *Gbagbo* (ICC-02/11-01/11-572), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute," 16 December 2013, para.40.
[166] Ibid, para.44.
[167] Ibid, para.46.

as "subsidiary facts." Article 74(2) did not contain such a limitation for the interpretation of the term "facts and circumstances described in the charges."[168]

The AC was not openly critical of the Prosecutor's case. Nevertheless, its rejection of the appeal stemmed primarily from the way the OTP presented its case during the confirmation hearing, including the evidence used as well as the formulation of the charges in the DCC. Notably, in the amended DCC, the Prosecutor relied on 39 incidents, including the four charged incidents in alleging the existence of an "attack" under article 7 of the Statute.[169] In June 2014, the PTC confirmed the charges against Gbagbo determining that there were substantial grounds to believe that

> the *four incidents* in the context of which the charged crimes were committed share common features (in terms of their characteristics, nature, aims, targets and alleged perpetrators, as well as times and locations) with the *other acts* forming part of the attack – thus satisfying the required nexus – and are to be also considered "as part of" the relevant course of conduct that targeted perceived Ouattara supporters, within the meaning of article 7(1) of the Statute.[170]

The PTC had discussed in the confirmation judgment both the 'four incidents' and the 'other acts' separately before determining that they proved together the existence of an "attack" under article 7(1) of the Statute.[171]

6.6 Modes of liability

The ICC case-law itself has demonstrated that the mode of participation is not only part of the charges but also "an inherent aspect of the crime."[172] As discussed in section 6.3.5 the most important example was the *Katanga* judgment where the TC recharacterised the mode of liability under regulation 55. Another significant example comes from the *Bemba* case. On 3 March 2009, the PTC adjourned the confirmation hearing requesting from the Prosecutor to consider submitting an amended DCC, addressing another mode of liability, other than individual criminal responsibility under article 25.[173] In this respect, the Prosecutor submitted an amended DCC, which included command or superior responsibility, pursuant to article 28, as an alternative, but not in substitution of, individual

[168] Ibid, para.37.
[169] *Gbagbo* (ICC-02/11-01/11-592-Anx1), Document amendé de notification des charges, 13 January 2014, para.56.
[170] Gbagbo Confirmation Decision, n.87, para.212 (emphasis added).
[171] Ibid, section 2(I)(A) and (B) respectively.
[172] Jacobs D., The Katanga Judgment: A Commentary (part 2): Regulation 55 and the modes of liability, *Spreading the Jam*, 11 March 2014 <http://dovjacobs.com/2014/03/11/the-icc-katanga-judgment-a-commentary-part-2-regulation-55-and-the-modes-of-liability/>
[173] Bemba Adjournment Decision, n.139.

criminal responsibility under article 25(3)(a). [174] Eventually the defendant was charged for his criminal responsibility as a commander (article 28(a)).

Ambos raises the question whether a PTC's modification competence also extends to changing a mode of liability, thus, not being restricted to changing a crime.[175] He also states that a PTC cannot evaluate the evidence *in abstracto* but rather does so "only with a view to a certain legal qualification (offences, modes of liability)."[176]

The text of article 61(7)(ii) appears to support a restrictive interpretation which allows only for a change in the crime. The PTC in *Bemba* arguably adopted a wide understanding of the notion of a "different crime" under article 61(7)(ii).[177] It stated that it relates both to the crimes as well as to the modes of liability. Depending on the mode of liability at play, "the material (objective) elements of the crime are shaped differently." To this effect, the PTC admitted that the mode of participation has "a bearing on the structure of the crime."[178]

In *Banda and Jerbo* in assessing the suspects' individual criminal responsibility the PTC noted that the Prosecutor charged the suspects as direct or indirect co-perpetrators "without excluding any other applicable mode of liability."[179] It recalled that in accordance with article 67(1)(a) and rule 121(1), the accused is "[t]o be informed in details of the nature, cause and content of the charge[s]." Furthermore, regulation 52(2) provides that the DCC shall include "the precise form of participation under articles 25 and 28." Consequently the Chamber restricted its analysis to the modes of liability specifically addressed in the DCC.[180]

In *Bashir* the PTC found reasonable grounds to believe that the defendant is criminally liable under article 25(3)(a) as an indirect perpetrator or as an indirect co-perpetrator, thus, not clarifying for the time-being whether he had absolute or shared control of the State apparatus in the implementation of the common plan to carry out the genocidal campaign in Darfur. The Prosecution had argued that Bashir was in full control of the "apparatus" of the GoS, and used his "supreme authority" to commit the genocidal campaign.[181] However, the majority in the First Arrest Warrant Decision took the view

[174] *Bemba* (ICC-01/05-01/08-395-Anx3), Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, 30 March 2009.
[175] Ambos, K., Critical Issues in the Bemba confirmation decision, vol.22(4) *LJIL* (2009) 715, p.724.
[176] Ibid, p.725.
[177] Ibid, pp725-726.
[178] Bemba Adjournment Decision, n.139, para.26.
[179] *Banda and Jerbo* (ICC-02/05-03/09), Corrigendum of the "Decision on the Confirmation of Charges, 7 March 2011, para.124 ('Banda and Jerbo, Confirmation Decision').
[180] In this respect the PTC quoted a similar view expressed by PTC III in Bemba Adjournment Decision, n.139, para.39.
[181] *Situation in Darfur* (ICC-02/05-157-AnxA), Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, para.250.

that Bashir shared control of the state apparatus with other high-ranking Sudanese officials.[182] Consequently, the establishment of criminal intent required showing substantial grounds to believe that Bashir and those with whom he shared control of the state apparatus agreed that the GoS carried out its counter-insurgency campaign with genocidal intent. To this effect, the majority assessment consisted of looking into the GoS's genocidal intent rather than Bashir's genocidal intent.[183] This would signify that where the TC to decide on the mode of participation of the suspect this will have a bearing on object of the *mens rea* inquiry for the crime of genocide.

6.7 Confirmation decisions

One of the primary functions of the PTCs is "the filtering out of unmeritorious cases."[184] This has been stressed consistently in the confirmations decisions.[185] In this respect, the PTCs have stressed the "limited scope and purpose" of the confirmation hearing which should not turn into a "mini-trial."[186] At the same time, however, "the confirmation process defines the 'facts and circumstances' that form the subject-matter of the trial."[187] Notably, under article 74(2), the TC in rendering its decision "shall not exceed the facts and circumstances described in the charges and any amendments to the charges." Therefore, in undertaking its mandate under article 61 of the Statute, the PTC is required to

> evaluate whether the evidence is sufficient to establish substantial grounds to believe the person committed each of the crimes charged. In order to make this determination as to the sufficiency of the evidence, the PTC must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence.[188]

Hence, confirmation process is "by its nature an evidentiary hearing."[189] In this context, the early confirmation decisions have brought to the fore the PTCs' role in contributing to the interpretation and development of ICC crimes.

6.7.1 Abu Garda

The confirmation decision in *Abu Garda* is telling of the PTC judges' determination to elaborate extensively on novel legal issues before them. Abu Garda was charged for the WC of murder (article

[182] *Bashir* (ICC-02/05-01/09-03), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para.150.
[183] Ibid, para.151.
[184] Nerlich, n.1, p.1347. See also: Ambos and Miller, n.104, pp.347-348.
[185] Ibid.
[186] *Katanga* and *Ngudjolo* Confirmation Decision, n.115, para.64; *Abu Garda* (ICC-02/05-02/09-243-Red), Decision on the Confirmation of Charges, 8 February 2010, para.39 ('Abu Garda Confirmation Decision').
[187] Nerlich, n.1 p.1349.
[188] Mbarushimana Appeal Judgment, n.141, para.39.
[189] Ibid.

8(2)(c)(i)), intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission (article 8(2)(e)(iii)), and pillaging (article 8(2)(e)(v)).

Article 8(2)(e)(iii) is one of the new crimes in the Statute. As explained in chapter 4, there was disagreement as to its precise meaning. The majority noted at the outset that murder and pillaging were allegedly committed during and in the aftermath of the alleged attack on the AMIS mission . Furthermore, it noted that the elements under article 8(2)(e)(iii) would have legal consequences for its finding regarding the murder charges. Thus, it considered it appropriate to begin its analysis with article 8(2)(e)(iii).[190]

The majority discussed extensively both the objective and subjective elements of the crime shedding light to its scope.[191] They discussed individual elements of the crime including the meaning of the term "peacekeeping mission" as well as when such a mission is entitled to civilian protection.[192] It was determined that there were substantial grounds to believe that the WC under article 8(2)(e)(iii) had been committed at the AMIS compound.[193] Nevertheless, the PTC ultimately declined to confirm charges against Abu Garda having found that there were no substantial grounds to believe that he can held criminally responsible under article 25(3)(a).[194]

It might seem odd that the majority spent so much time to elaborate the specifics of a crime for which there were not sufficient evidence to charge Abu Garda. Judge Cuno Tarfusser concurred with the majority's conclusion whilst disagreeing with its reasoning.[195] He said that given the lacunae and shortcoming found in the evidence it was not necessary for the Chamber to conduct a detailed analysis of the material elements of the crimes charged.[196]

A Court should not predetermine legal issues which may be of relevance to a future case thus compromising the principle of presumption of innocence.[197] In this respect, the dissenting judge referred to in particular as to whether the AMIS mission had a protected status under humanitarian law at the time of the attack. The majority considered in detail that there were substantial grounds to believe that such a requirement had been satisfied.

[190] Abu Garda Confirmation Decision, n.186, para.59.
[191] Ibid, paras 60-96.
[192] Ibid, paras.68-77 and 78-89 respectively.
[193] Ibid, paras 97-151.
[194] Ibid, para.232.
[195] Ibid, Separate opinion of Judge Cuno Tarfusser, pp.99-103.
[196] Ibid, para.3.
[197] Ibid, para.7.

6.7.2 Banda and Jerbo

The PTC's elaborate analysis was soon employed by the very same judges in the confirmation of charges against Banda and Jerbo. The cases against these two individuals stemmed from the same application as the case against Abu Garda.[198] Given that the background in the two cases was the same the PTC refrained from revisiting issues which had been exhaustively addressed in *Abu Garda* including the legal interpretation of the elements of article 8(2)(e)(iii).[199] It merely proceeded to undertake a factual analysis of each element on the basis of the prior legal determination, to establish whether it is supported by evidence. The Chamber concluding that both the objective and subjective elements had been satisfied to the substantial grounds to believe threshold proceeded to consider the other two counts.[200]

In assessing the suspects' individual criminal responsibility the PTC concluded that there were substantial grounds to believe that both suspects were criminally responsible as direct co-perpetrators.[201] It proceeded to confirm the charges against them.

The PTCs have not only elaborated the crime attacking peacekeeping personnel and objects which is important in itself. Moreover, they have taken the view that it has a quality of a 'contextual crime' where in the course of such an attack other alleged crimes may be committed. Thus, a negative determination in establishing the occurrence of such an attack renders unnecessary an assessment of those counts which allegedly contain conduct committed during such an attack. Significantly, three individuals to date have been charged by the Prosecutor.

Significantly, "the most extensive jurisprudence on the Court's substantive law is currently to be found in the confirmation decisions of the Pre-Trial Chambers."[202] This seems as an unavoidable consequence. The PTCs necessarily interpret the elements of the crimes contained in the charges in order to determine whether there are substantial grounds to believe that the person(s) committed the charged crimes. The law-making potential of this exercise is particularly relevant in the ICC case-law given that "at this stage of the ICC's existence […] most of the ICC Statute's substantive law provisions have not yet been illuminated by jurisprudence."[203] Nevertheless, while article 21(2) of the Statute provides that the Court "may apply principles and rules of law as interpreted in its previous decisions" there is no obligation to do so. Therefore, the extent to which the TCs have relied on the

[198] Banda and Jerbo, Confirmation Decision, n.179, para.8.
[199] Ibid, paras.23 & 61.
[200] Ibid, paras 62-64, 86.
[201] Ibid, para.162.
[202] Nerlich, n.1, p.1350.
[203] Ibid, p.1351.

findings of the PTCs is an important indicator of the latter's role in the development of ICC crimes. For example, in the *Lubanga* judgment aside re-characterising the conflict, the TC largely followed the PTC's findings in the confirmation decision.[204]

6.8 Cumulative charging

The Prosecutor had charged Bemba with three counts of CaH (rape, torture and murder) and four counts of WC (rape, torture, murder, outrages upon personal dignity and pillaging).[205] The PTC rejected the "cumulative charging approach" adopted by the Prosecutor and declined to confirm torture (as a CaH) and outrages upon dignity.[206]

The Chamber clarified that as a matter of fairness and expeditiousness of the proceedings, this prosecutorial practice may only be justified in relation to 'distinct' crimes. This is the case when each crime allegedly breached "requires at least one additional material element not contained in the other."[207] The PTC also points out that the ICC legal framework is different from that of the *ad hoc* tribunals since under regulation 55, a TC "may re-characterise a crime to give it the most appropriate legal characterisation."[208] Hence, the Prosecutor need not employ cumulative charging as a way of ensuring that at least one possible characterisation is retained by the Chamber.

The PTC held that torture (CaH) and outrages upon dignity (WC) are fully subsumed by the count of rape (CaH).[209] It considered that this as a more appropriate legal characterisation for the conduct presented given that rape compared to torture "requires the additional specific material element of penetration" and compared to outrages the facts presented "reflect in essence the constitutive elements of force or coercion in the crime of rape, characterising this conduct, in the first place, as an act of rape."[210]

The Prosecutor applied for leave to appeal the confirmation decision. One of the issues he raised was whether the PTC had the authority to decline to confirm charges on the basis of cumulative

[204] Graf R., *The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment*, 10(4) JICJ (2012) 945, p.12.
[205] Ibid.
[206] Bemba Confirmation Decision, n.39, operative paragraph e). The PTC also declined these two charges, along with torture as a war crime, considering that the accused lacked sufficient notice of "the facts underpinning the charges." See paras: 209, 307 and 309.
[207] Ibid, para.202.
[208] Ibid, para.203.
[209] Ibid, paras 205 and 312.
[210] Ibid, paras 204 and 310.

charging.[211] Notably, such a power is not expressly authorised by the Court's legal texts. Importantly, the Prosecutor submitted that the Court's ruling "did not discount the sufficiency of the Prosecutor's evidence. To the contrary, the Chamber found the charges to be essentially indistinguishable from the rape charges that, it expressly found, *were* sufficiently proven."[212]

The Prosecution considered that declining to confirm charges which have been established to the "substantial grounds to believe standard," improperly limited its ability to present its case. Consequently, the proceedings were unfair for the Prosecution and the outcome of the trial would be affected. The Prosecution stressed that the purported cumulative charges were intended "to capture the full extent of the criminal conduct and victimization."[213]

The Chamber did not accept that the PTC lacks authority to decline charges on the basis of cumulative charging.[214] Its role during the confirmation proceedings is not restricted to merely accepting the charges brought before it by the Prosecution, but to "filter" carefully which cases are to proceed to trial. Such power does not bar the Chamber from making findings deemed necessary to protect the rights of the Defence.[215]

The PTC clarified that cumulative charging is possible where the Prosecutor presents evidence "pertain[ing] to different specific elements not contained in the other."[216] It did not accept that the proceedings were unfair for the Prosecutor. The PTC's decision not to confirm certain charges on the basis of cumulative charging does not reduce the factual scope of the case nor does it significantly affect the outcome of the trial.[217] Thus, it rejected the Prosecutor's leave to appeal.

The PTC reiterated the TC's finding in *Lubanga* on regulation 55. According to the TC the drafting of the regulation by the judges in plenary and its subsequent adoption by the ASP "underlines its legitimacy."[218] Also, the PTC considered that regulation 55 "reflects a further important development in international criminal law which pertains to the general powers of a Trial Chamber to effectively discharge its statutory functions in the interests of justice."[219]

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[211] *Bemba* (ICC-01/05-01/08-427), Prosecution's Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, 22 June 2009, para.8.
[212] Ibid, para.12.
[213] Ibid, paras 21 & 27.
[214] *Bemba* (ICC-01/05-01/08-532), Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 18 September 2009, para.51 ('Bemba Decision on Prosecutor's Leave to Appeal').
[215] Ibid, para.52.
[216] Ibid.
[217] Ibid, paras 56 & 61.
[218] *Lubanga* Decision on the status of the evidence, n.37, para.47.
[219] Bemba Decision on Prosecutor's Leave to Appeal, n.214, para.57.

