Irina Valusha, Maryna van den Boom

JURISDICTION OVER INTERNATIONAL CRIMES

The International Criminal Court and Other Ways of Ending Impunity

Kazimieras Simonavicius University

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Contents

Foreword 11

Chapter 1:
Jurisdiction issues and international criminal law 15

Introduction: What do we mean by jurisdiction? 17

Part 1. Jurisdiction in international criminal law: Retrospective and contemporary overviews 23

1. International criminal law: Genesis and elements 23
2. International criminal responsibility of natural persons and responsibility of states for international wrongful acts 26
   - 2.1. Responsibility of states for international wrongful acts 26
   - 2.2. International criminal responsibility of natural persons 28
   - 2.3. Conceptual interconnection between individual and state responsibilities 28
3. Selected principles of public international law and *lex specialis* of criminal law 30
   - 3.1. Sovereignty of states and "sovereign equality" 31
   - 3.2. Principle of *dedere aut judicare* ("extradite or prosecute") 32
   - 3.3. Complementarity 34
   - 3.4. Community interests: Principle, concept or "norm" 35
   - 3.5. Legal positivism and the principle of humanity 39

Part 2. Jurisdiction and universal jurisdiction: An in-depth study 45

4. Background information 45
5. Building the UJ framework 49
6. Understanding UJ 53
7. UJ – Scope and modes of application 54

Part 3. Global criminal justice as a forum for jurisdiction over international crimes 71

8. Institutional framework of international justice: Historical and legal overview 71
8.1. Building judicial power over international crimes 71
8.2. The interwar period: Versailles treaty 72
8.3. After WWII: Germany and Japan 74
8.4. End of the cold war: Ad hoc tribunals, hybrid courts 79
9. Substantive elements of international criminal justice 100
10. Individuality, accountability and duty to act 101
11. Selected international treaties (focus on the issue of jurisdiction) 103
11.1. Humanitarian law (Geneva Conventions and protocols) 104
11.2. International human rights law (genocide, apartheid, torture, enforced disappearance, trafficking of persons) 111
12. Conclusions: The growing role of international criminal law and the best option for criminal jurisdiction 120

Chapter 2:
Jurisdiction of the International Criminal Court and prosecution of offenders from non-member states of the Rome Statute 123

Introduction: Are the ICC's problems related to the lack of universal jurisdiction? 125

Part 1. The legal basis for the prosecution of macro-criminals by the ICC 129
1. The legal nature of the International Criminal Court and applicable law 129
2. The jurisdiction of the International Criminal Court and applicable international law 131
2.1. The problem of the definition: *Competence v. jurisdiction* 131
2.2. The establishment of the jurisdiction of the International |Criminal Court 132
2.3. Macro crimes as the object of the jurisdiction of the ICC: *ratione materiae*, *ratione temporis*, *ratione personnee* 135
3. The jurisdiction of the ICC in respect to individuals – offenders from non-member states 142

Part 2. Problems of international law in the exercise of the jurisdiction of the ICC against offenders from non-member states of the Rome Statute 145
4. Officials as persons addressed by the ICC and the principle of immunity..... 146
5. The principle of state immunity and immunity of the individual sovereign..... 148
5.1. Functional and personal immunity..... 148
5.2. Immunity from the criminal jurisdiction of foreign courts 152
5.3. Scope of immunity under international law..... 154
5.4. Immunity effect and waiver of immunity..... 156
6. Immunity in the most serious area: Human rights violations..... 158
7. Immunity issues, international human rights and humanitarian law conventions..... 161
8. Exemptions of immunity beyond the limits of international conventions..... 165
9. State immunity in light of the constitutionalisation of international law.... 175
Conclusions..... 180

Part 3. General principles *nullum crimen sine lege, nullum poena sine* and the personal responsibility of offenders from non-member states of the Rome Statute in accordance with applicable international criminal law..... 181
10. General principles among the sources of international criminal law..... 182
11. The *nullum crime* principle as an integral part of international criminal law..... 184
12. The principle *nullum crimen, nulla poena sine lege* in the Rome Statute.... 185
13. *Nullum crimen sine lege* as the barrier to the prosecution power of the ICC 186
Conclusions..... 187

Part 4. The jurisdiction of the International Criminal Court over offenders from third countries and the problem of third-party jurisdiction..... 189
14. The third effect of the regulation on the jurisdiction of the International Criminal Court 190
15. The threat of the Rome Statute for US troop contingents 192

Part 5. Restrictions and obstacles to the jurisdiction of the International Criminal Court 195

16. The blocking of the jurisdiction of the International Criminal Court by the Security Council 196
17. Exemption from the jurisdiction of the International Criminal Court by means of bilateral agreements 199
18. The extinction of the jurisdiction of the International Criminal Court by ad hoc courts: True or false? 200
19. Immunity interpretation as a misleading concept 203
Conclusions: Overall evaluation and outcome 206

Chapter 3: Legal preconditions for the exercise of jurisdiction by the ICC against an individual from a state non-member of the ICC: A Case Study of Pre-Trial Chamber 2's Warrants of Arrest for Two Individuals from the Russian Federation in the Context of the Situation in Ukraine, March 2023 209

Introduction 211

Part 1. Facts constituting an alleged crime and crime qualification: What to choose, war crimes (Article 8[2][b][viii]), crimes against humanity (Article 7[1][d]) or genocide (Article 6[e]) of the Rome Statute? 217

Part 2. State of law: *Lex specialis* with respect to the protection of children 225
1. International and national (Russian, Ukrainian, Belarusian) legal frameworks on the protection of children's rights and criminalisation of acts violating those rights 225
1.1. International framework (hard and soft law) 225
1.2. National legal framework (Russia, Ukraine and Belarus) 228
1.3. Interpretation of the general principles of children's rights' protection by Russia, Belarus and Ukraine 234
1.4. Protection of children's rights as jus cogens 239
2. Understanding genocide as the crime of crimes in hard and soft law 243
2.1. Article 2(e) of the Convention: Forcible transfer of children 246
2.2. Article 6(e) of the Rome Statute and the ICC's Elements of Crimes ... 252
2.3. The anthropological vs. the legal approach of genocide and its development towards jus cogens 256

3. The forcible displacement of children as an act of genocide: Reflections on this crime in the jurisprudence of the tribunals ICTY/ICTR, recent doctrine on Article 6(e) of the Rome Statute 261

Part 3. Jurisdiction of the ICC on the case on the alleged forcible transfer of children 265

4. Actus reus: Prohibited by the statute underlying acts 266
4.1. Viability of the group needs protection 267
4.2. Protection of the group as an entity 268
4.3. Ethnic cleansing 269
4.4. In whole or in part 270
4.5. "Children" as a protected group in international law, its definition ... 273
4.6. Transferring from one group to another 275
4.7. The definition of 'forcible' 277
5. *Mens rea*: specific genocidal intent (*dolus specialis*) and general intent (*dolus generalis*) 279
5.1. Specific intent – *dolus specialis* regarding forcible transfer 280
5.2. General intent – *dolus generalis* regarding forcible transfer 284
6. *Ratione personae* 286
6.1. *Ratione personae*: Preconditions regarding the officials of a non-state-party of the Rome Statute in offence of the allegedly committed forcible transfer of Ukrainian children 287
6.2. "Pacta tertiis" vs. officials of a state which is non-member of the Rome Statute 290
6.3. The addressees of the ICC warrant and the immunities' regime 292
Conclusions 294

Bibliography 297

List of Tables 325

Summary 327

Foreword

The possibility of bringing individuals to criminal responsibility on the basis of international law is widely acknowledged. Meanwhile, theoretical, normative and practical aspects of persecution of perpetrators for acts threatening common values which pave a clear way for fighting impunity over international wrongdoings are still under construction. After a permanent International Criminal Court (ICC) was established under the Rome Statute, adopted at the United Nations Diplomatic Conference in July 1998, and it started its operations in July 2002, humanity, in the person of the secretary-general, expressed strong hope that the jurisdiction of the International Criminal Court to prosecute criminals at the international level will help "in the fight against impunity or in our efforts to prevent genocide or other abominable crimes falling within the jurisdiction of the Court".[1] Through more than 20 years of the ICC legacy[2] it is becoming obvious that the selected jurisdiction of the ICC did not stop the vicious circle of impunity of

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1 The secretary-general of the United Nations, Kofi Annan, appealed to all states to ratify the statute as soon as possible, because there should be no concessions "in the fight against impunity or in our efforts to prevent genocide or other abominable crimes falling within the jurisdiction of the Court". UN, *International Criminal Court Statute Enters Force; Annan Hails 'Historic' Occasion*, UN News. Global Perspective, Human Stories, July, 2 2002, https://news.un.org/en/story/2002/07/39072-international-criminal-court-statute-enters-force-annan-hails-historic-occasion (accessed November 19, 2023).

2 In 2022 the court chambers issued 534 written decisions, over 15,000 victims participated in cases before the court, more than 8,900 new victim application forms were filed, including over 2,000 for the situation in Ukraine. See: ICC, *The Annual Report of the International Criminal Court on Its Activities for 2022/2023*, August 21, 2023, https://www.icc-cpi.int/news/annual-report-international-criminal-court-united-nations-its-activities-2022/2023 (accessed December 9, 2023).

dictators, tyrants, torturers and servants pursuing their immorality, mostly on the non-member states of the statute.

This raises the problem of the International Criminal Court's procedural capacity to prosecute offenders from non-members of the Rome Statute but also a question on how other effective jurisdiction modes over international crimes committed by macro-criminal nationals of non-member states may be brought before the ICC or other courts, on global or national levels. With regard to the establishment of ad hoc criminal tribunals/hybrid courts and special commissions of various kinds, as well as the Rome Statute of the International Criminal Court, governments, practitioners and scholars recognize that such bodies have their own jurisdictional and practical limitations. Meanwhile, considering that perpetrators of serious crimes of international concern are avoiding prosecution for alleged core crimes under territorial or national jurisdiction, including offenders who escaped from being punished abroad, there is an increased need for broader application of the principle of universal jurisdiction. There have been vivid examples when governments realise their commitment to facilitating the prosecution and punishment of perpetrators. Importantly, all possible ways of delivering justice and fighting impunity will be conducted in compliance with international law.

The main argument put forth by the authors is that, in addition to the International Criminal Court, which has limited jurisdiction, international organizations but also national states, particularly those that have made progress toward realizing the rule of law, can strengthen the international justice system in different ways: by supporting civil society, establishing independent investigative mechanisms, maintaining human-rights monitoring processes, and sharing the best practices of investigating international crimes, including those covered by the Rome Statute within their own systems, applying universal jurisdiction.

The goal of this monograph is twofold: (1) to present an analytical overview of the existing international and national approaches and institutions eligible to fight impunity for international crimes; (2) to provide it as

a roadmap, enabling interested readers (and actors) to undertake additional studies of the topic of jurisdiction(s) over international crimes in order to contribute to the body of knowledge and/or effective deeds aiming to fight impunity and bring justice at the local level or globally.

While the scope of this monograph is limited to the question of jurisdiction over selected international crimes recognized by international law as "core crimes", the first chapter focuses on broader issues of jurisdiction in the realm of international criminal law, providing legal analyses and historical overviews that reveal both institutional and substantive developments in international criminal law with the overarching goal of ending impunity for perpetrators of core crimes globally. The chapter includes analyses of the principles driving international criminal law's development, including the *lex specialis* principle of "universal jurisdiction".

In the second chapter, the scope will be narrowed to the jurisdiction of the ICC over criminals from non-member states. The third chapter is devoted to a specific case related to the ICC warrant against two high officials of the Russian Federation. The scope of this chapter will be even more precise: the legal analysis will include issues related to the "third party" notion, as well as the up-to-date development of the doctrine of international courts' jurisdiction against state officials and immunity. The chapter illustrates how international criminal law may apply and stimulate academic research on international criminal law, but also serve as a practical tool for the sake of ending impunity and preventing criminal enterprises locally and at the earliest stage.

This monograph emphasizes the importance of referencing, applying and developing international criminal law in various activities and embracing academic research and practical aspects of fighting impunity. The monograph covers foundational scientific concepts, normative arguments and case-law examples, facilitating a reader to obtain an outlook on international criminal law, which is applicable both on local and global levels.

Chapters 1 and 2 are written by Irina Valusha, and chapter 3 is written by Maryna van den Boom.

Chapter 1:
Jurisdiction issues and international criminal law

Introduction: What do we mean by jurisdiction?

International criminal law is a relatively new branch that emerged in response to the international cry for justice in cases of the most serious crimes. The concept of international crimes and the procedures governing the investigation, prosecution and punishment of the perpetrators individually accountable for their actions are the subject of international criminal law. To put it simply, international criminal law deals with two interrelated areas: crimes and jurisdiction. The jurisdiction issue must integrate traditional national-level jurisdiction with the new international branch of criminal law. There are various dimensions of the concept of jurisdiction. In order to provide the most comprehensive and practical framework, the author has selected features of the notion of "jurisdiction" that consider both the need for academic scrutiny and the practicality of materials for application by those involved in human rights activities. Ambitious goals to meet both approaches lead the author, and in seeking a balance between academic and practical approaches, the author brings examples from various legal systems and prepares analytical and historical overviews that provide readers with information serving as a means of self-comprehension of legal notions beyond pure normative considerations.

Jurisdiction is considered a fundamental principle in all legal systems, ensuring that cases are heard by the appropriate court or legal authority. Meanwhile the term *jurisdiction* may have different senses – from the notion related to the concept of state sovereignty, with the meaning of a state's power or authority, in which case it is completely synonymous with *sovereignty*. The word *jurisdiction* can also simply refer to a state's power or authority in a certain area, such as adjudication by courts or other judicial agencies.

For this monograph, jurisdiction – the concept and its term – constitutes the main subject of the study and relates mainly to criminal matters. The general title of the monograph, "Jurisdiction over International Crimes" merges two components of international criminal law: its material part, namely crimes, and the procedural component, jurisdiction, which might be entrusted respectively to judicial institutions, both national and international. International criminal jurisdiction refers to the allocation of judicial power among international criminal tribunals and domestic courts, united in combating impunity for international crimes. The author takes the contestable character as well as the variable modes of jurisdiction over international crimes between the judicial bodies into consideration. However, for the sake of establishing a comprehensive map of the possible ways of exercising jurisdiction over international crimes, the generic term *international criminal jurisdiction* fully satisfies the demand. In the literature one may see a confession that there is no hierarchy in exercising jurisdiction in criminal matters.[3] Meanwhile, the flow of different rules of international tribunals with respect to the jurisdiction over international wrongdoings, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and the International Criminal Court shall be respected. There are also regional agreements where jurisdiction matters with a sui generis mode of criminal jurisdiction, including cases with respect to core crimes.[4] The jurisdiction of national courts over international crimes de jure

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[3] Ilias Bantekas, *International Criminal Law*, Hart Publishing (2010); Ilias Banteka, Susan Nash, *International Criminal Law*, Routledge–Cavendish Publishing Limited (2003), p. 143–154, 163–164; Theresa Abend, *Grenzen der Völkerrechtsfreundlichkeit*, Göttinger Schriften zum Öffentlichen Recht, Band 13, Universitätsverlag Göttingen (2019).

[4] The European Union's Framework with respect to criminal jurisdiction matters might be presented as an example. When pursuing the objective of making the EU an area of freedom, security and justice, member states agree to abolish extradition between member states, replacing it with a system of surrender between judicial authorities. In that way traditional cooperation relations have been replaced by a system of free movement of judicial decisions in criminal matters, covering both presentence and final decisions within

may be favoured, as they are typically part of domestic material criminal law.[5] Moreover, the generally recognized principles have been requesting states' judicial actions on the domestic level in the cases of crimes threatening common values (see chapter 3, part 3.2.). The presented arguments support the use of the term *international criminal jurisdiction* to define the judicial power of relevant judicial bodies in combating international crimes.

When it comes to classification of jurisdiction modes, one may refer to the report of the United Nation (UN) secretary-general, prepared under a request of the UN General Assembly and its list of the following international criminal jurisdiction modes, which might be based on various foundations, such as: (a) territory (including subjective and objective territoriality); (b) nationality – the concept of "active personality"[6] or "passive personality"[7]; (c) protection reason.[8] It also might have universal dimension

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an area of freedom, security and justice. See: Council of the European Union, *Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures Between Member States*, 002/584/JHA, June 13, 2002, https://www.refworld.org/docid/3ddcfc495.html (accessed January 3, 2024). For examples on the practical application of the agreement, one may see: Eurojust, *Case-Law by the Court of Justice of the European Union on the European Arrest Warrant*, October 2023, https://www.eurojust.europa.eu/publication/case-law-court-justice-european-union-european-arrest-warrant-october-2023 (accessed November 19, 2023).

5 See supra note 3.

6 The "active personality"– a state has authority to make criminal law for its nationals wherever they act in the world – is the second fundamental principle of jurisdiction. See: Andre Klip, *European Criminal Law*, Intersentia (2009), p. 178–190.

7 The "passive personality" principle bases criminal jurisdiction on the status of the victim of crime as a national of the state exercising jurisdiction. See: Kenneth S. Gallant, "The Passive Personality Principle", [in:] idem, *International Criminal Jurisdiction: Whose Law Must We Obey?*, Oxford University Press (2022), online ed. Oxford Academic, May 19, 2022.

8 The protective approach allows states to prohibit and prosecute certain crimes committed wholly outside their territories by persons who are not their nationals. See: Kenneth S. Gallant, "The Protective Principle", [in:] idem, *International Criminal Jurisdiction…* Moreover, also *The Lotus Case*, Judgement No. 9, 1927, P.C.I.J, Series A, 18.19.

known as (d) the universal principle.[9] While all bases will be mentioned later, if implicitly by elaborating on the issues of criminal jurisdiction, the principle of "universal jurisdiction" (UJ) or "universal criminal jurisdiction" will be presented separately and in detail. When talking about the power of a judicial body both terms will be applied as synonyms. This method is justified, as one is following existing approaches of international law.

One more important note for better comprehension of the presented material is the interpretation of the pair of words *jurisdiction* and *competence*.[10] When talking about the power of a judicial body, both terms – *jurisdiction* and *competence* – will be applied as synonyms. This method is justified if one is following existing approaches of international law. For example, in the charter of the (Nuremberg) International Military Tribunal (IMT), the power of the tribunal to "try and punish" individuals who committed specific crimes (Article 6) goes as a part of the court jurisdiction, while in the Statute of the International Criminal Tribunal for Rwanda (ICTR) the same power is defined by the word *competence*. Some authors point out that the *jurisdiction*'s meaning is closer to the genesis of power, while *competence* says more about the capacity of an individual or a body to perform designated tasks. The mentioned approaches will be addressed in the monograph in a mutatis mutandis manner.

Although this complex subject may force the author to address issues across the spectrum of international law, such discussions will be included only if they serve the main idea – assisting in the comprehension of different effective jurisdictional ways to combat the most serious crimes threatening

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9 UN, Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments*, 65th Session, A/65/181, (2010), p. 3, https://digitallibrary.un.org/record/689030 (accessed November 18, 2024).

10 Marc Henzelin, *Commentary. Jurisdiction and Competence of the Tribunale*, Lalive (2005), https://www.lalive.ch/data/publications/mhe_Jurisdiction_and_Competence_of_the_Tribunal_2005.pdf (accessed November 18, 2024).

the international community. In the next part, devoted to the jurisdiction over individual responsibility, the concept of "accountability of states for international wrongful acts" will be briefly introduced to compare the two.

Part 1. Jurisdiction in international criminal law: Retrospective and contemporary overviews

1. International criminal law: Genesis and elements

The very concept of "international criminal law" (ICL) focuses on holding individuals accountable for egregious offences, irrespective of their domicile. There are different approaches when defining international criminal law. The author will use the wording and algorithm prepared by Cassese, who identifies ICL as "a body of international rules" and provides two main area of the rules, which prescribe:

(1) Certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, international terrorism) and

(2) Making persons who engage in such conduct criminally liable.

The third, a very crucial element, is that these rules consequently either authorize states or impose upon them the obligation to prosecute and punish such criminal conduct. Additionally, ICL also regulates international proceedings before international criminal courts, for prosecuting and trying persons accused of such crimes.[11] The main purpose of international criminal law is determined by the traditional perceptions expressed in national penal laws,[12] but significantly influenced by purposes and principles of the modern framework of international cooperation of states aiming to protect

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[11] *Cassese's International Criminal Law*, revised by Antonio Cassese et al., Oxford University Press (2013), p. 3–5.

[12] Hans-Heinrich Jescheck, Thomas Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, Duncker & Humblot (1996), p. 1.

people's coexistence as a "human family".[13] This generally defined goal, which is based on the Universal Declaration on Human Rights' statements, the author sees as a modern reading of international criminal law's anticipated outcomes.[14] More specific reasons, like victims' rights to truth, justice, reparation, and non-repetition, as well as a maximalist interpretation of the right to justice as a right to punish criminals, have also been consolidated in recent decades.[15]

The Rome Statute[16] established jurisdiction of the first and the only permanent International Criminal Court, with the determination to put an end to the impunity of the perpetrators of the crimes which threaten the peace, security and well-being of the world.[17] It also proclaimed the ICC's mission, which is impossible to fulfil without the joint efforts of international and national judicial powers.

International criminal law[18] differs from domestic law not only in its (universal) scope of application, but also in that it is limited to the protection of the basic values of humanity and the international community, for whose

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13 UN, General Assembly, *Universal Declaration on Human Rights*, December 10, 1948, preamble, para. 1.

14 Adopted in 1948, the *Universal Declaration* warned about the consequences and causes of the "barbarous acts which outraged the conscience of mankind" and drew the perspectives of the "advent of the world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want…". Ibid.

15 Elena Maculan, Alicia Gil, (2020). "The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts", *Oxford Journal of Legal Studies*, 40(1) (2020), p. 132–157.

16 UN, General Assembly, *Rome Statute of the International Criminal Court*, July 17, 1998, last amended 2010, preamble, para. 3, 5, https://www.refworld.org/docid/3ae6b3a84.html (accessed November 29, 2023).

17 Ibid.

18 "International criminal law" means material criminal law of an international law character which directly, i.e., without a state act of transformation (Article 59 II Basic Law – Constitution of the Germany), establishes the criminality of natural persons. Knut Ipsen, *Völker Recht*, C.H. Beck Verlag (1999), para. 42, Rdnr. 1.

protection the recognition of penal obligations under international law is justified.[19] For a long time states' exclusive authority over criminal persecution issues were regarded as domestic legal affairs because for centuries people did not have any rights or obligations recognized under international law. Individuals were not direct recipients of international rules in the former international community.[20]

Nonetheless, the indications of the concept of individual criminal responsibility in international law can be traced back[21] to a precedent set by Peter von Hagenbach, the governor of Breisach in southern Germany, in 1474. In that year he was charged with "trampling underfoot the laws of God and man" for acts including murder, rape, and "orders to his non-German mercenaries to kill the men in the houses where they were quartered so that the women and children would be completely at their mercy".[22] The individual was tried by an international panel of 28 judges, and after his conviction for multiple crimes stripped of his knighthood and executed. This singular historical example illustrates that an international criminal trial for committed atrocities was viewed as the very appropriate option far prior to the formal birth of the Westphalian nation-state system.

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19 See the judgement of the Israeli Supreme Court of 29 May 1962 on the *Attorney General of the Government of Israel v. Adolf Eichmann*, *International Law Reports*, 36 (1968), p. 277 et seq., based on the assumption that there is universal jurisdiction over genocide.

20 Bartram S. Brown, "International Criminal Law: Nature, Origins and a Few Key Issues", [in:] *Research Handbook on International Criminal Law*, ed. Bartram S. Brown, Edward Elgar (2011).

21 Ibid.

22 Quoted from: ibid. For more on this case and for good discussion of the development of individual criminal responsibility under international law, see: Edoardo Greppi, "The Evolution of Individual Criminal Responsibility Under International Law", *International Review of the Red Cross*, 81(835) (1999), https://international-review.icrc.org/sites/default/files/S1560775500059782a.pdf (accessed December 21, 2023).

2. International criminal responsibility of natural persons and responsibility of states for international wrongful acts

2.1. Responsibility of states for international wrongful acts

The international legal system, based on the Westphalian nation-state system, struggles with state accountability due to a lack of centralized enforcement mechanisms. This hinders practical consequences for states found responsible, and political considerations can impede effective application. Additionally, the complexity of state responsibility and attribution challenges make it difficult to assign responsibility.

Disputes arise when acts are carried out by nonstate actors or groups within a state, or by multiple states. Under a request of the UN, the concept of "internationally wrongful acts of a state"[23] has been developed by the International Law Commission (ILC) as Draft of Articles on the State Responsibility (2001). It contains the needed provisions, specifically that the state's responsibility "may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach".[24] It also stipulates a special mode of international responsibility which is entailed by a serious breach, by a state, of an obligation arising under a peremptory norm of general international law (so-called aggravated responsibility' of the state).[25] Regrettably, however, the concept of "internationally wrongful acts of a state" applies very seldom.

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[23] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chapter 4.E.1, November 2001. The text reproduced as it appears in the annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. 1)/Corr. 4.

[24] Ibid., Article 33.

[25] Ibid., chapter 3.

One recent example of the indirect application of the concept of a state's responsibility is a reference to the situation of the military invasion and crimes allegedly committed on the territory of Ukraine. The action was initiated by 38 states in accordance with Article 13(a) and 14(1) of the Rome Statute of the International Criminal Court. This referral formally notified the prosecutor of the ICC about the situation in Ukraine and asked it to start an investigation within ICC jurisdiction, stipulated in Article 5 of the Rome Statute.[26] The collective action aims to protect basic rights and obligations of all states, as stipulated by the International Court of Justice in the Barcelona Case in 1970. It includes prohibiting acts of aggression, genocide and racial discrimination, and assumes that "[e]very State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations".[27] To sum up, the concept of a state's responsibility is linked to the principle of the reciprocal assistance of states, and both influence individual criminal

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[26] This referral was made by the following group of state parties: Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria*, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden*, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland. ICC, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, March 2, 2022, https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states (accessed November 18, 2023).

[27] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, ICJ, Judgement of 5 February 1970, p. 32, para. 34, https://www.refworld.org/cases,ICJ,4040aec74.html (accessed November 18, 2023).

responsibility since they all depend on a state's willingness to obey international law and cooperate.

2.2. International criminal responsibility of natural persons

Individual criminal responsibility is justified by fundamental ideas and normative goals, developed through international humanitarian law (IHL) and human rights law (HRL). While IHL aims to protect the human family from wrongful acts and from wrongful acts leading to violations and crimes, the former strengthens normative frameworks for life and limb. Most rules of the ICL have evolved from municipal case law relating to international crimes, resulting in the gradual transposition of rules and legal constructs on an international level. Main stages and events related to international criminal justice will be presented later. Now, taking the most obvious features of the concept of international criminal responsibility of natural persons, they may be presented as follows: (1) recognising individual rights and freedoms, the international community of states as a whole, which seek to combat major crimes and advance accountability on a worldwide basis and impose obligations, namely, the international criminal accountability of natural persons; (2) by holding individuals accountable for international crimes, the legal system aims to deter future perpetrators by discouraging individuals from engaging in such heinous acts; (3) the normative set of personal criminal liability contributes to the awareness of individuals and their responsibilities towards society; (4) individual criminal accountability helps end impunity for international crime perpetrators and aims to prevent criminal enterprises directed by heads of governments.

2.3. Conceptual interconnection between individual and state responsibilities

The majority of international offences are considered punishable by national criminal law. If these breaches go unpunished and are widespread

and organized as a result of a state policy of impunity, the situation shall be considered by applying the concept of "aggravated responsibility" of the state on whose territory the perpetrators operate. Therefore, in the event that individuals commit one or a number of these crimes and their actions remain unpunished by a state, under the international law there may be two levels of accountability: the state's culpability, which is governed by public international law (PIL), with also application of the Draft Article of Responsibility, and the criminal liability of the individual, which comes under ICL.

However, one should be aware of a tendency showing that the international community currently tends to decline or neglect governmental culpability while continuing to elevate the concept of individual responsibility. This trend is driven mostly by political considerations and nations' reluctance to invoke the aggravating responsibility of other states unless strongly motivated by self-interest or political considerations. The genocide cases brought before the International Court of Justice (ICJ) by certain states demonstrate that, in theory, both legal paths are still open and may be pursued. Thus, in the case of "Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide", the ICJ considered that Serbia had failed to comply with the obligation to prevent the crime of genocide. Moreover, it had violated its obligations under the Convention and "it must transfer individuals accused of genocide to the ICTY and must co-operate fully with the Tribunal".[28]

The concept of individual criminal culpability has evolved over time and continues its development in response to historical events, retroactive calls for accountability and punishment for recently occurring atrocities. In the meantime, the rationale for personal accountability and the legitimacy of governmental accountability will be viewed as a multifaceted structure. The

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[28] See: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, ICJ, July 11, 1996, https://www.refworld.org/cases,ICJ,4040ba0c4.html (accessed November 18, 2023).

rationale behind both doctrines is to prosecute individuals responsible for crimes that threaten peace and security and in this way contribute to preventing atrocities in the future.

3. Selected principles of public international law and *lex specialis* of criminal law

Principia probant non probantur
(Fundamental principles require no proof; they are assumed a priori)

There are a number of principles that are highly relevant to criminal and international law. Referring to the Latin legal axiom *Principia probant non probantur*, the author highlights the role of legal principle in the process of research and practical application. While selecting the principles as well as all the materials for this monograph, the author kept in mind the main subject – international criminal jurisdiction – and its goal – to make readers comprehend the presented concepts. In order to achieve this goal there will be cases and examples that, in the author's opinion, are relevant for research and applicable to the practice of lawyers, law students and civil society organizations. The selected principles belong to the following groups:

1. General principles of law identified in Article 38 of the Statute of the International Court of Justice,[29] as the legal sources applied by the ICJ while deciding disputes submitted to it. Among the principles are also those which constitute due process and legality in all criminal matters but have not been presented in the monograph.
2. Principles developed within the international and national frameworks, and applied for the interpretation of genesis and application of norms and issues related to international criminal jurisdiction, including extraterritorial criminal jurisdiction. Most such principles will be presented in detail further.

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[29] UN, *Statute of the International Court of Justice*, April 18, 1946.

The principles of both groups may overlap. Moreover, some of the principles may have double or even triple genesis, for example, the principle of universal jurisdiction is an example of such a legal phenomenon. A survey among territorial states conducted by UN bodies since 2010 shows[30] that UJ might be viewed as (1) a mechanism in the collective system of criminal justice, (2) a generally recognised principle, (3) a tool allowing a state to bring criminal proceedings in respect to certain crimes, irrespective of the location of the crime and the nationality of the perpetrator or the victim.

3.1. Sovereignty of states and "sovereign equality"

International criminal law is rooted and has grown as part of a broader system of public international law that, since 1648,[31] has been based on state sovereignty.[32] The criminal branch (ICL) takes for granted the fundamental principle of nation states. State sovereignty, in its internal scope, implies a state's jurisdiction over its own territory and citizens. Simpson[33] retrospectively pointed out that the trajectory tracing the development of international law shows that the system has been developing from the highly centralized and unequal relations that were the mark of the pre-Westphalian stage in international affairs to a Westphalian order in which the sovereign equality of states becomes a new defining quality of the system.

Traditional international law established a set of rules protecting sovereignty, which included the (1) power to wield authority over individuals

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30 See supra note 9.

31 Peace of Westphalia – series of treaties, see: Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty", *International History Review*, 21(3) (1999), p. 569–591.

32 UN, *Charter of the United Nations*, October 24, 1945, 1 UNTS 16, Article 2, part 2 lists "the principle of a sovereign equality of all its Member States".

33 Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press (2006).

living in the territory, (2) the right to freely use the territory, (3) immunity from foreign court jurisdiction for acts or actions performed by the state in its sovereign capacities and (4) immunity of state representatives acting in their official capacities. The elements have been reflected in the Montevideo Convention (1933), which enshrines four characteristics of a state as a subject of international law:
(a) permanent population
(b) specific territory
(c) own government
(d) ability to enter into relations with other states.[34]

Following the former international community rules, individuals are subordinated to their "own" state and could not be held personally liable for any violations of those norms at the international level. This means that the traditional way to exercise the power of jurisdiction over crimes committed by individuals remains with nation states. This formula has been modified by introducing three principles: extradite or prosecute, community interests and complementarity.

3.2. Principle of *dedere aut judicare* ("extradite or prosecute")

The expression *aut dedere aut judicare* is a modern adaptation of a phrase used by Grotius: *aut dedere aut punire* (either extradite or punish), which was emphasized in his doctrine.[35] A contemporary method does not appear to go as far as Grotius did, considering the possibility that an accused

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[34] *Convention on Rights and Duties of States*, adopted by the Seventh International Conference of American States, Montevideo, December 26, 1933.

[35] Cherif M. Bassiouni, Edward M. Wise, *Aut Dedere Aut Judicare*: The Duty to Extradite or Prosecute in International Law, Martinus Nijhoff Publishers (1995), p. 3, 75–302; Hugo Grotius, *De Jure Belli ac Pacis*, ed. and introduction Richard Tuck, Liberty Fund, Inc. (2005), Book II, Chapter XXI, paras. 3–4, p. 1061–1064.

person could be judged not guilty. Furthermore, it leaves open the question of whether the mentioned obligation, at least with regard to particular international crimes, derives solely from pertinent treaties or if it also represents a general requirement under customary international law. While the principle "extradite or prosecute" is a predecessor of the universal jurisdiction principle, some commentators have also pointed out that it is important to distinguish between the *aut dedere aut judicare* principle and the concept of universal jurisdiction. Larsaeus is convinced that the modern expression better suits contemporary meaning, as it does not strictly imply an obligation to punish but rather to adjudicate or prosecute, or take steps towards it.[36]

Both UJ and other kinds of jurisdictions based on territoriality, nationality, passive personality, etc. are subject to the requirement *to present a case to the prosecuting authorities* or *to extradite* to a requesting state or international body. The author agrees with scholars who conclude from the perspective of the evolution of the principle that it represents new developments in international law and urgent concerns of the international community. It has also significantly developed as an effective tool against growing threats arising for states and individuals from criminal offences. Despite this, the obligation *aut dedere aut judicare* is pertinent to the debate over UJ, since it requires a state party to exercise UJ or submit the case to their criminal justice authorities for prosecution when the suspect is on state party territory. There are a set of treaties with provisions obliging a state party to exercise UJ:

1. Unlawful Seizure of Aircraft Convention, Article 7.
2. Unlawful Acts Against Aircraft Convention, Article 7.
3. Internationally Protected Persons Convention, Article 7.

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[36] Nina Larsaeus, "The Relationship Between Safeguarding Internal Security and Complying with International Obligations of Protection: The Unresolved Issue of Excluded Asylum Seekers", *73 Nordic Journal of International Law*, 73 (2004), p. 79.

4. Hostages Convention, Article 8(1).
5. Nuclear Material Convention, Article 10.
6. Torture Convention, Article 7(1) and (2).
7. Unlawful Acts Against the Maritime Navigation Convention, Article 10(1).
8. Mercenaries Convention, Article 12.
9. UN and Associated Personnel Convention, Article 14.
10. Terrorist Bombings Convention, Article 8.
11. Financing of Terrorism Convention, Article 10(1).
12. Nuclear Terrorism Convention, Article 11(1).
13. Enforced Disappearance Convention, Article 11(1) and (2).
14. 1999 Second Hague Protocol, Article 17(1).
15. 1949 Geneva Convention I, Article 49.
16. 1949 Geneva Convention II, Article 50.
17. 1949 Geneva Convention III, Article 129.
18. 1949 Geneva Convention IV, Article 146.

To sum up, a state signatory to one of the aforementioned treaties is required to respect the principle of *dedere aut judicare,* which is linked to another principle, universal jurisdiction, which will be discussed in detail later.

3.3. Complementarity

The traditional approach of when only a sovereign state has authority over its citizens and its territory is reflected in a modern legal act – the Rome Statute of the ICC – but modified by the principle of complementarity. The court and national courts of the state parties have a relationship based on the principle of complementarity, as stipulated in Articles 17 and 53 of the Rome Statute. The provisions specify that a case is inadmissible before the ICC if it is presently being investigated by a state having jurisdiction over it. However, the notion of complementarity permits ICC jurisdiction in cases when the state is incapable or unwilling to carry out an investigation

or when the state inquiry is carried out dishonestly, for example, by using it to absolve the subject of criminal guilt. Put another way, the ICC has secondary jurisdiction, while states retain main competence and authority to look into and prosecute international crimes. Since complementarity is evaluated case-by-case, nations and the ICC must work together to make sure that every instance of an atrocity is addressed.

This example demonstrates how a particular regulation reflects the general notion of complementarity. In other words, international bodies only become involved when national legal systems are unable or unwilling to effectively prosecute individuals for international crimes. This definition of international justice recognizes the primary jurisdiction of nation states to prosecute and adjudicate individuals for international crimes. Stated differently, national criminal justice systems should complement international criminal jurisdiction, indicating a state's supremacy over international justice. This principle sometimes is mixed with "subsidiarity", which is applied mainly in political and governance contexts. It means that decisions and actions should be taken at the lowest, most local level capable of addressing them effectively.

3.4. Community interests: Principle, concept or "norm"

In spite of the fact that numerous studies have been done on the recognition and protection of certain "community interests",[37] there is no clear legal motion defining it as a principle. This is why it becomes necessary to provide

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[37] Bruno Simma, "From Bilateralism to Community Interest in International Law", [in:] *Collected Courses of the Hague Academy of International Law*, vol. 250, The Hague Academy of International Law; Gaja Giorgio, "The Protection of General Interests in the International Community General Course on Public International Law (2011)", [in:] *Collected Courses of the Hague Academy of International Law*, vol. 364, The Hague Academy of International Law (2014); *The Common Interests in International Law*, eds Wolfgang Benedek et al., Intersentia (2014).

justification for the author's choice to include "community interests" in the section pertaining to the principles supporting the topic of international criminal jurisdiction.

In 2022, the ICL, researching the issue of jus cogence, touched upon the wording "international community of States" and referred to several decisions of international and national courts which acknowledged it as a link to the elevation of norms of general international law to peremptory status with state acceptance and recognition.[38] This approach proves that the "community of States" is seen as a term referring to a meaningful "collective actor" that deals within the process of establishing norms for protecting common interest.

The notion "community of States" in conjunction with "interests" was researched by Besson. She concluded that both – the nature and scope of "community interests in international law" are difficult to assess. It was also observed that widespread and persistent reasonable disagreement exists over what community interests are. Moreover, the disagreements are sometimes even antithetical (contrary) to the protection of community interests. However, Besson insists that the very sense of "community interests" shall be defended by appreciating their substance in terms of protecting common values and not increasing the risk of hegemony and inequality.[39]

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[38] ILC, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of International Law (jus cogens) with Commentaries*, Yearbook of the International Law Commission, vol. II (2) (2022), p. 38, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf (accessed November 23, 2023).

[39] Samantha Besson, "General Principles in International Law – Whose Principles?", [in:] *Les principes en droit européen / European Principles in European Law*, eds Samantha Besson, Pascal Pichonnaz, Schulthess (2011), https://core.ac.uk/download/pdf/159157428.pdf (accessed November 29, 2023); eadem, "Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?", [in:] *Community Interests Across International Law*, eds Eyal Benvenisti, Georg Nolte, Oxford University Press (2018), online ed. Oxford Academic, July, 19 2018.

Thus, even if there is no unilateral opinion on the notion of "community interest", the risk of "hegemony and inequality" justifies the need to consider the notion as suitable and relevant for the sake of common values. There are also additional arguments: firstly, the very purposes and principles reflected in and derived from Articles 1 and 2 of the UN statute establish a general framework for both notions – the "States' Community" and "Community interest". Moreover, the UN charter aims to maintain international peace and security by implementing "collective measures" preventing threats and suppressing aggression[40] and requires all states to fulfil their obligations in good faith to ensure their rights and benefits from membership.[41]

Making a correlation with the ICL's goal, which is to protect peace by fighting impunity over "the grave crimes that threaten the peace, security, and well-being of the world",[42]one may definitely agree that the purpose of the ICL is in line with the interests of the international community as a whole. Historical retrospective shows that with the free use of the high seas, the rule of sovereignty, or diplomatic immunity, a meaningful role of "community interest" and its sense have been traced.

Among the few exceptions to the network of bilateral legal rights and obligations that dominated in the previous historical stage of public international law (PIL), there was a general rule for fighting piracy. Later the principle of universal jurisdiction was built on the general consensus that piracy needs joint actions: (1) the actions of pirates may be interpreted as a sign that they have given up their original national citizenship and are therefore stateless; (2) pirates' actions may be mobile, so international community coordination of their actions is necessary for punishment; and (3) historically, each country needs a comprehensive offence against the crime

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40 Supra note 32, Article 1.

41 Ibid., Articles 1–2.

42 Supra note 16, preamble.

of piracy.[43] At that time each state had the right to act against piracy by capturing individual pirates and safeguarding joint interest. In 1817, a British court deemed pirates as enemies of the human race, renouncing and indiscriminately ravaging every country, creating universal terror and alarm.[44]

In the early 20th century traditional reciprocity rules were replaced with obligations for states towards other parties, altering international obligations and community interest. The Treaty of Versailles (1919) marked a significant milestone in recognising "social justice, universal peace, and human conditions of labour" and promoted "international cooperation and achieving international peace and security".[45]

Further steps in providing obligations that are incumbent upon each state towards all other contracting parties, and which are in no way reciprocal, appeared after World War II. The Allies made the decision to improve protections against genocide and other heinous violations of human rights in response to the Nazis' mass murder of members of ethnic and religious communities and their complete disrespect for the fundamental rights of thousands of people. The establishment of the UN system is a way to reaffirm "the dignity and worth of the human person, in equal rights of men and women and to promote social progress and the better standards of life in larger freedom"[46] by promoting justice and "universal respect for and observance of human rights and fundamental freedoms".[47] Thus, with regard to IHL, which is a basis for some international crimes, the ICJ has stated in its Advisory Opinion on the Legality of the Threat or Use of Nuclear

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43 Lassa Oppenheim, *International Law*, ed. Arnold D. McNair, Longmans (1928), p. 277; Devika Hovell, "The Authority of Universal Jurisdiction", *European Journal of International* Law, 29(2) (2018), p. 427–456.

44 Le Louis, Forest Case, quoted from Antonio Cassese, *International Law*, Oxford University Press (2005), p. 15.

45 The Covenant of the League of Nations (1920), including amendments adopted to December 1924.

46 Supra note 32, preamble, paras. 2 and 4.

47 Supra note 13, preamble, para. 6.

Weapons that rules of humanitarian law in armed conflict, ensuring respect for the human person and fundamental considerations of humanity have been "observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[48]

International human rights law, viewed by traditional scholars as a transition from the "law of coexistence" to the "law of cooperation," is a distinct legal framework.[49] However, the promising legal mechanism of the responsibility of states to ensure collective human rights, namely the obligation to implement the *erga omnes*[50] principle, does not always work. International human rights law, initially a unique regime, has stalled without challenging the state-centred structure of international law, as predicted by sceptics.[51] Yet states' readiness to practise *erga omnes* as a sign of solidarity towards community interests is still a long way from de jure acknowledgment to de facto enforcement.

3.5. Legal positivism and the principle of humanity

Legal positivism is a philosophical approach created in the middle of the 19th century. It was seen as progressive at the time. The idea of the "validity"

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48 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226, ICJ, July 8, 1996, para. 79.

49 Wolfgang Friedmann, *The Changing Structure of International Law*, Stevens and Sons (1964), p. 40–44 and 240–244; Karel Vasak, "Towards a Special International Human Rights Law", [in:] *The International Dimension of Human Rights*, eds Karel Vasak, Philip Alstom, UNESCO (1982), p. 671–672.

50 UN Human Rights Committee (HRC), *General Comment no. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, p. 2.

51 Jonas Christoffersen, "Impact on General Principles of Treaties Interpretation", [in:] *The Impact of Human Rights Law in General International Law*, eds Menno Kamminga, Martin Scheinin, Oxford University Press (2009).

of the legal norm is central to legal positivism. A rule is a legally binding decree in writing and the product of the work of a certain organization given the power and mandate to publish it.[52] Positivism contributed to the legal certainty of normative prescriptions, but it has played an adverse role in the process of establishing jurisdiction for international crimes. Thus, addressing Germany's penalties for World War I (WWI) aggression, the Treaty of Versailles, specifically Part 7, titled "Penalties", aimed to establish individual responsibility for war crimes and criminal jurisdiction.[53] The period between WWI and WWII faced challenges, including strict legal positivism, which limited the application of principles, highlighting the lack of normativity.

In the '20s of the same century, when drafting the Statute of the Permanent International Court of the League of Nations,[54] members of Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Report Presented to the Preliminary Peace Conference (Commission),[55] composed of lawyers from the United States, Great Britain and Italy, strongly objected to the inclusion of the principle of "objective justice", arguing that "peoples are subject to positive law, they are not subject to principles that have not yet been formulated in the form of positive norms recognized by all States".[56] During the discussions, international

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52 Alessandra Gianelli, "Origins and Challenges of a Positivist Approach to International Law", *Gaetano Morelli Lectures Series*, 3 (2020).

53 *Treaty of Peace Between the Allied and Associated Powers and Germany*, June 28, 1919.

54 League of Nations, Statute of the Permanent Court of International Justice, December 16, 1920.

55 *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Report Presented to the Preliminary Peace Conference*, March 29, 1919, p. 1–9, https://assets.cambridge.org/97811087/29086/excerpt/9781108729086_excerpt.pdf (accessed November 23, 2023).

56 *Proces-verbaux of the Processing of the Committee*, League of Nations, PCIJ, Advisory Committee of Jurists, The Hague: Van Langenhusen Brothers, 287, quoted from: Antonio Cassese, *International Law*, p. 612.

lawyers objected to the introduction of the concept of crime against humanity, claiming that there is no universal standard of "humanity". The international community, represented by highly qualified lawyers acting in the interests of peace, could not transcend the boundaries of legal positivism. Academic as well as practising lawyers were not ready to establish the institute of individual criminal responsibility nor a jurisdiction which would treat individuals for crimes threatening the international communities' values and principles. In those times but now as well, European countries have been known for centuries to follow the principle of strict positivism,[57] which is identical to *Lex lata* and *Lex ferenda*[58] and denies the need to analyse what the law should be but holds the position that the law in force is the only one to be applied. Law and the state, from the point of view of positive law, when introduced dominated in the first half of the 20th century, must meet

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[57] It is worth noting that the basis of legal positivism was the doctrine of the English philosopher Thomas Hobbes (1588–1679) on the absolute power of a sovereign state. According to Hobbes, it was sovereignty that could provide the best protection for the individual, who must fully submit to the authoritarian rules of the sovereign. Without such subjection there would be a war of all against all (bellum omnium contra omnes). The development of legal positivism is associated with the upliftment of the role of the state in the bourgeois system.

John Locke (1632–1704), a compatriot of Hobbes, took a different stance and, based on the concept of "social contract", argued that the sovereign should only fulfil the contract and respect the people. He defended the theory of individual natural human rights and the primordial freedom of man from the state. At the same time, Locke acknowledged that, by realizing the need for governance and laws, man had restricted his freedoms and resorted to a social contract, which provided the state with the law, a fair and independent court, and a police force that enforced court decisions. The two key figures in the analytic philosophy of law, Joseph Raz and H.L.A. Hart (1907–1992), as well as the Austrian jurist Hans Kelsen (1881–1973), are the architects of contemporary legal positivism. There are significant differences as well as evident lines of influence between them.

[58] *Lex ferenda* (sometimes also referred to as *de lege ferenda*) is a Latin expression that means "what the law should be", as an opposition to *lex lata*, which in turn is called "the law as it is".

the requirements of the formal-content side of the norms of laws, which are formed at the level of theoretical abstractions-principles and forms of imperative duties rather than moral and ethical views.

At the time lawyers did not overcome the judicial barriers in order to put notions of "human" and "humanity" into the realm of legal imperatives. Later it was argued that neo-positivism, with its detachment from content and morality in the assessment of laws solely from the point of view of their formal essence, is responsible for the perversion of the law in systems with totalitarian regimes, in particular in Nazi Germany under National Socialism. Radbruch confessed in his "Rechtsphilosophie" that a postulate on legality disarmed lawyers in the face of state institutions with clearly criminal content.[59]

A turning point in the history of legal positivism was the trial of the war criminals of World War II. In preparation for the Nuremberg trial, the International Military Tribunal adopted the concept of "crime against humanity", which was based on a natural-law understanding and served as a manifestation of a bitter victory of natural legality in jurisprudence.[60]

Struggles between humanism and rigorous positivism still exist today. One of the contentious issues is the question of universal jurisdiction applied to fight the impunity of those who escaped responsibility for committed atrocities. States that oppose the extension of universal jurisdiction to individuals having no legal connection to a state practising universal jurisdiction question the credibility of this kind of jurisdiction and argue against its application, referring to state sovereignty and strict legality.[61] Analyses of the selected principles: sovereignty, *dedere aut judicare*, complementarity,

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[59] Gustav Radbruch, "Gezetzliches Unrech und übergesetzliches Recht", [in:] *Rechtsphilosophie*, Hrsg. Erik Wolf, Hans-Peter Schneider, Koehler (1973), p. 352.

[60] Liudmila Ulyashyna, *International Legal Standards in the Field of Human Rights and Their Implementation: Theory and Practice of Application*, EHU (2013), p. 125.

[61] UN, General Assembly, *Debate Reveals Rift in Speakers, Understanding of Universal Jurisdiction Scope, Application as Sixth Committee Takes Up Report on Principle*", 78th Session,

community interests, legal positivism and the principle of humanity, in the author's opinion, have prepared the reader for further absorption of information on the principle of universal jurisdiction.

12th Meeting, GA/L/3692, October 13, 2023, https://press.un.org/en/2023/gal3692.doc.htm (accessed November 23, 2023).

Part 2. Jurisdiction and universal jurisdiction: An in-depth study

"Universal jurisdiction remains an exceptional ground of jurisdiction"
EU in the UN General Assembly, October 2023

"The jurisdiction to try crimes under international law is universal"
Attorney General of the State of Israel v. Eichmann, 1961[62]

4. Background information

As mentioned in the introduction to this chapter, universal jurisdiction is one type of the generic term "international criminal jurisdiction" and refers to a state's ability "to bring criminal charges in situations where traditional connections like as territoriality, nationality, passive personality, or the protective principle are absent at the time of the alleged offence".[63]

An overview of the current normative framework pertaining to the principle of UJ shows that neither an international treaty nor a soft law instrument have been adopted to identify and provide guidelines for unilateral understanding and application of the UJ principle. Certain academics and European institutions maintain firm belief that states' claims of universal criminal jurisdiction are governed by international law, both conventional and customary. According to European Commission experts, the practice

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62 Supra note 19.

63 Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8672/1/09 REV 1, (2009), p. 7, https://data.consilium.europa.eu/doc/document/ST-8672-2009-REV-1/en/pdf (accessed November 23, 2023).

of universal justice is permitted by customary international law with regard to international crimes such as piracy, war crimes, genocide, crimes against humanity and torture. They also bring to mind a number of treaties that require state parties to strengthen their criminal justice systems by exercising UJ over crimes specified in those treaties. However, it should be noted that this obligation only applies to the exercise of such jurisdiction in the event that a suspect later appears on the territory of the forum state.

The author tends to see one of the problems in comprehension and application of the UJ principle in the fact that the term *universal* with respect to jurisdiction is not mentioned in the specific treaties. To illustrate, let us see the clause on jurisdiction in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, whereas Article 3(2) articulates:[64]

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in Article 2 in the following cases:
> (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
> (b) When the alleged offender is a national of that State;
> (c) When the crime is committed against an internationally protected person as defined in Article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this article.

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64 *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, New York, December 14, 1973, 1035 UNTS 167, Article 3(2).

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Nothing in this text means that a state, by exercising its jurisdiction, shall refer to *lex specialis* (UJ). In spite of the fact that the term *universal* in conjunction with jurisdiction is broadly used, it has the common meaning expressed in the article above: to take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him or her. As the given example shows, treaty clauses are ambiguous on the nature of jurisdiction. Any state may use any method to accomplish justice; in other words, jurisdiction is a broad concept whose application may be based on protective, personality or geographical grounds. The manner of jurisdiction may be selected on the circumstances.

