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On the Activation of ICC Jurisdiction over the Crime of Aggression

Claus Kress*

Abstract

In the early hours of 15 December 2017, the Assembly of States Parties to the Rome Statute made the decision to activate the International Criminal Court's jurisdiction over the crime of aggression from 17 July 2018 onwards. The activation resolution was adopted after intense negotiations about one aspect of the jurisdictional regime, which had remained controversial since the adoption of the Kampala amendments on the crime of aggression. The New York breakthrough completes the work of the Rome and Kampala conferences and marks the culmination of a fascinating century-long journey. With all its imperfections, the consensus reached at the United Nations headquarters sends a timely appeal to the conscience of mankind about the fundamental importance of the prohibition of the use of force in any international legal order aimed towards the preservation of world peace.

1. Versailles, Nuremberg, Tokyo and Rome: Initial Milestones of a Long Journey

In a speech during an electoral campaign event in November 1918, the British Prime Minister, David Lloyd George, declared: 'Somebody ... has been responsible for this war that has taken the lives of millions of the best young men in Europe. Is not one to be made responsible for that? All I can say is that if that

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is the case there is one justice for the poor and wretched criminal, and another for kings and emperors.’¹

While the Prime Minister’s message provoked applause from his audience, the response of the diplomats of the time was less than enthusiastic. In its report of 29 March 1919 to the Preliminary Peace Conference, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties reached the following conclusion:

The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reproves and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace ... a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference.

This confirmation of the predominant view of nineteenth-century international law on the use of force by states foreshadowed the failure of the first attempt to set a precedent for the international criminalization of aggressive warfare.² This failure, however, also was a prologue. The Commission on Responsibilities had already complemented its rather dry conclusion with a hint that pointed to a possible change of direction: ‘It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.’

In the interwar period, this ‘desire’ was taken up by a movement of scholars which made a pioneering contribution to the formation of the discipline of international criminal law. In particular, the proposal for a crime of aggression held a prominent place in Vespasian Pella’s 1935 *Plan d’un code répressif mondial*. But, as Pella himself observed in retrospect, ‘States did almost nothing between the two wars to bring about an international system of justice.’

By this time, the UK had also joined the ranks of the sceptics. In 1927, the British Foreign Minister Austen Chamberlain informed the House of Commons of his view that a definition of aggression would amount to ‘a trap to the innocent and a signpost for the guilty.’³ Yet, at the more traditional interstate level of international law, the 1928 Kellogg–Briand Pact (which is the centrepiece of the fascinating and currently much-debated book *The Internationalists* by Oona A. Hathaway and Scott J. Shapiro⁴) marked the

1 The first part of this essay follows parts of C. Kreß, ‘Introduction: The Crime of Aggression and the International Legal Order’, in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2 vols, Cambridge University Press, 2017) 1–18. This earlier part of the international conversation about the subject has received a magnificent monographic treatment in K. Sellars, *Crimes Against Peace and International Law* (Cambridge University Press, 2013).

2 For a colourful account of this ‘first attempt’, see K. Sellars, ‘The First World War, Wilhelm II and Article 227: The Origin of the Idea of “Aggression” in International Criminal Law’, in Kreß and Barriga (eds), *supra* note 1, at 19–48.

3 This famous citation is taken up by Martti Koskenniemi in his reflections ‘A Trap for the Innocent ...’, in Kreß and Barriga (eds), *ibid.*, at 1359–1385.

4 O.A. Hathaway and S.J. Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017).

transition in positive international law from a *ius ad bellum* to a *ius contra bellum*. The Pact went even further and opposed the idea that the enforcement of a legal obligation could, as such, constitute a 'just cause' for war. The Pact was well received and entered into force as early as 1929. And when the decision was made at the end of the Second World War to make Germany's aggressive wars the subject matter of criminal proceedings, the Pact became the legal document of reference. The fact that the Pact lacked a penal sanction was of course well known. But now the world's political leaders were determined to set a creative precedent. At the Nuremberg trial, the British Chief Prosecutor Hartley Shawcross translated that determination into the following words: 'If this be an innovation, it is an innovation which we are prepared to defend and justify.' And Robert Jackson, the charismatic US Chief Prosecutor, who was one of the most important driving forces behind the creative precedent that was to be set, made this famous promise: 'And let me make clear that while this is first applied against German aggressors, the law includes, if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.'

The British delegation at Nuremberg, which was advised by Hersch Lauterpacht, then in the process of establishing himself as a leading authority in international law, could itself feel emboldened by the powerful statement that Lauterpacht had made a few years prior to the Nuremberg trial: 'The law of any international society worthy of the name must reject with reprobation the view that between nations there can be no aggression calling for punishment.' The defence replied by placing reliance on the legality principle. Not without eloquence, Hermann Jahrreiß, professor at the University of Cologne, pleaded:

[T]he regulations of the [London] Charter negate the basis of international law, they anticipate the law of a world state. They are revolutionary. Perhaps in the hopes and longings of the nations the future is theirs. The lawyer, and only as such may I speak here, has only to establish that they are new, revolutionarily new. The laws regarding war and peace between states had no place for them — *could* not have any place for them. Thus they are criminal laws with retroactive force.

But, as was perhaps to be expected, the 1946 Nuremberg judgment essentially endorsed the case for the Prosecution. It emphatically stated: 'To initiate a war of aggression ... is not only an international crime; it is the supreme international crime ...'⁵

While Nuremberg and the subsequent Tokyo judgment,⁶ together with the United Nations (UN) General Assembly's confirmation of the Nuremberg

5 For a comprehensive analysis of the Nuremberg judgment on 'crimes against peace', see C. McDougall, 'The Crimes against Peace Precedent', in Kreß and Barriga (eds), *supra* note 1, at 49–112.

6 It should not be forgotten that the Tokyo judgment, unlike Nuremberg, was not unanimous and that the 'Tokyo Dissents' form part of the long debate about the crime of aggression. For a comprehensive analysis, see K. Sellars, 'The Legacy of the Tokyo Dissents on "Crimes against Peace"', in Kreß and Barriga (eds), *supra* note 1, 113–141.

principles, crystallized the concept of the crime under international law of waging a war of aggression, developments over the next few decades would continue to bear greater resemblance to the state of affairs in the interwar period. The 1945 UN Charter had transformed the prohibition of war into a prohibition of the use of force. The Charter sought to fortify that latter prohibition through a system of collective security, which aimed higher than its forerunner in the 1919 Covenant of the League of Nations. But while these precedents had given birth to the idea of possible penal sanction for the unlawful use of force, the enforcement of this sanction — either through an International Criminal Court (ICC) or at the national level — was to remain a vain hope for the time being. In the 1950 s, Bert Röling, the Dutch member of the Tokyo Tribunal, articulated the pessimism of the time: ‘It would be a remarkable and astonishing thing: to find a generally acceptable definition of aggression.’

The year 1974 did not prove Röling’s scepticism wrong, although, on 14 December that year, the General Assembly succeeded in adopting its Resolution 3314⁷ by consensus. But on somewhat closer inspection, the ‘Definition of Aggression’, as contained in the annex to that resolution, turns out to be replete with constructive ambiguity.⁸ Most importantly, for our purposes, the consensus text distinguished between ‘act of aggression’ (within the meaning of Article 39 of the UN Charter) and ‘war of aggression’. Only the latter concept was directly related to the idea of individual criminal responsibility under international law (cf. the first sentence of Article 5(2) of the annex to 1974 GA Resolution 3314) and no attempt was made to define this concept.

And Röling’s scepticism would resonate even in the 1990s when the world witnessed the revival of international criminal law *stricto sensu*. The renaissance of the idea to create a global system of international criminal justice did not encompass the Nuremberg and Tokyo legacy on ‘crimes against peace’. The Statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda did not even list such a crime. Due to a last-minute compromise resulting from a proposal submitted by the Movement of Non-Aligned Countries,⁹ Article 5(1)(d) of the Rome Statute of the newly created ICC did include the ‘crime of aggression’, as it is now named. But the second paragraph

7 General Assembly, ‘Definition of Aggression’, GA Res. 3314 (XXIX), 14 December 1974.

8 For a detailed account, see T. Bruha, ‘The General Assembly’s Definition of the Act of Aggression’, in Kreß and Barriga (eds), *supra* note 1, at 142–177.

9 ‘Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59)’, 14 July 1998, UN Doc. A/CONF.183/C.1/L.75, as repr, in S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) 315. It bears recalling that Arab States (and among their distinguished delegates, Professor Mohammed Aziz Shukri from the University of Damascus deserves a special mention) have been particularly active in support of this last minute, and very important, diplomatic activity. And now Arab States will hopefully remember that they have repeatedly stated that the absence of the Court’s power to exercise its jurisdiction over the crime of aggression constitutes an important obstacle for them to ratify the ICC Statute. For a detailed analysis of the policy positions of Arab States, see M.M. El Zeidy, ‘The Arab World’, in Kreß and Barriga (eds), *supra* note 1, 960–992.

of this provision made plain that the ICC was yet to be empowered to exercise its jurisdiction over this crime.¹⁰ Once again, it had proven impossible to agree on a definition of the crime.¹¹

2. Liechtenstein's Appearance: Princeton and Kampala

An overwhelming majority of states, however, have not been prepared to accept that the crime of aggression is, for all practical purposes, not part of the *corpus* of crimes under international law. Since 2003,¹² Liechtenstein's Permanent Representative to the UN, Ambassador Christian Wenaweser, and his chief legal advisor Stefan Barriga, with the support of a number of eminent personalities, including perhaps most notably the charismatic Nuremberg prosecutor Benjamin Ferencz,¹³ and Jordan's¹⁴ not less charismatic diplomat (and since 2014 UN High Commissioner for Human Rights) Ambassador Prince Zeid Ra'ad Al Hussein have worked tirelessly to give voice to this sentiment and to create a momentum for change that has ultimately proved irresistible.¹⁵

10 In addition, § 7 of the of Final Act of the Rome Conference (UN Doc. A/CONF.183/13, 17 July 1998, as repr. in Barriga and Kreß, *supra* note 9, at 331) entrusted the Preparatory Commission with the mandate to prepare 'an acceptable provision on the crime of aggression for inclusion in this Statute'.

11 For a detailed account of the negotiations at the Rome conference, see R.S. Clark, 'Negotiations on the Rome Statute', in Kreß and Barriga (eds), *supra* note 1, at 244–270. For a documentation of the discussion and the proposals submitted between 1995 and 1998, see Barriga and Kreß, *ibid.*, at 201–331.

12 No significant progress was achieved between 1998 and 2002. The work during these years is recounted by R.S. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 859–890, and it is documented in Barriga and Kreß, *ibid.*, at 334–419.

13 B.B. Ferencz' monumental documentation *Defining International Aggression – The Search for World Peace: A Documentary History and Analysis* (2 vols, Oceana Publications, 1975) is well known. For his moving personal memoir, see B.B. Ferencz, 'Epilogue. The Long Journey to Kampala: A Personal Memoir', in Kreß and Barriga (eds), *supra* note 1, at 1501–1519. It should also be noted that Ben's son, Professor Donald Ferencz, the founder of the Global Institute for the Prevention of Aggression, has carried the flame forward and made numerous dedicated contributions to the negotiations, especially in their final phase. For Don's account of the activation of the ICC's jurisdiction over the crime of aggression, see D.M. Ferencz, *Aggression Is No Longer a Crime in Limbo*, FICHL Policy Brief Series No. 88 (2018).

14 Jordan has continued to play an active and constructive role in the negotiations, including those in New York in December 2017.

15 The remarkably substantial (and at the same time transparent) discussions during 2003 and 2009, which, in important parts, took place in the splendid grounds of Princeton University (and have therefore often been referred to as the 'Princeton Process'), and which were greatly facilitated by the hospitality of the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School, are documented in Barriga and Kreß, *supra* note 9, at 422–724. For a rather critical scholarly assessment in the form of a monographic treatment, see O. Solera, *Defining the Crime of Aggression* (Cameron May, 2007); for a monographic treatment of the subject in French, see M. Kamto, *L'agression en droit international* (Editions A. Pedone, 2010).

By the year 2009, a consensus on a draft substantive definition of the crime had emerged within the Special Working Group on the Crime of Aggression, a sub-organ of the ICC's Assembly of States Parties '(ASP).¹⁶ This consensus proved robust, even after the USA had returned to the negotiation table.¹⁷ The definition reads as follows:

For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The threshold requirement that the act of aggression must be in 'manifest' violation of the Charter of the UN constituted the key to reach agreement about the most demanding aspect of the negotiations: the formulation of the State Conduct Element.¹⁸ The double function of this requirement is to set a quantitative ('by its gravity and scale') and a qualitative ('by its character') threshold. The qualitative dimension bears emphasizing. It reflects the fact that the undisputed core of the prohibition of the use of force is surrounded by certain grey areas which are characterized by both sophisticated legal debate and deep legal policy divide. These areas, which unfortunately are of significant practical relevance, remain outside the scope of the definition of the crime of aggression. The threshold requirement provides the definition with its necessary anchor in customary international law and, at the same time, it ensures that the ICC will not have to deal with questions, which are not only legally but also politically highly controversial.

The agreement about the substantive definition of the crime made it possible to place the crime of aggression on the agenda of the First Review Conference of the Rome Statute held in the capital of Uganda, Kampala, in 2010. Yet, due to persisting controversies about the jurisdictional regime and the role of the UN Security Council, consensus at Kampala¹⁹ only emerged after the

16 The draft substantive definition was soon complemented by draft elements of the crime of aggression. Australia and Samoa deserve particular credit with respect to the formulation of this document in view of the submission of their 'March 2009 Montreux Draft Elements'. For a detailed account of the negotiations, see the chapter written by the Australian negotiators F. Anggadi, G. French, and J. Potter, 'Negotiating the Elements of the Crime of Aggression', in Barriga and Kreß, *ibid.*, at 58–80.

17 In Kampala, the substantive definition became the subject of discussion (only) to the extent that the US delegation proposed certain 'Understandings' regarding this definition (for the formulation of the US proposal, see Barriga and Kreß, *ibid.*, at 751–752). The fact that the last open issue was resolved at the end of a conversation, which had pitted the US against Iran, is just another remarkable element in the long journey described in this essay. For a detailed account, see C. Kreß et al., 'Negotiating the Understandings on the Crime of Aggression', in Barriga and Kreß, *ibid.*, at 81–97. For negotiators' perspectives from Iran and the USA, see D. Momtaz and E.B. Hamaneh, 'Iran', in Kreß and Barriga (eds), *supra* note 1, at 1174–1197, and H.H. Koh and T.F. Buchwald, 'United States', in Kreß and Barriga (eds), *supra* note 1, at 1290–1299.

18 For a detailed legal analysis of this element, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *ibid.*, at 412–564.

19 The *Journal* devoted its 10th Anniversary Special Issue to the topic: 'Aggression: After Kampala', 10 *Journal of International Criminal Justice (JICJ)* (2012) 3–288 (ed. by C. Kreß and P. Webb). For an excellent monographic treatment of the Kampala outcomes, see C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013). For a

conference clocks had been stopped during the night of 11 to 12 June 2010.²⁰ This consensus does not involve a Security Council monopoly over proceedings with respect to the crime of aggression before the ICC. But the Kampala consensus does include conditions for the Court's exercise of jurisdiction over the crime of aggression, which are significantly more restrictive than the conditions governing the Court's exercise of jurisdiction over genocide, crimes against humanity and war crimes. The essential point is that in a situation, which has not been referred to the ICC by the Security Council, the exercise of the Court's jurisdiction over the crime of aggression, pursuant to Article 15*bis* of the ICC Statute, will remain dependent on the consent of the states of the relevant territories and of the nationality of the individuals concerned.²¹

3. One More Hurdle

Even the consensus reached at Kampala did not constitute a complete breakthrough. Instead, it was decided to stipulate two additional conditions for the activation of the Court's jurisdiction over the crime. Pursuant to Articles 15*bis*(2) and (3) and 15*ter*(2) and (3) of the ICC Statute, the activation would require (i) the ratification or acceptance of the amendments by 30 States Parties, and (ii) a decision to be taken, after 1 January 2017, by the same majority of States Parties as is required for the adoption of an amendment to the Statute. The first condition already having been fulfilled,²² the activation decision was placed on the agenda of the sixteenth session of ASP held between 4 and 14 December 2017 in New York.

collection of essays, including a number of Belgian perspectives, see G. Dive, B. Goes, and D. Vandermeersch, *From Rome to Kampala: The First 2 Amendments to the Rome Statute* (Bruylant, 2012).

20 For a detailed account of the Kampala negotiations in the *Journal*, see C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179–1217. For a meticulous account of the negotiations from 1998 to 2010, see S. Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Barriga and Kreß, *supra* note 9, at 3–57.

21 For an analysis of the jurisdictional regime established in Kampala in the *Journal*, see A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 *JICJ* (2012) 209–227. For a comprehensive analysis of the same subject from a different perspective, see S. Barriga and N. Blokker in their three closely intertwined chapters 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals' and 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', in Kreß and Barriga (eds), *supra* note 1, at 621–674.

22 It is just another noteworthy element of the long journey described in this essay that it was Palestine that deposited the 30th instrument of ratification. One felt tempted to feel relieved that more ratifications were to follow soon thereafter, so that the legal complexities surrounding the question of Palestine's statehood would not constitute a further hurdle to the activation of the ICC's jurisdiction over the crime of aggression. The distinguished Palestinian delegate Majed Bamyá will be remembered by all participants in the December 2017 New York negotiations for his outstanding eloquence. For a thoughtful Israeli perspective on the overall negotiations, see R.S. Schöndorf and D. Geron, 'Israel', in Kreß and Barriga (eds), *ibid.*, at 1198–1216.

Making this activation decision proved far more than a ceremonial act. The reason for this is a legal controversy that had surrounded one detail of its consent-based jurisdictional regime ever since the adoption of the Kampala amendments. It is undisputed that paragraphs 4 and 5 of Article 15*bis* preclude the Court from exercising its jurisdiction over an alleged crime of aggression arising out of an act of aggression allegedly committed by a state which is not a party to the ICC Statute in a situation not referred to the Court by the Security Council. However, a division of legal opinions has been apparent ever since the adoption of the Kampala amendments with respect to how the state consent-based exercise of the Court's jurisdiction precisely operates between States Parties to the ICC Statute. In essence, two conflicting legal views had emerged.

According to the first position, in such a case, the Court is precluded from exercising its jurisdiction over an alleged crime of aggression if committed either on the territory or by a national of a State Party to the ICC Statute, if this state has not ratified the Kampala amendments. This 'restrictive position' is based on the second sentence of Article 121(5) of the ICC Statute, which, it is argued, has provided States Parties to the ICC Statute with a treaty right, which, under the law of treaties, cannot be taken away without their consent, as expressed by the ratification or acceptance of a treaty amendment concerning the point in question.

According to the opposite position, a State Party, by ratifying the Kampala amendments, provides the Court with the jurisdictional links referred to in Article 12(2) of the ICC Statute. This means that the Court may, *inter alia*, exercise its jurisdiction over a crime of aggression allegedly committed on the territory of such a State Party by the national of another State Party to the ICC Statute, even if this second state has not ratified the Kampala amendments. This state may, however, preclude the Court from exercising its jurisdiction in such a case by previously making a declaration, as referred to in Article 15*bis*(4) of the ICC Statute, that it does not accept such jurisdiction. This 'more permissive position', so it is argued, is not in conflict with the law of treaties, because Article 5(2) of the original ICC Statute empowered States Parties to adopt 'a provision...setting out the conditions under which the Court shall exercise jurisdiction with respect to' the crime of aggression, which would, in case and to the extent that it deviates from the second sentence of Article 121(5) of the ICC Statute, operate as *lex specialis*.

In a nutshell, the legal controversy in question only concerns situations not referred to the ICC by the Security Council. And for such situations it boils down as to whether a State Party that has not ratified the Kampala amendments must have made a declaration under Article 15*bis*(4) of the ICC Statute in order to preclude the Court from exercising its jurisdiction over a crime of aggression arising from an act of aggression allegedly committed by that State Party against a State Party which has ratified the Kampala amendments.

4. New York: Construction Work on a Final Bridge

During the process instituted before the ASP's December 2017 session to facilitate the activation decision, the fact that views were divided on this issue was confirmed and the conflicting legal arguments rehearsed.²³ Already in March 2017, Canada,²⁴ Colombia, France, Japan, Norway²⁵ and the UK had put forward a paper in order to explain their adherence to the 'restrictive position'.²⁶ Liechtenstein and then Argentina,²⁷ Botswana,²⁸ Samoa, Slovenia²⁹ and Switzerland,³⁰ responded through the submission of papers detailing the 'more permissive position'.³¹

One possible way of dealing with the situation would have been simply to activate the Court's jurisdiction and to leave it to the Court to decide the legal question, if it arose. More than 30 delegations joined Switzerland in a call for

23 *Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court over the Crime of Aggression* (ICC-ASP/16/24), 27 November 2017, §§ 11–22 ('*Report on the Facilitation ...*').

24 Canada's strong support before and in New York for the 'restrictive position' was more than a little astonishing because in Kampala this state had, after having made a proposal based on the 'restrictive position', worked together with Argentina, Brazil and Switzerland to pave the way towards a compromise; see Kreß and von Holtendorff, *supra* note 20, at 120–124.

25 Norway had adopted a comparatively sceptical attitude towards the negotiations on the crime of aggression more broadly; for the thoughtful reflections of the long-standing Norwegian head of delegation, Ambassador Rolf Einar Fife, on the subject, see 'Norway', in Kreß and Barriga (eds), *supra* note 1, at 1242–1263.

26 *Report on the Facilitation ...*, *supra* note 23, Annex II A. A few other states, including, in particular, Australia, Denmark, and Poland also went on record by adhering to the restrictive position.

27 In New York, Argentina continued the active role that this state had already played in Kampala (on that role, see Kreß and von Holtendorff, *supra* note 20, at 1202–1204) and before. The fact that the President of the ICC, the eminent former Argentinian diplomat Silvia Fernández de Gurmendi, was one of the early two Coordinators (the other being Tuvako Manongi from Tanzania) of the Working Group of the Crime of Aggression should not be forgotten and this includes the fact that her 'Coordinator's Discussion Paper' of 11 July 2002 (Barriga and Kreß, *supra* note 9, at 412–414) was an important point of reference in the subsequent negotiations.

28 Botswana's important role throughout the negotiations on the crime of aggression constitutes only one of many facets of this state's leading role in support of the establishment of a system of international criminal justice. In particular, Ambassador Athalia Molokomme's numerous principled (and thus powerful) interventions during the negotiations on the crime of aggression will be remembered.

29 Slovenia's constructive role during the negotiations on the crime of aggression bears emphasizing. The distinguished Slovenian delegate Danijela Horvat will be remembered for an entire series of thoughtful, dedicated and eloquent interventions during the New York Assembly meeting in December 2017. A similar note of recognition is due to the distinguished delegates Shara Duncan Villalobos from Costa Rica, Vasiliki Krasa from Cyprus, Päivi Kaukoranta from Finland, James Kingston from Ireland and Martha Papadopoulou from Greece for their valuable contributions to the New York, December 2017 negotiations. In the case of Greece, the important role played, over many years, by the distinguished delegate Phani Dascalopoulou-Livada will be remembered.

30 Switzerland continued the active role that this state had already played in Kampala (on that role, see Kreß and von Holtendorff, *supra* note 20, at 1202–1204). In New York, Switzerland took a leading role in support of the 'simple activation approach'.

31 *Report on the Facilitation ...* *supra* note 23, Annex II B and C.

such a ‘simple activation approach’.³² But many of those States Parties supporting the ‘restrictive position’ did not wish to take the risk that the Court might, after the activation of its jurisdiction, decide not to follow their view. They rather sought to have their position accepted and confirmed by all States Parties as part of the resolution accompanying the activation decision. Soon after the States Parties had gathered in New York on 4 December, their delegates, masterfully guided by the Austrian facilitator Nadia Kalb, together with the country’s head of delegation Konrad Bühler,³³ spent long negotiating hours and displayed a remarkable degree of creativity in attempts to build a final bridge between the two opposing approaches.

The essence of such a bridge would have consisted of allowing both camps to maintain their respective legal positions and of providing any State Party that supported the ‘restrictive position’, if it so desired, with a legal avenue for jurisdictional protection in the event that the Court were to embrace the ‘more permissive position’. One proposed variant of such a legal avenue was to have all States Parties agree that the communication by a State Party of its ‘restrictive position’ to the Registrar should be treated by the Court as a declaration, as referred to in Article 15bis(4) of the ICC Statute, if the Court were to embrace the ‘more permissive position’.³⁴ A second variant, as developed by Brazil,³⁵ Portugal and New Zealand,³⁶ was to allow any State Party, which so desired,

32 Letter of 7 December 2017 by the Permanent Representative of Switzerland to the United Nations to all Permanent Representatives of States Parties to the Rome Statute, on file with the author.