It is pertinent to see the how the practice of cumulative charging may have an impact on the development of ICC crimes. On the one hand, the restrictive approach adopted by PTC has been considered as a welcome development to prevent prosecutorial overcharging which places the Defence in a difficult position.[220] On the other hand, it has been as an obvious example where the ICC Chambers have undermined prosecutorial independence.[221] Notably, following the OTP's application for leave to appeal the PTC's decision not to confirm the aforementioned charges on the basis of cumulative charging a number of human rights organisations applied for leave to submit an *amicus* on the issue. Among others the submission asserted that cumulative charging is "a widely accepted and established practice in national and international courts which does not run counter to the rights of the accused and a fair trial."[222] Importantly, for the purposes of this thesis the *amici* submitted that cumulative charging risks trivialising rape and other crimes of sexual violence.[223] The application was rejected by Single Judge Trendafilova on the basis of ensuring the expeditiousness of the proceedings without entering into any discussion as to the content of the submission.[224]

6.9 Office of the Prosecutor – Change in Prosecutorial Strategy

It is highly interesting to observe how the OTP has recently decided to adapt its strategy in response to the developing jurisprudence. One of the most important strategic changes is the following:

> Due to the requirement of higher evidentiary standards and the expectation of being trial-ready earlier, the notion of focused investigations is replaced by the principle of in-depth, open-ended investigations while maintaining focus. The Office will expand and diversify its collection of evidence so as to meet the higher evidentiary threshold.[225]

According to the OTP Strategic Plan for 2012-2015 this change was deemed necessary as "[t]he judges require of the OTP to submit more and different kinds of evidence than what the Office considered would suffice in its focused investigations and prosecutions approach."[226] Thus, the aim is

[220] Ambos, n.175, p.724.
[221] Heller – Regulation 55, n.24, p.18.
[222] *Bemba* (ICC-01/05-01/08-488), Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 31 August 2009, para.11.
[223] Ibid, para.18.
[224] *Bemba* (ICC-01/05-01/08-504), Decision on Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 4 September 2009, para.8. See also: Application for leave to submit Amicus Curiae Observations in relation to the denial by Trial Chamber I of cumulative charging of rape and torture, *Redress* <http://www.redress.org/case-docket/the-prosecutor-v-jean-pierre-bemba>
[225] OTP, Strategic plan - June 2012-2015, 11 October 2013, para.4(a) <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf> ('Strategic Plan 2012-2015').
[226] Ibid, para.3.

to be as trial ready as possible by the confirmation of charges stage.[227] Already, the new model of in-depth, open investigations has been implemented in the situation in Mali.[228] The above change evidently draws from a number of cases and the Court's adjournment decision in *Gbagbo* comes immediately to mind. The OTP further acknowledged the considerable challenges encountered in relation to witnesses, particularly as regards their relevance and reliability, in terms of consolidating the prosecution case. This was a prevalent issue in *Njudgolo* and *Katanga.* To this effect, the Office intents to enhance its capability for collecting alternative forms of evidence taking advantage of the explosive growth and access to digital data.[229]

In light of its experience to date, the OTP is moreover reconsidering its approach in proving the responsibility of the individuals deemed most responsible:

> In such circumstances a strategy of gradually building upwards is needed. The Office would therefore first investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable chance to convict the most responsible. The Office will also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety. Such a strategy will in the end be more cost-effective than having unsuccessful or no prosecutions against the highest placed perpetrators.[230]

The OTP's strategic changes represent one of the most significant changes following the first years of its work and they are expected to shape its work in the coming years.

The Office is quite explicit as to how financial restraints have an impact not only on the quality of its work but also on the number of investigations and/or cases is able to conduct at any given time. As a general comment it stated that it is "unable to perform high quality preliminary examinations, investigations and prosecutions without a substantial increase in resources."[231] It cites the lack of adequate funds as "the most critical factor to ensure that the Office will successfully face the new challenges and the demands on the Office."[232] The focus on financial limitations could be perceived as a reaction to those Courts decisions which implicitly criticised the quality of investigations.

The changes in strategy have been translated into six strategic goals. There are a number of interesting changes compared to the past strategic goals (Three Year Report (2006), Prosecutorial Strategy 2009-

[227] Ibid, para.24.
[228] Ibid, para.90.
[229] Ibid, para.44.
[230] Ibid, para.22.
[231] Ibid, para.4(b).
[232] Ibid, para.7.

2012).[233] The latest strategic goals are less specific in that for the first time they do not mention neither the number of trials that are expected to be completed nor the number of investigations, current or new, to be undertaken.[234] Rather, the focus seems to be on the quality of preliminary investigations, investigations and prosecutions. Moreover, for the first time, an OTP goal is explicitly dedicated "to pay[ing] particular attention to sexual and gender based crimes and crimes against children."[235] The Office will factor these crimes into the assessment of gravity.[236] It has issued a policy paper on sexual and gender-based crimes in June 2014 and intends to finalise a 'Children Policy' in the near future.[237]

The OTP seems to share the problems encountered by the Chambers in relation to the structure through which the crimes are committed which "cover a broader range than the traditional, clear hierarchical structures."[238] It is noted in the strategic plan that contemporary structures are "much more fluid" and are based on "mobilization of communities."[239] It is further stated that both the OTP and the Court need to develop a better understanding both in relation to their functioning as well as how such cases should be investigated and prosecuted.

The OTP new strategic plan has been described as "the clearest articulation yet of Prosecutor Bensouda's vision for the OTP and, if implemented, has the potential to move the office in a very positive direction."[240] The OTP's decision to be as trial ready as possible by the time of the confirmation hearing has validly been perceived as a step too far on the part of the PTC judges.[241] The OTP refrains from criticising the Chambers but speaks about expectations for "higher evidentiary standards." Jacobs disagrees pointing out that "the need to change this policy stems not from higher expectations of judges, but from the failures of the Prosecutor in the past."[242] Moreover, he considers the bottom-up approach as unrealistic where the ICC will spend invaluable resources for prosecuting low-level criminals.[243]

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[233] Three Year Report (2006), n.16, p.3; OTP, Prosecutorial Strategy, 2009-2012, 1 February 2010, p.2 <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>
[234] Strategic Plan 2012-2015, n.225, para.5. See for further details: pp 18-34.
[235] Ibid, Strategic goal 3.
[236] Ibid, para.58.
[237] OTP Policies and Strategies, n.4. See: OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014 <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>
[238] Ibid, para.19.
[239] Ibid.
[240] Whiting A., ICC Prosecutor Announces Important Changes in New Strategic Plan, *Just Security*, 24 October 2013 <http://justsecurity.org/2215/icc-prosecutor-announces-important-strategic-plan/>
[241] Ibid.
[242] Jacobs D., Some Thoughts on the ICC OTP Strategic Plan: Trying to Build the Future on the Failures of the Past, *Just Security*, 8 November 2013 <http://justsecurity.org/2960/thoughts-icc-otp-strategic-plan-build-future-failures/>
[243] Ibid.

6.10 Conclusion

There is no doubt that the Prosecutor has been open to the Chambers' suggestions on a number of issues. This became published policy in the latest paper on Prosecutorial Strategy in November 2013. For the first time since the beginning of investigations and prosecutions by the OTP we see a change in policy which may directly be traced to the Court's evolving case-law. Moreover, it is a significant change of policy which although premised on improving the quality of the prosecutions and investigations is expected to affect which crimes are selected and how the charges are formulated, as well as which individuals should be the subject of prosecution.

The OTP's new strategic plan is a turning point in the dialogue between the OTP and the Chambers. These two organs in these first years have come to explore the breath of their mandates. At times, they have even exceeded their own powers raising valid arguments as to the fairness of the proceedings. The most relevant example is the Chambers' attempts to ameliorate perceived deficiencies in the Prosecutor's case which arguably threatened the prospects of securing a conviction.

The way that the different Chambers and the OTP perceive their functions and proceed to carry them, influences each other's work, and consequently impacts on the development of ICC crimes. The *Katanga* judgment revealed how regulation 55 can affect the relationship between pre-trial and trial proceedings. The results of the proceedings could essentially be perceived as 'two judgments.' There was "not only duplication, but actual inconsistency between findings at pre-trial and trial."[244] The judgment reversed fundamental elements of the confirmation decision and convicted Katanga on the basis of a mode of liability which had not been examined by the PTC. To this effect, the *Katanga* judgment revealed how "[t]he statutory framework allows different visions of the function of the pre-trial."[245] On the one hand, the PTCs merely serve a filtering function leaving the specification of the case for the trial stage. On the other hand, the PTC serves a broader role in terms of preparing the case for the trial stage.[246] Thus, it will be interesting to observe how the amended Prosecutorial Strategy will have an impact on the pre-trial proceedings and on the relationship between the PTCs and the TCs. Further, the Chambers' criticisms of the OTP's investigational and prosecutorial deficiencies and the decision on the part of the Prosecutor to be 'trial-ready' earlier is expected to influence the type of evidence, the suspects targeted, and consequently the charges selected to be brought before the PTCs. Whether this would lessen the use of regulation 55 or at least prompt a more prudent invocation of the provision remains to be seen.

[244] Stahn (Katanga Judgment), n.82, p.833.
[245] Ibid, p.832.
[246] Nerlich, n.1, pp.1348-1354.

Switching between an adversarial and inquisitorial approach does not necessarily contradict the Statute. The procedural law of the ICC "takes neither of the pure forms of the adversarial or inquisitorial models of criminal procedure, nor does it reflect any particular existing hybrid of the two systems."[247] This is unsurprising given that Statute was the compromise outcome of negotiations involving States which represented a wide range of different legal systems. Hence, "it will be basically up to the judges to find the appropriate balance between adversarial and inquisitorial elements."[248] Nevertheless, the ICC judges should "guarantee a *fair and efficient trial* by safeguarding the observance of the rights of the accused and other participants by and before the court."[249]

The issues identified and discussed in the previous sections demonstrate that the interaction between the Chambers and the OTP has an impact on the development of the crimes within the Court's jurisdiction. It is for this reason that the interaction between Chambers and the Prosecutor was identified in chapter 1 as being among the factors which contribute to the ability of the ICC to develop the crimes within its jurisdiction. The influence of this relationship on the ICC crimes is multifaceted and often implicit. For example, instructions to the OTP as to which type of evidence may substantiate or not the elements of a crime necessarily involve conveying to the Prosecutor the Chambers' interpretation and understanding of the scope of the provision. Alternatively, the ICC's case-law has highlighted that it is not possible to disconnect the mode of liability from the crimes themselves and the mode of liability does have an effect on how the material elements of the crimes are shaped and subsequently interpreted.

Throughout this chapter both the Chambers and the OTP have often been the subject of criticism, each one for different reasons. It is important to acknowledge that the issues elaborated in this chapter have arisen or have become weightier because the ICC has been established as a permanent institution. In this capacity, its organs work in diverse situations which often involve ongoing conflicts with precarious security conditions. While this does not absolve the Prosecutor for the difficulties encountered in preparing solid cases it puts the performance of her office in a wider context along with the often (over)assertive approach of the Chambers. The issues examined in this chapter are expected to be developed and refined further. Their potential impact on the development of the ICC crimes is enhanced by the permanent character of the Court. As the OTP and the Chambers encounter again these issues they are expected to articulate them in a more non-situation specific manner due to the numerous and widely dissimilar situations which come before them.

[247] Kress C., The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise, vol.1 *JICJ* (2003) 603, p.603. See also: Stahn (Regulation 55), n.36, pp.28-29.
[248] Ibid, p.605.
[249] Ambos and Miller, n.204, p.349.

Chapter 7: The ICC in Action – Part II

Action 'outside' the ICC

7.1 Introduction

Chapter 7 will explore how the crimes within the Court's jurisdiction may be developed by the ASP via the amendment procedure provided by the Rome Statute itself. Following the adoption of the Statute in 1998 this is the principal avenue by which the ICC's jurisdiction *ratione materiae* may be modified. The ASP provides the political forum for the inclusion of other offences in relation to which agreement may be reached as regards their definition and incorporation in the Statute.

The significance of the amendment procedure post-Rome and until Kampala is two-fold. Firstly, the amendment of the WC provision has demonstrated how uncontroversial amendments may be successfully pursued. Secondly, and by far most importantly, the Statute's first Review Conference in Kampala and its extensive background are illustrative of the approach that may be followed for achieving changes to the Court's material jurisdiction as regards 'difficult crimes.' The pivotal example here is the crime of aggression. Following the adoption of the Statute significant changes to the Court's jurisdiction are expected to follow the 'aggression example.' At Rome the scope of the crimes as these were eventually adopted might have been criticised as being too narrow; however, at the same time they represented the common denominator on which agreement could be reached. What was left outside of the Court's jurisdiction at the time did not garner sufficient support or insisting on its inclusion would have jeopardised the Statute's adoption.

Like the crimes adopted in Rome, the definition of aggression is the product of multilateral negotiations whereby its terms were extensively discussed and amended in order to reach the final result. Thus, the outcome of the Review Conference is extremely important in reflecting the will of the drafters, the scope of aggression and its status under CIL. In this context, the Review Conference, in amending the Statute, pursued an approach which both codified and developed existing CIL.[1] Moreover, as explained in detail throughout chapter 7 there has never been a clear picture as to what are the exact boundaries of the crime of aggression under CIL. Thus, in codifying the crime of aggression the drafters had considerable leeway to engage in progressive development, enhanced by the need to 'fit' the crime within the existing regime established by the Statute.

[1] Boyle A. and Chinkin C., *The making of international law: Foundations of Public International Law* (OUP 2007), p.234.

As discussed in chapters 2-4 the development of international crimes has raised the question whether "customary international law in the context of international criminal law means something different than customary international law in the context of traditional international law."[2] Notably, the ILC during its work on CIL concluded that both State practice and *opinio juris* are necessary for the formation and identification of a customary rule. At the same time the ILC conceded that

> There may, on the other hand, be a difference in application of the two-element approach in different fields (or perhaps more precisely, with respect to different types of rules): for example it may be that "for purposes of… [a specific] case the most pertinent State practice" would be found in one particular form of practice that would be given "a major role".[3]

The crime of aggression exemplifies this trend more than any other crime within the Court's jurisdiction because of the even greater scarcity of positive practice in this respect. Significantly, "[t]he existence of customary criminalization […] can be demonstrated through state practice, if mainly verbal, including states' desire to codify this criminalization in the Rome Statute."[4] Even more importantly, the process by which the crime of aggression was incorporated in the Statute demonstrates how the 'supreme' international crime which had eluded proper codification entailing individual criminal responsibility since Nuremberg was transformed into a modern offence. The aggression 'amendment package' adopted in Kampala sets out in detail the elements that need to be proven to substantiate a charge of aggression which will be influential in formulating an understanding how the individual elements of aggression are perceived and consequently proven.

There are a number of significant setbacks included in the amendment package which will be discussed in this chapter. Still, adopting a definition for the crime of aggression unequivocally demonstrates a unique feature of the ICC regime; the Court's jurisdiction *ratione materiae* can 'grow' and develop via the legislative-proper avenue provided by the Statute. As explained in chapter 1, the Rome Conference was a constitutional moment in international law-making which cannot rest on normal treaty-making.[5] The process by which the crime of aggression was adopted, which culminated at the Review Conference, was a continuation of this process *within the framework of the Rome Statute.* Similarly, the inclusiveness of the negotiations, which were open to both States Parties and non-States Parties and members of civil society, demonstrated that the result was of general

[2] Schabas W., Customary Law or 'Judge-Made' Law: Judicial Creativity at the UN Criminal Tribunals, in Doria J. *et al.* (eds), *The Legal Regime of the International Criminal Courts: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers 2009), p.101.
[3] Second report on identification of customary international law by Michael Wood, Special Rapporteur, 22 May 2014, A/CN.4/672, para.28.
[4] Milanovic M., Aggression and Legality: Custom in Kampala, vol.10(1) *JICJ* (2012) 165, p.170 (footnote omitted).
[5] Sadat N.S. and Carden S.R., The International Criminal Court: An Uneasy Revolution, vol.88 *Georgetown L.J.* (1999-2000) 381, p.390.

significance to the international community, a feature which augments the law-making potential of the process under the Statute and under CIL.[6]

I will examine the work undertaken on the crime of aggression since the Rome Conference in order to comprehend how obstacles may gradually be overcome over time. Thereafter I will look at what happened at the Review Conference itself, at which the most contentious issues were left for resolution. In parallel, I will consider the specifics of the definition of the crime of aggression as adopted in order to comprehend the contribution of the new definition in article 8 *bis* of the Statute on the development of the crime both within and outside the Statute.

In section 7.2 I will discuss the early developments in defining the crime of aggression which provided the foreground for the discussions which took place in the negotiations leading up to the Rome Conference. In section 7.3 I will provide an overview of the negotiations for an international criminal Court and the Rome Conference as regards the crime of aggression. This inquiry is necessary in order to understand the particular difficulties that the crime posed in terms of its drafting and inclusion in the Statute. Lastly, the outcome of the Rome Conference provided the starting point and the framework for the work on the crime of aggression which followed and is discussed in the remaining sections of this chapter.

