

Towards an International Criminal Court: Genesis and Main Features of the Rome Statute*

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Political Starting Point

The States Parties to this Statute, ...

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, ...

Have agreed as follows:

Art 1: An International Criminal Court ('the Court') is hereby established.

Thus reads the Preamble and first sentence of the *Rome Statute of the International Criminal Court* as adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17 July 1998, in Rome.¹ Admittedly, the adoption of the Statute is a little like the conception of a child who must remain in the womb until, finally, the agreed upon Court is actually established at The Hague (art 3 para 1).

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¹ The *Rome Statute of the International Criminal Court* of 17 July 1998 appears in the original English and French, as well as in German, in *Gesetzentwurf der Bundesregierung zum Römischen Statut des Internationalen Strafgerichtshofs* (IStGH-Statutgesetz), Bundesdruckerei. The Statute, along with the subsequent corrections of 10 November 1998 and 12 July 1999, as well as the 'Elements of Crime' (PCNICC/2000/INF/3/Add 1) and the 'Rules of Evidence and Procedure' (PCNICC/2000/INF/3/Add 2) adopted by the Preparatory Commission on 30 June 2000, were published in French, English and Spanish in (1/2/2000) 71 *Revue Internationale de Droit Pénal*.

Nonetheless, even before the hopefully successful birth takes place, this act of conception is a spectacular event in more ways than one:

- First, since the foundation of the United Nations, probably no other single institution has been established that could have, in the long run, a greater influence on national sovereignty than the International Criminal Court. Thus, the Court represents a very exciting step in the evolution of public international law.
- Second, from a political perspective, it is one of the first serious steps, worldwide, to show dictators and other (criminal) holders of high office that they are not immune from criminal prosecution.
- Third, from a criminal law perspective, this event should not be underestimated, as the creation of a Statute, applicable across national boundaries and to various legal cultures, presents both criminal law theoreticians as well as legal practitioners with the challenge of developing principles and rules that are acceptable to the world community.

As if these aspects were not in and of themselves sufficient, I shall add two additional personal motives for devoting my contribution to the planned International Criminal Court:

- on the one hand, my own involvement in this development, including cooperation on various memoranda to the draft² (which

² See the Siracusa/Freiburg drafts, proposed as alternatives to the International Law Commission ('ILC') drafts by an independent group of experts in cooperation with the Association Internationale de Droit Pénal ('AIDP'), the Istituto Superiore Internazionale di Scienze Criminali ('ISISC') in Siracusa and the Max Planck Institute for Foreign and International Criminal Law in Freiburg (see in particular *Draft Statute for an International Criminal Court. Alternative to the ILC-Draft*, Siracusa/Freiburg, July 1995; see also the unpublished *Freiburg Draft* of February 1996, proposed by a working group composed of A Eser, D Koenig, O Lagodny and O Triffterer, whereby the recommendations of this draft were incorporated into an amendment of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind (printed as an annex in O Triffterer, 'Acts of Violence and International Criminal Law' (1997) 4 *Croatian Annual of Criminal Law and Practice* 872-81); see also the 1994 ILC Draft Statute for an International Criminal Court with suggested modifications (*Updated Siracusa Draft*) prepared by a committee of experts, submitted by AIDP et al, Siracusa/Freiburg/Chicago, 15 March 1996) With regard to these developments, see Ch Nill-Theobald, 'Anmerkungen über die Schaffung eines Ständigen Internationalen Strafgerichtshofs' (1996) 108 *Zeitschrift für die gesamte Strafrechtswissenschaft* ('ZStW') 230; K Ambos, 'Zum Stand der Bemühungen um einen ständigen Internationalen Strafgerichtshof und ein Internationales Strafgesetzbuch' (1996) *Zeitschrift für Rechtspolitik* ('ZRP') 263 (with a comparison of the Siracusa/Freiburg alternative proposals to the ICTY and ICTR Statutes and the 1994 ILC draft); H-H Jescheck, 'Zum Stand der Arbeiten der Vereinten Nationen für die Errichtung eines Internationalen Strafgerichtshofs' in A Eser (ed), *Festschrift für Haruo Nishihara zum 70. Geburtstag*

ultimately became the Statute) and the honour of participating in a portion of the Rome Conference as a member of the German delegation,³

- on the other hand, my conviction that the idea of the International Criminal Court continues to need public support in order for the Court to be ratified by as many States as possible.

From Nuremberg via The Hague to Rome

Forerunners

Should the above heading be read to imply that the road to a permanent international criminal court did not begin until after World War II, this impression would not be completely correct. For although its importance should not be underestimated, the International Military Tribunal at Nuremberg⁴ was by no means the first step in the formation of a kind of supranational criminal court for certain crimes. Rather, the roots of this development may, apparently, be traced to the threshold of the 16th century, to the small town of Breisach situated on the border between France and what was then Habsburg.⁵ Even if it appears to be a stretch of the imagination to compare a trans-border court of that time, dealing with certain war crimes, with a modern International Criminal Court, we should at least be aware of the fact that the idea of establishing a court that can be relied upon at an international level when national justice fails is not an invention of the 20th century, but rather dates back at least to the second half of the 19th century when the Swiss Gustave Moynier, then president of the International Red Cross, came forward with his suggestion of an

(1998) 437, 440; H Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert* (1999) 345 ff.

³ Just prior to the Rome Conference, in May 1998, an International Workshop on the Role of the Prosecutor of a Permanent International Criminal Court, organised by the Max Planck Institute for Foreign and International Criminal Law in cooperation with the Office of the Prosecutor of the International Criminal Tribunal ('ICTY' and 'ICTR'), was held in Freiburg. The proceedings of this conference are published in L Arbour, A Eser, K Ambos and A Sanders (eds), *The Prosecutor of a Permanent International Criminal Court* (1998) (the 'Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court', introduced at the Rome Conference, can be found at 667-9). On this point, see also text accompanying below n 50.

⁴ See text accompanying below n 10.

⁵ For more on the proceedings that were begun in 1474 against Landvogt Peter von Hagenbach before an ad hoc tribunal of 28 judges from allied towns and that ended with his execution, see G Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol II: The Law of Armed Conflict* (1968) 462 ff.

international criminal court in response to the barbarity of the Franco-Prussian War of 1870-71.⁶

Whereas Moynier's suggestion still was a private initiative, by the end of World War I the idea of an international court enjoyed such international recognition in the political arena that the Peace Treaty of Versailles anticipated the trial of the former German Kaiser 'for a supreme offence against international morality and the sanctity of treaties' before an ad hoc international criminal court.⁷ This act of public international law was doomed to failure, however, as the Netherlands, where Wilhelm II had gone into exile, was not willing to extradite him.⁸

The International Military Tribunals at Nuremberg and Tokyo

Despite – or perhaps even on account of – the failure of earlier attempts, efforts to establish an international criminal court continued at both the private and the political level. The first achievement – from a public international law perspective, at least – can be seen in the *Convention for the Creation of an International Criminal Court*, whose jurisdiction was to be confined to crimes created by the *Convention for the Prevention and Punishment of Terrorism*,⁹ both of which were opened for signature in 1937. This effort was ultimately unsuccessful, however, due to the intervening Italo-Ethiopian war.

The decisive step from mere resolutions to an actual court was taken, finally, in August 1945, with the establishment of the International Military Tribunal ('IMT') at Nuremberg, where high-ranking war criminals from the European Axis powers were prosecuted and punished.¹⁰ The comparable Tokyo-based International Military Tribu-

⁶ U Fastenrath, 'Der Internationale Strafgerichtshof (1999) *Juristische Schulung* (JuS) 632, 632.