33 The two distinguished Austrian diplomats received knowledgeable advice from Dr Astrid Reisinger-Coracini from the University of Salzburg who had participated in the overall negotiations since 1999 and had made numerous important scholarly contributions since then.

34 Professor Dapo Akande and this author had formulated a joint draft encapsulating this legal position. This was done in the hope that it would be considered a genuine bridge-building attempt in view of the fact that Professor Akande and this author had taken opposite views regarding the underlying legal controversy. The draft was transmitted to the Austrian Facilitator by Germany without adopting it. This proposal has occasionally been referred to as the ‘Non-German Non-Paper’ and, to a certain extent, it was reflected in the ‘Discussion Paper, Rev. 1, 11 December 2017’, as presented by the Facilitator. During the New York negotiations, this author had reformulated the core of the Akande/Kreß joint draft proposal as follows: ‘Confirming that any statement made by a State Party, individually or collectively, that it subscribes to the view noted in preambular paragraph 4 shall (‘when made in writing and communicated to the Registrar’) be regarded as also fulfilling the conditions required for a declaration referred to in article 15 bis, paragraph 4, while recognizing that the issuance of any such statement would be without prejudice to that State maintaining its view that, in the absence of its own ratification or acceptance of the amendments, no declaration referred to in article 15 bis paragraph 4, is necessary to preclude the Court from exercising jurisdiction over the crime of aggression, arising from an act of aggression allegedly committed by that State Party.’ (Emphasis in the original).

35 Brazil had already played an important role in Kampala (Kreß and von Holtzendorff, *supra* note 20, at 1202–1204). In New York, this state, through its distinguished delegate Patrick Luna, worked tirelessly to build a final bridge. For the Brazilian policy perspective on the overall negotiations, see M. Biato and M. Böhlke, ‘Brazil’, in Kreß and Barriga (eds), *supra* note 1, at 1117–1130.

36 New Zealand’s association with this bridge-building attempt is noteworthy for its constructiveness as this state had made it clear that it believed the ‘restrictive position’ to be the correct legal view. So these three delegations lent further credit to the idea that it was possible to find a bridge. Sweden, it should be noted, took a position similar to that of New Zealand. Sweden’s

to be placed on a list established by the President of the ASP and to be transferred to the Registrar, and to have the ASP decide that the Court shall not exercise its jurisdiction over the crime of aggression 'over nationals or on the territory' of any such State Party.³⁷

5. Breakthrough Without a Bridge: A Memorable Night at UN Headquarters

But in the very late hours of the Assembly session, it turned out that France and the UK were not prepared to cross any such bridge. Their demand remained unchanged: all States Parties should accept the 'restrictive position' as part of the ASP resolution accompanying the activation decision. The French and British adamancy created an extremely difficult situation. Legally, it would have been possible to put a draft to a vote encapsulating either the 'simple activation approach' or a 'final bridge'. But irrespective of the uncertainties of voting³⁸ — would it have been wise to allow a question of such supreme political sensitivity to be overshadowed by a dispute within the ASP? In this latter regard, a great many delegations entertained the most serious doubts, as much as they had hoped that France and the UK would eventually show a spirit of compromise. Outvoting France and the UK was therefore not a real option. This meant that the fairly large group of States Parties, which believed in the correctness of the 'more permissive position', were left with the painful choice either to accept language which, from their legal perspective, strongly pointed in the direction of an 'amendment to the (Kampala) amendment', or to allow the open window for the activation of the Court's jurisdiction to close until an uncertain moment in the future.³⁹

This was when, one last time, conference clocks had to be stopped in order to allow delegations to make up their minds concerning the draft resolution proposed by the two Vice Presidents of the Assembly to whom Austria had handed over the task of making the final attempt. Crucially, the 'Draft

constructiveness in New York was in line with the helpful role this country had played during the 'Princeton Process', in particular through the contributions of its distinguished delegate, Pal Wrange.

37 See 'Additions by Brazil, Portugal and New Zealand to the Discussion Paper', 11 December, 13:00 (on file with the author). See also ICC-ASP/16/L.9, 13 December 2017, OP 1, and the explanations provided by the distinguished Swiss delegate Nikolas Stürchler in his blog entry, 'The Activation of the Crime of Aggression in Perspective', EJIL: Talk! Blog of the European Journal of European Law, 26 January 2018, available at <http://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (visited 28 January 2018).

38 On those uncertainties, see Stürchler, *ibid.*

39 The point is clearly articulated by Stürchler, *ibid.*

resolution proposed by the Vice Presidents' reflected the French and British demand⁴⁰ in the form of the following operative paragraph:

The Assembly of States Parties ...

2. *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments; ...

With a view to softening the 'unconditional surrender' to the demand of France and the UK, the next paragraph was drafted as follows:

3. Reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court; ...

This language is no more than a statement of the obvious fact that the ASP cannot replace the Court as the judicial body charged with applying the law in complete independence. It was therefore difficult to consider the inclusion of this paragraph in the Vice Presidents' proposal as more than a symbolic concession to those asked to give in. Yet, France was still not entirely satisfied and, with the support of the UK, it proposed to move the latter paragraph to the preamble. When Switzerland⁴¹ disagreed, the drama in New York had peaked and the almost incredible possibility loomed large that the century-long journey towards providing for an international criminal jurisdiction over the crime of aggression would ultimately derail because of the question as to whether the few words in question should be placed either in a preambular or an operative paragraph. At this absolutely critical juncture, the delegates from South Africa,⁴² Samoa⁴³ and

40 For the first articulation of this demand in the form of a text, see *Report on the Facilitation ...* *supra* note 23, Annex III *sub* A.

41 While Switzerland took the step to formally oppose the proposal, this state was certainly expressing the sentiment of a great many delegations present when it criticized the French proposal in question. This author recalls Cyprus and South Africa, in particular, voicing their lack of comprehension regarding France's move.

42 South Africa, especially through its distinguished delegate André Stemmet, had consistently supported the idea of the Court exercising its jurisdiction over the crime of aggression (for South Africa's policy position on the overall negotiations, see A. Stemmet, 'South Africa', in Kreß and Barriga (eds), *supra* note 1, at 1271–1284). It is particularly noteworthy that South Africa did not change course even at the New York 2017 Assembly of States' meeting where the same state again contemplated the possibility of leaving the community of States Parties.

43 Samoa is another smaller state that has been making important contributions to the negotiations on the crime of aggression. In particular, the countless thoughtful (and good-humoured!) interventions by the distinguished Samoan delegate, Professor Roger S. Clark, constitute a precious part of the *travaux préparatoires*. Samoa's ultimate contribution to the success of the negotiations, expressed through its distinguished head of delegation, Ambassador Aliioaiga Feturi Elisaia, consisted of adopting a non-lawyer's perspective of a world citizen reminding delegations at a most critical juncture of the negotiations what really is at stake.

Portugal,⁴⁴ each of them in their own way, made valuable contributions to prevent the negotiations from collapsing. Also, Vice President Sergio Ugalde from Costa Rica, after finding that the French proposal had met with opposition, asked one final time whether the Vice Presidents' proposal gathered the consensus of the room. This was followed by a dramatic moment of suspense after which it was clear that France and the UK had decided not to play hard-ball beyond the extreme, so that the proposal made by the Vice Presidents was eventually adopted by consensus.⁴⁵

6. 'It's Better to Bend than to Break'

By accepting operative paragraph 2 of the Activation Resolution, a large number of States Parties have made a concession, which must have felt very hard indeed after a protracted and *bona fide* attempt to build a bridge between the two conflicting legal views. These States Parties deserve praise. First, they genuinely believed in their 'more permissive position' and the very apparent fear of the opposite side that the Court might agree with this position only confirmed the strength of the arguments in support of it. Secondly, they had been engaging in an intensive *bona fide* bridge-building effort not only during the Assembly session, but also throughout the facilitation process all year long only to recognize at the very end that two states with a more powerful negotiation position were unprepared to respond.

Now they were being asked to give in.⁴⁶ In deciding to do so,⁴⁷ the States Parties in question demonstrated that, despite all this, they had not lost sight

44 Portugal has been an important voice in the negotiations from an early moment in time (see, for example, the '1999 Proposal by Greece and Portugal', as repr. in Barriga and Kreß, *supra* note 9, at 343). In New York, the interventions by the distinguished Portuguese delegate Mateus Kowalski stood out for their wisdom, fairness and elegance. This author would not wish to let pass this occasion to recall the important contributions made over many years by the late Professor and Legal Advisor of the Portuguese Ministry of Foreign Affairs Paula Escarameia.

45 The 'Draft resolution proposed by the Vice-Presidents of the Assembly. Activation of the Jurisdiction of the Court over the Crime of Aggression', ICC-ASP/16/L.10, 14 December 2017 became Resolution ICC-ASP/16/Res.5. One of the leading negotiators, Nikolas Stürchler in his blog, *supra* note 37, who recalls that consensus had emerged 'at around Friday 0:40 AM'.

46 It bears recording that, at this critical juncture of the New York 2017 negotiations, many distinguished civil society representatives made their voices heard in support of a final concession, which many of them found painful as well. This constructive role is noteworthy in light of the fact that the 'NGO community' has been playing a less active role with respect to the negotiations on the crime of aggression than it did with respect to the ICC Statute in general (for a detailed analysis, see N. Weisbord, 'Civil Society', Kreß and Barriga (eds), *supra* note 1, at 1310–1358. This author wishes to take this opportunity to pay tribute to the distinguished non-state delegates, Dr David Donat Cattin, Professor Donald Ferencz, Jutta Bertram Nothnagel, Professor Jennifer Trahan and Professor Noah Weisbord, for the substantial contributions to the success of the negotiations they have made, in one form or the other, over the long years of the discussions.

47 Perhaps understandably, many of those states confined their concession to what they felt was the necessary minimum and maintained their legal view in their explanations of vote. In Liechtenstein's explanation of position (on file with the author), for example, Ambassador Christian Wenaweser stated: 'we are of the firm view that the Court, in exercising its jurisdiction over the crime of aggression, must and will apply the law contained in the Kampala amendments'.

of the broader picture. So they were able to appreciate that the legal controversy, which had occupied so many minds for so long, almost paled to insignificance if seen in light of the historic dimension of the decision to activate the Court's jurisdiction by a consensus within the ASP.⁴⁸ This historic dimension is all the more apparent if it is considered that Germany,⁴⁹

48 In Liechtenstein's explanation of its position, Ambassador Wenaweser powerfully articulated sentiments subsequently echoed, in one way or the other, by many other delegations. In some particularly noteworthy parts, Liechtenstein's statement reads as follows:

'The historic significance of the decision we have taken today to activate the Court's jurisdiction over the crime of aggression cannot be overstated. Never has humanity had a permanent international court with the authority to hold individuals accountable for their decisions to commit aggression — the worst form of the illegal use of force. Now we do. ... We are disappointed that a few States conditioned such activation on a decision that reflects a legal interpretation on the applicable jurisdictional regime over the crime of aggression that departs from the letter and spirit of the Kampala compromise, and which aims to severely restrict the jurisdiction of the Court and curtail judicial protection for States Parties. Our reasons for joining the decision are twofold: ... Second, we believe that the importance of the activating jurisdiction has to be our overriding goal.'

In the same vein, the distinguished Swiss delegate Stürchler's blog, referenced *supra* note 37, wisely concludes:

'In all of this, let us not forget that the activation of the crime of aggression is meant to be a contribution to the preservation of peace and the prevention of the most serious crimes of concern to the international community as a whole. More than 70 years after the Nuremberg and Tokyo trials, the ICC has received the historic opportunity to strengthen the prohibition of the use of force as enshrined in the UN Charter and completed the Rome Statute as originally drafted. This is the perspective we should preserve.'

49 At the Rome conference, Germany was an unequivocal supporter of the inclusion of the crime of aggression into the jurisdiction of the ICC. Germany was accordingly quick to applaud the NAM proposal which inspired the original Art. 5(2) of the ICC Statute (*supra* note 9) and Germany was then instrumental in formulating paragraph 7 of the Final Act of the Rome Conference (UN Doc. A/CONE183/13, 17 July 1998, *supra* note 10). At this juncture, one would be remiss not to acknowledge the outstanding role that the late eminent German diplomat Hans-Peter Kaul, the first German judge at the ICC, has played also in the course of the negotiations on the crime of aggression. In a personal memoir, which this author hopes will also be published in English in due course, Judge Kaul, recalls his memory of the crucial moments of the Rome Conference (Hans-Peter Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht', in C. Safferling and S. Kirsch (eds), *Völkerstrafrechtspolitik* (Springer, 2014) 51–84, at 67–68). During the 'Princeton Process', a German delegate acted as one of the three sub-coordinators. In Kampala, Germany was designated Focal Point for the consultations on the US proposals for certain understandings. The head of the German delegation in Kampala, Ambassador Susanne Wasum-Rainer, has offered a German policy perspective on the negotiations in her chapter 'Germany', in Kreß and Barriga, (eds), *supra* note 1, at 1149–1157. Regarding the legal controversy underlying the New York negotiations, Germany had taken the position not to express a position. This was done with a view not to overemphasize the practical importance of the question and in order to be available, if need be, to serve as an 'honest broker' for a final bridge-building effort. During the final hours in New York, Germany's head of delegation, Ambassador Michael Koch, before and behind the scenes, demonstrated that his country's promise to be of assistance in making the activation of the Court's jurisdiction a reality had not been an empty one. Germany's contribution to the negotiations on the crime of aggression since the lead up of the Rome conference and until shortly after the Kampala conference is recounted and documented by this author in C. Kreß, 'Germany and the Crime of Aggression', in S. Linton, G.

Japan⁵⁰ and Italy⁵¹ had not only joined the consensus, but had, each of them in their own way, contributed to making this consensus materialize. For it had been those states in particular, through their wars of aggression before and during the Second World War, that had also placed the 'New Legal Order' (Hathaway and Shapiro) established by the Kellogg–Briand Pact under attack.⁵²

7. The Court Takes the Wheel

Pursuant to operative paragraph 1 of the Activation Resolution, the Court's jurisdiction will be activated as of 17 July 2018. By this, States Parties have provided the Court with a final space to make the few adjustments necessary in order to enable the Pre-Trial Division of the ICC to play its unprecedented judicial role under Article 15 *bis*(8) of the ICC Statute.⁵³ From 17 July 2018 onwards, it will be for the Court to indicate how it will apply the law, which is now ready on the

Simpson, and W.A. Schabas (eds), *For the Sake of Present and Future Generations. Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (Brill/Nijhoff, 2015) 31–51.

50 Japan's sceptical perspective on the historic Tokyo trial is well known and Hathaway and Shapiro, *supra* note 4, at 133 *et seq.* provide their readers with a fascinating account of the broader background to Japan's perspective. It is all the more important to state that Japan has unambiguously supported the idea that the ICC would exercise its jurisdiction over the crime of aggression. Regarding the legal controversy underlying the New York 2017 negotiations, Japan, perhaps most consistently of all states, has been defending the 'restrictive position' as the correct legal view (see the chapter 'Japan' written by the head of Japanese delegation at Kampala, the late Ambassador Ichiro Komatsu, in Kreß and Barriga (eds), *supra* note 1, at 1217–1233 and, in particular, at 1231–1232). Against this background, Japan's role during the New York 2017 negotiations is particularly noteworthy. While not leaving a shadow of doubt regarding Japan's legal position, Japan's head of delegation at New York, Director-General Masahiro Mikami, displayed great sensitivity for the perspective of the opposing side and ultimately also indicated Japan's readiness to consider crossing a final bridge. The Republic of Korea is another Asian state which has continuously supported the idea that the ICC should exercise its jurisdiction over the crime of aggression (for the perspective of a scholarly advisor to various South Korean delegations, see Y.S. Kim, 'Republic of Korea (South Korea)', in Kreß and Barriga (eds), *supra* note 1, at 1234–1241). During the December 2017 New York negotiations, the Republic of Korea stayed silent, however.

51 Italy has been supportive of the process since the beginning of the negotiations (see, for example, the proposal submitted by Egypt and Italy as early as in 1997 (repr. in Barriga and Kreß, *supra* note 9, at 226–227) and the contributions by the former distinguished Italian diplomat and Judge at the ICC, Mauro Politi, in the early phase of the negotiations should be remembered (for a useful collection of short comments on the negotiations by influential voices before the beginning of the Princeton Process, see M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate, 2004)). While it is probably fair to say that Italy has not been playing a leading role during the 'Princeton Process' and in Kampala, the country, when the New York December 2017 negotiations had reached their final part, through its distinguished delegate Salvatore Zappalà, was among the first delegations to support the Austrian facilitation in its bridge-building effort. Eventually, and one is tempted to see a providence of destiny at work, it was an Italian Vice President of the Assembly of States Parties, Ambassador Sebastiano Cardi, who co-presided over the consensual adoption of the activation resolution.

52 The story is powerfully told by Hathaway and Shapiro, *supra* note 4, at 131 *et seq.*

53 Those in charge within the Court will wish to turn to the comprehensive analysis provided by E. Chaitidou, E. Eckelmans, and B. Roche, 'The Judicial Function of the Pre-Trial Division', in Kreß and Barriga (eds), *supra* note 1, at 752–815.

books, in practice. It may seem advisable for the Office of the Prosecutor to signal at an early moment in time that it will take seriously the core message underlying the threshold requirement contained in Article 8bis(1) of the ICC Statute: that the substantive definition of the crime of aggression covers only a use of force by a state which reaches a high level of intensity and which is unambiguously unlawful. Such a signal will help dispel persisting — and understandable⁵⁴ — doubts that the Court could get involved in burning legal controversies about anticipatory self-defence,⁵⁵ self-defence against a non-state armed attack,⁵⁶ and humanitarian intervention.⁵⁷ Once states can be confident that the Court will not exercise its

54 This author does not find it easy fully to appreciate why France, led in New York by Ambassador Francois Alabrune and the UK, led in New York by Ambassador Ian MacLeod, have remained unprepared to cross a final bridge in the New York, December 2017 negotiations. He even wonders whether those two states would not have achieved greater legal certainty to their benefit (as they perceived it) had they crossed the bridge built for them by Professor Akande and this author (for certain potential legal ambiguities surrounding operative § 2 of the Activation Resolution, not to be explored in this editorial, see Stürchler, *supra* note 37). But this author does appreciate why quite a few states involved in military activities in grey legal area scenarios, instead of ratifying the Kampala amendments, appear to have adopted a position of ‘wait and see’ how the Court will interpret the substantive definition of the crime. This author also believes that it should be acknowledged that France and the UK are the only permanent members of the Security Council that have, until now, ratified the ICC Statute and that those two states have eventually accepted a jurisdictional regime that does not provide the Security Council with a monopoly over proceedings regarding the crime of aggression before the ICC. This author wishes to take this opportunity to acknowledge the important contribution made by the eminent former British diplomat Elizabeth Wilmshurst to the negotiations. In a number of very noteworthy statements (for some references, see Kreß, *supra* note 18, at 515–516, citations accompanying note 570), Ms Wilmshurst had reminded the negotiators of the need to ground firmly the substantive definition of the crime of aggression in customary international law. For British and French negotiators’ perspectives on the Kampala amendments, see E. Belliard, ‘France’, and C. Whomersley, ‘United Kingdom’, both in Kreß and Barriga (eds), *supra* note 1, 1143–1148, and 1285–1289. The intensity of the controversy over the proper role to be attributed to the Security Council when it comes to proceedings before the ICC involving the crime of aggression, gives any observer a vivid idea of how much constructive spirit had to be shown to make the ultimate breakthrough possible. Just compare the vigorous pleading for a Security Council monopoly by the eminent Chinese diplomat L. Zhou, ‘China’, in Kreß and Barriga (eds), *supra* note 1, 1133–1138, with India’s fierce opposition to a strong Security Council role, as recounted and documented by the eminent Indian diplomat N. Singh, ‘India’, in Kreß and Barriga (eds), *supra* note 1, 1164, 1165–1168, 1171.

55 For the increasingly intensive debate, see, most notably, the recent speeches delivered, first, by the UK and, subsequently, by the Australian Attorney-General, as repr. in EJIL Talk! Blog of the European Journal of International Law, available online at, respectively: <http://www.ejil-talk.org/the-modern-law-of-self-defence/> and in <http://www.ejil-talk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#more-15255> (visited 28 January 2018). For an analysis of ‘anticipatory self-defence’ in the context of the State Conduct Element of the crime of aggression, see Kreß, *ibid.*, at 473–479.

56 For example, the legal intricacies with respect to the use of force against the ‘Islamic State’ that many states have been carrying out in Syria at Iraq’s request, were very much in the minds of decision makers when the crime of aggression has been discussed recently. For an analysis of ‘The Use of Force in Response to an Armed Attack by Non-State Actors Emanating from the Territory of Another State’ in the context of the State Conduct Element of the crime of aggression, see Kreß, *ibid.*, at 462–467.

57 The intriguing question of the use of force in a case of dire need to avert a humanitarian catastrophe, but without a Security Council authorization, has loomed large in the background to all the negotiations. For an analysis of ‘The Use of Force to Avert a Humanitarian Catastrophe’ in the context of the State Conduct Element of the crime of aggression, see Kreß, *ibid.*, at 489–502, and at 524–526.

jurisdiction over the crime of aggression in these grey legal areas, it may be hoped that the number of ratifications will increase significantly as it will become extremely difficult for any victorious power whose judges sat in judgment at Nuremberg and Tokyo to explain why they still do not wish fully to embrace the legacy of their own pioneering course of action after the Second World War.

8. Epilogue: An Imperfect Though Timely Appeal to the Conscience of Mankind

There can be no doubt that the substantive definition of the crime of aggression is (as) narrow (as a definition of a crime under international law should be) and that the jurisdictional threshold for the Court's exercise of jurisdiction over the crime is (more) stringent (than desirable). But it would be fallacious therefore to belittle the December 2017 breakthrough in New York. Russia has recently crossed the red line and forcibly annexed foreign territory.⁵⁸ North Korea and the USA have long been exchanging martial threats of nuclear war. At the time of writing, Turkey has started a major military invasion in Syria without any concession to the idea that the prohibition of the use of force mattered a great deal.⁵⁹ At such a juncture, the signal that has been sent to the conscience of mankind by activating the ICC's jurisdiction over the crime of aggression is timely.

58 If seen in the context of Russia's important role in the long journey described in this essay, one cannot be but even more saddened by this state's manifest violation of the prohibition of the use of force in the case of Crimea. The fact that politics and law have always been inextricably intertwined in Russia's contributions to the century-long conversation is no distinctive feature of Russia's approach to the subject and does not constitute a reason not to acknowledge that Russia has made noteworthy text proposals from 1933 on, when Maxim Litvinov submitted a Soviet 'Definition of "Aggressor": Draft Declaration' to the Disarmament Conference (repr. in Barriga and Kreß, *supra* note 9, at 126–127). Russia's role before Nuremberg is usefully recalled by Hathaway and Shapiro, *supra* note 4, at 257. Stalin had supported a trial at a critical juncture and, in that respect, he formed 'an odd couple' together with Stimson. (The meeting of minds of Stalin and Stimson did not go much further, though, in light of Stalin's preference for a show trial). In this historic context, it bears recalling that it was the Russian professor A.N. Trainin, who coined the Nuremberg and Tokyo term 'crime against peace' (in A.Y. Vishinsky (ed.), *Hitlerite Responsibility Under Criminal Law*, transl. by A. Rothstein (Hutchinson & Co., 1945), at 37). For Russia's active role during the Cold War, see, for example, Sellars, *supra* note 6, at 119–126, 130–138, and Bruha, *supra* note 8, at 150–154. The '1999 Proposal of the Russian Federation' (repr. in Barriga and Kreß, *supra* note 9, at 339) is as succinct as it has been incapable of securing a consensus in its insistence on both the old Nuremberg and Tokyo language of 'war of aggression' and the idea of a Security Council monopoly. Yet, it is as noteworthy as it is promising, that the two distinguished Russian diplomats Gennady Kuzmin and Igor Panin state (in 'Russia', in Kreß and Barriga, *supra* note 1, at 1264), that 'Russia is satisfied with the outcome of the Review Conference with regard to the definition of the crime of aggression'.

59 The identical Turkish letters addressed to the Secretary-General and to the President of the Security Council (S/2018/53) makes reference to the right of self-defence as recognized in Art. 51 UN Charter, but does almost nothing to present facts in order to substantiate this legal claim. Instead, the letters make a dangerously vague reference to the 'responsibility attributed to Member States in the fight against terrorism' as if such a 'responsibility' could serve as a legal basis for a use of force on foreign territory without the consent of the territorial state and absent a Security Council mandate.

A Victory for International Rule of Law? Or: All's Well that Ends Well?

The 2017 ASP Decision to Amend the Kampala Amendment on the Crime of Aggression

Andreas Zimmermann*

Abstract

On 14 December 2017, the Assembly of States Parties of the Rome Statute decided to activate the International Criminal Court's jurisdiction over the crime of aggression. In doing so, it however seems to have rescinded the Kampala amendment adopted in 2010, and in particular, the need for State Parties to eventually opt out from the Court's aggression-related jurisdiction. This reversal, while being more in line with the Rome Statute than the Kampala amendment itself, raises new (and old) and challenging legal questions which are highlighted in this article.