The aforementioned implies that a state is free to select the mode of implementation by achieving the treaty goals. It appears that the terms *universal, international criminal* and *transboundary* are very theoretical. According to the author, the term *universal* in relation to jurisdiction first arose in an effort to emphasise the equality of approaches for the "universal" purpose of providing justice;[65] modes of jurisdiction, however, shall not supersede it but rather enable the community's interests to be achieved. The viability of the UJ's content and the scope of its practical application are hotly debated. Discussions continue at the highest levels of international society. The year 2009 saw the start of the General Assembly's examination of the general secretary's reports pertaining to observations on the reach and implementation of the concept of universal jurisdiction. The domestic legal systems of the territorial states participating in the surveys, relevant international treaties

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[65] The quote from the attorney general of the State of Israel in the Eichmann case used in the epigraph of the section illustrates the meaning of making jurisdiction against international criminals as inclusive as possible, supra note 19.

and judicial procedures are all assessed by preparation of the reports. The talks are still ongoing at the highest levels of global society.[66]

So far, political debates on the application of the jurisdiction issues that took place in New York in October 2023 show opposed positions. To illustrate, the African Union's delegation – although it respects the principle of universal jurisdiction – was concerned about its uncertain scope and application, as well as its abuse.[67] EU member countries' role in strengthening the application of the principle of universal jurisdiction has been expressed in the EU statement outlining the vision on the primary features of the UJ principle in combating impunity for the most heinous crimes.[68] Taking a different stance, a delegate from Belarus emphasised that the obligation to

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66 See UN General Assembly resolutions 64/117 of 16 December 2009, 65/33 of 6 December 2010, 66/103 of 9 December 2011, 67/98 of 14 December 2012, 68/117 of 16 December 2013, 69/124 of 10 December 2014, 70/119 of 14 December 2015, 71/149 of 13 December 2016, 72/120 of 7 December 2017, 73/208 of 20 December 2018, 74/192 of 18 December 2019, 75/142 of 15 December 2020, 76/118 of 9 December 2021 and 77/111 of 7 December 2022 and the General Secretary reports on the scope and application of universal jurisdiction.

67 Supra note 63.

68 It would be appropriate to quote: "As strong supporters of accountability for core international crimes, the European Union and its Member States support all efforts towards strengthening the current international legal framework on the prevention, prosecution, and adjudication of the most serious crimes under international law. Perpetrators of such crimes cannot go unpunished and there cannot be impunity for these criminals anywhere in the world. In that regard, universal jurisdiction can be an important tool to promote international accountability.
Universal jurisdiction remains an exceptional ground of jurisdiction, which is restricted to the most serious crimes under international law. Whilst the primary responsibility to investigate a crime lies with the State with a direct link to the crime, universal jurisdiction permits a State to exercise jurisdiction over an individual act despite the absence of *any* specific link of nationality or territoriality between that State and the particular offence. Furthermore, the application of the principle of universal jurisdiction ought to be governed by transparent rules, which guarantee legal certainty and reasonable exercise of that jurisdiction." See: *EU Statement – UN General Assembly 6th Committee: Principle of Universal Jurisdiction*, October 12, 2023, https://www.eeas.europa.eu/delegations/

apply universal jurisdiction can only arise on the basis of a universal international treaty, adding that recently the world witnessed increasing measures to ensure its broadest possible application. He said that from Belarus's perspective this is at odds with the fundamental principle of international law – the principle of the sovereign equality of states. A delegate from Lithuania, speaking also for Estonia and Latvia, pointed out: "If these states are unwilling or unable to bring perpetrators of crimes to account, other states that have no direct connection to the crime should fill the gap on the basis of universal jurisdiction."[69]

It is remarkable that a long time before the firm statement of the European Union was announced at the UN forum, civil society organisations and an academic institution acting in collaboration with human rights advocates were in the forefront of setting guidelines, principles and working approaches for raising awareness and the practical application of UJ.

5. Building the UJ framework

In 1999, as a response to the Pinochet case,[70] the well-known human rights organisation Amnesty International prepared a 12-page text titled "14 Principles on the Effective Exercise of Universal Jurisdiction".[71] In the introduction[72]Amnesty set the stage with a remarkable notice that the Allies' courts exercised universal jurisdiction over crimes against humanity and

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un-new-york/eu-statement-–-un-general-assembly-6th-committee-principle-universal-jurisdiction_en?s=63 (accessed November 18, 2023).

69 Ibid.

70 Human Rights Watch, *Chile – When Tyrants Tremble: The Pinochet Case*, 1 October 1999, B1101, https://www.refworld.org/docid/3ae6a84d8.html (accessed January 4, 2024).

71 Amnesty International, *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*, May 1, 1999, https://www.amnesty.org/fr/wp-content/uploads/2022/03/ior530011999en.pdf (accessed December 10, 2023).

72 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex part Pinochet*, House of Lords, March 24, 1999.

war crimes committed during World War II, establishing international law. However, only a few states provided such jurisdiction for crimes committed outside their territories, including Australia, Canada, Israel and the United Kingdom. Despite four treaties, states have failed to exercise universal jurisdiction over grave crimes since the war.

Two years later, another nongovernmental initiative with the participation of academicians - the Princeton Project on Universal Jurisdiction working in collaboration with the Program in Law and Public Affairs and the Woodrow Wilson School of Public and International Affairs at Princeton University, the International Commission of Jurists, American Association for the International law, the Commission of Jurists Netherlands, Institute of Human Rights and Urban Morgan Institute for Human Rights – joined the work on the UJ problem and issued the text "The Princeton on Universal Jurisdiction",[73] with "purposes of advancing the continued evolution of international law and the application of international law in national legal systems".[74] They also noted that the subject of the UJ project is of great relevance to all who work for human rights, and the very principle of UJ is seen as an essential instrument in the struggle to defend human rights. Defining the nature of UJ as Principle 1, they stipulate that

> for purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[75]

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[73] *The Princeton Principles on Universal Jurisdiction*, The Princeton Project on Universal Jurisdiction, Princeton, NJ (2001), p. 15, https://icj2.wpenginepowered.com/wp-content/uploads/2001/01/Princeton-Principles-Universal-Jurisdiction-report-2001-eng.pdf (accessed November 19, 2023).

[74] Ibid., preamble.

[75] Ibid., principle 1, part 1.

Introducing the work, authors of the report stated that the search for ways to end impunity in the case of gross violations of human rights is an essential part of the UN.[76] Beginning in 2009, the UN secretary-general produced an annual report, "The Scope and Application of the Principle of Universal Jurisdiction", which was prepared pursuant to General Assembly resolutions by nation states.[77] The reports consist of analyses of the country reports with information on the universal principle definition, distinctions drawn with respect to it, but also about domestic the legal rules with respect to judicial practice. The collections of reports represent well-structured and regularly updated information about the recent development of the universal jurisdiction applications.

The European Union has conducted a comparative analysis of African Union and European legal systems, focusing on the exercise of universal jurisdiction. The report, resulting from consultations, aims to find a lasting solution to concerns expressed by the African Union on 1 July 2008 regarding the abuse of universal jurisdiction by European states.[78] The AU-EU Expert Report on the Principle of Universal Jurisdiction" (2009) came as an attempt at reconciliation of the dispute and will be applied further, since it constitutes an important source of relevant information regarding the application of UJ in member states of the African Union.[79] Additionally, the workshop "Universal Jurisdiction and International Crimes: Constraints and Best

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76 Ibid., p. 15.

77 See supra note 66.

78 African Union (AU), *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, Decision Assembly/AU/Dec. 199(XI), July 1, 2008, https://au.int/sites/default/files/decisions/9558-assembly_en_30_june_1_july_2008_auc_eleventh_ordinary_session_decisions_declarations_tribute_resolution.pdf (accessed December 10, 2023).

79 Supra note 63.

Practices" (2018) was conducted to observe and discuss the UJ scope in Europe (see further, part "bb", *Modus operandi,* implementation issues).[80]

The ILC has also contributed to the discussions by elaborating on the Draft of Articles on the Immunity of State Officials from foreign criminal jurisdiction,[81] identifying two directions in the struggle against impunity: prosecution by international criminal tribunals and the domestic application of the principle of universal jurisdiction. Some facts related to the effectiveness of the ICC may be useful for further analyses of UJ's direction: After the ICC was established in 1998, reports on the results of its judicial power over the core international crimes: genocide, crimes against humanity, war crimes and aggression,[82] one has an opportunity to compare the effectiveness of international courts with the national courts activities.

As stated at the very beginning of the process of establishing the international criminal law regime, international prosecutions alone will never be sufficient to achieve justice. To consider some numbers: as of November 2023 there have been 31 cases before the ICC and 51 defendants.[83] No one yet compared this number with cases solved by national courts practising

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80 Universal Jurisdiction and International Crimes: Constraints and Best Practices, workshop jointly organised by the European Parliament's Subcommittee on Human Rights (DROI), the Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE). The workshop took place in Brussels on 28 June 2018 and was chaired by Member of the European Parliament (MEP) Barbara Lochbihler (Greens/EFA, Germany, vice chair of the DROI subcommittee), and MEP Heidi Hautala (Greens/EFA, Finland, vice chair of the LIBE committee). See: European Parliament, *Universal Jurisdiction and International Crimes: Constraints and Best Practices*, (2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf (accessed December 10, 2023).

81 Sunand Subramaniam, *ILC Draft Article 7 on Immunity of State Officials from Foreign Criminal Jurisdiction. A Reflection on the Role of International Criminal Law*, Völkerrechtsblog, March 30, 2022, https://voelkerrechtsblog.org/ilc-draft-article-7-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction/ (accessed December 10, 2023).

82 Supra note 16, Articles 1, 5.

83 Data available on the ICC website: https://www.icc-cpi.int/defendants.

the universal jurisdiction principle, but it will be evident that the crucial role of national legal systems in bringing an end to impunity remains the core of the international criminal law regime. The application of universal jurisdiction is therefore a crucial means of justice by states.

Nowadays, the ratification of the Rome Statute by 123 states (33 African, 19 Asia-Pacific, 18 eastern European, 28 Latin American and Caribbean states and 25 western European) is a significant achievement, but "approximately one third of the world's States are territories still remain outside the Court's jurisdiction" – said experts at the workshop "Envisioning International Justice" in November 2021.[84] The recent Israel-Hamas war and European crises have raised questions about the effectiveness of UJ in wartime conflicts. UJ may play a role in a wider accountability strategy, complementing international courts and prosecutions.[85] Understanding the phenomenon is crucial for applying the UJ principle effectively.

6. Understanding UJ

The principle of UJ is rooted in the antinomic nature of a state's sovereignty and community interests' principles, discussed earlier in this work. Respecting both principles, governments may exercise jurisdiction through legislative, executive and judicial measures while also responding to community interests to combat impunity and extradite or prosecute crimes.

Examples from the so-called sectoral conventions against terrorism may be used as an illustration of the combination and harmonisation of the principle and treaty provisions. The "Convention for the Suppression

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[84] Olympia Bekou, Triestino Marinello, Yvonne Mcdermott, *Envisioning International Justice: What Role for the ICC?*, European Parliament coordinator: Policy Department for External Relations Directorate General for External Policies of the Union PE 653.659, November 2021, p. 1, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653659/EXPO_STU(2021)653659_EN.pdf (accessed December 10, 2023).

[85] See supra note 80, abstract.

of Unlawful Seizure of Aircraft"[86] states in Article 7: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him/her [*her* added by the author], be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution." Applying case law, one may qualify a state's activities while prosecuting presumed perpetrators of core crimes as legitimate operations acting as "agents of the international community" (*AG v. Eichmann*, para. 12).[87]

The last but not least argument in the general understanding of the principle of UJ is its compatibility with other legal concepts, for example, the principle of complementarity. The latest principle highlights the importance of a national implementation of established international criminal jurisdiction over the most serious crimes and sees international tribunals as the last resort. This is fully in line with UJ's purposes.

To sum up, the nature of the principle of universal jurisdiction is rooted in a territorial state's willingness to limit or "tailor" its own sovereignty in favour of community interests, fighting impunity and protecting the well-being of a human family by prosecuting alleged offenders who allegedly committed international crimes or to extradite them either to an international tribunal (based on the complementary principle) or to the relevant state where the crime was committed (based on *dedere aut judicare*).

7. UJ – Scope and modes of application

Understanding the nature of universal jurisdiction and the principles which remain behind UJ offers a good start for learning its (1) scope and (2) modus operandi. Before starting the analysis the author will clarify the meaning

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[86] UN, *Convention for the Suppression of Unlawful Seizure of Aircraft*, December 16, 1970, 860 UNTS 105, https://www.refworld.org/legal/agreements/un/1970/en/26140 (accessed November 4, 2023).

[87] Supra note 19, para. 12.

of the terms: The common sense of *scope* is "opportunity for exercising the faculties or abilities; capacity for action",[88] and the special scope of UJ by the Cassese means "the range of international crimes which would be appropriate for application of the universal jurisdiction principle".[89] The term *international crimes* shall include three categories (Cassese's approach):[90]

1) Crimes that damage (states') collective interests and have a strong transnational or "international" dimension, like counterfeiting, slavery and the trafficking of women and children, terrorism, money laundering, corruption and so on.
2) Crimes established under customary rules, such as piracy, are longstanding crimes. The specification of the crimes states that any state that has apprehended those responsible for violent acts on the high seas can suppress them without outright forbidding or criminalizing piracy.
3) "Core crimes" of modern international criminal law have been established by international tribunals to prosecute and punish genocide, crimes against humanity and war crimes. International or mixed criminal courts exercise their jurisdiction over individuals who may be indicted on account of criminal rules of a truly international nature.

Modus operandi – general and l*ex specialis*

The general meaning of the mode of operation is "someone's habits (ways) of working".[91] Its special meaning shall be eligible in the international criminal process (mainly at the domestic level). The author suggests, under the modus operandi for criminal matters, a dichotomy between different measures which will be chosen and undertaken by a state in accordance with the domestic constitutional processes in order to achieve a positive social effect

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88 *Scope*, Collins Dictionary, https://www.collinsdictionary.com/dictionary/english/scope (accessed November 23, 2023).

89 Supra note 11, p. 18–19.

90 Ibid.

91 Jon E. Douglas et al., *Crime Classification Manual*, John Wiley and Sons (2006), p. 19–21.

due to the implementation of international obligations and national constitutional guaranties. The processes include, but are not limited to, general states obligations with respect to international treaties, such as adopting legislative and other measures, as they may be necessary to incorporate international crimes in national legal criminal codes and following the development of international criminal law and be able to prosecute offenders for crimes enumerated for UJ. The modus operandi of a state while working with implementation of UJ has its specificity, which will be presented later.

The scope of the universality principle in terms of the crimes in detail (*ratione materiae*)

The information on *ratione materiae* has been extracted from two documents of nongovernmental organizations,[92] and two reports of international and regional organizations[93] have been studied and presented in the table with the aim of analysing the data from the perspective of how international organizations, territorial states and civil society organizations understand the scope of UJ on a global, regional and country-by-country basis. The data from the mentioned sources is given in a table and organized as follows: the left columns (A, B) contain numbering and the identification of the report. Column C contains information regarding UJ crimes derived from the relevant report. If necessary, column D explains details.

The author will identify the crimes listed in studied reports (column C) by applying the classification which was presented in the previous section. The crimes (*ratione materiae)* will be grouped as following: (1) the general term *international crime* based mainly on treaties; (2) crimes derived from customary rules allowing suppression of apprehended offenders by any state;

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92 Supra note 71.

93 UN, *The Scope and Application of the Principle of Universal Jurisdiction: Resolution Adopted by the General Assembly*, A/RES/64/117, January 15, 2010, https://digitallibrary.un.org/record/673338 (accessed April 19, 2024); and see supra note 79, Council of the European Union, 2009.

and (3) the *lex specialis* "core crimes" of contemporary international law – to prosecute and punish genocide, crimes against humanity and war crimes. A brief analysis of the data will follow the table.

Table 1. On the scope of UJ crimes (*ratione materiae)*

N	Title of the body, title of the document and year of publication	Listed Crimes	Comments
A	**B**	**C**	**D**
1.	Amnesty International (AI), 1999, 14 principles on the effective exercise of universal jurisdiction; Principle 1, crimes of universal jurisdiction.	Crimes of Universal Jurisdiction Genocide, crimes against humanity, war crimes (whether committed in international or non-international armed conflict), other deliberate and arbitrary killings and hostage taking, whether these crimes were committed by state or by nonstate actors, such as members of armed political groups, as well as extrajudicial executions, "disappearances" and torture (Principle 1).	AI identifies *ratione materiae* applying the terms "grave human rights violations and abuses" and "violations of international humanitarian law".
2.	Program in Law and Public Affairs, Princeton University, 2001, principles of universal jurisdiction (PP), Principle 2.	Serious Crimes Under International Law Piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. (Principle 2, part 1). "The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under the international law" (Principle 2, part 2).	PP identifies *ratione materiae* applying the terms "serious crimes" and "other crimes under international law".

3	UN secretary-general report, A/65/181, 2010: "The scope and application of the principle universal jurisdiction" (UN) prepared pursuant to General Assembly resolution 64/117, by which the assembly requested the secretary-general to prepare a report on the basis of information and observations received from member states."	Serious Crimes of International Concern The list of crimes (not exhausted since not all states provided information for the report): piracy, slavery, genocide, war crimes, crimes against humanity, crimes against peace, torture war crimes, grave violations of the Geneva Convention 1949, other violations of international humanitarian law committed in international and non-international armed conflict as crimes against international law. The list of crimes is presented as the attachment (on a country-by-country basis): fiscal offences, propaganda for war, preparation of aggressive war, violation of measures necessary for application of international sanction, ecocide; production, proliferation of use of weapons of mass destruction; offences involving nuclear energy, explosions, radiation or endangerment; attacks against air or sea traffic, offences related to United Nations and associated personnel, money laundering, subsidy fraud, electoral crimes, enforced disappearance, etc. – as crimes specified in domestic legislation or a crime specified in a treaty to which the state had adhered.	The UN report is prepared on a country-by-country basis with a general part and attachments. The concept of "serious crimes of international concern" is applied and an attempt at classification in relation to the customary law and treaty law that has been prepared. The following crimes have been mentioned as customary laws: piracy, slavery, genocide, war crimes, crimes against humanity, crimes against peace, torture and some mentioned apartheid.

4.	Council of the European Union[94] 2009. The AU-EU Expert Report on the Principle of Universal Jurisdiction (EU; in the part devoted to the EU countries)	Most EU states apply UJ over grave breaches of the 1949 Geneva Conventions and 1977 Additional Protocol 1 over the crime of torture recognised in the Convention Against Torture 1984, and over crimes recognised in some or all of the various conventions dealing with terrorist acts and other crimes. Specifically: Belgium – genocide, crimes against humanity and war crimes; the Czech Republic – genocide, certain war crimes and crimes against peace; Denmark – genocide, crimes against humanity and war crimes; Finland – genocide, crimes against humanity and war crimes; France – over the crimes within the respective jurisdictions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); Germany, Netherlands, Spain, the UK and Luxembourg – genocide, crimes against humanity and war crimes; Sweden – crimes against international law.	EU report prepared by a group of experts who provided results of analysis of national laws. The report's "definition and content" lists the following international crimes: genocide, crimes against humanity, war crimes and torture, piracy (as customary law). Crimes defined in the treaties: grave breaches of Geneva Conventions and Additional Protocol, the crime of torture, the crime of attacks on UN personnel and the crime of enforced disappearance.

The comparative analyses allow us to conclude that there are problems in identifying the crimes constituting the scope of UJ. First of all, there is no equal approach to the term "international crime". In the four reports the following generic terms have been used: "crime of universal jurisdiction", "grave human rights violations and abuses", "violations of international humanitarian law," "serious crimes of international concern" and "other international crimes".

[94] See supra note 63.

The author applied the classification of international crimes based on the following groups: (1) the general term *international crime* based mainly on treaties; (2) crimes derived from customary rules; and (3) the *lex specialis,* "core crimes." It looks as though the term *core crimes* is not yet applied. But the other two groups, 1 and 2, are in favour of considering the division of the whole list of international crimes. Indeed, the analysis of the data introduced in the table shows that territorial states tend to divide their obligations with respect to international crimes depending on the source of obligations and establishing criminal jurisdiction – (1) from international treaties or (2) from customary rules. Most European countries are able to indicate "core crimes" – genocide, crimes against humanity and war crimes – as coming under the universal jurisdiction rules in spite of the fact that they do not call them specifically. Meanwhile, the global overview conducted by the UN secretary-general demonstrates that the states that participated in the survey may extend the scope of UJ to any crimes established by international treaties that do not necessarily fall under the category of "core crimes."

To sum up, in spite of the lack of a uniform classification of the scope of the "international crimes" that fall under UJ, the core crimes have been listed by all actors involved in surveys and in preparation of defining a joint scope and definition of UJ. Maybe, thanks to the innovative process of establishing contractual obligations in other areas that need protection due to community interest, core crimes are not always pursued as a priority. Moreover, attention to other crimes may be seen as a positive sign that territorial states will use UJ on a regular basis even to a broader extent.

Modus operandi – implementation issues

Modus operandi or, in other words, the means of implementation, depend on specific provisions and subjects of international treaties. Additionally, one shall consider general rules on states' obligations that are prescribed in the Vienna Convention on the Law of Treaties. The customary rules and

some generally recognized principles also play a meaningful role in the implementation of obligations, including those that impose UJ. Sometimes the same rule may come from different sources. Thus, for example, the general principle *pacta sunt servanda,* which says that "every treaty in force is binding upon the parties to it and must be performed by them in good faith" and today is a part of an international treaty. Simultaneously, the *pacta sunt servanda* and good faith have been recognized as general principles.[95]

For implementation of treaties based on the UJ principle, good faith is of special importance and was highlighted by governments when providing replies to the UN survey (2010):

> …jurisdiction, irrespective of its basis, [would be] only exercised, in *good faith*, and consistently with other principles and rules of international law. While perpetrators of serious crimes should be properly and genuinely investigated, prosecuted and punished, it was considered essential that the goal of ending impunity did not in itself generate abuse or bring about conflict with other existing rules of international law. Such an approach [has been] necessary to enhance the rule of law, meaningfully contribute to peace among nations and ultimately bring justice to victims.[96]

The *lex specialis* provisions of the treaties, which include the clause on the UJ principle, may indeed influence the routine way of implementation and shall not contradict generally recognized principles, including those

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[95] UN, General Assembly, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, Article 26.

[96] UN Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments*, 65th Session, A/65/181 (2010), p. 3–4, https://digitallibrary.un.org/record/689030 (accessed November 19, 2023).

stipulated in the UN Charter, Article 2.[97] In a nutshell, general international obligations for implementation – regardless of the sources that give rise to a state's duties and the subject of the treaties – are always considered a composition of two interrelated components:

- Legislative (constitutional) mechanism
- De facto implementation (practical application and the social effect from the international treaty), including in the course of judicial redress.

The author suggests that a doctrine on a state's international obligations regarding criminal jurisdiction could be beneficial for readers in implementing universal jurisdiction. According to the classification of the main duties, a state party is obliged:

- To establish or exercise criminal jurisdiction on the basis of specific grounds or with respect to a specific class of crimes;

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[97] Supra note 32, Article 2: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 1. The Organization is based on the principle of the sovereign equality of all its Members. 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter. 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. 6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security. 7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."

- To enact the necessary national legislation to provide for criminal jurisdiction on the basis of specific grounds;
- To exercise criminal jurisdiction over persons charged with international crimes on the basis of specific grounds.

Regardless of some existing *lex specialis* requirements for UJ, the above-presented model of states' obligations within the criminal procedure is relevant to the implementation methods in all kinds of criminal jurisdictions.

To understand to what extent the UJ principle may influence the existing instruments and procedures of the national system, one shall recognize and pay attention to a distinction between two ways of the mode of universal jurisdiction. The first one is "absolute," unlimited or unconditional, and it permits the forum state to exercise UJ over criminal cases by default or in absentia, in other words, even in cases where the offender was not physically present in the state. The conditional or limited type of universal jurisdiction demands that one or several conditions for the reasonable exercise of extra-territorial jurisdiction be fulfilled. The common factor is the presence of the alleged offender in the territory of the forum state. Additional considerations, based on the specificities of national jurisdiction, include the prohibition of extradition of the alleged offender to the territorial state or state of nationality or the need for a specific request or consent of a duly designated authority. Some governments stressed that, as a general rule, UJ within their jurisdiction could only be exercised when the perpetrator was present in their territory at the time when formal legal proceedings were initiated.

One more specific factor is a distinction between universal legislative jurisdiction and the jurisdiction concerning the investigation and trial of the accused persons. The former is prevalent and more acceptable in state practice and has been generally a sine qua non (an essential condition) for subsequent investigation and trial. On the other hand, a court could in principle also find its jurisdiction, directly on the basis of international law, to

exercise universal contentious jurisdiction without relying in any way on domestic legislation.[98]

All the possible interactions between international law and national law shall be solved in accordance with constitutional and other domestic legal frameworks, which in turn shall be in line with a state's international obligations. Specifically, in answering questions in the review under the auspices of the UN, states revealed varied practices in the implementation of criminal jurisdiction and the possibility to apply UJ.[99] One more example from the Convention Against Torture illustrates how a convention spells out the means of jurisdiction, making them instrumental and practical in achieving the goal of combating impunity (quote below).

> Convention Against Torture (1984)
> Article 5
> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:
> (a) When the offences are committed in any territory under its jurisdiction or onboard a ship or aircraft registered in that State;
> (b) When the alleged offender is a national of that State;
> (c) When the victim is a national of that State if that State considers it appropriate.
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph I of this article.
> 3. *This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law* (emphasis by the author).

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98 See supra note 96, p. 17.

99 Ibid, p. 30.

As one may see, according to Article 5, parts 1 and 2 of the torture convention, contracting states are required to incorporate the principles of territoriality, active nationality and universality (based on the forum *deprehensionis*[100]) into their criminal jurisdiction. The article also explicitly permits them to adopt the principle of passive nationality. Consequently, universality is already covered by the convention, in addition to all other traditional jurisdictional grounds; nevertheless, in the latter case, jurisdiction is established only in the event that the accused is present on state property. However, contracting states may also exercise criminal jurisdiction on the basis of their domestic laws, according to Article 5(3) of the convention.

As for the limitations of UJ, a survey conducted by the EU shows that the most EU states include the UJ clause with the following limitations:

(i) The presence of the suspect on the territory of the prosecuting state may be required, either before the initiation of a criminal investigation or before the commencement of trial proceedings (e.g., Denmark, France, Ireland, the Netherlands and the UK).

(ii) It may be that the suspect must, subsequent to the commission of the alleged acts, have become a national of the prosecuting state (e.g., under the UK's War Crimes Act of 1991) or a resident of that state (e.g., under the UK's War Crimes Act of 1991 and the UK's International Criminal Court Act of 2001 and the International Criminal Court [Scotland] Act 2001).

(iii) It may be that universal jurisdiction is granted by national law only over crimes committed during a specified conflict (e.g., France's Law N 95-1 of January 1995 and Law N 96-432 of 22 May 1996 apply only to crimes within the respective temporal and territorial jurisdictions of the ICTY and ICTR;[101] and the UK's War Crimes Act 1991 applies only to war crimes committed between 1 September 1939 and 5 June 1945,

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[100] *Forum deprehensionis*, Latin: "the place of the arrest of the suspect of committing a crime."

[101] Supra note 11, p. 283.

inclusive, in a place which at the time was part of Germany or under German occupation).[102]

Finally, talking about the effectiveness of application of UJ in investigations and court proceedings, EU experts report that contrary to the common narrative that claims the fall or the decline of UJ, an increase of UJ in the past decade occurred. The tendency reflects institution building and improved legislation, institutional learning as well as better opportunities to successfully investigate and prosecute war crimes in Europe.[103]

At the same time, the UN General Assembly (GA) continues to observe the implementation of UJ by territorial states globally. In its resolutions it reaffirms its adherence to the "purposes and principles of the Charter of the United Nations, to international law and to an international order based on the rule of law", which are essential for peaceful coexistence and cooperation among states. Member states regularly submit information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice.[104]

Real-life examples offered by the German delegation to the UN General Secretary in 2022 is of interest for learning more about UJ implementation at the national level: German courts issue verdicts in cases regarding torture in prisons in the Syrian Arab Republic and issue verdicts on crimes committed by members of Da'esh on a regular basis. Moreover, among the notable implementation measures is the establishment of specialized units within the Federal Criminal Police Office and the Office of the Federal Public Prosecutor General to investigate international crimes as well as investigations

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102 See more examples from the supra note 63.

103 See supra note 80.

104 UN, General Assembly, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the 6th Committee*, 76th Session, A/76/477, November 18, 2021, https://digitallibrary.un.org/record/3949307?ln=ar (accessed April 19, 2024).

into crimes against humanity and war crimes committed in Iraq and the Syrian Arab Republic. There are a number of concrete court cases which may be seen as practical outcomes of implementation measures with respect to UJ.[105] Moreover, Germany also reiterated that officials of another state are not entitled to functional immunity (immunity *ratione materiae*) with regard to acts carried out within the scope of their duties.[106] This is part of another doctrine on the limitation of immunity of states' officials in cases of the prosecution of core international crimes (will be presented in detail – chapter 2).

One must remember the critical role of civil society organizations in unifying efforts to oppose impunity all across the world. The recently published *Annual Review on Universal Jurisdiction* (2023), issued by different

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[105] In 2020–2022, German domestic courts convicted preparators of international crimes: (a) a national of the Syrian Arab Republic was convicted on 24 February 2021 for complicity in crimes against humanity in the form of torture and sentenced to four years and six months in prison; (b) a Syrian national was convicted on 13 January 2022 for crimes against humanity in the form of murder, torture, rape, sexual abuse and deprivation of liberty and issued a life sentence; (c) a case against a Syrian national is being heard concerning crimes against humanity in the form of torture and murder; (d) Germany reiterated comments previously made regarding trials and convictions concerning persons associated with Da'esh in Iraq and the Syrian Arab Republic who have returned to Germany; (e) on 30 November 2021, a former member of Da'esh was convicted and given a life sentence for genocide, crimes against humanity and war crimes. The accused and his wife, a German national, had abused a Yazidi woman and her daughter as slaves. In this case the crime occurred outside Germany and the accused is an Iraqi citizen who did not live in Germany when the investigation began: the accused was extradited from Greece to Germany in 2019, etc. See supra note 105, para. 7.

[106] UN, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General*, A/76/203, July 21, 2021, p. 32–34. The General Assembly has had the item on its agenda annually since then (resolutions 64/117, 65/33, 66/103, 67/98, 68/117, 69/124, 70/119, 71/149, 72/120, 73/208, 74/192, 75/142, A/77/423, 2022).

civil society organizations, provides information on 95 cases pending or decided in 2022 in various European countries.[107]

According to Eurojust,[108] between 2016 and 2021, the number of newly launched cases on core international crimes in Europe climbed by 44%. International reported the conviction of 78 people for international crimes during its first Universal Jurisdiction Annual Review in 2015. This increase is largely due to the participation of prosecuting authorities and specialist civil society organizations, whose investigation efforts and victim support have been vital for the cases to proceed forward. Furthermore, professional prosecutors have been honing their skills in the nuances of investigating foreign crimes, and courts have decided a number of critical legal concerns on a case-by-case basis over the years.

German scholar Jeßberger highlights the regionalization of universal jurisdiction in the global south, as seen in the prosecution of the deposed dictator of Chad Hissène Habré and the boomerang effect of Argentine prosecutors pursuing crimes committed in Spain during the Franco administration, potentially facilitating UJ prosecution in European legal systems. The workshop Universal Jurisdiction and International Crimes: Constraints and Best Practices discussed future strategic and tactical matters related to de facto implementation. Two traditional UJ approaches are the "global enforcer approach" and the "no safe haven approach", with the latter allowing states to act in their own interests by refusing sanctuary to war criminals. Another method in the implementation of UJ is a "complementary readiness approach", which concentrates on gathering, organizing, preserving and analysing the evidence that is already accessible in order to support criminal

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107 *Universal Jurisdiction Annual Review 2023*, #UJAR, written by Shoshana Levy, legal consultant at Trial International, in collaboration with the Center for Justice and Accountability, Civitas Maxima, the European Center for Constitutional and Human Rights, the International Federation for Human Rights and Redress, https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf.

108 Ibid.

proceedings in a national or international court that currently has jurisdiction over the crime or may in the future.

After reviewing the material on the implementation and application of the UJ principle, one may conclude that a traditional approach that jurisdiction problems relating to criminal proceedings are primarily under the jurisdiction of the states. However, a number of international treaties have clauses that require the incorporation and enforcement of the principle of universal jurisdiction. The spectrum of crimes that underpin universal jurisdiction is not well defined on the global level although being broadly understood among European Union member states. Deliberations on the use of universal jurisdiction against crimes and perpetrators are ongoing, with two opposed groups of states presenting their own reasons in UN forums. In the interim, the ILC is working on draft articles regarding the UJ application.

The methods, techniques and outcomes of implementation are determined by states' views toward commitments resulting from human rights, humanitarian law and other treaties preserving the values of the international community as a whole. The success of implementation, which is demonstrated by EU countries, depend on the willingness of states to cooperate with civil society organizations. Most states that have consistently opposed the UJ principle have not signed or ratified the Rome Statute; their record on human rights obligations appears unsatisfactory. Those states also oppose the UJ principle and justify their position by applying the sovereignty principle. The traditional views of the sovereignty principle, however, are no longer a haven for state officials claiming immunity from international and foreign justice. Current developments show a high dynamic in the application of universal jurisdiction in many European countries.

Part 3. Global criminal justice as a forum for jurisdiction over international crimes

Further, the author proposes a journey into a framework of the international criminal justice system. It will be presented as a combination of two distinct but interconnected parts: institutional (I) and material (II). A selective method, similar to the previous section of chapter 1, will be employed, giving the author liberty to choose which facts and norms to include in this section of the work.

8. Institutional framework of international justice: Historical and legal overview

This part aims to provide the reader with a comprehensive overview of the development of international criminal justice during the past century (1919 to date). The text is divided into two main slots, whereas the first part focuses on institutional building of jurisdictional power entrusted to fight international crimes, while the second presents substantive development of international law (mainly as treaty law), or in other words the material part of the ICL.

8.1. Building judicial power over international crimes

The historical approach examines the trajectory of the building of international institutions responsible for prosecuting crimes, considering political and social factors that influenced justice building. Each historical period

presents appropriate institutions for judicial power. The time frame is divided into several eras that represent diverse social and political circumstances influencing cries for international justice: (a) the interwar period; (b) following WWII; (c) following the cold war's conclusion; and the stage (d) on hybrid institutions and the International Criminal Court, whose jurisdiction will be analysed in detail in chapter 2.

8.2. The interwar period: Versailles treaty

Following World War I, attempts to establish international criminal tribunals were unsuccessful. The Commission on the Responsibility of the Authors of the War proposed a "high tribunal composed of judges recruited from numerous nations"[109] following the peace treaty signed at Versailles. The treaty included punishment for war crimes and established Wilhelm II's responsibility for "the supreme offence against international morality and the sanctity of treaties". The German emperor sought asylum in the Netherlands and the Dutch government declined to extradite him primarily due to the fact that the crimes for which he was charged were not covered by the Dutch Constitution.[110]

In fact, contrary to what was envisioned under Articles 228–30 of the Versailles treaty, neither an international court nor tribunals of the Allies were constituted regarding the prosecution of German military personnel accused of war crimes. Ultimately, the Allies chose only 4 out of the approximately 895 Germans charged to be prosecuted – generals and admirals, such as General E. Ludendorff, chief of staff of the army, General Paul von Hindenburg, later chief of staff of the army, and former chancellor Bethmann-Hollweg. Twelve minor inductees were ultimately brought

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[109] *Report on the Commission on the Responsibility of the authors of the [First World] War and on enforcement of Penalties*, in 14 AJIL (1920), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1917&context=ils (accessed November 23, 2023).

[110] The example was taken from the Cassesse, supra note 11.

to trial in 1921 before the Reichsgericht, a German court located in Leipzig, sometimes known as the Imperial Court of Justice. Out of the 12 inductees, 6 were found not guilty. Thus, the endeavour to institute a global criminal justice system ultimately proved fruitless. Some researchers, however, are convinced that the excellent legal quality of the Leipzig court's rulings established important precedents.[111]

However, one significant issue over the legacy of the international tribunals for the aforementioned period shall be given: There have been multiple attempts to create an international court with criminal jurisdiction since 1920. Firstly, the Council of the League of Nations ordered the Advisory Committee of Jurists (ACJ) to draft the Statute of the Permanent Court of International Justice (PCIJ). At that time, the request pointed out that the judicial body be competent to try crimes constituting a breach of international public order or other crimes committed against the universal law of nations. The draft was referred to the Assembly of the League of Nations,[112] but it quickly rejected the proposal out of hand as being "premature".[113] Afterwards, a number of nongovernmental organizations, including the Inter-Parliamentary Union, adopted draft statutes for an international criminal court (1889)[114] in 1925, and the International Law Association (1873), in 1926. However, none of these drafts resulted in anything tangible.

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[111] See: Claud Mullin, *The Leipzig Trials – An Account of the War Criminals' Trials and a Study of German Mentality*, Witherby (1921), p. 27.

[112] P. Sean Morris, "The Advisory Committee of Jurists and the Historical Origins of Scholarly Writings as a Source of International Law", *SSRN*, (2019), https://ssrn.com/abstract=3373294 (accessed April 19, 2024).

[113] See the text of the second resolution adopted by the advisory committee in Lord Phillimore, supra note 110.

[114] See the text of the draft in: *An International Criminal Court – A Step Toward World Peace – A Documentary History and Analysis*, vol. 1, ed. Benjamin Ferencz, Oceana (1980), p. 244ff; Pella V. Vespasian, "Towards an International Criminal Court", *The American Journal of International Law*, 44(1) (1950), p. 37–68.

Summing up, states were unwilling to give up control of their sovereignty and permit a sober examination and punishment of state leaders for crimes posing a threat to the interests of the community, even in the face of new values that showed the need to narrow pure nationalistic interests.

8.3. After WWII: Germany and Japan

Germany

In the Moscow Declaration on October 30, 1943, President Franklin D. Roosevelt, Prime Minister Winston Churchill and Premier Joseph Stalin spoke in the interest of the 32 united nations.[115] In a special part titled "Statement on Atrocities" they declared that Germans would be held for offences committed during the conflict. It was specified that "members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard specially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy".[116] The Allies also decided that others whose offences have no particular geographic location would be punished by a joint government decision of the Allies.[117]

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115 *Joint Four-Nation Declaration*, Moscow Conference, October 1943, https://avalon.law.yale.edu/wwii/moscow.asp (accessed April 19, 2024).

116 Ibid. Statement on Atrocities, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin.

117 Whitney R. Harris, "Tyranny on Trial: The Trial of the Major German War Criminals at Nuremberg, 1945–46", *The International Lawyer*, 40(1) (2006), p. 7–13.

The declaration as well as the specific statement sound like "victor's justice" decisions. Indeed, in the London Agreement, in which additionally to the mentioned parties France joined the treaty, the Moscow statements have been articulated partly as paragraphs of the preamble and partly as specific articles. The meaning of the London Agreement was twofold: firstly, it provided conditions for establishing an international military tribunal, and secondly, its annex constituted the charter of the (Nuremberg) International Military Tribunal (IMT).[118] The charter contains a clear set of jurisdiction elements of the IMT, which had power:

- To try and punish
- War criminals of the European Axis countries (individuals or as members of organizations)
- Who committed the following crimes:
- Crimes against peace,
- War crimes,
- Crimes against humanity.[119]

The jurisdiction of the tribunal towards leaders was established in Article 6 of the charter by the following:

> [l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan, [t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[120]

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118 UN, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* ("London Agreement"), August 8, 1945, 82 UNTC 280.

119 Ibid., Article 6, parts 1, 2.

120 Ibid., Article 6, part 3, Article 7.

Moreover, other tribunals (courts) were established by the Allies composed of judges from some of the allied countries (mainly from the US) and tried minor alleged war criminals. Additionally, according the Law No. 10, passed by a special "Control Council", which was established by the four "Victors Powers" – the US, Britain, France and the Soviet Union, German courts were authorised to try persons accused in all three categories of crimes (Article 6).

Japan

On 26 July 1945, U.S. President Harry Truman, British Prime Minister Winston Churchill, and President Chiang Kai-shek of the Republic of China, who were meeting in Potsdam, Germany to consider war strategy and postwar policy, signed the declaration, which proclaimed terms for the Japanese surrender. Soviet leader Joseph Stalin also attended the Potsdam Conference but did not sign the declaration since the Soviet Union had not enter the war against Japan at that moment.

The Potsdam Declaration announced the intention of these states to prosecute major Japanese war criminals. In January 1946, the supreme commander for the allied powers, who was also the US supreme commander-in-chief, proclaimed the Charter of the International Military Tribunal for the Far East (IMTFE)[121]. It was very similar to the (Nuremberg) International Military Tribunal, and consequently the jurisdiction differed only in geographical scope, namely the tribunal may:

- Try and punish
- War criminals of the far eastern countries (individuals or as members of organizations) who committed the following offences:

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[121] *Charter of the International Military Tribunal for the Far East*, special proclamation by the Supreme Commander for the Allied Powers in Tokyo, charter dated January 19, 1946; amended charter dated April 26, 1946, tribunal established January 19, 1946, Treaties and Other International Acts Series 1589, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (accessed November 23, 3023).

- Crimes against peace;
- Conventional war crimes, violations of the laws or customs of war;
- Crimes against humanity.[122]

In comparison to the Statute of Nuremberg Tribunal, the wording "leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan" was placed in p. c) of Article 5, and according to the systematic interpretation rules it seems as though it applies only to crimes against humanity.

However, during the proceedings all accusations brought by the prosecutor formally included crimes against humanity, conventional war crimes and crimes against peace. As in Nuremberg, the Allies created three groups: Class A: Prosecutions of prominent (Japanese – put in brackets by the author) officials for alleged crimes against peace. Class B and C: Conventional war crimes and crimes against humanity were charged against (Japanese – put in brackets by the author) nationals of whatever rank. The allegation of crimes against peace was a requirement for prosecution, unlike the Nuremberg trials; only those whose offenses included crimes against peace could face legal action from the tribunal. In this instance, Tokyo did not hear any Class C charges.[123]

The IMTFE was held in Tokyo from 3 May 1946 to 12 November 1948. During that time the tribunal tried 28 people, of whom 25 received sentences. Of the remaining defendants, two passed away naturally and one was deemed incapable of standing trial after experiencing a breakdown on the first day of the trial. Seven of the 25 defendants found guilty received death sentences, 16 received life sentences and 2 received reduced jail terms. Trials

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122 Ibid., Article 5.

123 *Tokyo War Crimes Trial*, The National World War II Museum, https://www.nationalww2museum.org/war/topics/tokyo-war-crimes-trial (accessed November 23, 3023).

of other alleged war criminals were held in the nations where the crimes were allegedly committed.[124] There has been much criticism reiterated due to the lack of fair-trial standards indicated by defence lawyers during the trials.[125] In that time, no one among them mentioned the fact that the judges and prosecutors were appointed by and dependent on the victor states.

However, the very treaties agreed upon between the antagonist states, even though they were more or less allies during the war, show that the states may break the monopoly of national jurisdiction over international crimes and act together for justice. Moreover, the legal society of all countries has benefited from the case law developed due to the international tribunals' proceedings.

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[124] John Grant, Craig Barker, *International Criminal Law Desk Book*, Routledge–Cavendish Publishing Limited, (2006), p. 218.

[125] Interestingly, that the attorneys' main defence for contesting the tribunal's authority to hear and rule on the accusations made in the indictment were the following: "(1) Article 5(a) of the Charter of the Tribunal cannot be amended by the Allied Powers acting through the Supreme Commander to designate 'Crimes against Peace' as justiciable; (2) Aggressive war is not inherently illegal, and the 1928 Pact of Paris renouncing war as a tool of national policy does not expand the definition of war crimes or create new ones; (3) War is an act of a nation for which there is no individual responsibility under international law; (4) The provisions of the Charter are 'ex post facto' legislation and are therefore unlawful; (5) The Instrument of Surrender, which stipulates the implementation of the Potsdam Declaration, stipulates that the only crimes to be tried are Conventional War Crimes as defined by international law on July 26, 1945, the day the Declaration was made; (6) Killings committed during combat operations, unless they violate the laws and customs of war or the rules of warfare, are considered normal incidents of war and do not qualify as murder; (7) A number of the accused are prisoners of war and may be tried by martial law, as stipulated by the Geneva Convention 1929, rather than by this Tribunal." See: *Jurisdiction of the International Military Tribunal for the Far East*, judgment of 4 November 1948, N 501250 (1948), p. 35–42, https://www.legal-tools.org/doc/8bef6f/ (accessed November 19, 2023).

8.4. End of the cold war: Ad hoc tribunals, hybrid courts

Significant developments in international law and relations occurred during the optimistic late 20th century, a time when borders were opened, walls were torn down, new states were established and their constitutions reaffirmed a dedication to the rule of law and human rights. Nonetheless, new difficulties arose with the end of the cold war. To determine how major the modifications have been, all you need to do is glance at the map (Attachment 1). While a number of historians, sociologists and lawyers working in the field of international law and international relations have referred to the formation of the "new international order",[126] the "new global law"[127] or period of "mature international law",[128] politicians and academics noted a number of unfavourable effects following the fall of the Soviet bloc. They mention involvement of "severe instability and the disintegration of the global community", which when combined with the rise of nationalism and fundamentalism led to a spiral of largely internal armed wars that were very violent and cruel.[129]

In a positive change, one should mention that the issues of human rights that have long been a contentious topic in political discussions have indeed entered the lexicon of practitioners, including lawyers from all parts of the European continent. It appeared that states could come to an agreement on a number of issues at the turn of the century, including the protection and regulation of human rights. Furthermore, it was discovered that the focus

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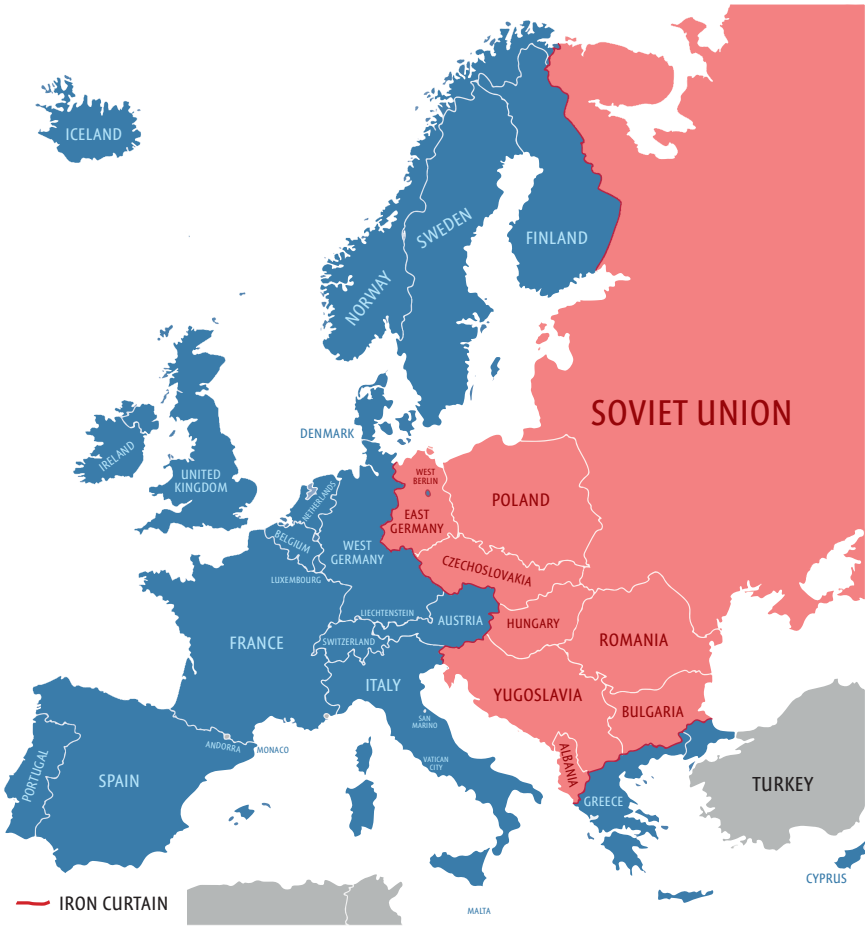
126 Charlotte Ku, Paul F. Diel, "International Law as Operating and Normative Systems: An Overview", [in:] *International Law: Classic and Contemporary Reading*, eds Charlotte Ku, Paul F. Diel, Boulder (2009), p. 1–17.

127 Stanley Hoffman, "The Crisis of Liberal Internationalism", *Foreign Policy*, 98 (1995), p. 159–177.

128 Thomas M. Frank, *The Power of Legitimacy Among Nations*, Oxford University Press (1990).

129 Antonio Cassese, *International Law*, p. 455.



Attachment 1. Map of the Iron Curtain in Europe. Source: https://commons.wikimedia.org/wiki/File:Iron_Curtain_map.svg. Author: Sémhur.

and attention placed on the other side regarding the necessity of upholding human dignity and punishing those who violate the principle of jus cogence had strongly prompted the development of international criminal justice that would adhere to fair-trial norms.

One may observe that this period is characterized by intensive work by establishing, proceeding with and completing the work of different kinds of

institutions: ad hoc tribunals for Yugoslavia and Rwanda, judicial bodies with mixed elements of national and international ones and, finally, planning and establishing the first permanent international court, which would be a flagman in the fight against impunity for committed crimes.

Ad hoc tribunals

Former Yugoslavia – ICTY

Alarmed by violations of international humanitarian law in the former Yugoslavia and especially in Bosnia and Herzegovina, including mass killings, systematic detention and rape of women and ethnic cleansing, on 25 May 1993, the UN Security Council (SC) adopted a resolution (Resolution 827, 1993)[130] with a long title that determined that the situation continued to pose a threat to international peace and security, further announcing its intention to put an end to such crimes and bring justice to the victims. The SC adopted the statute of the ad hoc tribunal (ICTY) in the same resolution. The ICTY statute was a matter for numerous amendments.

The jurisdiction (competence) of the court was stipulated in Article 1 as follows:

- To prosecute[131]
- Persons responsible for
- Serious violations of international humanitarian law committed

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130 UN Security Council, *International Criminal Tribunal for the Former Yugoslavia (ICTY)*, May 25, 1993, S/RES/827 (1993).

131 In comparison with the previous tribunals, the jurisdiction of the ad hoc tribunal used the wording "persecute" and not "to try and punish", which sounds closer to the standards stipulated by the human rights treaties: (i) independent and impartial tribunal, (ii) presumption of innocence, (iii) public hearings, etc.

- In the territory of the former Yugoslavia in accordance with the statutes' provisions.[132]

Among the crimes which constitute a power of the ICTY are the following:
- Grave breaches of the Geneva Convention of 1949,
- Violations of the laws or customs of war,
- Genocide (including forcibly transferring children of a group to another group, Article 4, p. e),
- Crimes against humanity (Articles 2-5).

The tribunal had its jurisdiction only against natural persons (Article 6), whereas the individual responsibility's scope included all kinds of activities with respect to the mentioned crimes; the official position of any accused person whether as head of state or government or other officials shall not relieve them of criminal responsibility and not mitigate punishment (Article 7, parts 1 and 2). The ICTY's jurisdiction was declared as having a concurrent jurisdiction and primacy over national courts' jurisdictions (Article 8).

Up to the end of the ICTY activities, a grand total of 161 individual were indicted, 90 individuals were sentenced; the last indictments were confirmed and disclosed in the spring of 2005, having been issued in December 2004.[133] On 20 July 2011, Goran Hadžić, the last wanted person, was apprehended. As an ad hoc tribunal, the institution formally ceased to exist on 31 December 2017, following the issuance of the final decision on 29 November 2017. The UN Security Council approved the three-phase plan in resolutions 1503 and 1534. It called for finishing all first instance trials by the end of 2008, completing all investigations by the end of 2004 and finishing all work by the end of 2010. The International Residual Mechanism

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132 Supra note 130, Article 1.

133 *Infographic: ICTY Facts & Figures*, United Nations. International Residual Mechanism for Criminal Tribunals, https://www.icty.org/node/9590 (accessed November 23, 2023).

for Criminal Tribunals (IRMCT), the ICTY's successor organization, was in charge of handling the remaining duties of the ICTY, such as monitoring sentencing and reviewing appeals filed after 1 July 2013. For example, Mladić's appeal occurred only in August 2020, and on 8 June 2021 his final appeal was rejected by the IRMCT.[134]

There have been critical voices that, due to political and military inaction, the international community's response to the Yugoslavian war was slow and hesitant. Thus, throughout the battle, the creation of a tribunal was seized upon as a late attempt to save face as well as in the earnest belief that it would act as a deterrent to future atrocities. However, no doubts exist that over the past two decades the tribunal has irreversibly changed the landscape of international criminal and humanitarian law.

Rwanda – ICTR

Another ad hoc judicial institution, the tribunal addressing impunity in the territory of Rwanda and Rwandan citizens responsible for genocide and other serious violations committed in the territory of neighbouring countries was established by the UN Security Council acting under Chapter 7 of the UN Charter in November 1994 (SC Resolution 955). The SC adopted the Statute of the International Criminal Tribunal for Rwanda (ICTR) by the same resolution.