⁷ For more on this point, see H-H Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (1952) 41 ff.

⁸ See D von Selle, 'Prolog zu Nürnberg – Die Leipziger Kriegsverbrecherprozesse vor dem Reichsgericht' (1997) 19 *Zeitschrift für Neuere Rechtsgeschichte* ('ZNR') 193; Ahlbrecht, above n 2, 36 ff.

⁹ League of Nations DOC C 546 (I). 1937 V (1938), reprinted in M C Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (1997) 791-810. For more on this point, see Jescheck, above n 7, 117 ff; Ahlbrecht, *ibid* 57 ff.

¹⁰ *Charter of the International Military Tribunal*, 8 August 1945, 59 Stat 1544, 824 UNTS 279, 3 Bevens 1238, reprinted in Bassiouni, *ibid* 183-6. For an in-depth discussion of the foundations and proceedings of the Nuremberg IMT, see Jescheck, *ibid* 140 ff. For an assessment from a contemporary perspective, see, eg, Ahlbrecht, *ibid* 59 ff; M C Bassiouni, 'Das „Vermächtnis von Nürnberg“: eine historische Bewertung fünfzig Jahre danach' in G Hankel and G Stuby (eds),

nal for the Far East ('IMTFE') was established in January 1946.¹¹ Thus, it is not incorrect to characterise Nuremberg as the starting point of a real international court; after all, the IMT did not exist solely as a mere political ideal or theoretical draft, but it actually entered into force and was successful, in that war criminals were tried and some even sentenced to death and executed. Although as a German I hesitate to do so, I must point out that the Nuremberg and Tokyo Tribunals were not convened by the entire world community, but rather were established by the victors of the Second World War; this has resulted in references in some quarters to 'victors' justice' and has led some to question the Tribunals' impartiality.¹²

The Ad Hoc Tribunals for Yugoslavia and Rwanda

Whereas I do not share the aforementioned objections to the Nuremberg Tribunal and, indeed, consider the Tribunal the first real breakthrough towards international responsibility for international crimes, safer ground was not reached until additional efforts at the UN level¹³ led to the establishment in 1993 of the International Criminal Tribunal for the former Yugoslavia ('ICTY')¹⁴ sitting in The Hague (Netherlands) and in 1994 of the International Criminal Tribunal for Rwanda ('ICTR')¹⁵ sitting in Arusha (Tanzania).¹⁶ The

Strafgerichte gegen Menschheitsverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen (1995) 15, 15 ff and 29 ff.

¹¹ The *Charter of the International Military Tribunal for the Far East*, 19 January 1946 and 26 April 1946, TIAS No 1589, 4 Bevans 20, reprinted in Bassiouni, *International Criminal Law Conventions and Their Penal Provisions*, above n 9, 196-9, can also be found at: Ahlbrecht, *ibid* 407-10 with more information at 103 ff. For a contemporary assessment of the IMTFE, see B V A Röling and A Cassese, *The Tokyo Trial and Beyond. Reflections of a Peacemonger* (1993).

¹² See G Werle, 'Menschenrechtsschutz durch Völkerstrafrecht' (1997) 109 ZStW 808, 811 ff.

¹³ For more on this point, see B Graefrath, 'Die Verhandlungen der UN-Völkerrechtskommission zur Schaffung eines Internationalen Strafgerichtshofs' (1992) 104 ZStW 191; F Rigaux, 'Internationale Tribunale nach den Nürnberger Prozessen' in Hankel and Stuby, above n 10, 142; Ahlbrecht, above n 2, 336 ff.

¹⁴ The *Statute of the International Tribunal for the Former Yugoslavia*, SC Res 827 (25 May 1993), Bassiouni, *International Criminal Law Conventions and Their Penal Provisions*, above n 9, 251-7, and the German law of 10 April 1995 regulating cooperation with the International Tribunal for the former Yugoslavia (Yugoslavian Tribunal Law), appear in both English and German in W Schomburg and O Lagodny, *Internationale Rechtshilfe in Strafsachen* (3rd ed, 1998) 1175. For an in-depth discussion, see Ahlbrecht, *ibid* s 232 ff. For a contemporary historical perspective, see M C Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996).

¹⁵ The *Statute of the International Tribunal for Rwanda*, SC Res 955 (8 November 1994), Bassiouni, *International Criminal Law Conventions and Their Penal Provisions*,

legitimacy of these tribunals has a much broader basis, as they were established by the United Nations Security Council and are not merely creations of possibly biased military victors, but rather of the international community as a whole.¹⁷

However, since these tribunals - both for Yugoslavia as well as for Rwanda - are no more than ad hoc tribunals whose existence depends upon specific historical and political situations and whose jurisdiction is correspondingly limited, they lack permanence, both in theory and in practice.¹⁸ For although there is still a great deal of work to be done and in light of the numerous offences yet to be investigated and prosecuted they might indeed strive for 'eternity', they are dependent on financial support that must be renewed regularly, and thus their continued existence is perpetually uncertain.

The Rome Resolution for a Permanent International Criminal Court ('ICC')

In order, among other things, to put an end to this uncertainty and to create a less arbitrary and more structured foundation, the limited competencies and resources of the ad hoc tribunals gave new impetus to the efforts to establish a permanent International Criminal Court;

ibid 258-64, as well as the German law of 1998 regulating cooperation with the International Tribunal for Rwanda (Rwanda Tribunal Law), appear in both English and German in Schomburg and Lagodny, *ibid* 1207. For an in-depth discussion, see Ahlbrecht, *ibid* 302 ff.

¹⁶ On the origins of these tribunals, see V Morris and M P Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. A Documentary History and Analysis* (1995) vol 1, in particular at 17 ff; C Hollweg, 'Das neue Internationale Tribunal der UNO und der Jugoslawienkonflikt' (1993) *Juristen Zeitung* (JZ) 980; Ch Tomuschat, 'Sanktionen durch Internationale Strafgerichtshöfe' (1994) II(1) *Verhandlungen des 60. Deutschen Juristentages Münster* 1994, Q53, 54 ff; O Triffterer, 'Von „Nürnberg“ zu einem Internationalen Gerichtshof zur Verfolgung der Kriegsverbrechen im ehemaligen Jugoslawien' in H Neisser (ed), *Menschenrechte als politischer Auftrag* (1993) 61, 110 ff; O Triffterer, 'Universeller Menschenrechtsschutz auch durch das Völkerstrafrecht? Von Nürnberg zum Internationalen „Jugoslawien-Tribunal“ in Den Haag, (1995) 46 *Politische Studien* 32, 44 ff; B Graefrath, 'Jugoslawien und die internationale Strafgerichtsbarkeit' in Hankel and Stuby (eds), above n 10, 295.

¹⁷ See Hollweg, *ibid* 981 ff, 988.