*Das eben ist der Fluch der bösen Tat,
dass sie, forzeugend, immer Böses muss gebären.*

*This is the curse of every evil deed/
that, propagating still, it brings forth evil.*

*—Friedrich Schiller
Wallenstein (Die Piccolomini)*

1. Introduction

On 14 December 2017, the 16th meeting of the Assembly of States Parties of the Rome Statute (ASP) adopted Resolution ICC-ASP/16/Res.5 concerning the

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‘Activation of the jurisdiction of the Court over the crime of aggression.’¹ By doing so, the ASP not only decided to activate the *International Criminal Court* (ICC)’s aggression-related jurisdiction effective as of 17 July 2018 (i.e. exactly 20 years to the adoption of the Rome Statute), but, rather, as acknowledged by many delegations participating in the recent negotiations, the ‘narrow’ jurisdictional view now reflected in operative paragraph 2 of the above-mentioned ASP resolution also effectively amended the Kampala amendment, though without formally doing so.²

As will be recalled, the Kampala amendment had introduced Article 15*bis*(4) into the Rome Statute. Arguably, under this provision, the Court would be able to exercise its aggression-related jurisdiction even vis-à-vis State Parties of the Rome Statute not having ratified the Kampala amendment, unless such states were willing to opt out of the Court’s aggression-related jurisdiction. Under this view, the Kampala amendment had thus cleared the path for a jurisdictional basis of the ICC far beyond the limitations contained in Article 121(5) Rome Statute, when it comes to the Court’s treaty-based (rather than Security Council-triggered) aggression-related jurisdiction. It had, however, in the then also newly introduced Article 15*bis*(5) Rome Statute, by the same token, also excluded the Court’s aggression-related jurisdiction whenever a non-State Party was involved in an act of aggression, unless the Security Council were to refer the situation to the Court.

It was this first ‘u-turn’ from Rome to Kampala that was, to say the least, highly problematic. The compromise was the result of an effort at Kampala to try to circumvent the parameters for treaty amendments, as laid down in Article 121 Rome Statute. As will be recalled, Article 121(5) Rome Statute quite unequivocally provides that ‘[i]n respect of a State Party which has not accepted the amendment [to articles 5, 6, 7 and 8 of this Statute], the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.’ Article 121(5) Rome Statute, therefore, does not require any form of action by non-ratifying State Parties in order for the Court not to be able to exercise its jurisdiction vis-à-vis the nationals of those State Parties, or when the alleged crime was committed on their territory. Article 15*bis*(4) Rome Statute, introduced by the Kampala amendment, instead made a formal opt-out declaration by a non-ratifying State Party necessary in order for the Court to be barred from exercising its jurisdiction ‘over a crime of aggression, arising from an act of aggression committed by a State Party’.

Resolution ICC-ASP/16/Res.5 concerning the ‘Activation of the jurisdiction of the Court over the crime of aggression’, now adopted on 14 December 2017 at

1 Text available online at <https://asp.icc-cpi.int/iccdocs/asp.docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf> (visited 24 January 2018).

2 See C. Kreß, ‘On the Activation of ICC Jurisdiction over the Crime of Aggression’, in this issue of the *Journal*, at 11: ‘...the fairly large group of States Parties, which believed in the correctness of the “more permissive position”, were left with the ...choice ...to accept language, which, from their legal perspective, strongly pointed in the direction of an “amendment to the (Kampala) amendment” ...’.

the 16th ASP in New York, constitutes *another* ‘u-turn’ as far as the procedure to amend the Rome Statute is concerned. While at first glance it seems that the Court’s jurisdictional reach (or lack, therefore) vis-à-vis non-ratifying State Parties is now (once again, one might say) more in line with Article 121 Rome Statute, the aforesaid resolution continues to raise significant old and new legal problems.

2. ... from Rome to Kampala: the So-called ‘Positive Understanding’ of Article 121(5) and the New Article 15bis(4)

There is no need to discuss in much detail the parameters for amendments to the Rome Statute given that these have already been analysed much more in depth on previous occasions, *inter alia*, by this author.³ It is sufficient to recall that in light of general rules of treaty law as codified in the Vienna Convention on the Law of Treaties (VCLT), neither Article 5(2) Rome Statute (as then adopted in Rome), nor the alleged so-called ‘positive understanding’ of Article 121(5) Rome Statute⁴ (contradicted by various compelling arguments including those based on Article 121(6),⁵ as well as on Article 124⁶ and on Article 15bis(5) Rome Statute⁷) could have provided for the inclusion of Article 15bis(4), nor indeed of Article 15bis(5). As will be recalled, one view of Article 15bis(4) was that it seemed to be intended to ‘force’ contracting parties of the Rome Statute to positively opt-out from the Court’s jurisdiction over acts of aggression committed by its nationals or on its territory, even if these states had not ratified the said amendment.

Given divergent views on the matter among State Parties which had already surfaced during and after the adoption of the Kampala amendment, a facilitation process was started⁸ with the aim to eventually reach consensus. This negotiation process culminated in the 16th ASP adopting in New York the activation resolution, which made the above-mentioned second ‘u-turn’ in an attempt to bring the ICC’s aggression-related jurisdictional parameters back in line with the provisions on amendments of the Rome Statute, as well as with treaty law more generally. The underlying (renewed) legal problems of this

3 A. Zimmermann, ‘Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties’, 10 *Journal of International Criminal Justice* (JICJ) (2012) 209 *et seq.*, *passim*.

4 *Ibid.*, 217 *et seq.*

5 *Ibid.*, 215 *et seq.*

6 *Ibid.*, 217 *et seq.*

7 *Ibid.*, 219.

8 For a more detailed exposé of the process, see *Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression*, ICC-ASP/16/24, 27 November 2017.

activation resolution, and more specifically the attempt to now ‘reverse’ Article 15*bis*(4) Rome Statute, need to be addressed.

3. ... and Back from Kampala to New York: Reversing Article 15*bis*(4) and Returning to the ‘Negative Understanding’ of Article 121(5)?

Indeed, the most crucial, and indeed most controversial element of the activation resolution consists in its take on Article 15*bis*(4) Rome Statute (as introduced by the Kampala amendment on the crime of aggression) generally, and its take on the legal position underlying Article 15*bis*(4) Rome Statute, now confirming that the so-called ‘positive understanding’ of Article 121(5) Rome Statute was neither compatible with the Statute, nor with general international law.

The position the resolution is taking on Article 15*bis*(4) Rome Statute is however less than unequivocal. For one, preambular paragraph 1 of Resolution ICC-ASP/16/Res.5 ‘*recall[s]* resolution RC/Res.6’ which, in 2010, had introduced Article 15*bis*(4) into the Rome Statute. Besides, in preambular paragraph 5, it *simultaneously* ‘*recall[s]* paragraph 4 of article 15*bis* and paragraph 5 of article 121’.⁹ Such combined reference might indeed be understood as implying that both provisions are compatible with each other. That in turn would only be true if the so-called ‘positive understanding’ of Article 121(5) Rome Statute were the correct interpretation of the latter provision which is, however, as shown elsewhere, clearly not the case.¹⁰ Moreover, the last preambular paragraph of Resolution ICC-ASP/16/Res.5 further reiterates Resolution RC/Res.6 adopted in Kampala, with its reference to the possibility to lodge an opting-out declaration foreseen in the then newly introduced Article 15*bis*(4) Rome Statute.

All those references, plus the obvious fact that Article 15*bis*(4) Rome Statute has been retained as such, could lead to an ambiguous result. They possibly indicate that a contracting party might only be protected from the Court exercising its jurisdiction concerning acts of aggression related to the territory or the nationals of a non-ratifying State Party provided that the relevant State Party has formally lodged an opting-out declaration under the still existing Article 15*bis*(4) Rome Statute. What is more, under Article 15*bis*(4), any such declaration would not bar the Court from exercising its jurisdiction where the act of aggression was committed on the territory of a non-ratifying State party by a national of another State Party which has not submitted such an opting-out declaration.

At the same time, however, operative paragraph 2 of Resolution ICC-ASP/16/Res.5 simply ‘confirms’ that ‘the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of

⁹ Emphasis added.

¹⁰ Zimmermann, *supra* note 3, 219 *et seq.*

a State Party that has not ratified or accepted these [Kampala] amendments [on the crime of aggression]'. The ASP has thereby implicitly reiterated the plain text of Article 121(5) Rome Statute.

This approach stands in line with the correct, i.e. the so-called negative, understanding of Article 121(5) Rome Statute. The contracting parties of the Rome Statute present in New York, and assembled in the ASP, therefore now — contrary to their own position taken in Kampala — seem to simply take it for granted that a mere non-ratification of the Kampala amendment suffices to 'shield' a State Party of the Rome Statute from the Court exercising its treaty-based, aggression-related jurisdiction vis-à-vis the said State Party and its nationals, without any need for a formal opting-out declaration.

This is underlined by the use of the word 'confirm' in operative paragraph 2. This wording underscores that the states involved in the negotiation process, by adopting the new resolution, had not wanted to decide anything *de novo*. Rather, it seems they had merely wanted to emphasize the (in their view correct) negative understanding of the relevant norm, i.e. of Article 121(5) Rome Statute. This means, however, that, by the same token, not only Article 15*bis*(4) Rome Statute has become completely redundant and superfluous, but that also any declarations already lodged thereunder (like the one by Kenya lodged in November 2015¹¹), or to be lodged in the future, share that fate.

As a matter of fact, a simultaneous ratification of the Kampala amendments *and* the deposit of an opting-out declaration might have made sense in the past. It would have made sense to ratify the Kampala amendment and combine it with an opting out declaration in order to help reach the necessary quorum of 30 states before the Court could exercise its aggression-related jurisdiction under Article 15*bis*(2) and Article 15*ter*(2) Rome Statute. Any such 'triggering' effect has however become obsolete once this quorum was reached in June 2016.¹² This by now an obsolete provision, which is incompatible with the very idea of contracting parties not having to opt out in order to be 'shielded' from the Court's treaty-based aggression-related jurisdiction, has however been retained. This fact is hard to square with the (correct) 'negative understanding' of Article 121(5) Rome Statute, now embodied in operative paragraph 2 of the activation resolution adopted in New York.

At the same time, however, the drafting history of Resolution ICC-ASP/16/Res.5 seems to confirm that the states involved in the negotiation had indeed wanted to completely set aside *any* effect Article 15*bis*(4) Rome Statute might still have had. They did so, however, without explicitly and formally deleting

11 See 'Declaration of Non Acceptance of Jurisdiction of the International Criminal Court Pertaining to the Crime of Aggression Pursuant to Paragraph 4 of Article 15 of the Rome Statute', MFA. INT. 8/14AVOL. X (86), 30 November 2015, available online at <https://www.icc-cpi.int/iccdocs/other/2015.NV.Kenya.Declaration.article15bis-4.pdf> (visited 24 January 2018).

12 See on this latter issue A. Zimmermann, '29 + 1 = 30 – The Kampala Amendment on the Crime of Aggression and the Recent Accession by Palestine', EJIL: Talk! Blog of the European Journal of International Law, 29 June 2016, available online at <https://www.ejiltalk.org/29-1-30-the-kampala-amendment-on-the-crime-of-aggression-and-the-recent-accession-by-palestine/> (visited 24 January 2018).

Article 15*bis*(4) Rome Statute. In particular, it is worth noting that the drafts contained in ICC-ASP/16/L.9 and ICC-ASP/16/L.9/Rev.1 of 13 December 2017 and 14 December 2017, respectively, had still retained an ‘opting-out light’ approach. They had stated in draft operative paragraph 1 (a) that the ASP would take note of ‘the [views] [positions] expressed by States Parties, individually or collectively, as reflected in the Report on the facilitation, or upon adoption of this resolution to be reflected in the Official Records of this session of the Assembly or communicated in writing to the President of the Assembly’.¹³ Put otherwise, the said drafts, if adopted as they then stood, would have still, unlike the final version adopted, required some form of (formal or informal) statement by a State Party of the Rome Statute in order for such state not to be bound by the Kampala amendment. Besides, these two draft versions of the activation resolution had also noted that they were meant to ‘be without prejudice to [the possibility to lodge] a declaration referred to in [paragraph 4 of] article 15 *bis*’.¹⁴ Yet, this ‘opting-out light’ approach was finally rejected. Rather, the States Parties present in New York now simply refer in operative paragraph 2 of the activation resolution, as adopted, to the very fact that a given State Party has neither ratified nor otherwise accepted the Kampala amendment on the crime of aggression.

It ought to be noted, however, that right after the adoption of the aforesaid resolution, a number of States Parties took the floor to reiterate their legal position, namely that Article 15*bis*(4) Rome Statute (and the underlying ‘positive understanding’ of Article 121(5) Rome Statute) had not been touched upon by the resolution, and specifically by its operative paragraph 2.¹⁵ This leaves one with the resolution’s ‘curious paragraph 3’,¹⁶ which ‘[r]eaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court’, and the position of which as either a preambular paragraph, or as an operative paragraph of the resolution, was a matter of dispute.¹⁷ Yet, this provision merely reiterates a banality, namely that should an issue arise as to the Court’s jurisdiction, the matter will be settled by the Court itself without any outside interference.

What is brought out by this overall analysis is that the text adopted in New York constitutes the obvious outcome of a political compromise. Given this character, the text (once again one might say) leaves fundamental questions of treaty law unresolved, and namely the question as to the ‘fate’ of Article

13 Footnote omitted.

14 See operative paragraph 1(c) of ICC-ASP/16/L.9, and ICC-ASP/16/L.9/Rev.1 (on file with the author).

15 N. Stürchler, ‘The Activation of the Crime of Aggression in Perspective’, *EJIL: Talk! Blog of the European Journal of International Law*, 26 January 2018, at 4, available online at <https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (visited 4 February 2018).

16 See for this terminology K. Heller, ‘The Draft Resolution’s Curious Paragraph 3’, *Opinio Juris*, 15 December 2017, available online at <http://opiniojuris.org/2017/12/15/the-curious-paragraph-3/> (visited 24 January 2018).

17 Kreß, *supra* note 2, at 12.

15bis(4), and whether indeed all states involved in the process considered that it has lost all of its normative relevance for good. As a matter of fact, it was this fundamental question that seems not to have been resolved. Time only will tell, for example, whether States Parties might, the text of the activation resolution notwithstanding, still submit opting-out declarations in which they might then confirm the continued relevance (in their view) of the so-called 'positive understanding' of Article 121(5) Rome Statute, and hence the continued necessity to submit opting-out declarations under Article 15bis(4) Rome Statute.

There are certainly risks involved for the legitimacy of the Court in this deliberate ambiguity. It suffices to imagine that one day in the future, the extremely sensitive issue arises as to whether the Court can exercise its aggression-related jurisdiction (or would rather not) vis-à-vis a contracting party of the Rome Statute which has not ratified the Kampala amendment on the crime of aggression. It is this fundamental question, the answer to which might then depend on the interpretation of the deliberately ambiguous resolution now adopted by the ASP.

There are however even more open legal questions raised by Resolution ICC-ASP/16/Res.5. For one, one wonders what the legal position of those contracting parties of the Rome Statute is, which were *present in Kampala* (and had therefore then joined the then prevailing formal consensus and the concept underlying Article 15bis(4) Rome Statute), but which were now *not present in New York*. As a matter of fact, those states might have had a well-founded expectation that the result reached in Kampala on the necessity to opt-out under Article 15bis(4) Rome Statute in order for a contracting party to be 'shielded' from the Court's aggression-related jurisdiction would not — the almost obvious legal problems involved in this position notwithstanding — be diametrically undercut by a new decision of the ASP, as adopted in New York. This holds even more true if this group of states was to eventually include a state that had already ratified the Kampala amendment including its Article 15bis(4) Rome Statute, thereby further underlying the respective state's assumption that a formal opting-out was necessary in order for a contracting party to indeed be 'shielded' from the Court's aggression-related jurisdiction.

Besides, for those 35 States that have already ratified the Kampala amendment (including Article 15bis(4)) on the basis of the alleged 'positive understanding' of Article 121(5), the second jurisdictional 'u-turn' now performed so elegantly in New York might also, depending on their respective constitutional system, raise significant constitutional issues. The starting point is that it is safe to assume that at least in most, if not all, of these 35 countries the ratification of the Kampala amendments required a law authorizing the respective government to submit an act of ratification with the depositary in order for the state to become bound by the Kampala amendment under international law. Yet, any such domestic law approving the Kampala amendments was then obviously based on the 'positive understanding' of Article 121(5) Rome Statute, as (then) being reflected in the newly added Article 15bis(4) Rome Statute. To provide but some examples, one might inter alia refer to the official

reasoning of the German government submitting the Kampala aggression amendments for the approval by the German Parliament. The said explanatory report explicitly stated that ‘the jurisdiction of the ICC does not extend to a crime of aggression committed by a State party *if this State party has previously declared that it does not intend to recognize the exercise of jurisdiction* (so-called “opting-out”-declaration).’¹⁸ The same holds *mutatis mutandis* true, for Austria,¹⁹ Belgium,²⁰ Switzerland (where the Swiss government had in particular even highlighted the political problems for a State Party to opt out, which ‘political problem’ no longer seems to exist),²¹ as well as for Liechtenstein (the government of which in its explanatory statement then had made specific reference to the so-called, by now obsolete, ‘positive understanding’ of Article 121(5)).²² Put otherwise, all these domestic legislatures had enabled their respective governments to ratify the Kampala amendment in the clear understanding that the ICC would, as a matter of principle, be in a position to exercise its aggression-related jurisdiction vis-à-vis nationals of all other State Parties when the act of aggression is committed against another State Party, unless the former State Party had submitted an opting-out declaration under Article 15bis(4) Rome Statute. With the recent adoption of Resolution

18 Deutscher Bundestag [German Parliament], *Drucksache 17/10975, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zu den Änderungen vom 10. und 11 Juni 2010 des Römischen Statuts des Internationalen Strafgerichtshofes vom 17. 21 July 1998*; translation by the author.

19 See statement by the Austrian government submitting the Kampala amendment for approval by the Austrian Parliament, available online at <https://www.parlament.gv.at/PAKT/VHG/XXV/I/100028/fnameorig.338057.html> (visited 24 January 2018): ‘... Art. 12 of the [Rome] Statute ... does not apply ... if this State party has previously declared that it does not intend to recognize the exercise of jurisdiction (“opting-out”).’

20 See ‘Projet de loi portant assentiment aux Amendements au Statut de Rome de la Cour pénale internationale relatifs au crime d’agression, adoptés à Kampala le 11 June 2010 lors de la Conférence de révision du Statut de Rome’ § 78, available online at <http://www.senate.be/www/?COLL=S&LANG=fr&LEG=5&MVal=/publications/viewPub.html&NR=2270&VOLGNR=1> (visited 24 January 2018), which provides, *inter alia*:

la Cour ne pourra exercer sa compétence à l’égard d’un crime d’agression que [sic]

...

3. l’acte d’agression dont résulte le crime d’agression a été commis par un État Partie au Statut de Rome qui n’a pas effectué la déclaration prévue à l’article 15bis, paragraphe 4, du Statut de Rome (emphasis added).

21 See *Message portant approbation des amendements au Statut de Rome de la Cour pénale internationale relatifs au crime d’agression et aux crimes de guerre* of 19 February 2014, available online at <https://www.admin.ch/opc/fr/federal-gazette/2014/1973.pdf> (visited 24 January 2018), 1973 *et seq.* (1982), stating that ‘un Etat peut ... déclarer qu’il ne reconnaît pas la compétence de la Cour à l’égard du crime d’agression au cas où il commettrait lui-même un acte d’agression (déclaration dite “déclinatoire”). On peut penser que les obstacles politiques au dépôt d’une telle déclaration seraient relativement importants.’ Footnote omitted.

22 *Bericht und Antrag der Regierung an den Landtag des Fürstentums Lichtenstein betreffend die Änderungen des Römer Statuts des Internationalen Strafgerichtshofes vom 10. und 11 Juni 2010*, available online at <https://crimeofaggression.info/documents/2/Liechtenstein.ratification.bill.pdf> (visited 24 January 2018), 17–18: ‘... a State party may escape from such [aggression-related] jurisdiction by depositing with the registrar of the ICC an ‘opting-out’ declaration’ (emphasis added, translation by the author).

ICC-ASP/16/Res.5 this has changed quite dramatically. Yet, this de facto amendment of the Kampala amendment (including the de facto abolition of Article 15bis(4) described above)²³ was done by way of a decision of the various governments of State Parties only, with immediate legal effect — and hence without any form of parliamentary approval. What is most relevant is that this includes the governments of those 35 State Parties, the parliaments of which had previously adopted the Kampala amendment by way of a formal law. Depending on the respective constitutional order this raises the question whether such de facto amendment of the Kampala amendment now provided for in the New York ASP resolution, activating the by now much more limited aggression-related jurisdiction of the ICC, might not require yet another parliamentary approval in at least some of these states. An analysis of the constitutional system of all of the above-mentioned ratifying states (and even more so of all 35 States that have done so) would obviously by far be beyond the scope of this article. It may be sufficient to note that, however, as far as Germany is concerned, it was the German Constitutional Court which laid down in its jurisprudence specific limits on the informal development of a given treaty regime by the German government without renewed parliamentary approval.²⁴ Apart from this more formal argument, the quite substantial change to the content of the Kampala amendment, without involvement of the respective democratically elected parliaments, might also raise quite significant issues of democratic legitimacy.

4. Rome, Kampala, New York and the Symbolic Nature of the Court's Aggression-related Jurisdiction in the Future

As is well known, the definition of the crime of aggression as contained in Article 8bis Rome Statute, which requires 'an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations' (which *arguendo* would not substance-wise encompass, for example, the illegal invasion of Iraq by US forces in 2003) leaves little, if any, room for its application.²⁵ This is now combined with a very limited jurisdiction *ratione personae*. As a matter of fact, it is now only acts of aggression involving on *both* sides of the armed conflict, two or more of the currently 35

23 See Stürchler, *supra* note 15, at 5, stating that the resolution 'would seem to imply a revision of the plain reading of article 15bis.'

24 See BVerfG (German Constitutional Court), Judgment of the Second Senate of 22 November 2001-2 BvE 6/99-; partial English translation available online at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2001/11/es20011122_2bve000699en.html (visited 4 February 2018).

25 For further details, see A. Zimmermann and E. Freiburg, 'Art. 8bis. The Crime of Aggression', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court - A Commentary* (3rd edn., Beck/Hart/Nomos, 2016) 580.

states, that have ratified the Kampala amendment that would come within the ICC's aggression-related jurisdiction (unless the Security Council were to refer such a situation to the Court under Article 15*ter* Rome Statute). It suffices to go through the list of those states — including Andorra, Austria, Costa Rica, Lichtenstein, Luxembourg, Malta, Samoa, San Marino, Switzerland or Trinidad and Tobago — to confirm that it is unlikely that the Court will in the foreseeable future be faced with a situation in which its treaty-based aggression-related jurisdiction will become relevant. It might be only otherwise if one were to, for example, imagine an armed conflict between neighbouring states which have both ratified the Kampala amendment. Yet, the list of such scenarios is — fortunately — not only very limited, but also quite beyond political imagination.

As a matter of fact, can one really expect in the foreseeable future an armed conflict arising between any of those 35 states that might at the same time amount to the crime of aggression? What is more, it does not seem realistic to expect that a relevant number of additional State Parties to the Rome Statute, in particular states involved in the use of military force, will ratify the Kampala amendment any time soon. Rather, the very process leading to the New York activation confirms the reluctance, by a variety of State Parties, to accept the Court's aggression-related jurisdiction including notably those two permanent members of the Security Council which are contracting parties of the Rome Statute, namely France and the United Kingdom.

Put otherwise, the New York activation may therefore, by and large, be considered an act of symbolic international 'legislation'. It is thus in line with the recently adopted treaty on the prohibition of nuclear weapons which in the same vein will not be ratified by those states concerned by the envisaged prohibition of nuclear weapons. At the same time, the activation of the Court's aggression-related jurisdiction will raise high hopes in less informed circles. They may expect that from now on any kind of illegal war will no longer go unpunished. This expectation might then further undermine the ICC in the eyes of a larger public opinion. It might very well be perceived as standing idly by while the crime of aggression is (allegedly) being committed — while simply being barred to act given its underlying limited jurisdictional regime.

Finally, the activation of the Court's aggression-related jurisdiction might even serve as a disincentive for future Security Council referrals (in the unlikely event such referrals might happen again at all given the overall current political situation). In that regard, it suffices to refer to the Syrian armed conflict as an example. If one were to assume that at the relevant time, the Court's aggression-related jurisdiction had already been activated, and further assuming that the Russian Federation would have been willing to not veto a referral of the Syrian situation to the ICC, would it then have been really realistic to assume that even those permanent members of the Security Council which have favored such referral in the past would still be willing to do so? It suffices to recall the various uses of military force by *inter alia* France, the United Kingdom, but particularly the United States (including in particular its 2017

Shayrat missile strike as a reaction to the alleged use of chemical weapons by Syrian armed forces in Khan Shaykhun) without authorization by neither the Security Council, nor obviously by the territorial state, to demonstrate that even if otherwise the Security Council (and its permanent members exercising the right of veto) was willing to refer a situation to the ICC, the newly added aggression-related jurisdiction might very well serve as (a further) disincentive to do so²⁶ — and this indeed, might make us reflect on the above quote from Friedrich Schiller's tragic trilogy, *Wallenstein*.