The jurisdiction (competence) of the court was stipulated in Article 1 as follows:

- Prosecute
- Persons responsible for serious violations of international humanitarian law

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[134] Stephen Arrig Koh, *The Mladić Appeal Judgment and the Enduring Legacy of the Hague Tribunals*, June 28, 2021, https://www.justsecurity.org/77197/the-mladic-appeal-judgment-and-the-enduring-legacy-of-the-hague-tribunals/ (accessed November 3, 2023).

- Committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states
- Between 1 January 1994 and 31 December 1994.

The following crimes have been embraced by the ICTR:

- Genocide (including forcibly transferring children of one group to another group, Article 2, p. e),
- Crimes against humanity,
- Violations of Article 3 common to the Geneva Conventions and Additional Protocol II.

Like the ICTY, the tribunal for Rwanda was ordered by the UN Security Council to complete its work within a definite time and pass the leftover activities to the International Residual Mechanism for Criminal Tribunals (IRMCT). According to available data up to November 2015, the ICTR indicted a total of 93 individuals. The ICTR (or the IRMCT as its successor) convicted 62 individuals: 25 of whom are currently serving sentences, 22 of whom have completed their sentences and 14 of whom died while serving their sentences. The tribunal acquitted 14 individuals and transferred the cases against 10 individuals to national jurisdictions.[135]

In spite of critical comments seen as usual to arguments on the model of victors' justice inherited by the ICTR, in reality, it has been a pioneer in the development of a reliable international criminal justice framework, generating a significant corpus of legal precedents concerning crimes against humanity, war crimes, genocide and forms of collective and individual accountability. It is the first international tribunal to rule on cases pertaining to

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[135] *Legacy Website of the International Criminal Tribunal for Rwanda. The Cases*, UN, International Residual Mechanism for Criminal Tribunals, https://unictr.irmct.org/en/cases (accessed November 23, 3023).UN Security Council, *Report on the Completion of the Mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015*, https://unictr.irmct.org/sites/unictr.org/files/legal-library/151117_ictr_final_report_en.pdf (accessed November 23, 3023).

genocide and the first to interpret the 1948 Geneva Convention's definition of genocide. It is also the first international tribunal to acknowledge rape as a tool of genocide and to define rape in terms of international criminal law.

The "media case"[136] was yet another significant milestone, as the ICTR held media professionals accountable for broadcasts meant to incite the people to commit crimes of genocide. The court convicted RTLM cofounder Ferdinand Nahimana, executive director Jean-Bosco Barayagwiza and Hassan Ngeze, founder and editor of Kangura, for their role in the incitement. The tribunal classified the radio broadcasts and newspaper articles spreading hate as crimes against humanity. Although their conviction for direct involvement in genocide was overturned on appeal, their participation in broadcasting hate was maintained.[137]

Hybrid institutions

In the late 1990s and early 2000s, the UN Security Council considered the situations in, among other places, Sierra Leone, Cambodia, East Timor and somewhat of *sue generis* institutions suitable for delivering justice there. While selecting the existing data on the established institutions, this author systemised it in order to present: the body which made the decisions on the establishment of the judicial institutions, the scope of the jurisdiction power, outcomes of the institutions and exit methods.

Sierra Leone

This is indeed a sue generis case when the government of Sierra Leone requested "a special court" in 2000 to address major crimes against civilians and UN forces during the decade-long civil conflict in the nation

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136 Sophia Kagan, "The 'Media Case' Before the Rwanda Tribunal: The Nahimana et al. Appeal Judgement", *Hague Justice Journal*, 3(8) (2008), p. 83–91, https://www.elevenjournals.com/tijdschrift/hjj/2008/1/HJJ_187-4202_2008_003_001_006.pdf (accessed December 19, 2023).

137 Ibid.

(1991-2002). This request led to discussions by the Security Council[138] and the establishment of the Special Court for Sierra Leone (SCSL) in 2002.

Importantly, the SC considered the development and negative tendencies in the country directed the UN Secretary General to address the following questions of (1) the temporal jurisdiction of the special court, (2) an appeals process including the advisability, feasibility and (3) appropriateness of an appeals chamber in the special court or of sharing the Appeals Chamber of the international criminal tribunals for the former Yugoslavia and Rwanda or other effective options and (4) a possible alternative host state, should it be necessary to convene the special court outside the seat of the court in Sierra Leone, if circumstances so require.[139]

According to the statute of the SCSL (Article 1), it had the jurisdiction (competence):[140]

- To prosecute
- Persons who
- Bear the greatest responsibility for serious violations of
- International humanitarian law and
- Sierra Leonean law committed
- In the territory of Sierra Leone
- Since 30 November 1996.[141]

The court's *ratione materiae* jurisdiction covered:

- Leaders who,
- In committing "such crimes" (see p, d, e above),

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138 UN Security Council, *On the Establishment of a Special Court for Sierra Leone*, August 14, 2000, S/RES/1315 (2000).

139 Ibid., Article 7.

140 UN Security Council, *Statute of the Special Court for Sierra Leone*, January 16, 2002, https://www.refworld.org/docid/3dda29f94.html (accessed January 5, 2024).

141 Ibid., Article 1, part 1.

- Have threatened the establishment of and implementation of the peace process in Sierra Leone.

Article 1, part 2, also stipulates that

> any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State

are covered by the court's jurisdiction. Consequently, Article 1, part 3, stipulates that "with respect to this group of persons the Court may also have jurisdiction in the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, if authorized by the Security Council on the proposal of any State".

The "hybrid" character of the tribunal, reflected in the fact that the sources of the material jurisdiction find themselves not only in international treaties but also in national legislation (not a sentence). The tribunal statute indicates the jurisdiction over international "conventional" crimes:

- Crimes against humanity (Article 2),
- Violations of Artic2 3 common to the Geneva Conventions and of Additional Protocol 2 (Article 3),
- Other serious violations of international humanitarian law (Article 4).

It also applied national legislation (crimes under Sierra Leonean law).[142]

An important statute's provision (Article 6, part 2) on the issue of

[142] It applied also national penal legislation, including the following: "a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31): i.

accountability of state's officials "whether as Head of State or Government or as a responsible government official", states that the court shall not relieve such persons of criminal responsibility nor mitigate punishment (limitation of the immunity clause).

During its work (since 2002 to 31 December 2013),[143] the Special Court for Sierra Leone ("Special Court") has indicted 22 persons and sentenced 12. In spite rather low quantitative indicators, there are important innovations of the court's activities. Firstly, as the pioneer of the "combined" approach to international criminal justice, the court demonstrated the productiveness of the hybrid model, which combined national ownership with international partnership. Moreover, due to this approach, the court, indeed, achieved important contributions to international criminal law which might be of interest for readers: (1) the case against Charles Taylor is a landmark against a former head of state successfully initiated and completed. In the case of Mr. Taylor, he was convicted of war crimes and sentenced to 50 years imprisonment,[144] (2) the case against those who committed attacks directed against United Nations peacekeepers,[145] and (3) the principal

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Abusing a girl under 13 years of age, contrary to section 6; ii. Abusing a girl between 13 and 14 years of age, contrary to section 7; iii. Abduction of a girl for immoral purposes, contrary to section 12. b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861: i. Setting fire to dwelling – houses, any person being therein, contrary to section 2; ii. Setting fire to public buildings, contrary to sections 5 and 6; iii. Setting fire to other buildings, contrary to section etc. see Art 5 of the Statute."

143 In anticipation of the completion of the judicial activities of the Special Court, the UN and the government of Sierra Leone signed an agreement establishing a small residual court to carry out the remaining work of the court. The residual mechanism was ratified on 1 February 2012. See: *Special Court for Sierra Leone*, Hybrid Justice, https://hybridjustice.com/special-court-for-sierra-leone/ (accessed November 23, 3023).

144 *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgement, Special Court for Sierra Leone, May 18, 2012, p. 2475–2478, https://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1301.pdf (accessed November 23, 3023).

145 *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, (Trial Judgement), March 2, 2009, para. 2238,

judicial examination on the procedural relationship between a court and a truth and reconciliation commission, where truth and reconciliation commissions and courts operate simultaneously in a search for post-conflict justice.[146]

East Timor

In 1999, following a wave of gross human rights violations from the Indonesian armed forces, the Timorese demanded UN bodies for justice, meaning mainly the establishment of an ad hoc international criminal tribunal on the model of Yugoslavia and Rwanda.[147] Researchers claim[148] that although the matter had been discussed informally in the UN Security Council after it sent an emergency delegation to visit the destroyed territory, the question of an international tribunal was not pursued further. This was caused in part by the ongoing criticism of the ICTY and ICTR of the protracted length of trials and the tribunals' alleged lax outcomes standards, which in a significant number of cases compromised the accused's right to a fair trial.[149] As a result

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p. 677–684, https://www.refworld.org/jurisprudence/caselaw/scsl/2009/en/92027 (accessed November 23, 3023).

146 *Prosecutor v. Norman*, Case No. SCSL-03-08-PT, Appeals Judgement, Special Court for Sierra Leone, November 28, 2003, para. 41–44, https://www.rscsl.org/Documents/Decisions/CDF/Appeal/122/SCSL-03-08-PT-122.pdf (accessed November 23, 3023).

147 Joint statement by Amnesty International and the Judicial System Monitoring Program: *Indonesia/Timor-Leste: Justice for Timor-Leste: UN Dragging Its Heels While Perpetrators Walk Free*, April 13, 2004, https://www.amnesty.org/fr/wp-content/uploads/2021/09/asa210132004en.pdf (accessed November 23, 3023).

148 Kyla M. Ehrisman, "The Extraordinary Chambers in the Courts of Cambodia: Gauging the (In)Effectiveness of a Locally-Run Tribunal", *Creighton International and Comparative Law Journal*, 4 (2013), p. 25–38; Seeta Scully, "Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia", *Asian Pacific Law and Policy Journal*, 13 (2011), p. 300–350.

149 For a detailed analysis of this issue, see: UN, *Report of the Group of Experts on the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda*, Doc. A/54/634, November 22, 1999.

of the discussions, for East Timor, the Special Panels for Serious Crimes (ETSP) under the Dili District Court established a judicial body (ETSP or tribunal), which was given jurisdiction over the following crimes: (a) genocide, (b) war crimes, (c) crimes against humanity, (d) murder, (e) sexual offences and (f) torture (Article 1.3).[150] Moreover, the ETSP, in accordance with Article 2.2, was empowered with "universal jurisdiction", which was defined as "jurisdiction irrespective of whether: (a) the serious criminal offence at issue was committed within the territory of East Timor; (b) the serious criminal offence was committed by an East Timorese citizen; or (c) the victim of the serious criminal offence was an East Timorese citizen".[151]

The UN-sponsored tribunal in East Timor worked from 2000 to 2005. The UN's opinion that the tribunal was successful is contested by criticism of its performance. In the opinions of some researchers and human rights organisations,[152] the Timorese administration has not been able to secure the surrender of a great majority of important suspects related to the conflict in 1999 who are currently in Indonesia. Most observers saw this situation coming from the beginning, and it was one of the main causes of the persistent requests for the establishment of an international tribunal, including those made by the UN High Commissioner for Human Rights' International Commission of Inquiry or support from the UN Security Council in accordance with Chapter 7 power. There was a lack of international political support.[153]

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150 UN Transitional Administration in East Timor, *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, as amended by Regulation 2001/25, June 6, 2000, Section 10, https://www.legal-tools.org/doc/c082f8/pdf (accessed November 23, 3023).

151 Ibid., Article 2.2.

152 David Cohen, *'Justice on the Cheap' Revisited: The Failure of the Serious Crimes Trials*, East Timor, Asia Pacific Issues. Analysis from the East-West Centre No. 80, May 2006.

153 Supra note 32; chapter 7 powers refer to the part of the UN Charter that allows the Security Council to take measures to maintain or restore international peace and security.

Critical notices also relate to its legitimacy. Significant legitimacy challenges arose as a result of the regime's early credibility crisis, triggered by heinous atrocities. It was frequently criticized that the special panels solely found Timorese people guilty, leaving Indonesians free. Furthermore, it created hesitation among the political elite, who would have preferred to focus on building connections with Indonesia. However, the UN did not offer the required political will or funds for the serious crimes process to be completely successful. Second, one of the most serious performance-related concerns is the "calibre" of the accused's defence counsel. Because of the nature of the acts involved, there was still a shortage of experienced counsels. Throughout the special panels' and SCU's tenure, there were numerous key periods when it appeared likely that the scope of operations – particularly for the SCU – were substantially limited, owing primarily to the life cycle of the UN mission.[154]

According to experts, the advantage of the Timorese model that was presented was its proximity to the victims, which would ideally make the pursuit of justice a more rewarding endeavour for both the nation as a whole and the few witnesses in specific cases. Other experts insist that the process was effective because nearly 400 people were indicted after four years. Forty-eight defendants were found guilty, and two were found not guilty in 35 trials. On the surface this seems to be equivalent to the ICTY's rate of progress, where little more than 130 people have been charged in more than a decade.[155] However, residents believe that the international involvement in Timor-Leste's court system has left only a modest legacy and that many more steps are required to rebuild the country's legal system.

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154 Caitlin Reiger, Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, International Centre for Transitional Justice, March 2006, https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf (accessed December 19, 2023).

155 Ibid.

Cambodia

This country was among the first that opened its courts to international criminal justice. In 1997 the Cambodian government asked the UN for help in setting up a tribunal to bring charges against the leading Khmer Rouge leaders. A statute known as the Extraordinary Chambers in the Courts of Cambodia (ECCC, Court) for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea was passed by the Cambodian National Assembly in 2001. This court was established to try significant crimes committed between 1975 and 1979 under the Khmer Rouge dictatorship. In June 2003, an agreement was eventually struck with the UN outlining the ways in which the international community would support and take part in the Extraordinary Chambers.

The ECCC began their operations in February 2006 and became fully operational after the adoption of their internal rules in June 2007. The ECCC stands as a court of the Cambodian national legal system, albeit uniquely structured to require direct participation by the UN and international judges and officials in its staffing and administration by virtue of the UN/Cambodia agreement as well as the Cambodian domestic law governing the Extraordinary Chambers, adopted in 2001 and amended in 2004 ("ECCC Law").[156] The "competence" of the court was the following:

- To bring to trial (Article 1) while personal jurisdiction is limited to
- Senior leaders of democratic Kampuchea and (Article 1) those who were most responsible for
- The crimes and serious violations of Cambodian laws related to crimes (Article 3)
- The crimes of genocide, crimes against humanity (Articles 4-5)
- International humanitarian law and custom (Article 6)

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[156] *Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004*, NS/RKM/1004/006, Cambodia, https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (accessed December 19, 2023).

- And other international conventions recognised by Cambodia that were committed (Articles 7-8)
- The court's temporal jurisdiction embraced the time line from 17 April 1975 to 6 January 1979.
- Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "suspects".[157]

Moreover, the chamber had jurisdiction to bring to trial all suspects who committed any of these crimes set forth in the domestic 1956 penal code (Article 3) during the period from 17 April 1975 to 6 January 1979.

There are controversial assessments of the role and achievements of the Extraordinary Chambers. As researchers claim, additionally to its spoiled reputation for corruption and political interference, the ECCC has faced significant challenges in meeting international fair trial standards, resulting in a failure from a human rights perspective.

According UN Special Expert David Scheffer,[158] both international and Cambodian criminal justice have benefited, to varying degrees, from the Extraordinary Chambers' jurisprudence and the lessons learned. Most importantly, the Extraordinary Chambers have achieved substantial progress towards fulfilling their mandate. Indeed, the jurisprudence of the Extraordinary Chambers, including their procedural and substantive decisions and judgements of guilt or acquittal. It has also served as a model for the creation of similar courts anchored in national systems with external assistance, e.g., as the Extraordinary African Chambers in the Senegalese courts established

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157 Ibid., "Competence", Article 2.

158 David J. Scheffer, *What Has Been 'Extraordinary' About International Justice in Cambodia?*, speech by the UN Secretary-General's Special Expert on United Nations Assistance to the Khmer Rouge Trials, William and Mary Law School Williamsburg, Virginia (2015), https://www.unakrt-online.org/articles/speech-un-special-expert-david-scheffer-what-has-been-%E2%80%98extraordinary%E2%80%99-about-international (accessed December 19, 2023).

to investigate and prosecute former Chadian leader Hissène Habré as a result of a joint agreement between Senegal and the African Union.

Providing a comprehensive report about the "Khmer Rouge Tribunal", James A. Goldston, executive director, and the Open Society Justice Initiative concluded that the lessons of the extraordinary chambers "brought a measure of accountability for some of the most heinous crimes of the 20th century". However, in his opinion, the tribunal's potential to "foster greater respect for the rule of law in Cambodia has been stunted by inconsistent funding, intransigence at home, and inadequate political backing from abroad". Meanwhile, the author predicted in 2016 that as "the world confronts mass violence in the future, the experience of the ECCC in Cambodia offers lessons worth heeding".[159]

Lebanon

One more special "hybrid" tribunal was established by UN Security Council Resolution 1757 of 30 May 2007, which also included an annex with the tribunal's statute. The tribunal convened for the first time on 1 March 2009 and was superior to Lebanon's national courts. The tribunal's headquarters are in Leidschendam (the Netherlands), and it also maintains a field office in Beirut, the capital of Lebanon.

The statute was originally linked to the text of the "Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon".[160] It stipulates in the preamble and in Article 1, titled "Establishment of the Special Tribunal" the tribunal's jurisdiction scope:

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[159] James A. Goldston, *Performance and Perception. The Impact of the Extraordinary Chambers in the Courts of Cambodia*, Open Society Justice Initiative (2016), https://www.justiceinitiative.org/uploads/106d6a5a-c109-4952-a4e8-7097f8e0b452/performance-perception-eccc-20160211.pdf (accessed November 21, 2023).

[160] *Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*, Beirut, January 29, 2007, New York, February 6, 2007.

- to try (preamble)[161]
- All those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others,
- responsible for the attack of 14 February 2005.

Interestingly, that the statute states that the applicable law is domestic penal legislation eligible for prosecution and punishment of the crimes referred to in Article 1, namely: (a) the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "increasing the penalties for sedition, civil war and interfaith struggle".[162] De jure it was a tribunal established to try persons involved in a single event – the attack of 14 February 2005.

This is not a usual statement, which has been articulated in the agreement and repeated fully in the statute and is the consent of the Security Council for a case in which when the tribunal's jurisdiction shall be extended to other deeds related to the main attack. Another particularity of the mentioned articles of the agreement and the statute is including the modes/elements of criminal liability – criminal intent (motive), the purpose behind the attack, the nature of the victims targeted, the pattern of the attack (modus operandi) and the perpetrators – in the jurisdiction clause.

Final verdicts were delivered in 2020. Experts who evaluated the work of the tribunal noted that it was the first to address terrorism as a separate international offence.[163] Thus, the tribunal became a sui generis international

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161 *Statute of the Special Tribunal for Lebanon*, Attachment to the Agreement (ibid.).

162 Ibid., Article 2.

163 See a critical analysis of Kai Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism Under International Law?", *Leiden Journal of International Law*, 24 (2011), p. 655–675.

criminal tribunal as a product of "a substantial international component; its standards of justice, including principles of due process of law, are those applicable in all international or UN-based criminal jurisdictions; and its rules of procedure and evidence are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure; and its success may rely considerably on the cooperation of third States".[164] These appreciations sound like proof of the success of international justice.[165]

Experts noted that it has had strong domestic links, namely "its subject matter jurisdiction or the applicable law remain national in character",[166] which may prove the sustainability of its results and its affirmative effect for the society and legal system. Furthermore, studies comparing the aforesaid court trial and its implementation procedure to the Special Tribunal for Lebanon conclude that the latter appears more akin to the unilateral/authoritarian strategy adopted in the situations of Rwanda and the former Yugoslavia. This is possibly the most important feature that is identified as a preferred form for a justice system dealing with transnational crimes. Researches continue to discuss the rather unique bilateral/consensual approaches used to establish courts of a "hybrid" nature.[167] Opponents say that the drafters deliberately omitted the inclusion of international crimes, such as crimes against humanity,[168] as well as a reference to the Arab Convention Against Terrorism.

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[164] UN Security Council, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893, November 15, 2006, para. 7.

[165] Ibid., at 189; Nidal N. Jurdi, "The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon", *Journal of International Criminal Justice*, 5(5) (2007), p. 1126; Marco Milanovic, "An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon", *Journal of International Criminal Justice*, 5(5) (2007), p. 1140.

[166] Supra note 164.

[167] Mario Odoni, "The Establishment of the Special Tribunal for Lebanon and Domestic Jurisdiction", *Hague Justice Journal*, 4(3) (2009), p. 171–196.

[168] Supra note 164, p. 655–675.

To sum up, regarding building of international criminal justice, one may say that the worldwide community of nations has progressed through a number of historical stages in terms of increasing understanding, achieving normative consolidation and establishing the international criminal justice system. The first sporadic efforts to combat piracy, as well as individual examples of trials conducted by a group of judges of several countries over the 16th and 19th centuries, suggest that the understanding that the authority and effectiveness of the actions of the international community are indisputable. However, the common understanding of the purpose, prevailing model of national state sovereignty did not serve as fertile soil for building sustainable international institutions combating international atrocities.

The initiatives to establish a substantive part of international criminal law through the codification of international crimes, as well as the establishment of a procedure for the implementation of international justice, were not successful after the First World War in spite of the presence of an existing body of international humanitarian law that had the potential to punish those who violated the established rules of warfare, including the treatment of civilians, prisoners and wounded. The Treaty of Versailles, the League of Nations and the International Labour Organization have been important milestones in the development of international cooperation and understanding of universal human values for social well-being and peace. In the meantime, due to strong legal positivism, lawyers have failed to overcome regulatory barriers in defining crimes against humanity. Later, it was defined and based on general principles of law as was stipulated in the Statute of the International Military Tribunals after the Second World War.

Changes in the map of the world, the collapse of the USSR and the system of created socialist states and the postwar divisions of Europe, together with enthusiasm over individual freedoms and open borders also led to imbalances in the formerly existing system of two dominant powers. While the institution of international responsibility of states, including for serious violations, has proven to be practically insufficient, the question of individual

criminal responsibility and the exercise of jurisdiction by judicial bodies established by the international community, empowered to deal with cases of individuals suspected of international crimes, has been in demand.

Eight institutions established for the administration of international criminal justice have been analysed in this section: the four specially established international tribunals (Military Tribunal – Nuremberg, the Far East military tribunals, the Yugoslav tribunal, and the Rwandan tribunal) and the four "hybrid" criminal courts (the Special Court for Sierra Leone, the Special Panels for Serious Crimes in Cambodia, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon with aim to provide readers with food for consideration of their effectiveness and adherence to a high fair-trial standard.

In the author's view, the common strengths of all these institutions are their commitment to the fight against impunity, the restoration of victims, affirmation of the general principles of law and criminal justice through the formation of jurisprudence and the development of doctrine.

Furthermore, the role of all such courts in restoring the very meaning and objectives of justice as well as the establishment of an institutional superstructure to strengthen the legal systems of countries where international crimes have occurred, was significant, and the assessment of the lessons learned and the challenges faced by the institutions considered.

A negative side of the tribunals established by the decision of the winning countries in international wars or conflicts is the low level of legitimacy of such institutions in view of the dependency of judges and prosecutors on the states concerned. However, their contribution to raising awareness and codifying the new branch of international criminal law is priceless. The fact that the so-called ad hoc tribunals established for Yugoslavia and Rwanda were not expanded is a telling warning. The causes could include high financial and technological expenditures as well as the relative inefficiency of the processes themselves: the duration of the proceedings and states' refusal to cooperate in the extradition of suspects at the request of the courts.

The creation of "hybrid" institutions has its own characteristics and, accordingly, not only failures but also advantages on two levels: (1) the international character of such institutions is the inclusion of UN bodies in the establishment of tribunals, as well as further support, including the formation of an international component of the judiciary and the prosecutor's corps; the positive side is the dissemination of the best standards of justice both in terms of material law and from the position of due process; (2) indicators of the national component hybrid courts is their reliance not only on international but also in national law, and also the proximity of the locations of the courts to the local population, which enhances the positive educational impact with a view to further formation and functioning of the judicial system, and as a preventive effect for the prevention of international crimes in the country and region.

Meanwhile, there are also advantages of international criminal courts which present benefits over the "hybrid" vessels as well as over domestic courts, especially those seated within state territory where crimes have been committed. They are believed to be more unbiased due to the absence of enforcement agencies for evidence collection, search, seizure of documents and executing arrest warrants. However, these courts must rely heavily on state cooperation and international diplomacy.

9. Substantive elements of international criminal justice

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. … Such are the places where every man, woman and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[169]
>
> *Eleanor Roosevelt, co-author of the Universal Declaration on Human Rights*

This section provides a critical overview of the substantive element of international criminal law, namely emphasizing the laws that codify conduct that may lead to criminal liability on an individual basis. Jurisdiction is only one of two key elements of international criminal law. The second one, a substantive part of criminal law, is international crimes. It will be presented here via selected elements that help to better comprehend (1) the legal aspects related to jurisdiction and (2) the existing normative provisions that extend the possibilities of application of the jurisdiction issues in practice.

While presenting issues related to the jurisdiction of national courts, authors use a selective approach which allows them to place emphasis on the treaties that may be predominantly adjudicated. Before discussing specific treaties, which contain clauses imposing individual criminal responsibility, the author considers international law provisions devoted to the duties and responsibilities of an individual, including those which aim to contribute to the implementation of the principles of international criminal law both locally and globally.

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[169] Madeline Branch, *10 Inspiring Eleanor Roosevelt Quotes*, United Nations Foundation, https://unfoundation.org/blog/post/10-inspiring-eleanor-roosevelt-quotes/.

10. Individuality, accountability and duty to act

The states' accountability model, which has already been discussed in part 2.1. has several indicators that examine the liability of the primary subjects of international law, namely states. However, there are several factors that contribute to the model's lower efficiency than expected.

Statistics show that today, 5.1 billion people – two-thirds of the Earth's population – lack meaningful access to justice. Behind this statistic are "lives lost, dreams crushed and conflicts sparked".[170] The UN special rapporteur on the independence of judges and lawyers, Margaret Satterthwaite, in her report "The Promise of Legal Empowerment in Advancing Access to Justice for All" (2023), highlights the need to empower communities to understand and use the law, hence expanding access to justice and building a people-centred justice system. She highlights the need to "democratize legal systems" and uphold the intrinsic dignity of every member of the human family – as guaranteed in the Universal Declaration of Human Rights.[171]

In the 1990s, as a new phase of historical circumstances emerged and the need for enabling civil society emerged, the so-called "Declaration on Human Rights Defenders"[172] was adopted, providing individuals with a more extensive and clear mandate. The preamble of the declaration highlights the connection between the enjoyment of fundamental freedoms and international peace and security while also emphasizing that noncompliance with human rights obligations cannot be justified in the absence of these

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170 UN, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Margaret Satterthwaite – The Promise of Legal Empowerment in Advancing Access to Justice for All*, A/78/171, July 2023, https://www.ohchr.org/en/documents/thematic-reports/a78171-report-special-rapporteur-independence-judges-and-lawyers (accessed December 19, 2023).

171 Ibid., summary.

172 UN, General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Resolution Adopted by the General Assembly*, A/RES/53/144, March 8, 1999.

conditions.[173] The role of individuals is growing, in the implementation of international criminal law as well. The mandate for such actions is present in an international legal framework: "[e]veryone has the right, individually and in association with others: (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters".[174] Moreover, "Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms".[175] Providing the mandate and the space for human rights activities, international law reminds us of the interrelation between domestic law and an international framework, whereas only "domestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted".[176] The clause means that if national legislation is not in line with the international obligations of a state, everyone may refer to international provisions and draw attention to noncompliance.

One more important introductory note: the notion of "human family",[177] which goes beyond an "individual" approach. The notion embraces all individuals and makes them a core of the entire ecosystem of international law, the notion "We the People",[178] which begins the Charter of the United

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173 Ibid, preamble, para. 5.

174 Ibid., Article 6.

175 Ibid., Article 12, part 1.

176 Ibid., Article 3.

177 Supra note 13, preamble, para. 1.

178 Supra note 32, preamble, para. 1.

Nations and should not be forgotten in daily work with issues related to strengthening peace and security in the world.

11. Selected international treaties (focus on the issue of jurisdiction)

Substantive international criminal law might be seen as a composition of normative prescriptions for crimes and subjects of crimes. Meanwhile, some international conventions intended to regulate specific objects and prevent threats to the world community's interests and values are still neglected in terms of realizing the possible ways of bringing perpetrators to individual criminal responsibility via legal means.

Grant and Barker tried to classify different treaties, and their collection introduces the following categories: laws of war, crimes against humanity, terrorism, miscellaneous crimes.[179] Building on the idea, this author would add to the collection other important hot topical areas of international law that need consideration on criminalization of some activities of individuals, for example: cyber activities, protection of the human genome, application of artificial intelligence, ecological law, peace and security regulations and organized crime, including by private military and security companies.

The volume and focus of such a monograph forces us, however, to reduce the ambitions and concentrate on two sets of the treaties belonging to (1) international humanitarian law (IHL), namely, four Geneva Conventions and two additional protocols; and (2) international human rights law (IHRL), presented via the Convention for the Prevention and Punishment of the Crime of Genocid,[180] the International Convention on the

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[179] Supra note 124.

[180] UN, General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 UNTS 277.

Suppression and Punishment of the Crime of Apartheid,[181] the Convention Against Torture And other Cruel, Inhuman and Degrading Treatment and Punishment,[182] the Convention for the Protection of All Persons from Enforced Disappearance and Protocol to Prevent,[183] the Protocol to Prevent, Suppress and Punish the Trafficking of Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime.[184] Results of the legal analyses of the treaties of the two branches – IHL (Table 2) and IHRL (Table 3) will be presented in two relevant tables.

11.1. Humanitarian law (Geneva Conventions and protocols)

Humanitarian law (which may also be called law of war) is defined as a system of norms aimed at preventing all possible means of suffering that can be avoided during war (armed conflicts of international character and non-international armed conflicts). Two Latin phrases, jus ad bellum and jus in bello, are traditionally used to identify the subject area.

Jus ad bellum has long been used to describe the conditions under which states may resort to war or to the use of armed force in general. Since the establishment of the prohibition of the use of force in the Charter of the United Nations (Article 2, paragraph 4), the concept and the term have continued to appear in historical and scientific literature.

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181 UN, General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, November 30, 1973, A/RES/3068(XXVIII).

182 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, p. 85, 10 December 1984.

183 UN, General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, New York, December 20, 2006, Doc. A/RES/61/177.

184 UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, November 15, 2000.

Jus in bello refers to the rules governing the conduct of parties in an armed conflict. Lawyers emphasize the need to know and be able to use both concepts in order not to narrow the limits of legal protection during armed conflict and to guarantee the victims of application of the Jus ad bello rules regardless of the cause of the conflict, i.e., even in cases where the party has violated the prohibition of the use of force, which is the axiom of modern law of war in jus ad bellum.[185]

Humanitarian law encompasses general principles and rules of customs agreed a long time ago and codified on the basis of states' consent to regulate warfare, both by restraining belligerents in the conduct of armed hostilities and by protecting those who do not take part or no longer take part in combat. Provisions of the selected legal acts of IHL have been analysed from the perspective of the presence of provisions substantiating an international crime with the subject and the objective elements, a state's positive obligations with respect to criminalising the activities threatening IHL objectives and bringing an accused to justice, and the jurisdiction clause with respect to prosecution of the accused. The data will be organized and presented in Table 2 below. Columns A and B: numbering, titles and identification of an international document; Column C: excerpts from the treaties' texts on the four elements: subject of crime, objective elements of crimes, implementation measures and jurisdiction clause, if any; column D: relevant comments. The results of the legal analyses of the data are presented below.

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[185] Jasmine Moussa, "Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law", *International Review of the Red Cross*, 90(872) (2008), p. 963–990.

Table 2. Humanitarian law treaties and individual criminal responsibility

N	Treaty, state parties' ratification numbers	(1) Subject, (2) objective element of the crime, (3) implementation measures, (4) jurisdiction, clause if any	Comments, if any
A	B	C	D
1	Geneva Convention 1 (for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field),[186] 1949, ratified by 196 states.[187]	(1) Persons taking part in hostilities, including members of the armed forces (Article 3, part 1). (2) Article 3 prohibits: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) the taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (3) Articles 49, 50 oblige parties to undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or to have committed any grave breaches of the convention, to suppress all acts contrary to the convention; to pursue suspected persons regardless of their nationality and bring them to trial.	Highlights in column C are added by the author. The treaty presents the whole spectrum of the sought elements anticipated in research regarding provisions on the subjects and criminalisation of activities of individuals (persons). The treaty also stipulates the general obligations of state parties, including the criminalisation of the offences, to suppress the illegal activities and to try the alleged criminals. The jurisdiction clause complies with international principles without mentioning them specifically.

[186] On the legacy of all the mentioned conventions, one may read Grant and Barker, supra note 125.

[187] UN, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, August 12, 1949, 75 UNTS 31.

		(4) Jurisdiction issues: Article 49, search for persons alleged to have committed… grave breaches… bring persons regardless their nationalities before its own courts, if it prefers and in accordance with provisions of its own legislation; hand such persons over for trial to another high contracting party, provided such high contracting party has made a prima facie case.	
2	Geneva Convention (2) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949.[188] 196 states are party to the convention.	(1) Article 3, part 1 – similar to Geneva Convention 1. (2) Article 3 – similar to Geneva Convention 1. (3) Articles 50-51– similar to Geneva Convention 1, Articles 49-50. (4) Jurisdiction issues – Article 51 (content is similar to Geneva Convention 1, Article 49).	The convention applies to all cases of armed conflicts even if the occupation is met with no armed resistance (Article 2). Additionally, see comment on Geneva Convention 1.
3	Geneva Convention (3) relative to the Treatment of Prisoners of War, 1949.[189] 196 states are party to the convention.	(1) Article 3 (content similar to Geneva Convention 1, Article 3). (2) Article 3 (content similar to Geneva Convention 1, Article 3). (3) Articles 129-130 (content similar to Geneva Convention 1, Articles 49-50). (4) Jurisdiction issues- Article 129 (content similar to Geneva Convention 1, Article 49).	See comment on Geneva Convention 1.

[188] UN, *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, August 12, 1949, 75 UNTS 85.

[189] UN, *Geneva Convention Relative to the Treatment of Prisoners of War (III)*, August 12, 1949, 75 UNTS 135.

4	Geneva Convention (4) relative to the Protection of Civilian Persons in Time of War,[190] 1949. 196 states are parties.	(1) Article 3 (content similar to Geneva Convention 1, Article 3). (2) Articles 3 and 147 (content similar to Geneva Convention 1, Articles 3 and 50). (3) Articles 146-147 (content similar to Geneva Convention 1, Articles 49-50). (4) Jurisdiction issues- Article 146 (content similar to Geneva Convention 1, Article 49).	See comment on Geneva Convention 1.
5	Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977.[191] 174 states are party to the convention.	(1) No clear indication of subject (as individuals), only state parties. (2) Article 85, part 2. Acts described as "grave breaches" in the conventions, the breaches of this protocol if committed against persons in the power of an adverse party protected by Articles 44-45 and 73 of this protocol, or against the wounded, sick and shipwrecked of the adverse party who are protected by this protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse party and are protected by this protocol (see full text on the protocol). (3) Article 5 stipulates the duty of parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the conventions and of this protocol by the application of the system of protecting powers, including inter alia the designation and acceptance of those powers, in accordance with the following paragraphs.	The protocol does establish obligations against an individual. Moreover, the wording of the articles describing the prohibited activities originate from legal framework and the concept of state responsibility, not individual criminal culpability. With respect to general obligations on implementation, they describe state party obligation without any specific ones related to criminalization of the prohibited activities. The jurisdiction clause refers to the Geneva Conventions and *lex generalis*.

[190] UN, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, 75 UNTS 287.

[191] UN, *Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 UNTS 3; UN,

		(4) Jurisdiction issues – Article 85, part 2. Subject to the rights and obligations established in the conventions and in Article 85, paragraph 1 of this protocol, and when circumstances permit, the high contracting parties shall cooperate in the matter of extradition. They shall give due consideration to the request of the state in whose territory the alleged offence has occurred.	
6	Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 1), Geneva, 8 June 1977. 169 states are party to the convention.	(1) no clear identification of the subject (as individuals), only state parties. But indirectly, in Article 6 on penal prosecution, "a person found guilty of an offence…" (2) Article 4, part 2, prohibits (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation and any form of corporal punishment; (b) collective punishment; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts. Article 17: Prohibition of the Forced Movement of Children. (3) Implementation of care and aid to children (Article 4, part 3), fair trial standards for those accused (Article 6), protection and care for the wounded (Article. 6), etc. (4) No reference to jurisdiction issues.	There is no precise wording which indicates an individual is a subject of obligations. However, an interpretation of the protocol's articles allows us to indicate signs of provisions intended to establish rules for further criminalization of the activities by a state party in national legislation. There is, however. no jurisdiction clause.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609.

The author analysed the core IHL's conventions with the aim of examining the war treaties' provisions. The examination scope was limited to: (1) persons as subjects of obligations: (2) substantiating objective elements of international crimes: (3) highlighting the state's general obligations, including criminalizing activities threatening IHL objectives: (4) the jurisdiction clause. The author's goal was not to examine every international instrument in detail but to show that the Geneva Conventions have been a platform for provisions that define the subject, the objective elements of war crimes, and that they are eligible for direct application and implementation.

First of all, the analysis shows that once the Geneva Conventions, which were enacted after World War II, explicitly established subjects of international crimes, elements of crimes and jurisdiction elements, the most recent protocols (1977) avoid addressing individuals as subjects of international criminal responsibility and imposing obligations on the state to criminalize the offences. One may explain this with the argument that the protocols have a supplementary character to the Geneva Conventions, and the last will be applied by interpretation as *lex generalis* law. However, the deficit of clear wording may hinder effective implementation while considering individual criminal responsibility in concrete cases.

Secondly, one should be aware that the four Geneva Conventions have established a solid basis for the national implementation of obligations related to international crimes and their punishment at the national level. The conventions, being sets of customary rules and ratified by most governments, might be applied directly by national courts and other judicial institutions – ad hoc, hybrid or permanent criminal courts.

The last but not least finding is that the protocols prefer the language of states responsibility. The author sees this fact as a good reminder that both modes of accountability – individual and the state's responsibility – might occur in order to punish perpetrators.

To summarise, the fundamental documents of the Law of War (humanitarian law) contain provisions regulating elements of core international

crimes, particularly war crimes. They serve as a platform for provisions that expand on the subject and objective elements of war crimes. In spite of the fact that the protocols avoid addressing individuals and instead focus on states parties, they should be applied together with the Geneva Conventions to solve possible gaps from systematic interpretation.

11.2. International human rights law (genocide, apartheid, torture, enforced disappearance, trafficking of persons)

International human rights law, which consists of numerous treaties, "soft law" instruments and case law of global and regional judicial and quasi-judicial bodies is a normative realization of the philosophical concept that every human being is born with inherent rights and freedoms. In addition to recognizing normative freedoms and rights, international agreements require states to uphold and defend those rights. Furthermore, the treaties impose duties on states to respect the rights of individuals and to implement measures in order to promote and protect rights and freedoms.

In order to prevent threats that might come from state authorities but also from so-called "third parties", the measures shall also include the establishment of a system of "effective legal remedies". The concept of legal remedies assumes that in any country substantive and procedural rules exist and apply, and the intuitional facilities in a territory under the jurisdiction of a specific government operate to ensure fair standards and due process. The state's duties to establish effective legal protection assumes any protection against violations, including those violations that, by their nature, intensity or systematicity reach the level of international crimes. That anticipates the fulfilment of obligations to investigate and prosecute individuals suspected of committing the crimes. States' policies and practices, if resulting in impunity for perpetrators, may trigger the application of the principle of universal jurisdiction by special international institutions, including the International Criminal Court or by other countries willing to combat international crimes.

For the part devoted to international human rights law, five international treaties have been selected for analyses with the focus subjects of obligations, substantiating objective elements of international crimes and state's general obligations, including criminalising activities threatening IHL objectives and the jurisdiction clause. The data have been organised as a table with four columns (A, B) – numbering, treaty's title and ratification status, (C) cuts of a treaty, texts with minimum information about four elements: (1) the subject of the crime, (2) objective elements of a definition of the crime, (3) implementation measures and (4) the jurisdiction clause, if any. Column (D) provides comments. Results of the analyses are presented below:

Table 3. Human rights law treaties and individual criminal responsibility

N	Treaty, state-parties ratification number	Subject, 2. Objective elements, 3. Implementation measures, 4. jurisdiction clause, if any	Comments
A	B	C	D
1.	UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide,[192] 9 December 1948. 173 State parties as of December 2023.	(1) Article 4: Persons committing genocide or any other acts enumerated in Article 3 shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. (2) Article 1: The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. (3) Article 2 in the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:	Highlights in the column C are added by the author. Persons (individuals) regardless of their official status are subjects of the ICL and punishable in case of coming the crime. Objective elements of the crime of genocide are well prescribed, and together with subjective part may serve as a basis for national penal legislation.

[192] Supra note 180.

		(a) killing members of the group; (b) …(e) Forcibly transferring children of the group to another group." (4) Article 5: "Contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3." (5) Article 4: "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."	The set of measures for implementation focuses on state's legislative activities with the aim to punish persons guilty in acts of genocide. Finally, the jurisdiction clause enumerates two main forums for the trail of persons allegedly committed the crime, namely (1) national tribunal or (2) international one having jurisdiction toward the accused person.
2	International Convention on the Suppression and Punishment of the Crime of Apartheid,[193] 1973. 109 state parties as of December 2023.	(1) "[…] individuals, members of organizations and institutions and representatives of the state whether resigning in the territory of the state in which the acts are perpetrated or in some other state[…]". (See more in Article 3.) (2) "The term *the crime of apartheid* … include[s] similar policies and practices of racial segregation and discrimination, as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them [in different forms]: (a) …… liberty of person: (i) by murder of members of a racial group or group […]". (See more in Article 2.)	Persons (Individuals), including states' officials. The definition of the crime is comprehensive and may be applied in national legal systems. The convention includes general obligations which focus on practical steps: On the executive level: – to suppress – to prevent any encouragement of the crime of apartheid – to punish persons guilty of that crime;

[193] Supra note 182.

		(3) "The states parties to the present convention undertake: (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish […]". (See more in Article 4.) (4) Article 4: "to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for or accused of the acts defined in Article I2 of the present convention, whether or not such persons reside in the territory of the state in which the acts are committed or are nationals of that state or of some other state or are stateless persons." Article 5: "Persons … may be tried by a competent tribunal of any state party to the convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those states parties which shall have accepted its jurisdiction."	On the legislative level: - To adopt legislative measures and enable prosecution, trial and punishment. The Jurisdiction clause is complete and provide varies modes of effective prosecution.
3.	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984,[194] CAT.	(1) No direct identification of an individual, only with respect to extraditions "a person alleged to have committed any offence referred to in Article 4" see more in Article 7. (2) Definition of Torture – Article 1, "all acts of torture are offences under …criminal law" (see more in Article 4.) (3) Article 2.1. "Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."	The CAT does not address directly a person (individual) as a subject of the crime of torture. The definition of the Torture applies a passive voice with respect to the offender.

[194] Supra note 182.

	173 state parties as of December 2023.	2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture. Article 3: "no 'refouler' […]". Article 4: "all acts of torture are offences under its criminal law". Article 5: "all measures to establish jurisdiction over the [crime]". (4) Articles 5-8: "all measures to establish jurisdiction over the [crime]: (a) when the offences are committed in any territory under its jurisdiction or onboard a ship or aircraft registered in that state; (b) when the alleged offender is a national of that state; (c) when the victim is a national of that state if that state considers it appropriate." 2. "Each state party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the states mentioned in paragraph 1 of Article. 3. This convention does not exclude any criminal jurisdiction exercised in accordance with internal law." Article 6: obligations to take a person alleged to have committed a crime to custody.	The definition of torture, however, provides legal prepositions which constitute objective elements of acts of torture. In the author's opinion, the definition provides a broad margin of appreciation in describing the objective elements of the crime of torture. Moreover, part 2 of the Article specifies that the article is without prejudice to other legislative acts providing wider application. Meantime, Article 4 demands from States-parties that all acts of torture are an offence under its criminal law. Implementation measures have been described in three articles and provide a broad range of measures – starting from the general obligations to the *lex specialis* with respect to "refouler" and the obligation to punishment of the offenders.

			Moreover, the implementation measures include the state's obligation to establish jurisdiction, take into custody (Arts. 5-8).
4.	Convention for the Protection of All Persons from Enforced Disappearance, 2006.[195] Signatories: 98, Parties: 72 as of December 2023.	(1) Article 1 mentions "persons or groups of persons acting without the authorization […], Article 10 includes […] a person suspected of having committed an offence of enforced disappearance […]". (2) Article 2 provides a definition of enforced disappearance: "[…] and is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, in which place such a person is outside the protection of the law." Article 5, the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law. (3) Article 3: "Each state party shall take appropriate measures to investigate acts defined in Article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the state and to bring those responsible to justice. Article 4: each state party shall take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law."	individuals mentioned in the definition of the offence of enforced disappearance. However, and in CAT, the wording of the Convention shows that the convention does not address an individual as a subject of a crime but rather leaves criminalisation to the states-parties. With the respect to the objective elements, the list of activities which may constitute the "material" part of the crime is present (Art. 2) but needs implementation measures from the side of a state.

[195] Supra note 183. Annex, article 9(2) (not in force).

		(4) Article 9.1: "Each state party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance: (a) when the offence is committed in any territory under its jurisdiction or onboard a ship or aircraft registered in that state; (b) when the alleged offender is one of its nationals; (c) when the disappeared person is one of its nationals and the state party considers it appropriate."	A unique preposition about the scope of the enforced disappearance, which may qualify as a crime against humanity, refers to international law and means that a nation state shall provide implementation measures in accordance with international obligations which might exists beyond the current convention. The implementation measures are focused on establishing the jurisdiction and bringing perpetrators to justice.
5.	Protocol to Prevent, Suppress and Punish Trafficking of Persons, Especially Women and Children[196]. Signatories: 117. Parties: 181.	(1) No clear clause about the subjects of the crime, but in the Article 3, while describing measures on implementations, there are prepositions addressing subjects through the gerund form: (a) subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article, and (c) organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.	The subject – a person (an individual) is not definitely addressed but rather articulated through his/her deeds.

[196] Supra note 184. The Protocol supplements the UN, General Assembly, *United Nations Convention Against Transnational Organized Crime. Resolution Adopted by the General Assembly*, November 15, 2000, A/RES/55/25.

		(2) Article 3 provides a definition: "'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use, 'trafficking in persons', even if this does not involve any of the means of force or other forms of coercion, abduction, fraud, deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs […]". (3) Article 5 prescribes "[…] to establish as criminal offences the conduct set forth in Article 3 of this Protocol, when committed intentionally." (4) No jurisdiction clauses.	Moreover, in part 3 (a) of Article 5 of the protocol (criminalisation) is stipulated: "[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences and the subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article."

Data being extracted from five human rights conventions has been analysed with the aim of obtaining an overview of whether the human rights treaties contain elements of the crime (the subject and objective elements), measures related to states' general obligations and if the jurisdiction clauses are included in the treaties.

The author did not analyse the case law of international tribunals or national policies or courts' decisions since her aim was to appreciate the content of the human rights treaties in terms of their accuracy and comprehension for national application in fighting impunity.

According to the author's assessments, the easiest and most correct in terms of defining the subject and objective elements is the Convention on the Prevention and Punishment of the Crime of Genocide, which established a framework which includes all needed elements either for direct

application in the national practice or work of international tribunals due to the clear wording of the articles, but also because of clear focus on the states' implementation measures and articulation of the jurisdiction clauses. Less clear but still present is an indication of an individual/person in the Convention on the Crime of Apartheid. This convention lists a comprehensive number of implementation measures, and its jurisdiction clauses are complete and provide varies modes of effective prosecution. In the other three conventions, including the protocol, individuals (persons), even if they are mentioned (for example in the definition of the offence of enforced disappearance), the texts do not indicate they are subject of a crime but rather leave the criminalisation of activities conducted by the persons to the state-parties. The wording of the conventions is not always clear enough to establish the subject of a crime and substantiate the crime in national legislation. However, the very fact that human rights treaties include provisions which in detail explain the jurisdiction issues with respect to persons and international crimes give an important impetus to study the possibilities on application of the provisions in order to tailor national legislation and practice, making them sensitive to issues related to ending impunity.

Summing up the legal analyses of the provisions of five legal instruments of international criminal law, the author considers that it is evident that human right law was ahead in the development of international criminal law, starting from the Convention on the Suppression and Punishment pf the Crime of Genocide, as well as the Convention on the Suppression and Punishment of the Crime of Apartheid. Both conventions have established elements of the crimes, at least what concerns a subject and the objective part of the crimes which both clearly articulated as "crimes under international law". When it comes to other conventions, the CAT identifies the act of torture as act of criminal law, but not international criminal law. The Convention for the Protection of All Persons from Enforced Disappearance points out that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity, which is a correct definition at

the time when the Convention was adopted, but the enforced disappearance of persons was already defined in international criminal law as an element of the crimes against humanity. Finally, when it comes to the Protocol to Prevent, Suppress and Punish Trafficking on Persons, especially Women and Children, it conveys clauses that trafficking is a crime, but it was not clearly mentioned that these kinds of acts might be considered elements of the objective part of the crimes against humanity. It is a clear failure of the international treaty, since it did not consider the existing provisions of the status of international tribunals, including the Rome Statute.

When it comes to jurisdiction clauses, the clearest and most thoughtfully formulated texts are the texts on both the Genocide and Apartheid Conventions as well as the CAT, where one can find articles prescribing in detail available types of jurisdictions allowing any type of criminal jurisdiction exercised in accordance with internal law. The "internal law" may incorporate the UJ approaches.

12. Conclusions: The growing role of international criminal law and the best option for criminal jurisdiction

The first chapter, "Jurisdiction Issues and International Criminal Law," provided a reader with a summary of how international criminal law developed and organised for a better response to the contemporary demands of international society. The topic of jurisdiction addresses the practical aspects of prosecuting those committing crimes. More specifically, the jurisdiction issues interact with both main components of criminal law: with its substantive part – a composition of specific crimes, and with the procedural dimension, which is enabling rules of investigating, reviewing and punishing criminals. Thus, criminal jurisdiction determines the scope, preconditions and bodies that carry out justice in the case of committed crimes.

International criminal law has developed *lex specialis* approaches to be prepared to prosecute and bring to justice any individually committed

atrocity defined as a core crime of international law. The interests of the international community to be protected from threats to humanity from one site, and the high cross-border trans-border movements from another, require innovative and at the same time legitimate methods. The traditional view of criminal jurisdiction as an internal affair of a state is subject to revision. International/transnational/universal jurisdiction has been designed not only on the grounds established by customary rules: territory, subject, crime. Contemporary international law allows the practice of universal jurisdiction by domestic courts with deviations from the mentioned above the "traditional" bases of criminal jurisdiction, but at the same time under the strict requirements of ensuring the rule of law and scrutiny on adherence to the standards of a fair trial. As an alternative to the application of universal jurisdiction in national courts, attempts have been made in international law to establish military and ad hoc tribunals established under the control of winning states and hybrid judicial institutions combining elements of international and national justice. All these mechanisms have their pros and cons. Meanwhile, the practice of civil society in a number of European countries is to help states in their efforts not to become a "safe haven" for criminals but to bring them to justice. Current practice suggests that national judicial proceedings, based on international law standards and supported by an independent judiciary, are the most effective and dynamic tool in the fight against impunity.

The following chapter presents the features of the functioning of the International Criminal Court as an alternative to national prosecution based on the principle of universality and hybrid tribunals created for specific situations and/or countries where, for some reason, the justice system does not work.

Chapter 2:
Jurisdiction of the International Criminal Court and prosecution of offenders from non-member states of the Rome Statute

Introduction: Are the ICC's problems related to the lack of universal jurisdiction?

The jurisdiction of the ICC to prosecute criminals at the international level was one of the most heavily controversial issues. As a result of the compromises reached during the conference with a view to achieving a majority result, 120 states voted in favour of the Rome Statute, with 21 abstentions, and seven participating states voted against it. It entered into force in July 2002, following the deposit of the sixty-first instrument of ratification.

The ICC was designed to investigate and deter major international crimes such as crimes against humanity, war crimes, and genocide.[197] Two modifications to the Rome Statute of the ICC were approved by the Review Conference in June 2010. The offence of aggression is defined in the Second Amendment.[198] Although it became operative in May 2013, its activation was contingent upon two requirements, which were satisfied only in July 2018. The latest amendment was adopted in 2019 and relates to Article 8 (war crimes), which provides an additional violation by intentionally using the starvation of civilians.