¹⁸ See also Graefrath, 'Jugoslawien und die internationale Strafgerichtsbarkeit', above n 16, 315; H-H Jescheck, 'Der Internationale Strafgerichtshof: Vorgeschichte, Entwurfsarbeiten, Statut' in G Bemman and D Spinellis (eds), *Strafrecht - Freiheit - Rechtsstaat. Festschrift für G A Mangakis* (1999) 483, 489 ff.

these efforts bore fruit at the Rome Diplomatic Conference in 1998.¹⁹

Although quite a bit could be said about the starting points, the agenda and the various participants – both on stage as well as behind the scenes – I shall limit myself to three general observations:

- First, the final results of the conference, including the Rome Statute, clearly illustrate the importance of the support from academics²⁰ and non-governmental organisations²¹ during the preparatory phase and of their influence in the realisation of international goals of such complexity and political import.²²
- Second, with regard to the power play between States seriously interested in an international criminal court and those openly or covertly trying to prevent it, the Rome Conference has proved that ‘where there’s a will, there’s a way’. In this case it was, above all, the determination of a coalition of so-called ‘like-minded States’, including both Australia and Germany, that carried the day with a total of 120 positive votes from around 160 participating countries. The United States, in the opposition, found itself on the losing side in a rather unusual coalition with, among others, the People’s Republic of China and Iraq.
- Third, the Rome Conference has confirmed that the establishment of an ICC requires confrontation with and solution of three decisive issues:

¹⁹ From the burgeoning literature concerning the origins of the Rome Conference, see, eg, Jescheck, *ibid*; Ahlbrecht, above n 2, 343 ff; R S Lee, ‘Introduction’ in R S Lee (ed), *The International Criminal Court. The Making of the Rome Statute* (1999) 1; R S Lee, ‘Creating an International Criminal Court - of Procedures and Compromises’ in H A M von Hebel et al (eds), *Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos* (1999) 141; U Leanza, ‘The Rome Conference on the Establishment of an International Criminal Court’ in F Lattanzi and W A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (1999) vol I, 7.

²⁰ See, eg, the references in above nn 2-3. See also, M C Bassiouni (ed), *Commentaries on the International Law Commission’s 1991 Draft Code of Crimes against the Peace and Security of Mankind* (1993); Ahlbrecht, *ibid* 335 ff.

²¹ See W R Pace and M Thieroff, ‘Participation of Non-Governmental Organisations’ in Lee (ed), *The International Criminal Court. The Making of the Rome Statute*, above n 19, 391; Ahlbrecht, *ibid* 348 ff.

²² An exhaustive survey of the efforts toward international criminal jurisdiction undertaken since World War I on the political (both governmental and non-governmental) level and in academia is offered by M C Bassiouni, ‘Historical Survey: 1919-1998’ in M Ch Bassiouni (ed), *The Statute of the International Criminal Court. A Documentary History* (1998) 1.

- the selection and definition of crimes over which the ICC should have jurisdiction;
- the relationship between international and national criminal justice, which is crucial in that it is the responsibility of national authorities to cooperate with the ICC, particularly where the transfer of a suspect or procurement of evidence is concerned; and
- the degree of independence conceded to the Court and its prosecuting authorities by the United Nations and its organs, as well as by national authorities and, not unimportantly, the degree of protection afforded against other external influences.

Admittedly, this list of controversial points does not mean that other issues did not deserve more attention, such as the general requirements of criminal responsibility that – although visibly improved in comparison to earlier drafts – still evince deplorable deficits.²³ But whenever national sovereignty appears to be endangered and the debates are dominated by representatives of public international law, it is not unusual for genuine questions of criminal law to lose out to power games with political implications.²⁴

An Overview of the Rome Statute

A discussion of the Rome Statute in all its dimensions cannot be attempted here.²⁵ Faced with a choice between a comprehensive approach that of necessity could be nothing other than superficial and an approach in which the focus is on a few, fundamental issues, I de-

²³ For example, see my commentary on art 31 in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) and on arts 25, 30 and 32 in A Cassese (ed), *The Rome Statute for an International Criminal Court. A Commentary* (in print), which offers a wealth of material on this point.

²⁴ The tremendous diversity in the various fundamental positions is stunningly apparent from the compilation of the drafts that were prepared by the International Law Commission and the Preparatory Committee prior to the Rome Statute and that served as a basis for the Statute: see Bassiouni, *The Statute of the International Criminal Court*, above n 22, 115-793. Additional details regarding the 'battle of opinions' prior to, as well as during, the Rome Conference can be found in the publications listed above n 19.

²⁵ See, eg, the overview in Ahlbrecht, above n 2, 360 ff. See also K Ambos, 'Zur Rechtsgrundlage des Internationalen Strafgerichtshofs. Eine Analyse des Rom-Statuts' (1999) 111 ZStW 176; O Triffterer, 'Der Ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit' in K H Gössel and O Triffterer (eds), *Gedächtnisschrift für Heinz Zipf* (1999) 493.

cided on the latter. At this point, however, presentation of at least a basic outline of the Rome Statute would be useful.

The Statute consists of a Preamble, in which the threat posed by international crimes and the determination to fight this threat is expressed impressively, and 13 parts composed of 128 articles:

- Part 1: Establishment of the Court (arts 1-4),
- Part 2: Jurisdiction, Admissibility and Applicable Law (arts 5-21),
- Part 3: General Principles of Criminal Law (arts 22-33),
- Part 4: Composition and Administration of the Court (arts 34-52),
- Part 5: Investigation and Prosecution (arts 53-61),
- Part 6: The Trial (arts 62-76),
- Part 7: Penalties (arts 77-80),
- Part 8: Appeal and Revision (arts 81-5),
- Part 9: International Cooperation and Judicial Assistance (arts 86-102),
- Part 10: Enforcement (arts 103-11),
- Part 11: Assembly of States' Parties (art 112),
- Part 12: Financing (arts 113-8),
- Part 13: Final Clauses (arts 119-28).

Foundations and Limits of the International Criminal Court's Jurisdiction

As indicated by the title of Part 2 of the Rome Statute, 'Jurisdiction, Admissibility and Applicable Law', the foundations and limits of the jurisdiction of the International Criminal Court result from a mix of substantive and procedural grounds: namely, from a list of crimes that are within the jurisdiction of the Court (A); and from certain procedural preconditions (B); and only if and insofar as the elements of these two grounds are satisfied does the Court have jurisdiction (C).

(A) Four Categories of International Crimes (Art 5)²⁶**Common Features**

Considering some of the quite far-reaching lists of international crimes that have been suggested over the past several decades as appropriate for the jurisdiction of an international criminal court,²⁷ the list actually adopted by the Rome Statute may seem to be quite short. Article 5 of the Statute names only four categories of crime: genocide, crimes against humanity, war crimes and aggression.

This already rather limited selection of possible crimes is reduced still further in that the jurisdiction of the ICC is restricted to 'the most serious crimes of concern to the international community as a whole' (art 5 para 1 sen 1), whereby the 'admissibility' of a case will also be denied if '[t]he case is not of sufficient gravity to justify further action by the Court' (art 17 para 1(d)).²⁸

This means that, even if an act in the sense of one of the aforementioned crimes was committed, it must still be ascertained whether the international community as a whole was so gravely affected as to justify prosecution by the ICC. With this general requirement in mind, the following can be said about the individual crimes.

Genocide (Art 6)

Genocide can be characterised by three primary elements:

- by the *object of legal protection*, in that national, ethnic, racial or religious groups, as such, should be protected from complete or partial destruction;
- by the specific *acts constituting the offence*, whereby in addition to the 'classical' forms of genocide, such as killing or serious bodily or mental harm or the infliction of intolerable conditions of life upon members of the group, 'modern' forms of eradication have been added, such as the prevention of births or the forcible transfer of children of the group to another group; and

²⁶ On the general historical development of this 'Special Part' of the ICC Statute, see H von Hebel and D Robinson, 'Crimes within the Jurisdiction of the Court' in Lee (ed), *The International Criminal Court. The Making of the Rome Statute*, above n 19, 79; O Triffterer, 'Der Ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit', *ibid* 507 ff.

²⁷ Possible 'international crimes' have been compiled in M Ch Bassiouni, *International Crimes: Digest/Index of International Instruments 1815-1985* (1986); M Ch Bassiouni, *International Criminal Law: Crimes* (1986).