26 This would only not be the case if the Security Council could, when referring a situation, exclude the Court from, at the the same time, also exercising its aggression-related jurisdiction. This is however hard to square with the fact that under Art. 13(b) ICCSt. it is a situation, but not a specific crime, that is being referred to the Court by the Security Council. Yet, even if the Security Council were to attempt to exclude the crime of aggression as part of a referral of a given situation, it would run the risk that the Court might consider such limitation not to be compatible with the Rome Statute, and then nevertheless exercise its aggression-related jurisdiction on the basis of the underlying Security Council referral. This danger alone might be a major hindrance to the Security Council referring a situation in the first place.

When (and How) Will the Crime of Aggression Amendments Enter into Force?

Interpreting the Rome Statute by Recognizing Participation in the Adoption of the Crime of Aggression Resolutions as ‘Subsequent Practice’ under the VCLT

Darin Clearwater*

Abstract

Determining if the crime of aggression amendments to the Rome Statute have actually entered into force will be crucial to someday prosecuting individuals for crimes of aggression before the International Criminal Court. Yet a narrow interpretation of the Rome Statute designates a different process from that specified by the two Crime of Aggression Resolutions (RC/Res.6 and ICC-ASP/16/Res.5) as determinative of when the amendments will enter into force, and it is not immediately clear which process should be followed. This uncertainty can be resolved by recognizing that the participation of States Parties in the separate adoptions by consensus of the Crime of Aggression Resolutions constituted ‘subsequent practice’ within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. As such, this state practice can be regarded as having established an authoritative interpretation of the Rome Statute to the effect that all seven crime of aggression amendments will rightfully enter into force as specified within these resolutions.

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1. Introduction

In the final hours of the Sixteenth Session of the Assembly of States Parties (ASP) to the Rome Statute held in December 2017, a decision was taken to activate the jurisdiction of the International Criminal Court (ICC or ‘the Court’) over the crime of aggression, effective 17 July 2018 — 20 years to the day since the Rome Statute was signed. Now that over a year has passed since the thirtieth State Party ratified or accepted the crime of aggression amendments, once the calendar reaches 17 July 2018 the factual requirements of the conditions for the activation of ICC jurisdiction will finally have been fulfilled.¹ Yet, even after these factual requirements have been fulfilled, questions will still remain concerning when, and on what basis, the various crime of aggression amendments will enter into force for any given state affected by, or involved in, an alleged crime of aggression, be it the victim of such a crime (‘victim state’) or the state of nationality of the alleged perpetrator (‘state of nationality’).

The fundamental problem that lies at the heart of such questions is that there are two different interpretations of Article 121 of the Rome Statute (‘Statute’) available as to how the crime of aggression amendments are to enter into force. The ‘broad interpretation’ of Article 121 suggests that *all* seven amendments will enter into force in accordance with *one* of the two regimes established by Article 121; as such, this interpretation establishes what can be labelled the ‘single-track process’ for entry into force of the crime of aggression amendments. The ‘narrow interpretation’ of Article 121, on the other hand, suggests that *some* of the crime of aggression amendments will enter into force in accordance with one of the two regimes established by Article 121 while the remaining amendments will enter into force in accordance with the *other* regime; as such, this interpretation establishes what can be labelled the ‘dual-track process’ for entry into force of the amendments. Because each process — single- and dual-track — invokes a different entry-into-force regime for some (but not all) of the amendments, each process effectively designates the occurrence of a different event as determinative of the date upon which some (but not all) of the amendments will enter into force.

So, why is this a problem? Well, because it is extremely likely that, in the early days following the fulfilment of the factual requirements of the conditions for the activation of jurisdiction over the crime of aggression, the ICC will seek to exercise its jurisdiction *after* the occurrence of the event designated by the single-track process as determinative of the date of entry into force for (all of) the amendments but *before* the occurrence of the event designated by the dual-track process as determinative of the date of entry into force for (some of) these amendments. Until it can be conclusively determined which process — single-track or dual-track — is the *rightful* process for entry into force of the crime of aggression amendments, it will not be able to be said with certainty in such cases whether (all of) the amendments have in fact

1 As required by Arts 15bis(2) and (3) and 15ter(2) and (3) ICCSt.

entered into force as required. And in the absence of certainty, any purported exercise of jurisdiction by the Court in such cases will be exposed to challenges as to the jurisdictional legitimacy of the proceedings.

While a reasonable case can be made for the broad interpretation of Article 121 — and the single-track process that it supports — based on a broad teleological reading of this provision, it is by no means certain that the Court will be *initially* inclined to endorse this interpretation if and when it is confronted with this issue in the future. Thus, with this uncertainty in mind, it will be prudent to consider what other interpretative means are available to support the single-track process as the *rightful* process.

As it happens, the Crime of Aggression Resolutions ('CoA Resolutions') — RC/Res.6 and ICC-ASP/16/Res.5 — each support the single-track process.² Accordingly, the primary focus of this article will be to examine whether recourse can be had to these resolutions pursuant to the rules on treaty interpretation that are enshrined within the Vienna Convention on the Law of Treaties (VCLT) in order to conclusively determine which is the rightful process for entry into force.³ It will be contended that the participation of States Parties in one or both of the consensuses by which the CoA Resolutions were adopted constituted 'subsequent practice' within the meaning of Article 31(3)(b) VCLT and that, as such, this practice can thereby be regarded as having established an *authoritative interpretation* of the Statute in support of the single-track process for entry into force of the crime of aggression amendments.⁴

It will be contended further that even if one rejects the contention that participation in the adoptions by consensus of one or both of the CoA Resolutions constituted 'subsequent practice', this participation should nevertheless at least be regarded as constituting a 'supplementary means of interpretation' of the Statute pursuant to Article 32 VCLT.

Ultimately, regardless of whether this participation constituted 'subsequent practice' or constitutes a mere 'supplementary means of interpretation' instead, it will be concluded that the practical end result will be the same: the seven crime of aggression amendments will rightfully enter into force in accordance with the single-track process and not as could otherwise occur pursuant to the narrow interpretation of Article 121.

To these ends, the layout of this article will be as follows. Section 2 will describe the various regimes that exist under the Statute to govern the entry into force of amendments to the Statute, and will consider the possible interpretations of Article 121 — 'broad' and 'narrow' — that are available and the single- and dual-track process for entry into force of the crime of aggression amendments that each interpretation supports. Section 3 will consider what

2 RC/Res.6, Adopted at the 13th plenary meeting, on 11 June 2010, by consensus; ICC-ASP/16/Res.5, Adopted at the 13th plenary meeting, on 14 December 2017, by consensus.

3 Aside from Art. 31(3)(b), the precise meaning of which will be examined in some detail below, a general understanding of Art. 31 of the VCLT will be presumed herein.

4 On the precise meaning of 'authoritative interpretation', see *infra*, Section 6.

the potential ramifications on the Court's ability to exercise jurisdiction over a crime of aggression would be in the case of one process or the other constituting the *rightful* process for entry into force of these amendments. This section will go on to briefly reflect upon which interpretation of the Statute is likely to be upheld by the Court, if and when this matter comes before it in the future, and will note the need to explore other interpretative means for determining which is the rightful process. Section 4 will provide a necessary background to the content of the CoA Resolutions and the circumstances under which each of them were adopted in 2010 and 2017, respectively. Section 5 will provide some preliminary reflections on the possible role that the CoA Resolutions may play in interpreting the Rome Statute. Section 6 will then examine the primary contention of this article: that States Parties' participation in the adoptions of one or both of the CoA Resolutions constituted 'subsequent practice' within the meaning of Article 31(3)(b) VCLT, which thereby established an 'authoritative interpretation' of the Statute in favour of the single-track process for entry into force of the crime of aggression amendments. Finally, Section 7 will explore the closely related yet conceptually distinct fall-back contention that the adoption of RC/Res.6 constitutes a 'supplementary means of interpretation' of the Rome Statute in accordance with Article 32 VCLT.

2. Entry into Force According to the Rome Statute

A. Entry into Force of Amendments in General

The Rome Statute establishes two distinct, yet complementary, entry-into-force regimes for what can be labelled *non-institutional amendments*; i.e., amendments to provisions that do not fall within the scope of Article 122.⁵

Article 121(4) provides the default entry-into-force regime (hereinafter, 'Article 121(4) regime') for such amendments:

Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

Hereinafter, regardless of whether Article 121(4) actually applies in a given scenario or not, the benchmark of a year having elapsed since seven-eighths of States Parties deposited their instruments of ratification or acceptance will be referred to as 'the seven-eighths benchmark'. Unless and until the seven-eighths benchmark has been met, amendments that fall within the scope of the Article 121(4) regime will not enter into force for any State Party, whatsoever.

5 Art. 122 ICCSt. regulates the entry into force of amendments to 'provisions of an institutional nature', which are exhaustively designated as such therein. None of the crime of aggression amendments concern such provisions; as such, the entry-into-force regime established by Art. 122 will not be discussed further herein.

The entry-into-force regime of Article 121(5), on the other hand, constitutes an exception to the default applicability of the Article 121(4) regime:

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.

Article 121(5) continues:

In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Note that it is only the first sentence of Article 121(5) that concerns entry into force of the amendments that fall within the scope of this provision. The second sentence, by contrast, deals specifically with additional conditions that limit when the Court can exercise its jurisdiction vis-à-vis an amendment ordinarily covered by Article 121(5). Accordingly, a reference to the 'Article 121(5) regime' hereinafter should be understood as being a reference only to the *first* sentence of Article 121(5).⁶

B. Entry into Force of the Crime of Aggression Amendments

The crime of aggression amendments to the Statute are outlined within seven paragraphs of Annex I of RC/Res.6.

Paragraph 1 of Annex I deleted Article 5(2). Paragraph 2 added to the Statute the crime of aggression definition through the addition of an entirely new Article 8*bis*. Paragraphs 3 and 4 added entirely new Articles 15*bis* and 15*ter* concerning, inter alia, the trigger mechanisms by which the Court may exercise jurisdiction over the crime of aggression: Article 15*bis* for exercises of jurisdiction following prosecutory investigations initiated either *proprio motu* or by a State Party referral; and Article 15*ter* for exercises of jurisdiction following a prosecutory investigation initiated by a Security Council referral. The new Articles 15*bis* and 15*ter* also contain the conditions for the activation of the Court's jurisdiction over the crime of aggression, as alluded to above. Paragraphs 5, 6, and 7 of Annex I introduced other miscellaneous amendments: the addition to Article 25 of a new clause — paragraph 3*bis* — so as to restrict criminal responsibility for the crime of aggression to state leaders; the alteration to the text of Article 9(1) so as to include Article 8*bis* within the list of provisions the interpretation of which shall be assisted by reference to the Elements of Crimes; and the alteration to the text of Article 20(3) so as to extend the doctrine of *ne bis in idem* to the crime of aggression.

So, the question becomes: leaving aside for the moment any possible interpretative impact of the CoA Resolutions, which of the Statute's two entry-into-

⁶ See further *infra*, Section 3.A, note 19.

force regimes for non-institutional amendments would ordinarily apply to each crime of aggression amendment?

There is little doubt that at least *some* of the crime of aggression amendments would ordinarily fall within the scope of the Article 121(5) regime. For instance, there is no difficulty in regarding the deletion of Article 5(2) in this manner, as Article 5 is *explicitly* mentioned within Article 121(5).

Additionally, once regard is had to a teleological reading of Article 121(5) in light of the *travaux préparatoires* of the Statute overall,⁷ a compelling case can be formulated as to why the addition of Article 8bis should likewise fall within the scope of the Article 121(5) regime, notwithstanding that it does not amend ‘articles 5, 6, 7 or 8’ as such. When the original text of the Rome Statute was adopted on 17 July 1998, that version’s Article 121(5) made express reference to ‘article 5’ alone; Articles 6, 7, and 8 were not mentioned.⁸ This was because in earlier draft versions of the Statute that were used throughout much of the Rome Conference, the definitions of genocide, crimes against humanity, and war crimes were all contained within a singular provision: Article 5.⁹ It was not until the late stages of the Conference that the decision was taken to shift the definition of each crime into its own separate provision while retaining the list of crimes over which the Court would eventually possess jurisdiction — including the crime of aggression — within Article 5. Thus, the original reference within Article 121(5) to ‘article 5’ alone had to be amended. However, while this change was apparently made to the working draft of the Statute under consideration for the remainder of the Conference, it did not find its way into the formal version of the Statute finally adopted — an omission that was not noticed until after the conclusion of the Conference. The Office of the Secretary-General, as depositary, was subsequently notified,¹⁰ after which it made the requested corrections in accordance with Article 79 VCLT to the effect that Article 121(5) of the Statute currently in force now refers to ‘articles 5, 6, 7 and 8’.¹¹

Thus, the Article 121(5) regime was clearly always intended to apply to any amendments made to the definitions of the original three core crimes of the Statute. Moreover, the Article 121(5) regime was *also* intended to apply to the addition to the Statute of entirely *new* crimes.¹² The reason for this lies in the

7 As outlined in R. Clark, ‘Article 121: Amendments’, in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn., C.H. Beck/Hart/Nomos, 2016) 2298–2304, at 2302–2303, margin 11–12.

8 UN Doc. A/CONF.183/9, 17 July 1998, Art. 121(5).

9 For example, see *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, Vol. III, UN Doc. A/CONF.183/13 (Vol. III), Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14–22.

10 Letter attached to Note from the Secretary-General, C.N.502.1998.TREATIES-3 (Depositary Notification) dated 25 September 1998, reproduced in Clark, *supra* note 7, at 2302–2303, margin 12.

11 ‘Procès-Verbal of Rectification of the Original of the Statute, dated 10 November 1998’, United Nations, *Treaty Series*, Vol. 2187, 502–506, at 506.

12 The term ‘new’ here is used in the sense of a crime being *new to the Rome Statute* rather than *new to international criminal law in general*.

fact that under the Statute as it currently exists today, the addition of an entirely new crime will require not only an amendment to the Statute in the form of the addition of a new provision defining the new crime, but also an amendment to Article 5. This is because the phrase ‘crime(s) referred to in article 5’ is used numerous times throughout the Statute to delineate the scope of particular provisions,¹³ and in the absence of a corresponding amendment to Article 5, these provisions simply would not apply to the new crime. Now, if it were the case that the Article 121(5) regime had *only* been intended to apply to amendments to the definitions of *existing* crimes, and not to the addition of definitions of *new* crimes, one would expect that the text of Article 121(5) would have been corrected further in 1998 so that it would *only* refer to Articles 6, 7, and 8 (and not to Article 5), as this would then mean that the amendment to Article 5 that would necessarily have to accompany the addition of a new Article for any new crime would enter into force in the same manner as that new Article; namely, in accordance with the Article 121(4) regime. The fact that Article 121(5) retained its original reference to Article 5, notwithstanding that the definitions of crimes are no longer situated within this provision, demonstrates that any amendment to the Statute that adds the definition of a new crime — such as the amendment concerning Article 8*bis* — will rightfully fall within the scope of the Article 121(5) regime just as will the corresponding amendment to Article 5.¹⁴

It is questionable, however, whether the remaining crime of aggression amendments — those concerning Articles 9(1), 15*bis*, 15*ter*, 20(3), and 25(3*bis*) — should likewise fall within the scope of the Article 121(5) regime, as none of these amendments concern provisions that are explicitly mentioned within Article 121(5), nor do any of them introduce the definition of a new crime to the Statute.

There are two different interpretations of Article 121 that are available to determine how these remaining five amendments should enter into force. A *narrow interpretation* of Article 121 (‘narrow interpretation’) would maintain that any crime of aggression amendment that neither concerns Articles 5 through 8 nor introduces the *definition* of the crime of aggression should be regarded as falling beyond the scope of the Article 121(5) regime and should therefore fall within the default scope of the Article 121(4) regime instead. As such, this narrow interpretation would end up supporting what has earlier been labelled the ‘dual-track process’ for entry into force of the crime of aggression amendments, whereby some of these amendments (those concerning Articles 5(2) and 8*bis*) will enter into force in accordance with the Article 121(5) regime while the remaining amendments (those concerning Articles 9(1), 15*bis*, 15*ter*, 20(3), and 25(3*bis*)) will enter into force in accordance with

13 Arts 12(1), 13, 15*ter*(5), 17(2)(a), 18(2), 20(2), and 77(1) ICCSt.

14 The fact that the crime of aggression was already included under Art. 5(1) is immaterial to this argument.

the Article 121(4) regime.¹⁵ In effect, the narrow interpretation maintains a largely literalist interpretation of the language of Article 121, granting only that the amendment concerning Article 8*bis* should be treated somewhat differently on the teleological basis discussed above.

By contrast, a *broad interpretation* of Article 121 ('broad interpretation') would maintain that the function of Article 121(5) goes beyond the regulation of the entry into force of amendments that *introduce the definitions of new crimes* (or amendments that *alter the definitions of existing crimes*) to also include the regulation of the entry into force of those *additional* amendments, the adoption of which is necessary to augment the existing legal framework of the Statute so that the Court will be able to exercise jurisdiction over a newly added crime. As such, this teleologically broader interpretation would recognize that the seven crime of aggression amendments 'are all a package intended to bring into effect the "new" crime' and would thereby end up supporting what has earlier been labelled the 'single-track process' for entry into force, under which these amendments will *all* enter into force in accordance with the Article 121(5) regime alone.¹⁶

Before reflecting upon which of these interpretations is likely to be initially endorsed by the Court, it will be useful to consider what the potential ramifications on the Court's ability to exercise jurisdiction over a crime of aggression would be in the case of either of the processes — single-track or dual-track — that are supported by these interpretations being found to constitute the rightful process for entry into force of the crime of aggression amendments.

3. The Problem: Single-Track versus Dual-Track

So, why does it need to be resolved as to which process — single-track or dual-track — is the rightful one by which the crime of aggression amendments will enter into force? Well, aside from the fact that attaining conceptual clarity on this matter is inherently worthwhile, there will likely arise a practical need to resolve this issue in the early days following the fulfilment of the factual requirements of the conditions for the activation of the Court's jurisdiction. To demonstrate this, it will be helpful to divide possible future exercises of the Court's jurisdiction over the crime of aggression into two categories: those that are conducted on the basis of a prosecutory investigation initiated

15 An argument could be formulated that because the amendment concerning Art. 9(1) allows recourse to be had to the Elements of Crimes to assist in *interpreting* Art. 8*bis* and thereby *essentially relates* to the definition of the crime of aggression, it should therefore also fall within the scope of the Article 121(5) regime. However, this argument would be unlikely to sway a proponent of the narrow interpretation vis-à-vis entry into force of this amendment.

16 D. Akande, 'The ICC Assembly of States Parties Prepares to Activate the ICC's Jurisdiction Over the Crime of Aggression: But Who Will be Covered by That Jurisdiction?' EJIL: Talk!, 26 June 2017, available at <https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/> (visited 10 January 2018).

either *proprio motu* or by a State Party referral pursuant to Article 15*bis* ('non-SC-initiated exercises of jurisdiction'), and those that are conducted instead on the basis of a prosecutory investigation initiated by a Security Council referral pursuant to Article 15*ter* ('SC-initiated exercises of jurisdiction').

A. Entry into Force and Non-SC-initiated Exercises of Jurisdiction

Beginning with non-SC-initiated exercises of jurisdiction commenced pursuant to Article 15*bis*, the Court will only be able to proceed with such exercises of jurisdiction if the following three conditions have been satisfied.¹⁷ First, the alleged crime of aggression must not have been committed by a national of, or on the territory of, a non-State Party.¹⁸ Secondly, the crime of aggression amendments must have entered into force for either the victim state or the state of nationality (or perhaps both¹⁹), thereby rendering operational the trigger mechanism of Article 15*bis* by which the Court can exercise its jurisdiction.²⁰ Thirdly, as the use of this trigger mechanism will be subject to the Court's jurisdiction having been activated prior to the occurrence of the alleged crime of aggression in accordance with the factual requirements of Article 15*bis*(2) and (3),²¹ these factual requirements must also have been fulfilled.

17 Note that Art. 15*bis*(4) enables States Parties to opt out of the Court's jurisdiction over crimes of aggression. For ease of discussion, it will hereinafter be assumed in the hypothetical scenarios under consideration that the state of nationality *has not* opted out.

18 Art. 15*bis*(5).

19 Prior to the adoption of ICC-ASP/16/Res.5, a compelling case could be made that the second sentence of Art. 121(5) does not apply to the crime of aggression amendments and that, therefore, only one or the other — but not both — of the state of nationality and the victim state must have ratified or accepted the amendments for a non-SC-initiated exercise of jurisdiction to proceed; see further, C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *Journal of International Criminal Justice* (JICJ) (2010) 1179–1217, at 1214; S. Barriga, 'Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression', in G. Dive, B. Goes, and D. Vandermeersch (eds), *From Rome to Kampala: The First 2 Amendments to the Rome Statute* (Bruylant, 2012) 31–53, at 51. However, the language of Operative Paragraph 2 of the newly adopted ICC-ASP/16/Res.5 explicitly notes that *both* States must have ratified or accepted the amendments. Ultimately, this issue will be a matter for the Court to decide. Indeed, the reference to Arts 40(1) and 119(1) in Operative Paragraph 3 may have been inserted to emphasize this very point: D. Akande, 'The International Criminal Court Gets Jurisdiction Over the Crime of Aggression', EJIL: Talk!, 15 December 2017, available at <https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/> (visited 10 January 2018). As such, the Court may someday find itself having to assess whether the adoption of ICC-ASP/16/Res.5 alone constituted 'subsequent practice' that established an authoritative interpretation of the Statute *vis-à-vis* the conditions for a non-SC-initiated exercise of jurisdiction, in much the same way that Section 6 of this article will consider whether the adoption of both ICC-ASP/16/Res.5 and RC/Res.6 constituted subsequent practice that established an authoritative interpretation *vis-à-vis* entry into force.

20 Arts 15*bis*(1) and (4), 12(2), and 13(a) and (c) ICCSt.

21 Regarding jurisdiction *ratione temporis*, see also Understanding 3 of RC/Res.6, Annex III.

Now, it is relatively easy to envisage a scenario arising in the future involving an attempted non-SC-initiated exercise of jurisdiction by the Court where:

- the alleged crime of aggression occurred at least a year after the thirtieth State Party ratified or accepted the crime of aggression amendments (thereby fulfilling the factual requirement of Article 15*bis*(2));
- the alleged crime occurred after 17 July 2018 (thereby fulfilling the factual requirement of Article 15*bis*(3));
- both the victim state and the state of nationality are States Parties to the Rome Statute and were so at the time of the alleged crime;
- both the victim state and the state of nationality ratified or accepted the amendments at least a year prior to the alleged crime; *and*
- the seven-eighths benchmark for the amendments *has not* yet been met.

In such a scenario, the question over the rightful process — single-track or dual-track — as to how the crime of aggression amendments will enter into force will prove crucial as to whether the exercise of jurisdiction can proceed.

If, for instance, the *single-track process* is the rightful process, then clearly the non-SC-initiated exercise of jurisdiction *will* be able to proceed in this scenario. This is because both factual requirements for the activation of the Court's jurisdiction have been fulfilled *and* all seven crime of aggression amendments have entered into force for the victim state and the state of nationality — due to the fulfilment of the conditions of the Article 121(5) regime — thereby rendering the trigger mechanism of Article 15*bis* operational.

Alternatively, if the *dual-track process* is the rightful process, then clearly this exercise of jurisdiction *will not* be able to proceed. This is because while the amendments concerning Articles 5(2) and 8*bis* have entered into force for both the victim state and the state of nationality due to the fulfilment of the conditions of the Article 121(5) regime, the amendment concerning Article 15*bis* — and, for that matter, those concerning Articles 9(1), 20(3), and 25(3*bis*) — *has not* entered into force for any State Party due to a lack of fulfilment of the conditions (i.e., the seven-eighths benchmark) of the Article 121(4) regime, notwithstanding that at least 30 States Parties have already ratified or accepted the amendments over a year earlier. While aggression would still be criminalized under the Statute in this scenario, it could not be prosecuted before the Court by way of a non-SC-initiated exercise of jurisdiction because the relevant trigger mechanism — that established by Article 15*bis* — would not yet have become operational.