7.2 Early years (-1994)

This section looks at the challenges that discussants in the AHCom had before them when they began their work in 1994. This date was chosen because it marks the beginning of a period when the convening of a multilateral conference for an international criminal court started to be considered as a possible outcome. Aggression had long been considered as the 'supreme international crime.' However, when compared to genocide, CaH and WC, it conspicuously lagged behind in terms of codification and adjudication, aside the 1974 definition adopted by the UNGA which is discussed below.[7]

The first formulation of individual criminal responsibility came in the 1945 London Charter where article 6(a) defined crime against peace.[8] The Nuremberg Judgement held that article 6(a) was

[6] Jennings R. and Watts A. (eds), *Oppenheim's International Law: Volume I Peace* (9th edn OUP 2008), p.1204, § 583.
[7] Gaja G., The Long Journey towards Repressing Aggression, in *The Rome Statute of the International Criminal Court: A Commentary*, vol. IA, A. Cassese, P. Gaeta, J. Jones (eds), Oxford: OUP (2002), pp 427, 429.
[8] Charter of the International Military Tribunal, 8 UNTS 284, Annex, 8 August 1945, <http://avalon.law.yale.edu/imt/imtconst.asp#art6>

declaratory of the state of IL at the time. It relied on a number of preceding instruments and foremost on the Kellogg-Briand Pact which renounced recourse to war as an instrument of national policy.[9] As regards the argument that IL is only concerned with the actions of States and thus does not provide for individual responsibility the Tribunal stated the following: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[10] Lastly, the Judgement gave to the crime of aggression the characterisation of the "supreme international crime" which **"**contains within itself the accumulated evil of the whole."[11] The IMTFE in its Judgement decided to "express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal."[12]

In 1946 the UNGA affirmed the principles recognised by the Nuremberg Charter and the Judgment of the Tribunal. Moreover, it directed the ILC to formulate these principles, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code.[13] The ILC completed these principles in 1950.[14] In its commentary it acknowledged that neither the Nuremberg Charter nor the Judgement defined the notion "war of aggression." Rather, "[i]t was by reviewing the historical events before and after the war that it found that certain of the defendants planned and waged aggressive wars."[15]

Parallel to the work of the ILC on a draft code of offences the UNGA established special committees to formulate a draft definition of aggression.[16] These special committees were unable to adopt a draft definition.[17] In 1954, the UNGA considering that the draft code "raises problems related to that of the definition of aggression" took the decision to "defer consideration of the question of the draft Code […] until such time as the General Assembly takes up again the question of defining aggression."[18] It

[9] League of Nations, General Treaty for Renunciation of War as an Instrument of National Policy, 27 August 1928, article 1 < http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>
[10] Trial of the Major War Criminals before the International Military Tribunal, Volume I, Judgement 171, pp 218-224, in particular p.223 <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf>
[11] Ibid, p.186.
[12] International Military Tribunal for the Far East, Judgement of 4 November 1948, p.439 <http://werle.rewi.hu-berlin.de/tokio.pdf>. An almost identical definition to art.6(a) of IMT Charter was also reproduced in Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, article II(1)(a) <http://avalon.law.yale.edu/imt/imt10.asp>
[13] Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, UNGA Res 95(I), 11 December 1946, operative paras 1 & 32.
[14] ILC, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *YICL*, 1950, Vol.II, 374.
[15] Ibid, Commentary, para.113. In view of its finding, the Tribunal found it unnecessary to discuss whether these aggressive wars were also "wars in violation of international treaties, agreements, or assurances." (ibid, para.114). See also Nuremberg Judgement, n.12, p.216.
[16] UNGA Res 688(VII), 20 December 1952; UNGA Res 895(IX), 4 December 1954; UNGA Res 897(IX), 4 December 1954.
[17] For further information on the work of these special committees on the question of defining aggression see the summary provided on the ILC website:< http://legal.un.org/ilc/summaries/7_5.htm>
[18] UNGA Res 897(IX), 4 December 1954. See also: UNGA Res 1186(XII), 11 December 1957.

was not until 1967 that the UNGA decided to resume substantive work on the matter.[19] In 1974 the UNGA adopted by consensus the definition proposed to it by the UNGA Sixth Committee.[20]

The definition annexed to the 1974 UNGA resolution 3314 ('1974 Definition') was not designed for the purposes of individual criminal responsibility. Rather, it was primarily intended to be recommended to the UNSC "as a guide when […] called upon to determine the existence of an act of aggression."[21] Nevertheless, it proved to be pivotal not only for the development of the crime of aggression but also for the very establishment of the Court itself. Shortly after the adoption of the definition, work on the draft code of offences was resumed by the ILC.[22] Subsequently, the UNGA requested the ILC when considering the draft code of crimes to address simultaneously the question of establishing an international criminal court or other international criminal trial mechanism which would have jurisdiction over these crimes.[23] Thus, agreeing on a definition of aggression in 1974 provided a momentum to the revival of the work on the establishment of an international criminal court.

It is pertinent to mention the main provisions of the 1974 Definition. Article 1 defines 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." According to article 2 while the first use of armed force by a State constitutes *prima facie* evidence of an act of aggression, the UNSC may still conclude that a determination of an act of aggression is not justified "in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." Article 3 sets out the list of acts which may qualify as acts of aggression, subject to article 2. Article 4 explicitly states that the list of acts is not exhaustive and that the UNSC may determine that other acts constitute aggression. According to article 5(2) "[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility."

In 1994 the ILC adopted a Draft Statute for an International Criminal Court. Among the proposed crimes was aggression. The ILC noted the difficulties of defining the crime of aggression. However, at the same time it acknowledged that it would seem "retrogressive to exclude individual criminal

[19] UNGA Res 2330(XXII), 18 December 1967.
[20] UNGA, Report of the Sixth Committee, UN Doc. A/9890, para.13.
[21] UNGA Res 3314(XXIX), 14 December 1974, operative para.4.
[22] UNGA Res 36/106, 10 December 1981, operative para.1.
[23] UNGA Res 44/39, 4 December 1989.

responsibility for aggression […] 50 years after Nuremberg."[24] On the other hand, the ILC took the view that the UNSC's special responsibilities under Chapter VII of the UN Charter meant that prosecutions for aggression should only be brought if the Council has determined that the relevant State has committed aggression involving the crime of aggression which is the subject of the charge.[25] The difficulties of definition and the role to be accorded to the UNSC haunted the negotiations which ensued. In any case, the UNGA proceeded to establish an *ad hoc* committee "to review the major substantive and administrative issues arising out of this draft statute."[26]

7.3 *Ad Hoc* Committee, Preparatory Committee, and the Rome Conference (1995-1998)

Following the establishment of the AHCom the pace of events accelerated in light of its mandate "to consider arrangements for the convening of an international conference."[27] The AHCom proved to be equally divided in relation to the crime of aggression. There was division not only on the question of the definition and the role of the UNSC but also on whether it was appropriate to include the crime within the Court's jurisdiction in the first place.[28] As regards the definition, some delegations found the Nuremberg precedent as unhelpful because it referred to a war of aggression which had already been waged and characterised as such. In contrast, a prospective definition would have "to tackle the difficult issue of possible justifications such as self-defence or humanitarian intervention."[29] The 1974 Definition was also viewed as unhelpful for the purpose of prosecuting individuals. The list of acts of aggression therein was not exhaustive. Moreover, it distinguished between wars of aggression which were described as criminal, and acts of aggression which gave rise to State responsibility.[30]

In the meantime the ILC adopted a draft code in 1996.[31] The draft code characterised aggression as a crime against the peace and security of mankind. In the analysis provided in the Commentary, the ILC took the firm view that the Nuremberg Charter and the Judgment are "the main sources of authority with regard to individual criminal responsibility for acts of aggression."[32] Notably, the draft code was one of the documents at the disposal of the delegates in the ensuing negotiations for an international

[24] Draft Statute for an International Criminal Court with commentaries, 1994, Report of the International Law Commission on the work of its 46th session, *YILC*, 1994, vol.II, Part Two, draft article 20, p.38, para.6 <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf>
[25] Ibid, article 23(2).
[26] UNGA Res 49/53, 9 December 1994, operative para.2.
[27] Ibid.
[28] Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, G.A. 50th Sess., Supp. No. 22, A/50/22, 1995, paras 63-70.
[29] Ibid, para.64.
[30] Ibid.
[31] Report of the International Law Commission on the work of its 48th session, 6 May - 26 July 1996, UN Doc. A/51/10, p.16, para.45.
[32] Ibid, para.5.

criminal court. It was referred to on a number of issues including in relation to the approach to be followed in defining the crimes within the Court's jurisdiction.[33]

The work of the AHCom was continued by the Preparatory Committee established by the UNGA to prepare "a widely acceptable consolidated text of a convention for an international criminal court" to be considered by a conference of plenipotentiaries.[34] The sessions of the Preparatory Committee did not come any closer to bridging the differing views of the delegations.[35] It became clear that any future of the crime of aggression in the Statute was intertwined with what was draft article 23 at the time, which dealt with the relationship between the Court with the UNSC. This affected the formulation of both provisions.

Upon the completion of its mandate the Preparatory Committee transmitted to the Conference the text of a draft Statute for an ICC.[36] The suggested text was accompanied by two remarks. Firstly, the proposal was intended to reflect the view held "by a large number of delegations" that the crime should be included in the Statute.[37] Moreover, it clarified that this draft is without prejudice to the discussion pertaining to the relationship between the Court and the UNSC. The proposed text consisted of three options, all of which were heavily bracketed. A common feature in all three options was the requirement that the conduct took place in violation of the UN Charter and that the individuals to be prosecuted would be persons in a position of exercising control or capable of directing the political or military action of a State.

The early stages of the Rome Conference showed a widespread support for the inclusion of the crime of aggression within the Court's mandate.[38] The vast majority of states were willing to accept a link between the Court and the UNSC which would respect the latter's role under the UN Charter whilst at the same time safeguarding the independence of the Court. Thus, they backed the inclusion of the crime provided a generally acceptable definition was agreed and the relationship between the two institutions was properly clarified. Granting exclusive competence to the UNSC to determine an act of aggression before the Court was to proceed was largely promoted by the P-5. The States which

[33] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Volume I (Proceedings of the Preparatory Committee During March-April and August 1996)*, G.A. 51st Sess., Supp. No. 22, A/51/22, 1996, paras 52-53 ('Preparatory Committee Report 1996, Vol.I').
[34] UNGA Res 50/46, 11 December 1995, operative para.2. The mandate of the Preparatory Committee was extended by UNGA Res 51/207, 17 December 1996; UNGA Res 52/160, 15 December 1997.
[35] Preparatory Committee Report 1996, Vol.I, n.33, paras 66-73.
[36] Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act*, UN Doc. A/CONF.183/2/Add.1 (1998).
[37] Ibid, fn.6.
[38] Committee of the Whole, Summary Record of the 6th Meeting, 18 June 1998, UN Doc. A/CONF.183/C.1/SR.6; Summary Record of the 7th Meeting, 19 June 1998, UN Doc. A/CONF.183/C.1/SR.7.

opposed the inclusion of the crime mainly based their position on the difficulties of agreeing on a definition at the present stage rather than on a principled position against the inclusion of the crime.

Despite the widespread support for the inclusion of the crime of aggression the negotiations resulted in an impasse. There was pervading disagreement on both the question of the definition and the role to be accorded to the UNSC.[39] To this effect, the Bureau Proposal was not a surprising development. This proposal did not include aggression as one of the crimes within the Court's jurisdiction in article 5 of the Statute. Rather, a note at the end of the provision mentioned that if no acceptable definition is agreed by the end of 13 July 1998, the Bureau would propose that "the interest in addressing these crimes be reflected in some other manner, for example, by a Protocol or review conference."[40] While most States were disappointed with this development at the same time, a significant number of delegations recognised that the proposal was the most appropriate way to achieve a compromise over this intractable issue.[41] The eventual arrangement on the crime of aggression was based on a proposal submitted by the Movement of Non-Aligned Countries ('NAM').[42] The NAM countries were the most fervent supporters who persistent until the end on the inclusion of aggression.

The resulting compromise is to be found in article 5 of the Statute as adopted and in the Final Act to the Review Conference. Article 5(1) lists aggression as one of the crimes within the Court's jurisdiction. However, according to article 5(2) the Court shall have jurisdiction over the crime only once a provision is adopted in accordance with articles 121 and 123 "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." According to resolution F annexed to the Final Act, a Preparatory Commission would be established to prepare proposals for a definition and elements of crime of aggression as well as the conditions under which the ICC shall exercise jurisdiction over the crime. Such proposals shall be submitted to the ASP at a Review Conference for consideration.[43]

[39] The following meetings involved extensive discussion on the role of the UNSC and the pre-conditions for the exercise of jurisdiction: Committee of the Whole, Record of the 29th Meeting, 9 July 1998, UN Doc. A/CONF.183/C.1/SR.29; Record of the 30th Meeting, 9 July 1998, UN Doc. A/CONF.183/C.1/SR.30; Record of the 31st Meeting, 9 July 1998, UN Doc. A/CONF.183/C.1/SR.31.

[40] Bureau Proposal, 10 July 1998, UN Doc. A/CONF.183/C.1/L.59 (as corrected on 11 July 1998, UN Doc. A/CONF.183/C.1/L.59/Corr.1)

[41] Committee of the Whole, Record of the 33rd Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.33; Record of the 34th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.34; Record of the 35th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.35; Record of the 36th Meeting, 13 July 1998, UN Doc. A/CONF.183/C.1/SR.36.

[42] Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59), 14 July 1998, UN Doc. A/CONF.183/C.1/L.75.

[43] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/13, 17 July 1998, operative para.7.

Importantly, this arrangement meant that States did not come any closer on agreeing to a definition of the crime of aggression. Neither the Nuremberg precedent nor the 1974 Definition separately or combined garnered adequate support. Nevertheless, even this nominal inclusion of the crime was not without effect. It was perceived as a – albeit paradoxical one– confirmation of its customary nature.[44] Moreover, article 5(2) and the Final Act put in place certain parameters which would profoundly affect future developments and the approach taken in each succeeding forum. The provision was to be consistent with the UN Charter. This factor was to have an impact on both the definition of the crime and the conditions for the exercise of its jurisdiction. In this way the Court's establishment already had an impact on the development of the crime of aggression. While requiring a link with the UN Charter and the leadership element might be particular to the crime of aggression still there are other factors which have a bearing on any crime that may be incorporated in the Court's jurisdiction in the future. In the section below I will examine the progress achieved in each stage of the negotiations in terms of defining the crime (and the extent to which jurisdictional matters affected the definition) and the character of each forum and the extent to which this facilitated progress. Also, I will point out how the Statute's existing provisions had a role to play.

7.4 Preparatory Commission and Working Group on Crime of Aggression (-2002)

The PrepCom took up the matter immediately and agreed to set up a Working Group on Aggression ('WGCA').[45] The PrepCom held 10 sessions between 1999 and 2002. Ultimately, it did not succeed to submit a completed draft for consideration at the first ASP session in 2002. Nevertheless, it forwarded to the ASP a Discussion Paper as proposed by the Coordinator of the WGCA ('2002 Discussion Paper')[46] which provided a summary of the main positions expressed during its work. Despite the lack of significant progress in this period a number of observations may be made. Firstly, the 2002 Discussion Paper demonstrated that even though numerous disagreements persisted as regards the crime's definition the thorn in the discussion was agreeing on the 'conditions' for the exercise jurisdiction over aggression by the Court. The main issue which related strictly speaking to the definition was whether the crime only covered aggressive *acts* or whether it was confined to aggressive *wars* (a related issue which also arose was the issue of permissible self-defence). The proposals put forward on the question of 'conditions' ranged from granting absolute monopoly to the

[44] Kress C. and Holtzendorff L., The Kampala Compromise on the Crime of Aggression, vol.8 *JICJ* (2010) 1179, p.1182; Gaja (Cassese), n.7, p.
[45] UN Doc. PNCICC/1999/L.5/Rev.1.
[46] Discussion Paper Proposed by the Coordinator, 11 July 2002, UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. Document includes two parts: Part I- Definition of the crime of aggression and conditions for the exercise of jurisdiction; Part II - Elements of the crime of aggression drawn from a proposal submitted by Samoa.

UNSC[47] to determine the existence of an act of aggression before the Court could proceed to giving to the ICC jurisdiction over the crime in the absence of a determination by the UNSC.[48] This discussion reflected the understanding that the reference to 'conditions' in article 5(2) was "a reference to the role the Council may or should play."[49] Also, it was already discernible that the other crimes' incorporation in the Statute as well as the PrepCom's simultaneous work on the EoC for these crimes were influencing the parameters for the drafting and incorporation of the crime of aggression in the Statute.

Paragraphs 1 and 2 of the 2002 Discussion Paper introduce the distinction between the "crime of aggression" and the "act of aggression." An act of aggression by a State needs to be committed in order for an individual to be liable for the crime of aggression. Two aspects in these paragraphs are noteworthy. Paragraph 1 specifies that an act of aggression "by its character, gravity and scale, constitutes a *flagrant* violation of the Charter of the United Nations."[50] This can be perceived as being based on an understanding that not all acts of aggression entail individual criminal responsibility. This is also in accordance with the trend to have in place contextual requirements in all the crimes within the Court's jurisdiction, the absence of which means that the underlying acts do not rise to the level of a crime within the Court's jurisdiction. This is also evident from other proposals submitted during this period which refer among others to a "manifest" or "clear" violation of the UN Charter.[51] Paragraph 2 states that an "act of aggression" means an act referred to in the 1974 Definition, without specifying a provision. This signified that while a number of delegations still believed in the 1974 Definition's utility no agreement had been reached at that stage as to how exactly this provision, whether in whole or in part, could be incorporated in the ICC formulation.