²⁸ On this point, see also heading 'Sufficient "Gravity" as a Prerequisite of Admissibility (Art 17 para 1 (d))' below.

- by the required *intent* to destroy, in whole or in part, such a group.

Crimes Against Humanity (Art 7)

For this category of crime there are two required elements:

- On the one hand, one of eleven *acts constituting the offence* named in the Statute must be committed, whereby in addition to ‘classical’ atrocities such as murder, enslavement and torture, the following acts have been added in reaction to so-called ethnic cleansing and attempts by dictators to maintain their regimes: enforced disappearances of persons, the crime of apartheid as well as forced pregnancy or forced sterilization. In addition, the scope of this article is significantly expanded in that a kind of catch-all clause - (art 7 para 1 (k)) allows for its application to ‘[o]ther inhumane acts of a similar character’, and as a result the specificity of this category has been questioned.
- On the other hand, a certain degree of narrowing is achieved in that the aforementioned acts must be committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’ (art 7 para 1). However, the question arises as to the extent to which the ‘small soldier’ participating in an act constituting the offence must know of the overall plan or if the knowledge requirement applies solely to high-ranking military officials or other ‘policy makers’. This issue has not yet been completely resolved,²⁹ although it seems to me to be sufficient if the individual offender knows that he is involved in an inhumane policy even if he or she is not privy to details concerning the extent and structure of the overall plan.

War Crimes (Art 8)

This category of crime is also characterised by the combination of a general feature with certain acts constituting the offence.

- First of all, *acts constituting the offence* are defined as ‘[g]rave breaches of the Geneva Convention’ of 1949 (art 8 para 2(a)), such as willful killing, inhuman treatment (including biological experiments) and the taking of hostages. This specification is generally expanded to include ‘[o]ther grave violations’ of the law and customs applicable in international *armed conflict* (art 8 para 2

²⁹ See R Dixon, art 7 margin no 15 in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, above n 23; von Hebel and Robinson, above n 26, 95 ff.

(b-f)), so that a total of approximately 50 different acts may constitute a war crime. Some of these acts may, however, overlap with crimes against humanity (art 7), such as, for example, rape, sexual slavery and enforced prostitution, and the Statute does not indicate how to proceed in such cases.

- This substantively broad scope of application appears to be subject to certain limitations, however, in that the jurisdiction of the ICC in respect of war crimes applies ‘in particular’ when these are ‘committed as part of a plan or policy or as part of a large-scale commission of such crimes’ (art 8 para 1). Admittedly, the extent to which this restriction is compulsory is uncertain. It would certainly be compulsory if, as advocated by the USA, the jurisdiction of the ICC had been limited to the aforementioned general clause ‘only’. Since, however, instead of the term ‘only’ the phrase ‘in particular’ is used,³⁰ the jurisdiction of the Court may exceed the expressly mentioned policy goals or ‘large scale commission’ and may include other cases as well, such as, for example, the total destruction in a single action of an undefended village, even if no overall plan behind the attack can be proved.
- Furthermore, as far as war crimes are concerned, a transitional provision (art 124) must be mentioned, according to which a State Party can refuse to accept the jurisdiction of the ICC for a period of seven years following entry of the Statute into force when a war crime is alleged to have been committed by its nationals or on its territory. Since this ‘opt-out’ clause, whose adoption into the Statute is due primarily to the efforts of France,³¹ leads to a weakening of international criminal jurisdiction that can only be explained in terms of national interests, one can only hope that no country will muster the political-moral courage necessary to shirk in this way its international responsibility for war crimes.

Aggression (Art 5 Para 1(d), Para 2)

This category of crime – like war crimes – is yet another example of how difficult it is for some countries to expose themselves to the jurisdiction of the ICC. For although the crime of aggression is subject to the jurisdiction of the Court (art 5 para 1(d)), the negotiators in

³⁰ See von Hebel and Robinson, *ibid* 106 ff.

³¹ See A Zimmermann, art 24 margin no 1 in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, above n 23.

Rome were unable to agree upon a definition of 'aggression'.³² Thus, the exercise of jurisdiction by the ICC in this regard is delayed until, in an amendment procedure provided for in arts 121 and 123, the crime of aggression is defined and additional conditions for the exercise of jurisdiction are established (art 5 para 2). When this will take place or if, in fact, it will ever take place, cannot be said at this time.

(B) Procedural Prerequisites for the Exercise of Jurisdiction (Arts 12-20)

The presumption that one of the aforementioned crimes has been committed is a necessary but not a sufficient condition for the jurisdiction of the ICC. Jurisdiction can be established only if, on the one hand, additional conditions are satisfied and, on the other hand, certain grounds for denial are negated. In this context, three primary kinds of positive and negative grounds for admissibility can be identified:

'Nexus'

The requirement discussed here is perhaps most easily explained by means of comparison to the expansion of national criminal law to offences committed on foreign territory.³³ If one assumes that the exercise of state power – including supreme judicial power – is basically limited to one's own territory ('territoriality principle'), the application of national criminal law to offences committed beyond the borders requires a special justification, namely, a so-called 'nexus'. This can be found in the nationality of the offender ('active personality principle') or of the victim ('passive personality principle'), or it can be located in the interests of the state seeking to exercise jurisdiction ('real' or 'protective principle') or in certain legal interests that are deserving of international protection ('universality principle'). Depending on the circumstances, the 'representational principle' may be a possibility, especially in cases in which the state where the offence was committed is unable to prosecute and/or leaves prosecution up to the criminal justice system of the place of arrest. Whereas a comparison of the various national justice systems reveals that the afore-

³² For more on this point, see A Zimmermann, art 5 margin nos 17ff in Triffterer (ed), *ibid.*

³³ On the need to differentiate between the different levels of conflicting national criminal laws, international (procedural) cooperation and supranational criminal jurisdiction, see generally A Eser, 'Basic Issues of Transnational Cooperation in Criminal Cases' in E M Wise (ed), *Criminal Science in a Global Society: Essays in Honor of Gerhard O W Mueller* (1994) 3.

mentioned principles are invoked more or less frequently for the exercise of jurisdiction over extra-territorial offences, the 'universality principle' appears to be the first and obvious choice for the jurisdiction of an international criminal court. Thus, the ICC must have jurisdiction whenever one of the crimes named in the Statute has been committed, and indeed regardless of where the crime was committed or of the nationality of the offender or the victim. An exception from this would appear to be conceivable only with regard to the territory of states that are not parties to the Statute, although it could be argued that in cases involving crimes that are 'of concern to the international community as a whole' according to art 5 para 1, the jurisdiction of the International Criminal Court may not be denied by any nation-state. The adoption of this solution, the only consistent application of the universality principle, was thwarted, however, by the national self-interest of many countries concerned that it would compromise their sovereignty. Thus, in the Rome Statute, international criminal jurisdiction depends – apart from the assumption that one of the listed international crimes has been committed – upon an additional nexus. Employing a rather opaque statutory technique, the Statute provides for the following cases:³⁴

- (a) where the United Nations Security Council refers a 'situation' in which one of the international crimes may have been committed to the Prosecutor of the ICC (art 13(b));
- (b) where such a situation is referred to the Prosecutor by a State Party (art 13(a)); and
- (c) where the Prosecutor herself has initiated an investigation and the investigation has been authorised by the Pre-Trial Chamber (art 13(a), art 15 para 4);
- (d) whereby in groups (b) and (c) it is also necessary that either:
 - the state on whose *territory* the conduct in question occurred is a *Party to the Statute* (art 12 para 2 (a)) (reminiscent of the 'territoriality principle');
 - or the *person accused of the crime is a national of a State Party* (art 12 para 2 (b)): (reminiscent of the 'active personality principle').