B. Entry into Force and SC-initiated Exercises of Jurisdiction

Turning now to SC-initiated exercises of jurisdiction commenced pursuant to Article 15*ter*, the fact of the amendments not having entered into force for the victim state or the state of nationality in any given scenario will not, in and of itself, impede the Court's exercise of jurisdiction,²² nor will the fact of

²² Arts 15*ter*(1) and 13(b) ICCSt. See also Understanding 2 of Annex III to RC/Res.6.

either state not being a State Party to the Statute. Nevertheless, it will still be necessary for the crime of aggression amendments to have entered into force for at least *one* out of the entire class of States Parties — even if said State Party is neither the victim state nor the state of nationality — thereby rendering operational the trigger mechanism of Article 15*ter* by which the Court can exercise its jurisdiction over any state.²³ Moreover, the use of this trigger mechanism will be subject to the Court's jurisdiction having been activated prior to the occurrence of the alleged crime of aggression in accordance with the factual requirements of Article 15*ter*(2) and (3).²⁴

Now, it is relatively easy to envisage a scenario arising in the future involving an attempted SC-initiated exercise of jurisdiction by the Court where:

- the alleged crime of aggression occurs at least a year after the thirtieth State Party ratified or accepted the crime of aggression amendments (thereby fulfilling the factual requirement of Article 15*ter*(2));
- the alleged crime occurs after 17 July 2018 (thereby fulfilling the factual requirement of Article 15*ter*(3)); and
- the seven-eighths benchmark for the amendments *has not* yet been met.

In such a scenario, the question over the rightful process will once again prove crucial as to whether the exercise of jurisdiction can proceed.

If, for instance, the single-track process is the rightful process, then clearly the SC-initiated exercise of jurisdiction *will* be able to proceed in this scenario. This is because both factual requirements for the activation of the Court's jurisdiction have been fulfilled *and* all seven crime of aggression amendments have entered into force for at least one State Party, thereby rendering the trigger mechanism of Article 15*ter* operational.

Alternatively, if the dual-track process is the rightful process, then clearly this exercise of jurisdiction *will not* be able to proceed. This is because while the amendments concerning Articles 5(2) and 8*bis* have entered into force for at least one State Party due to the fulfilment of the conditions of the Article 121(5) regime, the amendment concerning Article 15*ter* — and, for that matter, those concerning Articles 9(1), 20(3), and 25(3*bis*) — *has not* entered into force for any State Party due to a lack of fulfilment of the conditions (i.e., the seven-eighths benchmark) of the Article 121(4) regime, notwithstanding that at least 30 States Parties have ratified or accepted the amendments over a year earlier. While, once again, aggression would still be criminalized under the Statute in this scenario, it could not be prosecuted before the Court by way of an SC-initiated exercise of jurisdiction because the relevant trigger mechanism would not yet have become operational.

23 Agreeing, see S. Barriga and N. Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary*, Vol. 1 (Cambridge University Press, 2017) 621–645, at 630–631.

24 Regarding jurisdiction *ratione temporis*, see also Understanding 1 of RC/Res.6, Annex III.

C. *The Way Forward*

So, multiple scenarios can arise — and indeed likely will arise — wherein whether an SC- or a non-SC-initiated exercise of jurisdiction over an alleged crime of aggression will be able to proceed will be dependent upon the process by which the crime of aggression amendments will enter into force.²⁵ The question for the immediate future therefore becomes: which is the rightful process by which the crime of aggression amendments will enter into force? The dual-track process supported by a narrow interpretation of Article 121 or the single-track process supported by a broad interpretation of Article 121?

Given the fact that — as has just been demonstrated — an endorsement of the dual-track process for entry into force of the crime of aggression amendments would likely frustrate (some) prosecutions for crimes of aggression in the future, it seems likely that the Court will, when faced with this issue, adopt the broad interpretation of Article 121 and thereby endorse the single-track process that it supports. While likely, however, this is by no means certain. The potential still exists for a defendant to someday argue — depending on the circumstances involved — that the Court should not be able to exercise jurisdiction because the amendments that establish, *inter alia*, the trigger mechanism that is being relied upon have not actually entered into force.

Thus, if for no other reason than to neutralize this line of argument before it can someday be exploited, it is worth exploring what, if any, other interpretative means are available to support the single-track process as the rightful process by which the crime of aggression amendments will enter into force.

4. The Crime of Aggression Resolutions

A. *RC/Res.6*

Resolution RC/Res.6 was adopted at the first Review Conference of the Rome Statute held at Kampala in 2010 ('Review Conference'). Its adoption lay the groundwork for the fulfilment of the expectations of the Rome Conference vis-à-vis the crime of aggression, which had been enshrined within Article 5(2) (as it then was) of the 1998 Rome Statute:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

²⁵ In fact, the only set of circumstances in which it will not matter which is the rightful process for entry into force is where the events designated by *each* process as determinative of entry into force have *both* occurred prior to the alleged occurrence of a crime of aggression.

Operative Paragraph 1 ('OP 1') of RC/Res.6 states that the Review Conference:

Decides to adopt, in accordance with Article 5, paragraph 2, of the Rome Statute ... the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; ...

As has already been mentioned,²⁶ Annex I of RC/Res.6 contains seven paragraphs detailing seven separate amendments to the Statute: those concerning Articles 5(2), 8*bis*, 9(1), 15*bis*, 15*ter*, 20(3), and 25(3*bis*). The adoption of RC/Res.6 as a single instrument effectively constituted the adoption of each and every amendment to the Statute listed within Annex I.

The method used by the Review Conference to adopt RC/Res.6 was adoption by consensus, rather than adoption by an affirmative vote. As such, while it is known that 84 of 111 States Parties to the Statute at the time initially presented their credentials to the Review Conference,²⁷ it does not appear to be known definitively how many delegations were actually present — and thus how many States Parties participated in the consensus — when RC/Res.6 was adopted.²⁸ Nevertheless, in the absence of any evidence to the contrary, there is no compelling reason to believe that attendance and participation was *much* below 84.²⁹

Operative Paragraph 1 of RC/Res.6 supports the single-track process for entry into force of the crime of aggression amendments. It does so by having declared that '[all of] the amendments ... shall enter into force in accordance with article 121, paragraph 5 [of the Rome Statute]' ('OP 1 declaration').

B. ICC-ASP/16/Res.5

Resolution ICC-ASP/16/Res.5 was adopted at the Sixteenth Session of the ASP held at New York in December 2017 ('16th ASP'). Just like RC/Res.6, the method used to adopt ICC-ASP/16/Res.5 was adoption by consensus. As such, while it is known that 114 of 123 States Parties to the Statute at the time presented their credentials to the 16th ASP,³⁰ it is once again unknown precisely how many States Parties were actually present — and thus how many States

²⁶ See *supra* Section 2.B.

²⁷ *Official Records of the Review Conference of the Rome Statute of the International Criminal Court*, Kampala, 31 May – 11 June 2010, 2010, ICC Doc. RC/11, 21 December 2010 (hereinafter, 'Review Conference Official Records'), Annex I: Report of the Credentials Committee, at 26, §§ 4–7.

²⁸ W. Schabas, 'Success!!!', The ICC Review Conference: Kampala 2010, 12 June 2010, available at <http://iccreviewconference.blogspot.co.uk/2010/06/success.html> (visited 17 January 2018).

²⁹ It has been suggested, by implication, that approximately five delegations had departed prior to the final meeting: S. Barriga and L. Grover, 'A Historic Breakthrough on the Crime of Aggression', 105 *American Journal of International Law* (2011) 517–533, at 520.

³⁰ *Delegations to the Sixteenth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, New York, 4–14 December 2017, ICC Doc. ICC-ASP/16/INF.1, 28 December 2017 (hereinafter, 'List of Delegations to the 16th ASP'), at 3–45.

Parties participated in the consensus — when ICC-ASP/16/Res.5 was adopted.³¹

The primary purpose of adopting ICC-ASP/16/Res.5 was to take a decision concerning the activation of the Court's jurisdiction over the crime of aggression. However, Operative Paragraph 2 of this resolution also provides, *inter alia*,³² that the ASP:

Confirms that, in accordance with the Rome Statute, [the crime of aggression amendments] enter into force for those States parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance ...

Given that Operative Paragraph 2 borrows the language of those aspects of Article 121(5) that relate to entry into force, it should be noted that ICC-ASP/16/Res.5 effectively endorses the *substance* of the OP 1 declaration of RC/Res.6, despite not replicating the precise language of OP 1. As such, ICC-ASP/16/Res.5 can likewise be regarded as supporting the single-track process.

Hereinafter, the declarations contained within each of the CoA Resolutions that the crime of aggression amendments shall enter into force in accordance with the single-track process shall be collectively referred to as the 'single-track declarations'.

5. The Role of the CoA Resolutions in Interpreting the Rome Statute

So, assuming *arguendo* hereinafter (unless otherwise indicated) that the Court would not be initially convinced by the teleological basis of the broad interpretation of Article 121 *alone*, and that it would be more positively disposed towards the narrow interpretation and the dual-track process that it supports, the question now becomes: precisely what interpretative significance can be read into the adoptions of the CoA Resolutions vis-à-vis the task of determining the rightful process by which the crime of aggression amendments will enter into force?

It could be contended that the single-track declarations contained within the CoA Resolutions were *ultra vires* — i.e., beyond the competence of the Review Conference and the 16th ASP, respectively, to determine — and that, as such, these declarations will have no effect whatsoever on the manner in which Article 121 should rightfully be interpreted. After all, if the drafters of the Statute had intended to allow its provisions concerning entry into force to potentially be circumvented whenever a consensus of States Parties so desired, wouldn't they have included an explicit clause to this effect? In the absence of any such explicit clause, it would appear, so this argument might go, that the

31 It has been suggested that approximately 100 delegations were present at the time: N. Stürchler, 'The Activation of the Crime of Aggression in Perspective', EJIL: Talk!, 26 January 2018, available at <https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (visited 26 January 2018).

32 See further *supra* Section 3.A, footnote 19.

only means available under the Statute to establish a *different* entry-into-force regime to that of (a narrow interpretation of) Article 121 would be to apply the amendment provision to amend the amendment provision itself — i.e., adopt an amendment to Article 121, the entry into force of which will not occur until the seven-eighths benchmark has been met (given that an amendment to Article 121 would itself fall within the scope of the Article 121(4) regime).

Despite Japan apparently having floated such an idea prior to the adoption of RC/Res.6,³³ this course of action was clearly not taken. As such, proponents of the view that the single-track declarations were *ultra vires* and that the dual-track process is the rightful process by which the crime of aggression amendments will enter into force would then have two options. They could either argue that the inconsistency between these declarations and the narrow interpretation of Article 121 is such as to render the adoption of the CoA Resolutions, and thereby the adoption of the crime of aggression amendments as well, void *ab initio* — a rather drastic outcome.³⁴ Alternatively, they could argue that, regardless of what the CoA Resolutions purport to mandate vis-à-vis entry into force, the crime of aggression amendments were nevertheless adopted legitimately and will remain subject to the dual-track process. The former argument would lead to aggression not being criminalized by the Statute at all, whereas the latter would lead to scenarios wherein aggression, while criminalized by the Statute, could not be prosecuted before the Court, as described above.

However, one should not be so quick to conclude that the single-track declarations were *ultra vires*. Doing so fails to take account of the role that the conduct of States Parties to a treaty carried out subsequent to the conclusion of that treaty can have in determining the manner in which that treaty should be interpreted, as shall be seen next.

6. The Role of the CoA Resolutions in Interpreting the Rome Statute: ‘Subsequent Practice’

Under the general rule of treaty interpretation enshrined within Article 31 VCLT, the conduct of the parties to a treaty that occurs subsequent to the conclusion of that treaty can — if certain criteria are satisfied — establish an *authoritative interpretation* of that treaty.³⁵ Article 31(3)(b) VCLT, in particular, states that when interpreting a treaty there shall be taken into account: ‘any

33 R. Manson, ‘Identifying the Rough Edges of the Kampala Compromise’, 21 *Criminal Law Forum* (2010) 417–443, at 422; I. Komatsu, ‘Japan’, in Kreß and Barriga (eds), *supra* note 23, Vol. 2, 1217–1233, at 1225.

34 The possibility of such an argument someday being made is implied by Manson, *supra* note 33, at 436–437.

35 Once again, on the *precise* meaning of ‘authoritative interpretation’, see further *infra*, this sub-section and Section 6.B.

subsequent practice in the application of that treaty which establishes the agreement of the parties regarding its interpretation'. Hereinafter, a reference to 'subsequent practice' (without quotation marks) should be read as a reference to particular conduct of states that does in fact satisfy the requirements of Article 31(3)(b) VCLT with respect to a particular treaty.

As Article 31(3)(b) is relatively sparse on detail, the International Law Commission (ILC) has recently been engaged in attempting to clarify the parameters of this provision (as well as those of Article 31(3)(a) relating to the conduct of states having concluded a 'subsequent agreement').³⁶ While the ILC's 'Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission' (hereinafter, '*Draft Conclusions*') has not yet been finalized, it still constitutes the most detailed exploration of this subject undertaken to date.³⁷ As such, the *Draft Conclusions* will be of considerable assistance in seeking to apply Article 31(3)(b) to the adoptions by consensus of the CoA Resolutions.

The ILC describes subsequent practice as both comprising 'objective evidence of the understanding of the parties as to the meaning of the treaty' and as being 'not necessarily conclusive, but more or less authoritative' as to the interpretation of a particular treaty established thereby.³⁸ Yet, despite the latter description, the ILC explicitly declines to use the phrase 'authoritative interpretation' to describe an interpretation established by subsequent practice.³⁹ Nevertheless, it is submitted that the phrase 'authoritative interpretation' — with its connotations of a particular interpretation being credible and influential yet *not necessarily* dispositive of the issue — most usefully conveys the meaning that the ILC wishes to ascribe to such an interpretation.

Accordingly, the phrase 'authoritative interpretation' will be (and has already been) used throughout this article to describe an interpretation established by subsequent practice. Moreover, references to 'subsequent practice' hereinafter should be further understood as implicitly conveying that the conduct in question establishes precisely such an authoritative interpretation. Given that an authoritative interpretation 'is not necessarily conclusive', the precise interpretative weight to be accorded such an interpretation will be addressed in due course.⁴⁰

36 Note that while each of the CoA Resolutions could *conceivably* constitute a 'subsequent agreement' within the meaning of Art. 31(3)(a) VCLT, the fact that the consensus by which each resolution was adopted was not shared in by all States Parties, but rather only by those that were present at the time, renders this extremely unlikely. Nevertheless, much of what follows will be of comparable application to Art. 31(3)(a).

37 'Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission', in *Report of the International Law Commission, Sixty-eighth session (2 May–10 June and 4 July–12 August 2016)*, UN Doc. A/71/10, Chapter VI, Part C, 120–240 (hereinafter, '*Draft Conclusions*').

38 *Draft Conclusions*, Conclusion 3 and Commentary, § 1 (citing *Yearbook of the ILC* (1966), Vol. II, UN Doc. A/CN.4/SER.A/1966/Add.1, at 221, § 15), and Conclusion 3: Commentary, § 7.

39 *Draft Conclusions*, Conclusion 3: Commentary, § 7.

40 See further *infra*, Section 6.B.

So, having now delineated some terminological parameters, the question that emerges in the specific case of the CoA Resolutions, and which will occupy the remainder of the current section, is: did States Parties' participation in the adoption by consensus of one or both of these resolutions at the Review Conference in 2010 and the 16th ASP in 2017, respectively, amount to subsequent practice? As shall be seen, if this question is answered in the affirmative, then the interpretation of the Statute that was established by this practice is that the crime of aggression amendments will rightfully enter into force as specified by the single-track declarations of these resolutions.

Alternatively, if this question is answered in the negative, and if the Court is unconvinced by the broad interpretation of Article 121 alone, then it appears that there are three possible outcomes. Two of these outcomes have already been touched upon briefly above: the seven amendments might be void *ab initio*, or instead they might enter into force in accordance with the dual-track process. There is, however, a third option that would likely prevail over the other two: that States Parties' participation in the adoptions of these resolutions might constitute a 'supplementary means of interpretation' of the Statute, recourse to which is permitted under Article 32 VCLT. This third option will be considered in Section 7.

A. Adoption of the CoA Resolutions as 'Subsequent Practice'

In order for particular conduct by states to amount to subsequent practice, Article 31(3)(b) VCLT requires that the following criteria be met:

- (i) There must have occurred *practice* by parties to the treaty;
- (ii) The practice must have occurred *subsequent* to the conclusion of the treaty;
- (iii) The practice must have occurred in the *application* of the treaty;
- (iv) The practice must establish an *understanding regarding the interpretation of the treaty*; and
- (v) The understanding must be the subject of *agreement of the (other) parties to the treaty*.

As will become apparent, criteria (i) through (iv) are collectively concerned only with those States Parties to a treaty that have actually engaged in the particular conduct in question. Criterion (v), on the other hand, is concerned only with those States Parties that *have not* engaged in said conduct. Thus, in the following application of these criteria to the adoption of each of the Crime of Aggression Resolutions, criteria (i) through (iv) will only be concerned with those States Parties that were present when one or both of these resolutions were adopted by consensus and that thereby participated in one or both of these consensuses (hereinafter, 'participating States Parties'). Criterion (v), on the other hand, will only be concerned with those States Parties that were not present when either resolution was adopted (hereinafter, 'absent States Parties').

1. Criterion (i): *There Must Have Occurred Practice by the Parties of the Treaty*

The parameters of criterion (i) are extremely broad. Just as is the case with regard to the comparable requirement for the formation of a norm of customary law,⁴¹ state practice under Article 31(3)(b) VCLT may consist of anything that is either said or done by a state.⁴²

So, given the extensive scope of criterion (i), there appears to be no reason why attendance at an international conference and participation within the consensus by which a resolution is adopted cannot amount to state practice. Of course, there may, and likely will, be some doubt as to whether this conduct can be demonstrative of the necessary agreement of the States Parties involved; this point will be returned to in the discussion below.⁴³ Nevertheless, it seems inarguable that the attendance and participation of participating States Parties in one or both of the consensuses by which of the CoA Resolutions were adopted at least satisfies criterion (i).

Based upon a comparison of the record of the States Parties that presented credentials to attend the Review Conference and the 16th ASP, respectively, the only current States Parties to the Statute that are publicly known *not* to have engaged in the practice of participation within the adoption by consensus of *either* RC/Res.6 *or* ICC-ASP/16/Res.5 are Dominica, Liberia, and Vanuatu.⁴⁴ However, given that it is not definitively known how many of the States Parties that were credentialed to attend either of the meetings where each resolution was adopted were actually in attendance, it may be the case that there are *other* States Parties that were not in attendance for the adoption of either resolution. This being said, there are unlikely to be *many* more States Parties that fall into this category, if indeed there are *any* more at all.

Accordingly, it can reasonably be concluded that almost every current State Party has engaged in state practice by participating in the adoption of at least one of the two CoA Resolutions.

2. Criterion (ii): *The Practice Must Have Occurred Subsequent to the Conclusion of the Treaty*

As the adoptions of RC/Res.6 and ICC-ASP/16/Res.5 occurred approximately 12 years and 19.5 years, respectively after the conclusion of the Rome Statute, the practice of participating States Parties easily satisfies this criterion.

41 International Law Association, London Conference (2000), Committee on Formation of Customary (General) International Law, *Final Report of the Committee*, at 14. See also: O. Dörr, 'Article 31: General Rule of Interpretation', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 521–570, at 555, margin 78.

42 *Draft Conclusions*, Conclusion 4: Commentary, §§ 17–18.

43 See further *infra*, Section 6.A.4.(b).

44 *Review Conference Official Records*, Annex I: Report of the Credentials Committee, at 26, §§ 4–7; *List of Delegations to the 16th ASP*, at 3–45.

3. Criterion (iii): *The Practice Must Have Occurred in the Application of the Treaty*

Criterion (iii) focuses upon whether the practice was undertaken in the application of the treaty in question. As noted by the ILC, state practice occurring in the application of a treaty includes those acts and omissions carried out by a State Party 'by which [that State's] rights under a treaty are exercised or its obligations are complied with'.⁴⁵

While participation in the adoption by consensus of RC/Res.6 admittedly does not constitute the quintessential example of States Parties exercising their rights under a treaty, it can nevertheless still be regarded as practice that occurred in the application of the Statute by virtue of the fact that it involved the exercise of States Parties' rights to decide whether to adopt amendments to the treaty in accordance with Article 121(3). Additionally, while Article 5(2) (as it previously was) perhaps stopped short of *obligating* States Parties to negotiate and adopt provisions relating to the crime of aggression, it clearly envisaged that states would do so in the future in accordance with Articles 121 and 123, the latter of which mandated the convening of a Review Conference seven years after entry into force of the Statute.

Accordingly, the adoption of RC/Res.6 (in accordance with, and thereby in application of, Article 5(2)) by the consensus of participating States Parties (in accordance with, and thereby in application of, Article 121(3)) at the first Review Conference (convened in accordance with, and thereby in application of, Article 123) clearly satisfies the requirements of criterion (iii).

Similarly, the adoption by consensus of ICC/ASP/16/Res.5 can be regarded as having occurred in the application of the Statute by virtue of the fact that it involved the exercise of States Parties' rights to decide whether, and when, to activate the jurisdiction of the Court in accordance with Articles 15*bis*(3) and 15*ter*(3), which occurred by way of the adoption by consensus of a resolution in accordance with Article 121(3) at a session of the ASP that was convened in accordance with Article 112(6). Accordingly, the adoption of ICC-ASP/16/Res.5 likewise satisfies criterion (iii).⁴⁶

4. Criterion (iv): *The Practice Must Establish an Understanding Regarding the Interpretation of the Treaty*

For criterion (iv) to require that particular practice must establish an understanding regarding the interpretation of the treaty is to convey that the practice of a State Party must evince an understanding that is held by that State Party as to how the treaty is to rightfully be interpreted.⁴⁷

⁴⁵ *Draft Conclusions*, Conclusion 6: Commentary, § 3.

⁴⁶ Moreover, even if one were to reject the foregoing argument, it should be noted that the ILC has also recognized 'inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference' as conduct 'in the application of the treaty': *Ibid.*, Conclusion 4: Commentary, § 18.

⁴⁷ *Ibid.*, Conclusion 6(1). The ILC prefers the term 'position' rather than 'understanding'.

There are two questions that arise from criterion (iv) in the specific context of the adoption of the CoA Resolutions. First, did the adoptions of these resolutions evince an understanding regarding the interpretation of the Rome Statute? Secondly, was participation in either consensus by which these resolutions were adopted sufficient to warrant attribution of this understanding to those participating States Parties? While the distinction between these two questions is quite artificial given that such an understanding cannot exist without it having been held by States Parties engaged in the practice that evinces that understanding, dividing the focus of criterion (iv) in this manner will facilitate its application in the present context. Accordingly, throughout the discussion of the first question, it should be provisionally assumed that the States Parties in question do in fact hold the understanding under examination; this provisional assumption will then be tested in the discussion of the second question.

- (a) Did the adoptions of the CoA Resolutions evince an understanding regarding the interpretation of the Rome Statute?

In order to determine whether an understanding established by particular practice regards the interpretation of a treaty, it must first be determined what the content of this understanding actually *is*. In the case of the CoA Resolutions, the content of the understanding evinced by their respective adoptions is that the crime of aggression amendments will enter into force as specified by OP 1 of RC/Res.6 and as reiterated by ICC-ASP/Res.5: namely, for each State Party ‘one year after the deposit of their instruments of ratification or acceptance’. That is to say, the content of the understanding is that the single-track process is the rightful process by which the amendments will enter into force.

Once the content of the particular understanding evinced by the practice under examination has been ascertained, it must then be determined whether that understanding was one that *regards* the interpretation of a particular treaty. Given that the understanding evinced by the respective adoptions of the CoA Resolutions *confirms* the *broad* interpretation of Article 121 (and the single-track process that this interpretation supports) and *refutes* the *narrow* interpretation (and the dual-track process that *it* supports) this understanding is clearly one that *regards the interpretation of the Statute*.

Note that there should be no need for States Parties to a treaty to explicitly state at the time of the occurrence of their practice that they have acted in a certain way so as to contribute to the establishment of an authoritative interpretation of the treaty in question. To the contrary, while such states ‘must be aware of ... and accept the interpretation contained’ within the practice in question,⁴⁸ the fact that the particular interpretation is *necessarily entailed* by that practice should suffice to demonstrate this awareness and acceptance.⁴⁹

48 *Ibid.*, Conclusion 10: Commentary, § 1.

49 Cf. *Ibid.*, Conclusion 4: Commentary, §§ 13 (‘purport’) and 20.

In the case of the CoA Resolutions, participating States Parties had to have been familiar with the entry-into-force provisions of the Statute at the time of their adoptions of these two resolutions. Their practice in adopting these resolutions and the single-track declarations contained therein notwithstanding the possible alternative interpretation of Article 121 necessarily entails their understanding regarding the interpretation of the Statute that the single-track process constitutes the rightful process by which the crime of aggression amendments will enter into force.