Paragraph 3 while not directly related to the definition is of particular interest. It states that article 25(3) (individual criminal responsibility), article 28 (command responsibility) and article 33 (superior orders) "do not apply to the crime of aggression." Similarly, the Samoan proposal on the elements of the crime of aggression stated that given that by its very nature the crime of aggression is a leadership crime it did not believe that the aforementioned provisions "fits" it.[52] These provisions are to be found in Part 3 of the Statute ('General Principles of Criminal Law') but the discussion in relation to them poses questions of a wider context. Clark while concurring with Samoa's position made the following

[47] Proposal Submitted by the Russian Federation: Definition of the Crime of Aggression, 29 July 1999, UN Doc. PNCICC/1999/DP.12.
[48] Proposal Submitted by Greece and Portugal, 7 December 1999, UN Doc. PNCICC/1999/WGCA/DP.1.
[49] Hebel H.V. and Robinson D., Crimes within the Jurisdiction of the Court, in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, and Results* (Kluwer Law International 1999), p.85.
[50] Emphasis added.
[51] Proposal Submitted by Germany: Definition of the rime of Aggression, 30 July 1999, UN Doc. PNCICC/1999/DP/13; Proposal Submitted by Guatemala, 26 September 2011, UN Doc. PCNICC/2001/WGCA/DP.3.
[52] Elements of the Crime of Aggression – Proposal Submitted by Samoa, 21 June 2002, UN Doc PCNICC/2002/WGCA/DP.2, para.15.

pertinent comment: "The crime of aggression has to be fitted within the structure of the Rome Statute."[53] Thus, the Statute itself had an impact on how the aggression provisions were to be formulated and introduced in the Statute.[54] In addition to the aforementioned provisions, this impact also extended to others which are more directly relevant to the definition of the crime itself, these being the EoC and article 30 of the Statute (see discussion below).

Paragraphs 4 and 5 of the 2002 Discussion Paper refer to the 'conditions' for the exercise of jurisdiction. Paragraph 5 is problematic because it attempts to resolve the issue as to what happens when the UNSC fails to act. The level of disagreement is reflected by the five Options available. According to Option 1 the Court may proceed while according to Option 2 the Court shall dismiss the case. Options 3-5 involve bringing into play in addition to the UNSC, the ICJ or the UNGA. Given that in all but one option (Option 1) the determination of a crucial element of the offence is to be made by an external body, "[t]his has drastic effects on the structure of the offense."[55] Thus, it is necessary to consider how the different positions of participants as to the role of the UNSC vis-à-vis the Court had an impact the definition of the crime of aggression.

According to Clark two decisions had substantial implications in the conceptualisation of all ICC crimes. These were the decision to have a broad "general part" in Part 3 of the Statute and the decision to draft elements of crimes after the adoption of the crimes.[56] These factors had greater impact in the crime of aggression than in the other crimes given that the PrepCom had the very recent experience of drafting elements for the other crimes. My position is illustrated by the approach pursued by Samoa in proposing elements for the crime of aggression.

The Samoan proposal was the first tentative effort to define the elements of the crime of aggression. The proposal was prepared on the premise that aggression could be conceptualised like the other crimes within the Court's jurisdiction in terms of "mental" and "material" elements in accordance with article 30 of the Statute.[57] Article 30 is the default rule according to which "unless otherwise provided" there is no criminal responsibility in the absence of "intent and knowledge" in respect of the "material elements." According to the Samoan proposal during the drafting of the elements for the other crimes, participants were convinced that the drafters of the Statute understood three types of material elements that might be present in a given crime, these being, "conduct," "consequences" and

[53] Clark R.S., Rethinking Aggression as a Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court, vol.15 *LJIL* (2002) 859, p.881. The author participated actively in the sessions of the SWGCA and he represented Samoa in the negotiations on the Rome Statute.
[54] Ibid, p.863.
[55] Ibid, p.869.
[56] Clark (2002), n.56, p.863.
[57] Samoa Proposal, n.55, paras 1-2.

"circumstances."[58] Also during the drafting of the elements for the others crimes the PrepCom slowly evolved a subcategory of "circumstances," not specifically mentioned in article 30, the "contextual circumstances."[59] As discussed in previous chapters, in particular chapter 3 on CaH, the contextual elements determine whether the underlying acts can rise to the level of "the most serious crimes of concern to the international community as a whole."[60] Samoa prepared its proposal on the elements for the crime of aggression on the basis of the above understandings. The decision to follow the approach pursued in the PrepCom in relation to the other crimes was significant in that it demonstrated the precedential value of this exercise and its influence in drafting elements for the crime of aggression.

7.5 Special Working Group on the Crime of Aggression, Princeton intersessional meetings and Assembly of States Parties (2002-2010)

The mandate of the PrepCom came to an end at the first session of the ASP in 2002.[61] During the same session the ASP decided to establish a SWGCA to elaborate proposals on the crime of aggression to be submitted to the ASP for consideration at a Review Conference.[62]

A fundamental change in the approach to be followed in conducting work on the crime of aggression was observed from the beginning of the work of the SGWCA. This approach is very valuable in understanding how such amendments may be done to the crimes within the Court's jurisdiction or alternatively how new crimes maybe added. The SWGCA's first report foreshadowed what was to follow. Ambassador Wenaweser of Liechtenstein, Chairman of the SWGCA, addressing the ASP expressed the view that SWGCA should be allocated more meeting time in view of the complexity and importance of the issue. The SWGCA was granted such request in the future sessions. Moreover, the view prevailed to complement the work of the SGWCA with intersessional meetings. This soon became the so-called 'Princeton Process' which was indispensable in enabling the SWGCA to successfully complete its work. The Chairman further noted that several delegations emphasised the need to keep at this stage of deliberations the legal and political aspects of the issue separate, focusing on the former in order to make further progress.[63] In fact, the SWCGCA's work throughout its

[58] Ibid, para.7.
[59] Ibid, para.10.
[60] Rome Statute of the International Criminal Court, Preamble, para.4 <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>
[61] Final Act – Resolution F, n.43, para.7.
[62] Continuity of Work in Respect of the Crime of Aggression, 9 September 2002, ICC-ASP/Res.1.
[63] Informal Intersessional of the Special Working Group on the Crime of Aggression, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University,21 to 23 June 2004, ICC-ASP/3.SWGCA/INF.1, para.5 ('2004 Princeton Report').

existence was based on this premise.[64] Moreover, it was agreed early on that the SWGCA needed to complete its work well in advance the Review Conference, at the latest 12 months before to allow for the generation of the political momentum needed for the adoption of provisions at the Conference.[65] In addition, it was decided in the SWGCA to establish a "virtual working group" that would allow States to advance their discussion outside the ASP and intersessional meetings.[66] This showed a willingness to employ all the means available to achieve progress.

Of particular interest are the informal meetings which took place between 2004-2007 at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School at Princeton University ('Princeton Process'). These meetings took place at the invitation of the Government of Liechtenstein. Importantly, these meetings were inclusive. Invitations to participate were sent to all States who had signed the Final Act as well as some representatives of civil society. Thus, they could be attended by non-States Parties as well as by NGOs.[67] These meetings were instrumental in complementing the work undertaken within the ASP.

By 2007 there was an understanding that the group was entering into a new phase of its work.[68] To this effect, the Chairman prepared an updated version of the 2002 Discussion Paper to reflect the progress achieved thus far.[69] Moreover, it was obvious for a while that the work undertaken was following a thematic structure. Below, I will follow the same structure in order to understand the progress achieved in terms of defining the crime (and agreeing on the related matters). Two further discussion papers were submitted by the Chairman in 2008 and 2009, respectively.[70] As will be seen in this section the main issues which were still pending were the modalities for entry into force of the amendments (article 121(4) or (5)) and paragraph 4 of draft article 15*bis.* The 2009 final report of the SWGCA, adopted by consensus, contained the proposals which were forwarded to the ASP in

[64] Informal transcript of the oral statement made by Ambassador Wenaweser (Liechtenstein), Chairman of the Special Working Group on the Crime of Aggression, to the plenary session of the Assembly of States Parties, 12 September 2003 in Barriga S. and Kress C. (eds),*The Travaux Préparatoires of the Crime of Aggression* (CUP 2012), pp424-425.
[65] Informal Intersessional of the Special Working Group on the Crime of Aggression, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University,13 to 15 June 2005, ICC-ASP/4.SWGCA/INF.1, para.90 ('2005 Princeton Report').
[66] Ibid, para.91. At least three discussion papers were produced as a result of the establishment of the virtual working group which were used as a basis for the discussions during 2005. These are: Discussion Paper 1: The Crime of Aggression and Article 25, Paragraph 3, of the Statute; Discussion Paper 2: The Conditions for the Exercise of Jurisdiction with Respect to the Crime of Aggression; Discussion Paper 3: Definition of Aggression in the Context of the Statute of the ICC, *ASP Official Records*, ICC-ASP4/32, Annex II, B, C, D, p.376 et seq.
[67] While China and Russia participated in the meetings at Princeton the US government was not represented "following its then policy of non-engagement with the Court." See Grover L., A Historic Breakthrough on the Crime of Aggression, vol.105 *AJIL* (2011) 517, p.519.
[68] Report of the Special Working Group on the Crime of Aggression, ICC-ASP/5/SWGCA/2, *ASP Official Records*, ICC-ASP/5/35, Annex II, 9, para.4.
[69] The Chairman duly proceeded to submit the updated version of the discussion paper at the next SWGCA meeting in 2007. See: Discussion paper proposed by the Chairman, 16 January 2007, ICC-ASP/SWGCA/2.
[70] Discussion Paper on the Crime of Aggression Proposed by the Chairman: Revision January 2009, 19 February 2009 ICC-ASP/7/SWGCA/INF.1, paras 1-3.

preparation of the Review Conference.[71] The 2009 proposals have been described as a 'watershed' in the outcome of the negotiations on the basis of which the Kampala compromise was achieved.[72]

Work also continued in the framework of the WGRC which was established by the ASP as its eight session.[73] Following the conclusion of the proceedings by the SWGCA, work on the crime of aggression was chaired by H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan). With the Review Conference approaching he continued work until the last minute in order to minimise to the greatest extent outstanding issues. The new Chairman continued the practice of holding inclusive meetings noting that "the participation of both States Parties and non-States Parties was essential, despite the fact that the Group no longer existed as such."[74]

7.5.1 Individual conduct

The general view that Part 3 of the Statute should be applicable to all the ICC crimes unless there are specific reasons for not doing so was highly influential in reaching an agreement in this respect.[75] The 2002 Discussion Paper suggested the so-called 'monistic approach,' which did not distinguish between the different modes of participation by excluding article 25(3). However, this approach was soon abandoned by the SWGCA for the 'differentiated' approach which maintains the different forms of participation in the commission of the crime. One of the arguments raised against the monistic approach was that it did not properly reflect that the Statute was based on the interplay between the crimes, in Part 2, and the general principles of criminal law, in Part 3.[76]

Having expressed a preference for the differentiated approach work focused on two issues. Firstly, it was considered necessary to reflect the leadership nature of the crime to avoid the prosecution of ordinary soldiers. This was achieved by transposing the leadership qualifier from the definition of the crime into article 25(3) in the form of a new separate paragraph (article 25(3) *bis*).[77] According to the last SWGCA report "this provision was crucial to the structure of the definition of aggression in its current form."[78] Secondly, participants discussed how to describe the "conduct element" in the

[71] Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/SWGCA/2, *ASP Official Records,* ICC-ASP/7/20/Add.1, Annex II, 20 ('2009 SWGCA Report').
[72] Kress and Holtzendorff, n.44, p.1184. See: Proposals for a Provision on Aggression Elaborated by the Special Working Group on the Crime of Aggression, in *2009 SWGCA Report,* Annex (Appendix) I ('2009 Proposals').
[73] The WGRC was established by Resolution ICC-ASP/8/Res.6, adopted at the 8th plenary meeting, 26 November 2009, by consensus. See operative para.4.
[74] Informal Intersessional meeting on the Crime of Aggression, Liechtestein Institute on Self-Determination, Woodrow Wilson School, Princeton Club, New York, 8 to 10 June 2009, ICC-ASP/8/INF.2, paras 3-5 ('2009 Princeton Report').
[75] 2004 Princeton Report, n.63, para.26.
[76] Discussion Paper 1, n.66, see in part. pp 376-8, 382.
[77] Ibid, p.377.
[78] 2009 SWGCA Report, n.71, para.25.

crime's definition. Various proposals were put forward but in the end the Chairman's proposal, which followed more closely the wording of the existing crimes and also mirrored the Nuremberg precedent commanded most support ("planning, preparation, initiation or execution").[79]

Lastly, contrary to the suggestion in the 2002 Discussion Paper, no decision was taken to explicitly exclude articles 28 and 33. While it was acknowledged that any potential application that they may have was theoretical, it was not found necessary in the end to explicitly exclude these provisions. The same approach was also followed as regards the attempted participation by an individual in an act of aggression which may arise under article 25(3)(f).[80] Finally, it was also agreed that the default rule in article 30 would apply to the crime of aggression.[81] Thus, despite suggestions for the partial application of Part 3, in the end the decision was taken not to treat the crime of aggression in a differential manner with the exception of adding a new paragraph in article 25(3).

Clark takes the view that new article 25(3) *bis* is *ex abundante cautela* since it does not add anything new but merely repeats the leadership aspect of the crime already included in article 8 *bis*.[82] The obvious question which arises is where to draw the line as to who may be indictable. At Nuremberg the Tribunal's jurisdiction was limited to major war criminals. Thus, the Tribunal did not actually have to adopt a leadership standard. This question was mostly elaborated in the proceedings subsequent to Nuremberg where determining which of the defendants could commit aggression was more of an issue. According to the *High Command* trial criminality for aggressive war attaches only "to individuals at the policy-making level."[83] The tribunal declined to set a fixed rank saying that criminality refers to the actual power of an individual to 'shape or influence' the war policy of his country.[84] This phrase was contemplated during the work of the SWGCA however it did not command sufficient support. According to Heller, the eventual choice of 'control or direct' over the aforementioned precedent is problematic because no private economic actor (e.g. industrialists) could satisfy the requirement. On the contrary, the Nuremberg Tribunals assumed that aggression could be committed by private economic actors. Thus, he argues that the current definition is a significant

[79] Report of the Special Working Group on the Crime of Aggression, ICC-ASP/5/SWGCA/2, *ASP Official Records,* ICC-ASP/5/35, Annex II, 9, para.11 ('2007 SWGCA Report (January)'); Report of the Working Group on the Crime of Aggression, ICC-ASP/6/SWGCA/1, *ASP Official Records,* ICC-ASP/6/20, Annex II, 87, para.8 ('2007 SWGCA Report (December)').
[80] Mancini M., A Brand New Definition for the Crime of Aggression: The Kampala Outcome, vol.81 *Nord.J.Int'l L.* (2012) 227, p.242.
[81] 2005 Princeton Report, n.65, para.51.
[82] Clark R. S., Alleged Aggression in Utopia: An International Criminal Law Examination Question for 2020, in Schabas W.A. *et al.* (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate 2013), p.66. fn.4.
[83] *High Command* trial (*United States v. Von Leeb et al.,* Nuremberg, 1948), 11 *NMT* 462, 486, cited in Dinstein Y., *War, Aggression and Self-Defence* (5th edn CUP 2011), pp142-143.
[84] Ibid, pp.488-489.

retreat from the Nuremberg principles.[85] The standard adopted appears to be restrictive in that the terms chosen in the end impose a less elastic text compared to the Nuremberg Tribunals. At the same time, these terms do not conclusively exclude private actors from the crime's ambit. Thus, any clarification would have to be provided by the ICC itself.

7.5.2 State conduct

Like the other crimes, the negotiations on the crime of aggression were driven by a belief that the crime's scope should remain within the confines of CIL. As previously discussed, this was a considerable challenge given the diversity of opinion as to the scope of the crime under CIL. Work undertaken was based on the Nuremberg formulation and the 1974 Definition. These two sources had an influence on each other which was reflected in the final outcome. Bringing together these two precedents constitutes by itself an example of progressive development for the crime of aggression. In Nuremberg the crime has been elaborated on the basis of a "war of aggression." During discussions, it was recognised that it would be too restrictive to limit the jurisdiction to acts which amounted to a war of aggression. Thus, broad support was expressed for the term of "act of aggression" as articulated in the 1974 Definition.[86] The inclusion of acts 'short of war' has been perceived as a widening of the scope of the definition. However, the discrepancy is more apparent than real due to the requirement of a 'manifest' violation which "creates a high threshold for individual culpability."[87]

Broad support was expressed for a definition that would refer to the 1974 formulation. However, divergent views existed as regards the way the 1974 Definition was going to be referred to in the provision.[88] This related, among others, to the issue whether the State conduct should be defined by a specific or generic provision.[89] In the end the compromise was built around the specific list of acts from the 1974 Definition. This was achieved by defining an "act of aggression" on the basis of the *chapeau* of article 1 the 1974 Definition and by specifying that "[a]ny of the following acts" in draft article 8*bis* paragraph 2 shall qualify as an act of aggression in accordance with the 1974 Definition. The 2009 draft definition which was forwarded to the ASP reproduced the list of acts from the 1974 Definition. The resulting definition in article 8 *bis* was thus achieved by a combination of the generic and specific approaches which resemble the structure previously adopted for the definitions of

[85] Heller K.J., Retreat from Nuremberg: the Leadership requirement in the Crime of Aggression, vol.18 *EJIL* (2007) 477, pp 496-497.
[86] Informal Intersessional of the Special Working Group on the Crime of Aggression, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, 8 to 11 June 2006, ICC-ASP/5/SWGCA/INF.1, para.23 ('2006 Princeton Report').
[87] Dinstein, n.83, p.135.
[88] 2007 SWGCA Report (January), n.79, para.19.
[89] 2006 Princeton Report, n.86, para.32.

genocide and CaH.[90] However, the turning point to achieve consensus was the threshold requirement which was placed at the end of paragraph 1 of draft article 8*bis*.[91] These two will be discussed in turn to understand how they had an impact on the definition of aggression as adopted.