³⁴ For more on the various 'trigger mechanisms' with which the jurisdiction of the ICC can be established or denied, see F Lattanzi, 'The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism' in Lattanzi and Schabas (eds), above n 19, 51.

As if this were not complex enough, the aforementioned membership requirement can be waived on the basis of a so-called '*opt-in*' clause if a *non-Party State* on whose territory the conduct in question occurred or whose nationality the suspect holds recognises the jurisdiction of the ICC for the crime in question (art 12 para 3).

Sufficient 'Gravity' as a Prerequisite of Admissibility (Art 17 para 1(d))

Even if it is not a genuine prerequisite of admissibility, a limit on the jurisdiction of the International Criminal Court can also be found in the fact that the ICC must declare a case 'inadmissible' if it 'is not of sufficient gravity to justify further action by the Court' because it does not involve 'most serious crimes of concern to the international community as a whole' (art 17 para 1(d) in combination with Preamble para 10 and art 1 sen 2).

(C) Résumé of the Fundamental Prerequisites of International Criminal Jurisdiction

If we disregard additional restrictions that may arise from the primacy of national criminal justice³⁵ and from the principle of '*ne bis in idem*' (art 20), the intervention of the ICC depends on the following conditions:

1. A crime listed in art 5 must be suspected;
2. The case must be sufficiently grave to justify investigation and prosecution by the ICC (art 17 para 1(d));
3. Either the state where the conduct in question occurred or the state of which the accused is a national must be a State Party (art 12 para 2); if this is not the case, the non-Party State can use the '*opt-in*' clause of art 12 para 3 to recognise the jurisdiction of the ICC over the crime in question.

If the aforementioned prerequisites are satisfied, even a national of a *non-Party State*, can be subject to the jurisdiction of the ICC, for example, in the case of a soldier of a non-Party State who commits a crime against humanity on the territory of a State Party. Moreover, the membership of the state where the conduct in question occurred, as well as the nationality of the accused, are irrelevant if the United Nations Security Council has referred a possibly criminal action to the Prosecutor of the ICC (art 13(b)).³⁶ Hence, US citizens, in par-

³⁵ See heading 'Complementarity of National and International Criminal Jurisdiction' below.

³⁶ See heading 'Nexus' above.

ticular, could be subject to the jurisdiction of the ICC even if the USA does not ratify the Rome Statute. Fear of this scenario could explain why the USA, even though it voted against the adoption of the ICC Statute, worked diligently on the Preparatory Commission (which is responsible for the drafting of rules and which I will come back to later),³⁷ and at the very last moment – namely on 31 December 2000 (art 125 para 1) – signed the Statute. In so doing, the USA secured itself the right to participate in the drafting of additional Elements of Crimes and Rules of Procedure and Evidence.³⁸

The Relationship of the International Criminal Court to National Criminal Justice and to the United Nations

Complementarity of National and International Criminal Jurisdiction³⁹

In order to understand what is meant by ‘complementarity’ of international and national criminal jurisdiction as mentioned in the Preamble (para 10), it is useful to first examine the status of the previous international tribunals.⁴⁰

It was characteristic of the International Military Tribunals of Nuremberg and Tokyo that they enjoyed – in practice if not in theory – *exclusive* criminal authority in relation to national criminal justice. Each tribunal was located in the country of nationality of most of those facing trial before it; similarly, foreign states where crimes were committed, themselves quasi victims of war crimes, understandably had no objections to an international criminal institution taking on the burden of prosecution. In this way the International Military Tribunals, as a rule, had direct access both to the accused as well as to potential evidence.⁴¹ Thus, the IMTs can be seen as examples of a

³⁷ See heading ‘Next Steps’ below.

³⁸ On the controversial position of the United States with regard to an International Criminal Court, see the symposium issue ‘The United States and the International Criminal Court’ (2001) 64 *Law and Contemporary Problems*, with occasionally contradictory opinions.

³⁹ See generally A Eser, ‘National Jurisdiction over Extraterritorial Crimes within International Complementarity’ in L Ch Vohrah et al (eds), *Man’s Inhumanity to Man – Essays in Honour of Antonio Cassese* (forthcoming); see also Werle, ‘Menschenrechtsschutz durch Völkerstrafrecht’, above n 12, 832 ff.

⁴⁰ See generally P Benvenuti, ‘Complementarity of the International Criminal Court to National Criminal Jurisdictions’ in Lattanzi and Schabas (eds), above n 19, 21.

⁴¹ See Benvenuti, *ibid* 23 ff.

‘direct enforcement model’, a term most likely attributable to Bassiouni.⁴²

In comparison, the authority of the ad hoc Tribunals for Yugoslavia and Rwanda is not quite so extensive. Admittedly, their jurisdiction retains ‘primacy over national courts’, with the result that the ICTY can request transfer of a case at any stage of the procedure (art 9 para 2 ICTY Statute). Nevertheless, this primacy is not exclusive since on the basis of express *concurrent* jurisdiction national courts retain the right to prosecute international crimes as long as the ICTY has not taken over the case (art 9 para 1 ICTY Statute).⁴³

Clearly, questions concerning priority are of essential importance for the sovereignty of nation states. Thus, a power struggle prior to the Rome Conference regarding exactly this point was unavoidable and, indeed, could have caused the efforts to establish an International Criminal Court to fail entirely. The solution came, finally, with the recognition of the so-called *complementarity* of international and national criminal jurisdiction (Preamble para 10, art 1 sen 2).⁴⁴ The following principles can be drawn from this ‘magic word’:

- (a) Even if the Rome Statute accords neither side absolute ‘primacy’ or ‘priority’ over the other, *national* criminal authorities are, in essence, accorded a kind of conditional *priority*; for if and as long as a nation state that has jurisdiction is investigating or prosecuting an international crime or has issued a final judgment, prosecution by the ICC is ‘inadmissible’⁴⁵ (art 17 para 1 (a)-(c), art 20).
- (b) A limit is placed on this national precedence, however, if the competent *national* authorities are ‘*unwilling or unable*’ genuinely to carry out the investigation or prosecution of an international crime (art 17 para 1 (a) and (b)), whereby unwillingness to prosecute can be presumed if, among other things, national criminal

⁴² See M C Bassiouni, *International Criminal Law. A Draft International Criminal Code* (1980) 107ff – in contrast to an ‘indirect enforcement model’ in which international criminal law is enforced by national courts. On this point, see also Triffterer, ‘Der Ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit’, above n 25, 515 ff; Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, above n 23, Part 1 margin no 49.

⁴³ See Graefrath, ‘Jugoslawien und die internationale Strafgerichtsbarkeit’, above n 16, 297 ff; Benvenuti, above n 40, 32 ff; Triffterer, ‘Der Ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit’, above n 25, 519 ff.

⁴⁴ See Triffterer, *ibid* 527 ff; Benvenuti, *ibid* 38 ff; J T Holmes, ‘The Principle of Complementarity’ in Lee (ed), *The International Criminal Court. The Making of the Rome Statute*, above n 19, 41.

⁴⁵ Note that ‘admissibility’ refers to the need to satisfy certain procedural requisites before the ICC has jurisdiction.

proceedings are conducted in such a way as to shield the accused from an effective prosecution (see art 17 para 2, art 20 para 3).