Certain observers[199] hold the opinion that impunity has diminished and that the specific effects of the ICC's deterrence are apparent as long as

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[197] Crimes within the jurisdiction of the ICC: (a) The crime of genocide (b) Crimes against humanity (c) War crimes (d) The crime of aggression – Article 5' of the Rome Statute.

[198] *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Resolution RC/Res.6: The Crime of Aggression*, C.N.651.2010.TREATIES-8, November 29, 2010.

[199] Benjamin J. Appel, "In the Shadow of the International Criminal Court", *The Journal of Conflict Resolution,* 62(1) (2018), p. 3–28.

governments carry out the goals of the Rome Statute into their own domestic laws and cooperate. In July 2008, the ICC issued an arrest warrant for Omar Al-Bashir,[200] the acting president of Sudan, on charges of genocide in connection with the conflict in Darfur, where ethnic cleansing allegedly took place. Thus, the international justice body accused Al-Bashir for the first time; however, till now, the trial has not started. Individuals are not tried by the ICC unless they are present in court. The accused has escaped justice so far, despite the efforts to hand over Al-Bashir to the ICC for trial.[201]

The ICC has come under scrutiny for its dismal record, most notably after Jean Pierre Bemba's army was acquitted of the crimes they had committed in the Central African Republic. Moreover, the court has only been able to punish middle-level officials, not the leaders of illegal businesses. The United States, China, Russia, and India are among the most powerful nations in the United Nations, and they have all declined to ratify the Rome Statute. The political class in Africa has witnessed the majority of the cases in which the ICC has intervened and also criticises the ICC.[202]

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200 The first warrant for the arrest for Omar Hassan Ahmad Al Bashir was issued on 4 March 2009, the second on 12 July 2010. The suspect is still at large. Next steps: Until Omar Al Bashir is arrested and transferred to the seat of the ICC in The Hague; the case will remain in the pretrial stage. The ICC does not try individuals unless they are present in the courtroom. *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Decision, ICC-02/05-01/09, July 12, 2010, https://www.icc-cpi.int/sites/default/files/itemsDocuments/190515-al-bashir-qa-eng.pdf (accessed December 19, 2023).

201 Samy Magdy, *Official: Sudan to Hand Over Al-Bashir for Genocide Trial*, AP News, February 11, 2020, https://web.archive.org/web/20200212090956/https://apnews.com/c6698024bdd7f1cade89b9b4101d25c1 (accessed November 19, 2023).

202 Fatou Bensouda, *Africa Question. Is the International Criminal Court (ICC) Targeting Africa Inappropriately?*, Topic for March 2013–January 2014, ICC Forum, https://iccforum.com/africa (accessed November 19, 2023).

The main problem, as it seems by some scholars,[203] is the lack of universal jurisdiction of the ICC, which makes the vicious circle of impunity of dictators, tyrants and torture servants who are pursuing their immorality in some of the non-member states of the statute not be stopped in their enterprise. The ICC declared in March 2022 that it was looking into any crimes that Russian military forces may have committed in Ukraine, following Russia's military invasion of that country. The ICC issued an arrest warrant for Russian President Vladimir Putin in March 2023, accusing him of war crimes, including the forcible removal of Ukrainian children from areas of their country that the Russian military had captured and the forcible transfer of Ukrainian children from those areas to the Russian Federation.

The International Criminal Court's procedural capacity to prosecute non-member states raises questions about the admissibility of macro-criminal individuals before the ICC. Examining the normative requirements for the criminal liability of international criminals found in the statute, as well as the issues raised by the ICC, are essential components of this work. In an effort to address these issues in compliance with the statute's standards, decisions and rulings from both local and foreign courts, current practice and academic writings have been discussed.

Firstly, in part 1 of this chapter the legal bases of the jurisdiction of the ICC, including the legal nature of the statute, the law applicable to the court and the subject matter of the court's criminal justice (*ratione materiae*) will be presented. Then the concept of the jurisdiction of the tribunal is to be defined in accordance with the sense of the term "jurisdiction" according to the Anglo-American language. In addition, this chapter provides an excerpt in the area of establishing the jurisdiction of the ICC and the existing formal

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[203] Olympia Bekou, Robert Creyer, "The International Criminal Court and Universal Jurisdiction. A Close Encounter?", *International & Comparative Law Quarterly*, 56(1) 2007), p. 49–68.

competence of the international criminal court in accordance with the rules of the Rome Statute.

Part 2 is devoted to examining the exercise of the jurisdiction of the World Criminal Court over offenders from non-member states of the Rome Statute, considering the existing problems of international law. For the purposes of this analysis, the special group (heads of state or government, officials, soldiers and commanders of the armed forces) should be differentiated from the general group of non-member states in order to be able to examine precisely the link between international law issues and each of these groups. The next, part 3, deals with the limitations and obstacles to the jurisdiction of the ICC in prosecuting offenders from non-member states of the Rome Statute. In conclusion, part 4 presents prospects for the exercise of the jurisdiction of the ICC as a world criminal court.

Part 1. The legal basis for the prosecution of macro-criminals by the ICC

1. The legal nature of the International Criminal Court and applicable law

The ICC is based on a multilateral treaty which was negotiated in the framework of the UN. Juridically, the ICC was established as an international body based in The Hague and equipped with the international legal personality for the performance of its contractual tasks.[204] Since the court is based on a multilateral treaty, the contracting parties are the masters of the institution. The political decision-making body of the tribunal, the so-called Assembly of States Parties, and not, for example, the General Assembly or the UN Security Council, select the attorney-general and the 18 chief judges who have special competence and professional experience in either the field of criminal law or in the area of international criminal law.[205] The financing rules also reflect the strong influence of the state parties. The tribunal is not, like the two ad hoc tribunals or hybrid courts, financed solely by the budget of the UN, but is financed by the contributions of state parties and the UN in accordance with article 115 of the UN Charter.

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[204] Supra note 16, Article 4, part 1.

[205] Ibid. According to Article 39, part 1 of the statute there shall be achieved a balance between competence in criminal and international law in the various instances, with the procedural and pretrial bodies consisting mainly of judges with experience in criminal proceedings.

Thus, as regards the question of what constitutes the legal nature of the ICC, it can be concluded that it is an international body, created by a treaty of international law, which receives its power from the will of the state parties. It should also be regarded as a supranational institution, since the member states have transferred part of their criminal jurisdiction and thus a core area of their national sovereignty.[206]

Article 21, part 1(a) of the Rome Statute provides for a hierarchy of applicable rules. According to it, the statute, Elements of Crimes[207] and its Rules of Procedure and Evidence apply first, in the second place are applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. Moreover,

> general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards[208]

might be applied. In the hierarchy of sources, "principles and rules of law as interpreted in its [ICC] previous decisions" are at the last but not least place.[209]

Article 21 of the statute establishes a so-called "level ratio": the next level norms are only applied if the previous level is not applicable. Moreover,

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206 Aline Bruer-Schäfer, *Der Internationale Strafgerichtshof. Die Internationale Strafgerichtsbarkeit im Spannungsfeld von Recht und Politik*, Schriften zum Staats- und Völkerrecht, Band 90, Peter Lang (2001), p. 202.

207 *The Elements of Crimes*, adopted at the 2010 Review Conference, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010 (International Criminal Court publication RC/11).

208 Supra note 16, Article 21, part 1 (b), (c).

209 Ibid., part 2.

Article 21, part 3, of the statute stipulates the rules of the application and interpretation, mentioning that the above-mentioned norms shall be in accordance with internationally recognized human rights and shall refrain from discrimination on whatever grounds. It is crucial for an international tribunal and, under Article 21 of the statute, for the ICC to take its decisions on the basis of law and not on the grounds of mutual political convictions.[210]

2. The jurisdiction of the International Criminal Court and applicable international law

2.1. The problem of the definition: *Competence v. jurisdiction*

The jurisdiction of the ICC is regulated in Articles 11-16 of the statute. It is important that the term "jurisdiction" embraces both notions – the jurisdiction and the competence, which are strictly distinguished in some languages.[211] In the Tadic interim judgement, the Chamber of Appeals of the ICTY[212] also stated that the concept of "jurisdiction", in international law, must be based on a broad understanding, so that it covers not only jurisdiction (authority of a court or official organization to make decisions and judgements)[213] in its actual sense, but also jurisdictions (a country, state, or other area where a particular set of laws or rules must be obeyed[214]). Authors admit that various conceptions and connotations of the term "jurisdiction" exist, ranging from fairly narrow constructions in

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[210] Wolff Heintschel von Heinegg, "Zur Zulässigkeit der Errichtung des Jugoslawien-Strafgerichtshofes durch Resolution 827", *HuV-I*, 2 (1996), p. 75–84.

[211] Supra note 10.

[212] *Prosecutor v. Dusko Tadic* (Appeal Judgement), Case No. IT-94-1-A, ICTY, July 15, 1999.

[213] *Authority*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/authority#google_vignette ee (accessed November 19, 2023).

[214] *Jurisdiction*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/jurisdiction?q=jurisdictions (accessed November 19, 2023).

which the term is applied solely to the exercise of the jurisdiction of the ICC,[215] to wider notions of jurisdiction encompassing not only *ratione tertiis* and *ratione temporis*.[216] Against this background, the term is understood in this broad sense and the term *jurisdiction* means formal jurisdiction,[217] so that, for the purposes of the statute, it is assumed that there are no differences between the terms *jurisdiction* and *competence*, and therefore the terms will be used synonymously in this work.

2.2. The establishment of the jurisdiction of the International Criminal Court

The question of the jurisdiction of the ICC was heavily controversial at the Conference of the States' Representatives in Rome. An important aspect of the statute's application was the question of how a state has to have consented to the ICC's jurisdiction in order for the ICC to act in its full capacity over the state. With regard to this issue, fundamental regulatory models faced each other: the first group of jurisdictionally friendly states, including the Federal Republic of Germany, assumed that the Criminal Court should be competent once established – ipso facto – and without further approval requirements for all of the core crimes just mentioned, committed worldwide,

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215 Elizabeth Wilmshurst, "Jurisdiction of the Court", [in:] *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, ed. Roy S. Lee in cooperation with the Project on International Courts and Tribunals, Kluwer Law International (1999). A similar view is promulgated by Richard Goldstone, *Terrorists Can Be Brought to Justice Only by Legal Means*, The Independent, London, October 2, 2001, https://www.independent.co.uk/voices/commentators/richard-goldstone-terrorists-can-be-brought-to-justice-only-by-legal-means-9164360.html (accessed April 19, 2024).

216 Such an understanding is implicit in *The Rome Statute of the International Criminal Court: A Commentary*, eds Antonio Cassese, Paola Gaeta, John R.W.D. Jones, Oxford University Press (2002), viii et seq. A similar definition is contained in *Black's Law Dictionary*. See: "Jurisdiction", [in:] *Black's Law Dictionary*, ed. B. Garner, West Group (2000), p. 687: "[A] court's power to decide a case or issue a decree".

217 Kai Ambos, "Zur Rechtsgrundlage des Internationalen Strafgerichtshofs. Eine Analyse des Rom-Statuts", *ZStW*, 111(1) (1999), p. 175–211.

regardless of whether the state of the crime, the "custody" state, the state of the victim or the perpetrator, or even several of these states have cumulatively consented to the court's exercise of competence.[218]

On the other hand, the second group of states sought to make the exercise of jurisdiction by the tribunal conditional on the submission of some or all of the states mentioned above, either by ratifying the statute[219] or through a separate procedure analogous to Article 36 of the Statistics of the International Criminal Court,[220] to the jurisdiction of the ICC. Finally, a third group of states sought to require that, in respect of each individual criminal proceeding, all or some of the aforementioned states should agree to the initiation of the proceedings.[221]

If the above-mentioned model of jurisdiction were to be adopted by the Conference of Representatives in Rome, it would ensure the establishment of an effective criminal court, given that the countries whose nationals are most likely to carry out the crimes under the ICC are hardly really inclined to submit to the jurisdictions of the permanent international tribunal. Furthermore, a system of individual declarations of submission – and therefore a model of ad hoc agreement on a case-by-case basis – would not only create practical problems in the area of individual criminality but would also create large gaps in criminality.[222] Unfortunately, it has not been possible to

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218 See comments to Article 22, option 1 to the draft of the ICC Statute: "(a) State that becomes a Party to the Statute thereby accepts the inherent jurisdiction of the Court with respect to the crimes referred to in article 20 para (a) to (d)". ILC, *Draft Statute for an International Criminal Court with Commentaries*, July 22, 1994, Yearbook of the International Law Commission, vol. II (2) (1994), https://www.refworld.org/docid/47fdfb40d.html (accessed January 7, 2024).

219 See: M. Cherif Bassiouni, William A. Schabas, *The Legislative History of the International Criminal Court* 2 vols., Brill (2016).

220 UN, General Assembly, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998, in Zutphen, The Netehrlands*, Article 21 bis Option 1, A/AC.249/1997/L.8/Rev.1, 6, https://www.legal-tools.org/doc/7ba9a4/pdf/ (accessed November 19, 2023).

221 Ibid.

222 Andreas Zimmermann, "Die Schafung eines ständigen Internationalen Strafgerichtshofes Perspektiven und Probleme vor der Staatenkonferenz in Rom", *ZaöRV*, 58(1) (1998),

incorporate in the Statute of the International Criminal Court the universal law based on the principle of universal criminal jurisdiction proposed by the trial-friendly group. Indeed, as already illustrated in chapter 1, the legitimacy of the principle of universality is not recognized equally by all states and faces considerable criticism. While some states (e.g., Germany, Italy and with some limitations, Austria) recognize and exercise the principle, it is largely rejected by others (e.g., France, the United States and some African states).

Consequently, the current regulation creates a penalty gap in the case of an internal conflict in which the state concerned is neither a contracting party nor ad hoc recognizes international criminal jurisdiction. Human rights organizations have described these conditions of jurisdiction as the biggest disappointment of the conference. For example, Human Rights Watch supported the so-called South Korean Proposal, which stipulated that either the consent of the state in which the perpetrator is detained or the state of the nationality of the victims may establish the jurisdiction of the International Criminal Court.[223] Real progress has been achieved by the Conference of States, when the final content of Article 12, part 1 of the statute is agreed on, providing the automatic recognition of the jurisdiction of the ICC for the offenses referred to in Article 5, upon ratification or accession of the statute. However, a time-limited derogation from the principle of so-called "automatic jurisdiction" applied in the area of war criminals, which a state party may have excluded from the court's competence under article 124 of the statute, is valid for seven years from the date of ratification or accession with respect to the category of crimes referred to in Article 8 of the Rome Statute.[224] In 2015 the article was deleted.

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p. 47–108.

223 Supra note 207, p. 241.

224 On 26 November 2015, at the 11th plenary meeting of the Assembly of States Parties to the Rome Statute, which was held from 18 to 26 November 2015 in The Hague, The Netherlands, the parties adopted Resolution ICC-ASP/14/Res.2, in accordance with Ar-

Overall, however, it can be noted that the court's powers of prosecution are less powerful than those of states under the principle of universal jurisdiction or complementarity of criminal justice. The ICC cannot act on the basis of the principle of passive personality, nor can it act if neither the territorial state concerned nor the state of nationality of the offender are states parties to the statute. So, regulating the jurisdiction of the ICC and its possibilities to be dealt with in a specific case are results of the diplomatic conference's compromise, with all weaknesses of this compromise.[225]

2.3. Macro crimes as the object of the jurisdiction of the ICC: *ratione materiae*, *ratione temporis*, *ratione personnee*

The ICC focuses on the prosecution of the core crimes: genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8) and crime of aggression (Article 8, bis) as listed in Article 5. Articles 6-8 of the Rome Statute enshrined the concept of international crimes, which is also called "macro crime". According to Jäger, the notion "macro crime" basically encompasses system-compliant and situation-specific behaviours within an organizational fabric, power apparatus or other collective action context:[226] "war- and international law-relevant macro-events",[227] so it differs qualitatively from

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ticle 121, para. 3, of the Rome Statute, the amendment to Article 124 of the Rome Statute. The amendment was circulated by the secretary-general under cover of depositary notification C.N.439.2015.TREATIES-XVIII.10 of 30 July 2015 (UN, *Rome Statute of The International Criminal Court Rome, 17 July 1998. Norway: Proposal of Amendment*, https://treaties.un.org/doc/Publication/CN/2015/CN.439.2015-Eng.pdf [accessed November 22, 2023]). Amendment to Article 124 of the Rome Statute says: "Article 124 of the Rome Statute is deleted".

225 Gerd Seidel, Carsten Stahn, "Das Statut des Weltstrafgerichtshofs", *Jura*, 1 (1999), p. 15.

226 Herbert Jäger, "Ist Politik kriminalisierbar?", in: *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse*, Band 3: *Makrodelinquenz*, Hrsg. Klauss Lüderssen, Nomos Verlagsgesellschaft (1998), p. 122 et seq.

227 Horst Schüler-Springorum, *Kriminalpolitik für Menschen*, Suhrkamp Verlag (1991), p. 236.

the known "normal" forms of crime, including the known special forms (terrorism, drug crime, economic crime, etc.). The difference is caused by the nature of the macro crime that is rutted in a political will of the acting power aiming to establish and profit from the exceptional conditions enabling an active role in macro criminality. Macro crime is narrower than the criminologically more frequently discussed "crime of the powerful",[228] because the latter generally refers to acts committed by the "mighty" in defence of their position of power, and the (economic) "power" defended by them is not necessarily identical to the state or state power.[229]

The decisive state involvement, tolerance, omission or even reinforcement of macro-criminal behaviour is clarified by the element "political". This also rejects the recent tendency to extend the term to all large-scale criminal threats – in accordance with Jäger.[230] Political macro crime thus means, in the narrowest sense, "state-enhanced crime",[231] the "politically motivated collective crime" or – less precisely – "state delinquency", "state terrorism" or "government crime". It is always a question of the policy of delinquency[232], which has been established by a "criminal state" and directed against its own citizens. Thus, the substantive jurisdiction of the ICC covers the most serious crimes: genocide, crimes against humanity, war crimes and crimes of aggression as so-called "nuclear crimes" (core crimes), listed in Article 5 of the statute.[233]

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228 To the problematic content of the term "power" in this context, in: *Kleines Kriminologisches Wörterbuch*, Hrsg. Günther Kaiser et al., C.F. Müller (1993), p. 246 et seq.

229 Ibid.

230 Supra note 227, p. 122.

231 Wolfgang Naucke, *Die Strafe juristische Privilegierung, verstärkte Kriminalität*, Verlag Klostermann (1996), p. 19.

232 David Satter, *Darkness at Dawn: The Rise of the Russian Criminal State*, Yale University Press, 2003.

233 *The Crime of Aggression*, Coalition for the International Criminal Court, https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression (accessed November 19, 2023).

Formal competence of the International Criminal Court

The conditions for exercising jurisdiction are governed by Article 12 of the Rome Statute. The ICC has "inherent" jurisdiction over the crimes listed in Article 5 of the statute (*jurisdiction ratione materiae*). This competence is ipso facto conferred without the specific consent of the contracting parties by their accession to the statute.

Scholars introduce the concept of "inherent jurisdiction"[234] for the core crimes and interpret it as a toll allowing states parties, on the basis of the principle of universal jurisdiction, to grant the ICC the same competence which they may exercise themselves.[235] Consequently, the ICC could also enjoy criminal sovereignty under the principle of universal jurisdiction, as could the states which have conferred it on it, even though the perpetrator is neither a national of a contracting state, nor was the act committed in the territory of a contracting state. Other academicians disagree, with a solid arguments that the relatively broad provision of Article 12, part 1 of the statute, which establishes inherent jurisdiction, is substantially restricted by Article 12, part 2 of the statute in the case of the prosecution of the state and the prosecutor's "proprio motu-investigation", so that, in the final analysis, the ICC does not act on the basis of a criminal power conferred on it by states parties, which they derive from universal jurisdiction, but that this "extended jurisdiction" is almost excluded by the requirement of the consent

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234 Jessika Liang, "The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals New", *Criminal Law Review: An International and Interdisciplinary Journal*, 15(3) (2012), p. 375–413.

235 Angelika Schlunck, "Der internationale Strafgerichtshof: Diskussionsstand vor Diskussionsstand vor der Diplomatischen Konferenz in Rom vom 15. Juni bis, 17 Juli 1998", [in:] *Völkerrechtliche Verbrechen vor dem Jugoslawien Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof: Beitrag Zur Entwicklung einer effektiven Internationaler Strafgerichtsbarkeit*, Hrsg. Horst Fischer, Sascha Rolf Lüder, Berlin Verlag A. Spitz (1999), s. 166.

of the territorial and home state, and the question of whether the universal principle is at all applicable is irrelevant.[236]

A further condition for the exercise of jurisdiction, Article 12, part 2 of the Rome Statute, requires, in cases where there is no reference to the Security Council, that either the state in whose territory the conduct in question has taken place and/or the state to which the accused person belongs are either state parties to the statute, or that there is the "ad hoc consent" under Article 12, part 3 of the state of one of these states, or, where applicable, both.

An example from the current ICC practice will be relevant: Ukraine has twice accepted the ICC's jurisdiction pursuant to Article 12, part 3 of the statute over alleged crimes under the Rome Statute. Firstly, the jurisdiction of the ICC extended to the time period from 21 November 2013 to 22 February 2014. Secondly, the ICC prosecutor announced on 28 February 2022 that an investigation into the situation in Ukraine would be opened, encompassing any new alleged crimes falling within the court's jurisdiction. The office received a state party referral from Lithuania and a joint referral from various countries. The scope of the investigation encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on Ukraine's territory from 21 November 2013 onwards.[237]

In this respect, the ICC, namely, its jurisdiction, is generally applicable insofar as it is based on the consent of the states that have submitted themselves to it. However, consideration of a specific case requires that the case has been assigned to the prosecutor of the court either by a state party (Article 13[a] [i] of the Rome Statute) or by the Security Council (Article 13[b]). Finally, the prosecutor can also refer a case to the court on its own initiative (Article 15 compared with Article 13, lit. c, Article 12, part 2).

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236 Supra note 207, p. 243.

237 ICC Ukraine, *Situation in Ukraine*, ICC-01/22, https://www.icc-cpi.int/situations/ukraine (accessed November 28, 2023).

Jurisdiction *ratione temporis*, complementary principle and "failed" state

The jurisdiction of the ICC relates exclusively to crimes committed after the entry into force of the statute (Article 12, part 3 of the Rome Statute). If a state becomes a contracting party after the entry into force of the statute, the ICC may, in principle, exercise its jurisdiction only in respect of crimes committed after entry the treaty into effect for that state, unless the state has made a declaration in accordance with Article 12, part 3.

Another strict requirement for jurisdiction is the principle of complementarity (Article 17 of the Rome Statute): the ICC can act only if the national court is unwilling or unable to prosecute a crime falling within its competence and the case in question is sufficiently serious. The ICC therefore has no priority jurisdiction, unlike the ad hoc tribunals. Ambos examines the principle towards the ICC normative provisions and considers that the court depends on the effectiveness and seriousness of national law enforcement.[238] This makes it clear that the ICC is not intended to replace national bodies, but merely complement them. The rule-exception wording used in Article 17, part 1 of the statute suggests that the absence of jurisdiction of the ICC is presumed in principle when national investigations are initiated. The narrowly restricted categories of cases in which the court has jurisdiction are listed in more detail in Articles 17, parts 2 and 3, and are characterised by the words 'failed state' and 'abuse of law'.

The concept of a failed state[239] will be briefly presented here through its "jurisdiction dimension", which means the failure of a state to prosecute

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238 Kai Ambos, "Der neue Internationale Strafgerichtshof-ein Überblick", *Neue Juristische Wochenschrift*, (1998), p. 3743–3747.

239 "A state that can no longer perform the basic functions of government, such as providing security and law enforcement, raising taxes, controlling its territory and borders. A Fragile States Index published by the Fund for Peace, a think-tank, listed ten countries in its most vulnerable categories in 2022". See: *The A to Z of International Relations*, The Economist, https://www.economist.com/international-relations-a-to-z#F (accessed November 28, 2023). Daniel Thürer, "The Failed State and International Law", *Berichte der Deutschen Gesellschaft für Völkerrecht*, 34, (1995), p. 9–47.

macro-criminals. This may occur, in particular, in the event of a complete or partial collapse of state order, but also when the territorial state concerned is no longer in a position to exercise its sovereignty over the entire territory of the state.[240] In reality, in addition to the inability of a state to enforce its own power against the criminals, one may precisely see that for the crimes for which the ICC exercises its jurisdiction, some respective national officials do not have genuine interest in carrying out effective prosecution, as these will not seldom be crimes that have been committed either on behalf of or at least with the knowledge of governmental authorities.

These are situations in which national criminal proceedings were initiated solely to protect the accused from prosecution by the ICC.[241] Not only does this apply in cases where an accused has been acquitted by a national court for an act for which he may have to be held accountable before the ICC, but where the accused is convicted but the punishment is not proportionate to the conviction, or when the sentence is imposed shortly after conviction. In spite of the fact that part 9 of the Rome Statute has been elaborated to facilitate international cooperation and judicial assistance, restraints existed. They have been addressed during debates that resulted in the adoption of the mentioned resolution.[242] The Independent Oversight Mechanism, a crucial part of the assembly, was established to be a fully operational bureau assisting the court by investigation, inspection and evaluation functions. The International Development Law Organization highlighted the importance of the mechanism in maintaining professional and ethical standards among its staff and elected officials.

The second problem concerns situations in which national criminal proceedings are delayed to such an extent that it can no longer be assumed that

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240 Supra note 207, p. 97.

241 Diba Majzub, "Peace or Justice? Amnesties and the International Criminal Court", *Melbourne Journal of International Law*, 3(2) (2002), p. 247.

242 ICC, *Strengthening the International Criminal Court and the Assembly of States Parties*, adopted at the 13th plenary meeting, December 12, 2018, by consensus, ICC-ASP/17/Res. 5.

the law enforcement authorities would seriously try to convict the accused in a given case. Here too, a mere delay in proceedings, for example beyond what is permissible under the relevant human rights guarantees, cannot yet be considered sufficient. Rather, considering the complexity of any investigation, it will be crucial, inter alia, whether the duration of the proceedings remains within the limits of what is common in comparable national procedures.

Finally, Articles 18 and 19 of the statute provide a double admissibility examination for the sake of complementarity. As a result, a competent state may begin procedures or appeal their admission to the ICC's Appeal Chamber. It is therefore clear that, in terms of its overall conception, but also, above all, in its relationship with the national courts, the ICC does not have an equal but, in any case, a complementary role in relation to national criminal justice.

Addressees of the jurisdiction of the ICC (jurisdiction *rationé personnee*)

Natural persons (individuals) who are more than 18 years of age at the time of the act are subjects of the core crimes falling within the ICC *rationé personnee* jurisdiction (Articles 25-26 of the Rome Statute). The statute articulates that the judgement is directed exclusively against the natural person her/himself. Accordingly, states are not eligible to be the addressees of the statute, as it concerns exclusively individual criminal responsibility, with the consequence that the question of state responsibility is excluded from the jurisdiction of the International Criminal Court. However, as already discussed, state responsibility may also arise but within another legal procedure.

The limitation of criminal prosecution to individuals has been welcomed by scientists and practitioners in this regard, as it avoids group or racial aspects and thus the potential for conflict.[243] Other academicians consider that

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[243] The same goes for the ICTY: Karin Oellers-Frahm, "Das Statut des ICTY", *ZaöRV*, 54(1994), p. 419.

the very fact of criminal obligation of individuals on the basis of international law's prohibitions and restrictions does not encounter any concern, since the same affirms a direct responsibility of the person under international law, without requiring the transposition of the relevant norms into national law.[244]

3. The jurisdiction of the ICC in respect to individuals – offenders from non-member states

Despite the treaty nature of the Rome Statute, in some cases it does not apply only to states parties. Under the current version of Article 12, part 2 nationals of third countries may be brought before the ICC. However, the requirement is that they have operated in the territory of a contracting party, since at least the territorial state must have recognised the admissibility of the court in order for it to act. Here is, again, a case related to activities of officials of a non-member state who may serve as a recent example: In 2023, the ICC Pretrial Chamber II issued arrest warrants for two individuals: Mr. Vladimir Vladimirovich Putin, president of the Russian Federation, and Ms. Maria Alekseyevna Lvova-Belova, commissioner for children's rights in the Office of the President of the Russian Federation.

According to court facts, the suspects are allegedly accountable for the war crime of unlawfully deporting and transferring children from occupied areas of Ukraine to the Russian Federation in the period – at least as early as 24 February 2022. Ukraine has accepted the ICC's jurisdiction ad hoc. Based on the facts of the activities of the suspected individuals, the jurisdiction of the ICC is "combined" and based on the following modes of jurisdiction:

- *Ratione personae* (Article 25),
- Territory of a state which accepted the court's jurisdiction (Article 12, part 3),

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244 Ibid.

- The crimes – Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.[245]

The case illustrates the condition for the exercise of jurisdiction: Article 12, part 3 provides that a non-contracting state, but one which is the state of the place of the crime or of the perpetrator, shall at any time, ad hoc, accept competence in a particular case. These conditions of jurisdiction apply only in cases where a case is referred to the court by a contracting state or where the prosecutor is investigating (Article 13 [a] and [c]).

In the case of a transfer by the UN Security Council under chapter 7 of the UN Charter, the jurisdiction of the International Criminal Court is given without further notice (Article 13 [b]).

By qualifying the allocation to the prosecution as a measure under chapter 7, the Rome Statute supplements the Security Council's remedial options under Article 41 of the UN Charter.[246] This means that the assignment of one or more cases requires a corresponding decision by the Security Council, to which the right of veto under Article 27 of the UN Charter applies. This excludes action against the will of the permanent members of the Security Council. Nevertheless, this competence of the Security Council is ultimately consistent. Indeed, if it has the right to establish ad hoc criminal courts within the limits of its competence under chapter 7 of the UN Charter, it must also have the power to assign cases for prosecution to an existing International Criminal Court.[247]

This assignment of one or more cases by the UN Security Council does not require the consent of the state in whose territory the offences were committed or the state of the nationality of the accused. In this respect, it is also possible for the Security Council to prosecute crimes committed in the territory of a non-contracting state or by persons who do not have the nationality of a contracting state and, therefore, cannot be prosecuted by any

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245 Supra note 238.

246 *Rome Statute of the International Criminal Court: A Commentary*, eds Otto Triffterer, Kai Ambos, C.H. Beck–Hart–Nomos (2016), Article 19, p. 849 et seq.

247 Supra note 222.

state party or the prosecutor of the court. In that respect, this competence of the Security Council plays an essential role, at least from the point of view, towards the global prosecution of crimes covered by the statute of the ICC.[248]

Summing up, the International Criminal Court, as an international body, is based on a multilateral treaty prepared by the international community and voted on by the majority of states. The rules of the Rome Statute on the jurisdiction of the ICC reflect the current negotiated compromise between states. As a result, the ICC has weaker jurisdiction than some of the states under the principle of universal jurisdiction. Despite certain weaknesses, the ICC can exercise its jurisdiction over perpetrators of universally punishable core crimes (genocide, crimes against humanity, war crimes and crime of aggression). The addressees of prosecution by the ICC are natural persons who were 18 years of age at the time of the crime. In certain cases, the court also exercises jurisdiction over persons from third countries. The ICC has jurisdiction over crimes committed after its entry into force. Its competence complements national jurisdiction.

[248] Georg Dahm, Jost Delbrück, Rüdiger Wolfrum, Völkerrecht, Band 1/3, De Gruyter (2002), p. 1153.

Part 2. Problems of international law in the exercise of the jurisdiction of the ICC against offenders from non-member states of the Rome Statute

The exercise of the jurisdiction of the International Criminal Court in prosecuting offenders' nationals of state that have not ratified the Rome Statute will encounter certain problems rooted in international law. These problems arise from the fact that, on the one hand, international criminal law (ICL) is part of international public law (IPL), where certain rules have developed and apply between states as the main actors. On the other hand, the ICL is about the personal responsibility of individuals who have a special nature compared to "normal" parties in international legal relations – states.

The Rome Statute allows a number of issues of international law to be resolved on the basis of consensus between parties in accordance with the Art. 112 of the Statute.[249] Among the numerous challenges, experts repeatedly also mention the issue that nationals of nonstate parties, such as US nationals, were excluded from ICC jurisdiction.[250] It is no secret that US citizens have been involved in certain international conflicts. Being a purely

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[249] Hans-Peter Kaul, *The International Criminal Court – Current Challenges and Perspectives*, Salzburg Law School on International Criminal Law, August 8, 2011, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/289B449A-347D-4360-A854-3B7D0A4B9F06/283740/010911SalzburgLawSchool.pdf (accessed November 8, 2023); Benjamin Dolin, *The International Criminal Court: American Concerns about an International Prosecutor*, Law and Government Division, May 14 2002, PRB 02-11E, https://publications.gc.ca/Collection-R/LoPBdP/BP/prb0211-e.htm (accessed November 8, 2023).

[250] Daniel Krcmaric, "Does the International Criminal Court Target the American Military?", *American Political Science Review*, 117(1) (2023), p. 325–331.

judicial, neutral and apolitical institution, the ICC welcomed the fact that the ICC gained jurisdiction with regard to the crime of aggression after 2017.[251]

At the same time, the legal problem of judging individuals from non--member states needs a dogmatic explanation. In this paper, three existing dilemmas which are linked to the main issue – treatment of individuals from non-member states – will be examined, namely:

- The problem of prosecution of officials in relation to the principle of state immunity,
- The question of personal responsibility under the applicable international criminal law and the legal principles *nullum crimen sine lege* and *nullum poena sine lege*, and
- The issue of the applicability of the Rome Statute to third-state, so-called "third party jurisdiction".

At the beginning of each of the thematic issues the selected problem will be presented.

4. Officials as persons addressed by the ICC and the principle of immunity

The principle of immunity enshrined in international law is of particular importance in the prosecution by the ICC of persons who have committed offences attributed to them not in private but rather in official capacity. Under the Rome Statute, the official status of an offender does not relieve him of his individual criminal responsibility, and the ICC does not prevent the exercise of its jurisdiction by having an official position as a head of state or government, as a member of a government or parliament, as an elected representative or as an official in a government. This follows from Article 27, also from paragraphs 4, 5 and 6 of the preamble, which state that the most

[251] Ibid.

serious crimes affecting the international community as a whole must not remain unpunished and impunity must be put to an end.

The determination of the extent of the personal criminal liability of the executing state body is a core area of state sovereignty.[252] However, it can be inferred from the Rome Statute that the contracting state expressly waives the immunity which it is entitled to so that the examination and judgement of state acts by the ICC, in view of this effective voluntary waiver of the states parties, should not be regarded as a violation of national sovereignty. There is no need to state further that this restriction and waiver of immunity applies only to the circumstances set forth in the statute. A mitigation of punishment is also excluded.[253] In view of the clear regulation, there is no question of how to deal with acting heads of state, as they are not exempt from the fundamental norm of Article 27 of the Rome Statute.

With regard to the problem of (state) immunity in the exercise of jurisdiction over officials from non-member states of the Rome Statute, there are significant questions before the ICC. In view of the outlined problem, the issue of immunity in the area of most serious human rights violations falling within the jurisdiction of the ICC must be examined.

Then consider the scope of immunity of officials against crimes subject to the jurisdiction of the International Criminal Court (Article 5 of the Rome Statute) and applicable law by the ICC (Article 21, part 1 [b], [c]). Of particular importance are the international criminal law conventions, including the question of international customary recognition, the statutes of international courts, resolutions and draft international organizations and bodies, legislation and jurisprudence of individual states, as a possible resort to general principles of national law. The outcome will be further assessed

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252 Gerhard Stuby, "Internationale Strafgerichtsbarkeit und die Staatliche Souveränität", [in:] Gerd Hankel, Gerhard Stuby, *Strafgerichte gegen Menschenverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, Hamburger Edition 1995, p. 440.

253 Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Tribunal: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft (1999), Article 27, Rn.18.

in connection with the role and competence of the ICC as a supranational body in an international constitutionalisation process.

5. The principle of state immunity and immunity of the individual sovereign

5.1. Functional and personal immunity

While functional immunity can be seen as being directly linked to a state's own immunity, the principles of personal immunity are more than a privilege of the individual beneficiary and are therefore to be regarded as an independent legal institution. Officials are representatives of the state, whose functional activities are attributable to the state represented.[254] If this person enjoys the protection of immunity, the principle of functional immunity widely recognised in international law does not apply to a natural person acting on an individual basis. A claim would result in a limitation of the functioning capacity of the state, since the acting official is subject not only to the instructions of his own state but also to the restrictions of the foreign legal order.

As brought to the attention of a reader, the immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae.* Accordingly, the ILC in its "Draft Articles on the Immunity of state officials against foreign criminal responsibilities" (2022), in Article 7, "Crimes Under International Law in Respect of Which Immunity *ratione materiae* Shall Not Apply", that the immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) genocide;

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[254] Supra note 246, Article 86, p. 2014 et seq.

(b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.[255]

Thus theoretically, all natural persons performing public functions in their capacities as officials are exempted from the jurisdiction of foreign states in accordance with the rules of international law.[256] Personal immunity, however, is an independent, original legal institution.[257] Indeed, personal immunity is also a consequence of sovereignty under international law because it protects the area of state-represented action from foreign interference by providing special protection to officials worthy of special protection. Personal immunity, which may include the whole of private life, is by the highest representatives of a state.

Personal immunity is linked to the outstanding position of the respective officials, but ultimately only heads of state, diplomats and the highest representatives of the government. According to the ILC's Draft Articles,[258] the scope of immunity *ratione personae* extends to the heads of state, heads of government and ministers of foreign affairs "during their term of office".[259]

The position of the head of state is of particular importance in the tradition of international law. The head of state has special functions and thus qualifies against other state bodies. As the highest representative of a state,

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255 ILC, *Report of the International Law Commission*, 73rd Session (18 April–3 June and 4 July–5 August 2022), A/77/10, chapter 6: "Immunity of State Officials from Foreign Criminal Jurisdiction", Article 7, https://legal.un.org/ilc/reports/2022/ (accessed April 23, 2024).

256 See: *Bundesgerichtshof Neue Juristische Wochenshrift*, 1989, p. 678 (Indian Defence Minister's Witness Charge); *Bundesgerichtshof Neue Juristische Wochenshrift*, 1979, p. 1101 (immunity of an official of Scotland Yard).

257 Georg Dahm, *Zur Problematik des Völkerstrafrechts*, Veröffentlichungen des Instituts für internationales Recht an der Universität Kiel (1956), p. 43.

258 Supra note 253, Article 5.

259 Ibid., Article 4, Scope of Immunity *Ratione Personae*, 1. Heads of state, heads of government and ministers for foreign affairs enjoy immunity *ratione personae* only during their term of office.

the head of state makes a state a subject and performs special representative functions at the intergovernmental level.[260] In international law, the highest representative of the state is also legally represented, not only as a representative, but as an important body.

In the case of members of a government, the issue of immunity must be assessed in a differentiated manner. Official acts are excluded from the jurisdiction of foreign state, irrespective of the assignment or status of the individual act. Personal immunity may be granted only under very strict conditions. Heads of government and certain ministers, especially the Minister for Foreign Affairs, should be granted personal immunity insofar as they do not require any special authority to represent their state.[261] The criminal responsibility of individuals who are high-level officials raises particular problems. Personal immunity applies to crimes under international law.[262] Thus, during the term of office, a high-level official must not be prosecuted for such crimes. However, the modern trend in international law shows that personal immunity does not apply in a case of prosecution before (specific) international criminal courts.[263] There are plenty of cases advocating that the personal immunity in case of prosecution before (specific) international criminal courts is not applicable.[264] The International Criminal Court prac-

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260 Otto Kimminich, "Das Staatsoberhäupter im Völkerrecht", *AVR*, 26 (1988), p. 132.

261 Karl Doehring, *Völkerrecht*, C.F. Müller Verlag (1999), p. 285.

262 See: *Democratic Republic of the Congo v. Belgium*, ICJ Report 3. 2002, February 14, 2002, p. 3. https://www.icj-cij.org/case/121 (accessed November 3, 2023); *Germany v. Italy (Greece Intervening)*, ICJ, Judgment, February 3, 2012, https://www.icj-cij.org/case/143 (accessed November 3, 2023).

263 Supra note 16, Article 27.

264 See: *Prosecutor v. Al Bashir*, ICC, Appeals Chamber, ICC-02/05-01/09-397-Corr, May 6, 2019, p. 100 et seq., and a joint vote in favour of Eboe-Osuji et al., para. 52, https://www.icc-cpi.int/court-record/icc-02/05-01/09-397-corr (accessed November 3, 2023); *Prosecutor v. Al Bashir*, Pretrial Chamber 1, December 13, 2011, ICC-02/05-01/09-139-Corr, para. 33, https://www.legal-tools.org/doc/8c9d80/pdf (accessed November 3, 2023); *Prosecutor v. Taylor*, Special Court for Sierra Leone, Appeals Chamber, May 31, 2004,

tice, based on Article 27 of the Rome Statute, is an example of ceasing personal impunity for high officials.

For a while, scholars believed that this rule does not apply to non-states parties, and referred to the international customary law restrictions of personal immunity before international criminal courts.[265] Information on the current case of the arrest warrants against high officials of the Russian Federation by the Pre-trial Chamber of the ICC, including the jurisdiction justification, has not yet been disclosed, considering that the warrants are secret in order to protect victims and witnesses and also to safeguard the investigation. It includes only references to the alleged crimes, territory, and *ratione temporis*.[266]

Will the ICC, in its justifications, apply Article 27 to highlight that the statute is equal to all persons without any distinction based on official capacity? Or will it analyses customary rules like the ILC did in its report (2022) by describing a concept of immunity *ratione personae* with respect to "foreign criminal jurisdiction" and extending it specifically to the Heads of State, heads of government, and Ministers of Foreign Affairs?[267]

In the author's opinion, the Rome Statute avoids concepts *ratione personae* and *ratione materia* substituting them by the term "official capacity", which encompasses both elements of a personality and the functions of an official, underscoring the irrelevance of exemption from responsibility

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https://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf (accessed November 3, 2023).

265 Andreas Payer, "Immunity and Crimes Under International Law: Simultaneous Discussion of BGHSt 65, 286. ex ante", *Journal of Legal Researchers*, 1 (2022), p. 13–28.

266 ICC, *Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, Press Release, March 17, 2023, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed November 3, 2023).

267 Supra note 81. According to the ILC's Draft Articles, the scope of immunity *ratione personae* extends to the heads of state, heads of government and ministers for foreign affairs during their term of office (Article 4).

nor reduction of sentence under the statute. Nevertheless, mindful that the conduct addressed in the present situation is allegedly ongoing, and that the public awareness of the warrants may contribute to the prevention of the further commission of crimes, the chamber considered that it is in the interests of justice to authorise the registry to publicly disclose the existence of the warrants, the names of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the chamber.

5.2. Immunity from the criminal jurisdiction of foreign courts

While the principle of state immunity is largely recognised as a legal principle, there are doubts as to the extent to which the exemption from domestic jurisdiction of foreign states should be extended. According to the available documents and studies, there is no indication that the rules of state immunity should be applied exclusively to civil proceedings.[268] The doctrine of international law, citing the principles applied in the so-called Mc Leod case,[269] assumes the applicability of the immunity rules to the area of criminal justice. Moreover, the current intensive practice of application of the universal criminal jurisdiction principle in practice of domestic courts of

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[268] Michael Bothe, "Die strafrechtliche Immunität fremder Staatsorgane", *ZaöRV*, 31 (1971), p. 246–269; Council of Europe, *State Immunity under International Law and Current Challenges*, CAHDI Proceedings (2017), https://rm.coe.int/final-publication-state-immunity-under-international-law-and-current-c/16807724e9 (accessed April 19, 2024).

[269] Robert Jennings, "The Caroline and McLeod Cases", *American Journal of International Law*, 32 (1938), p. 92; Hans-Heinrich Jescheck, "McLeod-Fall", [in:] *Wörterbuch des Völkerrechts. In völlig neu bearbeitete*, Band 2, Hrsg. Karl Strupp, Hanz-Jurgen Schlochauer, De Gruyter (1961); Ignaz Seidl-Hohenveldern, "Immunität ausländischer Staaten in Strafverfahren und Verwaltungsstrafverfahren", [in:] *Gedächtnisschrift Hans Peters*, Hrsg. Hermann Conrad, Springer (1967), p. 915–922; Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford Monographs in International Law, Oxford University Press (2008), online ed. Oxford Academic, March 22, 2012.

several European countries indicate that national authorities accepted the obligation to investigate war crimes and crimes against humanity committed in Iraq and the Syrian Arab Republic and try the perpetrators. The German government and national judiciary have explicitly established the legal position that officials of another state are not entitled to functional immunity (immunity *ratione materiae*) with regard to acts carried out within the scope of their duties.[270]

In its ongoing legal work on the challenges, scope and limitations of impunity, the UN International Law Commission (ILC) indicates concerns about a lack of clear comprehension of the systemic nature of the international legal order, wherein, while considering crimes without immunity, there shall be a balance between respect for sovereign equality, accountability and individual criminal responsibility while ensuring the end of impunity for serious international crimes, a primary objective of the international community.[271] The ILC highlights that striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of a state) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (state officials) arising from the commission of the most serious crimes under international law.[272]

Indeed, while the principle of judicial immunity (civil and criminal) to foreign authorities for their official acts has been traditionally established, new trends and appearances reflected in judicial decisions as well as in

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[270] UN, *The Scope and Application of the Principle of Universal Jurisdiction. Report of the Secretary-General*, A/77/111, December 7, 2022, p. 36–38, https://www.un.org/en/ga/77/resolutions.shtml (accessed May 5, 2024). For previous comments submitted by Germany, see: A/65/181, A/72/112 and A/76/203.

[271] ILC, "Immunity of State Officials from Foreign Criminal Jurisdiction", [in:] *Report of the International Law Commission*, 73rd Session (18 April–3 June and 4 July–5 August 2022), A/77/10, p. 188–284, https://legal.un.org/ilc/reports/2022/ (accessed November 22, 2023).

[272] Ibid.

statements by a state need more consideration.[273] However, the principle of immunity does not apply without limitations.

5.3. Scope of immunity under international law

International law acknowledges various exceptions to state immunity, encompassing both customary law and international treaty law.[274] The European Convention on the Immunity of States 1972[275] contains a number of exceptions. Other restrictions are contained in the Vienna Conventions on Diplomatic and Consular Relations of 1961 and 1963. The ILC sought to draw up a draft Convention,[276] impressed by the Anglo-American immunity laws,[277] which were passed as the Foreign Sovereign Immunities Act[278] of 1976 (FSIA) in order to establish criteria for determining whether a sovereign foreign nation (or any of its political subdivisions, agencies or instruments) is exempt from federal or state court jurisdiction. In 1977, under

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273 Michael Bothe, "Die strafrechtliche Immunität…", p. 248.

274 Supra note 262, p. 246–269; Matthias Herdegen, "Die Achtung fremder Hoheitsrechte als Schranke nationaler Strafgewalt", *ZaöRV*, 47 (1987), p. 221–241.

275 Council of Europe, *European Convention on State Immunity*, Basle, May 16, 1972, European Treaty Series, No. 74, https://rm.coe.int/16800730b1 (accessed November 22, 2023); Bundesgesetzblatt (BGBl), 2 (1990), p. 34.

276 Draft articles for the Convention on State Immunity, ILA, report of the 60th Conference, Montreal 1982, *ILA Newsletter*, 25 (1982), p. 5 et seq., https://ila-americanbranch.org/wp-content/uploads/2020/12/ABILANews1982-10.pdf (accessed November 22, 2023).

277 Following the enactment of the U.S. Foreign States Immunities Act in 1976, the United Kingdom implemented the U.K. State Immunity Act. This served as a model for additional immunity rules that were implemented in the Anglo-American jurisdiction in the years that followed. See: *H.R.11315 – Foreign Sovereign Immunities Act*, 94th Congress (1975–1976), https://www.congress.gov/bill/94th-congress/house-bill/11315 (accessed May 5, 2024).

278 The FSIA (1976) establishes criteria for determining whether a foreign sovereign nation (or any of its political subdivisions, agencies or instrumentalities) is exempt from federal or state court jurisdiction. The FSIA is codified at Title 28 §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 of the United States Code.

a mandate from the UN General Assembly, the ILC codified the Jurisdictional Immunities of States and Their Property, and in 2004 the convention was adopted. However, it is not in force yet.[279]

At the national level, immunity under international law has been codified, especially in Anglo-American jurisdictions. Similar statutes can be found in the jurisdictions of the United States, the United Kingdom, Australia, Canada, Singapore and Pakistan. Most of the continental European countries resort directly to internationally recognised rules of law.[280] State immunity, however, forms a fundamental part of the global legal system. Any deviation from the principle of immunity carries with it the inherent risk of inciting other states to take similar action and weaken the principle itself. Researchers and politicians believe that "both the international system as a whole and bilateral interactions between state would be hampered by this development. Thus, it is evident from our day-to-day work that a universal framework of State immunity that would be upheld by all is necessary".[281]

The 2004 UN Convention on the Jurisdictional Immunities of States and Their Property, which expands on the 1972 European Convention on State Immunity, could serve as a model for a worldwide framework for the system of state immunities. However, 20 years after its passage the convention still has only 23 contracting states and needs 30 state parties to come into effect.[282]

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279 UN, General Assembly, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, December 2, 2004, A/RES/59/38.

280 Georg Karl, *Völkerrechtliche Immunität im Bereich der Strafverfolgung schwerster Menschenrechtsverletzungen*, Nomos Verlagsgesellschaft (2003), p. 42.

281 Marek Smolak, "The International Legal Framework on State Immunity", [in:] *State Immunity under International Law, and Current Challenges*', Council of Europe, CAHDI Proceedings (2017), p. 3.

282 UN, General Assembly, *Convention on Jurisdictional Immunities of States and Their Property*, New York, December 2, 2004, A/RES/59/38, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en.

There may be exceptions to the principle of immunity in the form of an accomplishment,[283] waiver[284] or a substantive or legal link of the claim in question, or the act to be prosecuted by the state of the court. The two forms of immunity restrictions are to be discussed.

5.4. Immunity effect and waiver of immunity

According to literature and jurisprudence, the realization of a legal position in the event of its misuse may lead to the withdrawal of a privilege; thus, under certain conditions, like breach of a good faith principle, including commitments of the core international crimes, immunity may be restricted. One example on issues of espionage as a reason for the forfeiture of diplomatic immunity may illustrate the negative effect of immunity in some circumstances. Ward's research devoted itself to transnational representation for national objectives, wherein the world community recognizes a special regime for diplomats, granting privileges and immunities to protect the sending of a state's unhampered conduct in foreign relations. Ward concludes that in cases of espionage a state may abolish immunity, subject diplomats to criminal penalties and restore diplomacy to its intended role.[285]

Since the end of the last century and the beginning of the millennium, a number of national judicial proceedings have emerged in which states and state bodies have been denied immunity under international law due to crimes committed by the Nazi regime during the Second World War.[286]

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283 Juliane Kokott, "Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen", [in:] *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht. Festschrift für Rudolf Bernhard*, Hrsg. Ulrich Beyerlin et al., Springer (1995), p. 135 et seq.

284 Supra note 246, Article 98, p. 2157 et seq.

285 Nathaniel P. Ward, "Espionage and the Forfeiture of Diplomatic Immunity", *The International Lawyer*, 11(4) (1977), p. 657–671.

286 Oliver Dörr, "Staatliche Immunität auf dem Rückzug?", *Archiv des Völkerrechts*, 41 (2003), p. 211.

In one such case, Hugo Princz (1992) filed a lawsuit against the Federal Republic of Germany before a U.S. district court. It was over' compensation for the internment and abuse that Prince had suffered as an American Jew among the National Socialists. The district court denied the Federal Republic of Germany state immunity because it was an act of flagrant disregard for all humanity for which there could be no exemption from responsibility.[287] There are also other cases with a liberal interpretation of states' immunity. The Italian Constitutional Court has declared the unconstitutionality of several national laws, including Article 3 of Law No. 5 of 2013 and Article 1 of Law No. 848 of 1957, which requires Italian courts to deny jurisdiction in cases of war crimes and crimes against humanity. The court also deemed the norm of immunity of states from the civil jurisdiction of other states unconstitutional.[288]

Immunity can be waived. Each state is allowed to submit itself to judicial proceedings on a voluntary basis, contrary to the protection initially granted against foreign jurisdiction. Since immunity is not an exemption from legal responsibility but only an objection to a legal assessment at the procedural level, the state concerned is ultimately free to accept a legal evaluation by foreign courts.