As regards the list of acts, the question which arises is whether it is exhaustive or not. The provision says 'any of the following acts' which gives support to the view that the list is not exhaustive. During the discussions in the SWGCA there was no agreement in this respect while those who favoured an open list argued that it was "at least to a certain extent, open."[92] They argued that such an interpretation would provide room for future developments in IL bringing among others within the ambit of the definition the actions of non-state actors.[93] According to Kress and Gillet, the list of acts is non-exhaustive. The former argues that this does not breach the principle of legal certainty because "the general definition ensures a sufficient degree of legal certainty."[94] Gillet adds to this approach stating that the threshold requirement "provides additional protection to an accused against being convicted for conduct that could not be reasonably be seen as being prohibited by law."[95]

The imposition of a threshold requirement was driven by two concerns. Firstly, it relates to the magnitude or gravity of an action to exclude isolated incidents such as border skirmishes ('quantitative threshold'). On the other hand, it was also driven by a consideration regarding the right course of action where there was a degree of uncertainty as to the legality of the conduct, the so-called grey areas ('qualitative threshold').[96] While the 2002 Discussion Paper referred to 'flagrant' violation, during the SWCGA sessions this was soon replaced with the adjective 'manifest' which commanded much more support.[97] Arguments existed both for and against the inclusion of a threshold. However, it was an almost inevitable development in order to reconcile widely divergent views on the matter. It also demonstrated the impact of the Statute itself and the approach which had been already been undertaken to formulate the other crimes within the Court's jurisdiction.[98] The Statute affirmed its jurisdiction over the most serious crimes of concern to the international community as a whole and as

[90] Schabas W.A., *An Introduction to the International Criminal Court* (4th edn, CUP 2011), p.149.
[91] See article 8*bis*.
[92] Report of the Special Working Group on the Crime of Aggression, *ASP Official Records*, ICC-ASP/6/20/Add.1, Annex II, 9 ('2008 SWGCA Report (June)'), para.34.
[93] Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, 11 to 14 June 2007, ICC-ASP/6/SWGCA/INF.1, *ASP Official Records*, ICC-ASP/6/20, Annex III, 96 ('2007 Princeton Report'), paras 47-51. The definition of an act of aggression as "the use of armed force by State" excludes non-State actors unless their actions can be attributed to a State. See Gillet M., The Anatomy of an International Crime: Aggression at the International Criminal Court, pp 9-10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209687>
[94] Kress C., The ICC Review Conference: Mission Accomplished or Unfulfilled Promise?, vol.8 *JICJ* (2011) 1179, p.1191.
[95] Gillet, n.93, pp13-14.
[96] Discussion Paper 3, n.66, p.379. See: Kress C., Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus, vol.20(4) *EJIL* (2009) 1129, p.1138; Trahan J., The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference, vol.11 *ICLR* (2011) 49, p.58.
[97] 2006 Princeton Report, n.86, para.20.
[98] Kress (Reply to Paulus), n.96, p.1139 and fn.35.

regards each individual crime it set out the particular characteristics which elevate the underlining conduct to the status of an ICC crime. These particular characteristics usually form part of the contextual elements determining the threshold requirements.

The wording of the threshold which remained unchanged until its adoption as follows: "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." As will be seen below, the threshold has been one of the most criticised features of the new definition. However, the following extract from the 2008 SWGCA report is telling of its acceptance among delegates:

> Although views differed on the need for a threshold, a critical mass of delegations had, over the years, decided in favour of its inclusion. Its removal would constitute a fundamental change to the definition of aggression for the purposes of the Statute.[99]

As mentioned above the term "manifest" was the option which commanded the greatest amount of support in the SWGCA. Paulus has criticised the term as being unclear.[100] Admittedly, the SWGCA did not explain why this term was chosen over the others and what interpretation was thought to be accorded to it. The term is not completely foreign in the Statute. Article 33 which deals with superior orders refers to 'manifestly unlawful' orders. Moreover, the term manifest is conditioned in that an act of aggression will attain this status because of its 'character, gravity and scale.' Here again we see the influence of the Statute in determining whether an act is of sufficient gravity on the basis of both qualitative and quantitative considerations. The three adjectives demonstrate this trend which has already been reflected both in the work of the Prosecutor and of the Chambers (see chapter 6). These terms may suffer from a *prima facie* lack of clarity, particularly the term 'character,' but this can easily be remedied were cases of aggression to come before the Court. Arguably, gravity and scale refer to the crime's quantitative aspect while character brings into play qualitative considerations.[101]

The main problems which would potentially arise by the interpretation and application of the manifest threshold are to be found in the Understandings which were adopted as part of the amendment package in Kampala. I will discuss this in detail in section 7.6.2 below.

[99] 2008 SWGCA Report (June), n.92, para. 28.
[100] Paulus A., Second thoughts on the crime of Aggression, vol.20(4) *EJIL* (2009), 1117, p.1121.
[101] Kress (Reply to Paulus), n.96, p.1135.

7.5.3 Conditions for the exercise of jurisdiction

The issue of conditions for the exercise of jurisdiction does not directly relate to the definition of the crime of aggression. However, the creative approach elaborated in the end on this issue could have a profound influence on whether eventually the Court will be able to exercise jurisdiction over the crime. This may not only affect the actual relevance of the adopted definition in the future but also the ability of the ICC to further develop the crime. Thus, it needs to be looked at in detail.

Two issues remained pending in the 2009 SWGCA proposals submitted to the ASP. Firstly, deciding whether the amendments would enter into force under article 121(4) or article 121(5). The enabling resolution, to which the proposed amendments were annexed, provided for these two alternatives pending agreement. The second issue related to the question of a prior determination of aggression before the Court could exercise jurisdiction and on the appropriate body to make this determination. On one end of the spectrum it was argued that the Court's exercise of jurisdiction should not be subject to any determination by an external or internal organ. At the other end it was argued that such a determination should be within the UNSC's exclusive remit.[102] The only aspect commanding general agreement was that any provision would have to be consistent with the UN Charter.[103] However, it was not clarified by either article 5(2) or article 121 how this 'consistency' would have an effect either on the issue of entry into force (state content being an integral part in this respect) and the eventual arrangement on the matter of prior determination of aggression before the Court was to proceed. This ambiguity was worsened by the fact that the formula in article 5(2) did not clarify which parts of article 121 it was referring to.[104]

I start with the second issue. As mentioned above, the 2002 Discussion Paper provided for five options. These options essentially remained undergoing some 'tidying up' and redrafting over the years. Despite the deadlock, the work of the SWGCA did clarify a number of significant issues. The question of exercise of jurisdiction was placed as a separate provision after article 15, as proposed article 15 *bis*. Paragraph 1 of article 15 *bis* clarified that all three trigger mechanisms apply to the crime of aggression. It was also made explicit in paragraph 3 of article 15 *bis* that the Prosecutor could proceed with an investigation on the crime of aggression when there is a prior UNSC determination.[105] All the paragraphs in the new draft article were generally acceptable with the exception of the appropriate formula where a UNSC determination was absent (paragraph 4).[106]

[102] 2005 Princeton Report, n.65, para.65.
[103] Ibid, para.63.
[104] Clark R.S., Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute, vol.41 (2009) *Case W.Res.J.Int'l L.* 413.
[105] 2008 SWGCA Report (June), n.92, paras 38-39.
[106] 2009 SWGCA Report, n.71, paras 18-19.

Determining the way forward in the absence of a UNSC determination proved to be inextricably linked with the question of whether the Court should have jurisdiction over the crime of aggression in cases where the aggressor State had not adopted the aggression amendments. The answer to this question was concomitant to agreeing whether the amendments should enter into force under article 121(4) or article 121(5).[107] According to article 121(4), except as provided in paragraph 5 of the provision, an amendment would enter into force for all States Parties one year after ratification or acceptance of the amendments by seventh-eights of them. On the other hand, article 121(5) refers to any amendment that may be done in relation to articles 5, 6, 7 and 8. It provides that such amendments will only enter into force for those States Parties which have accepted them. According to the second part of the provision, the Court will not have jurisdiction over a crime covered by the amendment when committed by nationals or on the territory of a State Party which has not accepted the above amendments. Article 121(5) already appears to deviate from the rules applied to the other crimes within the Court's jurisdiction. Namely, according to article 12 it is enough that the crime was committed on the territory of a State Party or by one of its nationals for the ICC to exercise jurisdiction. On the contrary, article 121(5) requires that both territoriality and nationality are satisfied.[108]

It became evident early on that it would not be easy to agree whether article 121(4) or article 121(5) applied. Those in favour of article 121(4) argued that given that aggression was already mentioned in article 5 it was already in the Statute and it should not be treated differently from the other crimes. On the other hand, those who preferred article 121(5) claimed that given that the provision explicitly referred to article 5, the application of article 121(5) was automatic. During the SWGCA meetings it was generally agreed that this limitation would not apply to UNSC referrals and that any solution should avoid differential treatment between States Parties and non-States Parties. There was disagreement whether the Court should have jurisdiction where two States Parties were involved but only one of them had accepted the amendment.[109] Notably, States Parties which had not accepted the amendments would be more insulated from these provisions than non-State Parties. This appeared to be the case where the State Party was either a victim or an aggressor in a given situation.

Discussion on the matter was continued by the WGRC. As regards the entry into force of the amendments the main issue of contention was the scenario to be adopted for *proprio motu* investigations and State referrals where the aggressor State had not adopted the amendments. The

[107] Non-Paper by the Chairman on the Conditions for the Exercise of Jurisdiction, in *2009 Princeton Report*, annex III, paras 6-7 ('2009 Chairman's Non-Paper on the Exercise of Jurisdiction').
[108] Gaja (Cassese), n.7, pp 438-439.
[109] Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/SWGCA/1, *ASP Official Records*, ICC-ASP/7/20, Annex III, 47 ('2008 SWGCA Report (November)'), paras 7-16.

2009 Chairman's non-paper elaborated on the two main alternatives.[110] First, acceptance by the aggressor State would not be required for the Court to be able to exercise jurisdiction. This would be the case if article 121(4) applied. Also, such an outcome would be possible where the amendments entered into force under article 121(5) combined with a "positive understanding" of the second sentence of article 121(5) which would clarify that the Court would not be prevented to exercise jurisdiction for an act of aggression committed against a State Party that has accepted the amendment. Both options were considered to be in accordance with article 12(2) where the victim state's acceptance established the necessary territorial link for the exercise of jurisdiction, which applied to all the other crimes within the Court's jurisdiction. Alternatively, the aggressor's State acceptance would be required before the Court would be able to exercise jurisdiction where the amendments entered into force under article 121(5) combined with a "negative" understanding.

A non-paper shortly before the Review Conference attempted to further clarify the matters which were pending and the options available. As regards the jurisdictional filters there were still two alternatives.[111] Under alternative 1 there would a UNSC filter. Under alternative 2 there was no jurisdictional filter in place or there were a number of options providing for a non-UNSC filter (ICC internal judicial filter, UNGA, ICJ). With the work of the WGRC reaching its completion the Chairman requested all States Parties present to indicate their preferred combination as regards the two main issues which were still pending. Notably, "[t]he combinations attracted varying levels of support."[112] The fact that no proposal dominated the support of delegations indicated that a compromise solution was yet to be found.

7.5.4 Elements of Crimes

Following the Samoan proposal which was incorporated in the 2002 Discussion paper, no substantial discussion on the elements for the crime of aggression was undertaken by the SWGCA almost until the end of its work. Eventually, and without undue difficulty, the SWGCA and later the WGRC were able to agree on draft elements which were submitted to the Review Conference as part of the whole proposal. Work on the elements was facilitated by the recent exercise of the PrepCom to draft the EoC for the other crimes within the Court's jurisdiction.

[110] 2009 Chairman's Non-Paper on the Exercise of Jurisdiction, n.107, paras 9-12.
[111] Crime of Aggression: Non-Paper by the Chairman on Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction, in *2010 WGRC Report,* Appendix I, paras 11-12.
[112] Report of the Working Group on the Review Conference, *ASP Official Records,* ICC-ASP/8/20/Add.1, annex II, 42, para.13.

For the purposes of the 2009 Princeton meeting the Chairman presented a non-paper on the elements which had been prepared on the basis of draft article 8 *bis*.[113] The non-paper suggested the inclusion of a "special introduction" to provide additional guidance as this had been done for the other crimes.[114] Paragraph 2 of the special introduction clarifies that the perpetrator need not have made a "legal evaluation" regarding the inconsistency of the use of State force with the UN Charter. A parallel to this can be found in the special introduction to the WC.[115] Paragraph 3 characterises the term manifest as an "objective qualification." Another parallel concerns the special introduction of the crime of genocide.[116] In the main part of the elements, Elements 1 and 2 deal with the individual conduct and the leadership requirement. Elements 3 and 4 refer to the State act of aggression. Element 3 provides explicitly that the act of aggression must be "committed." Lastly, Elements 5 and 6 refer to the threshold requirement. Elements 4 and 6 deal with the mental element of the crime. These elements require that a perpetrator was factually aware of the circumstances that established the inconsistency between the State use of force and the UN Charter and that such inconsistency was a manifest violation of the UN Charter. As regards the meaning of the term "manifest" it was suggested that the Court would apply "the standard of a reasonable leader," similar to the standard of a reasonable soldier in the context of manifestly unlawful orders under article 33.[117]

The proposals on the elements and their structure received broad support. Thus, the facilitator for the crime of aggression in the WGRC, Prince Zeid, recommended transmitting the draft elements to the Review Conference along with the text produced by the SWGCA.[118]

7.6 Review Conference

During the Review Conference discussions proceeded on the basis of formal as well as informal discussions. In particular, due to the latter kind of discussions it has not been always easy to trace with precision the way by which proposals followed one another and influenced one another. The impact of particular States may be discerned. USA's active role eventually had a determinative and unexpected influence on the definition of the crime that had been forwarded to the Review Conference without any brackets.

[113] Non-Paper by the Chairman on the Elements of Crimes, in *2009 Princeton Report*, annex II.
[114] Ibid, para.4.
[115] Ibid,para.6.
[116] Ibid, para.7.
[117] 2009 Princeton Report, n.74, para.25.
[118] Report of the Working Group on the Review Conference, *ASP Official Records*, ICC-ASP/8/20/Add.1, annex II, 42, para.18 ('2010 WGRC Report').

Here I will deal with two issues separately. The first is the question of conditions in relation to which agreement had not been previously reached. Secondly, I will examine the elaboration of the Understandings and how these may have an impact on the definition of the crime of aggression.

7.6.1 Conditions

The first step taken towards reducing the options available in case of UNSC inaction was to eliminate the involvement of either the UNGA or of the ICJ.[119] Given that for a while there was limited explicit support for these options, the suggestion to drop them was not opposed. This development revealed a preference for such a decision to rest with the Court itself.[120] Thus, we were left with two alternatives, a UNSC filter and an internal Court filter regulated by the PTC.

Recourse to creative attempts became evident early on. The first such initiative came from Argentina, Brazil and Switzerland ('ABS Proposal'). This proposal provided for a different entry into force regime for UNSC referrals on the one hand (article 121(5)) and *proprio motu* investigations and State referrals on the other (article 121(4)). [121] As a result of this proposal article 15 *bis* was split into two separate provisions. Article 15 *bis* was to deal with State referrals and *proprio motu* while new article 15 *ter* provided for the UNSC referrals.[122] This development was to influence further negotiations. However, the central role given to article 121(4) meant that it was unlikely to win over firm supporters of article 121(5) and thus more fine-tuning was required.