- (c) In a case where both national and international courts assert jurisdiction, the final word depends on which of these courts is accorded the so-called *Kompetenz-Kompetenz*. If, for example, a national court were allowed to judge its own ability or willingness to conduct proceedings, the ICC would be at the mercy of the good or evil will of the national authorities. On the other hand, if the ICC were allowed to determine whether a national court is unable or unwilling to prosecute an international crime, the ICC would have the last word in disputes over jurisdiction. Since the Rome Statute puts the power to determine the inability of a national court in the hands of the ICC (art 17 para 3), it very much seems – contrary to current scepticism – as though, in the final analysis, the ICC has been accorded *primacy* despite the conditional priority enjoyed by national criminal jurisdiction.⁴⁶
- (d) Furthermore, the obligation of national jurisdictions to engage in *international cooperation* with the ICC, regulated relatively comprehensively in Part 9 of the Rome Statute (arts 86-102), should not be underestimated.⁴⁷

The Role of the United Nations Security Council and of the Prosecutor⁴⁸

Serious disputes concerning both of these roles took place both before and during the Rome Conference. Depending on whether the Prosecutor has the *ex officio* power to initiate criminal prosecution or whether the Prosecutor must first be authorised by the UN Security Council to start a prosecution, or whether the latter may even have the exclusive power to initiate criminal prosecution, a shift from objective justice to political influence takes place. If the right to initiate criminal prosecution were to lie solely in the hands of the Security

⁴⁶ See Holmes, above n 40, 51 ff; Sh A Williams, art 17 margin no 31, in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, above n 23. But see A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* ('EJIL') 144, 159 ff; Triffterer, *ibid* 529 ff.

⁴⁷ For more on this point, see D Rinoldi and N Parisi, 'International Co-operation and Judicial Assistance Between States Parties and the International Criminal Court' in Lattanzi and Schabas (eds), above n 19, 339.

⁴⁸ P Gargiulo, 'The Controversial Relationship Between the International Criminal Court and the Security Council' in Lattanzi and Schabas (eds), *ibid* 67; L Yee 'The International Criminal Court and the Security Council' in Lee (ed), *The International Criminal Court. The Making of the Rome Statute*, above n 19, 143.

Council, Members of the Council could, from the very beginning, shield their own nationals from prosecution by the ICC – thereby attaining an increase in international influence. In contrast, those interested in achieving the greatest possible degree of impartiality would have to support a strong and highly independent Prosecutor. In the end, the power struggle between these competing positions led to the following compromise:

- On the one hand, the *Prosecutor* is granted the right to initiate investigations on her own motion (art 13(c), art 15 paras 1 and 2); however, the decision to investigate is subject to judicial review by the Pre-Trial Chamber (art 15 paras 3-6).⁴⁹
- On the other hand, the *Security Council* has the right to refer a ‘situation’ to the Prosecutor in which one or more international crimes appear to have been committed (art 13(b)) and thereby to cause the Prosecutor to take action. Even more incisive, however, because it ties the Prosecutor’s hands, is the right of the Security Council to obtain a (renewable) 12-month deferment of investigation or prosecution (art 16). This could certainly be useful should world peace be endangered by the premature investigation of an unpredictable dictator; however, it also opens the door to the possibility of obstruction, in that members of the Security Council could use it to block investigations of their own nationals.
- The latter can also be applied to cases in which a State Party has exercised its right to refer criminal activity to the Prosecutor for the purpose of investigation (art 13(a)); indeed, art 16 allows the Security Council to intervene even in cases in which national criminal authorities – themselves perhaps unable to prosecute – seek the help of the ICC.

The importance of the division of power between the International Criminal Court – representing the world community – and the Security Council – representing only a few selected countries – can perhaps be inferred from the fact that, shortly before the Rome Conference, Judge Louise Arbour, at that time Chief Prosecutor of the International Tribunals for Yugoslavia and Rwanda, organised in cooperation with the Max Planck Institute an international workshop to discuss the role of the Prosecutor. As the co-organiser of this event, I was, of course, very pleased that the Rome Statute adopted

⁴⁹ On this point, see generally S A Fernández de Gourmendi, ‘The Role of the International Prosecutor’ in Lee (ed), *ibid* 175.

the gist of quite a number of the recommendations included in the 'Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court'.⁵⁰

General Principles and Elements of Criminal Responsibility

The mere fact that the Rome Statute contains a separate section entitled 'General Principles of Criminal Law' (Part 3) is quite an achievement, as such a section is a novelty for an international tribunal. Earlier drafts of the International Law Commission, primarily developed by representatives of public international law,⁵¹ included practically no rules of criminal law,⁵² and the Statutes of the International Tribunals for Yugoslavia and Rwanda also contain only limited rules concerning individual criminal responsibility (arts 6, 7 ICTY and ICTR Statute). Even the International Law Commission's 1994 'Draft Statute for a Permanent International Criminal Court' comprised only a short art 33 dealing with 'Applicable Law'. In light of this, a group of criminal law experts felt that it was necessary to develop an alternative draft, which they did in 1995 and 1996 at workshops in Siracusa and Freiburg. Many of the proposals contained in this draft, with its comparatively detailed regulations pertaining to substantive law,⁵³ found their way into the draft resolution of the Preparatory Committee of the Rome Conference. As a result, the ICC Statute boasts at least the basic, core requirements for criminal responsibility as well as grounds for excluding responsibility (arts 21-33). The following discussion of a few salient points is not meant to be comprehensive:⁵⁴

- ⁵⁰ On this point, see the documentation mentioned in above n 3, including the 'Freiburg Declaration' in English, French, Spanish and German, at 667 ff.
- ⁵¹ See Ch Tomuschat, 'Die Arbeit der ILC im Bereich des materiellen Völkerrechts' in Hankel and Stuby (eds), above n 10, 270.
- ⁵² See A Eser, 'The Need for a General Part' in Bassiouni (ed), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind*, above n 20, 43, Nill-Theobald, above n 2, 235 ff.
- ⁵³ For details, see arts 33-1 to 33-18 *Updated Siracusa-Draft*, above n 2; K Ambos, 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint' (1996) 7 *EJIL* 519, 529 ff; Ambos, 'Zum Stand der Bemühungen um einen ständigen Internationalen Strafgerichtshof und ein Internationales Strafgesetzbuch', above n 2, 268 ff.
- ⁵⁴ For additional details, see – in addition to the relevant commentaries to arts 31 to 33 in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, above n 23, and Cassese (ed), *The Rome Statute for an International Criminal Court. A Commentary*, above n 23 – the comprehensive contributions by K Ambos, 'General Principles of Criminal Law in the Rome-Statute' (1999) 10 *Criminal Law*

Applicable Law (Art 21)

As the Rome Statute could not possibly be expected to address all aspects of criminal law, other norms must be relied upon in cases posing non-regulated issues. For this purpose, art 21 foresees the following hierarchy:

- In the first place, the *Statute* itself (including ‘Elements of Crimes’ that have yet to be adopted) is to be applied (para 1(a)).
- In the second place, the Court can fall back on the applicable *treaties and the principles and rules of international law* (para 1(b)).
- Should these kinds of primary sources be insufficient, *general principles of law* that the ICC has derived from the national laws of legal systems throughout the world may be applied, including the national laws of states that would normally exercise jurisdiction over the crime in question, providing, however, that these principles are not inconsistent with the Rome Statute and international law in general (para 1(c)).⁵⁵
- In addition, the ICC may apply its own *case law* (para 2).
- Finally, in accordance with a so-called *consistency test* developed primarily by Canada, the application and interpretation of law must be consistent with internationally recognised human rights and must not be discriminatory (para 3). While the express mention of gender in this context was difficult for some countries to accept, it was nonetheless retained.⁵⁶