While it might be tempting to argue, as defendants someday charged with a crime of aggression may do, that the language of Article 121 effectively leaves no room for anything other than the dual-track process in accordance with the narrow interpretation of this provision, it should be noted that the International Court of Justice (ICJ) has previously implicitly declined to follow similar reasoning. In the *Namibia Advisory Opinion*, the ICJ viewed the practice of members of the Security Council since the Council's establishment as having evinced their understanding that an abstention by a permanent member will not prevent the adoption of a non-procedural resolution.⁵⁰ This understanding was clearly one that regarded the interpretation of the UN Charter; specifically, Article 27(3) which provides that: 'Decisions of the Security Council on [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.' Given the ordinary meaning of the term 'concurring', one would ordinarily expect that the use of this term within Article 27(3) would mean that anything other than an affirmative vote by *all* permanent members would prevent adoption of a non-procedural resolution. Yet, the ICJ showed little hesitation in endorsing the practice of the members of the Security Council to the contrary.

Indeed, 'since the parties to the treaty are their own masters ... [they may] amend, extend or delete a text' by engaging in subsequent practice within the meaning of Article 31(3)(b) VCLT to this effect whenever they so choose.⁵¹ In effect, Article 31(3)(b) allows states to authoritatively interpret particular treaty provisions by clarifying, enlarging, restricting, or even subtly modifying their scope and content,⁵² even where such an interpretation is, strictly speaking, not entirely consistent with the ordinary meaning of the terms utilized therein.

Accordingly, if the Court someday finds itself *initially* inclined to view the ordinary meaning of the language of Article 121 in a manner consistent with the narrow interpretation, the fact that the understanding evinced by the

50 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), 16 (hereinafter, '*Namibia Advisory Opinion*'), at 22, § 22. While the ICJ did not refer specifically to Art. 31(3)(b) VCLT, it nevertheless clearly had the general principle at the heart of this provision in mind.

51 M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), at 429, margin 16. See also Dörr, *supra* note 41, at 554–555, margin 76.

52 Cf. *Draft Conclusions*, Conclusion 7(3) and Commentary, §§ 21–38.

adoption of the CoA Resolutions runs counter to this interpretation should prove no barrier, in and of itself, to recognizing the practice that established this understanding as subsequent practice that authoritatively interprets Article 121 to the contrary.

- (b) Was participation in the adoptions by consensus of one or both of the CoA Resolutions sufficient to warrant attribution of this understanding to participating States Parties?

Turning now to the question of the normative significance of participation in adoption by consensus, it could be argued — contrary to the primary contention of this article — that as participation in consensus could be viewed as largely *passive* rather than *active*, it is incapable of establishing that the requisite *understanding regarding the interpretation of a treaty* (hereinafter, ‘interpretative understanding’) is one that is actually held by participating States Parties. Rephrased, this argument would seek to establish that participation in consensus cannot, in and of itself, demonstrate the requisite *agreement* of participating States Parties to the interpretative understanding in question.

It is submitted, however, that this argument would establish too high a threshold for ‘agreement’ under Article 31(3)(b) VCLT. When a resolution is adopted by consensus at a meeting of States Parties, each State Party that is present at the time had the prerogative and the opportunity immediately before adoption not only to call for a vote instead but also to vote against the resolution and even to encourage others to do the same. Indeed, in such circumstances, anything less than a unanimous affirmative vote would almost certainly fall short of establishing the requisite agreement required by Article 31(3)(b), and, as such, the adoption of the resolution in question could not be considered to be subsequent practice.

But when a resolution is adopted by *consensus* following the individual decisions of participating States Parties to be in attendance and not to disrupt or oppose that consensus, those States Parties’ decisions should rightfully be able to be construed as demonstrative of their agreement to the interpretative understanding of the treaty in question. Accordingly, the practice of participating States Parties in participating within the adoptions by consensus of RC/Res.6 and ICC-ASP/16/Res.5, respectively, should be able to be construed as demonstrative of those States Parties’ agreement that the single-track process will apply to the crime of aggression amendments.

What’s more, the case for participation in consensus being demonstrative of the agreement of participating States Parties will be even stronger where there are additional indicia to this effect.⁵³

53 *Ibid.*, Conclusion 11(3) and Commentary, § 38. Note that while the ILC is clearly reluctant to recognize that participation in consensus can constitute agreement, reluctance is not the same as refusal.

In the case of RC/Res.6, these additional indicia can be found in the absence of expressions of *disagreement* by participating States Parties throughout the extended period since this resolution was adopted. Given the fact that the sooner the crime of aggression amendments enter into force, the sooner the Court will conceivably be able to exercise its jurisdiction over nationals of States Parties (and indeed non-States Parties as well) for crimes of aggression,⁵⁴ one would expect that *if* States Parties *disagreed* with the single-track process then they would have spoken up since RC/Res.6 was adopted, lest their silence be construed as indicative of their agreement to an interpretative understanding that will likely hasten the day that their own nationals will become subject to the Court's jurisdiction.

Moreover, participating States Parties must have become aware that the general consensus amongst the academic community, and indeed the concordant view of the UN Office of Legal Affairs (Treaty Section),⁵⁵ that arose following the adoption of RC/Res.6 was that the single-track process *is* the rightful process by which the amendments will enter into force. In the face of such a widespread external assessment of the rightfulness of the OP 1 declaration, it was incumbent upon any such participating State Party that did not agree with the interpretative understanding of the Statute seemingly evinced by their practice to subsequently make its disagreement known. The fact that, to the author's knowledge, no such disagreement has since been voiced is highly suggestive of the fact that no such disagreement existed at the time of RC/Res.6's adoption. This is not to say of course that participating States Parties' subsequent silence *constitutes* their agreement to the interpretative understanding in question; rather, only that this silence provides independent additional indicia *of* their agreement.

In the case of ICC-ASP/16/Res.5, the short amount of time that has elapsed since the adoption of this resolution clearly prevents, at least for the time being, any subsequent silence of participating States Parties from being construed as *persuasive* additional indicia in support of the contention that their participation in adoption by consensus demonstrated their support for the single-track process. However, the very fact of this resolution's adoption itself constitutes a further indication of the agreement of (most of) the States Parties that participated in the adoption of RC/Res.6. That is to say, where a State Party was present when RC/Res.6 was adopted and then was also present when ICC-ASP/16/Res.5 was adopted, the participation in the adoption by consensus of the latter effectively amounts to an endorsement of the interpretative understanding that is evinced by the participation in the adoption by

⁵⁴ See further *supra*, Sections 3.A and 3.B.

⁵⁵ See Letter from the Secretary-General, C.N.651.2010.TREATIES-8 (Depositary Notification), dated 29 November 2010; and 'United Nations Treaty Collection, Chapter XVIII, 10.b: Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court', available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg.no=XVIII-10-b&chapter=18&clang=en> 'Status: Parties: 35' (visited 10 January 2018).

consensus of the former. This is due to the fact that ICC-ASP/16/Res.5 effectively reiterates the substance of the OP 1 declaration of RC/Res.6. Based on the records of States Parties that presented their credentials to the Review Conference and the 16th ASP respectively, it appears that 77 States Parties can be *provisionally* regarded as having endorsed the single-track process in this manner, and the *actual* number is unlikely to be much lower.⁵⁶

Admittedly, two participating States Parties — France and Japan — did express reservations, in the non-formal sense,⁵⁷ over the crime of aggression amendments at the time of RC/Res.6's adoption.⁵⁸ However, these two States Parties' contemporaneously-expressed reservations should not be taken as indicative of their *disagreement* to the interpretative understanding in question, especially given that, as far as is publicly known, each of these two States Parties were also present when ICC-ASP/16/Res.5 was adopted.⁵⁹ France's reservations arose from its view that Article 15*bis*(8) conflicted with what it saw as the exclusiveness of the Security Council's role and thereby contravened the direction under Article 5(2) that the crime of aggression provisions 'shall be consistent with the relevant provisions of the Charter of the United Nations'. As such, France appears to have taken no issue with the applicability of the single-track process to the crime of aggression amendments.

And while Japan did express 'serious doubts as to the legal integrity of the amendment procedure' based upon what it saw as 'typical "cherry picking" from the relevant provisions related to the amendment', it did not declare this procedure to be unlawful, nor has it done so since.⁶⁰ Indeed, even with these concerns, Japan did not thwart consensus by calling for a vote. Nor did Japan denounce the amendment procedure in absolute terms, instead speaking of the procedure being 'very difficult to justify', resting on a 'dubious legal foundation', and containing various 'legal ambiguities and loose-ends'.⁶¹ Admittedly, these comments do not constitute a ringing endorsement of the interpretative understanding in question. Nevertheless, each of these comments can still accommodate the view that participation in adoption by consensus constituted Japan's agreement.⁶²

Indeed, to return briefly to the matter of non-procedural Security Council resolutions being adopted notwithstanding an abstention by a permanent member, in the early days of the Security Council, non-permanent members did, on occasion, express reservations about this practice even though they

56 *Review Conference Official Records*, Annex I: Report of the Credentials Committee, at 26, §§ 4–7; *List of Delegations to the 16th ASP*, at 3–45.

57 As opposed to the formal, *legal* sense as defined within Art. 2(1)(d) VCLT.

58 See *Review Conference Official Records*, Annex VII, at 121, and Annex VIII, at 122–123.

59 See *List of Delegations to the 16th ASP*, at 3–45.

60 *Review Conference Official Records*, Annex VIII, at 121–122.

61 *Ibid.*, Annex VIII, at 122–123.

62 Cf. A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties', 10 *JICJ* (2012) 209–227, at 225.

did not formally object to the adoption of the particular resolutions.⁶³ These reservations, however, did not prevent the resolutions in question from being adopted, nor did they prevent the ICJ from recognizing this general practice as being demonstrative of how Article 27(3) UN Charter will apply. Accordingly, neither should Japan's comments be regarded as warranting a conclusion that there has been insufficient agreement by participating States Parties to the interpretative understanding of the Statute evinced by their practice.

5. Criterion (v): *The (Interpretative) Understanding Must Be the Subject of Agreement of the (other) Parties to the Treaty*

In the preceding sub-section it was argued that participation in the consensus by which the CoA Resolutions were adopted was sufficient to establish the existence of an understanding that was held — i.e., *agreed to* — by *participating* States Parties regarding the interpretation of the Statute. Criterion (v) requires that there must also be agreement of *absent* States Parties to this interpretative understanding.⁶⁴

At the outset, it should be recalled that — as far as is publicly known — the only current States Parties that have not participated in the adoption of either resolution are Dominica, Liberia, and Vanuatu.⁶⁵ As such, the only States Parties that criterion (v) is *definitely* concerned with in the present context are these three states.⁶⁶

It is universally accepted within the academic community that *all* States Parties must agree with a particular interpretative understanding of a treaty before that understanding will become an authoritative interpretation of that treaty pursuant to Article 31(3)(b) VCLT.⁶⁷ This view is supported by the *travaux préparatoires* of the VCLT itself. Previously, the draft of the provision that ultimately became Article 31(3)(b) referred to '*all the parties*'; however, the ILC subsequently dropped the word '*all*' and noted that:

By omitting the word "all" the Commission did not intend to change the rule. It considered the phrase "the understanding of the parties" necessarily means "the parties as a whole". It

63 For example, see *Official Records of the Security Council, 3rd year: 232nd Meeting, 23 January 1948*, Lake Success, New York, UN Doc. S/PV.232, at 169–70, per Mr Arce of Argentina (regarding SC Res. 39, 20 January 1948 (USSR abstaining)); *Official Records of the Security Council, 4th year: 414th meeting, 4 March 1949*, Lake Success, New York, UN Doc. S/PV.414, at 14, per Mr Arce of Argentina and Mahmoud Fawzi Bey of Egypt (regarding SC Res. 69, 4 March 1949 (UK abstaining)).

64 *Draft Conclusions*, Conclusion 10(1) and Commentary, § 1.

65 See further *supra*, Section 6.A.1.

66 And, of course, any other State Party whose absence from the meetings where each CoA Resolution was adopted, despite having been credentialed to attend one or both meetings, later becomes public knowledge.

67 For example, see U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007), at 162–163; K. Heller, 'The Uncertain Legal Status of the Aggression Understandings', 10 *JICJ* (2012) 229–248, at 241; Dörr, *supra* note 41, at 559, margin 86.

omitted the word “all” merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.⁶⁸

Accordingly, while every State Party need not actually *engage* in the practice, those that do not must nevertheless agree with the particular interpretative understanding of the treaty that is evinced by the practice of those that do. In effect, therefore, ‘agreement of the parties’ in Article 31(3)(b) should actually be read as ‘agreement of *all* the parties’.

So, as practice can include anything that is said or done by a state, and as the practice in question need not be engaged in by every State Party to a treaty for it to amount to subsequent practice, this must then mean that the *silence and inaction* of those States Parties that do not engage in said practice can potentially constitute their agreement to the interpretative understanding held by those States Parties that do. Indeed, there are numerous examples within international jurisprudence of such silence and inaction being regarded as having constituted agreement.⁶⁹

Of course, just as is the case with customary law, one must always be cautious in attributing normative significance to the silence and inaction of a state. Nevertheless, there are circumstances where such silence and inaction can justifiably be regarded as having constituted agreement to the interpretative understanding in question.⁷⁰ The ILC has recognized as much in its *Draft Conclusions*: ‘Silence on the part of one or more parties can constitute acceptance of the subsequent practice *when the circumstances call for some reaction*.’⁷¹

In the case of RC/Res.6, it is in fact possible to establish the existence of circumstances that ‘call[ed] for some reaction’ by disagreeing absent States Parties at the time, if indeed there actually were any absent States Parties that disagreed. These circumstances arise out of the knowledge — actual or constructive — that States Parties possessed prior to the Rome Conference and the onus that fell upon any State Party that nevertheless chose not to attend and subsequently came to disagree with the interpretative understanding held by those that did.

Given the work that was undertaken by the Special Working Group on the Crime of Aggression (SWGCA) throughout the 2000s, States Parties must have known that there was a very real possibility that the Review Conference would adopt amendments defining the crime and establishing the legal framework under which it could be prosecuted. States Parties must also have

68 *Yearbook of the ILC* (1966), Vol. II, UN Doc. A/CN.4/SER.A/1966/Add.1, at 222, § 15. See also *Draft Conclusions*, Conclusion 10(2): Commentary, § 13.

69 For example, see *Case Concerning a Dispute Between Argentina and Chile Concerning the Beagle Channel*, 18 February 1977, UNRIIAA, Vol. XXI, Part II, at 187, § 169; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports (1962) 6, at 23 (hereinafter, ‘*Case Concerning the Temple of Preah Vihear*’).

70 Villiger, *supra* note 51, at 431, margin 22; Dörr, *supra* note 41, at 559–560, margin 86–87.

71 *Draft Conclusions*, Conclusion 10(2) (emphasis added) and Commentary, § 15 (citing *Case Concerning the Temple of Preah Vihear*).

realized, given the debates that occurred within the SWGCA over the manner in which the various amendments should enter into force, that the Review Conference may end up choosing to utilize a single entry-into-force regime — the Article 121(5) regime — for all amendments. And they must have known that by declining to attend the Review Conference, they would be foregoing their best chance to influence the negotiations and to generally make their point of view heard. These circumstances combined rendered it incumbent upon any States Parties that nevertheless chose not to attend the Review Conference and that subsequently came to *disagree* with the detail of the crime of aggression amendments adopted — including the chosen process by which they would enter into force — to make their views known thereafter lest their silence subsequently be construed as tacit agreement.

As, to the author's knowledge, no State Party that was absent from the Review Conference has since made its disagreement known, despite circumstances that clearly called for some reaction by any such absent State Party that did disagree, the silence and inaction of absent States Parties since the adoption of RC/Res.6 can reasonably be regarded as having constituted their agreement.

Moreover, even if one wishes to assert, contrary to what has just been suggested, that absent States Parties should not be expected to have been aware of the possibility that the Review Conference might utilize an entry-into-force regime that differs from that supported by the narrow interpretation of Article 121, this only serves to further support the contention that it was incumbent upon such absent States Parties to voice their *disagreement* after it became apparent that the Review Conference had done precisely that.

In fact, it is difficult to think of any *other* circumstance that would clearly 'call for some reaction' by an absent State Party vis-à-vis the interpretative understanding in question, except perhaps for the commencement someday of an actual prosecution for a crime of aggression allegedly committed by a national thereof. And if such a prosecution does someday commence, the Court will likely be unconvinced that a subsequent expression of disagreement to this interpretative understanding is *bona fide*, given that, by that point, the absent State Party will have had ample time — over eight years — to have made its views known previously. In such circumstances, a denunciation of the single-track process will seem more like an attempt to 'shield the person concerned from criminal responsibility' — to borrow a phrase from Article 17(2)(a) — than an authentic expression of *disagreement* to the interpretative understanding in question.

Logic dictates that in order to prevent abuse of the interpretative process enshrined within Article 31(3)(b) VCLT, there must only be a limited window of opportunity following the establishment of circumstances that 'call for some reaction' within which an absent State Party must react to express its disagreement and thereby prevent state practice from becoming subsequent practice. Thus, the more time that has elapsed between the adoption of RC/Res.6 and any such hypothesized denunciation by an absent State Party, the less

likely it will be that the Court will assess any such denunciation as rupturing the implicit collective agreement of all States Parties to the treaty.

In the case of ICC-ASP/16/Res.5, it is likely too soon — as at the time of writing — since the adoption of this resolution to determine whether absent States Parties' subsequent silence constitutes their agreement to this resolution's support for the single-track process. However, as Dominica and Liberia were States Parties at the time of the Review Conference, and as Vanuatu became a State Party in 2012, each of these three States Parties has had ample opportunity to respond to the adoption of RC/Res.6, and its support for the single-track process. To date, no such response has been forthcoming.

Accordingly, as no current State Party that was absent from both the Review Conference (or not party to the Statute at the time) and the 16th ASP has, to the author's knowledge, made its disagreement known in the many years since RC/Res.6 was adopted, despite circumstances that clearly called for some reaction in a timely manner by any such State Party that did in fact disagree, it can reasonably be concluded that *all* States Parties actually were in agreement that the single-track process is the rightful process by which the amendments will enter into force.

6. *Conclusion to Section 6.A.*

So, to summarize the abstract criteria of Article 31(3)(b) VCLT: when particular conduct by States Parties to a treaty occurs in the application of, and thereby subsequent to, that treaty and establishes an interpretative understanding both held by those States Parties and agreed to by all States Parties that did not engage in said conduct, this conduct will amount to subsequent practice that establishes an authoritative interpretation of that treaty.⁷²

Applying these abstract criteria to the CoA Resolutions, it can be concluded that the participation of States Parties in the adoptions by consensus of one or both of these resolutions constituted state practice occurring in the application of the Rome Statute that established a particular interpretative understanding of the Statute held by participating States Parties and tacitly agreed to by absent States Parties. As such, this conduct amounted to subsequent practice that established an authoritative interpretation of the Statute to the effect that the single-track process is the rightful process by which the crime of aggression amendments will enter into force.

⁷² Just to be clear, when particular conduct amounts to subsequent practice, the substance of the 'authoritative interpretation' established thereby and the substance of the 'interpretative understanding' held by States Parties are, essentially, identical. The difference in terminology is maintained solely to be able to express that sometimes the conduct of States Parties will reveal that they hold a particular interpretative understanding of a treaty notwithstanding that said conduct does not actually amount to subsequent practice and therefore *does not* establish an authoritative interpretation. In such scenarios, the substance of the interpretative understanding *does not* match the substance of the authoritative interpretation established by the subsequent practice because there simply was *no subsequent practice*.

The question that now arises is: precisely how much weight should be accorded this authoritative interpretation?

**B. Adoption of the CoA Resolutions as Subsequent Practice:
Interpretative Weight**

As mentioned above, the ILC notes in its *Draft Conclusions* that, while subsequent practice will 'not necessarily [be] conclusive' as to the interpretation to be accorded a particular treaty, it will be 'more or less authoritative'.⁷³ Thus, it is already apparent that the interpretation established by conduct that amounts to subsequent practice will be one that is extremely influential.

Yet, the ILC goes further than this by noting that in order to ascertain the *precise* degree of interpretative influence that such practice will command, one must examine the 'clarity and specificity' of the interpretation established thereby,⁷⁴ as well as 'whether and how it is repeated'.⁷⁵

When considered against these factors, the interpretation of the Rome Statute established by the adoption of RC/Res.6 appears *even more* authoritative. For instance, it is immediately apparent that the language of the single-track declarations is of an extremely high degree of 'clarity and specificity'. Indeed, leaving aside the unfortunate decision of the drafters of RC/Res.6 to include a direct reference to Article 121(5) within OP 1 rather than simply replicating within OP 1 the relevant text of Article 121(5) *verbatim* as occurred within ICC-ASP/16/Res.5,⁷⁶ it is difficult to think of a clearer and more specific manner in which States Parties could have articulated their interpretation of the Rome Statute as to how the crime of aggression amendments will rightfully enter into force.

Additionally, while participation in adoption by consensus may not be the paradigmatic form in which subsequent practice was originally envisaged by the drafters of the VCLT, once it is appreciated that such participation may nevertheless constitute practice that evinces an interpretative understanding of a treaty held by those States Parties participating in that practice, it becomes evident that in the case of the CoA Resolutions there has been a high degree of repetition amongst participating States Parties, albeit all occurring at either one time and place (11 June 2010, Kampala) or another (14 December 2017, New York). Indeed, the conduct of each individual State Party that participated in one or both of the adoptions by consensus of the CoA Resolutions can effectively be regarded as a single (or double) instance of state practice that collectively amount to subsequent practice.

Taking these various factors into account, it can reasonably be concluded that the interpretation established by the subsequent practice of participation in the adoptions by consensus of one or both of the CoA Resolutions should

⁷³ *Draft Conclusions*, Conclusion 3: Commentary, § 7.

⁷⁴ *Ibid.*, Conclusion 9(1) and Commentary, § 2.

⁷⁵ *Ibid.*, Conclusion 9(2) and Commentary, §§ 6–8.

⁷⁶ See further, *supra* Section 4.

essentially be regarded as virtually decisive of the question as to how the crime of aggression amendments will rightfully enter into force.

C. Conclusion to Section 6

So, the outcome of the foregoing analysis is that a strong case can be made for the contention that the participation of States Parties in the adoptions by consensus of the CoA Resolutions amounted to subsequent practice which establishes that the crime of aggression amendments will rightfully enter into force in the manner specified therein. As such, this analysis would serve to undermine the narrow interpretation of Article 121, and the dual-track process that it supports, in the event that the Court was initially unconvinced by the broad interpretation alone.

This is not to assert, however, that reasonable minds cannot disagree with the foregoing analysis. It must be acknowledged that it remains open to debate, for instance, whether the ‘agreement of the parties’ to the interpretation embodied within the CoA Resolutions vis-à-vis entry into force can be established by participation in adoption by consensus alone, and whether agreement can likewise be inferred from the subsequent silence and inaction of absent States Parties.

Nevertheless, even if one rejects the primary contention being espoused herein, there is still one further argument waiting in reserve to establish that the single-track process is the rightful process by which the crime of aggression amendments will enter into force.

7. The Role of the CoA Resolutions in Interpreting the Rome Statute: ‘Supplementary Means of Interpretation’

A. The Adoption of the CoA Resolutions as a ‘Supplementary Means of Interpretation’

As has already been seen above,⁷⁷ in the absence of a conclusion that the adoptions of the CoA Resolutions constituted subsequent practice, there are two possible interpretations of the effect of Article 121 on the entry into force of the crime of aggression amendments that are available pursuant to Article 31 VCLT. A broad interpretation of Article 121 supports the single-track process for the entry into force of the amendments. A narrow interpretation of Article 121, on the other hand, supports the dual-track process for entry into force.

So, the question now becomes: if the Court were to be initially unconvinced by the broad interpretation alone, could the fact of States Parties’ participation

⁷⁷ See *supra* Section 2.B.

in the adoptions by consensus of one or both of the CoA Resolutions lend any interpretative assistance to the broad interpretation in the absence of a finding that such conduct constituted subsequent practice?

In a word: yes. Under Article 32 VCLT, state conduct carried out subsequent to a treaty that does not qualify as subsequent practice may nevertheless still constitute a 'supplementary means of interpretation' that can 'contribute to the clarification of a treaty'.⁷⁸ Thus, even if participation in the adoptions of one or both of the CoA Resolutions did not amount to subsequent practice, it would still constitute a supplementary means of interpretation in support of the single-track process. And recourse to this supplementary means of interpretation would be justified on two grounds. First, because such recourse would definitively resolve the ambiguity that arises by virtue of an interpretation of Article 121 carried out pursuant to Article 31 VCLT yielding two inconsistent results: those of the broad- and narrow interpretation.⁷⁹ Needless to say, recourse to the adoption of the CoA Resolutions would resolve this ambiguity in favour of the broad interpretation.