Canada responded with a proposal based on an 'opt-in' mechanism where a UNSC determination was not forthcoming.[123] The Court would be able to proceed with an investigation provided that 'all states concerned' had declared their acceptance. This proposal relied on a strict state-consent jurisdictional regime. As expected, this proposal was not welcomed by the many delegations which supported the 'ABS Proposal.'[124]

The next important development was the so-called 'ABCS Non-Paper.'[125] It focused on State referrals and *proprio motu* investigations. This non-paper arguably "paved the way for the ultimate

[119] Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.1, in *2010 WGCA Report,* Appendix II.
[120] Introductory Remarks by the Chairman, Unofficial transcript of the meeting of the Working Group on the Crime of Aggression, 1 June 2010, 5.00 p.m., prepared on the basis of original audio footage, in Barriga and Kress, n.64, p.738.
[121] Non-Paper Submitted by the Delegations of Argentina, Brazil and Switzerland as of 6 June 2010, in *2010 WGCA Report,* Appendix V, A.
[122] Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.2, in *2010 WGCA Report,* Appendix I.
[123] Non-Paper Submitted by the Delegation of Canada as of 8 June 2010, in *2010 WGCA Report,* Appendix V, B.
[124] Kress and Holtzendorff, n.44, p.1203.
[125] Declaration (Draft of 9 June 2010 16h00), in Barriga and Kress, n.64, p.772.

compromise."[126] The 'ABCS Non-Paper' as its starting point followed the same approach taken by the Statute as regards the other crimes. It subjected the crime of aggression to the jurisdiction of the Court in accordance with article 12. To this, two important limitations were added. First, it gave to a State Party the right to file a declaration of non-acceptance. This was presented not as 'opt-out' mechanism but rather as "a declaration that would affect a State Party's acceptance *already* given under article 12(1)."[127] Secondly, it excluded altogether the Court's jurisdiction in respect of non-States Parties. This scheme was completed by an activation clause delaying the Court's jurisdiction for five years from the entry into force of the article for any State Party. This proposal soon garnered wide support among delegates. However, the P-5, both States Parties and non-States Parties, remained to be persuaded to accept a proposal which abandoned the concept of UNSC monopoly.[128]

The non-papers issued by the President of the Review Conference on the 10 June incorporated the ABCS Non-Paper.[129] The enabling resolution finally made the choice that amendments were to be adopted in accordance with article 121(5). It also stated that a State Party may lodge a declaration of non-acceptance prior to ratification or acceptance. The resolution further stipulated for review of the amendments seven years after the beginning of the Court's jurisdiction. The additional requirement of 30 ratifications by States Parties was included in articles 15 *bis* and ter. In relation to the jurisdictional filters the option between the two alternatives still persisted. Alternative 2 had been amended whereby an authorisation to proceed with an investigation would have to be granted by the Pre-Trial Division.

These papers were introduced by the President at plenary sessions which were then adjourned to allow for informal, group or bilateral, consultations. While agreement seemed possible regarding the issue of entry into force, the end of the Conference was approaching and agreement on the question of jurisdictional filters was pending. In the meantime, the plenary had already adopted the amendments to the WC provision. The argument that it might be better to merely adopt the definition of aggression and the UNSC referral mechanism and leave the rest for a future Review Conference was not unreasonable. There was also concern that if a vote count was called whether a sufficient number of delegation would choose (not) to vote or would in any case be present as their flights were shortly to depart.[130]

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[126] Kress and Holtzendorff, n.44, p.1203.
[127] Introductory Remarks by the President, Unofficial transcript of the meeting of the Working Group on the Crime of Aggression, 10 June 2010, 11.00 a.m., prepared on the basis of original audio footage, in Barriga and Kress, n.64, p.780 (emphasis added).
[128] Kress and Holtzendorff, n.44, p.1204.
[129] Non-Paper by the President of the Assembly, 10 June 2010 12:00 noon; Non-Paper by the President of the Assembly, 10 June 2010 23:00 p.m., in Barriga and Kress, n.64, pp 774-778, 782-786.
[130] Harrington J., The President's Non-Paper on the Crime of Aggression (Updated), *EJIL: Talk!*, 10 June 2010 <http://www.ejiltalk.org/the-presidents-non-paper-on-the-crime-of-aggression/>

The question of jurisdictional filters was left for the last day of the Conference. It can be argued that the President was only able to proceed to this matter because of the drastic reduction of the scope of the Court's jurisdiction over *proprio motu* investigations and State referrals. The resulting filter would only catch those States Parties which had adopted the amendment and had not filed a declaration of non-acceptance. Also, non-States Parties were excluded altogether. At the same time it was clear that granting monopoly to the UNSC would not command the requisite two-thirds majority to be adopted.[131] Thus, any solution would have to be based on alternative 2, which provided a role to the Court itself. This was counterbalanced to a certain extent within alternative 2 which gave a priority role to the UNSC. To this effect, before proceeding on his/her own, the Prosecutor should first verify whether the UNSC has already determined whether an act of aggression has taken place. If not, the Prosecutor must wait six months before proceeding. Further concessions were deemed necessary to appease the P-5, including France and the UK as States Parties to the Statute which by accepting a non-exclusive role for the UNSC they were "effecting a dramatic shift in their position on the prerogatives of the Security Council."[132] These concessions took the form of an activation formula. This was reflected in the last non-paper issued by the President. It provided for a non-exclusive UNSC on the basis of what was until then alternative 2. Placeholders were added in both draft articles 15 *bis* and *ter* pending continued discussions on the activation clause.[133]

The final part of the negotiations was divided into two camps. On the one hand, the P-5 argued that activation of the provision takes place by consensus at a future Review Conference. On the other hand, the opposite camp, objected to any further decision for the activation of the provision. The President sought to break the stalemate in the evening by proposing a middle solution according to which the activation of both articles 15 *bis* and *ter* was conditional on a "decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment of the Statute," i.e. by a two-third majority.[134] The time had come for the participants to make a decision. When the president re-convened the plenary meeting after midnight he put before the plenary the revised draft resolution, which incorporated the activation clause for adoption by consensus.[135] The resolution was adopted shortly after midnight by consensus.[136]

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[131] Barriga S., Negotiating the Amendments on the crime of aggression, in Barriga and Kress, n.64, p.55.
[132] Schabas (An Introduction), n.90, p.153.
[133] Non-paper by the President of the Review Conference, 11 June 16:30 p.m. <www.iccreviewconference.blogspot.com>. Following its presentation to the plenary, the non-paper was issued as a draft resolution on which the Review Conference would take a decision in the evening, pending agreement on the activation formula. See: Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression' 11 June 2010, in *Review Conference Office Records*, RC/10, 5.30 p.m.
[134] Untitled text, 11 June 2010, 11.00 p.m., distributed by the President at the 13th plenary meeting of the Review Conference, in Barriga and Kress, n.64, p.804.
[135] Barriga, n.131, pp 56-57.
[136] RC/Res.6, The Crime of Aggression, Review Conference Official Records, RC/11, part II, 17. The following articles were also amendment to reflect the incorporation of the crime of aggression in the Rome Statute: articles 9(1), 20(3), 25(3).

Discussions on the issue of entry into force had a clear verdict. Amendments are to be governed by article 121(5). Further, given that the amendments were viewed as a "single amendment package" it follows that article 121(4) "does not apply to any part of the package."[137] What is more vital following the adoption of the amendments is to understand to whom these amendments will actually apply. It has not been entirely clear whether all States Parties will be bound unless they file a declaration of non-acceptance or whether only those States Parties that ratify the amendments (and have not opted out).[138] The former view is more in accordance with article 12 while the latter accords more with article 121(5). The amendments have been criticised of 'asymmetry' between States Parties that will decide to opt-out and those that do not. According to Heller, a national of a State Party that opts-out of the amendments cannot be prosecuted for an act of aggression against a State-Party which has not opted out. However, the opposite is not true. This asymmetry is also found in cases involving non-States Parties where the Court is precluded from exercising jurisdiction where a non-State Party is involved in a case before it even though it may do so in relation to the other crimes.[139]

The apparent lack of clarity is much more severe than the delayed activation and the requirement for 30 ratifications. It relates to the question as to who is going to be caught eventually by the provision when it enters into force. The 30 ratifications will be achieved given that 26 States Parties have already ratified the amendments.[140] Thus, it is not a question of not having in place an operative mechanism to adjudicate the crime of aggression.[141] Rather, the issue is whether the Court will have jurisdiction over the States involved. While there was an attempt to distinguish the declaration of non-acceptance from the notion of 'opt-out' it is difficult to see how these two may differ in practice. In fact it has been referred as such by scholars.[142] Further, the possibility of UNSC referrals appears remote in view of its practice to date.

Concluding, leaving aside the question of entry into force, the conditions for the exercise of jurisdiction are far more problematic. This is particularly so when it comes to article 15 *bis*. The requirements imposed are clearly not stipulated in the Statute. Perhaps it is surprising that the amendments were adopted by consensus. Notably, the only country to take the floor before the adoption of the resolution to express its serious concerns as to the legal implications entailed was

[137] Dinstein, n.83, p.133.
[138] Ibid. See also: Schabas W., The Kampala Review Conference: A Brief Assessment, 17 June 2010 <http://humanrightsdoctorate.blogspot.com/2010/06/kampala-review-conference-brief.html>; Heller K.J., The Sadly Neutered Crime of Aggression, *Opinio Juris*, 13 June 2010 <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/>
[139] Ibid.
[140] Schabas (A Brief Assessment), n.138. For progress of ratifications see: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en>
[141] Sriram C.L., State Aggression is Finally a Crime . . . But how is it Punished?, *The Guardian*,14 June 2010 <http://www.theguardian.com/commentisfree/2010/jun/14/state-aggression-international-criminal-court>
[142] Dinstein, n.83, pp133-134; Lavers T., The New Crime of Aggression: A Triumph for Powerful States, vol.18 *JCSL* (2013) 499, p.500.

Japan. However, it had decided not stand in the way of consensus.[143] The adoption of the amendments on aggression confirmed the ability of the institution of the ICC to garner sufficient support and will to bring about a significant change in the evolution of ICL.

7.6.2 Understandings

The concept of understandings made its appearance late, in 2009, in the context of the SWGCA in relation to a discussion on a number of issues which the Review Conference might want to deal with, but not in the text of the amendment itself.[144] They concerned the interpretation of the amendments. They were submitted to the Review Conference as part of the amendment package.[145] The draft understandings were generally welcomed by the delegations.[146] I will primarily focus on the understandings which pertained to the definition of the crime.

The topic of the understandings was taken up by the American delegation.[147] The head of the USA delegation expressed his dissatisfaction with the draft definition considering it to be 'flawed.' He took the position that the apparent consensus on the definition masked sharp difference as to key aspects of its *meaning.* He welcomed the idea of addressing concerns through understandings, "without the need for disturbing the language of Article 8bis itself." The understandings were perceived as essential to minimise a number of undesirable risks.

The American delegation proceeded to formally introduce in the debate a long list of draft understandings.[148] A number of observations are pertinent here. The draft definition commanded wide support. Obviously the majority of delegations were not eager to re-open the issue of the drafting of the definition at this late stage in the negotiations. Importantly, the USA proposal did not purport to modify the text of the definition opting for the medium of understandings to meet its concerns on the definition. The developments which followed on the question of understanding demonstrate how a significant non-State Party,[149] perhaps the most significant, who in its own words had come to the

[143] Explanation of Position, Review Conference Official Records, RC/11, Annex VII, p.121.
[144] Non-Paper on Other Substantive Issues on Aggression to be Addressed by the Review Conference, in *2009 SWGCA Report*, Annex (Appendix) II; 2009 SWGCA Report, n.71, paras 27-41.
[145] Conference Room Paper on the Crime of Aggression, RC/WGCA/1, in *2010 WGCA Report*, Appendix III.
[146] Report of the Working Group on the Crime of Aggression, RC/5, in *Review Conference Official Records*, RC/11, Part II, Annex III, 45, para.21.
[147] Koh H.H., Legal Adviser, US Department of State, Statement at the Review Conference of the International Criminal Court, 4 June 2010 <http://www.state.gov/s/l/releases/remarks/142665.htm>
[148] Untitled, undated text, distributed by the US delegation after the meeting of the Working Group on the Crime of Aggression on 7 June 2010, in Barriga and Kress, n.64, pp 751-752.
[149] The non-States Parties which had signed the Final Act had observer status. According to the Rules of Procedure and Evidence of the Review Conference observers states were allowed to speak as well as to submit proposals and amendments. USA, Russia and China participated with the status of observers < http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-3-ENG.pdf>

Review Conference 'in a spirit of renewed engagement,'[150] could have an impact in the negotiations of the definition of the crime. This was further facilitated by the inclusive character of the negotiations which were intended towards reaching a consensus among all participants.

Kress, as Head of the German delegation, was assigned to act as a Focal Point for consultations on the draft understandings submitted by the USA and to explore possible avenues for agreement. The Focal Point concentrated his efforts on reaching agreement on two understandings which seemed to be particularly important to the American delegation. He proceeded to submit draft understandings in this respect.[151] These were eventually adopted as understandings 6 and 7:

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself.

Akande has interpreted understanding 6 to mean that use of force will only amount to aggression where it is a "grave violation with serious consequences."[152] According to Heller there is a discrepancy between article 8 *bis* paragraph 1 and understanding 6. The former focuses on the 'character, gravity and scale' of the aggressive act while the latter focuses on the gravity of the acts and their consequences. The increased attention on consequences reflects USA's concern in relation to humanitarian intervention.[153] Van Schaack considers that the focus on consequences brings into play the argument that acts which technically violate the UN Charter might not constitute acts of aggression by the fact that they improve the situation on the ground.[154] This interpretation leads us again to the question of 'grey cases.' Although here we may only speculate pending the judicial interpretation of the provisions, understanding 6 seems intended to enhance the qualitative aspect of the 'manifest' violation.

A few words are necessary in relation to understanding 7. The first sentence, as adopted, was re-formulated to incorporate Canada's request that the combination of all three elements was relevant to

[150] Koh, n.147.
[151] Untitled, undated text, distributed by the German delegation as facilitator for the draft understandings, 9 June 2010, in Barriga and Kress, n.64, p.773.
[152] Akande D., What Exactly was Agreed in Kampala on the Crime of Aggression? *EJIL: Talk!*, 21 June 2010 <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>
[153] Heller K.J., The Uncertain Legal Status of the Aggression Understandings, vol.10(1) *JICJ* (2012) 229, pp232-233.
[154] Van Schaack B., The Crime of Aggression and Humanitarian Intervention on Behalf of Women, vol.11 *ICLR* (2011) 477, p.485.

determine whether a violation was manifest, even though not all them need to be present to the same degree. The second sentence was added to bring USA on board in relation to the suggested text. On its face, the sentence seems to be intended to exclude situations where only one component is established while the other two are not.[155] Kress and Holtzendorff have made an interesting 'prediction' as to how understanding 7 is going to be interpreted by ICC judges. They argue that the 'gravity' and 'scale' can be satisfied at varying degrees. However, they take the position that the problem of a "sliding scale" is not relevant with respect to 'character' whose purpose is to exclude 'grey area' cases. I share Akande's position that the first sentence of understanding 7 suggests that all three criteria are present while according to the second one two will do. While these are apparently contradictory on closer inspection they are not.[156] This is because the three components are interrelated. This has already become evident in the Court's jurisprudence to date. However, the understandings still have an impact on the definition of aggression as this has been elaborated in article 8 *bis.*

Understanding 7 'slightly' raises the threshold making it more difficult to find a manifest violation.[157] While the presence of all three components is in accordance with the conjunctive approach in paragraph 1 of article 8 *bis*, the aforementioned provision does not require that all of the components are 'sufficiently' satisfied. Thus, understanding 7 introduces a certain *rigidity* to the way the Court is to interpret 'character, gravity and scale.' It directs the Court to adopt a particular interpretation of the term manifest violation. However, such an interpretation is not the only one under article 8 *bis*. For example, article 8 *bis* does not prevent the Court from balancing the three components so that a particularly grave use of force is a manifest violation despite its small scale.[158]

The understandings were but one of the creative pragmatic methods used at the Review Conference to foster acceptance of the amendments. However, their adoption was not accompanied by a debate as to their "precise legal significance." Importantly, there was no discussion as to the status of the understandings in the context of the VCLT.[159] As a result, the relationship vis-à-vis the adopted definition and elements is not entirely clear.[160]

[155] Kress and Holtzendorff, n.47, pp 1206-7. According to Dinstein, understanding 7 underlines the "conjunctive nature" of the 3 components, n.89, p.136.
[156] Akande, n.154.
[157] Van Schaack, n.173, p.484. See also Heller, n.153, p.246.
[158] Heller K.J., Are the Aggression "Understandings" Valid?, *Opinio Juris,* 16 June 2010 <http://opiniojuris.org/2010/06/16/are-the-aggression-understandings-valid/>
[159] Kress C. *et al.* Negotiating the Understandings on the crime of aggression, in Barriga and Kress, n.64, p.83.
[160] Stahn C., The "End", the "Beginning of the End" or the "End of the Beginning"? Introducing Debates and Voices on the Definition of "Aggression"?, vol.9 *LJIL* (2010) 875, p.879.

There is little evidence that the understandings are amendments to the Statute.[161] However, there is some support that the understandings qualify as primary means in interpretation under article 31 of the VCLT. According to Harrington "[a] connection can be drawn between these understandings and article 31 […] and more specifically the use of any subsequent agreement between the parties regarding the interpretation of a treaty or the application of its provisions."[162] Mancini has argued that the understandings, while they do not have treaty status they "may be considered as forming part of the context" for the purpose of interpreting amendments to the Statute, pursuant to article 31(2)(b) of the VCLT.[163] Milanovic has taken a similar view saying that "the Court could theoretically depart from the understandings […] but only if they directly contradicted the text of the Statute or perhaps its object and purpose. There is very little chance of that happening."[164]

According to Heller, the understandings can be nothing more than supplementary means of interpretation, that is, travaux préparatoires according to article 32 of the VCLT.[165] To this effect, their application by the Court as supplementary means of interpretation is discretionary and it depends on the particular circumstances of the case. Under this scenario, the Court may have recourse to them if it determines that interpretation according to article 31 of the VCLT "leaves the meaning ambiguous or obscure."[166] This has not happened very often in the practice of international tribunals and the ICC is not expected to act in a different way.