An express waiver may be made by contract or by declaration before the court called for the decision.[289] Submission can, however, also occur indirectly through consensual conduct, which must be interpreted faithfully from the point of view of an assessment from submission to foreign jurisdiction.

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[287] *Princz v. Federal Republic of Germany*, 813 F. Sup. 22 22 (D.D.C.1992), but the second instance withdrew the decision by a majority and accepted the immunity of the defendant state (26 F. 3rd II66=ILM 33 [1994], 1483 [D. C. Cir. 1994]).

[288] The Tribunal of Florence has ruled in favor of the constitutionality of Article 1 of law no. 848 of 1957 and Article 1 of law no. 5 of 2013, which granted the Italian republic access to the United Nations Convention on Jurisdictional Immunities of States and their Property. The case involved the appearance of several individuals, including the president of the council of ministers and the testimony of various attorneys.

[289] Supra note 246, Article 98, p. 2157 et seq.

Consequently, numerous exceptions to state immunity are recognized in international law. For further investigation, the scope of immunity in connection with human rights violations, in particular those which are subject to the jurisdiction of the ICC, is important.

6. Immunity in the most serious area: Human rights violations

During the early 19th century, recognition of jus cogens was established, as experts claim. Oppenheim said that a number of "universally recognized principles" of international law rendered any conflicting treaty void, and therefore the peremptory effect of such principles was itself a "unanimously recognized customary rule of International Law".[290] However, with respect to human rights, jus cogens as a concept of compulsory international law norms started to be applied later, after WWII. Article 53, part 2 of the Vienna Treaty Convention defines jus cogens as a norm accepted by the international community of states as a whole and recognised as a standard from which no derogation may be permitted and which can only be amended by a subsequent norm of the same legal nature. A contract that violates such a rule shall be void.[291]

In all jurisdictions, the jus cogens norms have been mentioned as imperative norms of international law. However, for a long time, lists of such norms differed. For example, German scholars counted the ban on genocide and a core of human rights as mandatory in the list of jus cogens.[292] In 2022 the ILC issued a draft conclusion on the identification and legal consequences of peremptory norms of general international law and

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290 Jan Brownlie, *Oppenheim's International Law*, vol. 1: *Peace*, eds Robert Jennings, Arthur Watts, Longman (1992), introduction and part I.

291 Supra note 95, Article 53, p. 1, Article 64.

292 Supra note 18, Article 5.

reiterated a list of crimes and violations attributed to the jus cogens character.[293] Among the norms are the following: (a) the prohibition of aggression; (b) the prohibition of genocide; (c) the prohibition of crimes against humanity; (d) the basic rules of international humanitarian law; (e) the prohibition of racial discrimination and apartheid; (f) the prohibition of slavery; (g) the prohibition of torture; (h) the right of self-determination. Consequently, the general principle of state immunity may be limited for the protection of the objects of the listed crimes. Most of the objects related to human rights are normatively regulated under international law. As already articulated in chapter 1, various human rights treaties impose unquestionable obligations on the states or communities of states concerned to respect and not violate human rights. There are ongoing discussions about the possibilities of response and the instruments of international law for sanctioning violations of these rights. Issues of immunity exemption are implicit in all such discussions, for example, while considering universal jurisdiction. However, the issue of immunity exemption in cases of serious violations will be considered from other perspectives.

As seen in parts of jurisprudence and in literature, a waiver of immunity is a reaction of the international community to a violation of jus cogens,[294] and as suggested by some scholars, it first might be practiced to reduce a state's immunity.[295] Such measures will be theoretically consistent with the UN Charter, which states that [a] "state member of the United Nations who has persistently violated the principles contained in the present Charter may be expelled from the organization by the General Assembly upon the

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293 ILC, *Draft Conclusion on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens) with Commentaries*, Yearbook of the International Law Commission, vol. II (2) (2022), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf (accessed November 3, 2023).

294 Supra note 246.

295 Violations of *jus cogens* shall be void in accordance with article 53 of the *Vienna Convention on the Law of Treaties*.

recommendation of the Security Council".[296] Interpreting such a case via a specific purpose of "promoting and encouraging respect for human rights and freedoms",[297] and the principle to "fulfil obligations in good faith",[298] one may see that in future, due to violation of the purposes and principles of the UN, a state might be limited in the scope of the principle of the sovereign equality of all its members by the reduction of its immunity.

Nowadays, there is no doubt that the establishment of international criminal law, in its substantive and institutional dimensions, is the most important stage in the development of sanctions instruments in cases of serious violations of human rights. The establishment of individual criminal responsibility gives the individual an autonomous position; in the case of victim it provides instruments for filing cases against a state or individual perpetrator. Moreover, the obligation in international law that imposes individual culpability holds him or her responsible for his or her breaches of fundamental norms of international public order. In this context, the privilege of immunity is no longer important; rather, the position of the person concerned as a state body has been regularly declared negligible for a long time.[299] However, the recent development may be seen as an evolution of international criminal law towards the inevitable prosecution and punishment of those who are responsible for mass human rights violations and international crimes.

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[296] Supra note 32, Article 6.

[297] Ibid., Article 1, part 3.

[298] Ibid., Article 2, part 4.

[299] For example, the Statute of the United Nations Criminal Tribunals for Yugoslavia (Article 7, 2) and Rwanda (Article 6, 2).

7. Immunity issues, international human rights and humanitarian law conventions

International law and the obligation to prosecute human rights violations are enshrined in certain conventions. The most important are to be discussed through the perspective of state's and individuals' immunities.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The prohibition of torture was first enshrined in the Universal Declaration of Human Rights[300] and the European Convention on Human Rights[301] before the International Covenant on Civil and Political Rights of 1966, which repeated the former wording on the prohibition of all cruel, inhuman or degrading treatment or punishment, without, however, making a conceptual definition of the status of the torture act, added the prohibitions of irrational punishment and involuntary submission to medical or scientific experiments.[302]

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Convention on Torture)[303] finally adopted a precise definition of the concept of torture and established the obligation of states parties to criminalize torture. Article 4(1) of the convention expresses the obligation of states parties to punish all acts of torture under national law.[304] The Convention on Torture, however

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300 Supra note 13, Article 5.

301 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols No. 11 and No. 14*, November 4, 1950, ETS 5, Article 3.

302 UN, General Assembly, *International Covenant on Civil and Political Rights*, December 16, 1966, 999 UNTS 171, Article 7.

303 Supra note 182.

304 Ibid., Article 4 (1) of the Convention on Torture: "Each State Party Shall Ensure That All Acts of Torture Are Criminalized Under Its Criminal Law. The Same Applies to

does not contain specific provisions specific to the issue of immunity.[305] One possible limitation of immunity was derived from the court's interpretation of the convention during the verdict in the Pinochet case.

The Pinochet case

The starting point of judicial considerations in the second decision of the House of Lords of 24 March 1999 was the distinction between the immunity of an incumbent and that of a former head of state. This distinction was based on a corresponding interpretation of the U.K. State Immunity Act,[306] which, with regard to the immunity of a head of state, refers to the U.K. Diplomatic Privileges Act of 1964 and thus to the Vienna Convention on Consular Relations.[307] Article 39 of the Vienna Convention on Consular Relations stipulates the end of the personal immunity of the diplomat at the end of the term of office; only functional immunity existed in addition. As a result of this approach, the judges' search for justice was limited to the question of Pinochet's functional immunity (*rationae materiae*).[308]

The case focused on the question of the extent to which Pinochet should be granted immunity *rationae materiae* for the torture he was accused of. This was based on the Convention on Torture, which entered into force in the United Kingdom on 8 December 1988. Six of the seven judges voted in favour of denying Senator Pinochet immunity. Only Lord Goff of Chieveley concluded, in his dissenting opinion, that Senator Pinochet, as a former head of state, is entitled to protection from foreign jurisdiction.[309]

Attempted Torture and to Acts Committed by Any Person Representing Membership or Participation in Torture".

305 Supra note 278, p. 73.

306 *State Immunity Act 1978*, All UK legislation, https://www.legislation.gov.uk/ukpga/1978/33 (accessed November 3, 2023).

307 United Nations, Vienna Convention on Consular Relations, 24 April 1963.

308 Supra note 278, p. 74.

309 *Der Fall Pinochet(s)*, Hrsg. Heiko Ahlbrecht, Kai Ambos, Nomos Verlagsgesellschaft (1999), p. 148.

Four of the seven recognizing Lord Judges saw the Convention on Torture as the constitutive basis for limiting immunity.

The outcome of the second House of Lords decision is clear. The fundamental prerequisite for the decision to restrict Senator Pinochet's immunity, however, was ultimately that all officials, including heads of state, should be granted the same functional immunity. As a consequence, there is no legal distinction between former heads of state and other subordinate officials. Exceptions to the exception in favour of the head of state concerned would be the result of political considerations.[310] The resulting reverse conclusion, however, is that the Convention Against Torture does not provide any evidence of a restriction on personal immunity.[311]

Convention on the Prevention and Punishment of Genocide

This convention[312] was the first treaty of international law in the field of crimes against humanity since World War II. The convention deals with a whole range of different acts (Article 2), provides for the criminality of conspiracy as well as participation as special forms of acts, and specifically mentions the penalty of governing persons or public officials who have committed acts punishable under Article 3.

Many scientists believe that the convention explicitly restricts functional immunity.[313] Another group of scientists assumes that Article 4 of the convention does not clearly regulate the issue of immunity.[314] Unlike the Convention on Torture, the content of the Genocide Convention does not

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310 Accordingly, all the judges in the case of Pinochet also agreed that an exemption from immunity would not be possible if he was still in office at the time of the proceedings, cf. ibid., p. 148 et seq.

311 Supra note 207, p. 78.

312 Supra note 191.

313 Supra note 273; Matthias Herdegen, "Die Achtung fremder…", p. 224.

314 Supra note 278, p. 80; Roland Bank, "Der Fall Pinochet: Aufbruch zu neuen Ufern bei der Verfolgung von Menschenrechtsverletzungen?", *ZaöRV*, 59 (1999), p. 698.

allow for a clear interpretation.[315] Indeed, there is no distinction between private and functional acts, so the acts referred to in Article 3 of the convention could also be committed in private by the sovereign bodies mentioned in Article 4. In such a case, Article 4 would be irrelevant to the issue of immunity. It should be noted that the Convention on Genocide does not contain any evidence of a restriction on personal immunity.

The Fourth Geneva Conventions of 12 August 1949

In 1949, representatives of 47 countries succeeded in adopting four comprehensive conventions:[316] Article 2 common to the conventions limits their applicability to the area of international conflicts, with certain provisions given particular importance also being applied in the context of domestic disputes. In 1977, the conventions were extended by additional protocols I and II, supplementing the scope of the agreements.[317]

The Geneva Conventions contain specific provisions which ultimately even establish the obligation of states parties to prosecute serious violations of international humanitarian law. The question of immunity is, however, not explicitly regulated in the Geneva Conventions and requires an interpretation.

The nature of the criminal record described here is crucial, as well as the obligation of states parties to prosecute the perpetrators, regardless of their nationality, the nationality of the victim or the place of the crime. Since

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315 Lord Phillips, in his vote in the Pinochet case, refered to the rule in Article 4 of the Convention on Genocide, however, considers it only "a declaration"; quoted by Karl, supra note 278, p. 80.

316 Just to remind: the 1st Geneva Convention on the Improvement of the Fate of the Wounded and Sick of the Armed Forces in the Field; the 2nd Geneva Convention for the Improvement of the Fate of the Wounded, the Sick and Ship Wreckers of the Armed Forces to Sea; the 3rd Geneva Convention on the Treatment of Prisoners of War; and the 4th Geneva Convention on the Protection of Civilian Persons in Wartime, Supra notes 187–191).

317 Supra note 192.

the purpose of the conventions was not to regulate private, but rather state, conduct, it provides for an individual's punishment for committed crimes. In conjunction with the principle of universal jurisdiction, this constitutes a limitation of functional immunity. The issue of personal immunity has not been considered.

An examination of the most important conventions in the field of international criminal law shows that it is necessary to demonstrate a link between criminal status and state conduct as the ultimate constitutive feature of the act in torture, genocide and Geneva conventions: the restriction of immunity is the logical consequence of the special qualification of a crime already resulting from the respective crime definitions or, at least, from the objective of the relevant convention.

8. Exemptions of immunity beyond the limits of international conventions

It remains questionable whether the principles of limiting immunity set out above apply beyond contractual limits. It must be examined whether immunity exemptions constitute a customary obligation.

The instrument of international law

Recognition of possible exemptions from immunity beyond contractual boundaries has been heavily debated for a while. There is broad agreement here on the obligations not to violate fundamental human rights, which have jus cogens character, and on the necessity of limiting the privileges of immunity in human rights violations.

However, the restriction on immunity might be justified only by systematic considerations or a "general" or even customary recognition.[318] Amnesty

[318] See: Michael Bothe, "Die strafrechtliche Immunität…", p. 246–269, but also the statements by Amnesty International on the Pinochet case – see: Amnesty International, *The*

International's opinion on the issue of Pinochet's immunity is of particular interest. According to Amnesty International, the customary recognition of numerous exemptions to immunity is largely undisputed.[319] It must be further illustrated to what extent the problem of immunity exemptions for officials can be demonstrated as a uniform practice that transcends contractual boundaries.

The practice of customary recognition of exemptions from immunity statutes and decisions of international tribunals

The condemnation of state sovereigns under the exclusion of the possibility of invoking an action in a high-quality function was expressly provided for in the statute of the (Nuremberg) International Military Tribunal. Article 7 of the statute stated: "The official position of an accused, whether as head of state or as responsible official in a government department, shall not be considered as a basis for exclusion or reduction of punishment".[320] The principle of denying functional immunity to state authorities in cases of war crimes

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Case of General Pinochet. Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity, Report EUR 45/21/98, October 1998, https://www.amnesty.org/en/wp-content/uploads/2021/06/eur450211998en.pdf (accessed April 22, 2024).

319 Amnesty International, *Amicus curiae Letter in the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum (Re: Augusto Pinochet Ugarte)* and *In the Matter of an Application for Leave to Move for Judicial Review between: The Queen v. Nicholas Evans et al. (Ex Parte Augusto Pinochet Ugarte.* See: Amnesty International, *The Case of General Pinochet…* Amnesty International refers to the District Court of Jerusalem, *Attorney-General of the Government of Israel v. Eichmann*, ILR 5 (1961), para. 30 and the proceedings against the militia commanders in Argentina, the Argentinean Supreme Court of Justice, decision of 30 December 1985 and the Argentinian Supreme Courts of Justice, decision on 30 December 1986, without specifying the source, as well as the Honecker case, BVerfG, DtZ 1992, 216 and others.

320 Article 7 of Statute of the International Military Tribunal, attached to: UN, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* ("London Agreement"), August 8, 1945, 82 UNTS 280.

or crimes against humanity was expressly emphasized also in the judgement of the Nuremberg military court.[321]

Ultimately, immunity *ratione personae* did not play a role in the Nuremberg war crimes trials. Although Article 7 of the statute mentions "Head of State", it does not deal more closely with the distinction between current and former heads of state. The total surrender of Germany led to the fact that none of the accused, not even the Reich Chancellor Dönitz, who served at the end of the war and succeeded Adolf Hitler from 1 to 9 May 1945, was in office at the time of the indictment.[322] The issue of personal immunity was also excluded from the Tokyo war crimes trials, as the Japanese emperor was not among the accused.[323] Article 6 of the statute of the International Military Tribunal for the Far East,[324] as well as Article 7 of the Nuremberg statute, establishes the unlimited responsibility of state authorities: "Neither the official position, at any time, of an accused, nor the fact, that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment of the Tribunal determines that justice so requires." The

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321 Arnold Paskal, *Der UNO Sicherheitsrat und die Strafverfolgung von Individuen*, Helbing and Lichtenhahn, (1999), p. 49.

322 Robert K. Woetzel, *The Nuremberg Trials in International Law with a Postlude on the Eichmann Case*, Stevens (1962), p. 229; Arnold C. Brackmann, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, HarperCollins Publishers Ltd (1989), p. 86.

323 Franz-Stefan Gady, *Should the United States Be Blamed for Japan's Historical Revisionism?*, The Diplomat, August 15, 2015, https://thediplomat.com/2015/08/should-the-united-states-be-blamed-for-japans-historical-revisionism/ (accessed November 18, 2023).

324 UN, *Charter of the International Military Tribunal for the Far East*, special proclamation by the supreme commander tor the allied powers in Tokyo, January 19, 1946; amended charter dated April 26, 1946, Treaties and Other International Acts Series 1589 (1946), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (accessed April 18, 2024).

decision of the military court clearly excludes the objection to functional immunity.[325]

The statute for the former Yugoslavia must in any case contain a limitation of immunity, as it is necessarily derived from international law precedents, which the secretary-general of the United Nations expressed even before the establishment of the tribunals.[326] Article 7(2) of the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[327] provides for the criminal responsibility of officials: (…) Article 3: "The official position of an accused person, whether as head of state or government or as a responsible official of the government, does not relieve him or her of criminal responsibility, nor is it a basis for mitigating his or her sentence (…)".

Heads of state in office have not been convicted by the ICTY. However, the lack of a distinction between current and former heads of state in the regulation makes it difficult to assess the question of personal immunity solely on the basis of the present regulation. Despite the uncertainty of the legal situation, Slobodan Milosevic's position as an acting head of state, or any resulting obstacle to persecution, has not been considered.[328]

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325 Bernard V.A. Rölling, C.F. Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946–12 November 1948*, Band 2, APA-University Press (1977), p. 996–1001.

326 UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* [ontains text of the *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*], May 3, 1993, S/25704 (1993); Herwig Roggemann, *Der Internationale Strafgerichtshof der Vereinten Nationen von 1993 und der Krieg auf dem Balkan*, Berlin Verlag A. Spitz 1994, p. 108.

327 UN Security Council, *International Criminal Tribunal for the Former Yugoslavia* (*ICTY)*, May 25, 1993, S/RES/827 (1993), https://www.refworld.org/docid/3b00f21b1c.html (accessed November 18, 2023).

328 On 11 March 2006, former Yugoslav president Slobodan Milošević died in his prison cell of a heart attack [1] at age 64 while being tried for war crimes at the International Criminal Tribunal for the Former Yugoslav (ICTY) in The Hague. Milošević's four-year

The statute of the International Tribunal for Rwanda is largely identical to that of the Yugoslav tribunal.[329] Thus, one shall conclude that the issue of functional immunity is clearly regulated in the statutes of the criminal tribunals established by the international community of states. Sovereigns are denied the right to invoke the principles of functional immunity from international law. A restriction on personal immunity for macro-crimes is likely to justify the interpretation by international criminal courts[330] that individual immunity as a diplomatic privilege is relevant only in intergovernmental communications.

Resolutions and draft resolutions of international bodies

In order to codify international law, already, in November 1946, the UN General Assembly commissioned the International Law Commission (ILC) to prepare a draft Code of Offences Against the Peace and Security of Mankind. The second revised draft contained wording in Article 3 almost identical to Article 7 of the statute of the Nuremberg International Military Tribunal on the individual punishability of sovereigns under international law:[331]

"The fact that a person acted as Head of State or as a responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code."

The attempt at binding codification failed: already in the commission, the draft of state representatives was rejected. In 1981, the UN General

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trial had been a major international news story, and he died a few months before its verdict was due.

329 UN Security Council, *On the Establishment of an International Tribunal for Rwanda and Adoption of the Statute of the Tribunal*, November 8, 1994, S/RES/955 (1994).

330 Supra note 278, p. 106. Im Ergebnis übereinstimmend IGH, *The Arrest Warrant of 11 April 2000 (Demokratic Republic of the Congo v. Belgium)*, Judgment, February 14, 2002, ICJ Reports 2002, https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf (accessed December 19, 2023).

331 UN, General Assembly, *Draft Code of Offences Against the Peace and Security of Mankind*, 9th Session: 1954, Yearbook of the International Law Commission, vol. II (1954).

Assembly decided to revise the draft code. The last draft was completed in 1996 and was rejected by the General Assembly.[332] No more attempts to adopt the code were undertaken. Meanwhile, as a draft the document might be applied. Article 7 of the draft envisaged the criminal responsibility of state authorities irrespective of their official position. Head of state and head of government are explicitly mentioned here: "The official position of the individual, who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."

The ILC commented on the provisions of the draft code with reference to the statute of the International Military Tribunal of Nuremberg:

> It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.[333]

So, the issue of functional immunity is regulated in the statutes of international criminal courts as well as in the draft ILC. Ultimately, the explicit

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[332] UN, "Draft Code of Crimes Against the Peace and Security of Mankind" (Draft Code and Commentaries), [in:] *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, Yearbook of the International Law Commission, vol. II (2) 1996, p. 1 et seq., A/51/10 (1996).

[333] See also commentary to the *Draft Code of Crimes Against the Peace and Security of Mankind*, to Article 7 et seq. "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to allow him to invoke this same consideration to avoid the consequences of this responsibility," (*Report of the International Law Commission on the Work of Its Forty-Eighth…*).

limitation of personal immunity is likely to be found only in Article 27, part 2, of the Rome Statute and the statute for the jurisprudence of the former Yugoslav and Rwanda tribunals. As a current expression of the will of the international community of states as a whole,[334] the rule contained in Rome by the states parties to the conference, which have restricted personal immunity to international tribunals, can be considered.

Jurisprudence of national and international courts

The approach to the reduction of state immunity is a question, in its essence, whether a corresponding exception has already been enforced in state practice, with the consequence that the customary rule of international law has limited the substantive scope of state immunity. Decisions of national courts serve as an important indication of the existence of a general rule recognized by customary international law.

The Pinochet case has so far been the most well-known, but far from the only national court proceedings against state bodies. In 2000, the French authorities investigated Libyan President Gaddafi,[335] the president (Denis Sasson Hguesso) and the interior minister (Pierre Oba) of the Congo[336] for crimes against humanity and torture. The Spanish judiciary have gone against former dictators of Guatemala,[337] the Dutch judiciaries against the

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334 See the definition of the notions "international community of states as a whole" in conclusion 7 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), 2022.

335 *Gaddafi Case*, Decision of the Cour dàppel de Paris, October 20, 2001, https://opil.ouplaw.com/display/10.1093/law:ildc/774fr01.case.1/law-ildc-774fr01 (accessed May 5, 2024).

336 ICC, *The Republic of the Congo Seises the International Court of Justice of a Dispute with France*, Press Release No. 2002/37, December 9, 2002, https://www.icj-cij.org/sites/default/files/case-related/129/129-20021209-PRE-01-00-EN.pdf (accessed November 3, 2023).

337 *Frankfurter Allgemeine Zeitung*, April 4, 2000, p. 9.

former ruler of Suriname, Desi Bouterse,[338] and Senegal against the previous ruler of Chad, Hissenen Habre.[339] In 1996, the German attorney general opened an investigation against Iranian government members in connection with the terrorist attack at the Mykonos restaurant in Berlin and obtained an arrest warrant for the then Secret Service Minister Fallabian before the Federal Court of Justice.[340]

In this context, some judgements of the Belgian judiciary are of particular importance. Since the entry into force of the Law on the Prosecution of Serious Violations of International Humanitarian Law of 1993 and its 1999 supplement,[341] the Belgian law enforcement authority has been empowered to proceed with war crimes, genocide and crimes against humanity wherever they have been committed.[342] On 12 February 2003, the Court of Cassation of Belgium issued its judgement in the case against Israeli Prime Minister Ariel Sharon.[343] Sharon had been accused of being responsible for the massacres of Sabra and Shatila during the Israeli occupation of Lebanon, in his capacity as Israel's then defense minister. On the grounds that Sharon, as the current head of government of a foreign state, enjoys immunity from the Belgian judiciary, the Court of Cassation rejected the suit, apparently opening the way for a trial against Sharon after his resignation from office.

The key point is that this judgement is clearly linked to the world-famous case of Belgian justice – the Yerodia Decision. In this case, the investigating

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338 Matthias Ruffert, "Pinochet Followup: The End of Sovereign Immunity", *Netherlands International Law Review*, 48(2) (2001), p. 174 et seq.

339 *Frankfurter allgemeine Zeitung*, September 29, 2001, p. 3.

340 *Frankfurter allgemeine Zeitung*, April 16, 1997, p. 1; arrest warrant of 15 March 1996.

341 *Law on the Prosecution of Serious Violations of International Humanitarian Law* of June 16, 1993 (Moniteur Belge, August 5, 1993, p. 17751 et seq.) and its supplement of February 10, 1999 (Moniteur Belge, March 23, 1999, p. 9286 et seq.).

342 Tobias Gries, "Der aktuelle Fall: Der lange Arm des nationalen Richters: Demokratische Republik Kongo v. Königreich Belgien", *Humanitäres Völkerrecht*, 1 (2001), p. 19 et seq.

343 Cour de cassation de Belgique (deuxiéme chambre Francaise), Urteil v. 12 Februar 2003, Journal des tribunaux 2003, p. 243 et seq.

judge issued an arrest warrant at the "Tribunal de premie`re instance de Bruxelles" on 11 April 2000 against the then minister of foreign affairs of the Democratic Republic of the Congo, Yerodia Abdoulaye Ndombasi, on suspicion of committing war crimes and crimes against humanity in August 1998. The Congo subsequently filed an action before the International Court of Justice (ICJ).[344]

The issue of prosecution of immunity holders in office was most important in the proceedings before the ICJ. In its judgement of 14 February 2002, the court concluded that customary international law provided for comprehensive criminal immunity for ministers of foreign affairs in office, similar to those of heads of state in office which had not been breached even in the case of war crimes and crimes against humanity.[345] Consequently, in the Yerodia case, the ICJ declared the issuance and dissemination of the arrest warrant against him to be contrary to international law.

At the beginning of April 2003, the Belgian parliament adopted a major amendment to the 1993/1999 act.[346] The exercise of the principle of universality in the absence of a suspect is now excluded if, in the interests of the administration of justice and in the light of Belgium's international obligations, the case should be brought before an international court or a national court of the state of the place of the crime or of the state of the suspects' home or residence, provided that the court concerned is "competent, independent, impartial and equitable". This restriction of world justice was not the least the result of massive US pressure after former US president George

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344 ICJ, *The Arrest Warrant of 11 April 2001* (*Democratic Republic of the Congo v. Belgium*), Judgement, February 14, 2002, published in: ILM 41(2002), p. 536 et seq.

345 See the supra note 341.

346 House of Representatives of Belgium, *Bill Amending the Law of 16 June 1993 on the Suppression of Serious Violations of International Humanitarian Law and Article 144b of the Judicial Code*, https://www.refworld.org/legal/legislation/natlegbod/1999/en/14330 (accessed January 19, 2024).

Bush was sued by the families of the victims of the First Gulf War before Belgian justice.[347]

The issue of immunity for human rights violations also arose in the Al-Adsani case against Kuwait. The English courts granted immunity, and Al-Adsani appealed to the European Court of Human Rights, claiming a violation of Article 6 of the ECHR. The court acknowledged that the prohibition of torture is jus cogens of international law, but that the immunity of a state is a permissible limitation of the guarantee of legal protection [348]

The propensity to bring perpetrators to justice, including those relying on immunity, has been greatly extended in the recent decade, as shown in chapter 1 of the monograph. As a result, it is important to emphasize that there is a consistent tendency in case law to exempt immunity from foreign jurisdiction in the field of significant human rights breaches committed by officials today. However, it appears that ongoing efforts to oppose the process of establishing conditions for limiting the functional and personal immunity of state officials, including heads of state or governments, a member of the government or parliament, an elected representative of government officials will oppose establishing a consistent and equal approach as customary law.

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[347] In that time, newspapers reported that after the "Belgium's highest court threw out a war crimes case against former US President George H.W. Bush, Secretary of State Colin Powell and Israeli Prime Minister Ariel Sharon. The Belgian law that allowed for genocide and war-crimes complains against foreign leaders had been drastically amended over the summer after U.S. Defence Secretary Donald Rumsfeld threatened to boycott meetings of the North Atlantic Treaty Organization in Belgium" (*The Wall Street Journal Europe*, September 25, 2003).

[348] *Al-Adsani v. the United Kingdom*, Application No. 35763/97, [GC] – ECHR, 35763/97 Judgement, November 21, 2001, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-59885%22]} (accessed January 19, 2024).

Interim conclusion

A restriction of functional immunity is contained in the corresponding interpretation of the Convention Against Torture, the Fourth Geneva Conventions and the Geneva Convention on the Prevention and Punishment of Genocide. However, these conventions do not constitute a restriction on personal immunity. The Statute of International Criminal Tribunals, as well as the draft of the UN ILC's codification, contain a general limitation of functional immunity for crimes against peace, crimes against humanity and war crimes.

Although there is no explicit limitation of personal immunity (with the exception of the Rome Statute), it is possible, through the comments of the International Law Commission, the declaration of will of the states participating in the Rome Conference, that is, almost the international community of states as a whole, and the broad practice of national states applying the principle of universality and the latest decisions of the ICC, to deduce as a customary rule the limitation of personal immunity to international tribunals.

9. State immunity in light of the constitutionalisation of international law

The special role and competence of the ICC in light of the development of the concept of limitations of the states 'immunity' directly relates to evaluating the status quo in fighting impunity. The ICC remains the only supranational body capable of bringing individuals to criminal responsibility at the international level.

More than two decades ago, public international law experienced a renaissance, now being appreciated as emerging international constitutional

law.[349] Scholars noted that international law had been essentially becoming neo-monistic because, through the expansion of the means and channels of broadcasting and interpreting international and national law through the decisions of international justice bodies, national legislation and practice were directly influenced by universal approaches.[350] A number of scholars spoke of the fact that "the difference between domestic and international law is increasingly blurred", "that law is becoming post-national. While national systems retain their importance, globalization and international and regional regimes have a significant influence on these systems, which leads to domestic legal systems "losing their rigid frameworks".[351] Indeed, it seemed that the international community was in the process of forming and consolidating an (international) monopoly of force, on the basis of which *a ius puniendi* was established.[352]

It was a romantic era, with views on the possibility of reconciling a state's right to inviolability, as represented by the principle of immunity, with the international community's declared goal of establishing and maintaining a functioning system for the protection of human rights. The principle of equal sovereignty, together with the wording that "nothing in the UN Charter shall authorize the UN to intervene in matters that are essentially within domestic jurisdiction",[353] started to be used as a shield from foreign or international control and critique. Countries and entire regions have been denied true democratic elections, sliding into an autocracy where impunity

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349 Harold Koh, "Why Do Nations Obey International Law?" (review essay), *Yale Law Journal*, 106(8) (1997).

350 Charlotte Ku, Paul Diel, "International Law as Operating and Normative Systems: An Overview", [in:] *International Law: Classic and Contemporary Readings*, eds Charlotte Ku, Paul F. Diel, Boulder (2009).

351 Niko Krisch, *Beyond Constitutionalism: The Pluralistic Structure of Postnational Law*, Oxford University Press (2010).

352 Kai Ambos, Christian Stener,"Vom Sinn des Strafens auf innerstaatlicher und supranationaler Ebene", *JuS*, 1 (2001), p. 9.

353 Supra note 32, Article 2, paras. 1 and 7.

is used to empower those who are well-armed to destroy the civil rights and freedoms of people under their jurisdiction.

Facts of genocide, torture, the „disappearance of people ", organized „ethnic cleansing" or evictions are almost exclusively politically motivated and too rare properly investigated nor punished.[354] The perpetrators who stand behind the crimes and order or ultimately commit the crime themselves are allegedly officials, members of the government, soldiers, judges and prosecutors.[355] The rhetorical question of scholars who ask how substantive criminal law may be effective if material criminal law and procedures, in particular the principle of immunity, block each other?[356] How to overcome the traditional way of appreciation of immunity by a strictly formalistic approach?

Indeed, the legal idea of sovereignty and equality of states is deeply rooted in international law and, with its anchoring in Article 2, part 1, of the UN Charter, has been counted as a system of values of postwar international law. However, the same article in part 2 articulates the principle of good faith, which shall be a strong condition while assessing any state's behaviour if there are facts of allegedly abusing the legal provisions of the UN Charter by a state. Some international treaties include the notion of the abuse of rights, and it has been interpreted in legal practice. For example, Article 300 of the 1982 United Nations Convention on the Law of the Sea reads:

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[354] In addition to the conflicts in Yugoslavia and Rwanda, there are numerous examples, including the discrimination against the people of East Timor, the numerous human rights violations in Argentina and Chile and the current authoritarian regime in Belarus.

[355] Ales Bialiatski, *The Nobel Peace Lecture*, December 2022, https://www.nobelprize.org/prizes/peace/2022/bialiatski/lecture (accessed January 19, 2024); UN, High Commissioner for Human Rights, *Situation of Human Rights in Belarus in the Run-up to the 2020 Presidential Election and in Its Aftermath*, A/HRC/49/71, March, 2022, https://documents.un.org/doc/undoc/gen/g22/276/97/pdf/g2227697.pdf?token=MUUTvNpbvEJOOgyRoE&fe=true (accessed January 19, 2024).

[356] See about the theory on the issue: Robert Alexy, *Theorie der Grundrechte*, Suhrkamp Verlag AG (1994), p. 71–157.

"States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".[357] The European Convention on Human Rights,[358] in its Article 17, "Prohibition of abuse of rights", states: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

Lauterpacht, in his "Function of Law of International Community", noticed that legal rights, granted by the community, cannot be infringed upon by individuals since their misuse becomes unlawful when it degenerates into an abuse of rights. This occurs when the community's general interest is infringed upon by sacrificing an important social or individual interest for a lesser, legally recognized individual right.[359]

All legal systems have roots in the idea that rights and competences can be misused, leading to the establishment of controls on their use. Application of the prohibition of abuse of rights in international law seems problematic, especially due to differences in content, such as conflicts of

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[357] *Convention on the Law of the Sea*, December 10, 1982, A/CONF.62/122, 21 ILM. 1261. The ICJ, by explaining the base-line, wrote: "The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order to properly apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the general direction of the coast. Therefore, one cannot confine one-self to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large". *Fisheries (United Kingdom v. Norway)* [1951], ICJ Report 116, p. 141–142.

[358] Supra note 301.

[359] Hersch Lauterpacht, *The Function of Law in the International Community*, Archon Books (1966), p. 286.

sovereign rights, international criminal law and international immunity rules.[360] The concept, however, evolves and authors who studied the applicability of the doctrine of "abuse of rights" in international relations are confident the doctrine is applicable to what was demonstrated in practice in international courts.[361]

It is vital for international criminal law efficiency that those procedures will be guaranteed by international bodies and procedures. In balancing between the interest of the community of a state as a whole and the principle of equal sovereignty, which is often misused by alleged criminals who "threaten the peace, security and well-being of the world" (Rome Statute, preamble para. 3), the definite interpretation shall be done for the sake of the constitutionalising not detracting the building of international criminal justice.

Years of promising development towards international solidarity passed away. Nowadays, lack of political will and confrontation between countries of "north" and "south", between those who protect "traditional values" and those who are building "democratic participation" brought the human family to a deep crisis. The Rome Statute obliges each contracting party to represent the interests of the community of states, in particular its *ius puniendi*. The overwhelming majority of states that have adopted the Rome Statute, as mentioned above, appeared to indicate a partial change in a hierarchy of values, which need protection and effective participation.

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360 Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford Monographs in International Law, Oxford University Press (2008); online ed. Oxford Academic, March 22, 2012.

361 Michael Byers, "Abuse of Rights: An Old Principle, a New Age", *McGill Law Journal*, 47 (2002), p. 389–434.

Conclusions

It is possible to exercise the jurisdiction of the ICC over officials from non--member states of the Rome Statute. Jurisdiction limited to four crimes contains the important prerequisites for prosecuting international offenders. The increasingly important objective of the international community to create a functioning system for the protection of human rights is now opposed to the strict immunity of state leaders, according the customary law. Applicable international criminal law has restrictions and exceptions on the functional immunity of officials.

In assessing the special role and competence of the ICC as the only supranational permanent body at the international level, it should be noted that in the case of the most serious human rights violations, when a situation has been transferred by the Security Council in accordance with chapter 7 of the UN Charter, in the interests of the community of states as a whole, the personal immunity of officials of the ICC may be restricted.

Part 3. General principles *nullum crimen sine lege*, *nullum poena sine* and the personal responsibility of offenders from non-member states of the Rome Statute in accordance with applicable international criminal law

Another problem in the prosecution of persons from non-member states of the Rome Statute is the application of international criminal law norms from general sources, which serve as a basis for the adjudication of crimes falling within the *rationae materie* jurisdiction of the International Criminal Court. In a number of national legal systems, the principle of *nullum crimen, nullum poena sine lege scripta* is one of the guiding principles of the application of law.[362] Only a positive law can declare an act a crime (*nulla crimen sine lege*); the same is true for establishing a punishment for the crime (*nulla poena sine lege*). The *nulla crimen, nulla poene sine lege scripta* principle states that only a written law can criminalize an act of persons and threaten punishment as a legal consequence.

Therefore, questions arise as to whether and in what terms the principle should also be observed in international criminal law and what effect it has on the application of international criminal norms (in accordance with Article 21, part 1[b] of the Rome Statute) or unwritten norms to offenders from non-members of the Rome Statute.

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[362] Adolf Schottlaender, *Die geschichtliche Entwicklung des Satzes: nulla poena sine lege*, Schletter (1911), p. 11.

10. General principles among the sources of international criminal law

General sources of international law are listed in Article 38, part 1, lit. a-c, of the Statute of the International Court of Justice and consist of international conventions, international customary law and general principles of law. However, since international criminal law is part of criminal law, there may be special restrictions on this matter. For example, in the Federal Republic of Germany, "the principle of legality", "the reason for determination" and "the functional guarantee of criminal law" prohibit retroactive actions, extension or aggravation of existing facts and reasoning by analogy in criminal law.

There has been no binding positive legal regulation of the principle of *nullum crimen* in any international treaty or convention.[363] Although Article 11, part 2, of the UN Universal Declaration of Human Rights (UDHR) of 10 December 1948 laid down the prohibition of retroactivity,[364] its interpretation did not give rise to the requirement of written law, as it was not formulated positively. In addition, it is spoken of as criminality under "international law", since unwritten law is recognised in the international sphere, and unwritten international law should also be considered sufficient. It should be borne in mind that, for example, the Anglo-American jurisdiction, in its traditional form, does not require written legal norms.[365]

After all, the UDHR did not have binding effect by its adoption in 1948. Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,[366] which has been a binding instrument from the very beginning, provides for the same. So, it is also assumed that liability is based on an unwritten rule of law. More specifically,

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363 Johannes Wessels, Werner Beulke, *Strafrecht. Allgemeiner Teil. Die Straftat und ihr Aufbau. Lehrbuch et Entscheidungen*, C.F. Müller Verlag (2001), Article 2, I.

364 Supra note 13, Article 11, part 2.

365 Supra note 246.

366 Supra note 301.

its part 2 stipulates: "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations. Geneva Conventions of 1949 presuppose the admissibility of unwritten norms in international criminal law".

A case Baumgarten v. Germany[367] reveals how the mentioned part of the general principle *nullum crimen, nulla poena sine lege* has been applied in German domestic courts and later considered by the UN Human Rights Committee. Klaus Dieter Baumgarten claimed to have been the victim of violations of the International Covenant on Civil and Political Rights by Germany. Baumgarten has been a high official of the former German Democratic Republic (GDR) from 1979 until his retirement in February 1990. In 1996, the Regional Court of Berlin convicted Baumgarten of homicide and attempted homicide, sentencing him to six years and six months in prison. The Berlin Regional Court found that the author was responsible for the deaths or injuries inflicted on persons trying to cross the inner-German border, or the Berlin Wall, by virtue of his annual orders, triggering a chain of subsequent orders and inciting the acts committed by border guards in the cases at issue. The court held that the author's acts were neither justified by the pertinent service regulations issued by the Minister of National Defence, nor under Article 27, paragraph 2, of the State Border Act, arguing that these legal justifications were invalid because they manifestly violated basic principles of justice and internationally protected human rights. The Federal Constitutional Court's landmark decision emphasized that "the prohibition of retroactive application of criminal laws in article 103, paragraph 2, of the Basic Law was not applicable to situations where the other state (GDR) made provision for criminal offences to cover the most serious criminal wrongs but excluded criminal liability through grounds of justification

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[367] *Baumgarter v. Germany*, Application No. 960/2000, UN, HRC, CCPR/C/78/D/960/2000 (Official Case No. 2003).

which went beyond the written norms, instigated such wrongs, and violated human rights recognized by the community of nations". The decision's legal justification in section 27, paragraph 2, of the Border Act, as applied in the GDR's state practice, had to be disregarded because it violated basic notions of justice and humanity in such an intolerable manner that the positive law must give way to justice (the so-called Radbruch formula).[368] This also follows from Article 15, part 2, of the International Covenant on Civil and Political Rights, which states, "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

11. The *nullum crime* principle as an integral part of international criminal law

The question of whether the *nullum crime* principle is a customary law norm or a general principle of law that provides for the validity of the principle in international criminal law is a debated issue among scholars. According to Trifferer, the principle of *nullum crime* in its strict form is neither an element of established international law nor of customary international law. Nor is it to be regarded as a generally accepted principle of all civilized nations.[369]

As one may see, the principle legality in international law is not included in Article 15, parts 1 and 2 of the International Covenant on Civil and Political Rights, Article 7, parts I and 2 of the ECHR, Article 11, part 2, of the Universal Declaration of Human Rights of 10 December 1948, or Article 6, part 2, of the Second Geneva Additional Protocol of 8 June 1977. Since the principle is not known or required in all legal systems, the court argues that the strict legality function of *nullum crime* does not apply, so norms

368 Supra note 59.

369 Supra note 253, p. 133.

of unlawful law can also justify criminality.[370] Accordingly, there must be a rule of international law which establishes the criminality of the act at the time of the crime.[371] The core idea of the principle of *nullum crimen*, *nulla poena sine lege*,[372] which also applicable in international law, reads:

> Every criminal interference of a state power in the sphere of individual freedom is bound by the existence of a norm. The standard may belong to the statutory or non-legislative law; It must, however, already exist at the time of the offence and determine the punishability of the act, i.e. it must contain a general penalty targeted at the individual, a specific threat of punishment, precisely defining the nature and the amount of the penalty, is not required.[373]

Thus, the validity of the principle *nullum crimen, nulla poena sinne lege* is also recognised in international criminal law, where the existence of any norm, whether written or unwritten, is considered sufficient.

12. The principle *nullum crimen, nulla poena sine lege* in the Rome Statute

Article 22 of the statute governs the principle of *nullum crimen, nulla poena sine lege*. With this regulation, the statute goes beyond applicable international law, as punishment can only be imposed on the basis of the written norms of the Rome Statute. The requirement for sufficient certainty arises

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370 See: Christiane Nill-Theobald, *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA*, Freiburg (Breisgau) (1997), [diss.], p. 25 et seq.

371 See: Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Tribunale: Observers Notes, Article by Article*, Nomos Verlagsgesselshaft (1999), p. 133; Georg Dahm, Jost Delbrück, Rüdiger Wolfrum, *Volkerrecht*, Band 1/3, De Gruyter (2002), p. 65; not only unwritten norms to justify the criminality, but to the criminality of the act is waived and the unlawfulness of the action is sufficient.

372 "No crime, no punishment without law".

373 Supra note 370.

from Article 22, part 2, of the statute, which contains a strict prohibition of analogy to the detriment of the perpetrator, which is also not recognised by international law. Finally, it is expressly stated that a definition should be interpreted in case of doubt in favour of the person against whom the investigation, prosecution or judgement is directed. The principle of *nullum crimen* is contained in the statute in its four forms, since a person may be punished only for acts which were punishable under the statute at the time of the offence (*lex scripta*), were committed after its entry into force (*lex praevia*), are sufficiently defined (*lex certa*) or have not been extended by analogy (*lex stricta*).[374] Articles 23 and 24 of the statute are closely linked to Article 22, which cover the *nulla poena sinne lege* principle separately. The establishment of this principle is intended to prevent the recourse to penalties not laid down in the statute. Thus, the general regulations of the principle in the Rome Statute clearly go beyond applicable international law and limit the powers of the judges of the ICC.

13. *Nullum crimen sine lege* as the barrier to the prosecution power of the ICC

In accordance with Article 5 of the Rome Statute, the jurisdiction of the ICC is limited to four of the aforementioned offences, meaning that other offences of international criminal law are only possible through decentralised prosecution of a state. The criminal statutes referred to in Article 5 are partly derived from applicable treaty law and partly from customary international law. Article 10 states that they are not understood as precluding any further formation of customary law.[375] However, the importance of a contractual or customary development of international material criminal law is limited in the statute. Article 10 speaks of this development "for purposes other

[374] See supra note 218.

[375] Supra note 246, p. 1148.

than those of this Statute." This makes it clear that customary or contractual developments cannot serve as a basis for extending the ICC's law enforcement powers.

It can also be regarded as an expression of the *nullum crimen* principle, by which a deliberate limitation of the enforcement power of the ICC was assumed. The question of the meaning of Article 21 I (b) of the Rome Statute inevitably arises. After that, the ICC can apply international treaties, general principles of law and customary law. However, this only applies within the limits laid down in Article 5. Thus, international treaties, customary international law and general principles of law cannot be used to extend the enforcement power of the ICC. Consequently, when prosecuting offenders from non-member states, the court may apply international treaties, general principles of law and customary law only within the limits laid down in Article 5 of the Statute of the International Criminal Court. In assessing persons, even if a case is assigned to the ICC by the UN Security Council, it is not permitted to derive individual facts from the whole of applicable international humanitarian law.

Conclusions

In the international arena, the principle of *nullum crimen, nulla poena sinne lege* is recognized, with the existence of any norm, whither written or unwritten, deemed sufficient. The Rome Statute goes beyond applicable international law, as a punishment by the ICC can only be based on the written norms of the statute. International treaties, customary law and general principles of law must not be applied to extend the enforcement powers of the International Criminal Court. Offenders from non-member states can only be brought to justice for crimes subject to the ICC.

Part 4. The jurisdiction of the International Criminal Court over offenders from third countries and the problem of third-party jurisdiction

The problem of the jurisdiction of the ICC over nationals of a state that has not ratified the treaty is referred to as "third-party jurisdictions". During the Conference of States in Rome, the US, Russia, China and India attached great importance to the establishment of the principle that the opening of the jurisdiction of the International Court of Justice should depend on the consent of the state in each individual case (opt in, opt out), which was not guaranteed in particular by Article 12. Furthermore, it was argued that the rules establishing the jurisdiction of the International Criminal Court contained the principle of universal jurisdiction and thus also subjected "non-contracting states" to the jurisprudence of the ICC and created obligations for those states. Although the United States had signed the statute, the following argument was subsequently made in the introductory remarks to the US Congress that the Rome Statute, a treaty involving the United States, allows US forces abroad to be prosecuted by the International Criminal Court, violating treaty law and potentially limiting the US's ability to fulfil NATO obligations.[376]

Because of the central importance of American troops in UN peacekeeping operations and the substantial efforts of the US to establish the two

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[376] See Article 2 of the ASPA (American Servicemembers Protection Act), which constitutes Title 2 of the 2202 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States [H.R. 4775]). Quoted from Garsten Stahn, "Gute Nachbarschaft um jeden Preis? Einige Anmerkungen zur Anbindung der USA an das Statut des Internationalen Strafgerichtshofs", *ZaöRV*, 60(3–4) (2000), p. 637.

ad hoc tribunals, Washington's concerns could not be addressed and were explained in literature and during negotiations. The problem also touched on other states which have not ratified the statute and consider it unacceptable to third countries. Thus, it is necessary to examine whether the judgement of third-country nationals is to be regarded as a violation of that state and, therefore, as "third party jurisdiction" in breach of international law. First, the current jurisdiction of the OCC is assessed in relation to undisputed principles of international law. Then the US accusations will be analysed in terms of a possible "peacekeeper" conviction by the ICC. Finally, a result will indicate the legal position of third countries in relation to the jurisdiction of the International Criminal Court.

14. The third effect of the regulation on the jurisdiction of the International Criminal Court

It should be noted that a treaty of international law only binds the contracting parties, so it is not possible to bind third states against or without their will.[377] Therefore, the principle of customary international law *pacte tertiis nec prosunt nec nocent* applies, which is reflected in Article 34 of the Vienna Convention on the Law of Treaties. Opponents of the International Criminal Court see the Rome Statute as a treaty at the expense of third parties[378] because the statute and the underlying jurisdictional regime, in principle, create the possibility of prosecuting nationals of a state which has not ratified it. As explained in the present chapter, under Article 12, part 2, the ICC has jurisdiction in three situations to punish crimes committed by offenders from states that have not ratified the statute:

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377 Supra note 95, Article 34.

378 Mahnoish N. Arsanjani, "The Rome Statute of the International Criminal Court", *The American Journal of International Law*, 93(1) (1999), p. 22–43.

- The first is that the state of origin of the offender accepts the jurisdiction of the International Criminal Court ad hoc.
- A second possibility arises if the crime is committed in the territory of a contracting state.
- Otherwise the court may act against the will of those states only on the basis of a referral decision of the Security Council in accordance with Chapter 7 of the UN Charter.

Studies of the statute have revealed that it does not give rise to a direct obligation of the third state, so it cannot be obliged either to act actively or to abstain.[379] According to Zimmermann, for a state which is not a contracting party to the statute, it does not give rise to contractual obligations, but, in any case, to actual adverse effects by enabling proceedings to be opened against nationals of noncontracting states.[380] In particular, such a third state is not obliged to cooperate with the ICC unless the jurisdiction of the ICC is based, in the specific case, on an authorised resolution of the Security Council.

General international law has no principle that a state has exclusive jurisdiction over crimes committed by its nationals.[381] As early as 1927, the Permanent International Court of Justice ruled in the Lotus case that the supremacy of states is related not only to nationality (national state principle) but also to territorial sovereignty.[382] The principle of universal law (universality principle) as a further step in the fight against crimes affecting the international community and as such is being commonly used by states today. This principle of "universal jurisdiction" is also applicable to the practice of

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379 Andres Zimmermann, Holger Scheel, "Zwischen Konfrontation und Kooperation", *Vereinte Nationen*, 4 (2002), p. 137.

380 Ibid.

381 See in this regard Article 86 of the statute, which expressly refers only to the contracting parties with regard to the obligation to cooperate.

382 PICJ, the case of the S.S. Lotus, P.C.I.J., Series A, 1927, no. 10, 18 (24).

American courts[383] and is stated in the (Third) Restatement of the Foreign Relations Law of the United States: "A state has jurisdiction to impose penalties for certain offences recognized by the international community as worldwide crimes, such as piracy, slave trafficking, genocide, war crimes and certain terrorist acts, even if no other links are available."[384]

The objection to the ICC's authority to prosecute is that the criminal status records of the statute have so far, apart from the ad hoc and hybrid tribunals (see chapter 1), only been prosecuted at the national level.[385] However, this is not convincing: Indeed, if states themselves exercise jurisdiction over nationals of foreign countries there must be no reason why they should not transfer it to international courts. Centralized law enforcement by a court with independent judges will be more effective and generally benefit offenders. Thus, these objections based on the *pacta – tertiis* rule are not substantially justified.[386]

15. The threat of the Rome Statute for US troop contingents

The second approach to American criticism of the Rome Statute is the assertion that American officials and soldiers could be charged by the International Criminal Court if US troop contingents operate in the territory of states parties to the Rome Statute or third parties. On 2 August 2002, the American Service Members' Protection Act (hereinafter "ASPA"[387]) was

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383 *Demjanjuk v. Petrovsky*, 776 F. 2d 571, 582 (6th Circuit 1985).

384 Ibid.

385 Ruth Wedgewood, "The International Criminal Court: An American View", *European Journal of International Law*, 10(1) 1999, p. 93 et seq.

386 See also further proof at Stahn Carsten, "Gute Nachbarschaft um jeden Preis? Einige Anmerkungen zur Anbindung der USA an das Statut des Internationalen Strafgerichtshofs", ZaöRV, 60(3-4) (2000), p. 631 (637).

387 The ASPA (American Servicemembers Protection Act) constitutes Title 2 of the 2202 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States (H.R. 4775). The act was repealed in April 2022.

adopted in the United States to prevent, inter alia, US troops deployed in UN peacekeeping operations from being brought before the ICC. The law described the danger of conviction for US soldiers. Meanwhile, the jurisdiction of the ICC is limited to such crimes that reflect international customary law in force. One shall highlight the threshold of application of the criminal record and understand that isolated acts of individual soldiers will generally not exhibit the criminal energy required by the statute for the ICC's jurisdiction established to combat the core crimes.[388]

However, there is some criticism that, according to Article 8 of the Rome Statute, virtually any individual war crime can be prosecuted before the criminal court, since the threshold clause of Article 8 part 2 (b), uses the word "particularly"/"namely". In this respect, the US was committed to reaching a higher threshold. To assume that any threshold clause is in fact absent on these grounds does not seem, however, to be sustainable, since the interpretation of Article 8 cannot, for systematic reasons, be made without Article 5. It limits the jurisdiction of the court to serious crimes affecting the international community.[389] Furthermore, the United States – like any state – can prevent its nationals from being held accountable before the International Criminal Court if they take their own prosecution measures against offenders. The principle of complementarity, enshrined in the Rome Statute, provides reliable protection against offenders in countries of origin, even if they are not parties to the statute. Thus, one could see a third effect of the statute at most in the fact that noncontracting states are forced to effectively prosecute their own nationals if they want to protect them from proceedings before the International Criminal Court. But this consequence is, in any case, a positive legal reflection of the statute.