Secondly, recourse to the adoptions of these resolutions as a supplementary means of interpretation would be permitted to determine the appropriate interpretation of Article 121 in light of the 'manifest absurd[ity] or unreasonable[ness]' of applying the narrow interpretation of this provision to the crime of aggression amendments.⁸⁰ That such an interpretation is 'manifestly absurd or unreasonable' is evident in the fact that, as demonstrated above,⁸¹ no prosecution for a crime of aggression could actually proceed where the definition has entered into force but the provisions establishing the appropriate trigger mechanisms have not. Criminalization without a means of enforcement is unlikely to lead to any extra compliance where the underlying act that is criminalized is one that is already prohibited to states by the UN Charter.⁸²

Accordingly, even if one were to reject the contention that the adoptions of the CoA Resolutions constituted subsequent practice, they would still nevertheless qualify as supplementary means of interpreting the Statute that would support the contention that the crime of aggression amendments will rightfully enter into force in accordance with the single-track process.

B. The Adoption of the CoA Resolutions as a 'Supplementary Means of Interpretation': Interpretative Weight

While the interpretative weight attributed to conduct that constitutes a supplementary means of interpretation will generally be less than that which would be attributed to conduct that qualifies as subsequent practice, the precise

78 *Draft Conclusions*, Conclusion 7(2). See also *ibid.*, Conclusion 2: Commentary, §§ 9–10, Conclusion 4(3) and Commentary, §§ 20 and 24.

79 Art. 32(a) VCLT.

80 Art. 32(b) VCLT.

81 See further *supra*, Sections 3.A and 3.B.

82 Specifically, by Art. 2(4).

degree of the former will nevertheless be influenced by the very same factors that would determine the precise degree of the latter; namely, clarity and specificity of the particular conduct in question, and the extent to which this conduct is repeated.⁸³ As the degree to which each of these factors is present in the case of the adoptions of the CoA Resolutions is the same regardless of whether they are regarded as subsequent practice or as supplementary means of interpretation instead, one could expect that even if the Court — someday presented with this issue — did not consider these adoptions to be dispositive of the question of the rightful process by which the amendments will enter into force because of their status as (mere) supplementary means, it would nevertheless still consider them to be highly influential. And, in the absence of a compelling argument to the contrary, it is not unreasonable to conclude that such an influential means of interpretation would likely lead to precisely the same result as if the adoptions of these resolutions had been considered to have been subsequent practice.

8. Conclusion

The inclusion of Article 5(2) within the original Rome Statute agreed upon at the Rome Conference in 1998 served as an innovative compromise between a diverse array of opinions on the crime of aggression. Nevertheless, the expectation expressed within Article 5(2) that the adoption of a *single* provision would be sufficient to both define the crime *and* set out the conditions under which the Court would exercise jurisdiction was, in the event, overly simplistic. That States Parties would eventually require seven separate amendments to the Statute to augment the existing legal framework of the Statute in order to enable the Court to exercise jurisdiction over the crime of aggression was clearly not anticipated at the time. Nor was it anticipated that, depending on the manner in which Article 121 is interpreted, an argument may someday arise that the criminalization of aggression under the Rome Statute will have occurred much earlier than the establishment of the mechanism by which that crime can be prosecuted. While this narrow interpretation of Article 121 may not be the most persuasive interpretation available even without regarding participation in the adoptions of one or both of the CoA Resolutions as subsequent practice, there remains a very real risk that a defendant may someday seek to rely on this interpretation to prevent the Court from exercising its jurisdiction and to thereby escape accountability for the commission of a crime of aggression.

Nevertheless, the risk of the crime of aggression amendments entering into force in such a bifurcated and asynchronous manner can be easily neutralized by recognizing participation in the adoptions of one or both of the CoA Resolutions as subsequent practice within the meaning of Article 31(3)(b) VCLT. Moreover, even if one rejects the contention that States Parties' conduct

⁸³ *Draft Conclusions*, Conclusion 9(3).

in adopting these resolutions constituted subsequent practice, this conduct should nevertheless still be regarded as a supplementary means of interpretation under Article 32 VCLT. Either way, if and when this matter comes to be litigated before the Court, the practical end result should be the same: namely, that all seven crime of aggression amendments will rightfully enter into force 'for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance'. It is only by viewing these amendments as entering into force pursuant to this single-track process that the international community will finally have gained — effective from 17 July 2018 — a permanent jurisdiction over the crime of aggression. While the actual reach of this jurisdiction will be far from universal, it will still amount to a considerable step forward towards ending impunity for the 'supreme international crime'.

The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations

An Appraisal of the Existing Solutions to an Under-discussed Problem

Talita de Souza Dias*

Abstract

The principle of legality occupies a central place in the Rome Statute of the International Criminal Court (ICC). Its core element is the principle of non-retroactivity, which requires that criminal acts be previously prohibited and punishable by law. Nevertheless, there are two main instances where the application of the Statute risks being substantively retroactive: when the UN Security Council (SC) refers a situation to the ICC, or a state makes an ad hoc declaration accepting the Court's jurisdiction for a situation, and the relevant conduct was not criminal under any previously binding source of law. Despite the significance of this issue, it has only been briefly discussed in the literature. It has also been overlooked by the drafters of the Statute and by the ICC itself. Against this backdrop, the purpose of this article is to critically appraise the few solutions that have been proposed so far and to identify the key elements of a better avenue for reconciling the Rome Statute with the principle of legality.

1. Introduction

The principle of legality or *nullum crimen, nulla poena sine lege* is now firmly recognized as a fundamental human right and an essential component of criminal

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justice in general international law.¹ Its core element is the rule of non-retroactivity,² which requires that the conduct in question be criminalized by *some* source of law that was previously applicable to the individual, and sufficiently accessible and foreseeable to him/her.³ This principle ensures that individuals have fair notice of the consequences of committing a crime, and are protected from state arbitrariness. As such, it has played an important role in the context of the International Criminal Court (ICC, the Court), the only permanent international criminal tribunal with a quasi-universal reach. Different aspects of the principle of legality are reflected in Articles 22, 23 and 24 of the Rome Statute (the Statute, ICC Statute), the treaty establishing the ICC. It is also included in the scope of Article 21(3) of the Statute, which requires the Court to interpret and apply its law consistently with ‘internationally recognized human rights’.⁴

Paradoxically, there are two main instances where the application of the Rome Statute risks being retroactive. First, when the Security Council (SC),

- 1 This includes customary international law and general principles of law. See e.g. K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010), at 3, 8–9; M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002), at 365–369.
- 2 M. Cherif Bassiouni, ‘Principles of Legality in International and Comparative Criminal Law’, in M. Cherif Bassiouni (ed.), *International Criminal Law: Sources, Subjects and Contents* (BRILL, 2008), at 89; Gallant, *supra* note 1, 352; A. Skander Galand, ‘Conflicts of Norms in Situations Referred to the International Criminal Court by the United Nations Security Council’ (PhD Thesis on file at the European University Institute, Florence), available online at <http://cadmus.eui.eu/handle/1814/37643> (visited 19 January 2018), at 105, 130, 143.
- 3 See e.g. Art. 15(1) International Covenant on Civil and Political Rights (ICCPR), Art. 7(1) European Convention of Human Rights (ECHR) (requiring that the conduct constitute a criminal offence under national or international law, and that the penalty be no greater than the one that was applicable at the time of the conduct) and Art. 9 American Convention on Human Rights (ACHR) (requiring that the offence and the penalty be provided for in ‘the applicable law’ at the time of the conduct). See also Gallant, *supra* note 1, at 20, 352, 357–358, 364–365; V. Spiga, ‘Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice (JICJ)* (2011) 5, at 16; B. Van Schaack, ‘*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals’, 97 *Georgetown Law Journal* (2008) 119, at 158–172; *Kononov v. Latvia*, Appl. no. 36376/04, judgment of 24 July 2008, § 122; Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, *Hadžihasanović et al.* (IT-01-47-PT), Appeals Chamber, 27 November 2002 (hereinafter ‘Interlocutory Appeal on Joint Challenge to Jurisdiction’), §§ 20–25; Decision on Joint Challenge to Jurisdiction, *Hadžihasanović et al.* (IT-01-47-PT), Trial Chamber, 12 November 2002 (hereinafter ‘Decision on Joint Challenge to Jurisdiction’), § 62; Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction — Joint Criminal Enterprise, *Milutinović et al.* (IT-99-37-AR72), Appeals Chamber, 21 May 2003 (hereinafter ‘JCE Decision’), §§ 37–42; *David Michael Nicholas v. Australia*, *United Nations Human Rights Committee (UNHRC) Communication No. 1080/2002*, UN Doc. CCPR/C/80/D/1080/2002, 24 March 2004, §§ 7.3, 7.5; Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Salim Jamil Ayyash et al.* (STL-11-01/I/AC/R176bis), Appeals Chamber, 16 February 2011, §§ 136–137; Report of the International Law Commission on the Work of Its Forty-Sixth Session, GA Res. 49/10, 1994, at 113–114.
- 4 See e.g. Gallant, *supra* note 1, at 331–332; M. Milanovic, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’, 9 *JICJ* (2011) 25 (hereinafter ‘Rome Statute Binding?’), at 52; *Report of the Preparatory Committee on the Establishment of an International Criminal Court - Addendum*, UN Doc. A/CONF.183/2/Add.1, 19 April 1998, at 47, footnote 63.

making use of its powers granted by Article 13(b) ICC Statute, refers to the Court a situation involving non-states parties (and not otherwise subject to the Court's jurisdiction under Article 12). Secondly, when a situation originates from an ad hoc declaration under Article 12(3), i.e. a declaration by which a state (party or not) grants the Court jurisdiction over a situation that took place when such state had not accepted the application of the Rome Statute.

In both cases, the risk of retroactive application of the Statute has two explanations. First, both SC referrals and ad hoc declarations can involve retrospective situations (i.e. situations that occurred before the referral or declaration),⁵ as an exception to the Court's generally prospective jurisdiction.⁶ Furthermore, both SC referrals and ad hoc declarations can bring to the Court situations involving non-states parties or states that have joined the Statute only after the referral or declaration.⁷ To the extent that these states had not accepted the application of the Rome Statute to their nationals or in their territory at the time of the facts, the exercise of the Court's jurisdiction and the application of the Statute would be retroactive in those instances.

To be sure, the mere fact that a certain piece of criminal law only becomes binding on the individual after the conduct, i.e. a *formally* retroactive law, is not in itself a breach of the principle of non-retroactivity. In fact, what matters is whether the individual was put on notice, by *some* prior source of criminal law, that his/her conduct was criminal and punishable.⁸ In other words, the *nullum crimen* principle is concerned with *substantive* retroactivity, that is, the application of crimes and penalties whose *substantive content* were neither accessible nor foreseeable to the individual. Thus, even if the Rome Statute, as a formal source of law, only becomes binding on the individual after the relevant events, there would be no violation of non-retroactivity if he/she was bound by *some* prior source of law, such as customary international law (CIL), general principles of law,⁹ an applicable treaty, or even domestic law, that criminalized the same conduct and applied the same or a less severe punishment.

5 Arts 11(2), 12(3) and 13(b) ICCSt.

6 See Art. 11 ICCSt.

7 See Art. 12(2)–(3) and 13(b) ICCSt.

8 See *supra* note 3.

9 See Art. 15(2) ICCPR (n 3); Art. 7(2) ECHR (n 3), both of which allow general principles of law to serve as the legal basis of a certain offence. The applicability of these provisions to cases outside of the context of World War II is supported by their text (which does not limit their temporal scope), and was endorsed by the ECtHR in, *inter alia*, *Penart v. Estonia*, Appl. no. 14685/04, judgment of 24 January 2006, at 9; *Kolk and Kislyiy v. Estonia*, Appl. nos 23052/04 and 24018/04, judgment of 17 January 2006, at 9. See also T. Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 82 *Nordic Journal of International Law* (2013) 221, at 230; B. Juratowitch, 'Retroactive Criminal Liability and International Human Rights Law', 75 *British Yearbook of International Law* (2005) 337, 340–341; M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987), at 332; W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, 2006), at 233–236. But see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn., NP Engel, 2005), at 368; Boot, *supra* note 1, at 137–141, 159–160.

However, if the substantive content of the Rome Statute goes beyond previously applicable sources of law, the individual could not have had notice of the exceeding statutory provisions. In those types of scenario, the *formally* retroactive application of the Statute will be coupled with a problem of *substantive* retroactivity, and one cannot convincingly say that the crimes contained in the Statute were universally accessible and foreseeable.¹⁰ There was simply no *applicable* source of law that could have provided notice to the individual. Although the characterization of the principle of legality as a ‘principle of justice’ allowed the Nuremberg, Tokyo and some domestic post-World War II trials to rely on the moral condemnation of the conduct (a reasoning whose validity has been preserved by Articles 15(2) of the International Covenant on Civil and Political Rights (ICCPR) and 7(2) ECHR),¹¹ this view no longer holds true today.¹² As will become clearer throughout this article, it is the substantive retroactivity of the Statute in cases of SC referrals and ad hoc declarations which mainly concerns us.

As the recent practice of the ICC demonstrates, the retroactive scenarios identified earlier are not purely theoretical. In fact, the Statute risks being applied retroactively in cases arising out of six retrospective situations: the two situations referred by the SC, i.e. Darfur and Libya, and the four situations covered by the ad hoc declarations lodged by Uganda, Côte d’Ivoire, Ukraine and Palestine. Notably, one case relating to the situation in Côte d’Ivoire (the *Gbagbo and Blé Goudé* case),¹³ and another arising from the situation in Uganda (the *Ongwen* case) are already on trial.¹⁴

10 W.A. Schabas, *An Introduction to the International Criminal Court* (5th edn., Cambridge University Press, 2017), at 57; M.P. Scharf, ‘Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States’, 35 *New England Law Review* (2000) 363, at 375–376. For a similar conclusion, see Gallant, *supra* note 1, at 342–343.

11 *X v. Belgium*, Appl. no. 268/57, judgment of 20 July 1957, at 241; *Vasiliauskas v. Lithuania*, Appl. no. 35343/05, judgment of 20 October 2015, 189; Boot, *supra* note 1, at 138, 140–141, 158; Bossuyt, *supra* note 9, at 331; Mariniello, *supra* note 9, at 228.

12 M. Milanovic, ‘Aggression and Legality: Custom in Kampala’, 10 *JICJ* (2012) 165 (hereinafter ‘Aggression and Legality’), at 168–169; Milanovic, ‘Rome Statute Binding?’ *supra* note 4, at 36; Van Schaack, *supra* note 3, at 155–158; Juratowitch, *supra* note 9, at 359; Galand, *supra* note 2, at 129; Gallant, *supra* note 1, at 404–405; JCE Decision, *supra* note 3, § 42.

13 See ICC, ‘Situation in Côte d’Ivoire’, available online at <https://www.icc-cpi.int/cdi> (visited 19 January 2018). Note that, although Côte d’Ivoire’s ad hoc declaration is partially retrospective (i.e. it applies from the date of the declaration, 18 April 2003, back to 19 September 2002), the charges against Gbagbo and Blé Goudé only cover events that occurred after the declaration. Nonetheless, some of these events occurred *before the entry into force of the Statute for Côte d’Ivoire* (i.e. 14 May 2013). See, in this regard, Decision on the confirmation of charges against Laurent Gbagbo, Public Redacted Version, *Gbagbo* (ICC-02/11-01/11-656-Red), Pre-Trial Chamber I, 12 June 2014 (hereinafter ‘Gbagbo Confirmation of Charges’), §§ 267–275; Decision on the confirmation of charges against Charles Blé Goudé, *Blé Goudé* (ICC-02/11-02/11-186), Pre-Trial Chamber I, 11 December 2014, § 194. If one takes the view that the ad hoc declaration was purely jurisdictional and could not have prescribed the substantive provisions of the Statute to the relevant individuals (see Milanovic, ‘Aggression and Legality’, *supra* note 12, at 174, and footnote 35, then the charges relating to facts that occurred before 14 May 2013 would be retroactive.

14 ICC, ‘Ongwen Case’, available online at <https://www.icc-cpi.int/uganda/ongwen> (visited 19 January 2018). Because Uganda ratified the Statute in June 2002, it only entered into force for this state in

Despite the severity of the problem in question, i.e. a violation of a fundamental principle of criminal law and possibly a rule of *jus cogens*,¹⁵ it seems to have gone unnoticed by the drafters of the Rome Statute¹⁶ and by the ICC itself.¹⁷ In the literature, most commentators overlook or do not take issue with the potential violation of the principle non-retroactivity in cases of SC referrals and ad hoc declarations. This is why it has been referred to as ‘the elephant in the room’.¹⁸ A few authors have identified the problem and proposed some workable solutions. Nevertheless, these proposals have been made on a rather superficial level, often in the context of different topics. More importantly, they have never been appraised before.

Against this backdrop, the purpose of this article is to fill this gap by undertaking a thorough assessment of the existing solutions to the problem of the Rome Statute’s retroactive application in cases of SC referrals and ad hoc declarations. In addition, by building upon their merits and shortcomings, we also aim to identify what are the key components of a more complete solution to the issue under scrutiny.

2. Identifying the Existing Solutions to the Statute’s Retroactive Application in Cases of SC Referrals and Ad hoc Declarations

While the level of detail of the existing solutions varies to a certain extent, it is possible to classify them into three main categories: ‘compatibility check’, ‘interpretative’ and ‘displacement’ solutions.

September 2002. Thus, Uganda made a retrospective ad hoc declaration covering the period between 1 July 2002 and 1 September 2002. See W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2016) (hereinafter ‘*Commentary on the Rome Statute*’), at 359–360; Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, *Situation in Uganda* (ICC-02/04-1), Presidency, 5 July 2004, Annexed letter. For the specific changes and events that relate to retroactive events, i.e. those occurring between 1 July 2002 and 1 September 2002, see Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15-422-Red), Pre-Trial Chamber II, 23 March 2016, at 90–91, §§ 66–80, at 93–94, §§ 91–98, at 99–102, §§ 119–124, at 102–104, §§ 125–131 (those charges relate to sexual and gender-based crimes, and conscription and use of child soldiers).

15 Gallant, *supra* note 1, at 399–402; T. Meron, *War Crimes Law Comes of Age: Essays* (Oxford University Press, 1999), at 244; Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Hadžihasanović, Alagic and Kubura* (IT-01-47-AR72), Appeals Chamber, 16 July 2003, § 55.

16 See e.g., *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June–17 July 1998, *Official Records, Volume III, Reports and Other Documents*, UN Doc. A/CONF.183/13, July 1998 (hereinafter ‘*Rome Conference, Vol. III*’), at 333, § 97 (the only record of a problem of retroactive application of the Statute being raised, and only in relation to ad hoc declarations).

17 See e.g. Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009 (hereinafter ‘*Bashir Arrest Warrant*’), § 45; Gbagbo Confirmation of Charges, *supra* note 13, §§ 193–278.

18 Galand, *supra* note 2, at 99.

A. Compatibility Check Solutions

Many authors have proposed what we call ‘compatibility check’ solutions.¹⁹ They suggest a simple verification of consistency between the Statute and pre-existing CIL, or domestic law, in cases of SC referrals and ad hoc declarations.²⁰

According to the proponents of this solution, if this verification shows that the relevant statutory crime or mode of liability did not exist in CIL, then, as we argued earlier in the introduction, the application of the substantive provisions of the Statute would be inconsistent with the principle of non-retroactivity.²¹ Conversely, if CIL does recognize a crime or a mode of liability that is ‘equivalent’ to the one contained in the Rome Statute, then no problem of substantive retroactivity would arise.²² Since CIL is directly applicable to virtually any individual in the world,²³ the fact that the Rome Statute did not formally apply to the perpetrator at the time of the conduct would be of no consequence for the purposes of satisfying the principle of legality.

Although this reasoning is in essence correct, it fails to address two fundamental questions.

First, what should the Court do in cases where the Rome Statute goes beyond CIL and risks clashing with the principle of non-retroactivity? To be fair, the Statute has codified and contributed to the formation of various rules of CIL. Yet, there are still several instances in which the former goes beyond the latter. This is not only true for specific categories of crimes²⁴ and their various

19 See e.g. L. Condorelli and S. Villalpando, ‘Referral and Deferral by the Security Council’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 627, at 636–637; B. Broomhall, ‘Article 22: Nullum Crimen Sine Lege’, in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Beck/Hart, 2016) 949, at 956; T. Meron, ‘Revival of Customary Humanitarian Law’, 99 *American Journal of International Law* (2005) 817, at 832; R. O’Keefe, *International Criminal Law* (Oxford University Press, 2015), at 553–554; S. Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, in Cassese, Gaeta and Jones (eds), *ibid.*, 733, at 750; K.S. Gallant, ‘Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts’, 48 *Villanova Law Review* (2003) 763, at 819, 820, 828, 835, 837, 838–840, 842; Gallant, *supra* note 1, at 339–343.

20 See e.g. O’Keefe, *supra* note 19, at 554; Meron, *supra* note 19, at 832; Broomhall, *supra* note 19, at 956; Gallant, *supra* note 1, at 339–340; Gallant, *supra* note 19, at 828, 839.

21 O’Keefe, *supra* note 19, at 553; Gallant, *supra* note 1, at 338–342; Broomhall, *supra* note 19, at 956; Meron, *supra* note 19, at 832.

22 O’Keefe, *supra* note 19, at 554; Gallant, *supra* note 1, at 339; Gallant, *supra* note 19, at 820, 828, 835, 838–839; Meron, *supra* note 19, at 832; Broomhall, *supra* note 19, at 956.

23 Gallant, *supra* note 19, at 818, 835. Similarly, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc. S/25704, 3 May 1993, § 34.

24 Examples include the war crime of attacking personnel, installations, material, units or vehicles involved in a peacekeeping mission (Art. 8(2)(b)(iii) and (e)(iii) ICCSt.) and the crime of enforced disappearance of persons (Art. 7(1)(i) ICCSt.). See R. Bartels, ‘Legitimacy and ICC Jurisdiction Following Security Council Referrals: Conduct on the Territory of Non-Party States and the Legality Principle’ (Social Science Research Network 2016) available online at <http://papers.ssrn.com/abstract=2742154> (visited 19 January 2018), at 25; Galand, *supra* note 2, at 65.

elements,²⁵ but also for modes of liability and the mental element.²⁶ In those cases where the Statute is broader than CIL, a simple compatibility check does not tell us how the Court can avoid or resolve a violation of the *nullum crimen* principle. More specifically, it is unclear whether the Court should refuse to exercise jurisdiction, or whether it could interpret or even displace the provisions of the Statute to accord them with custom.

Secondly, compatibility check solutions fail to indicate on what legal grounds the Court could proceed to a comparison between the Rome Statute and CIL. The answer to this question is by no means evident from the Statute's text. This is because Article 21(1)(a) appears to give primacy to the application of the Statute across all situations that come within the Court's jurisdiction.²⁷ Moreover, the Statute's own version of the principle of legality, found in Articles 22(1), 23 and 24(1), does not seem to require consistency between the Statute and CIL or another source of law that was binding on the individual at the time of the conduct. All that these self-contained provisions require is that the conduct comes within one of the definitions of crimes provided in the Statute, that it takes place after the Statute's entry into force and that the punishment be applied in accordance with the Statute.²⁸

In sum, it appears that compatibility check solutions are insufficient to address the substantive retroactivity of the Statute in cases of SC referrals and ad hoc declarations.

B. The Interpretative Solutions

The second set of solutions which have been proposed to tackle this issue are what we call 'interpretative solutions'. They seem to take the compatibility check further by suggesting that, in cases where the Rome Statute is broader than CIL, there is an apparent conflict or inconsistency with the principle of non-retroactivity which can be interpreted away.²⁹

25 M.P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', 64 *Law and Contemporary Problems* (2001) 67, at 77.

26 For instance, indirect co-perpetration (Art. 25(3)(a) ICCSt.) is a statutory innovation, and the mental element for superior responsibility of military commanders (Art. 28(a)(i) ICCSt.) is broader than the one under CIL. See R. Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2014), at 367–370, 390; Milanovic, 'Rome Statute Binding?' *supra* note 4, at 38.

27 Lamb, *supra* note 19, at 750; O'Keefe, *supra* note 19, at 552; Milanovic, 'Rome Statute Binding?' *supra* note 4, at 30–31, 51–52; Milanovic, 'Aggression and Legality', *supra* note 12, at 175. See also Bashir Arrest Warrant, *supra* note 17, § 44; Judgment pursuant to Art. 74 of the Statute, *Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, § 1395.

28 O'Keefe, *supra* note 19, at 552, footnote 108; Milanovic, 'Rome Statute Binding?' *supra* note 4, at 52; Bartels, *supra* note 24, at 20; Galand, *supra* note 2, at 118–119; S. Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 99 *The Journal of Criminal Law and Criminology* (2009) 857, at 908. But see *contra* Gallant, *supra* note 1, at 341.

29 See e.g. Milanovic, 'Aggression and Legality', *supra* note 12, at 174–175; Milanovic, 'Rome Statute Binding?' *supra* note 4, at 37–38, 48–52; Bartels, *supra* note 24, at 19–28; Galand, *supra* note 2, at 136–138, 142–144.