It must be borne in mind that the USA considered the understandings as an indispensable part of the crime of aggression which put in place safeguards "which made the definition more precise, to ensure that the crime will be applied only to the most egregious circumstances."[167] The willingness to 'persuade' the USA as regards the amendments was consistent with the spirit to adopt the provisions by consensus.[168] While the relationship of the understandings with the provisions of the Statute is to be determined, the 'context' in a general sense, as opposed to its meaning under article 31(2) of the VCLT, supports the view that the understandings will be taken into account in an (almost) similar way as the EoC under article 9.

[161] Heller ('Understandings' – Opinio Juris), n.158.
[162] Harrington J., The Aggression Negotiations at the ICC Review Conference, EJIL: Talk!, 8 June 2010 <http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/>
[163] Mancini, n.80, p.230.
[164] In Heller ('Understandings' – Opinio Juris), n.158.
[165] Heller, n.153, pp245-246.
[166] Report of the ILC, UN Doc. A/6309/Rev., 3-28 January 1966, p.218.
[167] Hoh H. in Heller, n.153, pp 246-247.
[168] Harrington (8 June 2010), n.162.

7.8 Conclusion

Delegates in Rome had been unable to agree on both a definition of the crime of aggression and on whether the exercise of jurisdiction over the crime should be subject to a prior determination of an act of aggression by the UNSC. The definition of the crime as adopted at the Statute's first Review Conference in Kampala in 2010 has attracted much more attention and criticism as regards the jurisdictional requirements put in place rather than the definition of the crime itself. Agreement on the amendments finally adopted was achieved in a very gradual and incremental manner over the years, step by step dealing with different issues separately at a time, while leaving the most contentious ones for discussion in Kampala.

It may be argued that any lessons to be learned by the adoption of the crime are largely of relevance only to the crime of aggression due to its particular characteristics and nature. This is not the case. Uncontroversial amendments aside - such as those effected on the WC provision[169] - any other exercise pertaining to the Court's material jurisdiction will also involve divisive issues of a similar nature. In this respect, the long journey undertaken in codifying the crime of aggression in the Statute may be indicative of the route to be followed for future amendments.

A central focus of this chapter has been to understand how the adopted definition might have an impact on the evolution of the crime of aggression under the Statute and as a consequence under CIL. A significant challenge was assessing article 8*bis'* effect on the development of the crime of aggression when the contours of the offence under general IL are disputed.[170] The situation has been exacerbated by the fact the two sources of law, the Nuremberg precedent and the 1974 Definition were not developed following their inception. The UNSC has demonstrated a profound resistance in determining that a State conduct amounts to an act of aggression and to date has not relied at all on the 1974 Definition.[171] While the lack of any subsequent practice in terms of individual criminal responsibility following WWII has given rise to the argument that the crime of aggression may not be considered as a crime under CIL[172] this has at all times remained a minority view.[173] The Nuremberg precedent was criticised at the time that it was not declaratory of the current state of law. However, today it may be considered as "virtually irrefutable that present-day positive customary law reflects the

[169] See Chapter 4: War Crimes.
[170] Paulus, n.100, p.1119.
[171] Dinstein, n.83, p.137.
[172] Bassiouni M.C. and Ferencz B.B., The Crime against Peace and Aggression: From Its Origin to the ICC, in Bassiouni M.C. (ed.), *International Criminal Law Volume I* (3rd edn Brill 2008), p.227.
[173] Gaja (Cassese), n.7; Kress (Reply to Paulus), n.103, p.1132; Triffterer O., 'Establishment of the Court', in Triffterer O. (ed.), *Commentary to the Rome Statute of the International Criminal Court* (2nd edn Beck/Hart 2008), p.40.

Judgment."[174] At least parts of the 1974 Definition have long been pronounced as having customary status by the ICJ.[175] Dinstein has further argued that the replication of the list from the 1974 Definition implied that the Review Conference deemed them to be "declaratory of customary international law."[176] Importantly, the lack of absolute clarity as to the definition of the crime under CIL provided "some legitimate scope for 'refining' and thereby 'crystallizing' customary international law."[177]

It is extremely difficult to determine whether and to what extent the Kampala definition of aggression is a deviation from CIL. According to Milanovic there are indications supporting the view that the definition of aggression is identical or narrower than its scope under CIL whilst at the same time there are a number of indications that article 8 *bis* may have gone beyond existing CIL.[178] Such a question is "difficult, if not impossible, to answer in the abstract, due both to the unclear content of the customary rule and the vagueness of the treaty one."[179] Hence, "[o]ne needs an actual prosecution with adversarial argument on both the law and the facts to move things further."[180]

The adopted definition does not deviate dramatically from already existing formulations. It takes the Nuremberg precedent as its starting building block[181] and develops this with the 1974 Definition. What the drafting exercise, in the context of the ICC, mainly involved was the merging of these two formulations.[182] At the same time this amalgamation was adjusted to become compatible with the concept of individual criminal responsibility and dressed with how the Statute regime perceives the nature of a crime which is considered to be among the most serious crimes of concern to the international community as a whole. If we look at the drafting history of all the crimes within the Court's jurisdiction we can easily see an established preference in articulating and/or developing thresholds in the crimes' definition which must be satisfied before the Court can exercise jurisdiction over them. In the case of aggression, as with the other crimes within the Court's jurisdiction (in particular CaH), extensive attention was given to the threshold requirement, arguably 'at the expense' of the specific acts proscribed within. .

An obvious difficulty which was particular to the crime of aggression is the lack of case-law following the completion of the trials at the end of WWII. This is to be contrasted with the jurisprudential

[174] Dinstein, n.83, p.128.
[175] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, ICJ Reports 1986 14, para.195. Doubts have been expressed regarding some of the acts in the lists, such as (c) and (e). See Kress (Reply to Paulus), n.96, p.1137.The eventual inclusion of the whole list sets all the acts within on an equal footing.
[176] Dinstein, n.83, p.139.
[177] Kress (Reply to Paulus), n.96, p.1140.
[178] Milanovic, n.4, pp.183-186.
[179] Ibid, p.185.
[180] Ibid.
[181] See article 8 *bis* paragraph 1: ""crime of aggression" means the planning, preparation, initiation or execution […] of an act of aggression." "Waging," which was included in article 6 of the Nuremberg Charter was replaced with "execution."
[182] Gillet, n.93, p.6.

development of the other crimes which benefited enormously from the so-called 'revival' of ICL in the 1990s. The fact that any potential incorporation of the crime of aggression in the Statute was the first such codification by an international tribunal mandated to prosecute individuals accused of its commission raised the stakes even higher. The quality of the ICC as the first permanent international criminal tribunal was an important consideration in this respect. The compromise in Kampala was not "more than just a compromise."[183] Even if the definition in the Rome Statute where to merely replicate its Nuremberg counterpart, the provision adopted would still have to be considered as an example of progressive development. This is because any crime within the Court's jurisdiction is subject to the detailed regime of general principles of criminal law and supplemented by EoC, whose purpose is to assist the Court in the interpretation of the crimes. This is just to name the most prominent examples.

During the work of the WGCA and later on of the SWGCA we can see the impact of the Court itself and the parameters within which it has been established which will have a bearing on any crime to be added within its jurisdiction. Thus, the crime of aggression exemplifies that: 1) the framework of the Court will have an impact on how the crime is to be *incorporated* in the Statute and thereafter 2) how the incorporated crime will evolve under CIL due to the 'potentially transformative' nature of the ICC.[184] Therefore, the Court's transformative effect is both inwards and outwards. As regards, the aggression amendments these "represent a singular achievement that confirms the continuing dynamism of the Court."[185]

The already existing structure of the Statute meant that the crime's general framework was 'pre-determined' and to a large extent it was about filling-in the gaps in the crime's definition. This is not to say that the main body of the definition is immune from criticisms However, despite the significant caveats put in place it is beyond dispute especially after Kampala […] that, in principle, the international community considers aggression to be a crime under existing international law."[186] The Rome Statute, an international instrument which was the result of lengthy negotiation, "represent[s] a consensus reached by a large number of States following a lengthy and complex drafting process. Its provisions will inevitably influence the evolution of international law."[187] The aggression amendments represent the next step in this process. That is, it demonstrates how this instrument by itself can 'grow' having on impact not only in an internal manner on its scope of jurisdiction but also on the development of the crimes under IL.

[183] Ibid, p.522.
[184] Sadat L.N., The International Criminal Court and the Transformation of International Law, in Sadat L.N. and Scharf M.P. (eds.), *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008), p.313.
[185] Schabas (An Introduction), n.90, p.146.
[186] Dinstein, n.83, p.134.
[187] Schabas W.A., The International Criminal Court: A Commentary on the Rome Statute (OUP 2010), p.271.

Chapter 8: Conclusion

> When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.[1]

This thesis set out to explore how the *establishment* of the ICC has had an impact on the *development* of the crimes within its jurisdiction as well as how it may have a bearing on their further and future *development.* The work undertaken was necessarily forward-looking and largely determined by ongoing events. Hence, the outcome and eventual law-making impact of some these events were to a certain extent speculative as they are beyond the temporal scope of this thesis.[2] Despite this limitation, trends have been identified, including the possible directions which can be pursued by the Court henceforth, which will have a bearing on the interpretation and further development of the crimes within its jurisdiction and as a consequence under CIL.

The ICC's law-making potential is a continuing aspect of the institution's identity. Its dynamism is not a finite or fixed consideration. As revealed in this thesis it is influenced by events, decisions and omissions, some which are often external to and completely beyond the Court's control. While certain developments could have been anticipated by examining the Statute's negotiating history, others could not have been foreseen before the Court became operational. Nevertheless, what has been of fundamental importance for this thesis is how these developments, both anticipated and unanticipated, can impact the crimes' development. The ICC 'in action' will continue to 'make' law. It is quite certain that it will do so in manners not identified by this thesis. What this thesis has done though is to ascertain how the ICC's law-making potential is unique and particular to the Court. Moreover, the discussion in the previous chapters demonstrated how this quality stems from the ICC's negotiating history and its outcome and how it relates both to the crimes' definitions and the wider legal framework which has been established by the adoption of the Statute.

8.1 The Rome Conference revisited

In the first place this thesis explored the elaboration of the Rome Statute as a multilateral treaty and how it encompassed characteristics pursuant to which it could be referred to as a 'law-making' treaty. The extensive negotiations undertaken for the drafting of the Statute, both in terms of the number and types of actors involved as well as the elaboration of the provisions, reflected the significance of the

[1] *Missouri v. Holland* 252 U.S. 416 (1920), 433, cited in Arsanjani M.H. and Reisman W.M., The law-in action of the International Criminal Court, vol.99(2) *AJIL* (2005) 385, p.385.
[2] The temporal endpoint of this thesis is 1 June 2015.

subject-matter. This was the first time that the drafting of an international criminal institution endowed with jurisdiction over individuals was inclusive and interactive and not a matter which concerned only the victorious countries in a conflict or the members of the UNSC. Provisions were negotiated and re-negotiated repeatedly to reach their final form. Notwithstanding, there was "general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law."[3]

While the drafters proceeded on the premise that they were dealing with 'existing' rather than 'new' crimes, the highly legalised and detailed formulation of the crimes, necessarily incorporated a significant element of progressive development. In this respect, "the mere change of form from custom to treaty, quite apart from the subtle changes of emphasis almost inevitably associated with the actual drafting of the rules, will change the direction of the future development of the law."[4] The Statute did more than merely changing the form of the crimes from custom to treaty. Aside from the crime of genocide, the drafting of CaH and WC on many occasions involved "the *substantial alteration,* or the *complete reform,* of existing rules."[5] This is especially obvious in relation to WCs as included in article 8 of the Statute. The bulk of acts in article 8 were based on widely ratified conventions many of which were considered to be part of CIL before their incorporation in the Statute. The added detail in relation to a number of crimes in article 8 was to remedy the rather scant and vague wording of some of these primary rules of IHL in order to ensure, among others, their compliance with the principle of legality. As a consequence, the delegates at Rome when drafting the WC provisions had to "be specific as to the content of the underlying primary rules" or as to what they "thought that the primary rules were."[6]

The adoption of the EoC further consolidated the law-making potential of the Statute definitions in bringing about a change of perception as to how the crimes within the Court's jurisdiction are understood and consequently proven. On the one hand, the EoC are not binding and their purpose is merely to "assist the Court in the interpretation and application"[7] of the crimes. On the other hand, the Court "shall apply" them "*[i]n the first place*" along with the Rome Statute and the RPE.[8] Thus, pursuant to article 21 of the Statute the above legal texts of the ICC, which include the EoC, clearly and unequivocally take precedence over CIL and are to be employed accordingly by the Court in the

[3] Kirsch P., Foreword, in Dörmann K. (ed.), *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003), p.xiii.
[4] Jennings R.Y., The Progressive Development of International Law and its Codification, vol.24 *BYBIL* (1947) 301, p.305.
[5] Villiger M.E., *Customary international law and treaties: a manual on the theory and practice of the interrelation of sources* (Kluwer Law International 1997), p.105 (emphasis in original).
[6] Bothe M., War Crimes in Cassese A., Gaeta P., Jones John R. W. D. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1A (OUP 2002), p.381.
[7] Rome Statute of the International Criminal Court, article 9(1) <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> ('Rome Statute')
[8] Ibid, article 21(1)(a) (emphasis added).

application and interpretation of the crimes. As discussed in section 8.3, while CIL and the Statute, as an instance of treaty law, are independent sources of law which can influence each other, in the present case, the balance has shifted in favor of the Statute for effecting changes under CIL. What is unique as regards the EoC is how these non-binding interpretative aids can have an impact on the customary scope of the crimes within the Court's jurisdiction.

Admittedly, the normative significance of the EoC is an aspect of the ICC's law-making potential which has yet to be fully or adequately explored in the ICC case-law. Interestingly, though, the PTC majority decision in *Bashir* provided strong indications that the EoC can advance changes in the interpretation of a key element of the crime of genocide such as genocidal intent. Notably, while the text of the crime has remained immutable since its initial formulation, its interpretation has not. In particular, the jurisprudence of the *ad hoc* tribunals contributed immensely to articulating content and meaning to the crime's constituent elements. Still, any changes on the interpretation and accordingly on the scope of the definition of genocide promoted by the non-binding EoC of the Statute are more far-reaching; relatedly, the definition of the crime has not only remained unchanged since its inception but has also long ago attained customary status.[9]

8.2 The Review Conference: the continuing 'growth' (development) of the ICC crimes

Under certain circumstances "a very widespread and representative participation in the convention might suffice of itself"[10] to transform a conventional rule into a customary one. To date, 123 States Parties have joined the Statute.[11] While this number is considerable, approaching universality in terms of ratification remains a remote prospect. A large number of States have not acceded to the Statute which arguably militates against the conclusion that membership is truly 'representative.' On the other hand, the extensive involvement of States Parties and non-States Parties at the Statute's first review conference in Kampala demonstrated that the attention of the international community on the Court's jurisdiction *ratione materiae* was not a one-off process which culminated and ended with the Statute's adoption. Hence, the substantive law changes agreed upon at the Review Conference were still a matter of general significance to the international community. This context confirmed the law-making potential of the drafting process under the Statute and under CIL.[12]

[9] *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, ICJ Reports 1951 15, 28 May 1951, p.23.
[10] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969 3, 20 February 1969, para.73.
[11] ICC, The States Parties to the Rome Statute <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>
[12] Jennings R. and Watts A (eds), *Oppenheim's International Law: Volume 1 Peace* (9th edn OUP 2008), p.1204, § 583.

The process by which the crime of aggression was adopted, which culminated at the Review Conference, was "a singular achievement that confirms the continuing dynamism of the Court."[13] Moreover, it demonstrated that the Statute will not merely be a neutral receptor of new crimes within its jurisdiction. Amendments to the Court's jurisdiction *ratione materiae* will be moulded to a considerable extent *by the framework of the Rome Statute.* For example, it appears highly unlikely that any further additions to the Statute will not have at least some sort of a threshold requirement which must be satisfied in order to elevate the underlying acts to the status of ICC crimes over which the Court can exercise jurisdiction. Furthermore, the elaboration of EoC has developed into an indispensable practice in the drafting of ICC crimes. Likewise, the amendments to the WC provision, while limited in scope, exhibit the same characteristics.