Summing up, the starting point of the "third-party jurisdiction" problem is the Rome Statute-based principle of the ICC's competence, which,

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388 Supra note 386, p. 632 et seq.

389 Supra note 379, p. 138.

in certain cases, provides for international criminal liability of perpetrators from non-member states. The norms are not contrary to international law, as they do not involve contractual obligations but adversely affect noncontracting parties. The US position on the International Criminal Court and the Rome Statute has objections and fears that are not of international law but rather of a political nature. The purposes and scope of the jurisdiction of the International Criminal Court in exercising jurisdiction over offenders, including those from non-member states, in accordance with the norms of the Rome Statute, reflect the modern development of international criminal law and the human community as a whole.

Part 5. Restrictions and obstacles to the jurisdiction of the International Criminal Court

The final part of this chapter will address contemporary developments, which play a drastic role in the development process of international criminal law, in particular in the area of the competence and authority of the ICC. These events and their impact take place in the context of tension between (international) criminal law and politics. The history of international criminal law shows that political considerations prevent, block and delay the development of law, but on the other hand may also enable and advance the rule of law or decisively determine its content.[390] The relationship between the Security Council and the ICC is of paramount importance. This is analysed in the legal dispute over resolutions 1422 (2002) and 1487 (2003) with reference to Article 16 of the Rome Statute.

Another of the already existing problems and obstacles to the jurisdiction of the ICC is the conclusion of US bilateral agreements in which the contracting parties mutually undertake not to transfer each other's nationals to the ICC. Moreover, the misleading legal concept of "immunity interpretation" has been influencing US administrations, which are guilty in their rather hostile attitude towards the ICC. Currently, there is also concern about the possible further erosion of the jurisdiction of the International Criminal Court by the establishment of new ad hoc or hybrid criminal

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[390] A notion *jus cogence* is an example of such development. See ILC, *Draft Conclusion on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens) with Commentaries*, Yearbook of the International Law Commission, vol. II (2) (2022), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf (accessed November 3, 2023).

tribunals, following the model of the international criminal courts for the former Yugoslavia and Rwanda, as well as for hybrid models, like those established for East Timor, Lebanon, Cambodia, Sierra Leone, mentioned in the first chapter. The mentioned problems will be discussed further.

16. The blocking of the jurisdiction of the International Criminal Court by the Security Council

One of the US's politically motivated demands for the ICC proceedings was that the Security Council should, in any case, have primary jurisdiction to initiate procedures before the International Criminal Court. In that case, the United States, as a permanent member of the Security Council, would have the right of veto, under Article 27, part 3, of the UN Charter to prevent legal proceedings against its nationals against or without their will.

The Russian Federation delegation has echoed discussions, including their expectations on the continuing role of the Security Council in the future:

> Today marks the end of an important effort to reconcile different legal systems. It was a reason for satisfaction that a compromise package has been crafted that the Russian Federation has been able to support. It was regrettable that it had been adopted by vote. With respect to aggression, the Russian Federation's understanding was that the powers of the Security Council on that issue would not be affected.[391]

The expectation to establish a stronger power of the SC over criminal justice hasn't succeeded. The Rome Statute (articles 12, 13 and 14) grants states

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391 UN, *UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court*, UN Press Release L/2889, July 20, 1998, p. 9, https://press.un.org/en/1998/19980720.l2889.html (accessed December 19, 2023).

the right, including offenders from non-member states, to investigate a situation in which it appears that crimes have been committed, to submit to the prosecutor in order to determine whether one or more persons should be charged with committing those crimes. That is why, after entry into force of the Rome Statute, the US sought other means to ensure that its citizens were not subject to persecution by the International Criminal Court. On 12 July 2002, the Security Council adopted resolution 1422 (2002), requiring the International Criminal Court, pursuant to Article 16 of the Rome Statute:

> The Security Council (…) 1. Requests the International Criminal Court, in accordance with Article 16 of the Rome Statute, in any case involving current or former officials or officers of a participating state which is not a party to the Rome Statute as a result of acts or omissions in connection with an operation established or authorized by the United Nations, … not to initiate or prosecute any investigation or prosecution in respect of such a case, unless the Security Council decides otherwise.[392]

The occasion was the US veto in the Security Council against an extension of the UN mission in Bosnia and Herzegovina. To justify its fundamental rejection of the ICC, the US pointed out that it did not intend to subject its military personnel in such operations to the "politized prosecution" of an internationally occupied court, which it feared. On 12 June 2003, resolutions 1422 (2002) were renewed by a new resolution, 1487 (2003). In paragraph 2, the intention was expressed to renew the request received in paragraph 1 on 1 July each year under the same conditions.

The actions of the US and the relationship between the Security Council and the ICC have been discussed by scientists and politicians. Many of them see the danger that the influence of a political body such as the Security Council on a jurisdictional body may lead to questioning the independence

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[392] UN Security Council, *On United Nations Peacekeeping*, July 12, 2002, S/RES/1422 (2002).

of the International Court of Justice and thus the validity of the rule of law.[393] In the analysis of the aforementioned Security Council resolutions, the norms of the UN Charter and Article 16 of the Rome Statute, legal questions also arise.

Under Article 16, it is possible that the Security Council may suspend both investigations and proceedings for a period of 12 months on the basis of a resolution issued in accordance with chapter 7 of the UN Charter. The council's powers to stop any proceedings by the International Criminal Court shall not be exceeded if and to the extent that the conditions of Article 39 of the UN Charter are met. The fact that the United States' right of veto entails Security Council decisions only in difficult circumstances cannot be regarded as a violation of Article 103 of the UN Charter.[394] Consequently, it should be noted that resolutions 1422 (2002) and 1487 (2003) were adopted without the conditions laid down in Article 39. The Security Council bases its resolutions on chapter 7. In principle, such Security Council resolutions are externally binding, but in this case only a "request" has been addressed to the ICC.

It is questionable whether Security Council resolutions under chapter 7 of the UN Charter (Article 39) can bind an independent body such as the ICC, which has its own legal personality under Article 4, 1, of the Rome Statute. The practice of international law indicates that the obligations of states parties do not automatically pass to the international institutions established by the 1422 (2002) and extended by a new resolution 1487 (2003).[395] For this reason, a direct obligation of the ICC to the aforementioned resolutions cannot be justified solely by Article 39 of the UN Charter but requires the additional recourse to Article 16 of the statute. Thus, it is

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393 Sebastian Heselhaus, "Resolution 1422(2002) des Sicherheitsrates zur Begrenzung der Tätigkeit des Internationalen Strafgerichtshofs", *ZaöVR*, 62 (2002), p. 907.

394 Supra note 379, p. 139.

395 Supra note 393, p. 910.

decisive for the binding effect to the ICC whether the resolutions comply with the requirements of Article 16 of the Rome Statute.

Another point of criticism is the immunity regime in resolutions. For the nationals of those noncontracting states of the Rome Statute that participate in UN operations, the two resolutions automatically and generally grant "blank-immunity" for all acts connected with such an operation, regardless of the severity of the alleged crime. In addition to present officials, former officials and officials of a noncontracting state also benefit from the immunity regime since the provisions of the resolutions state that the personnel from a contributing State (which is not a Party to the Rome Statute) will not be subjected to investigation over acts or omissions relating to a United Nations established or authorized operation, unless the Security Council decides otherwise.

Consequently, paragraph 1 of resolutions 1422 and 1483 violates Article 16 of the Rome Statute in several respects, since the resolutions constitute a flat-scale, non-discriminatory immunity scheme for nationals of noncontracting states for acts related to UN personnel. In this case, we can talk plausibly of a balance between peacekeeping and (international) justice. It must be noted that such influence by a political body undermines the independence of the ICC in general and thus the future effectiveness of the ICC.

17. Exemption from the jurisdiction of the International Criminal Court by means of bilateral agreements

The strategy of the US as an opponent of the Rome Statute to maximize the jurisdiction of the ICC was defined in the American Service Members' Protection Act (ASPA). Another step in the systematic compilation of possible US measures is the conclusion of bilateral agreements in which the parties mutually undertake not to transfer other nationals to the ICC. This is based on Article 98, part 2, of the Rome Statute, which provides that the International Court of Justice may not submit a request for transfer which would

require the requested state to act contrary to its obligations under international conventions. As of February 2023, 123 states had ratified the Rome Statute, and the United States had entered into bilateral agreements with seventeen states: Afghanistan, Dominican Republic, East Timor, El Salvador, Gambia, Honduras, India; Israel, Kuwait, Marshall Islands, Mauritania, Micronesia, Nepal, Palau, Romania, Tajikistan and Uzbekistan.[396]

On the other hand, the question arises as to whether parties to the Rome Statute – such as Romania and Tajikistan – are also entitled to subsequently conclude agreements that prevent them from cooperating with the ICC. Although Article 98 does not contain any time limitation for agreements concluded before the entry into force of the statute, subsequent bilateral agreements may also prevent the ICC from making requests for transfer which would force a contracting party to violate international law.[397] At the same time, it must not be overlooked that the conclusion of a bilateral agreement by a contracting party after its accession to the Rome Statute will give it the opportunity to cooperate effectively with the International Criminal Court. In general, this conduct by parties statute is contrary to the principle of *pacta sunt servanda* of faithful performance of the treaty,[398] There is no doubt, therefore, that the conclusion of bilateral agreements is contrary to the treaty's objective of ensuring effective prosecution by the International Criminal Court.

18. The extinction of the jurisdiction of the International Criminal Court by ad hoc courts: True or false?

Since the entry into force of the Rome Statute, it was expected that no new ad hoc court would be established but that an existing court would exercise

396 Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law", *The American Journal of International Law*, 97(1) (2003), p. 202.

397 Supra note 379, p. 141

398 Supra note 95, Article 26.

its jurisdiction over offenders, including those from non-member states, in referring cases to the Security Council. As has already been explained, the ICC has a limited jurisdiction. Moreover, it is regrettable to note that it seems that the International Criminal Court has a weaker enforcement power compared to the former ad hoc criminal tribunals. This is one of the reasons why the question has been raised whether the establishment of a new ad hoc criminal court, following the examples of the former criminal courts, is appropriate for the situation in other countries. For example, in 2002 a proposal in this direction in relation to Iraq was supported by the European Parliament.[399]

There had been some obstacles to the exercise of the jurisdiction of the International Criminal Court in relation to Iraq: the country was not a member of the Rome Statute. Furthermore, in principle, the tribunal could only initiate proceedings against offences committed after 1 July 2002 – the date of entry into force of the statute. A body created by Iraqi national law to try Iraqi citizens or residents accused of genocide, crimes against humanity, war crimes or other major crimes committed between 1968 and 2003 is frequently referred to as the Supreme Iraqi Criminal Tribunal. It coordinated the trial of Saddam Hussein and those of other Ba'ath Party members. The tribunal, however, did not own a high reputation due to its methodical defects, lack of fair trial procedures and political dependency on the Iraqi government.[400] This example clearly shows that in this case the UN Security Council should be using its broad powers under chapter 7 of the UN Charter. It is empowered to establish an ad hoc criminal tribunal and to extend the jurisdiction of the International Criminal Court, including in respect of facts prior to 1 July 2000, provided that the factual requirements

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399 *Report v. H. Hausmann*, Development Strategy Against Iraq, in: Parliament No. 21 (24 May 2002).

400 Guillermo de Aragáo, Eugénio Josè, "Ein internationaler Strafgerichtshof für den Irak?", *Humanitäres Völkerrecht*, 1 (2003), p. 22–23.

of chapter 7 are met in the individual case.[401] According to Zimmermann, this means that the Security Council could also exempt the ICC – as far as it wishes and covered by chapter 7 of the UN Charter – from the restrictions that, for the court, would otherwise arise from the basic model of a treaty-created body. Thus, noncontracting parties to the Rome Statute could also be required to cooperate with the ICC. Furthermore, the Security Council could also exempt the International Criminal Court from other constraints of the statute, such as compliance with the principle of complementarity.[402]

Politically, however, it is currently unthinkable for the UN Security Council to hand over cases to the ICC. Of the five permanent members, which have the right to veto decisions (Article 27, 3, of the UN Charter), only two – France and Great Britain – are parties to the Rome Statute. So far, China, Russia and the US have kept their distance. The described US scepticism towards the ICC is expressed, as has already been written, in various domestic and foreign policy measures. It is therefore to be expected that the right of veto could be exercised by these states during the voting of a resolution referring cases to the ICC.

Time has shown that fear of the establishment of new ad hoc and hybrid courts in addition to the ICC has mushroomed (see chapter 1). This tendency remains. In 2022, the European Parliament called on EU member states and the international community, in close cooperation with Ukraine, to urgently establish a special ad hoc international criminal tribunal to investigate and prosecute the crime of aggression committed by the political and military leadership of the Russian Federation. The resolution also calls for the provision of necessary financial support to the tribunal. This follows a resolution adopted by the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly and the Council of Europe Committee of

401 Ibid.

402 Supra note 222, p. 94.

Ministers.[403] Authors of the report, "Tribunal for the Crime of Aggression Against Ukraine – A Legal Assessment", based on analyses of the former ad hoc tribunals and some political considerations, concluded that every aspect discussed above demonstrates that there would be legal difficulties with the creation of a special court for the crime of aggression against Ukraine. It would suggest "interpreting current positive international law in a wide-ranging and even comprehensive manner".[404] As recent developments have shown, the ICC has found a way to start investigations and issue a warrant against state officials. The future of international criminal justice should be domestic, but for the time being the role of a permanent international criminal body is of high importance.

19. Immunity interpretation as a misleading concept

A long time ago, lawyers consulting the US administration developed the concept of "immunity interpretation," which means that so far as the United States is a nonparty state to the Rome Statute, and the ICC has no jurisdiction over U.S. persons for actions performed even on the territory of a state party to the Rome Statute. The "immunity interpretation" concept had been broadly applied by the Trump administration, even by expressing threats against the personnel of the ICC. The current president, Joe Biden, repealed the executive order authorizing such sanctions,[405] though Secretary of State Antony J. Blinken stated, "We maintain our longstanding objection to the

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403 European Parliament, Resolution of 19 May 2022 on the Fight Against Impunity for War Crimes in Ukraine, P9_TA(2022)0218, May 19, 2022.

404 Olivier Corten, Vaios Koutroulis, *Tribunal for the Crime of Aggression Against Ukraine – A Legal Assessment*, European Parliament coordinator: Policy Department for External Relations, Directorate General for External Policies of the Union, PE 702.574, December (2022).

405 US Department of State, *Press Statement: Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court*, April 2, 2021.

court's efforts to assert jurisdiction over personnel of non-state parties such as the United States and Israel."[406]

The United States' unfriendly policy[407] towards the ICC has not been fully overcome. However, one may observe that the "immunity interpretation" in terms of the ICC's lack of jurisdiction over U.S. nationals for actions undertaken on the territory of a state party to the Rome Statute is under internal criticism now. For a long time this interpretation has been largely rejected worldwide since it defies the core principles of criminal law, including territorial jurisdiction. Today, American practitioners and politicians criticise it for its archaic and counterproductive nature,[408] as it ignores the decision-making authority of a sovereign government when entering a treaty regime, including conferring criminal jurisdiction on an international court. The Russian invasion of Ukraine has highlighted the issue. Moreover, the recent ICC warrant issues with respect to the Russian Federation's officials have also illustrated that the legal interpretation of the Rome Statute provisions may be different than the American lawyers suggested.

Some politicians believe that the United States' immunity interpretation was not intended to permanently keep the United States out of the ICC. It was rather a tool to explain its status and non-exposure to ICC jurisdiction until Washington ratified the treaty.[409] The approach continues to defy the ICC's supplemental documents, including due process protections, complementarity, Security Council backstop, precise definitions of crimes, judicial oversight and strict admissibility standards. If the United States were to become a party

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406 Ibid.

407 Todd Buchwald et al., *Former Officials Challenge Pompeo's Threats to the International Criminal Court*, Just Security, March 18, 2020, https://www.justsecurity.org/69255/former-officials-challenge-pompeos-threats-to-the-international-criminal-court/ (accessed December 10, 2023).

408 David J. Scheffer, "The United States Should Ratify the Rome Statute", *Articles of War*, July 17 (2023), https://lieber.westpoint.edu/united-states-should-ratify-rome-statute/ (accessed April 23, 2024).

409 Ibid.

of the Rome Statute the immunity interpretation would become irrelevant, making it irrelevant for other non-party states. Moreover, the claims of the United States' perception of double standards are supported by a continuing hostile attitude towards the jurisdiction of the permanent judicial body which exercises judicial power over core crimes. Meanwhile, there is a rather simple legal way to restore US consent to permanent International Criminal Court jurisdiction, by communicating to the United Nations, as the depository of the Rome Statute, to withdraw the George W. Bush administration's letter of 6 May 2002, which states the United States' intention not to become a party to the Rome Statute and abandon any obligations as a signatory party. But the political will to reject the "immunity interpretation" and to change the unfriendly attitude towards the ICC from the US is still lacking.

Summing up this part, the problems highlighted here pose threats to the jurisdiction of the International Criminal Court. With Security Council resolutions 1422 (2002) and 1487 (2003), the US has achieved a step-by-step victory in its attempt to shield its own nationals from the ICC. This did not prevent the International Criminal Court from being instrumentalized by the Security Council – and primarily by its permanent members. Through agreements with the US, many states, including two members of the Rome Statute, have shown their willingness (assisted) to impede cooperation with the International Criminal Court. The interpretation of Article 98 by parties to such agreements is contrary to the meaning and purpose of the statute. The establishment of a new ad hoc court as an appropriate solution to the problem of the current weakness in the jurisdiction of the International Criminal Court would further erode its capacity to prosecute.

Finally, the unfriendly attitude from the site of members of the UN Security Council, including the US, together with its attempt to apply the misleading legal concept of "immunity interpretation," does not strengthen trust in international nor facilitate cooperation with the ICC. In that case, the jurisdiction of the ICC extended to offenders from non-member states of the Rome Statute is very much challenged.

Conclusions: Overall evaluation and outcome

A quarter of a century ago the long-awaited permanent International Criminal Court was established, and the Rome Statute is the result of years of political-legal negotiation, characterized by the search for consensual solutions and maximum willingness to compromise. The ICC deals with horrendous crimes of international concern, such as genocide, crimes against humanity and war crimes. For the last decades the Rome Statute has evolved, and the ICC's jurisdiction was extended to cover international aggression and new war crimes. By conducting investigations and trials in brutal conflicts, the court has developed tools to protect witnesses. The ICC faces challenges, such as limited jurisdiction, the refusal of major powers, lack of cooperation and recent defections. However, the ICC's impact on national judicial systems cannot be denied. Under the current version of Article 12, part 2, nationals of non-member states may only be brought before the ICC under certain conditions. In the event of a transfer by the UN Security Council under Chapter 7 of the UN Charter, the jurisdiction of the ICC is given without further delay (Article 13[b] of the Rome Statute). By qualifying the allocation to enforcement as a measure under Chapter 7, the Rome Statute is a supplement to the Security Council's options for action under Article 41 of the UN Charter. This assignment of one or more cases by the Security Council does not require the consent of the state in whose territory the offences were committed or the state of the nationality of the accused.

Existing problems of international law, such as the principle of state immunity and the application of international criminal law norms to offenders from non-member states of the statute, can also be resolved within the framework and on the basis of the Security Council authorising resolution. Furthermore, the Security Council could also exempt the ICC from other restrictions of the statute. On the other hand, it must be prevented so that the ICC can be instrumentalized solely by the Security Council. Nowadays, there is a danger that Article 16 of the Rome Statute and chapter 7 of the UN

Charter, the Security Council resolution, both bilateral agreements between states that prohibit the ICC from applying for transfer, the establishment of a new ad hoc court as well as notions on "immunity interpretation" will make it de facto inadmissible to prosecute by ICC. Thus, the success of the ICC depends largely on as many parties as possible, given the restrictive jurisdictional regime of Article 12, part 2, and the unfriendly attitude of the US as a permanent member of the Security Council.[410] With the opposition of China, India, Russia, the US and India abstaining, half of the world's population will be blocked from accessing this court for a foreseeable period of time.

However, the efficiency of the ICC can be partly recovered via ad hoc declarations of submission to ICC jurisdiction. Moreover, with the recent investigation opened by the ICC prosecutor[411] and a warrant issued by the pretrial chamber[412] against officials of the third country, they have been achieving a new effect of ICC jurisdiction. Indeed, being derived from the ad hoc recognition of the ICC's judicial power, it might stop those neighbouring governments from planning armed interventions. The fear of being prosecuted for committing wrongdoing in the territories of the states accepted by the ICC may influence the minds of millions, including the heads of such states.

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410 Supra note 226, p. 15.

411 Supra note 266 (ICC statement).

412 Supra note 266.

Chapter 3:
Legal preconditions for the exercise of jurisdiction by the ICC against an individual from a state non-member of the ICC:

A Case Study of Pre-Trial Chamber 2's Warrants of Arrest for Two Individuals from the Russian Federation in the Context of the Situation in Ukraine, March 2023

"The Allies decided a case in Nuremberg against a past Hitler –
but refused to envisage future Hitlers."
Rafał Lemkin

Introduction

"The Allies decided a case in Nuremberg against a past Hitler – but refused to envisage future Hitlers." This quote is from Rafael Lemkin, born into a Polish Jewish family in current Belarus, who studied law in Lviv, in present-day Ukraine. Lemkin, the author of the Convention on Genocide, criticized the Nuremberg trials, emphasizing the need to comprehensively address future genocides.

In The Hague, The Netherlands, on 2 March 2022, the prosecutor of the ICC announced the initiation of an investigation into the situation in Ukraine, following referrals from 38 state parties.[413] The prosecutor acted in accordance with the overall jurisdictional parameters conferred by the referrals and made no prejudice regarding the focus of the investigation; he applied a broad scope of the situation and encompassed any past and present allegations of war crimes, crimes against humanity or genocide committed by any person on any part of the territory of Ukraine from 21 November 2013 onwards.[414]

In March 2023, ICC Pretrial Chamber 2 issued arrest warrants for two officials from the Russian Federation: Ms. Maria Alekseyevna Lvova-Belova, the commissioner for children's rights in the Office of the President of the Russian Federation, and Mr. Vladimir Vladimirovich Putin, president of

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[413] Supra note 237.

[414] Supra note 26.

the Russian Federation. Pretrial Chamber 2 noted that there have been reasonable grounds to believe that each suspect was criminally responsible for war crimes in the form of unlawfully deporting and transferring population (children) from occupied areas of Ukraine to the Russian Federation. According to official data from the Ministry of Ukraine for the Affairs of the Temporarily Occupied Territories,[415] the number of Ukrainian children who have been allegedly moved to Russia and Belarus has increased over time and currently stands at least 19,546.

During the more than two years of the Russian invasion on Ukrainian territory, the author of this chapter has been conducting research with a focus on the legacy of elaboration of elements of the crime of genocide during and after the Second World War. The facts of the alleged transfer of children from Ukraine came to light via the media[416] already in April 2022. The retrospective and tragic present met. This has shifted research to another focus, which is a legal qualification of the events that happened against Ukrainian children from the perspective of contemporary international law and enriched by historical, anthropological and other factors influencing the legal judgements. This research was presented as a case study. This method facilitates the exploration of the real issue – the ICC pretrial warrant issued against two officials of the Russian Federations within a defined context

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415 *The Exact Number of Children in Need Cannot Be Established Due to the Active Fighting and the Temporary Occupation of Part of the Territory of Ukraine*, Діти війны, December 17, 2023, https://childrenofwar.gov.ua/, (accessed May 5, 2024).

416 1. Ewelina Ochab, *Ukrainian Children Forcibly Transferred and Subjected to Illegal Adoptions*, Forbes, April 10, 2022, https://www.forbes.com/sites/ewelinaochab/2022/04/10/ukrainian-children-forcibly-transferred-and-subjected-to-illegal-adoptions (accessed May 5, 2024); 2. Mykhailo Zagorodnyi, *Invaders Deport Children from Mariupol and Volnovakha to Rostov Oblast, Russia: They Want to Turn Them into Russian Citizens*", Ukrainska Pravda, May 31, 2022, https://www.pravda.com.ua/eng/news/2022/05/31/7349732/ (accessed May 5, 2024); 3. Roman Petrenko, *Russia Says More Than 300,000 Ukrainian Children "Deported"*, Ukrainska Pravda, June 19, 2022, https://www.pravda.com.ua/eng/news/2022/06/19/7353366 (accessed May 5, 2024).

(alleged deportation of children from the territory of Ukraine to the Russian Federation, the ICC jurisdiction towards the third state-party's officials) by applying a variety of legal sources (the Rome Statute, its Elements of Crimes, all relevant international and nations sources), as well as information from media and literature which illuminate historical, social and anthropological aspects. The author of this chapter was moved by a story on work with elements of the genocide during and after World War II. The wording "forcibly transferring children of the group to another group" has been identified as an additional form of criminal activity with the intent to "destroy, in whole or in part, a national, ethical, racial, or religious group" that came to the authors of the Convention on the Punishment of Genocide (hereafter "the convention") at the last stage of their work. Fortunately, that wording as a point (e) was included in Article 2 of the convention. The convention is among the legal sources applicable to the ICC. Remarkably, the wording "forcibly transferring children of the group to another group" of Article 6, without any editing, stepped into the Rome Statute.

Studying the ICC Pretrial Chamber's warrant, the author is curious as to why the chamber had utilized Article 8(2)(b)(viii) as the legal foundation for the warrant, whereas a special group (children) was included in spite of the fact that the letter of the war crimes provision does not include the group specifically.[417] Why did the Pretrial Chamber (PTC) decline Article 6 of the Rome Statute?

The author would like to challenge the position of the PTC and go for analysing issues related to ICC jurisdiction under the Rome Statute with respect to the *Ratione materiae* (Article 5), with a special emphasis on the crime of genocide (Article 6 [e]). The articles should be taken in conjunction with the Convention of Genocide's provisions, the ICC provisions on

[417] Supra note 16, Article 8 b (viii): "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory".

ratione personae (Article 25) and on the irrelevance of immunity (Article 27). Moreover, the author will touch upon the notion of the preconditions for exercising jurisdiction with respect to individuals who are nationals of the non-member states parties (articles 12 and 13).

The ICC applies the Rome Statute, elements of crimes, treaties, international law principles and national laws and legal systems.[418] That's why the author prepared an overview of the relevant national legislation of Belarus, Ukraine and the Russian Federation with the focus on: (1) protection of children's rights and (2) criminalising the acts with a genocidal intent. Regarding the scope of this research, it should be mentioned that the statement of the ICC prosecutor outlines the issuance of warrants based on war crime articles of the Rome Statute (8(2)(a)(vii) and 8(2)(b)(viii), with a specific emphasis on victims, namely children.[419] Simultaneously, the prosecutor includes genocide as one of the crimes under investigation.[420]

According to Article 58(6) of the Rome Statute, the prosecutor has the legal possibility to request an amendment of the warrant, modifying or adding specified crimes, as the act of forcible transfer of a population could qualify as both war crimes[421] – crimes against humanity[422] and genocide. Given the specifically targeted group (children), mentioned in both the Rome Statute (Article 6[e]) and the Genocide Convention (Article 2[e]), this work will concentrate on the crime of forcible transfer of children as an act of genocide, originating from Article 6(e) of the Rome Statute and Article 2(e) of the Genocide Convention. An additional argument about the applicability

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418 Ibid., Article 21, part 1 (a, b, c).

419 Supra note 26.

420 Ibid.: "the referrals (of the states) enable my Office to proceed with opening an investigation into the Situation in Ukraine from 21 November 2013 onwards, thereby encompassing within its scope any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person".

421 Supra note 16, Article 8.

422 Ibid., Article 7.

of the Genocide Convention in the legal analyses is a fact that on 26 February 2022, Ukraine filed in the Registry of the International Court of Justice an application instituting proceedings against the Russian Federation concerning "a dispute … relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (the Genocide Convention).[423]

Although national sources come as the last resort in the ICC application, the author believes that exploring domestic resources will be helpful. The comparative legal method of this research helps to embrace all three countries: Ukraine and the Russian Federation as direct addressees of the ICC warrant as parties of the military conflict, as well as Belarus, which is not directly mentioned in the Pretrial Chamber-issued documents. Meanwhile, it has been involved in a military invasion through use of its territory by the Russian army. Moreover, there have been news broadcasts that might be used in court investigations.[424] Thus, the author's research includes an overview of legislation of all three countries, though on different scales. Sharing similar legal-system origins, the governments of the three nations are

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[423] ICJ, *Conclusion of the Public Hearings "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)"*, Press Release No. 2023/49, September 27, 2023, https://www.icj-cij.org/sites/default/files/case-related/182/182-20230927-pre-01-00-en.pdf (accessed December 19, 2023).

[424] 1. Anthony Deutsch, *Thousands of Ukrainian Children Taken to Belarus – Yale Research*, Reuters, November 17, 2023, https://www.reuters.com/world/europe/thousands-ukrainian-children-taken-belarus-yale-research-2023-11-16/ (accessed December 19, 2023); 2. Karolina Jeznach, Thomas Grove, *Ukrainian Children Brought to Camps in Belarus, Exposed to Pro-Kremlin Propaganda*, The Wall Street Journal, August 21, 2023, https://www.wsj.com/world/europe/ukrainian-children-brought-to-camps-in-belarus-exposed-to-pro-kremlin-propaganda-26be126 (accessed December19, 2023); 3. *Ukraine Updates: 2,400 Children Taken to Belarus – Report*, Deutsche Welle, November 17, 2023, https://www.dw.com/en/ukraine-updates-2400-children-taken-to-belarus-report/live-67450984 (accessed, December 19, 2023).

currently going through a highly hostile period, which influences people's ties and governments' rhetoric, policies and laws.

Being the last but not least part of the current monograph, this chapter anticipates a practical exercise of legal notions of international criminal law and shows respect for the authoritative power of the court and a proactive attitude for a very much needed popularization of the court's efforts in fighting impunity. The first part of this chapter is an overview of the factual circumstances in relation to the alleged forcible transfer of Ukrainian children to Russia and Belarus. In the second part, legal provisions of national and international law are being analysed to distinguish certain general principles of law[425] which might be derived from the national legal systems of the three countries. In the third part, both the legal framework (national and international) regarding the protection of the rights of children will be discussed, and its reflection in the jurisprudence of international tribunals. The fourth part is devoted to the jurisdiction of the ICC: 4.1, *ratione materiae* (Article 5), with special emphasis on the crime of genocide (Article 6[e]) and additional information on application of the Convention on Genocide, Article 2(e); 4.2, *ratione personae* (Article 25) in conjunction with the restrictions on immunity (Article 27, irrelevance of official capacity); and the notion of "official capacity" applied to the addresses of the warrant. In conclusion, the author summarizes the outcomes of the study on the presence of the jurisdiction of the ICC towards a nonstate party (or parties) of the Rome Statute in the case of the forcible transfer of children from Ukraine and provides some recommendations on how to look for the right classification of the facts within the scope of the court's jurisdiction.

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425 Supra note 29, Article 38, part 1(c).

Part 1. Facts constituting an alleged crime and crime qualification: What to choose, war crimes (Article 8[2][b][viii]), crimes against humanity (Article 7[1][d]) or genocide (Article 6[e]) of the Rome Statute?

To fully understand the events that have led to suspicions of internationally committed crimes in Ukraine, it is crucial to categorize them appropriately and conduct a thorough analysis of the facts. This involves examining the Russian invasion in light of the Rome Statute, which incorporates perspectives from humanitarian law and human rights law.[426] In August 2022, the minister of social policy of Ukraine, Oksana Zholnovych, appealed to the UN Committee on the Rights of the Child with a request for assistance in protecting the rights of Ukrainian children due to Russian aggression.[427] Around the same time, Peter Maurer, president of the International Committee of the Red Cross (ICRC), entered into an agreement[428] with the president of the Russian Federation to establish safe passage and expressed the need for the conflicting parties to facilitate the evacuation of civilians from the cities in which

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426 UN, *Experts of the Committee on the Rights of the Child Commend Ukraine on Its Commitment to Child Rights, Ask About the Mental Health of Children in Light of the War and the Evacuation of Children with Disabilities*, Press Release, August 31, 2023, https://www.ohchr.org/en/press-releases/2022/08/experts-committee-rights-child-commend-ukraine-its-commitment-child-rights (accessed December 19, 2023).

427 Supra note 426.

428 International Committee of the Red Cross, *The ICRC President Ends His Visit to Russia, the Purpose of Which Was to Discuss Humanitarian Issues Related to the Armed Conflict*, Press Release, March 24, 2022, https://www.icrc.org/ru/document/prezident-mkkk-zavershaet-vizit-v-rossiyu-celyu-kotorogo-bylo-obsuzhdenie-svyazannyh-s.

hostilities are taking place and asked to allow the importation of humanitarian aid. According to the official data, thousands of children were taken to Russia[429] from the territory of Ukraine by the Russian Red Cross[430] (RRC[431]).

Among open sources, there have been warnings and protests expressed by Ukrainian state authorities and civil society organizations against the transfer. One of the calls to cease that practice was made during the ongoing transfer of children by Oleksandr Pavlichenko, executive director of the Ukrainian Helsinki Human Rights Union, who pointed to the illegal removal of Ukrainian children to the territory of the Russian Federation by

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429 The Exact Number of Children in Need Cannot Be Established Due to the Active Fighting and the Temporary Occupation of Part of the Territory of Ukraine, Діти війны, December 17, 2023, https://childrenofwar.gov.ua/. The conclusion of an agreement by ICRC with the Russian Federation by Mr, Maurer, signed for the execution of "evacuations", can, in particular, be assessed as a violation of Article 24 of the Geneva Convention. When concluding and executing these agreements, RCC is obliged to act within the framework of its Charter. All RCC agreements, including the aforementioned agreement with the Russian Federation, must be considered from the point of view of the principles of international law and, in case of conflict with these norms, must be declared invalid. The transfer of Ukrainian children under an agreement with the RCC in this way can be considered as illegal.

430 1. Russian Red Cross, *The Russian Red Cross Provided Assistance to More Than 3,500 Children Who Arrived in the Voronezh and Rostov Regions from Ukraine and Donbass*, Press Release, May 20, 2022, https://www.redcross.ru/news/rossiyskiy-krasnyy-krest-okazal-pomoshch-bolee-3500-detey-pribyvshim-v-voronezhskuyu-i-rostovskuyu-o/ (accessed December 19, 2023); 2. Russian Red Cross, *About 3.5 Thousand Children from Donbass and Ukraine Received Help from the RKK*, Press Release, May 23, 2022, https://rapsinews.ru/incident_news/20220523/307966007.html (accessed December 19, 2023).

431 It should be noted in this regard that the RCC, as an NGO, under jurisdiction of Russia, following its own charter, is obliged to respect independence, the norms of the Vienna Convention, as well as other provisions of the charter. By violating these provisions, the Russian Red Cross (RCC) can not only be held responsible for its actions in the future (as a subject of international law), but also some of its representatives can be brought before the courts of their states for violating the provisions of the Vienna Convention.

the RRC in an interview.[432] In December 2022, the minister of foreign affairs of Ukraine, Dmitry Kuleba, called on the ICRC to help with the release of Ukrainian prisoners of war and stop the forced transfer of Ukrainian children to the Russian Federation.[433] The facts above, as well as additional information that children were allegedly transferred to Belarus, the country neighbouring the Russian Federation, raise the question of whether the facts may serve as a substantive element of an international crime, and which crime particularly. Moreover, the question to whom such crimes may be attributed is also relevant.[434]

The facts of allegedly forcibly transferring children of the group "Ukrainian children" to the Russian Federation from Ukrainian territory may allow enumerated reasons for the legal qualification of the following crimes, where substantive parts of the crimes also include the notion "object":

Article 6: Genocide – "forcibly transferring children of the group to another group",

Article 7: Crimes against humanity, part 2 (d) – "Deportation or forcible transfer of population",

Article 8: War crimes, part 2 (b), (viii) – "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory".

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[432] Interview with Olexandr Pavlichenko (executive director of the Ukrainian Helsinki Human Rights Union), https://www.youtube.com/watch?v=u3wJzloatzA (accessed December 19, 2023).

[433] Message from official X account of Dmytro Kuleba, Minister of Foreign Affairs of Ukraine, https://twitter.com/DmytroKuleba/status/1601529469126447105 (accessed December 19, 2023).

[434] Anthony Deutsch, Stephanie van den Berg, *Ukraine Investigating Role of Belarus in Transfers of Children, Prosecutor Says*, Reuters, May 23, 2023, https://www.reuters.com/world/europe/belarus-accused-role-transfers-ukrainian-children-2023-05-23/ (accessed December 19, 2023).

Strictly speaking, "children '' as a *lex specialis* object, is present in only one of the listed crimes, namely in Article 6 (genocide). Two other articles (crimes against humanity and war crimes) deal with a more general term – "population". Acting in accordance with the letter and spirit of the Rome Statute, and being on the safe side, one would choose Article 6 as the most relevant for the facts taking place in the territory of Ukraine with respect to children. Just a reminder that the Pretrial Chamber issued its warrant under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute, specifying the suspicions related to alleged war crimes involving the illegal deportation and transfer of the population, particularly children, from occupied areas of Ukraine to the Russian Federation.

Before the author considers the object, it is now the right moment to present a comparative analysis of the subjective element or certain state of mind (*mens rea*) of the crimes defined in all three articles, 6, 7 and 8, of the Rome Statute. Additionally, to the objective part it constitutes an obligatory element of any crime. For those who are seeking the correct match between the normative expression of a crime and the real facts, it is crucially important to understand what the content of the criminal intent in a specific crime is. The author will present parts of provisions of all three articles that refer to the subjective side of the criminalized acts.

- In the case of genocide, criminal *intent* is directed to "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such",
- The subjective side of the crime against humanity is the knowledge of a subject of the acts of the "widespread or systematic attack directed against any civilian population",
- And acts listed under war crimes are to be incriminated if committed as "grave breaches of the Geneva Conventions of 12 August 1948" (Part 2, a and b of Article 8) and "other serious violations of the law and custom applicable in international armed conflict, within the established framework of international law", namely, any of the following acts, including (viii): "The transfer, directly or indirectly, by the Occupying Power of

parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory".

As one may conclude, the object of the crime – children – and the intent of an alleged perpetrator – "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" has been precisely articulated and seemingly matching both elements of the genocide. Other crimes have more general objects (population) and implied subjective elements which highlight the scale and intensity of the deeds rather than focusing the specific aim of destroying a specific group.

There are some arguments which, in the author's opinion, well deserve to be considered by the ICC when preparing the warrant against officials of a non-party state that continues military intervention in the territory of a state that acknowledged the jurisdiction of the ICC. First, in spite of the fact that the protected group, "children", is not present in Article 8, War Crimes, "children" are part of the entire group "population," and this argument has been indirectly reflected in the applied wording, "population (children)". Secondly, war crime relies on the implied intent within the concept "committed as a part of a plan or policy or as a part of the large-scale commission of such crimes". Legal qualification within the war crime definition may ease the process of collecting evidence on the subjective element of the alleged criminal acts. Finally, the persistent usage of the wording "a special operation," "denazification," and "demilitarisation," defining the military intervention by the Russian government, when providing communications to the population and the entire world, needed a clear and precise response. The ICC warrant included legal terms articulating "war" as the true character of the actions of the government of the Russian Federation.

The right qualification of the committed activities is crucial for several reasons. Firstly, the legal qualification regulates whether third countries have jurisdiction over crimes committed which need to be established to hold the masterminds and heads of state responsible for the crimes that

were committed outside the Russian Federation (on Ukrainian territory) and outside Ukraine (on Russian and Belarusian territory).

Secondly, the legal qualification of these crimes as genocide[435], war crimes[436] or crimes against humanity[437] influences the statute of limitations which is applicable to the perpetrators for those crimes.[438] If the acts are classified as such there may be no time or territorial limitations on prosecuting the involved officials in the future.

Thirdly, it is important to qualify this specific crime due to evidence collection towards the involved individuals. Proving the criminal liability of the individuals who are physically removed from the actual commission of crimes requires a clear demonstration that the crimes were committed and evidence of the leaders' complicity.

From the analysis provided by Joanna Korner, proving the criminal liability of leaders, who are far removed from the actual commission of the crimes, requires both establishing that the crime has been committed and then establishing the involvement of those leaders.[439] In this regard the public statements of Russian officials placed emphasis on the organized and systematic nature of the deportations of Ukrainian children to Russia.[440] The

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435 Supra note 180, Article 2.

436 Supra note 16, Article 8.

437 Ibid., Article 7.

438 UN, General Assembly, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, New York, adopted by the General Assembly on November 26, 1968, entered into force on November 11, 1970.

439 Joanna Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, ICTJ/Brookings-LSE Project Internal Displacement, July 2012, p. 8, https://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Criminal-Justice-Yugoslavia-CaseStudy-2012-English.pdf (accessed April 19, 2024).

440 1. Yale School of Public Health, *Russia's Systematic Program for the Re-Education and Adoption of Ukrainian Children, a Conflict Observatory Report*, February 14, 2023, p. 5, https://hub.conflictobservatory.org/portal/sharing/rest/content/items/97f919ccfe524d31a241b53ca44076b8/data (accessed April 19, 2024); 2. Amnesty International, *Like a Prison Convoy. Russia's Unlawful Transfer and Abuse of Civilians in Ukraine During*

statement of Lvova-Belova, commissioner for children's rights under the president of the Russian Federation,[441] statements of Foreign Minister Sergei Lavrov[442] and other publicly known facts[443] show a clear link between the actions of the involved Russian and Belarusian state leaders and the forcible transfer of children. Those facts, represented by testimonies of witnesses and officials' statements, provide an impression of state actions committed by foreign authorities on Ukrainian ground. The qualification of the crime

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'*Filtration*', November 2022, https://amnestyfr.cdn.prismic.io/amnestyfr/5a606ecd-6bd4-40db-8e61-f49deef785f8_EUR+5061362022+-+EN+-+Forcible+Transfers+-+Embargoed+10+Nov+2022.pdf (accessed April 19, 2024).

441 Elena Yakovleva, *Maria Lvova-Belova: Families from Six Regions of the Russian Federation Will Take Custody of 108 Orphans from Donbass*, RG.ru, July 15, 2022, https://rg.ru/2022/07/15/mariia-lvova-belova-semi-iz-shesti-regionov-rf-vozmut-pod-opeku-108-detej-sirot-iz-donbassa.html (accessed December 19, 2023).

442 *More Than 1 mln People Evacuated from Ukraine to Russia Since Feb. 24, Says Lavrov*, Reuters, April 30, 2022, https://www.reuters.com/world/more-than-1-mln-people-evacuated-ukraine-russia-since-feb-24-says-lavrov-2022-04-30/ (accessed December 19, 2023).

443 1. *The Ministry of Defense Announced the Evacuation of Almost 310 Thousand Children from Ukraine to Russia*, RBC.ru, June 19, 2022, https://www.rbc.ru/rbcfreenews/62ae67af9a79473f8e0dbc1a (accessed December 19, 2023); 2. *The Russian Ministry of Defense Evacuated More Than 300 Thousand Children from Ukraine, DPR and LPR*, EurAsiaDaily, June 19, 2022, https://eadaily.com/ru/news/2022/06/19/minoborony-rossii-evakuirovalos-ukrainy-dnr-i-lnr-bolee-300-tysyach-detey (accessed December 19, 2023); 3. Olesya Bida, "*We Are Forced to Say Goodbye to Those Deported Children Who Have Already Been Adopted by the Russians*." *Interview with a Human Rights Defender*, Hromadske, December 28, 2022, https://hromadske.ua/en/posts/we-have-to-say-goodbye-to-deported-children-who-have-been-adopted-by-russians-interview-with-human-rights-activist (accessed December 19, 2023); 4. Kateryna Rashevska, *How Russia Is Destroying the Identity of Ukrainian Children*, PassBlue, December 26, 2022, https://www.passblue.com/2022/12/26/how-russia-is-destroying-the-identity-of-ukrainian-children/ (accessed December 19, 2023); 5. *Children's Ombudsman of Russia Adopted a Child Removed from Mariupo*, Donbass News, October 26, 2022, https://novosti.dn.ua/ru/news/335289-detskij-ombudsmen-rf-usynovila-rebenka-vyvezennogo-iz-mariupolya (accessed December 19, 2023); 6. *Belarus Linked to Forcible Transfer of Ukrainian Children: Study*, Al Jazeera, November 17, 2023, https://www.aljazeera.com/news/2023/11/17/belarus-linked-to-forcible-transfer-of-ukrainian-children-study (accessed December 19, 2023).

committed will thus definitely need more scrutiny and judges' future considerations. The author's approach is to examine the publicly available information and study the ICC documents and decisions concerning the procedural steps. The focus of this analysis remains the same – jurisdiction of the ICC towards situations that occurred in a territory of a state which has not ratified the Rome Statute but accepted the court's jurisdiction with respect to core international crimes within the scope of Article 5 of the Rome Statute.

When it comes to the legal qualification of the acts of the alleged transfer of children from Ukraine to Russia and Belarus, which took place and were objected to by the state to which the children belong (Ukraine), the author will present her considerations to better comprehend the relevant provisions of the Rome Statute and elements of the crimes. The author will consider some factual details which may prove objective or subjective elements of the crimes. For example, facts of re-educating Ukrainian children or placing them in Russian families in absence of any consent from their parents or the Ukrainian state. In the author's opinion, such conduct is subject to different provisions of international criminal law, mentioned above (war crimes, crimes against humanity and genocide). However, since children as a group are specifically indicated in Article 6(e) of the Rome Statute and Article 2(e) of the Genocide Convention as a protected group, and as the state actions could possibly qualify as forcible transfer in the meaning of Article 6(e) of the Rome Statute, The author sees those as the best match and will argue for defending the position that the chamber will reformulate its indictment to Article 6(e) of the Rome Statute. In this context, it is crucial to underscore that the Genocide Convention was ratified by all three states: Russia, Ukraine and Belarus (distinct statements from the Belarusian Republic concerning Article 2[e] are elaborated on in section 2.1 of this chapter).

Part 2. State of law: *Lex specialis* with respect to the protection of children

1. International and national (Russian, Ukrainian, Belarusian) legal frameworks on the protection of children's rights and criminalisation of acts violating those rights

For the purpose of substantive analysis, two categories of treaties have been invoked in this research: those within the realm of human rights, encompassing provisions pertinent to children, and specific clauses delineating children's rights within overarching concepts and conventions in the sphere of humanitarian law. All conventions subjected to scrutiny in this inquiry have been ratified by three sovereign states: Russia, Ukraine, and Belarus. Provisions pertaining to the rights of children are herein applied concomitantly with norms of humanitarian law and tenets of international criminal law. Given that the sources of applicable law for international criminal law extend beyond the confines of the Rome Statute, encompassing norms derived from international agreements, ultimately embracing fundamental precepts discerned in national statutes and practices, such norms and the corollary principles emanating from them shall be duly examined within the ambit of this research.

1.1. International framework (hard and soft law)

The rights of children in the situation of hostilities in Ukraine are governed by several international treaties that have been ratified by both Russia, Belarus and Ukraine, in relation to the protection of children's rights, including:

Table 4: International treaties ratified by both Russia, Belarus and Ukraine in relation to the protection of children's rights

N	Title of international treaty
1	Convention on the Rights of the Child[444]
2	International Convention on the Elimination of All Forms of Racial Discrimination[445]
3	Convention on the Prevention and Punishment of the Crime of Genocide[446] Article 24
4	International Covenant on Economic, Social and Cultural Rights[447]
5	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[448]
6	Optional Protocol (OP) to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict[449]
7	OP to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography[450]
8	Geneva Convention concerning the Treatment of Prisoners of War, 1949[451]
9	Geneva Convention for the Protection of Civilian Persons in Time of War, 1949[452]
10	Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I, 1978)[453]
11	Eurojust Regulation to allow Eurojust to collect, preserve and analyse evidence related to core international crimes, European Commission, April 2022

Moreover, other legal sources, including the nonbinding instruments that provide standards for states to follow, also apply in regard to children in the circumstances of armed conflicts as such:

444 UN, General Assembly, *Convention on the Rights of the Child*, November 20, 1989.

445 UN, General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, November 20, 1963.

446 Supra note 180.

447 UN, General Assembly, *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 UNTS 3.

448 Supra note 182.

449 UN, General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, May 25, 2000.

450 UN, General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, May 25, 2000.

451 Supra note 189.

452 Supra note 190.

453 Supra note 191.

Table 5: Examples of other legal sources, including the nonbinding instruments, providing standards for states to follow

N	Legal sources, including nonbinding instruments
1	Security Council Resolution 1539 (2004, Children and armed conflict)[454]
2	UN Declaration on the Protection of Women and Children in Emergencies and in Armed Conflict[455]
3	Children and Armed Conflict Resolution (Security Council Resolution 1612, 2005)[456]
4	Paris Commitments on the Protection of Children from Illicit Recruitment or Use by Armed Forces or Armed Groups, 2007[457]
5	Principles and Guidelines for Children Associated with Armed Forces or Armed Groups, 2007[458]
6	Report of the Special Representative of the Secretary-General for Children and Armed Conflict, item 68 (a) of the provisional agenda of the 2007 UN General Assembly (A/62/228)[459]
7	UN Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules")[460]
8	"Will You Listen?" Voices of youth from conflict zones prepared in 2007 by the UNICEF secretary-general for children and armed conflict, UNICEF[461] and others

454 UN Security Council, *On Children in Armed Conflict*, S/RES/1539, April 22, 2004.

455 UN, General Assembly, *Declaration on the Protection of Women and Children in Emergencies and in Times of Armed Conflict*, A/RES/3318(XXIX), December 14, 1974.

456 UN Security Council, *On Children in Armed Conflict*, S/RES/1612, June 26, 2005.

457 EU Agenda, *EU Guidelines on Children and Armed Conflict: Children and Armed Conflict*, (2008), https://euagenda.eu/upload/publications/untitled-188090-ea.pdf (accessed December 19, 2023).

458 International Committee of Red Cross, *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups*, https://www.icrc.org › download › file › guiding (accessed December 19, 2023).

459 UN, General Assembly, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, item 68 (a) of the provisional agenda of the 2007, A/62/228, August 13, 2007.

460 UN, General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, A/RES/40/33, November 29, 1985.

461 UNICEF, *Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World*, April 2009, https://childrenandarmedconflict.un.org/publications/MachelStudy-10YearStrategicReview_en.pdf (accessed December 19, 2023).

1.2. National legal framework (Russia, Ukraine and Belarus)

Recognition of international obligations

Ratified international treaties, both Russia, Belarus and Ukraine regulating children's rights as a rule prevail above the national laws in their national legal systems. However, there are also some peculiarities.

Russia

According to part 4 of Article 15 of the Constitution of the Russian Federation,[462] generally recognized principles and norms of international law and international treaties of Russia are included in its legal system. At the same time, international treaties ratified by the Russian Federation are recognised as having a higher legal force than national laws.[463]

Belarus

Belarus, in its constitution, shares the idea in recognizing the supremacy of international treaties and principles of international law in its legal system.[464] The specific Belarusian legal provisions may vary but the overarching principle is to assign international law a prominent place in the national legal framework.[465]

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462 *The Constitution of the Russian Federation*, adopted at national voting on December 12, 1993, Article 15.

463 Supra note 462.

464 *The Constitution of the Republic of Belarus of 1994*, adopted at the republican referenda of November 24, 1996, of October 17, 2004 and February 27, 2022, Article 8.

465 *Law of the Republic of Belarus No. 2570-XII "On the Rights of the Child"*, November 19, 1993, https://www.refworld.org/legal/legislation/natlegbod/1993/en/73756 (accessed December 19, 2023). Article 38: "If an international treaty of the Republic of Belarus establishes rules other than those provided for by this Law, then the rules of the international treaty apply."

Ukraine

Article 8 of the Constitution of Ukraine recognizes the obligatory principle of the rule of law, but no other principles have been mentioned as sources of international obligations.[466] Meanwhile, in accordance with Article 9, international treaties are part of the national legislation of Ukraine only if they are in force and agreed to be binding by the parliament of Ukraine. Moreover, the conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the constitution. Article 17 of the Law on International Treaties of Ukraine defines the validity of international treaties of Ukraine on its territory.[467]

From the previous, it can be concluded that the national legal systems of the three countries recognize treaties as causing international obligations. Some laws point to their prevalence above their own national laws.