Two aspects of this regulation are noteworthy:

- On the one hand, the possibility of referring to principles of national law in addition to the as yet meagre principles of international criminal law is a welcome development and the distillation

Forum (‘CLF’) 1, Ambos, ‘Zur Rechtsgrundlage des Internationalen Strafgerichtshofs. Eine Analyse des Rom-Statuts’, above n 25, 184 ff and C Kreß, ‘Die Kristallisation eines Allgemeinen Teils des Völkerstrafrechts: die Allgemeinen Prinzipien des Strafrechts im Statut des Internationalen Strafgerichtshofs’ (1999) 10 *Humanitäres Völkerrecht* 4. With regard to historical development, see P Saland, ‘International Criminal Law Principles’ in Lee (ed), *The International Criminal Court. The Making of the Rome Statute*, above n 19, 189. With regard to the relationship between these provisions and German law, see generally G Werle, ‘Völkerstrafrecht und geltendes deutsches Strafrecht’ (2000) *JuristenZeitung* (‘JZ’) 755, 759; Jescheck, ‘Der Internationale Strafgerichtshof: Vorgeschichte, Entwurfsarbeiten, Statut’, above n 18, 494 ff.

⁵⁵ For an example of how this kind of a derivation of law could take place, based on the claim of duress as decided by the ICTY in the Erdemovic case, see C Kreß, ‘Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts’ (1999) 111 *ZStW* 597.

⁵⁶ See Saland, above n 54, 213 ff.

of these principles represents a challenge for scholars of comparative criminal law.

- On the other hand, it is a pity that although the laws of the state of nationality of the accused may enjoy special consideration, consideration of the laws of the state of nationality of the victim – as proposed in the Updated Siracusa Draft (art 33 para 3) – is, apparently, not intended. This shows yet again that the role of the victim, neglected in other places in the Statute as well, is underdeveloped on the international level and needs to be improved.

Principle of Legality (Arts 22-4)

The principles of ‘*nullum crimen sine lege*’ (art 22), ‘*nulla poena sine lege*’ (art 23) and the principle of non-retroactivity as applied to persons (art 24) correspond to standards already recognised in most domestic laws; of special interest are the prohibition on extension by analogy, which is not found in all countries, and the requirement of narrow interpretation in favour of the accused, found, apparently, in only a few countries (art 22 para 2).

Individual Criminal Responsibility (Art 25)

This central provision was highly controversial, for obvious reasons, and it would be an exaggeration to describe the version adopted by the Statute as an unmitigated success.⁵⁷ Whoever is led by the heading of art 25 to expect a comprehensive regulation of all essential elements of criminal responsibility will be disappointed; in fact, only the following issues are regulated:

- The jurisdiction of the ICC extends only to *natural persons* (para 1); thus, by implication, the criminal responsibility of legal entities, although advocated by some countries, is not recognised by the Statute.⁵⁸
- Although the regulations for the individual perpetrator lack detail, regulations concerning *co-perpetration* are comparatively comprehensive (para 3 (a)–(e)).

⁵⁷ For more on this point, see A Eser, ‘Individual Criminal Responsibility’ in Cassese (ed), *The Rome Statute for an International Criminal Court. A Commentary*, above n 23; for a general survey, see also K Ambos, ‘Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – From Nuremberg to The Hague’ in G K MacDonald and O Swake-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (2000) vol I, 5.

⁵⁸ See Saland, above n 54, 199.

- Whereas the punishability of criminal *attempts* is addressed (para 3(f)), crimes of omission are not expressly regulated; omission is not excluded completely, however, as various provisions of the Statute encompass conduct both in the sense of commission as well as in the sense of omission (eg, art 24 para 1).

Grounds for Excluding Criminal Responsibility

Article 31 bears this title, although grounds leading to the exclusion of criminal responsibility can also be found in various other articles.⁵⁹ The birth of art 31 was particularly difficult, as both the points of view regarding the necessity of an explicit regulation at all as well as regarding the goals and scope of such an article were extremely diverse.⁶⁰ The version that was finally adopted was proposed by Argentina. The most important aspects, in a nutshell, are as follows:

- As the Statute refers to ‘*grounds for excluding criminal responsibility*’ rather than to ‘defences’, it was apparently modeled on continental European concepts.
- As the catalogue of grounds listed is *not exclusive*, grounds of justification and excuse from other legal areas may also be considered (art 31 para 3).
- Lack of *culpability* due to mental abnormality (art 31 para 1(a)), intoxication (b), *self defense* (c) or *duress* (d) are simply listed one after the other with no further explanation: it is a pity that the Statute, unlike the laws of many countries, does not distinguish between justification and excuse.⁶¹
- This conceptual deficit may also explain why the regulations of the ‘*mental element*’ (art 30) and of *mistake* (art 32) are hardly satisfactory.⁶²
- In contrast, the solution of the *age* question (proposed by Italy and Canada) can be described as elegant: by simply excluding persons under the age of 18 from the ‘jurisdiction’ of the ICC (art 26), the Statute succeeded in avoiding, to a great extent, the controversy surrounding the age at which criminal responsibility at-

⁵⁹ See A Eser, art 31 margin nos 5 ff, in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, above n 23.

⁶⁰ For more on this point, see Saland, above n 54, 206 ff.

⁶¹ For more on this point, see A Eser, “Defences” in War Crime Trials’ in Y Dinstein and M Tabory (eds), *War Crimes in International Law* (1996) 251.

⁶² For more on this point, see A Eser, ‘Mental Elements – Mistake of Fact and Law’ in Cassese (ed), *The Rome Statute for an International Criminal Court. A Commentary*, above n 23.

taches (in some countries at age seven, in others not until age 21). This simple exclusion in the Statute does not affect the prerogative of national criminal justice systems to attach criminal responsibility when they see fit.⁶³

Penalties (arts 77-80)

In this area, the following appears to be noteworthy:

- Since the main penalties foreseen by the Statute are *imprisonment*, *fines* and *forfeiture* (art 77), the death penalty is implicitly barred. However, this is true only for international criminal jurisdiction: penalties available under national law are unaffected by this provision, and the death penalty remains an option at the national level.⁶⁴
- Although the Statute does not make provision for the payment of compensation by the offender to the *victim*, the establishment of a trust fund in the interest of victims has been suggested (art 79). However, the Assembly of States Parties has yet to determine how the Fund is to be managed.⁶⁵

Competition between Common Law and Civil Law Procedures

An entire article would be necessary in order even to begin to address the procedural issues posed by international jurisdiction.⁶⁶ Instead, I will concentrate on a structural aspect that gave rise to continuous speculation during the events leading up to the Rome Conference; namely, would the procedures ultimately decided upon display more of the adversarial aspects of the common law or more of the inquisitorial aspects of continental European procedure. A final judgment on this point cannot yet be made, as Parts 5, 6 and 8 of the Statute, dedicated to procedural issues, as yet offer only a skeletal outline of proceedings, which they subdivide into investigative procedure (arts 53-61), trial procedure (arts 62-76), and appeals procedure (arts

⁶³ See Saland, above n 54, 200 ff.

⁶⁴ For additional details, see R E Fife, 'Penalties' in Lee (ed), *The International Criminal Court. The Making of the Rome Statute*, above n 19, 319.

⁶⁵ See Ch Muttukumar, 'Reparation to Victims' in Lee (ed), *ibid* 242.

⁶⁶ A detailed overview of this issue is offered in Chapter 8 'International Criminal Law Procedures' in Lee (ed), *ibid* 217, whereas the essential principles and procedural steps are brought out by Ambos, 'Zur Rechtsgrundlage des Internationalen Strafgerichtshofs. Eine Analyse des Rom-Statuts', above n 25, 195 ff.