8.3 The role of customary international law in the development of crimes under the Rome Statute: interrelationship between customary international law and treaty law redefined

This thesis was conducted on the basis of the consideration that the law-making potential of the ICC is of a different quality than that of the *ad hoc* tribunals. Aside the unique features included within the ICC regime, which form part of the Court's law-making potential, this thesis demonstrated how the ICC's *overall* law-making potential differs from that of its predecessors. Essentially, there is a fundamental difference in the relationship between the definitions of the crimes under CIL and the crimes' definitions in the ICTR and ICTY Statutes and the Rome Statute, respectively. The distinction concerns the place and role of CIL in the development of international crimes by all the aforementioned tribunals.[14] In relation to the two *ad hoc* tribunals this finding is more relevant as regards the ICTY, where determining whether the tribunal's applicable law was grounded in CIL assumed a more prominent place in comparison to the ICTR.[15] In particular, although the ICTY's jurisdiction *ratione materiae* was defined by its statute, the Chambers relied on CIL in order to ensure respect for the principle of legality.[16] The ICTY AC explained the tribunal's reasoning in this respect

> the Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission […]. This is because in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements.[17]

[13] Schabas W.A., *An Introduction to the International Criminal Court* (4th edn CUP 2011), p.146.
[14] Meron T., *The making of international criminal justice a view from the bench: selected speeches* (OUP 2011), p.40.
[15] Ibid, pp.32-39.
[16] Ibid, pp.32-33.
[17] *Galić* (IT-98-29-A), 30 November 2006, para.83.

In contrast, the ICC is a highly legalised document where the 'elements of the prohibition' are sufficiently defined. Thus, "[t]he ICC Statute more closely resembles a civil law code. Unlike pleadings in the ICTY, therefore, the gravamen of future pleadings in the ICC will be the interpretation of the Statute, not its customary law underpinnings."[18] For example, in *Lubanga*, the first trial opened before the ICC, the Defence argued that the prosecution case violated the principle of legality because child recruitment was not a crime under CIL when the offense was committed. The PTC disagreed finding that the crime had already attained customary status at the time. Most importantly though, the PTC grounded its decision on the fact that there was sufficient evidence establishing substantial grounds to believe that the accused was aware that the crime of child recruitment "entailed his criminal responsibility *under the Statute*," which the DRC had already ratified before the occurrence of the events contained in the charges.[19]

As shown by the Court's application and interpretation of the crimes to date, the starting point is unequivocally the definitions of the crimes in the Statute. This is confirmed by article 21 of the Statute which sets out the 'Applicable law' for the Court. Accordingly, the Chambers shall apply *in the first place* the Statute, the EoC and the RPE. As regards custom, the Chambers may resort to this additional source of IL "*[i]n the second place, where appropriate*."[20] Thus, what is the role of CIL under the Statute?

In the case of the Statute there is no need to test the definitions of the ICC crimes against the backdrop of CIL in order to determine whether they comply with the principle of legality. On the contrary, as a consequence of the elaborate definitions of the crimes in the Statute, these statutory definitions of the crimes along with their interpretation, clarification and development by the Court will have an impact on the CIL formulations of these crimes. Notwithstanding the attempted 'divorce' between developments under the Statute and under CIL via the article 10 provision, it is not possible to isolate developments under treaty law from having an influence on CIL, and vice-versa. Article 38 of the ICJ does not establish a hierarchy between CIL and treaties; rather, these two sources of law are autonomous and it is precisely for this reason that "any one may affect – i.e. abrogate or modify – the other, whereas in a hierarchical relationship *only* one source could influence the other."[21] In the case of the ICC, because of the unique characteristics of the Statute and its quality as a law-making treaty, the backdrop for assessing normative developments, at least as regards the crimes within the Court's jurisdiction, are the ICC definitions of the crimes.

[18] Meron, n.14, p.40.
[19] *Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of the Charges, 29 January 2007, paras.306-307 (emphasis added).
[20] Rome Statute, n.7, article 21(1)(b) (emphasis added).
[21] Villiger, n.5, p.58.

8.4 The ICC 'in action': anticipated and unanticipated developments and their contribution to the Court's law-making potential

The Court's early work revealed almost immediately that the ICC's "law-in-action" will not only be quite different from that of the *ad hoc* tribunals but "may even prove quite different from that envisaged by its creators."[22] In particular, the first situations to open before the ICC, concerning DRC, Uganda and CAR, reached the Court by reason of self-referrals by these States Parties. Notably, "[t]here is no indication that the drafters ever contemplated that the Statute would include *voluntary* state referrals to the Court of difficult cases arising in their own territory."[23] This unexpected turn of events initiated the ICC's predominant focus on civil wars and internal strife along with the concomitant consequence as to the type of conflicts and armed groups which are expected to come within the Court's preview and which do not follow traditional patterns of warfare. On the normative level, the ICC's law-in-action inevitably followed suit reflecting that "[i]n any manifold of events, an innovation in one part inevitably precipitates changes and potential problems elsewhere."[24]

The Statute contains a highly articulated body of rules which reveal a clear preference for the strict interpretation of its provisions. Most importantly, the ICC is "the first international tribunal to explicitly contain provisions relating to the different components of the principle of legality."[25] While a strict literal interpretation seems appropriate for a criminal statute such as the Statute, the Court's work in practice has shown that the interpretation of the statutory provisions by the Chambers can have a strong teleological aspect. Among the fundamental objects of the Statute is to provide for the punishment of "the most serious crimes of concern to the international community as a whole."[26] Thus, the Statute's strict legalism is in conflict with the treaty's object and purpose, which at least from a substantive law perspective, calls for a teleological interpretation of the crimes.[27] Recently, this conflict became most evident in *Katanga*. The majority noted early on its judgment that a teleological interpretation pursuant to the VCLT "could be considered antithetical to the principle of legality."[28] Nevertheless, in the end, "[t]he pronounced emphasis on Article 22 in the opening part stands in stark

[22] Arsanjani and Reisman, n.1, p.386 (footnote omitted).
[23] Ibid, pp.386-376 (emphasis in original, footnote omitted). See also: Kirsch P. and Robinson D., Referral by State Parties in Cassese A., Gaeta P., Jones J. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002), pp.622-623.
[24] Ibid, p.401.
[25] Jacobs D., Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories in d' Aspremont J. and Kammerhofer J. (eds), *International Legal Positivism in a Post-Modern World* (CUP forthcoming), p.16.
[26] Rome Statute, n.7, Preamble, para.4.
[27] Stahn C., Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment, vol.12(4) *JICJ* (2014) 809, pp.815-816.
[28] *Katanga* (ICC-01/04-01/07-3436-tENG), Judgment pursuant to article 74 of the Statute, 7 March 2014, para.54.

contrast to the rather far-reaching interpretations of crimes against humanity, modes of liability and Regulation 55."[29]

The Chambers have interpreted broadly or have applied liberally provisions of the Statute, other than the crimes, but which have an impact on the outcome of proceedings and the ability of the Court to develop further the crimes within its jurisdiction. The most significant example in this respect is regulation 55 of the Regulations of the Court. The AC when interpreting this provision for the first time stated that "a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute."[30] The Court's limited jurisprudence has demonstrated the 'unlimited' ways by which regulation 55 may be employed to advance the proceedings and secure conviction when this would have been very difficult if not impossible. Nevertheless, the legally shaky foundations of the *Katanga* judgment, especially in terms of respecting the fair trial rights of the accused, highlighted that the "decisional legitimacy"[31] of the ICC judgments can be undermined by the inappropriate application of regulation 55. Significantly, the ability of the Court 'in action' to develop the crimes within its jurisdiction also depends on the legitimacy of its judgments. In this respect, addressing the problems which have arisen so far will impact on the weight accorded to the ICC judgments in terms of clarifying and developing the scope of the crimes.

The above clash does not only concern the form and the nature of the Statute. It also extends to the definitions of the crimes within the Court's jurisdiction and in particular to CaH and WC. As opposed to the crime of genocide whose definition has remained unchanged, the definitions in articles 7 and 8 have undergone a significant amount of alteration and restructuring. These definitions demonstrate an inherent contradiction; despite the outwardly modern formulations of the crimes their underlying rationale still remains grounded on the traditional conception of the crimes. As regards, CaH this finding primarily relates to the contextual elements of the crime as these are elaborated in the *chapeau* of article 7 of the Statute. As discussed in chapter 3, the contextual elements of the crime had never been clear prior to their incorporation in the Statute. Despite the lack of clarity on this fundamental aspect of the crime, the drafters had to agree upon the contextual elements in a manner which also addressed widely divergent views and perceptions as to the scope and meaning of the crime. As a consequence, even though the CaH definition is far more detailed and comprehensive than the preceding formulations of the crime, the Statute definition is not clear from ambiguities. Such a

[29] Stahn, n.27, p.816.
[30] *Lubanga* (ICC-01/04-01/06-2205), Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," 8 December 2009, para.77 (footnote omitted).
[31] Powderly J., Distinguishing Creativity from Activism: International Criminal Law and the 'Legitimacy' of Judicial Development of the Law in Schabas W.A. *et al.* (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate 2013), p.225.

feature is in itself normatively significant given that it provides a leeway to the Chambers to refine and develop the very scope of CaH. Notably, the principle *nullum crimen sine lege* does not bar progressive development of the law through interpretation.[32]

The definition's gradual refinement and development by the Court's work in practice was an anticipated consequence of the ICC's establishment. It was discernible by an examination of the definition and its constituent elements as well as the negotiations on the crime. Nevertheless, the Court's early case-law revealed that the development of CaH following the ICC's establishment is not restricted to the refinement of vague and ambivalent terms. The 'unanticipated' modern scenarios in which article 7 has been applied in the situations to open before the ICC so far are even more significant for the further and future development of CaH. In essence, the modern elaboration of CaH premised on the traditional conception of the crime did not take into account how conflicts are conducted nowadays. CaH "as a normative concept finds its very origins in "principles of humanity" first invoked in the early 1800s by a State to denounce another State's human rights violations of its own citizens."[33] This was also the premise on the basis of which CaH were included in the Nuremberg Charter. Indeed, the focus of CaH on "atrocities and other violations perpetrated by a State against its own population" has been characterised as "their origin and their *raison d'être.*"[34] The situations and cases with which the Prosecutor and the Chambers have had to deal so far clearly exposed the shortcomings of this conception given that they brought to prominence that not only most atrocities are committed in the course of internal conflicts but that they usually involve non-State groups which do not partake the characteristics of a State entity.

The Court's jurisprudence as to what it takes to determine which non-State groups may qualify as an 'organisation' for the purposes of 'organisational policy' is still unsettled. At the same time, the Court's early case-law has provided indications as to the possible route(s) which can be taken by the ICC in developing this key aspect of the crime. This is a matter of great importance as regards the ability of the ICC to contribute to the development of CaH. The Court's case-law is stimulating an adjustment and clarifying the outer limits and the very scope of CaH. In essence, the particularities entailed in the Court's involvement with CaH signify that the ICC can advance further the development of the crime by aligning the modern formulation of the crime in article 7 with its conceptual basis, that is, what elevates an act to the status of an international crime.

[32] See chapter 1, section 1.4.2.
[33] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), UN Doc. S/1994/1405, 9 December 1994, para.132.
[34] Schabas W.A., *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010), p.139.

The Court's work on CaH has great practical importance which further enhances the ICC's law-making potential. Article 7 is the only crime to have been charged in all the situations before the ICC to date. The ongoing situations involve a number of contexts: post-electoral violence (Kenya and Côte d'Ivoire), long-running civil wars (Uganda, CAR and DRC) and violent oppression of civilian population by repressive regimes (Sudan and Libya). These situations present a variety of settings not all of which fit within the classic conception of an armed conflict. While the crime's definition gradually shed away the war nexus requirement, the contextual elements which evolved to assume its role, did not take into consideration changes in modern warfare. This definitional 'inadequacy' was brought to the fore by the early ICC case-law. As a result of the Court's extensive work on CaH concrete results on the development of the contextual elements of the crime are expected not before long.

In chapter 4, I approached article 8 as a whole, as a war crimes provision, to substantiate the conclusion that the elaboration of the provision *per se* is normatively significant. It entailed the effective transition of WC from rules of IHL, ill-fitted for the purpose of individual criminal responsibility, to a fully-fledged modern ICL definition. The Court's work on WC further revealed how the characteristics of the situation, from which cases emanate and in relation to which charges are subsequently chosen, have an impact on the development of article 8. Here there is no issue of satisfying a threshold requirement comparable to the one in article 7(1) in the absence of which the underlying acts do not constitute CaH. On the contrary, the *chapeau* in article 8 "rather serves as a practical guideline for the Court."[35] Hence, the characteristics of a given situation have a *direct* influence on the very WC charges selected in each and every case. In particular, the Court's work in *prima facie* internal conflicts has meant that article 8's jurisprudential advancement has unevenly shifted in favor of WC committed in NIAC. The ICC's focus on a particular segment of article 8 highlights the normative role played by the Court *itself* in action. Importantly, such a development is taking place irrespective of the far greater level of protection afforded by article 8 to WC committed in IAC. In sum, the ICC in action can modify the direction of a crime's development independently and in spite of its substantive law scope under the Statute.

The Court's case-law has demonstrated the multifaceted law-making potential of the ICC. It revealed how the Court can accelerate the development of the 'novel' crimes included in the Statute, child conscription being the most prominent example to date. Given that the Prosecutor, restrained among others by budgetary and workload issues, will necessarily select a limited number of situations and cases, the Court's establishment unavoidably promotes the asymmetrical development of the crimes

[35] *Bemba* (ICC-01/05-01/08-424), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para.211 (footnote omitted).

within its jurisdiction. Indeed, the selection of cases for prosecution may be the greatest challenge to be faced by international justice.[36] The aforementioned highlight the key role played by Prosecutor and the Chambers alike in determining the Court's law-making potential. Their approach towards the selected situations, cases and charges has normative weight.

In undertaking its mandate the ICC faces completely different and arguably even greater challenges than the *ad hoc* tribunals which have an impact on its ability to develop the crimes within its jurisdiction. In the first place, "[t]he ICC is the archetypal *ex ante* tribunal."[37] To this effect, "a formidable challenge falls on the prosecutors and eventually on the judges who must determine whether and how to set priorities among their curial responsibilities and the inevitable political consequences of their actions."[38] Indeed, as discussed in chapter 6, the Court's work so far has demonstrated how the choices and decisions by the Prosecutor and the Chambers alike can shape the ICC's "law-in-action." In the second place, the ICC is a permanent institution. Hence, its mandate is not situation-specific.

The ICC's non-situation specific ambit is a unique factor which forms part of the Court's nature as a law-making institution. The diverse situations in which the Court is being involved bring into play different considerations as regards investigations and prosecutions by the Prosecutor and the application and the interpretation of the law by the Chambers. Therefore, the Chambers will necessarily evolve and adapt their interpretation of the crimes. For example, as shown by the early case-law in interpreting the contextual elements of CaH the precedential value of previous decisions holds sway to the extent that it is applicable in the context of subsequent situations and cases. While certain parts of the *chapeau* elements have a 'solid' interpretation since the very first situations/cases and have not been challenged ever since; others, such the term 'organisation' are still in a state of evolution which can potentially bring about fundamental changes to their meaning and scope. The interpretation of the term would not have acquired such a vital importance to the Court's work on CaH had the Court only been operating within the context of a single predetermined conflict situation.

A related finding which has become weightier as a result of the Court's permanent status is how its involvement in ongoing conflicts with precarious security conditions has influenced the way both the Prosecutor and the Chambers carry out their respective functions. While this issue does not strictly speaking concern the interpretation of the crimes by the Chambers, it became apparent on numerous occasions in the ICC's early case-law how it directly affects the quality of investigations and prosecutions. The Prosecutor is not absolved of responsibility in preparing solid cases; still, the

[36] Schabas W., *Unimaginable atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012), p.4.
[37] Arsanjani and Reisman, n.1, p.385.
[38] Ibid.

performance of her office is put in the wider context. Significantly, the often (over)assertive response of the Chambers confirmed how the different circumstances in a given situation/case impact as to what it takes to substantiate a charge to the requisite evidentiary threshold. While this is foremost an evidentiary matter it is inextricably linked with the way the Prosecutor prepares a charge and its understanding as to the meaning and scope of the constituent elements of the crime which forms part of the particular charge. Therefore, the Chambers' response to the Prosecutor's work is fundamental to the application and interpretation of the crimes within the Court's jurisdiction. As a consequence, the ICC's establishment as a permanent institution is inextricably linked to the further and future development of the crimes within the Court's jurisdiction. The Court's law-making potential as the first permanent institution of its kind is founded on the *continuity* of its jurisprudence over the course of simultaneously ongoing diverse situations, to be followed by yet more situations.

8.5 Epilogue: a note for the future

This thesis has focused on the Court's establishment and its operation in its first years in order to assess the strength of the relationship between the establishment of the ICC and the development of the crimes within its jurisdiction. Development was identified both in terms of having taken place and of going to take place prospectively. As a final note I would like to locate my findings, which are restricted by the thesis' temporal scope, within the Court's work in the long-term. Looking to the future, the Court's quality as permanent institution will become more obvious. To date, the ICC has often been referred to as a young court and treated accordingly. Unavoidably, as the Court becomes involved in more situations and cases, its further and future law-making potential will become more dependent on its work in practice rather than what was agreed upon in Rome and later on in Kampala.

The institution of the ICC is very much a child of its age. It is a modern instrument with its own unique characteristics. Its establishment was the next step in the practice of creating international criminal institutions. Moreover, its making took place at a time when the development of international crimes was entering a new trajectory in terms of their further evolution. Hence, the ICC started its operation when the field of ICL was undergoing its own state of transition. As a consequence, in understanding the ICC's law-making potential and output at a future stage it is pertinent to locate its role, purpose and direction as an integral part of international criminal justice.

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