Protection of children's rights

Russia

In Russia, the federal law On the Basic Guarantees of the Rights of the Child in the Russian Federation[468] and the federal law On the Protection of the

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466 *The Constitution of Ukraine*, adopted at the Fifth Session of the Verkhovna Rada of Ukraine, June 28, 1996, https://rm.coe.int/constitution-of-ukraine/168071f58b (accessed December 19, 2023). Article 8: "The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and must comply with it."

467 *Law of Ukraine "On International Treaties of Ukraine"*, adopted June 29, 2004. Article 17: "If an international treaty of Ukraine, which was concluded in the form of a law, establishes other rules than those provided for by the legislation of Ukraine, then the rules of the international treaty of Ukraine shall apply."

468 *Federal Law of the Russian Federation "On the Basic Guarantees of the Rights of the Child in the Russian Federation"*, July 24, 1998, No. 124, as amended on December 27, 2018, https://www.consultant.ru/document/cons_doc_LAW_19558/ (accessed December 19, 2023).

Population and Territories from Natural and Technogenic Emergencies[469] emphasize the importance of international law in protecting children's rights.[470] Moreover, the Law on Basic Guarantees of the Rights of the Child of the Russian Federation (Article 4, para. 2)[471] provides guaranties of the best interests of children. Additionally, the Russian Family Code grants a parent living separately from the child the right to communicate with and participate in the child's upbringing.[472]

Belarus

The Belarusian Law on the Rights of the Child shows a comparable approach. It establishes the right of children to live in a family and receive care from their own parents.[473] Moreover, a Belarusian legislator specifically included a special provision on the protection of a child from forced displacement.[474]

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469 *Federal Law of the Russian Federation "On the Protection of the Population and Territories from Natural and Man-Made Emergencies"*, December 21, 1994, Article 29, https://faolex.fao.org/docs/pdf/rus40565.pdf (accessed December 19, 2023).

470 Supra note 469, Article 6.

471 Ibid., Article 4: "State policy in the interests of children is a priority and is based on the following principles: legislative provision of the rights of the child; family support in order to provide education, upbringing, recreation and health improvement of children, protection of their rights, preparing them for a full life in society; responsibility of legal entities, officials, citizens for violating the rights and legitimate interests of the child, causing harm to him."

472 *Family Code of the Russian Federation*, December 29, 1995, N 223-FZ, as amended on 28 April 2023, Article 66.

473 Supra note 466. Article 15: "Every child has the right to live in a family, to know both of his parents, the right to their care, to live together with them, except in cases where separation from one or both parents is necessary in the interests of the child."

474 Ibid., Article 37: "The state takes measures against the illegal movement and non-return of children from abroad, their abduction, and trafficking in children for any purpose and form in accordance with the legislation."

Regarding orphan children who are staying on Belarusian territory, the Belarusian legislator grants those children Belarusian nationality. From the text of the provision it is not a choice but a matter of fact that an orphan child receives Belarusian nationality once he or she is on Belarusian territory.[475] From one side this provision can be an expression of the positive obligation of the state to care for orphan children. On the other hand, in the case of Ukrainian forcibly displaced children, this provision might violate several provisions of international treaties, such as "right to acquire a nationality", guaranteed under Article 7 of the Convention of the Protection of the Rights of a Child. This legislative collusion thus might cause difficulties with regards to the nationality of Ukrainian children. Based on Article 4 of the Constitution of Ukraine and Article 4 of its Law on Nationality, Ukraine is governed by a single nationality principle and children might lose Ukrainian nationality in some circumstances while staying on the territory of Belarus.

Ukraine

Firstly, the Law on Child Protection in Ukraine, as all national legislation, recognizes the supremacy of international treaties for the protection of children's rights.[476] Secondly, the Law of Ukraine on Child Protection (Article 1) provides the definition of child abuse as "a form of physical, psychological, sexual or economic abuse of a child, as well as any illegal transactions in relation to a child, in particular recruitment, transfer, concealment, transfer or receipt of a child for the purpose of exploitation through deception, blackmail or vulnerability of the child".[477] Article 14 of the same law addresses the

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475 *Law on the Citizenship of the Republic of Belarus*, 136-3, August 1, 2002, https://kodeksy-bel.com/zakon_rb_o_grazhdanstve.htm (accessed December 19, 2023), Article 12.

476 *Law of Ukraine "On Child Protection"*, Verkhovna Rada of Ukraine, No. 30, 2001, Articles 2 and 4, https://zakon.rada.gov.ua/laws/show/2402-14#Text (accessed December 19, 2023).

477 Ibid., Article 1.

separation of a child from their family and emphasizes that such separation should only occur if it is in the best interest of the child and based on a court decision that has legal force. This provision reflects the principle ensuring that the well-being and best interests of the child are the primary consideration in any decision regarding their separation from the family and is comparable to similar provisions of the Belarusian and Russian legal systems. In several other provisions of the Law of Ukraine on Child Protection (chapter 5 of the Law of Ukraine on Child Protection), the responsibility of the Ukrainian state is addressed in providing for the maintenance, upbringing and support of orphans, children deprived of parental care and homeless children. Also, the responsibility of the state in regard to children in a war zone (as Article 31 of the Law on Child Protection of Ukraine states: "children, who require additional or temporary protection"[478]) is regulated by this law, which clearly emphasizes the obligation of the Ukrainian state to protect and care for children who lack parental support or are in vulnerable situations on the territory of the state.

Displacement/unlawful adoptions of children in national laws

Russia

Under the legal provision of Article 126 in the Criminal Code of the Russian Federation,[479] the offense of kidnapping is penalized.[480] Notably, the

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478 Ibid., Article 31.

479 Criminal Code of the Russian Federation, No. 63-FZ, June 13, 1996, Article 126, https://www.legal-tools.org/doc/8eed35/pdf (accessed December 19, 2023).

480 *Review of Judicial Practice of the Supreme Court of the Russian Federation for the Second Quarter of 2000*, Bulletin of the Supreme Court of the Russian Federation, 2001, N 1, http://xn--b1azaj.xn--p1ai/2000/obzor-sudebnoy-praktiki-vs-rf/2000.10.04.html (accessed December 19, 2023). The act of kidnapping has been interpreted by the Presidium of the Supreme Court of the Russian Federation as "an illegal intentional action associated with the secret or open possession (capture) of a living person, moving him from a permanent or temporary location to another place and subsequent retention in

abduction of a minor and/or a group, as delineated in Article 126, paragraph 2, subsection d, is considered as an aggravating circumstance warranting more severe punishment.[481] Furthermore, in 2023 Article 154 of the Criminal Code of the Russian Federation criminalized unauthorized adoption by Russian authorities.[482] From the legal perspective outlined in the national framework of the Russian Federation, it is evident that the Russian legislature unequivocally denounces the act of forcibly transferring a child. Ensuring the protection of these principles and rights originating from them, within the context of hostilities, is crucial according to the legislation of Russia, Belarus and Ukraine. The Russian Law on Emergency Situations (Articles 28 and 39) guarantees the possibility of humanitarian assistance in accordance with international treaties ratified by the Russian Federation. It emphasizes that limitations on human rights will only occur in alignment with Russia`s international obligations based on ratified treaties.[483]

Belarus

The Belarusian Criminal Code, as stipulated in its Article 182, describes kidnapping as an act involving "secrecy, openness, deception, or abuse of trust," coupled with non-life-threatening violence against the victim, or the threat thereof or coercion in various forms resulting in the unlawful seizure of an individual and their relocation to another location. In a manner akin to the Russian legal stance, perpetrating such an act in relation to a minor

captivity. The main point of the objective side of this crime is the capture of the victim from his location and movement for the purpose of subsequent detention in another place."

481 Supra note 479, Criminal Code of the Russian Federation, Article 152.

482 Ibid., Article 154.

483 *Federal Constitutional Law of the Russian Federation "On a State of Emergency"*, N 3-FKZ, May 30, 2001, amended on November 2, 2023, https://www.consultant.ru/document/cons_doc_LAW_31866/ (accessed December 19, 2023).

is viewed as an aggravating factor, leading to a more stringent penalty of up to 15 years of imprisonment.

Ukraine

In its legal provision of the criminal code (Article 146), Ukraine criminalises and penalizes kidnapping while increasing the punishment for the kidnapping of children. Also, unlawful adoptions are penalized by Ukrainian legislation (Article 169, Criminal Code of Ukraine).

It can be concluded that all three legal systems, firstly, in general agree on the principles of the priority of children's rights described in the international conventions which are echoed in national laws and, secondly, all three countries agree to protect those rights based on the principles proclaimed by the conventions. In the context of the involuntary relocation of Ukrainian children from Ukrainian territory, it is crucial to evaluate whether there is a violation of national legal provisions and universally accepted principles applicable to all states. If children are being transferred without proper legal ground and without approval of their parents or authorities, and thus in violation of their best interests, it would constitute a breach of these legal provisions and consequently a violation of the rights of the children involved.

Do both nations comprehend which actions may jeopardize children's rights and run counter to safeguarding those rights, rather than upholding them? In the next paragraph specific principles will be distinguished to align them with current actions in this regard performed by the authorities involved.

1.3. Interpretation of the general principles of children's rights' protection by Russia, Belarus and Ukraine

Based on the national legal provisions in relation to the international obligations arising from different sources of international law, several essential general principles can be identified whereby Ukraine, Russia and Belarus

seem to agree in relation to the protection of children's rights. Those principles relevant in the hostilities in Ukraine are:

1. Non-discrimination of a child, regardless of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, health and birth of the child, parents or legal guardians, or any other circumstances. Both Russia, Belarus and Ukraine affirm the principle of non-discrimination, emphasizing that all children should be treated equally and without discrimination of any kind, irrespective of the child's or their parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Moreover, this principle is enshrined in Article 2 of the Convention on the Rights of the Child.
2. Protection of the child from all forms of discrimination or punishment based on the status, activities, views or beliefs expressed by the child, the child's parents, legal guardians or other family members, taking into account the rights and obligations of his parents, guardians or other persons legally responsible for him and to this end take all appropriate legislative and administrative measures. Both Russia and Ukraine developed laws and regulations that explicitly prohibit child abuse, including physical, psychological, sexual or economic abuse, condemning the exploitation of children for any purpose, such as child trafficking or forced labour.
3. Criminalisation of all forms of repression and cruel and inhumane treatment of women and children, including imprisonment, torture, executions, mass arrests, collective punishment, destruction of homes and forcible expulsion from their homes, committed by belligerents during military operations or in occupied territories.
4. Priority of the best interests of the child in all actions concerning children by public or private welfare agencies. Ukraine, Russia and Belarus recognize the principle that the best interests of the child must be the primary consideration in all decisions and actions concerning children.

5. Respect for the responsibility, rights and obligations of parents legally responsible for the child. Russia, Belarus and Ukraine acknowledge the importance of family support in providing education, upbringing, recreation and health improvement of children and recognize the rights and responsibilities of parents or legal guardians in raising and caring for their children.
6. Ensuring the survival and healthy development of the child. The legal systems of Ukraine, Russia and Belarus establish the responsibility of the state in protecting the rights of children, especially in cases where children lack parental care, are orphans or are in vulnerable situations.
7. Recognition and protection of the right to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by one's parents in all legal systems – Ukraine,[484] Russia[485] and Belarus.[486]

Ensuring the protection of these principles and rights originating from them, within the context of hostilities is crucial according to the legislation of Russia, Belarus and Ukraine. The Russian Law on Emergency Situations (Articles 28 and 39) guarantees the possibility of humanitarian assistance in accordance with international treaties ratified by the Russian Federation. It emphasizes that limitations on human rights will only occur in alignment with Russia's international obligations based on ratified treaties.[487] In Ukraine, the legislator explicitly states that restrictions on constitutional

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[484] The right to a name is guaranteed under Article 294 of the Civil Code of Ukraine. Constitution of Ukraine protects individuals from being deprived of their citizenship (Article 25). Law on Child Protection regulates the separation of a child from the family and emphasizes that such separation should occur only in the best interests of the child.

[485] Supra note 462, the right to a name is protected under Article 20 of the Constitution of the Russian Federation. Russian legal framework, including the Family Code of the Russian Federation, recognizes the rights and responsibilities of parents in the upbringing and care of their children.

[486] Supra note 465, Articles 7, 15, 20.

[487] Supra note 483, Article 28, sub 1.

rights and freedoms during a state of emergency are exhaustive and not subject to broad interpretation.[488]Article 24 of the Ukrainian Law on Emergencies[489] specifies certain rights that cannot be limited, including the prohibition of torture and cruel or degrading treatment or punishment. It also underscores the protection of rights in line with international agreements. Belarusian legislation on emergency situations similarly references treaty obligations when implementing measures related to humanitarian aid during a declared state of emergency.[490] Any violation of the above-mentioned provisions is to be addressed according to both domestic and international laws to protect the well-being and rights of the children involved.

While obviously all mentioned legal systems acknowledge the importance of protecting children's rights and recognize the general principles outlined in international and national laws, the de facto situation with respect to children's transfer, subsequent adoption of transferred children, trying to re-educate them.[491] making them a part of Russian families,[492] broadening the scope of unfriendly states on the matter of the irreversible adoption of

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488 *Law of Ukraine, About the Legal Regime of the State of Emergency*, Verkhovna Rada of Ukraine, No. 1550-III, April 16, 2000, Article 22, https://zakon.rada.gov.ua/laws/show/1550-14#Text (accessed December 19, 2023).

489 Ibid., Article 24.

490 *Law of the Republic of Belarus "On a State of Emergency"*, No. 117-Z, June 24, 2002, Article 23, https://kodeksy-bel.com/zakon_rb_o_chrezvychajnom_polozhenii.htm (accessed December 19, 2023).

491 Yale School of Public Health, Russia's Systematic Program for the Re-Education and Adoption of Ukrainian Children, a Conflict Observatory Report, February 14, 2023, https://hub.conflictobservatory.org/portal/sharing/rest/content/items/97f919ccfe524d31a241b53ca44076b8/data (accessed December 19, 2023).

492 Sarah El Deeb, Anastasiia Shvets, Elizaveta Tilna, *How Moscow Grabs Ukrainian Kids and Makes Them Russians*, AP News, March 17, 2023, https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6 (accessed December 19, 2023).

"Russian" children by amending the existing Dima Yakovlev Law,[493] which needs to be reviewed in compliance with those principles.

As analysed in the chapter 1 of the monograph, fulfilment of international obligations has to be performed in good faith.[494] With respect to obligations related to protection of the rights of children, states' activities shall be even more accurate. Facts of the withdrawal of Minsk Convention[495] and other international agreements by both Ukraine and Russia and consequences of such acts with respect to children's guarantees need to be examined in the light of the principle of good faith.[496] The withdrawal of Russia from the convection eliminated obligations to communicate to the former state party – Ukraine – about the pending interstate "adoptions"/transfers.[497]

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493 *Russian Lawmakers Eye Ban on 'Unfriendly Countries' Adopting Russian Children*, Reuters, August 1, 2022, https://www.reuters.com/world/russian-lawmakers-propose-ban-citizens-unfriendly-countries-adopting-russian-2022-08-01/ (accessed December 19, 2023).

494 Supra note 95, Article 26.

495 *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters* ("Minsk Convention"), concluded in Minsk, Belarus, 22 January 1993, as amended on 28 March 1997, entered into force on 19 May 1994, for the Russian Federation on 10 December 1994, http://cisarbitration.com/wp-content/uploads/2017/02/Minsk-Convention-on-Legal-Assistance-and-Legal-Relations-in-Civil-Family-and-Criminal-Matters-english.pdf (accessed December 19, 2023).

496 Supra note 95, Article 26. The concept is a crucial element of the *pacta sunt servanda*, as it implies that states should act in good faith when entering into and performing their obligations under a treaty stands as a generally recognized principle of international law with multifaceted meanings and functions. Moreover, it is also a way of interpreting treaties regulated by the Article 31 of the Vienna Convention on the Law of Treaties. See: Liudmila Ulyashyna, "The Meaning and Role of the Pacta Sunt Servanda Principle in International Law in Defining the Challenges to the Legitimacy of Peace and War", *Public Security and Public Order*, 32 (2023), p. 105–118.

497 According to the legislation of the Russian Federation, the adoption of Ukrainian children by Russians was impossible until May 2022 (it was not provided by the Family Code of the Russian Federation [Article 165]). According to the Minsk Convention (Protocol on the Results of Consultations of the Trilateral Contact Group, 8 September 2014), which continued to operate between Ukraine and the Russian Federation for humanitarian reasons, it was necessary to obtain permission for adoption from Ukraine. Despite

Ukraine, in its turn, after withdrawal from the Minsk Convention in December 2022,[498] still did not impose a moratorium on international adoptions from its side, though on July 1, 2022, international organizations called on Ukraine to do so.[499] The active participation of Belarusian authorities in the involuntary transfer of children from Ukraine is inconsistent with the principle of the good faith obligations of a state.

Indeed, while Ukraine, Russia and Belarus may agree in principle on the importance of protecting children's rights, the application of these principles in good faith may differ and depend on a country's sovereign/political will and its comprehension of the meaning of "interests of children." The assessment provided in this research involves weighing the priority given to a child's right to know their parents and be cared for by their parents in their usual environment, alongside the rights of children to preserve their nationality and identity. This evaluation is set against the positive obligation of a responsible state to rescue children from a war zone. The forcible transfer of these children and the alteration of their legal status is a complex situation which necessitates an evaluation from the perspective of international criminal law.

1.4. Protection of children's rights as jus cogens

The legal protection of children's rights seems to be self-evident today. However, it is quite a recent phenomenon in law. Only less than 100 years ago

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this agreement, from 23 April 2022 Ukrainian children began to be transferred by Russian authorities to Russian families on the territory of the Russian Federation (allegedly the process of "temporary guardianship", which is not adoption de jure).

498 Law of Ukraine on Suspension and Withdrawal from the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, December 5, 2022.

499 The Alliance for Child Protection in Humanitarian Action, *Universal Call for a Moratorium on Intercountry Adoption in Response to the Conflict in Ukraine*, July 1, 2022, https://resourcecentre.savethechildren.net/pdf/Moratorium-on-Intercountry-adoption-and-surrogacy_FINAL.pdf/ (accessed December 19, 2023).

the legal basis for the protection of children's rights began to emerge. The Geneva Declaration on the Rights of the Child, adopted in 1924, as first declared that all people owe children certain rights.[500] Later, in 1946, Article 25 of the Universal Declaration of Human Rights stated that mothers and children were recognized as legal subjects with the rights for "special care and assistance" and "social protection". In 1959 the Declaration of the Rights of the Child[501] was adopted by the UN General Assembly, which recognized, among other rights, children's rights to education, play, a supportive environment and health care. Six years later, in 1966, in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, UN member states established equal rights (including education and protection) for all children. These international instruments laid the foundation for the development of a comprehensive framework for the protection and promotion of children's rights. Since then, many additional conventions[502] have been established, such as the Convention on the Rights of the Child, in 1989,[503] which is the most widely ratified human rights treaty in history.

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[500] Rights to: means for their development; special help in times of need; priority for relief; economic freedom and protection from exploitation; and an upbringing that instills social consciousness and duty. After the Second World War UNICEF (1946) was established and the United Nations General Assembly passed the Universal Declaration of Human Rights.

[501] UN General Assembly, *Declaration of the Rights of the Child*, A/RES/1386(XIV), November 20, 1959.

[502] *Hague Convention on the Civil Aspects of International Child Abduction*, October 25, 1980; *Hague Adoption Convention*, 29 May 1993; *Paris Principles and Paris Commitments on Recruitment and Use of Children in Hostilities*, April 2007.

[503] Supra note 444; The Convention on the Rights of the Child was adopted in 1989 by the United Nations General Assembly recognizing the role of children as social, economic, political, civil and cultural actors, setting minimum standards for protecting the rights of children in all capacities and recognizing UNICEF by this convention as an expert on the matter of children rights.

Moreover, to prevent the abuse and exploitation of children worldwide, the UN General Assembly adopted two optional protocols to the Convention on the Rights of the Child in 2000.[504] Most recently, a third optional protocol was adopted in 2011[505] and entered in force in 2014, allowing children to bring complaints directly to the Committee on the Rights of the Child that investigate the claims and can direct governments to act.

The legislation of states is obviously aligning with the global legal movement to safeguard the rights of children. As highlighted in section 1.3., the national legal frameworks of Russia, Belarus and Ukraine also acknowledge identical principles in the realm of child protection. This alignment reflects a widespread commitment to upholding these rights and underscores their status as peremptory norms in international law, particularly considering the recent definition outlined by the International Law Commission (ILC) in its report.[506] Chapter 4 of the ILC report details the methods for identifying[507] the norms of jus cogens and elucidates the legal ramifications of conflicts between peremptory norms and other sources of international law,

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504 Supra note 450 and supra note 451.

505 UN, General Assembly, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, New York, December 19, 2011.

506 ILC, Report of the International Law Commission, 73rd Session (18 April–3 June and 4 July–5 August 2022), A/77/10, p. 108–187, https://legal.un.org/ilc/reports/2022/.

507 Ibid., in conclusion 3 of the report ILC provides on the definition of a peremptory norm of general international law (jus cogens): "A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In conclusion 4 the ILC gives guidance how to identify the norm of jus cogens: "To identify a peremptory norm of general international law (jus cogens), it is necessary to establish that the norm in question meets the following criteria: (a) it is a norm of general international law; and (b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

thereby illuminating their scope and nature.[508] The ILC characterizes such norms as those acknowledged and accepted by the international community of states as a whole – with no room for derogation. These norms are subject only to modification by a subsequent norm of general international law possessing the same character.[509] Additionally, the ILC offers guidance on recognizing these norms through state actions or legislation.[510]

The evident alignment of legal national frameworks in Russia, Belarus and Ukraine with global principles stipulated in international treaties and by the ILC, in its report, underscores a widespread commitment to upholding children's rights. This recognition reinforces their status as peremptory norms in international law (jus cogens), emphasizing their non-derogable nature. On the other hand, a breach of these norms according to the report of the ILC "is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation".[511] A breach of jus cogens must be regarded as an unlawful act in terms of international law, which – in the

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[508] Ibid., in conclusion 10 of the report the following consequence of the conflict between the peremptory norm and jus cogens is outlined; "Treaties conflicting with a peremptory norm of general international law (jus cogens) 1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (jus cogens). The provisions of such a treaty have no legal force." 2. Ibid., Subject to paragraph 2 of draft conclusion 11, if a new peremptory norm of general international law (jus cogens) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty."

[509] Ibid., p. 37, according to the ILC: "The norm in question must be accepted and recognized as one from which no derogation is permitted, and which can be modified only by a subsequent norm having the same character."

[510] Ibid., conclusion 8, Evidence of Acceptance and Recognition. The ILC states that "forms of evidence include but are not limited to: public statements made on behalf of states, official publications, government legal opinions, diplomatic correspondence, constitutional provisions, legislative and administrative acts, decisions of national courts, treaty provisions, resolutions adopted by an international organization or at an intergovernmental conference, and other conduct of states."

[511] Ibid., conclusion 19.

case of the forcible transfer of Ukrainian children – necessitates legal qualification based on the existing legal framework of international treaties. In this regard the provisions of Article 2(e) of the Convention and Article 6(e) of the Rome Statute might be highly relevant for qualification of the committed actions towards the Ukrainian children. It is justifiable to scrutinize both clauses, despite having identical content, due to their distinct origins. The Convention will be analysed given its high relevance to the alleged transfer of children and its extensive application history in tribunals. Article 6(e) of Rome Statute will be applied for a comparative analysis of both instruments.

2. Understanding genocide as the crime of crimes in hard and soft law

In light of the Convention, prior to qualifying the unlawful displacement of Ukrainian children as allegedly carried out by Russian authorities during the Russian aggression on Ukrainian territory, it is essential to establish the definition of genocide as a concept in law in consideration of its application today.

The word *genocide* was initially introduced by Raphael Lemkin,[512] who was born in Belarus and studied in Lviv (Ukraine), a lawyer with Jewish roots. It reminds humanity of the horrors of the Holocaust and World War II, where millions of people were killed in a highly organized manner. Since then some legal systems may have adopted a broader definition of genocide,

[512] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace (1944), p. 79.

which differs from the one in international law.[513] In a UN resolution originating from 1946,[514] genocide was described as

> denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

In 1948, this statement was echoed in the Convention on the Prevention and Punishment of the Crime of Genocide, when the UN adopted the Convention, which classified genocide as a crime under international law and incorporated many of Lemkin's ideas.[515] This Convention was ratified by both Russia, Belarus and Ukraine, and its provisions can be applied in the situation of Russian aggression today. The Convention has already found practical application in various cases, including the ongoing situation in Ukraine. The ratification of the Convention by both Russia and Ukraine

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513 *Case of Bosnian Serb Nikola Jorgić*, Federal Constitutional Court, 4th Chamber of the Second Senate, 2 BvR 1290/99, Rn. 1–49, December 12, 2000, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2000/12/rk20001212_2bvr129099.html (accessed April 19, 2024); *Prosecution v. Nikola Jorgić*, Oberlandesgericht Düsseldorf, Judgement of 26 September 1997, Case No. 2 StE 8/96, https://www.asser.nl/upload/documents/20120611T032446-Jorgic_Urteil_26-9-1997.pdf (accessed December 19, 2023).

514 UN, General Assembly, *The Crime of Genocide*, A/RES/96, December 11, 1946.

515 Farid Samir Benavides-Vanegas, "The Elimination of Political Groups Under International Law and the Constitution of Political Claims", *Florida Journal of International Law*, 15(4) (2003), Article 4, p. 588, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1436&context=fjil (accessed December 19, 2023). Lemkin suggested offering protection for political groups too, but this suggestion was not accepted by the Russian authorities.

became the legal basis for the International Court of Justice (ICJ) to invoke Article 9 in April 2022. This allowed the submission of a dispute by Ukraine regarding the interpretation, application and implementation of the treaty before the court, coinciding with the commencement of Russian and allegedly Belarusian aggression. Although Belarus was not initially mentioned in the proceedings, the concept of co-aggressorship involving this country gained subsequent attention from various sources.[516] In the case before the ICJ between Russia and Ukraine, the court invoked the Convention only to exercise its jurisdiction. In its decision the court did not express any opinion on the material part of any provision of the Convention. In its ruling on March 16, 2022, the court, following the requests of Ukraine, ruled for the immediate cessation of all military operations initiated by Russia on the territory of Ukraine.[517] Also, the court ordered Russia to ensure that all irregular armed units that it directs or supports (the Russian separatists) must cease their contributions to these military operations. These two measures of the court were adopted by 13 votes in favour and 2 against (Russian and Chinese judges voted against). The court unanimously adopted a third measure, stating that both parties must refrain from any action that could aggravate or expand the dispute.

The above-mentioned example of the application of the Convention by the ICJ within the international legal framework is a clear statement of the legal society towards justice for the Ukrainian nation. Unfortunately, in its ruling the court didn't follow the request of Ukraine on the need

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516 Niels Blokker, Nico Schrijver, "Kroniek internationaal publiekrecht", *Nederlands Juristenblad*, 951 (2022), p. 1161–1173, https://www.inview.nl/document/ide065bc07cb744f6494fb9fb612f6e8f9/nederlands-juristenblad-kroniek-internationaal-publiekrecht?ctx=WKNL_CSL_85&tab=tekst (accessed December 19, 2023).

517 ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Press Release No. 2022/11, March 16, 2022, https://www.icj-cij.org/public/files/case-related/182/182-20220316-PRE-01-00-EN.pdf (accessed December 19, 2023).

for the periodical report, while in its later ruling the court did so in regards to the Myanmar case,[518] based on the same provisions of the Convention.

In a broader context, recent legal proceedings related to the Convention highlight the importance of global cooperation in preventing genocide. Currently, the legal framework established by the Convention already acts as a guiding force for the Ukrainian nation affected by mass atrocities, underscoring the international community's commitment to upholding the principles of justice, human rights and the prevention of genocide in the Ukrainian case. Below, under 2.1 and 2.2, two specific provisions of the Rome Statute and the Genocide Convention will be analysed in parallel. The method will help to understand the background of both provisions and their eligibility in the case of the forcible transfer of Ukrainian children.

2.1. Article 2(e) of the Convention: Forcible transfer of children

This section starts with a poem written by Carol Kendall, a devoted advocate of the "Stolen Generations" movement in Australia.[519] In her poem she conveys her personal narrative, with a central message emphasizing the significance of safeguarding children from forced displacement.

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518 *Gambia v. Myanmar*, ICJ Judgement, July 22, 2022, https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-jud-01-00-en.pdf (accessed December 19, 2023).

519 *The Stolen Generations: The Forcible Removal of First Nations Children from Their Families*, Australians Together, December 4, 2021, https://australianstogether.org.au/discover-and-learn/our-history/stolen-generations/ (accessed December 19, 2023).

Kooris come in all colours *by Carol Kendall*	
I know I'm a Koori I've learned from my kin but sometimes I'm questioned on the colour of my skin. I'm questioned on this by both black and white my culture and identity are my legal right.	My Aboriginality I've searched for, so long but doubts of others make it hard to belong. If you wouldn't make judgements on just what you see then maybe by chance you'll see the real me.

Carol Kendall was praised by the deputy leader of the Australian Democrats for her impactful work in addressing the plight of Aboriginals of the stolen generation. Her efforts have been hailed as "the power of one" in order to recognise the illegal removal of aboriginal children from their own families.[520] Taken from her mother as a child to be adopted by an Australian couple, she herself discovered her aboriginal heritage during her teenage years. After a 15-year separation she was reunited with her birth mother. Devoting her entire life to the national inquiry on the "stolen generations", Carol served as the first cochair of the Sorry Day Committee. She provided an important contribution to the creation of the "Bringing Them Home Report: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families," which served as inspiration for Kurt Mundorff, professor of political science, whose work is of high importance for the understanding of the reading of Article 2(e) of the Convention today. As a researcher he was inspired by the publication of the Bringing them Home Report (cited above).[521] In his work, Mudorff

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[520] Senator Rindgeway (Deputy Leader of the Australian Democrats), *Matters of Public Interest*, Parliament of Australia, February 13, 2002, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansards/2002-02-13/0045%22 (accessed December 19, 2023).

[521] *Bringing Them Home. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, (1997), https://humanrights.gov.au/sites/

analyses the full scope of Article 2(e) by stating: "a culturally mediated form of destruction, like forcible child transfer, may nonetheless cause a group's physical or biological destruction".[522] His suggestion of reading Article 2(e) of the Convention is important, as it reminds us of its original idea: protection of a group by protecting its children.

Article 2 of Convention contains a description of several acts which constitute genocide. From this provision of the Convention it becomes clear that genocidal acts can extend beyond acts of homicide and encompass actions that, while not causing immediate fatality, such as under sub e (forcibly transferring children of the group to another group), are aimed to eventually eradicate a certain specific group and aim at the immediate or eventual destruction of the group as a distinct entity. Forcibly transferring children, which is one of the prohibited acts under Article 2(e) of the Convention, may be construed as constituting genocide while being not an act of physical killing.

In the Bringing them Home Report, such acts of forcible removal of children are described as also having a cultural aspect: "The policy of forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled 'genocidal' in breach of binding international law."[523] This quote shows the complex nature of this specific crime and thus this is why Article 2(e) must be read and interpreted in the context of the Convention as the whole, keeping in mind its original goal: protection of national, ethnical, racial or religious groups from destruction.

Mundorff's interpretation of Article 2(e) of the Convention aligns with Lemkin's original intent laid down in provision of Article 2(e) in 1946. The

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default/files/content/pdf/social_justice/bringing_them_home_report.pdf (accessed December 19, 2023).

522 Mundorff Kurt, "Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)", *Harvard International Law Journal*, 50 (2009), p. 63.

523 Supra note 522.

initial version of the Convention did not explicitly cover forcible child transfer at all. The initial text of Article 2 was based on Lemkin's *Axis Rules in Occupied Europe* and suggested four actions which would be regarded as genocide (sub a, b, c, d of the current version of Article 2). The extension of the original version of Article 2 of the Convention was introduced due to Lemkin's engagement with the work of Child Tracers in 1946, which played a crucial role in expanding the Convention's text, finally resulting in the inclusion of the definition provided in Article 2(e). In 1946, several Child Tracers warned Lemkin of Nazi kidnappings, elucidating that "during the search for these children, egregious crimes committed by Germans, involving the looting and kidnapping of children from various nationalities in the occupied countries, came to light. The Germans, driven by the desire to augment their population, perpetrated acts constituting the gravest offenses in human history." Lemkin underscored later on that "his personal involvement with the children prompted [him] to incorporate the abduction of children as an integral aspect of the concept of genocide".[524]

Based on Lemkin's own experience of genocidal acts regarding the forcible transfer of Jewish children by Nazis, discovered after World War II, he suggested incorporating a new provision into Article 2 of the Convention in 1946. This idea was supported by the Greek delegation in 1946. The motivation of Greece to amend the Convention stemmed at that time from its national interest: in those days the forcible child transfer and re-education of Greek children in communist kindergartens in Bulgaria and Romania.[525] This interest led the Greek delegation to advocate for the extension of Article 2 of the Convention. The provision of Article 2(e) of the Convention was

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[524] Mundorff Kurt, *Lemkin and the Origins of Article 2(e)*, June 28, 2023, http://opiniojuris.org/2023/06/28/lemkin-and-the-origins-of-article-2e/ (accessed December 19, 2023).

[525] Korkmaz Nuri, "Comparing Bulgarian and Greek Policies for the Integration of Turkish/Muslim Minorities: The Cold War", *Bilig – Journal of Social Sciences of the Turkic World*, 90 (2019), p. 30, https://dergipark.org.tr/tr/download/article-file/776462 (accessed December 19, 2023).

finally proposed[526] by the Greek delegation to the UN General Assembly in 1946 and – while opposed by the Soviets and commented by Polish and even Belgian representatives – it was adopted at the 82nd Meeting of the General Assembly on 23 October 1946 by 20 votes to 13, with 13 abstentions.[527]

A noteworthy observation, though not directly addressing Article 2(e) of the Convention, pertained to the preservation of culture and language. This comment was articulated by a representative from the Byelorussian republic (Mr. Khomussko) in the context of the removal of Article 3 during the same UN General Assembly session. Mr. Khomussko underscored that acts aiming to destroy language, religion or culture for reasons of national, racial or religious hatred were intrinsic to persecutions targeting group destruction, as evidenced by crimes committed under Adolf Hitler. He noted in this regard that

> acts of destruction of the language, religion or culture of a group for reasons of national, racial or religious hate, were always a feature of persecutions having as their object the destruction of groups – as the crimes perpetrated under Hitler showed – made it all the less necessary to prove that such acts should be punished.

Khomussko's argument emphasized that proof of punishment necessity for such acts diminishes when considering historical atrocities. Mr. Khomussko stated that his country "and others such as the Ukrainian SSR, Poland, Czechoslovakia and the Soviet Union had suffered from such persecutions, which were aimed at the destruction of cultural institutions and which had always accompanied acts of physical genocide".[528] While the Byelorus-

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526 UN, General Assembly, *Official Records of the Third Session*, part 1, 6th Committee, A/C.6/SR.61-140, p. 188, https://digitallibrary.un.org/record/698144 (accessed December 19, 2023).

527 Ibid., p. 190.

528 Ibid., p. 202.

sian delegation did not comment on the Greek amendment to Article 2(e) of the Convention, the overarching intention of the Byelorusian Soviet Republic to safeguard culture and language from hate-driven assaults became apparent and is documented within the international legal framework due to interpreting the Convention contextually and as a cohesive whole.

In part 4 of this chapter, all specific elements of Article 2(e) will be analysed in light of the circumstances related to the war in Ukraine. To constitute a crime of genocide the actus reus (guilty act) of the crime needs to be found in the acts of the perpetrators next to the *mens rea* (guilty mind) of the same crime. While Article 6(e) of the Rome Statute mirrors the language of the Convention, the discussion in this chapter will focus on the crime of the forcible transfer of children examined through the lens of Article 2 of the Convention, which explicitly defines genocide as acts intended to destroy, in whole or in part, a national, ethnic, racial or religious group. This article still holds significance as an original legal provision of the Convention constituting the base in the overarching jurisprudence of several tribunals. It is important to highlight in this regard that various tribunals have interpreted the Convention in numerous ways. In his research, Kurt Mundorff offers a comprehensive overview of the diverse approaches taken by different tribunals in interpreting the Convention. He aligns his perspective with the original legislative intent of Raphael Lemkin, including the broader ramifications of destruction as outlined in Article 2(e). Mundorff advocates for a cultural interpretation of the Convention and explores how the subsequent expansion of the Convention's text, advocated by Lemkin, demonstrates the legal evolution of the definition. According to Mundorff this evolution extends beyond physical acts to encompass cultural genocide as well.[529]

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[529] Mundorff Kurt, *A Cultural Interpretation of the Genocide Convention*, University of British Columbia (2018), p. 22, https://open.library.ubc.ca/media/stream/pdf/24/1.0376035/4 (accessed December 19, 2023).

Based on the aforementioned points, one can infer that if the Convention is interpreted as intended by its authors, it remains an effective instrument in the fight against genocide. As a result of the Greek delegation's advocacy for Article 2(e) in 1946, the international community's commitment to addressing novel forms of genocidal acts was established. The provision of Article 2(e) highlights the Convention's adaptability to evolving circumstances. The statement by the Byelorussian republic representative reinforces the legal significance of protecting cultural institutions from acts driven by national, racial or religious hate. This aligns, when drawing parallel with Article 2 of the Convention, with the broader understanding that such cultural destruction can be intrinsic to, and indicative of, genocidal intent. As the analysis extends into chapter 4, a judicial examination of specific elements within Article 2(e) will further elucidate the legal parameters of genocidal acts.

2.2. Article 6(e) of the Rome Statute and the ICC's Elements of Crimes

The prosecutor of ICC has been leading the official investigation on the situation in Ukraine since March 2022.[530] According to the published announcement, the current official investigation concerns all international crimes. While in its initial submission, the Ukrainian government acknowledged the International Criminal Court's jurisdiction over crimes allegedly committed on its territory between 21 November 2013, and 22 February 2014. The second statement expanded this timeframe indefinitely to include continuing accusations of crimes committed across the entirety of Ukraine starting on 20 February 2014.

The scope of the situation encompasses any past or present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013

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[530] Supra note 26.

onwards.[531] Moreover, genocide is one of the crimes that the ICC mentions to be investigated on the Ukrainian matter.[532] According to the statement of the president of the International Criminal Court, Judge Silvia Fernández de Gurmendi, "The inclusion of the crime of genocide in the Rome Statute was amongst the earliest agreements during the negotiations of the treaty and the definition of the crime contained therein reproduces verbatim the definition contained in Article 2 of the Convention".[533] This emphasizes the similarity of both legal acts, the statute and the Convention. Article 6 of the Rome Statute sounds equal to Article 2 of the Convention.

Though several calls were made towards Ukraine (for example the recent call of Human Rights Watch on 30 November 2023[534]) to ratify the Rome Statute, the country is not yet following up on those requests of the international community. If the Rome Statute's ratification will take place regarding Ukraine, the crime of forcible transfer of Ukrainian children can be prosecuted under the jurisdiction of the ICC while applying the provision of Article 6(e) of the Rome Statute, based on the Article 21 as, "in the first place" the court applies "(a) this statute, Elements of Crimes and its Rules of Procedure and Evidence". The question whether the application of the Rome Statute in regard to Ukraine is possible thus depends on the political will of the state itself in relation to the specific crime mentioned under Article 6(e)

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531 Ibid.

532 Supra note 237.

533 ICC, Fernández de Gurmendi Silvia, president of the International Criminal Court, *The Importance of the Genocide Convention for the Development of International Criminal Justice. Remarks at Event Commemorating the Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide and the Genocide Victims Day*, December 8, 2017, https://www.icc-cpi.int/sites/default/files/itemsDocuments/171208-ICC-President-remarks-at-Genocide-Convention-Commemoration.pdf (accessed December 19, 2023).

534 Human Rights Watch, *Letter by Human Rights Watch on Ukraine Rome Statute Ratification*, November 29, 2023, https://www.hrw.org/news/2023/11/30/letter-human-rights-watch-ukraine-rome-statute-ratification (accessed December 19, 2023).

In spite of the fact that the Ukrainian state did not ratify the Rome Statute but recognised its competence, which in the opinion of the ICC prosecutor provides grounds for proceeding with investigations with respect three crimes: genocide, crime against humanity and war crimes, Article 6(e) of the statute can serve as a legal framework for prosecution.

Additionally, according to Article 21 of the Rome Statute, the ICC is also allowed to apply […] where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict (part 1 [b]). Analysing the jurisprudence of both the ICTY and ICTR, it becomes clear that both tribunals applied and interpreted the Convention while the equal provisions on crimes were implemented in their tribunal statutes. For example, in *Prosecutor v. Juvénal Kajelijeli*, the court stated that "[f]or purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept [where] the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. A determination of the categorized groups should be made on a case-by-case basis, by reference to both objective and subjective criteria".[535]

Along with the ICTY, the ICTR applied the principles of the Convention and for the first time interpreted genocide as meant by Lemkin while mentioning the 'the intent of the drafters' in its Akayesu case.[536] According to the chamber, genocide could be established in the Rwandan case, because of "an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. Even pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father's group of origin". In this regard, it is worthwhile

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[535] *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement (TC), December 1 2003, para. 810.

[536] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), September 2, 1998, para. 701–702.

noting the testimony of witness PP, heard by the Chamber on 11 April 1997, who mentioned a statement made publicly by the accused to the effect that if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order "for the pregnancy to be aborted".[537]

Another legal source applicable in relation to the forcible transfer of children is the ICC's Elements of Crimes,[538] the provisions of which are meant to help the court to interpret provisions of the Rome Statute and consequently of the Convention. Elements of Crimes mention several details that might be important in the Ukrainian case. For example, it clarifies the term *forcibly*, which, according to Elements of Crimes, is "not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment". Also, in regard to the definition of *children,* Elements of Crimes provides an interpretation which otherwise remains unclear in some cases concerning age and would depend on the ratification of other international legal acts, such as the Convention on the Protection of the Rights of a Child.

From the abovementioned it can be stated that the ICC's decision to officially investigate the situation in Ukraine is a huge step in addressing alleged international crimes in Ukraine. The effectiveness of ICC jurisdiction in this case depends on Ukraine's political will to ratify the Rome Statute. Ukraine's decision remains a key factor in potential prosecutions under Article 6(e). Without its ratification, the legal framework may shift to the Genocide Convention, with the ICC applying principles of international law and treaties (such as the Convention) under Article 21 of the Statute.

Examining the precedents set by tribunals like the ICTY and ICTR, which successfully applied the Convention in their judgements, a possible

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[537] Ibid., para. 121.

[538] Supra note 207.

legal roadmap for the ICC is available. In essence, the successful prosecution of Ukrainian cases hinges on legal interpretations and frameworks, but equally on the cooperation and commitment of states to address alleged international crimes and pursue justice through established international legal mechanisms.

2.3. The anthropological vs. the legal approach of genocide and its development towards jus cogens

In his work "Taking 2(e) Seriously: Forcible Child Transfers and the Convention on the Prevention and Punishment of the Crime of Genocide", Kurt Mundorff calls attention to dormant Article 2(e) of the Genocide Convention. He cites various authors who draw parallels between a group and a living organism. One of these authors is Robyn Carpenter, who advocates for the "organism approach", emphasizing that "human groupings came to be seen as analogous to an individual organism, which could come under attack or be deprived of life itself".[539] While Mundorff refers to the Convention and its preparatory materials to stay within the legal qualification of the concept of genocide, specifically Article 2(e) of the Convention, another approach to the definition of genocide has been introduced in past decades: the anthropological perspective. The distinction between the anthropological understanding and the legal definition of genocide is an important issue, emphasizing the specific elements and intent required for the crime. Indeed, according to Marko Milanović, associate professor at the University of Nottingham School of Law, there are two widespread main approaches to genocide as concept: the concept of genocide in anthropology or other social sciences[540] and the legal concept of genocide.[541]

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539 Robyn Charli Carpenter, "Forced Maternity, Children's Rights and the Genocide Convention: A Theoretical Analysis" *Journal of Genocide Research*, 2(2) (2010), p. 213–216.

540 Supra note 513.

541 Marco Milanovic, "State Responsibility for Genocide", *European Journal of International Law*, 17(3) (2006), p. 553–604.

The anthropological approach to this crime is rooted in the understanding of an average person viewing it as a "mass murder of human beings on account of their race, ethnicity, religion, or other characteristics", although the legal concept of genocide as a crime "is conforming both with the text and the preparatory work of the Genocide Convention and the jurisprudence of international tribunals, yet this is exactly what states did when they adopted the Convention in 1948".[542] In this chapter the forcible transfer of children from Ukraine to Russia and Belarus is researched through the lens of the legal concept of genocide.

As mentioned earlier, the legal definition of the crime of genocide is given in Article 2 of the Convention. This article introduces a definition of the crime of genocide, in particular terms, detailing the required intent and listing the prohibited acts. Furthermore, the Convention specifies that the crime of genocide may occur in times of peace or war.[543] However, as becomes evident from the analysis of jurisprudence of tribunals (see 3.), even a clear written definition of genocide as a crime must be applied with a proper court's interpretation in the light of specific circumstances. This leads obviously to different outcomes, which in some cases introduce new findings within the legal concept of genocide.

It is worth noting that despite the occurrence of genocide as a specific crime since the Convention came into force, there have been limited instances of state leaders being held accountable for this crime within the international judicial framework. The high evidentiary threshold and challenges in gathering sufficient evidence have been contributing factors to the difficulties in prosecution. A prominent Serbian general, Ratko Mladić, for example, was able to avoid conviction for committing genocide for a very long time. In his case (appealed in 2021) the Appeal Chamber finally found him guilty of genocide and ruled that "genocide formed part of the objective

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542 Ibid.

543 Supra note 191, Article 1.

of the Overarching JCE (Joint Criminal Enterprise) and that Mladić and other members of the Overarching JCE shared the genocidal intent of the perpetrators of crimes acting as their tools".[544] The main reason for his long-time "escape" from prosecution was the high proof threshold of this crime and the lack of sufficient evidence, which is highly crucial.

While recalling Lemkin's expression from his autobiography, the legal approach to the crime of genocide needs greater attention today: "The Allies decided a case in Nuremberg against a past Hitler – but refused to envisage future Hitlers." Lemkin's critique of the Nuremberg trials highlights the need to address future instances of genocide and to ensure that the legal framework adequately captures and addresses this crime: the trials in Nuremberg were a partial success, according to Lemkin, as the Jewish identity of the victims was not emphasized and the Nazi leaders were indicted on the broader charge of "crimes against humanity". In those days genocide was unfortunately not yet recognized as a crime in the context of the Nuremberg trials.[545] The situation has changed significantly, keeping in mind the outcome of the Yugoslavian tribunal,[546] which will influence the judicial answer that will be given by international society in regards to the Russian aggression in Ukraine facilitated by Belarusian authorities.

While the crime of the forcible transfer of children falls within the scope of Article 2 of the Convention, it has not been the primary focus of previous tribunals until the recent warrant issued for Russian officials in 2023. No tribunal in history has initiated the prosecution of the crime of genocide with the forcible transfer of children specifically, as a separate crime under Article 2(e) of the Convention. However, given the enormous scale of the crime

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544 *Prosecutor v. Radislav Mladić*, Case No. MICT-13-56-A, Appeals Chamber, ICTY, June 8, 2021, para. 47.

545 Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze, Yale University Press (2013), p. 118.

546 *ICTY Remembers: The Srebrenica Genocide 1995–2015*, https://www.irmct.org/specials/srebrenica20/ (accessed December 19, 2023).

of forcible transfer during the Russian aggression on Ukrainian territory, it cannot be overlooked by the international legal community. On the one hand, this development represents another crucial step toward the protection of this most vulnerable group. On the other hand, the sheer magnitude of this crime of forcibly transferring children from Ukraine is undeniable and naturally attracts international attention from the perspective of justice.

Another crucial development that merits attention in the context of the crime of genocide is its peremptory nature, a characteristic that it shares with norms governing child protection (as mentioned under 1.4.). Upon scrutinizing the international legal framework, national legislations of Russia, Belarus and Ukraine, as well as the jurisprudence of tribunals, it becomes evident that the prohibition of genocide is upheld in all applicable legal systems, establishing it as a norm of jus cogens. The peremptory character of the crime of forcible transfer of children as a crime of genocide is pointed out both in the jurisprudence of past international tribunals and national courts of the involved countries, for example, in the Rwanda tribunal's case of *Prosecutor v. Kayishema and Ruzindana,*[547] followed by *Case Prosecutor v. Rutaganda.*[548] Also, the Russian Criminal Code is vocal on this specific crime of genocide, explicitly mentioning forcible child transfer:

> Actions aimed at the total or partial destruction of a national, ethnic, racial or religious group as such by killing members of that group, causing serious harm to their health, forcibly preventing childbearing, forcibly transferring children, forcibly relocating or otherwise creating conditions of life calculated to bring about physical destruction members of this group are punishable by imprisonment for

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[547] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, ICTR, May 21, 1999, para. 88.

[548] *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Chamber, ICTR, December 6, 1999, para. 46.

> a term of twelve to twenty years with restriction of freedom for a term of up to two years, or life imprisonment, or the death penalty.[549]

The Belarusian legislature followed the same approach by stating in the Belarusian Criminal Code (Article 127):

> Acts committed with the purpose of systematically destroying, in whole or in part, any racial, national, ethnic, religious group, or group defined on the basis of any other arbitrary criterion, by killing or causing great bodily harm to members of such group, or by intentionally causing living conditions, calculated for the complete or partial physical destruction of such a group, or the forcible transfer of children from one ethnic group to another, or the adoption of measures to prevent childbirth among such a group (genocide), shall be punished by imprisonment for a term of twelve to twenty-five years, or life imprisonment, or the death penalty.

In conclusion, while the legal approach to the concept of genocide continues to develop, the international community seems to have learned from past tribunals and is taking significant steps to the successful prosecution of this crime of forcible transfer of children by Russia. The legal recognition of genocide as jus cogens and the ongoing efforts of institutions like the ICC and the EU legislature provide a starting point for addressing the crime of genocide in the context of the Russian aggression within today's international legal framework.

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549 Supra note 479, Article 357.

3. The forcible displacement of children as an act of genocide: Reflections on this crime in the jurisprudence of the tribunals ICTY/ICTR, recent doctrine on Article 6(e) of the Rome Statute

Examples of the legal approach to the concept of genocide and the forcible transfer of children can be found in the decision of the Rwandan and Yugoslavian tribunals, established after the two most devastating conflicts at the end of the 20th century. Both tribunals reflected the origin of each of the conflicts in its statutes. In its resolution[550] introducing Yugoslavian tribunal, the UN qualified the actions of Yugoslavia's authorities and mentions ethnic cleansing for the first time in the history of international organizations. The term *ethnic cleansing* described the actions of the Yugoslavian authorities and the goal of creating ethnically pure territories. Another formulation was chosen in the UN resolution that established the tribunal of ICTR.[551] There, genocide is specifically named to qualify the state actions, highlighting the targeted actions aimed at eradicating a part of the population. The nature of the legal approach to both conflicts is reflected in the jurisprudence of the tribunals: in the Rwandan conflict the state actions were targeted to eradicate a part of a population, while in the Yugoslav conflict the aim was creating ethnically pure territories.

Another difference between the two tribunals is related to the forcible displacement of children in relation to crime of genocide. In the ICTR trials the forcible displacement of children was considered as one of the pieces of evidence of genocidal intent (*dolus specialis*),[552] but not regarded as a separate crime. In contrast, in the ICTY trials the displacement of persons,

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550 Supra note 130.

551 Supra note 329.

552 *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement (TC), January 27, 2000, paras. 159–165; supra note 549, paras. 54, 121, 509–524.

including children, was given significant attention in the leadership trials.[553] Based on recent developments around the Russian aggression, the displacement of children is today providing a starting point for the prosecution by ICC.[554] This demonstrates a step forward by the international community in addressing such crimes, drawing from the lessons learned from previous tribunals. It is noteworthy that while no separate tribunal has been established for Ukraine yet, the international community's statements to prosecute Russian state leaders indicate a commitment to protecting the rights of children violated by the Russian aggression. A similarity with the Yugoslavian conflict should be mentioned at this point: both legal actions were started by the international community while the war was ongoing. In the

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553 *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement (TC), August 2, 2001, para. 531–532: "531. The Bosnian Muslim women, children and elderly assembled at Potocari were forcibly transferred to Kladanj, an area in the territory of Bosnia-Herzegovina controlled by the ABiH, in order to eradicate all trace of Bosnian Muslims in the territory in which the Bosnian Serbs were looking to establish their own State. However, Bosnia-Herzegovina was the only State formally recognised by the international community at the time of the events. Since the Srebrenica civilians were displaced within the borders of Bosnia-Herzegovina, the forcible displacement may not be characterized as deportation in customary international law."; "532. The Chamber therefore concludes that the civilians assembled at Potocari and transported to Kladanj were not subjected to deportation but rather to forcible transfer. This forcible transfer, in the circumstances of this case, still constitutes a form of inhumane treatment covered under Article 5."