81-5). However, this three-part division, which can be found all over the world in both common law and civil law countries, still requires supplementation in the form of special Rules of Procedure and Evidence – to be developed by the Preparatory Commission.⁶⁷ At any rate, it can already be said that the ICC procedure displays both inquisitorial as well as adversarial elements:

- On the one hand, the opportunity provided to the accused to make an admission of guilt or to plead not guilty (arts 64 para 8(a), 65 para 1) can be seen as a phenomenon comparable to the common law guilty plea.
- On the other hand, the Pre-Trial Chamber, which must determine whether charges (arts 15 para 3, 61) and investigative measures (art 56-60) are admissible, is a phenomenon more characteristic of the civil law, especially of German criminal procedure. The influence of the inquisitorial tradition can be seen even more clearly, however, in the fact that the Prosecutor may not function as a one-sided opponent (ie, an adversary) of the accused, but rather is obligated to seek the truth and, in so doing, must investigate both incriminating and exonerating circumstances equally (art 54).⁶⁸

Should this combination of inquisitorial and adversarial elements succeed, national criminal procedures would also be free to develop structurally ‘interdisciplinary’ procedural systems in which courts would be geared to truth-seeking and the truth-seeking process would be as adversarial as possible.

Evaluation - Prospects for the Future

Goals Achieved and Vistas Opened

Even if it might appear somewhat daring to offer an evaluation on the basis of a selective and subjective presentation of certain aspects of the Rome Statute, it is already clear that on the long and obstacle-filled road towards the establishment of a Permanent International Criminal Court we have, with this Statute, come close to achieving our goal. Even if in the process, one aspiration or another had to be sacrificed, advances that would not have been considered possible a

⁶⁷ See heading ‘next steps’ below.

⁶⁸ In this respect, the ICC Statute can be distinguished from the ICTY Statute, which does not recognize an exonerating function: see M Bergsmo and P Kruger, art 54, margin nos 2, 10, in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, above n 23.

few years ago were made with regard to the central issues. The following selected points deserve special attention:

- First: Since a state, when it becomes a Party to this Statute, accepts at the same time the jurisdiction of the ICC (art 12 para 1), reservations – otherwise a frequent occurrence in international conventions – are excluded. In addition to its automatic jurisdiction over States Parties, the ICC may also exercise jurisdiction over nationals of non-Party States if they commit an international crime on the territory of a State Party.⁶⁹ In this manner, the ICC gains attractiveness and authority.
- Second: With the principle of ‘complementarity’,⁷⁰ a model has been found in which national criminal jurisdiction is respected and the threat of intervention from the ICC becomes a reality only when the state itself has failed to act appropriately. If, in such a case, the primacy of justice passes to the ICC, this loss of national sovereignty would appear to be justified in the interest of international solidarity in the fight against crime.
- Third: A compromise has been reached in the tense relationship between the United Nations Security Council and the Prosecutor of the ICC. Although the agreement is not ideal, it appears to be acceptable, given current circumstances. On the one hand, it respects the independence of the Prosecutor and allows her to initiate investigations on her own motion (art 13(c), art 15 para 1). On the other hand, the Security Council not only has the right to initiate investigations (art 13(b)), it can also bring about the deferment of investigations initiated by the Prosecutor (art 16). Public vigilance and critique may be necessary to ensure that the Security Council does not employ these methods of intervention to pursue political interests at the expense of justice.
- Fourth: As far as the crimes subject to the jurisdiction of the ICC are concerned, the ‘classical’ catalogue has been expanded to include new forms of crimes against humanity. Even if the general elements of criminal responsibility still evince the occasional deficit or inconsistency, the Rome Statute represents a highly innovative breakthrough in that, for the first time, regulations for an essential core of prerequisites for criminal responsibility for international crimes have been devised.

⁶⁹ See heading ‘Résumé of the Fundamental Prerequisites of International Criminal Jurisdiction’ above.

⁷⁰ See heading ‘Complementarity of National and International Criminal Jurisdiction’ above.

- Fifth: Even if the procedural rules still require further clarification and amendment, with the harmonising combination of principles from various legal systems of the world we are certainly heading in the right direction. Indeed, from a procedural perspective as well, the Rome Statute has proven to be a melting pot of various legal systems.
- Sixth: Finally, great progress has been made from the perspective of interdisciplinary jurisprudence, in that representatives of public international law (who in the past had considered the area of international criminal jurisdiction to belong to their domain and correspondingly defended their territory from encroachment by other legal disciplines) cooperated with representatives of criminal law in preparing for the Rome Conference. A positive effect of this change in attitude can be seen in the formal requirement that, when electing judges for the ICC, ‘an appropriate combination of expertise in criminal law and procedure and in international law’ be guaranteed for each division (art 39 para 1). This represents both a challenge as well as an opportunity for criminal law scholars that cannot be taken too lightly.

Next Steps

Even if – as mentioned at the beginning – the Rome Statute marks the conception of the ICC, this child must now be incubated, so to speak, until the establishment of the actual Court in The Hague heralds its birth. Two more things must be done before this event can take place:

- On the one hand, the Rome Statute itself requires various additions and safeguards. This task was for the most part delegated to a Preparatory Commission for the International Criminal Court, which was charged with developing various additions as well as possible amendments to the ‘Elements of Crime’ (art 9) and the ‘Rules of Procedure and Evidence’ (art 51) by 30 June 2000.⁷¹ All proposals of the Preparatory Commission must be agreed upon by the Assembly of States Parties (arts 112-8).
- On the other hand, in order for the Statute to enter into force, it must be *ratified* by at least 60 signatory states (arts 125, 126).⁷²

⁷¹ The ‘Elements’ and ‘Rules’ that have been adopted as of yet have already been integrated into the ICC Statute and published in the *Revue Internationale de Droit Pénal*. See above n 1.

⁷² For more on this point as well as on additional obligations of nation-states to support the ICC, see O Triffterer, ‘Legal and Political Implications of Domestic

According to the figures, available on 15 October 2001, more than 139 states have already become signatories, including Australia in 1998, and 43 have ratified, including Germany in 2000; thus, there is reason to believe that the required number of ratifications will be achieved and that, where necessary, national laws will be amended accordingly.⁷³

Even if the Rome Statute leaves something to be desired and even if it never actually enters into force, it at least points the way to the future, with its regulations serving as a model for national legal systems engaged in the modernisation of their criminal law.⁷⁴ If only in this way, the results of the work done in connection with the Rome Statute will certainly be felt for a long time to come.

Ratification and Implementation Processes' in C Kreß and F Lattanzi (eds), *The Rome Statute and Domestic Legal Orders, Vol I: General Aspects and Constitutional Issues* (2000) 1; this volume also includes additional contributions concerning national problems of implementation in numerous countries.

⁷³ In this regard, for example, a draft statute has already been developed in Germany by the Ministry of Justice: 'Referentenentwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuchs (VStGB- Einführungsgesetz – VStGBEG)', of June 2001 (<http://www.bmj.de/ggv/stgbeg.pdf>). On this point, see generally C Kreß, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs* (2000). For comparable efforts in other countries, see the contributions in Kreß and Lattanza (eds), *ibid*.

⁷⁴ See in particular Triffterer, 'Der Ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit', above n 25, 539 ff; Ahlbrecht, above n 2, 389 ff; Werle, 'Menschenrechtsschutz durch Völkerstrafrecht', above n 12, 825 ff.