554 UN, General Assembly, *Independent International Commission of Inquiry on Ukraine – Note by the Secretary-General*, A/77/533, 18 October 2023, https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary (accessed December 19, 2023). Due to the two declarations provided by Ukraine and referrals by other states parties, the commission stated that, though neither Ukraine nor the Russian Federation are states parties to the Rome Statute of the International Criminal Court (ICC), the ICC has jurisdiction in Ukraine. This creates a possibility for the commission to apply the Elements of Crimes within the Rome Statute so long as they reflect customary international law. Based on this conclusion of the commission, the forcible transfer of children became an important part of its report, though for now the commission is not qualifying it as a crime of genocide but mentioning it as a possible crime against humanity, a war crime or a crime of genocide.

Rwandan conflict the tribunal was established only after the hostilities had ended. The statement of the international community to start prosecuting Russian state leaders is an important sign to states to protect the rights of children, especially in times of war.

Part 3. Jurisdiction of the ICC on the case on the alleged forcible transfer of children

Article 2 of the Convention lists specific prohibited acts that constitute genocide. The forcible transfer of children, as mentioned in Article 2(e), can be considered as such an act of genocide if it meets all the necessary elements and requirements of the crime as interpreted by international tribunals. These interpretations, established by the jurisprudence of the international tribunals, will help in understanding the scope and requirements of the crime.

Concerning the fact that the Pretrial Chamber did not ground the recently issued warrant on the crime of genocide envisaged in Article 6(e) of the Rome Statute, the author proceeds with analysing the existing case law with anticipation that the ICC may apply the mentioned article in due course in the future. Facts on the alleged forcible transfer of children in the context of the Russian military invasion may constitute a crime of genocide. Exercising the possibility to examine the specific acts, intent, and other material elements of the crime as defined by the Convention and interpreted by international tribunals previously, the author is going to apply the mentioned elements, along with the relevant evidence and legal analysis, with an attempt to establish the occurrence of the crime within the meaning and scope of international law.

In *Prosecutor v. Bagilishema,*[555] the chamber sums up the two necessary elements of the crime of genocide, considering

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[555] *Prosecutor v. Ignace Bagilishema,* case no. ICTR-95-1A-T, Trial Chamber, ICTR, June 7, 2001, para. 55.

> that a crime of genocide is proven if it is established beyond reasonable doubt, firstly, that one of the acts listed under Article 2(2) of the Statute *(ICTR Statute)* was *committed* and, secondly, that this act was committed against a specifically targeted national, ethnical, racial or religious *group*, with the *specific intent* to destroy, in whole or in part, that group. Genocide therefore invites analysis under two headings: the prohibited underlying *acts* and the specific genocidal intent or *dolus specialis*.

This judgement is one of the examples where the two important headings are mentioned which were highlighted by the chamber and need to be analysed in order to establish the occurrence of the crime of genocide:

- *actus reus*: prohibited by the statute underlying acts;
- *mens rea*: the mental factor/guilty mind of the crime is important; the specific genocidal intent or *dolus specialis* needs to be present.

4. Actus reus: Prohibited by the statute underlying acts

The common perception of genocide, according to Colin Tatz,[556] often focuses on well-known instances such as Auschwitz, the Cambodian killing fields and the Srebrenica massacre, objectively observable mass killings. As mentioned previously under 2.1, it is important to recognize that the scope of acts covered by the Convention is far broader and includes various forms of conduct that can be considered as genocide. Article 2(e) of the Convention describes several material elements that must be met to claim a forcible child transfer successfully. By examining these elements individually, a clearer understanding can be gained of the specific requirements outlined in Article 2(e) of the Convention. This helps in recognizing the distinct place of forcible child transfer within the broader framework of the Convention.

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[556] Colin Tatz, "Genocide in Australia", *Journal of Genocide Research*, 1(3) 1999, p. 315–316.

4.1. Viability of the group needs protection

The purpose of the Convention is to protect a group as a whole rather than focusing solely on the physical destruction of single individuals. In the context of Article 2(e) of the Convention, the crime of forcibly transferring children can be considered as a manifestation of the broader intent to destroy a group. By forcibly transferring children from one group to another, the aggressor seeks to disrupt the group's continuity, cultural heritage and future generations. This act aims to undermine the targeted group's identity, cohesion and long-term survival.

Preparatory materials and comments to the Convention highlight the significance of this intent to attack a group as the distinguishing factor between an ordinary crime and genocide. The protection of a group is indeed a fundamental aspect of the Convention, including in relation to Article 2(e) concerning the forcible transfer of children, which is, for example, mentioned in the comments: "While genocide, like the other crimes, resulted in the physical destruction of one or several individuals, it involved a new factor, namely, the intention to destroy a group as such",[557] and "the main characteristic of genocide lay in the intent to attack a group. That characteristic should be brought out, as in it lay the difference between an ordinary crime and genocide".[558] These and many other statements outline the whole purpose of the Convention and give body to the specific element of the protection of a group regarding Article 2(e), the forcible transfer of children. Therefore, it can be concluded that the crime of forcibly transferring children, as described in Article 2(e), can only be committed when the group as a whole is under threat. The intention to destroy the Ukrainian nation as a group, a defining characteristic of genocide, is present in

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[557] UN General Assembly, official records, 6th Committee, 66th Meeting, see note 32, A/C.6/SR.66, October 4, 1948.

[558] UN General Assembly, official records, 6th Committee, 3rd Session, 73rd Meeting, see note 93, A/C.6/SR.73, October 13, 1948.

the opinion of the author of this chapter in cases of the Russian aggression involving the forcible transfer of children, as it undermines the group's viability and perpetuates long-lasting harm to its existence.

4.2. Protection of the group as an entity

Protection of a group as an entity was originally the aim of Lemkin's work while advocating his vision of the Convention.[559] In line with Lemkin's approach, in the Akayesu trial,[560] the ICTR recognized that an ethnic group can be defined by more than just a shared language or culture. While language can be a significant factor it is not the sole determinant. According to the ICTR the Tutsi victims were an ethnic group, even though they did share a common language and culture with the predominantly Hutu perpetrator group. "According to the Chamber, an ethnic group is generally defined as a group whose members share a common language *or* culture".[561] The ICTR's approach in the Akayesu case thus demonstrated a broader understanding of what constitutes an ethnic group. This approach recognizes that the identity and cohesion of a group can be based on multiple factors beyond language alone.

The language issue is an important aspect to pay attention to, in the opinion of the author, regarding the Russian aggression: Ukrainian and Russian officials have reported that some Ukrainian children deported to Russia will have to attend Russian schools.[562] These facts stipulate the acts of "merging" or "vanishing" the language of Ukrainian children and making them

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559 Supra note 512, p. 79–95.

560 Supra note 536, para. 122.

561 Ibid., para. 513.

562 Joahua Zitser, *Russia Forcibly Resettled Dozens of Mariupol Children in the Far East, 6,000 Miles Away from Their Homes, Ukrainian Official Says*, Business Insider, April 23, 2022, https://www.businessinsider.com/russia-forcibly-moved-mariupolchildren-6000-miles-away-ukraine-official-2022-4?r=US&IR=T (accessed December 19, 2023).

"Russian" as a violation of their rights and destroying their identity, according to ICTR jurisprudence. The ICTR approach is clearly entity-related and regards a broader range of aspects rather than language only, such as cultural aspects. According to Barbara Lüders,[563] it was only possible due to the tribunal's creation of a "stable and permanent" threshold in the Akayesu case, which is broadening the scope of the Convention, though this approach was highly disputed due to breaching the principle of legality.[564] Based on ICTR jurisprudence and the broader understanding of an ethnic group, the usage of Russian language by individuals from Donetsk, for example, should not be considered a valid argument to deny their Ukrainian identity. The determination of an ethnic group regarding Article 2(e) requires a comprehensive assessment of various cultural aspects and characteristics, considering the overall intent and impact on the targeted group.

4.3. Ethnic cleansing

The issue of deportation of Ukrainian children to Russia and their potential classification as ethnic cleansing is a serious matter that requires careful examination of the facts and legal definitions. In its report, Amnesty International points to the organized and systematic nature of the deportations of Ukrainian children to Russia, based on the testimony of witnesses and the statements of Lvova-Belova in her status of commissioner for children's rights under the president of the Russian Federation.[565] Another, often mentioned reason for the justification of aggression by Russia is the "the

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563 Barbara Lüders, *Die Strafbarkeit von Völkermord nach dem Römischen Statut für den Internationalen Strafgerichtshof*, Berliner Wissenschafts-Verlag (2004), p. 53.

564 Carola Lingaas, "Defining the Protected Groups of Genocide Through the Case Law of International Courts", *International Criminal Data*, Brief 18, (2015), p. 7.

565 Supra note 440, p. 6, 26.

denazification' of Ukraine".[566] Also, countless victim statements of denial of Ukrainian identity point out the clear intention of Russia to vanish the Ukrainian nation. These actions of the aggressor country can be assessed in the author's opinion as ethnic cleansing, based on the definitions given by the ICJ, in which the court stated that ethnic cleansing is "the imparting of ethnic homogeneity to the territory by the use of force or intimidation in order to expel persons belonging to certain groups, with territory… may be important because it indicates a specific intent to destroy".[567] The same approach can be found in the judgements of the ICTY.[568]

4.4. In whole or in part

The varying interpretations of different tribunals, as well as the differing perspectives on the significance of group size and the level of intent required, demonstrate the complexity and ongoing debate surrounding "in whole or in part" as an element of the crime of genocide. As follows from the comments to the Convention,[569] the element "in part" has been added to the Convention on a Norwegian initiative. This extension brought many discussions, even on the national level.[570] Those discussion didn't stop even after the Convention was in force, and it continues in chambers' decisions

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566 *Lavrov Explained What Denazification in Ukraine Means*, TASS Russian News Agency, April 26, 2022, https://tass.ru/politika/14112983 (accessed December 19, 2023).

567 *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement of February 26, ICJ, 2007, para. 180.

568 *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber II, January 14, 2000, para. 338.

569 UN General Assembly, 6th Committee, 3rd Session, 73rd Meeting. at 92-93, A/C.6/SR.73 (October 13, 1948, statement of Mr. Wikborg of Norway).

570 During ratification debates in the U.S. Senate, many expressed fear that "in part" might include cases of "murder of a single individual." Lawrence LeBlanc, "The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding", *American Journal of International Law*, 78(2) (1984), p. 369–385.

where the tribunals try to provide an answer to questions such as: What does the wording "in part" or "significant number" exactly mean? Is the killing of a national group within country borders, excluding diaspora, also genocide?[571] Is the killing of a single person with a genocidal intent enough to speak of genocide?

Unfortunately, the jurisprudence of the ICTY and ICTR is not providing very clear guidance. While interpreting the Convention, for example, in the Krstić case the ICTY mentioned that even the Nazis were deluded enough to believe they could eliminate every Jew on Earth.[572] In regards to the size of the group that would fulfil the requirement of Article 2 of the Convention, the ICTY Appeals Chamber held that "[t]he intent requirement of genocide under Article 4 of the Statute (ICTY) is satisfied where evidence shows that the alleged perpetrator intended to destroy at least a *substantial part* of the protected group".[573] It further stated that "the *substantiality requirement* both captures genocide's defining character as a crime of *massive proportions* and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group".[574]

The opinion of Special Rapporteur Benjamin Whitaker can additionally be taken into consideration when interpreting this element. According to the rapporteur: "'[i]n part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership".[575] Another approach follows in the Akayesu case, provided by the ICTR, which is applicable in only very

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571 United States Holocaust Memorial Museum, *The Armenian Genocide (1915–16): Overview*, https://encyclopedia.ushmm.org/content/en/article/the-armenian-genocide-1915-16-overview (accessed December 19, 2023).

572 *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement (AC), ICTY, April 19, 2004.

573 Ibid., para. 1723.

574 Ibid., para. 1724.

575 ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker*, July 2, 1985, 29, E/ CN.4/Sub.2/1985/6.

specific circumstances, as the intent should be even more evident in these cases, as considered by the author of this chapter. In that judgement, the court ruled that genocide may also include the killing, with the required intent, of only one single member of a protected group. The interpretation of the Convention in this manner broadens its scope significantly. The specific facts and circumstances of each case play an even more crucial role in determining whether the crime of genocide has been committed regarding this interpretation. In that case the Trial Chamber, when dealing with the constituent elements of genocide, held the view that there may be genocide even if one of the acts prohibited by the relevant rules on this matter is committed "against one" member of a group.[576]

The Travaux Préparatoires to the Convention[577] provide some insight into the intent of the drafters to protect stable and permanent groups, with membership typically determined by birth. The aim was to protect groups whose membership is not easily challengeable and is automatically acquired by birth: "the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups." The "common criterion" of the four groups protected by the Convention was found by the tribunal: "that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner" and "[I]t was necessary … to respect the intent of the drafters … which,

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576 Supra note 536, para. 521.

577 William A. Schabas, *Convention for The Prevention and Punishment of The Crime of Genocide*, https://legal.un.org/avl/ha/cppcg/cppcg.html (accessed December 19, 2023); *Collected Travaux Préparatoires*, Yale Law School, https://library.law.yale.edu/research-guides/collected-travaux-preparatoires (accessed December 19, 2023).

according to the travaux preparatoires, was clearly to protect any stable and permanent group".[578]

After examining the element of the crime of genocide, the author of this chapter came to the conclusion that the above-mentioned element "in whole or in part" has different interpretations by different tribunals. The dominant interpretation, as supported by the ICTY and reflected in the Jelisić case,[579] includes a substantiality requirement that considers the size of the group and its impact on the overall survival of the group. This interpretation recognizes that genocide is a crime of massive proportions and emphasizes the intent to destroy a substantial part of the protected group.

4.5. "Children" as a protected group in international law, its definition

The debates within the UN framework surrounding the groups to be protected by the Convention focused on the selection of specific groups. As mentioned above, according to Resolution 96 (1), the Secretariat's Draft, and the Ad Hoc Committee Draft, political groups were suggested for protection but were left apart for many reasons, such as "not stable enough", 'volunteer

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[578] Supra note 536, paras. 511, 516, 701–702.

[579] ICTY, *Prosecutor v. Jelisić case*, Judgement (TC), IT-95-10-A, July 5, 2001, paras. 107–108. It was not possible for the court to come to the conviction of Jelisić, even though the facts of his case seemed to show a very clear picture and genocidal intent was quite obvious. In the Jelisić case killing as many Muslims as possible and a clear genocidal intent of the perpetrator was obviously not enough for the chamber to convict Goran Jelisić of genocide *beyond reasonable doubt* and to prove that the accused was motivated by the *dolus specialis* of the crime of genocide. According to the chamber: "The benefit of the doubt must always go to the accused and, consequently, Goran Jelisić must be found *not* guilty on this count". In order to establish the responsibility in "a part of the group", the clear intention to destroy a part of the group is thus necessary. Only a little doubt in regard to arbitrarily killing was obviously not enough for conviction: "although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group".

membership", etc.[580] The author of this chapter agrees with the opinion of Mundorff on this matter, that due to the specificness of the groups' choice in the Convention and the obviously "biological" propagation processes, the central role of children is becoming even more highlighted in the context of the Convention, as it protects groups that rely on childrearing for their perpetuation:

> While these debates did not address the subject of children's custody, the result of the delegates' focus on immutable characteristics was to distinguish groups that propagate through 'biological' processes (i.e., childrearing) from groups that tend to reproduce through recruitment. By drawing this distinction, the framers highlighted the central role children play in the Convention, which only protects those groups that reproduce through childrearing.[581]

In summary, the debates during the formulation of the Convention highlighted the exclusion of political groups and the focus on groups that reproduce through childrearing. This emphasis on children within the Convention aligns undoubtedly with their central role in the perpetuation and survival of protected groups.

Article 2(e) of the Convention does not explicitly define the age range for the term *children*. To understand the definition of *child* within the context of the Convention, it can refer to other sources of international law, such as the Convention on the Rights of the Child. According to Article 1 of the Convention on the Rights of the Child, a child can be considered a person under 18 years. Apparently, this age limit was not always standard, following the discussion around the Rome Statute.[582] Today, this age limit

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580 UN, General Assembly, official records, 6th Committee, 3rd Session, 69th Meeting, see note 58, A/C.6/SR.69, October 7, 1948.

581 Supra note 522, p. 90.

582 Valerie Oosterveld, *The Elements of Genocide, in the International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers (2001),

has been widely accepted and recognized as a standard in international law concerning the rights and protection of children. A clear understanding of the definition of the word *child* and the exact age limit regarding Russian aggression is of high importance in case of the forcible child transfer of children from one group to another. Parsing Article 2(e) together with Article 2(d) of the Convention, it becomes obvious that age is not quite relevant to the harm caused: the removal of both younger and older children from a group can have significant negative consequences for the targeted group's survival and well-being.

According to the author of this chapter, it appears reasonable to establish an age limit of 18 years for children forcibly transferred from Ukraine to Russia and Belarus in the context of the Russian military invasion. This aligns with the legal definition of "a child" and corresponds with the accepted legal age of adulthood recognized by Ukraine,[583] Belarus[584] and Russia.[585]

4.6. Transferring from one group to another

"Now I know what it means to be a mother of a child from the Donbas. It's hard, but we definitely love each other. I think we can handle anything", Maria Lvova-Belova said in response to a question Putin asked her during a meeting at his Novo-Ogaryovo residence near Moscow.[586] This statement is

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p. 41, 54. (Discussing the controversy surrounding the definition of children in the offence of forcible child transfer during the Rome Statute ratification debates; proposed age-range designations ranged from 15 to 21 years of age, and the delegates finally compromised on 18.).

583 *Family Code of Ukraine*, January 1, 2003, Article 6.

584 *Law of the Republic of Belarus on Marriage and Family*, no. 278-3, July 9, 1999, Article 179, https://kodeksy-bel.com/kodeks_rb_o_brake_i_semje.htm (accessed April 19, 2024).

585 Supra note 472, Article 54, under 1.

586 *Putin's Children's Envoy Reveals She Adopted Child from Mariupol*, The Moscow Times, November 27, 2023, https://www.themoscowtimes.com/2023/02/16/putins-childrens-envoy-reveals-she-adopted-child-from-mariupol-a80249 (accessed December 19, 2023).

just one example of how "normal" and "usual" the displacement of a Ukrainian child should look for the average Russian family. Guided by the state leader, Putin,[587] the official state-marketing campaign around the adoption of children from the Donbass became "business as usual" after the Russian invasion. The normalization of the displacement and adoption of Ukrainian children from the Donbas by Russian families should be regarded, though, from the perspective of international law. Such actions involve the separation of children from their original group and their placement in another group, so they should be seen as unnatural and harmful. The concept of "transfer" in the context of the Convention is a complex issue that involves a balance between cultural and biological aspects. According to the ILC, this balance is actually on the edge of these two aspects of genocide as a crime.[588]

Several considerations are relevant in regard to the Russian aggression on Ukrainian territory in respect to the "transfer of children", according to the author. First, the most relevant is the factual separation of children from their group and placing them in another group, such was what happened in the current conflict, according to many victims' statements. Another important factor is assimilation and control. According to Claus Kreß, this is not a decisive aspect, though, as the prevention of assimilation should be the actual goal of the Convention:[589] "It would be absurd to allow a perpetrator to defeat a charge of genocide by keeping children in an orphanage, away from their group of origin but also not integrated into another group." Kreß states, moreover, that: "The prohibited act in question is completed if at least

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587 *Putin Said That the Number of Applications for the Adoption of Children from Donbass Is Growing*, TASS Russian News Agency, February 16, 2023, https://tass.ru/obschestvo/17066891 (accessed December 19, 2023).

588 ILC, *Report on the Work of Its 48th Session*, Yearbook International Law Commission, vol. II (2) (1996), p.1 et seq., A/51/10(1996), p. 11, 44–47. Different categories of the concept of genocide were regarded at the International Law Commission.

589 Claus Kreß, "The Crime of Genocide Under International Law", *International Criminal Law Review*, 6 (2006), p. 461–502.

one child has been *distanced* from the group to which it belongs. This result may be achieved by confining the child to a location outside the realm of the group from which it comes; it is not required that the child concerned is introduced into a different group, for example by way of adoption".[590] Here, the substantiality aspect of the crime will need to be considered, as mentioned under 4.4. Also, the countless facts of children having a "vacation" in Belarusian camps should be considered in this regard.[591]

Concluding from many victims' statements from the Russian/Ukrainian conflict, and moreover supported by the conviction of the perpetrators themselves (such as the above-mentioned statements of Putin and Lvova-Belova), it can be stated that the displacement of the children from Ukraine to Russia and Belarus can be qualified as a "transfer" in the meaning of Article 2(e) of the Convention, as children were separated from their stable group.

4.7. The definition of 'forcible'

Following the political idea of the creation of a new state (Republika Sprska) S. Milošević, M. Krajisnik, R. Brdjanin, M. Stakić and R. Karadzić introduced a horrifying campaign while terrorizing the non-Serb population by driving them out of their homes. The ICTY proceedings established that their objective was the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory: "the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in Bosnia and Herzegovina through crimes charged in this indictment".[592]

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590 Ibid.

591 Lorenzo Tondo, *Children Arrive in Belarus After Being Illegally Removed from Ukraine*, The Guardian, September 19, 2023, https://www.theguardian.com/world/2023/sep/19/children-arrive-in-belarus-after-being-illegally-removed-from-ukraine (accessed December 19, 2023).

592 *Prosecutor v. Radovan Karadiic*, Case No. IT-95-5/18-PT, ICTY, October 19, 2009, para. 6.

In terms of the definition of forcible transfer, the ICTY and ICTR have provided important interpretations. The ICTY distinguishes between deportation and forcible transfer, with deportation referring to transfer beyond state borders and forcible transfer relating to displacements within a state. However, both practices are condemned in international humanitarian law:

> Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond state borders, whereas forcible transfer relates to displacements within a state. However, this distinction has no bearing on the condemnation of such practices in international humanitarian law.[593]

The ICTR goes a step further and takes a broader approach by sanctioning acts that lead to the transfer of children, including threats or trauma that result from their forcible transfer: "the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another".[594]

The ICC defines *forcibly* in the Elements of Crimes under Article 7(1)d, where it states that: "the term 'forcibly' is not restricted to physical force, but may include *threat* of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."[595] Based on these sources and interpretations, the author concludes that the elements of forcible transfer, even in the narrowest interpretation, can be proven in the Russian aggression case. The

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[593] Supra note 553, paras. 521–522.

[594] Supra note 536, para. 509.

[595] Supra note 207, Article 7(1): "Crime Against Humanity of Deportation or Forcible Transfer of Population".

evidence of territorial displacement (children being physically replaced outside Ukraine's territory) and the involuntary/unlawful nature of the transfer (lack of consent from parents or the state) can be presented based on the victims' statements originating from various independent sources. While drawing a conclusion, it is important to note that proving the *actus reus* (guilty act) alone is not sufficient to establish the crime of genocide. The *mens rea* (guilty mind) of genocide, which refers to the specific intent to destroy, in whole or in part, a protected group, must also be analysed and established in this context. This analysis will be provided in the next chapter.

5. *Mens rea*: specific genocidal intent (*dolus specialis*) and general intent (*dolus generalis*)

It is not obvious to indicate a crime of genocide from any transfer of children by a state party; as such a transfer can be qualified as an act aimed to protect children's lives in times of war, objectively speaking. The *mens rea*, or guilty mind, of the crime of genocide consists of two layers of intent: specific intent and general intent. Together, they constitute the second aspect of the crime of genocide in the context of Article 2(e) of the Convention. Specific intent refers to the intention to destroy, in whole or in part, a protected group. In the context of the forcible transfer of children it would require demonstrating that the transfer was carried out with the specific intent to physically destroy the group or inflict serious bodily or mental harm upon its members. General intent, on the other hand, refers to the awareness of the perpetrator that their actions would contribute to the destruction of a protected group, and it would involve establishing that the perpetrator knew or had reason to know that the transfer would result in the destruction, in whole or in part, of the group.

According to Mundorff regarding *mens rea,* "This issue becomes even thornier with forcible child transfers, where genocidal actions have often been infused with the earnest belief that they were in the interests of the

targeted group's children."[596] It is thus important to create a clear picture of what constitutes *mens rea* in regard to the forcible transfer of children. The details of both parts of *mens rea* will be discussed in the next paragraph.

5.1. Specific intent – *dolus specialis* regarding forcible transfer

In regard to specific intent – *dolus specialis* – the chamber stated in the Akayesu case:[597] "it is a mental factor which is difficult, even impossible to determine." The ICTR chamber found several ways to distinguish the special intent "in the absence of a confession from the accused" from the following objective facts:

- "the general context of the perpetration of other culpable acts systematically directed against that same group, whether … committed by the same offender or by others;"
- "the scale of atrocities committed";
- the "general nature" of the atrocities committed "in a region or a country";
- "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups;
- "the general political doctrine which gave rise to the acts;
- "the repetition of destructive and discriminatory acts";
- "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group – acts which are not in themselves covered by the list … but which are committed as part of the same pattern of conduct".

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596 Supra note 522, p. 93.

597 Supra note 536, paras. 523–524

A comparable approach of the chamber can be found in the Alfred Musema trial.[598] In both trials the chamber places the emphasis on *dolus specialis* by proving genocide: the intent must consist of a special intent constituting the first layer of the required intent needed to prove the crime of genocide. Exactly this specific intent (as a part of *mens rea*) is a necessary factor that makes genocide stand out from any other serious crimes under international law, which also follows from the jurisprudence of the ICTY.[599] According to the ICTR, *dolus specialis* can be inferred from both words and deeds. The chamber stated that intent may be demonstrated by a pattern of purposeful action, meaning that a consistent and systematic pattern of actions can be indicative of the specific intent to commit genocide*:* "intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action." This judgement provides relevant detailed aspects to recognize special intent, such as:

- "the number of group members affected";
- "the physical targeting of the group or their property";
- "the use of derogatory language toward members of the targeted group";
- "the weapons employed and the extent of bodily injury";
- "the methodical way of planning";
- "the systematic manner of killing";
- "the relative proportionate scale of the actual or attempted destruction of a group".

In *Kayishema and Ruzindana*,[600] the chamber additionally noted the prior formed state of mind: "It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder. The Trial Chamber mentions that for the crimes of genocide to occur, the *mens rea* must be formed "prior to the commission of the genocidal acts." According to the same case,

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598 Supra note 552, p. 166

599 *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Trial Chamber, International Criminal Tribunal for the former Yugoslavia ICTY, December 14, 1999, p. 66.

600 Supra note 547, p. 91.

additional facts that prove the *mens rea* of genocide are: *obvious state involvement* which was noticed by the chamber as an important factor in carrying out the specific plan: "Although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation." … "[I]t is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime." It should be mentioned here, while it goes outside the scope of this paper and touches the responsibility of the perpetrators, that full knowledge of the plan is not necessary to become responsible for the commitment of the crime of genocide, according to the chamber: "[I]t is *unnecessary* for an individual to have knowledge of all details of genocidal plan or policy." On the other hand: "[T]he existence of such a [genocidal] plan would be strong evidence of the specific intent requirement for the crime of genocide".[601] The involvement of the state and the existence of a specific plan or organization can thus provide strong evidence of the specific intent requirement for the crime of genocide. While full knowledge of the plan is not necessary for individual responsibility, the existence of such a genocidal plan can be indicative of intent.

According to the ILC, the acts should be, by their nature, "conscious, intentional or volitional".[602] The negligence standard introduced by the ICC needs to be notified in this regard, as it unnecessarily provides an additional burden of proof and draws a clear difference with the jurisprudence of the ICTY/ICTR. Under the ICC statute (Article 30, p. 2b) the consciousness of the consequence needs to be established. According to Claus Kreß,[603] this might be the reason that the ICTY and ICTR both rejected the application of a negligence standard, following from the Akayesu case[604].

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601 Ibid., p. 94, 276.

602 ILC, *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*, Yearbook of the International Law Commission, vol. II (2) (1996), p. 44.

603 Supra note 589, p. 485.

604 Supra note 536, para. 501.

It should be noted, additionally, that the ICC statute establishes a specific commander responsibility in Article 28, which significantly broadens the scope of Article 30 by the Elements of Crimes regarding Article 6(e). These obvious "workarounds", in the opinion of the author, might be a solution regarding the forcible transfer of children. The author agrees with the statement of W. Schabas,[605] who stated: "The best example in the statute itself of an exception to the general principle is Article 28(a), on superior responsibility of military commanders, which sets a 'should have known' standard that manifestly falls below the knowledge requirement of Article 30" and "there are also examples of derogation from article 30 in the Elements of Crimes, for example, the norm by which the perpetrator of the genocidal act of transferring children."

From the point of view of the author, *dolus specialis* might be a possible legal challenge. Though the facts that would point out *dolus specialis* in regard to the forcible transfer of children by Russian authorities seem to be highly evident: the systematic nature of the crime (for example, the creation of a legislative base for adoption,[606] the indoctrination of forcibly removed children with Russian narratives refusing their Ukrainian roots,[607] the promotion of adoptions of those children in Russian society,[608] the enormous scale of this crime due to the high number of victims and but also the derogatory language of Russian propaganda in regard to the Ukrainian citizens.[609] The consciousness of the consequence might become a problem in regard to the forcible transfer of children in specific circumstances. By

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605 William A. Schabas, "Part 3. General Principles of Criminal Law", [in:] *Commentaries on International Law*, Oxford Scholarly Authorities on International Law (2010), p. 474.

606 Supra note 497.

607 *How Ukrainian Children Returned Home from Russia and What They Experienced on the Other Side of the Front*, https://www.youtube.com/watch?v=IKiy9iuYibo (accessed December 19 2023).

608 Ibid.

609 *Russian Propagandist Called to Drown and Burn Ukrainian Children or Translation*, https://www.youtube.com/watch?v=pi4ls2iB46g (accessed December 19, 2023).

the establishment of a special tribunal, the *dolus specialis* hurdle can be approached in a way that will be in line with the ICTY/ICTR approach, leaving more space for the court's interpretation in specific circumstances.

5.2. General intent – *dolus generalis* regarding forcible transfer

The specific intent to destroy a protected group is an additional requirement to the necessary general intent.[610] General intent in a legal sense extends beyond the narrow understanding of personal desires or motivations. It includes the foreseeability of the consequences of one's actions and the knowledge that those actions are likely to cause the unlawful result, even if the actor may have had ambivalence or regret about it. General intent must cover both the material elements of the individual genocidal acts mentioned in subparagraphs (a) to (e) of Article 2 of the Convention[611] and the element of the chapeau of the provision of Article 2, which states: "genocide means any of the following acts…" According to Professor P. Fletcher,[612] intent's legal meaning is broader than regular understandings of the word *intent*. The legal meaning of *intent* includes the side effects of intentional behaviour (such as separation of children from their parents as a result of forcible transfer, in our case) and will be regarded from this point of view as intentional and caused by the perpetrator. This point of view is in conformity with the approach of the concept of the intent within most jurisdictions: results will be regarded as intended when the perpetrator knew that his/her actions can possibly/were likely to cause the unlawful result, even though the actor

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610 Supra note 553, p. 549, 571–572: "a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequence of the prohibited act."

611 Supra note 567, para. 187.

612 George Fletcher, *Rethinking Criminal Law*, Oxford University Press (1998), para. 6.5.

was ambivalent about or may even have regretted that result.[613] The same approach follows from ICTR jurisprudence: in *Prosecutor v. Akayesu*[614] the chamber found that "the offender is culpable only when he has committed one of the offences charged under Article 2(2) … with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he *knew* or *should have known* that the act committed would destroy, in whole or in part, a group."

An important note that must be made in this regard is the provision of Article 30 of the ICC statute, which was discussed under 2.1. (requirement of the intent and knowledge), as it may pose challenges in establishing general intent for the forcible transfer of children in the situation of Russian aggression. However, the Elements of Crimes may offer some flexibility in this regard, mentioning that "the existence of intent and knowledge can be inferred from relevant facts and circumstances".[615] Based on the publicly known objective facts surrounding the Russian invasion, it can be argued that both general intent and specific intent of the alleged perpetrators can be proven. This conclusion can be drawn based on the statements publicly made regarding the success and the scale in which transfer of the children from Ukraine was taking place. Also, the preparation of the legislative basis in Russia shows a systematic and intended approach and a state policy chosen to maximize the genocidal effect of the forcible transfer, obviously without physically killing but destroying the rights and futures of those children within their own national group. *Dolus generalis* can be parsed from the fact of the transfer of children to the Russian or Belarusian territory by the authorities or NGOs (such as the Red Cross of both Russia and Belarus), which are executing orders without parents' consent or in contrary with the statements of Ukraine to stop such unlawful actions.

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613 Supra note 523, p. 94.

614 Supra not 537, p. 498, 517–522.

615 Supra note 208, p. 1.

6. Ratione personae

The general rules of the Rome Statute with respect to ratione personae – an element of the ICC jurisdiction – embrace several general principles of criminal law[616] and were briefly presented in Chapter 2 of the monograph. For the current analyses they shall be presented as follows:

- a natural person pursuant to the statute is subject to the court's jurisdiction (Article 26, part 1);
- no person shall be criminally responsible due to the retroactivity approach (Article 24, part 1);
- a person at the time of the alleged crime is above the age of 18 (Article 26).

Moreover, the permanent International Criminal Court is recognised as a "certain international criminal court[…], where [it] ha[s] jurisdiction, based on 'rule-exception' relationship".[617] That means that states parties waive their immunity[618] when entering the Rome Statute. Article 27 rules on the "irrelevance of official capacity", stating that the statute shall apply *equally to all person*s without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of itself, constitute a ground for reduction of sentence (emphasis by the author).

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616 Supra note 16, part "General Principles of Criminal Law".

617 Eleni Methymaki, Antonios Tzanakopoulos, "Freedom with Their Exception: Jurisdiction and Immunity as Rule and Exception", [in:] *Exceptions and Defences in International Law*, eds Federica Paddeu, Lorand Bartels, Oxford University Press (2020), p. 225–241.

618 More details on issues on immunity in international law in chapter 2 of the monograph.

The issues regarding the jurisdiction of the ICC over individuals are interconnected with the preconditions for the exercise of that jurisdiction. The general provisions foresee that the court's jurisdiction is exercised if:

- a state is a party of the Rome Statute and thereby accepted the ratione materiae to the crimes of the Article 5;
- a situation occurred in which one or more crimes appeared and states referred the case to the prosecutor;
- a prosecutor has initiated an investigation.

The court may proceed if one or more states (state parties or those that accepted the jurisdiction ad hoc) have one of the following links – (a) a territory where the crime occurred or (b) a person accused of the crime.

The investigation into the situation in Ukraine by the ICC prosecutor, initiated under the referrals from 39 states parties since March 2022, may not be considered under the general clause. The case is unique and presumes special considerations due to the following facts:

(a) Ukraine is not a state party of the Rome Statute but accepted ICC jurisdiction ad hoc.

(b) The addressees of the ICC warrant are officials of a state which are also non-members of the Rome Statute and did not accept its jurisdiction.

(c) The addressees of the ICC warrant are high officials, and in accordance with the rules of international custom may claim protection under the immunity regime.

6.1. *Ratione personae*: Preconditions regarding the officials of a non-state-party of the Rome Statute in offence of the allegedly committed forcible transfer of Ukrainian children

Each of the above-listed facts shall be examined through a set of rules stipulated by the Rome Statute, outlining preconditions for exercising ICC jurisdiction along with some relevant case law.

Ukraine is not a state party of the Rome Statute; meanwhile, the jurisdiction of the ICC by a non-state party may be declared with respect to the "crime in question" (Article 12, part 3).

Ukraine has submitted the declaration on the acceptance of the jurisdiction twice:

In 2014 – a declaration on recognition of the jurisdiction of the ICC for the purpose of identification, processing and judging the authors and accomplices of acts committed on the territory of Ukraine within the period 21 November 2013 to 22 February 2014.[619]

In 2015 – a declaration on recognition of the jurisdiction of the ICC over crimes against humanity and war crimes committed by the senior officials of the Russian Federation since 20 February 2014 without time limits. Accordingly, the latest declaration, which did not specify time limits but pertained to the "crime in question", signifies Ukraine's recognition of the ICC's jurisdiction with respect to war crimes and crimes against humanity.

The declaration and facts of the legal actions undertaken by the ICC (launching the investigation by the prosecutor and issuing the Pretrial Chamber warrant against two persons) raise questions:

How should the term "crime in question" be interpreted? Can a state specify the "crime in question", as Ukraine did in its declaration dated 4 February 2015, limiting the jurisdiction material stipulated in Article 5 of the statute? Will the ICC exercise its jurisdiction with respect to the crime of genocide even if it does not fall under the scope of ratione materiae, as indicated in the latest declaration submitted by Ukraine?

If this is a state that indicated the scope of *ratione materiale* by recognising jurisdiction in a way of submitting a declaration on the matter, it seems that the ICC may have jurisdiction only with respect to the crimes

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619 ICC, *First Declaration on Recognition of the ICC Jurisdiction by Ukraine*, April 9, 2014, https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf (accessed December 19, 2023).

against humanity and war crimes. On the other hand, according to Article 14, a state party may refer a situation to the prosecutor in which one or more crimes within the jurisdiction of the court appear to have been committed. The state party can request the prosecutor to investigate the situation to determine whether one or more specific persons should be charged with the commission of such crimes. The wording of the statute's proposition indicates that the state party is free to send a request and specify crimes within the jurisdiction of the court, including specific persons to be charged or warranted. According to the published announcement,[620] the referring countries have mentioned that the scope of the situation encompasses any past or present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21 November 2013 onwards.[621] Following this referral, the prosecutor submitted his requests to the Pretrial Chamber that considered the requests and supporting materials and authorized the commencement of the investigations and issued a warrant in accordance with Articles 15 and 57 of the Rome Statute.

The shortcuts from the Pretrial Chamber warrant, which is based on the prosecution's applications of 22 February 2023, stipulate that the ICC bodies see reasonable grounds to believe that each suspect bears responsibility for the war crime of the unlawful deportation of population and that of the unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice against Ukrainian children.[622] The chamber

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620 1. ICC, *State Party Referral Under Article 14 of the Rome Statute*, March 2, 2022, https://www.icc-cpi.int/sites/default/files/2022-04/State-Party-Referral.pdf (accessed December 19, 2023); 2. *Referral of the Government of the United Kingdom of Great Britain and Northern Ireland*, https://www.icc-cpi.int/sites/default/files/2022-04/Article-14-letter.pdf (accessed December 19, 2023); 3. *Referral of the Government of the United Kingdom of Republic of Lithuania*, https://www.icc-cpi.int/sites/default/files/2022-04/1041.pdf (acceseed December 19, 2023); 4. Supra note 114.

621 Supra note 26.

622 Supra note 267.

considered that the warrants were kept secret to protect victims and witnesses and to safeguard the investigation. Nevertheless, the chamber also considered that, in the interests of justice, it is appropriate to authorize the registry to publicly disclose the existence of the warrants, the names of the suspects, the crimes for which the warrants are issued and the modes of liability as established by the chamber. Therefore, the author of the chapter is curious to learn the full text of the warrant to understand the justification of the Pre-Chamber's choice to charge war crimes (Article 8) rather than genocide (Article 6). This choice does not seem coincidental, especially considering Ukraine's position regarding the scope of material elements of ICC jurisdiction, as accepted in the declaration dated 2015.

6.2. "Pacta tertiis" vs. officials of a state which is non-member of the Rome Statute

The so-called *pacta tertiis* rule, analysed in detail in chapter 2, stands out as the most significant objection to the exercise of jurisdiction by a treaty-based court. The primary hurdle for states opposing the ICC is the desire to evade international criminal responsibility for their citizens, particularly when it involves high-ranking officials. Sometimes, an argument "Rome Statute as a treaty at the expense of third parties"[623] is used to undermine the role and nature of the ICC and its activities embraced by its goals listed in the statute's preamble.[624]

The Rome Statute's and its jurisdictional regimes aim to prosecute citizens of a state which is unable or unwilling to bring justice and stop impunity. Exercising the ICC jurisdiction, the court's bodies do not impose

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[623] Supra notes 381, 382.

[624] Supra note 16, preamble, paras. 4, 5 "[…] the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, […] [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes […]".

obligations on third states but rather on individuals who allegedly committed the core crimes punishable by the ICC as well as by most national penal codes. With respect to the Russian Federation,[625] one should be aware that the country, during the Conference of States in Rome, attached importance to the ICC and signed the Constitutional Act of the International Criminal Court. The Rome Statute, adopted at a diplomatic conference in Rome in 1998, entered into force in 2002. In 14 years of silence, on 16 November 2016, the president of the Russian Federation signed Decree No. 361-rp, "On the Intention of the Russian Federation Not to Become a Party of the Rome Statute of the International Criminal Court"[626] and ordered the submission of the letter on the intention of the Russian Federation not to become a party to the Rome Statute to the secretary-general of the United Nations.

Although the 1969 Vienna Convention on International Law contains a provision on the intention not to become a party to temporary treaties and the duty to notify,[627] the provision is anticipated to be performed in good faith. It seems that in the current case the state did not meet the obligations not to defeat the object and purpose of the treaty by unduly delay for more than 17 years.[628]

In concluding the discussion on the impact of third-party effects, it is important to assess the situation by saying that while the state was aware and expressed its consent by providing a signature during the conference in Rome, it has given reasonable expectations to its own population as well as to the international community of states. By issuing bylaw no. 361-rp, the

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625 Alexandra Y. Skuratova, "Russia and the Rome Statute of the International Criminal Court", *Moscow Journal of International Law*, 4 (2016), p. 125–137 (in Russian).

626 *Decree of the President of the Russian Federation "On the Intention of Russia Not to Become a Party to the Rome Statute of the International Criminal Court"*, No. 361-rp, November 16, 2016, https://rg.ru/documents/2016/11/18/statut-dok.html (accessed December 19, 2023).

627 Supra note 95, Article 25, para. 2.

628 Ibid., Article 18(b).

Russian Federation dispatched a notification to the secretary-general of the United Nations. By the delayed action for almost 18 years, the state demonstrated neither a good faith approach nor compliance with the principles of the UN Charter.[629] This lack of cooperation is also evident in the state's stance toward the goals of the Rome Statute. Ironically, at approximately the same time when the Russian Federation decided not to become a member of the Rome Statute, Ukraine submitted a declaration accepting ICC jurisdiction, opening the possibility for the prosecution of the state's officials, including its president.

6.3. The addressees of the ICC warrant and the immunities' regime

As mentioned earlier, the concept of "Irrelevance of Official Capacity" (Article 27) arises from the states parties' consent to waive immunity for states' officials, a principle that is also gaining strength in customary law. However, the growing role of the concept of universal jurisdiction resulted in Article 27, part 2, of the Rome Statute and is viewed as a written expression of a customary international legal principle. This assumption is based on the concept that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction", as stated in the ICJ judgement in the Arrest Warrant Case.[630] According to the ICC Chamber's 2008 decision on the arrest warrant against Omar Al-Bashir (the head of state of Sudan, not a party to the Rome Statute), the preamble of the statute articulates that "one of the core goals of the statute is to put an end to impunity for the perpetrators

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629 Sergey Sayapin, *Russia's Withdrawal of Signature from the Rome Statute Would not Shield Its Nationals from Potential Prosecution at the ICC*, EJIL:Talk! Blog of the European Journal of International Law, November 21, 2016, https://www.ejiltalk.org/author/ssayapin/ (accessed April 19, 2024).

630 Case concerning the arrest warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), ICJ, February 14, 2002.

of the most serious crimes of concern to the international community as a whole, which must not go unpunished". This served as justification for rejecting the significance of Al-Bashir's immunity.[631] The chamber's second argument was that immunity is null and void before the ICC, as stated in Article 27.

Consequently, if the ICC exercises its jurisdiction over crimes allegedly committed by officials of a non-member state on the territory of a state recognising the court's jurisdiction, the legal consequences regarding immunity become inevitable. Importantly, the Rome Statute does not explicitly mention the two grounds for considering immunities, *ratione personae* and *ratione materia,* but instead imposes the notion of "official capacity" (Article 27).

In conclusion, the extension of Article 27 to officials of a non-member state in the current case seems to be legitimate, since a "territorial" state where the alleged crimes were committed has accepted ICC jurisdiction. The court's application of "the statutory framework provided for in the statute, the Elements of Crimes, and the Rules as a whole"[632] with no exemptions shows that the court anticipates to apply the Rome Statute's provisions in full scale to officials of the non-party state.

In summary, regarding the legality of applying Article 27, which nullifies the immunity of state officials against ICC jurisdiction, the author is convinced that once the ICC begins to exercise jurisdiction based on the ad hoc recognition of jurisdiction by a territorial state (Ukraine), the aforementioned officials will be treated equally with other individuals suspected of committing international crimes.

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631 ICC decision to issue an arrest warrant against Al-Bashir, ICC-02/05-01/09, December 11, 2017, para. 42.

632 Ibid., para. 43.

Conclusions

This chapter is built on the previous two chapters and takes a practical step forward by providing a unique legal analysis illuminating a current case of the ICC. The initiation of an investigation into the situation in Ukraine, following referrals from 38 state parties[633] submitted in March 2022, has been developing further after the arrest warrant from ICC Pretrial Chamber 2 issued for two officials from the Russian Federation in March 2023.

Being the last but not least part of the current monograph, the charter provides materials which are based on international, national criminal law and also on case law developed thanks to a rich legacy of international criminal justice. The author has been seeking answers to very concrete questions, such as why the ICC Chamber utilized Article War Crimes (8)(2)(b)(viii) as the legal foundation for the warrant related to a crime against a special group (children) and declined the article on genocide, whereas the "forcibly transferring children of the group to another group" is included in Article 6(1)(e) of the Rome Statute. The author has also been refreshing the well-developed notion of the *pacta tertiis* rule while considering the court's jurisdiction against nationals from the nonstate party.

Moreover, issues with respect to *ratione materiae* (Article 5), with a special emphasis on the crime of genocide has been analysed, in detail and in conjunction with the Convention of Genocide's provisions and supported by examples from case law containing interpretations conducted by several international tribunals and courts. The issues on the ratione personae (Article 25) and irrelevance of immunity (Article 27), as they are regulated by the Rome Statute and applied by the court, have been analysed. Finally, an outlook has been presented to illuminate the potential of the ICC in exercising jurisdiction with respect to individuals who are nationals of the non-member states parties (Articles 12 and 13), and specifically officials

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633 Supra note 237.

who enjoy zero immunity if they are treated in accordance with the Rome Statute. The declaration made by Ukraine to the ICC overcame impediments in launching the prosecution process.

The author also recognizes the work of Raphael Lemkin, his original vision and principles in approaching the crime of genocide, as laid down in the Genocide Convention. Nowadays, the Genocide Convention ensures a global landscape wherein the rights of the most vulnerable, namely children, are both protected and upheld. The current case illustrates the ICC's commitment in application of the existing legal framework, including the Genocide Convention, as adequate instruments for the prosecution of individuals, including officials who allegedly committed forcible child transfers under the specific circumstances caused by the invasion of Ukrainian territory by Russia.

Remarkably, in December 2023, the Office of the Prosecutor of the International Criminal Court presented a new Policy on Children.[634] In his statement, ICC Prosecutor Karim A. A. Khan KC emphasized that the world is witnessing the suffering of children globally. The new Policy on Children is designed to remedy their historic underrepresentation and lack of engagement in international criminal justice processes. "This policy represents a critical step in realizing my consistent pledge to take a child-sensitive approach to investigations and prosecutions, by articulating how we can proactively and explicitly consider their experiences in all our cases," he said. In the author's opinion, the new approach will make children's voices heard in every case, every situation. There is no doubt that this policy will also be applied to legal steps concerning the alleged forcible transfer of Ukrainian children.

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[634] ICC, *Office of the Prosecutor of the International Criminal Court Publishes New Policy on Children", statement by ICC prosecutor Karim A.A. Khan KC*, December 8, 2023, https://www.icc-cpi.int/news/office-prosecutor-international-criminal-court-publishes-new-policy-children-statement-icc (accessed December 19, 2024).

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List of Tables

1. On the scope of UJ crimes (*ratione materiae*) 57

2. Humanitarian law treaties and individual criminal responsibility 106

3. Human rights law treaties and individual criminal responsibility..... 112

4. International treaties ratified by both Russia, Belarus and Ukraine in relation to the protection of children's rights. 226

5. Examples of other legal sources, including the nonbinding instruments, providing standards for states to follow..... 227

Summary

Jurisdiction over International Crimes

The International Criminal Court and Other Ways of Ending Impunity

The book addresses the challenges and limitations in prosecution of individuals who committed crimes under international law. The individual criminal responsibility is broadly recognized and based on the understanding of the feasibility of such accountability in the present era.

The Nuremberg Trials in 1946 marked a pivotal moment, establishing the first international tribunal for individuals and initiating a new chapter in international law's pursuit of perpetrators threatening common values. The establishment of the permanent International Criminal Court (ICC) under the Rome Statute in 1998 and its operations since July 2002 show that its jurisdiction has not effectively curtailed the impunity of dictators, tyrants, and torture servants, especially in non-member States.

Motivated by these shortcomings, the authors have analyzed the ICC's procedural capacity to prosecute offenders from non-member States to the Rome Statute and explored alternative jurisdiction modes over international crimes committed by individuals. The book advocates a broader application of the universal jurisdiction principle, recognizing the limitations of ad hoc criminal tribunals, hybrid courts, and the practical constraints of the ICC. The authors propose that, in addition to the ICC, international organizations and national states—especially those progressing toward the rule of law—can enhance the international justice system. Their suggestions include supporting civil society, establishing independent investigative mechanisms, maintaining human rights monitoring processes, and sharing best practices in investigating international

crimes, including those covered by the Rome Statute, within national legal systems that apply the universal jurisdiction principle.

The monograph's double objective is to offer an analytical overview of existing international and national approaches and institutions eligible to combat impunity for international crimes and to serve as a roadmap for readers interested in further studies on jurisdiction(s) over international crimes. Emphasizing the importance of referencing, applying, and developing international criminal law in both academic research and practical efforts against impunity, the monograph covers foundational scientific concepts, normative arguments, and case-law examples. It aims to provide readers with an understanding of international criminal law applicable at both local and global levels.

The first chapter explores broader issues of jurisdiction in international criminal law, presenting legal analyses and historical overviews to reveal institutional and substantive developments in international criminal justice. It focuses on principles driving the development of international criminal law, including the *lex specialis* principle of 'universal jurisdiction.' The second chapter narrows the scope of the research to the ICC's jurisdiction and specifically over the criminals from non-member states. The third chapter delves into a individual case involving the ICC warrant against two high officials of the Russian Federation, which was issued in February 2023. This chapter includes legal analysis related to the 'third party' notion, the development of the doctrine of international courts' jurisdiction against state officials, and issues of immunity. Overall, all chapters of the monograph have been synergized by the idea to underscore the significance of international criminal law in combating impunity and preventing criminal enterprises, providing a comprehensive outlook of legal regulations and approaches applicable at both local and global levels.

Keywords: jurisdiction, impunity, International Criminal Court (ICC), universal jurisdiction, rule of law, core crimes, ad hoc tribunals, Genocide Convention, transfer of children

The book Jurisdiction over International Crimes: International Criminal Court and Other Ways of Ending Impunity by Irina Valusha and Maryna van den Boom addresses the challenges and limitations faced by courts in holding individuals criminally accountable under international law. It is based on a widely accepted understanding of the feasibility of such accountability in the present era and deals with shortcomings, particularly those related to the responsibilities of perpetrators from countries that are not members of the international criminal framework.

The Nuremberg Trials in 1946 marked a pivotal moment, establishing the first international tribunal for individuals and initiating a new era in the pursuit of perpetrators threatening common values in international law. Despite the establishment of the first permanent international criminal court in 1998 under the Rome Statute, its operations have not halted the impunity of dictators, tyrants, and others committing core international crimes.

The monograph stands out as unique and superior to other publications of its kind. It provides a detailed analysis of institutional and substantive developments in international criminal law. In particular, the research is enriched by the analysis of the International Criminal Court's jurisdiction over offenders from non-party states, including a recent ICC case. Additionally, the book explores the application of the universal jurisdiction principle in Europe and globally.

These aspects lend significant originality to the topic, especially in the context of current international conflicts and the debate on the limitations of international criminal law, which is being discussed publicly. There are no such detailed and comprehensive studies on the topic in question, neither in Lithuanian law nor in international law.

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