In more detail, interpretative solutions use the same compatibility check to verify whether the Rome Statute is consistent with custom or another previously applicable source of law, such as treaty law, general principles of law or domestic law. They also rely on this source of law to provide the legal basis for the criminalization and punishment of the conduct in cases where it coincides with the Statute.³⁰ However, unlike compatibility check solutions, they do tell us what the Court should do if the Statute goes beyond custom.

First, they identify an apparent norm conflict between the principle of non-retroactivity and the substantive provisions of the Statute which go beyond the previously applicable law.³¹ The conflict arises because, despite the Statute's self-contained provisions on the legality principle, Article 21(3) recognizes the principle of non-retroactivity *under general international law* (i.e. under CIL and as a general principle of law) as applicable law before the Court. In fact, this provision requires the Court to comply with 'internationally recognized human rights', which are generally understood to include the principle of non-retroactivity under general international law.³² Thus, the Court would be bound to satisfy the requirements of this principle, namely, that some source of law was previously applicable, accessible and foreseeable to the relevant individual.³³

The next step of interpretative solutions is to rely on Article 21(3) to interpret away the apparent norm conflict: this provision requires the Court to *interpret* the Statute in accordance with the principle of non-retroactivity under general international law.³⁴ This interpretation of the Statute would be twofold. On the one hand, the Statute is read as a 'merely jurisdictional' instrument whenever ad hoc declarations and SC referrals give rise to a problem of substantive retroactivity (i.e. whenever the Statute goes beyond some previously applicable source of law). This would mean that, although the Statute is, as a general rule, the substantive law that directly applies to individuals, in those exceptional instances it should be read as only providing the rules on the Court's jurisdiction.³⁵ On the other hand, this jurisdictional interpretation of the Statute would be followed by a reading down of any statutory provisions that exceed CIL or another source of applicable law. Accordingly, the individual could be *charged with and convicted for crimes and modes of liability provided for in the Statute*, but only to the extent that these conform to the previously applicable

30 Milanovic, 'Rome Statute Binding?' *supra* note 4, at 37, 48, 51–52; Milanovic, 'Aggression and Legality', *supra* note 12, at 174–175, including footnote 37; Bartels, *supra* note 24, at 4, 7, 17, 21–22; Galand, *supra* note 2, at 142–144.

31 Milanovic, 'Rome Statute Binding?' *supra* note 4, at 27, 36; Galand, *supra* note 2, at 97, 99, 125, 130, 144.

32 *Supra* note 4.

33 See *supra* note 3.

34 Milanovic, 'Rome Statute Binding?' *supra* note 4, at 52; Milanovic, 'Aggression and Legality', *supra* note 12, at 175; Bartels, *supra* note 24, at 20, 37; Galand, *supra* note 2, at 135–137.

35 Milanovic, 'Rome Statute Binding?' *supra* note 4, at 30–32, 48, 51–52; Milanovic, 'Aggression and Legality', *supra* note 12, at 174–175, 177; Galand, *supra* note 2, at 62, 134; Bartels, *supra* note 24, at 27.

law.³⁶ By basing the criminalization of the conduct on this alternative source of law, a potential violation of non-retroactivity would be avoided.³⁷

C. The Displacement Solution

A third type of solution to the retroactive application of the Statute in cases of SC referrals and ad hoc declarations is what we call the 'displacement solution'.³⁸ Three basic steps are discernible.

First, as with compatibility check and interpretative solutions, the displacement solution verifies whether the Statute is consistent with CIL and, in those cases, it relies on custom to provide the basis of the criminalization of the individual.³⁹ Nonetheless, in cases where the Statute goes beyond CIL, there would be a *genuine*, rather than an apparent, norm conflict between the principle of non-retroactivity and the more expansive statutory provisions.⁴⁰ As with interpretative solutions, this genuine norm conflict would arise because Article 21(3) incorporates the principle of non-retroactivity under general international law.⁴¹ Secondly, whenever faced with this genuine norm conflict, the Court would have to resort to a norm displacement technique, i.e. it would have to ascertain which rule prevails over the other.⁴² According to the displacement solution, this answer is also to be found in Article 21(3) ICC Statute, as this provision creates a hierarchy or 'super legality' in favour of 'internationally recognized human rights', including the principle of non-retroactivity. This is because Article 21(3) directs the Court not only to interpret but also to *apply* the law in accordance with those rights.⁴³

The third step of the displacement solution is to implement the norm displacement rule contained in Article 21(3). This would require the Court to displace or override any substantive provision of the Statute that goes beyond pre-existing custom in cases of SC referrals and ad hoc declarations.

36 Milanovic, 'Rome Statute Binding?' *supra* note 4, at 34, 52; Milanovic, 'Aggression and Legality', *supra* note 12, at 175; Bartels, *supra* note 24, at 27–28; Galand, *supra* note 2, at 142–144.

37 Milanovic, 'Rome Statute Binding?' *supra* note 4, at 52; Milanovic, 'Aggression and Legality', *supra* note 12, at 175; Bartels, *supra* note 24, at 21, 23, 36–37; Galand, *supra* note 2, at 142, 144.

38 D. Akande, 'Sources of International Criminal Law', in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 41, at 45–47.

39 *Ibid.*, 46.

40 *Ibid.*, 45–47.

41 *Ibid.*, 46–47.

42 See M. Milanovic, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law', 14 *Journal of Conflict & Security Law* (2009) 459, at 465; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), at 327.

43 Akande, *supra* note 38, at 47. See also A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 1051, at 1079–1082; G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter (eds), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 285, at 303–304.

In practical terms, the individual would be *charged with and convicted for statutory crimes and modes of liability*, but only to the extent that these are reflected in CIL.⁴⁴ This would resolve the norm conflict between the Rome Statute and the principle of non-retroactivity under general international law.

Note that, unlike the interpretative solutions, the displacement solution does not propose an interpretation of the Statute as a purely jurisdictional instrument whenever a problem of retroactivity arises. In fact, by suggesting that the Statute should be *applied* in accordance with the principle of non-retroactivity and that some of its provisions should be *displaced* to conform to custom,⁴⁵ the displacement solution appears to assume that the Rome Statute is substantive in nature.

3. Evaluating Interpretative and Displacement Solutions

A. *Merits*

Our brief incursion into the existing solutions to the retroactive application of the Rome Statute shows that interpretative and displacement solutions have filled some of the gaps that were left by compatibility check solutions. Significantly, we believe that three aspects of interpretative and displacement solutions are useful, if not essential, for tackling the problem under scrutiny.

First, the substantive retroactivity of the Rome Statute in cases of SC referrals and ad hoc declarations is indeed inconsistent with Article 21(3) ICC Statute, as the Court and many commentators seem to have overlooked.⁴⁶ The only way to argue that the Statute's retroactive application complies with Article 21(3) is to conceive the principle of legality not as a rule of international law, but as a non-binding 'principle of justice'.⁴⁷ However, as we mentioned earlier, this view is no longer reflective of the status of the *nullum crimen* principle under general international law.⁴⁸

The second key aspect is to frame of the Statute's retroactivity as a conflict of norms. This is particularly helpful in identifying and selecting the available methods to resolve the issue under scrutiny.

Lastly, resort to Article 21(3) seems to be the only or at least one of the few avenues that can solve or avoid the problem of the retroactive application of the Statute. This is because the Statute's own provisions on the principle of legality (Articles 22(1), 23 and 24(1)) are not very helpful.⁴⁹ As we mentioned

44 Akande, *supra* note 38, at 46–47, drawing a parallel with the Dissenting Opinion of Justice Robertson, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Norman* (SCSL-2004-14-AR72(E)), Appeals Chamber, 31 May 2004, at 7413, § 47.

45 Akande, *supra* note 38, at 46–47.

46 Galand, *supra* note 2, at 135.

47 Similarly, *ibid.*, at 126–127.

48 See *supra* note 12.

49 See *contra* Gallant, *supra* note 1, at 340–341.

earlier, they are not concerned with whether the conduct was criminalized by *some* previously *applicable* source of law, but only with whether it could have been characterized as a crime under the Statute when it took place.⁵⁰

B. Shortcomings

Despite their merits, interpretative and displacement solutions (along with compatibility check solutions) fail to address a few questions that are fundamental for resolving the problem at hand.

1. Absence of a Complete Analysis of the Rome Statute's Nature

The first of these fundamental questions relates to the nature of the Rome Statute, i.e. its conception as a mere jurisdictional instrument or as a source of substantive criminal law that is binding on individuals.

Recall that interpretative solutions conceive the Rome Statute as being *in general* substantive, that is, as providing the substantive law that should apply to most cases before the Court (i.e. whenever there is a nexus of territoriality or active nationality between the individual and a state party). It is only *if and when* this conception of the Rome Statute would give rise to a problem of substantive retroactivity (i.e. in cases of ad hoc declarations and SC referrals involving non-states parties, *whenever the Statute goes beyond custom*) that it should be interpreted as a mere jurisdictional instrument.⁵¹

Conversely, the displacement solution does not seem to give much thought to the issue of the Rome Statute's nature. It simply assumes that the Statute is always substantive, and does not even discuss the possibility of it being conceived as purely jurisdictional.⁵²

But what if the Rome Statute was *originally* conceived as being purely jurisdictional in certain circumstances, *regardless* of any potential inconsistency with the *nullum crimen* principle? In other words, are the substantive provisions of the Statute really meant to apply in *all the situations* over which the Court has jurisdiction (including ad hoc declarations and SC referrals)? Alternatively, could it be that, in certain circumstances, the Statute itself requires the application of a different source of substantive law?

The answer to this question can only be found in a complete and thorough analysis of the Rome Statute's nature. This analysis would not only involve an interpretation of the relevant provisions of Statute (i.e. looking at the Statute's text, context, object and purpose and preparatory works), which was briefly conducted by one proponent of an interpretative solution.⁵³ It would also

50 *Supra* note 28.

51 *Supra* note 35.

52 *Supra* note 45.

53 Milanovic, 'Rome Statute Binding?' *supra* note 4, at 30–32, 48–49; Milanovic, 'Aggression and Legality', *supra* note 12, at 175, including footnote 40.

include an investigation of the bases of prescriptive and adjudicative jurisdiction which underlie the Statute and the ICC, i.e. the powers which lie at the origin of the substantive law and the jurisdiction of the Court. And yet neither of these stages or levels of enquiry has properly been conducted by any of the solutions that we have identified so far.

Importantly, if the Statute does require the Court to apply an external source of law which was binding on the individual at the time of the conduct in cases of SC referrals and ad hoc declarations, a problem of substantive retroactivity would not even arise in the first place. Furthermore, if the application of these sources of law is indeed required by the Rome Statute, then the Court's reliance on the substantive provisions of the Statute may not only violate the principle of non-retroactivity, but might also be *ultra vires*.

2. *Recharacterization of Criminal Law*

The main problem with interpretative and displacement solutions is that they resort to the technique of 'recharacterization of criminal law' without questioning its legal validity.

Recharacterization or reclassification of crimes and other principles of individual criminal responsibility consists of applying a new source of substantive criminal law to conduct that had only been criminalized by another body of law. In this sense, the substantive law that was applicable to the individual at the time of the conduct is replaced by another law which criminalizes the same conduct but was only enacted after the facts.⁵⁴ For example, one could be convicted for the war crime of conscripting child soldiers under Article 8(2)(b)(xxvi) ICC Statute, even if the Statute was not previously binding on the individual or the offence was not part of CIL, as long as the conduct was criminalized by an analogous offence under applicable domestic law.

This is what both interpretative and displacement solutions implicitly advocate when they propose that the Rome Statute be 'accommodated' to the level of the applicable substantive law (i.e. CIL, treaties, general principles of law or domestic law), either by means of interpretation or displacement.⁵⁵ In fact, although it is an external source of law which criminalized the conduct at the time it took place, both interpretative and displacement solutions *still rely on the Rome Statute to provide the basis of the criminal charges, the conviction and the sentence*.⁵⁶

In the domestic level, this phenomenon occurs in the context of vicarious or representation jurisdiction: the forum state, while finding the basis of

54 See Gallant, *supra* note 1, at 40–42, 123–134, 276–278, 320–324, 340, 367–369; L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2014), at 162–163; Galand, *supra* note 2, at 143; Van Schaack, *supra* note 3, at 158–172.

55 See Gallant, *supra* note 1, at 340 and *supra* notes 36 and 44.

56 *Ibid.*

criminalization in a foreign law, eventually convicts the accused for an offence under its own domestic law.⁵⁷

At first glance, recharacterization of criminal law seems to be consistent with the principle of non-retroactivity under general international law.⁵⁸ This is because, as we mentioned earlier, what this principle requires is that the conduct be criminalized and punished but *some* previously applicable source of law, which could be either domestic or international law.⁵⁹ Thus, even if the Rome Statute only becomes binding on the individual after the facts, or even if it never becomes applicable to him/her, the individual could still be held responsible under the Statute if the conduct was criminalized by some previously applicable source of law.

This reading of the principle not only finds support in the text of various human rights conventions, but also in the practice of states and international courts.⁶⁰ Indeed, in the context of extradition proceedings and domestic prosecutions of extraterritorial crimes, it is common for states to prosecute individuals for crimes over which they had no prescriptive jurisdiction at the time of the conduct, as long as the conduct in question was also criminalized in the state where the crime was committed or in the state of nationality of the accused.⁶¹ This requirement is known as double criminality, and one of its purposes is precisely to ensure compliance with the principle of non-retroactivity.⁶² In addition, when exercising universal jurisdiction, domestic courts often rely on their own national legislation to charge and convict individuals for crimes that had only been previously criminalized by CIL.⁶³

Nonetheless, the same human rights treaties, particularly their preparatory works, and the same state practice also support the view that there must be a

57 Gallant, *supra* note 1, at 40–44, 282–287, 371–372; C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2015), at 121–123; C. van den Wyngaert, 'Double Criminality as a Requirement to Jurisdiction', in N. Jareborg (ed.), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag, 1989) 43, at 49–50.

58 Gallant, *supra* note 1, at 340, 367; Galand, *supra* note 2, at 143–144; Van Schaack, *supra* note 3, at 158–159; Grover, *supra* note 54, at 163.

59 See *supra* note 3.

60 *Ibid.*

61 L. Gardocki, 'Double Criminality in Extradition Law', 27 *Israel Law Review* (1993) 288, at 288–289; van den Wyngaert, *supra* note 57, at 43–44, 49–50; M. Plachta, 'The Role of Double Criminality in International Cooperation Matters', in N. Jareborg (ed.), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag, 1989) 84, at 106–107; Ferdinandusse, *supra* note 9, at 14; S.A. Williams, 'The Double Criminality Rule Revisited', 27 *Israel Law Review* (1993) 297, at 298–301.

62 Williams, *supra* note 61, at 298; van den Wyngaert, *supra* note 57, at 53; Plachta, *supra* note 61, at 107; Gardocki, *supra* note 61, at 289.

63 Ferdinandusse, *supra* note 9, at 33; E.S. Kobrick, 'The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes', 87 *Columbia Law Review* (1987) 1515, at 1519; *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*, UN Doc. A/65/181, 29 July 2010, §§ 12, 30; Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update* (2012), available online at <https://www.amnesty.org/en/documents/ior53/019/2012/en/> (visited 19 January 2018), at 1–2.

certain level of identity between prior and subsequent criminal laws. In fact, the drafting history of the ICCPR indicates that the thrust of non-retroactivity is that no one should be held guilty of any offence which did not constitute ‘*such an offence*’ at the time of the facts.⁶⁴ Furthermore, whenever confronted with different legal bases for the charges and conviction, and for the criminalization of the conduct, states have strived to ascertain that at least *all the essential or substantive elements* of the crime, modes of liability, *mens rea*, defences and penalties are the same as between those two sources of law.⁶⁵ The double criminality requirement is precisely one of the ways in which such equivalence is verified,⁶⁶ but several different methodologies have been developed by the jurisprudence of domestic courts, particularly in the context of universal jurisdiction.⁶⁷ The ad hoc tribunals and some human rights bodies have also taken the view that all the constituent elements of an offence, as it stood at the time of the conduct, cannot be subsequently altered.⁶⁸ For this reason, reliance on pre-existing domestic law, although helpful in establishing notice of an international crime, is insufficient for ensuring compliance with the *nullum crimen* principle.⁶⁹ This is because domestic ordinary crimes have less elements than international ones.⁷⁰

64 Bossuyt, *supra* note 9, at 321–322, 324.

65 Mariniello, *supra* note 9, at 246; Spiga, *supra* note 3, at 16; Juratowitch, *supra* note 9, at 344–345.

66 K. Cornils, ‘The Use of Foreign Law in Domestic Adjudication’, in N. Jareborg (ed.), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag, 1989) 70, at 79–80. But note that there are two slightly different views on the scope of double criminality: while double criminality *in abstracto* requires identity between the *material or objective* elements of the relevant crime, double criminality *in concreto* also requires consideration of any *subjective or personal* elements (e.g. mistake of law) as well as the *punishability* of the specific perpetrator at the time of the crime (e.g. pardons, statutes of limitation). In any event, it is generally agreed that, *in the context of criminal proceedings* (as opposed to extradition), and for the purposes of satisfying the principle of legality, double criminality *in concreto* should apply. See van den Wyngaert, *supra* note 57 at 51–54; Plachta, *supra* note 61, at 109–110; Gardocki, *supra* note 61, at 289–290.

67 High Court of Australia, *Polyukhovich v. The Commonwealth of Australia and Another* [1991] HCA 32; 172 CLR 501; 101 ALR 545 (hereinafter ‘*Polyukhovich*’), §§ 39, 46–50 (Judgment of J Brennan), § 26 (Judgment of J Toohey); Special Court of Cassation, The Netherlands, *In re SS Member Ahlbrecht*, cited in R. R. Baxter, ‘The Municipal and International Law Basis of Jurisdiction over War Crimes’, 28 *British Yearbook of International Law* (1951) 382, at 384; Supreme Court of Canada, *R v. Imre Finta*, Judgment [1994] 1 SCR 701 (hereinafter ‘*Imre Finta*’), at 811–820. Note that many domestic legal systems directly incorporate various sources of international criminal law, which would avoid recharacterization. Examples include Canada, Belgium, the USA and France. See Ferdinandusse, *supra* note 9, at 29–30, 33–35, 46–48, 56, 60–66.

68 See e.g. Trial Judgment, *Delalić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998 (hereinafter ‘*Delalić Trial Judgment*’), §§ 408, 411; Interlocutory Appeal on Joint Challenge to Jurisdiction, *supra* note 3, § 18(c); JCE Decision, *supra* note 3, §§ 37–38; Decision on Joint Challenge to Jurisdiction, *supra* note 3, §§ 61–62; *X Ltd. and Y v. United Kingdom* (1982) 28 DR 77, 9; *Mr Philippe Gombert v. France*, UNHRC Communication No 987/2001, UN Doc. CCPR/C/77/D/987/2001, 18 March 2003, § 6.3; *David Michael Nicholas v. Australia*, *supra* note 3, §§ 7.3, 7.5, 7.7.

69 JCE Decision, *supra* note 3, §§ 40–41; Judgment, *Vasiljević* (IT-98-32-T), Trial Chamber II, 29 November 2002, § 199.

70 Van Schaack, *supra* note 3, at 168.

Significantly, a certain level of identity between prior and subsequent laws is also necessary to fulfil the rationales of the principle of non-retroactivity, particularly to ensure that individuals have fair notice of the consequences of engaging in criminal conduct and that criminal laws achieve a deterrent effect. Moreover, from the perspective of states' jurisdictional powers, it is also essential that the subsequent law on which the charges and the conviction are based follows the substantive elements of the crime under the original jurisdictional basis. Thus, states exercising universal jurisdiction on the basis of CIL must look at the substantive ingredients of the relevant customary offence.⁷¹ Similarly, when exercising representation jurisdiction, states must observe the substantive elements of the crime under the domestic law of the state which had some jurisdictional authority (e.g. territoriality, active nationality) over the individual at the time of the events.⁷² A failure to undertake this assessment may result in an exorbitant exercise of jurisdiction in violation of international law.

The problem with recharacterization is that, when substituting one body of criminal law for another, not only does the *denomination* of the crime (or of the mode of liability, defence or mental element) change, but also *substantive elements* may be removed or added in the process. This means that the relevant conduct may not only be labelled differently, but there is also a risk that it goes from being innocent to criminal. The latter scenario could happen if the subsequent criminal law has less substantive ingredients, and is thus broader than the previously applicable one (note that the opposite is true for defences). In this case, a substantive problem of retroactivity would arise, as no prior law would have criminalized the conduct.

This often happens when international law is recharacterized as domestic law and vice-versa. On the one hand, if domestic law is subsequently applied as a surrogate for international law,⁷³ the danger is that broader domestic offences⁷⁴ may cover acts that were originally non-criminal.⁷⁵ Note that ordinary crimes, such as murder or rape, lack certain specific elements which are unique to the core international crimes, for instance the nexus with an armed conflict (in war crimes) and the existence of a systematic attack against a civilian population (in crimes against humanity).⁷⁶ Although these elements

71 J.B. Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC', 5 *JICJ* (2007) 421, 425–426; van den Wyngaert, *supra* note 57, at 52; Polyukhovich, *supra* note 67, §§ 37, 39 (Judgment of J Brennan), §§ 26, 72 (Judgment of J Toohey)].

72 Cornils, *supra* note 66, at 80–81.

73 See Ferdinandusse, *supra* note 9, at 15, 19–21, 40; Amnesty International, *supra* note 63, at 2, 13–15; L. Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', 32 *Columbia Journal of Transnational Law* (1994) 289, at 326–327.

74 See *supra* note 70. Domestic law could be a useful basis of criminalization when there is no other source of law (e.g. treaties, CIL) that criminalized the conduct at the time of facts.

75 See e.g. *Vasiliauskas v. Lithuania*, *supra* note 11, §§ 60, 166, 181–184.

76 Galand, *supra* note 2, at 143; Grover, *supra* note 54, at 164; Gallant, *supra* note 1, at 322–324, 340; Decision on the Prosecution Motion for Referral to the Kingdom of Norway – *Rule 11 bis of the Rules of Procedure and Evidence*, Bagaragaza (ICTR-2005-86-11bis), Trial Chamber III, 19 May 2006 (hereinafter 'Rule 11 bis Decision'), § 16.

are often characterized as ‘jurisdictional’, the fact that they refer to substantive aspects of the conduct means that their removal significantly alters the nature and the scope of the crime.⁷⁷ In fact, these elements are the very essence of international crimes, as it is their presence which indicates the special seriousness of these crimes.⁷⁸ On the other hand, if domestic law is later (re)characterized as a more specific rule of international law, not only will the individual be accused of a graver crime, but new modes of liability which are exclusive to international law may be added,⁷⁹ and defences and other bars to prosecution (e.g. statutes of limitations) that were originally available under the applicable law may be removed.⁸⁰ Thus, here too there is a risk of criminalizing conduct that was innocent when done and/or substantially aggravating the situation of the accused.

But the removal of essential elements can also take place as between different sources of international law (treaty law, general principles or CIL) providing for similar crimes, defences, modes of liability or mental elements. This happens whenever the subsequent law is broader (or narrower, in the case of defences) than the previously applicable one. In fact, it is rarely the case that all the sources of international law are identical in their substantive content. For instance, while crimes were set out in great detail in the Rome Statute and in the Elements of Crimes, those under CIL are inevitably more elusive, given the unwritten nature of custom.⁸¹ In the same vein, apart from some rare examples such as the Genocide Convention,⁸² treaties that recognize core international crimes do not usually contain as detailed descriptions of crimes, modes of liability, defences and standards of *mens rea* as those of the Rome Statute.⁸³ A good example of a crime that has different substantive elements in treaty law, CIL and the Rome Statute is torture as a crime against humanity. This offence has been understood to require a specific purpose (e.g. obtaining information or a confession, punishment) under the 1984 Torture Convention⁸⁴ and under CIL,⁸⁵

77 Grover, *supra* note 54, at 164; L.N. Sadat and S.R. Carden, ‘The New International Criminal Court: An Uneasy Revolution’, 88 *The Georgetown Law Journal* (1999) 381, at 431. *Contra* Van Schaack, *supra* note 3, at 168–169.

78 Wexler, *supra* note 73, at 358; Rule 11 *bis* Decision, *supra* note 76, § 16; Imre Finta, *supra* note 67, at 814, 817–818.

79 Milanovic, ‘Aggression and Legality’, *supra* note 12, at 173.

80 See e.g. *Kononov v. Latvia*, Appl. no. 36376/04, judgment of 17 May 2010, Dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi, §§ 16–19. See also Juratowitch, *supra* note 9, at 345–346.

81 See Schabas, *An Introduction to the International Criminal Court*, *supra* note 14, at 126; Grover, *supra* note 54, at 355.

82 See Arts II and III, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

83 Bassiouni, *supra* note 2, at 95–98, 100; Grover, *supra* note 54, at 135; A. Cassese et al., *Cassese’s International Criminal Law* (3rd edn., Oxford University Press, 2013), at 28.

84 Art. 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

85 Judgment, *Kunarac et al.* (IT-96-23-T& IT-96-23/1-T), Trial Chamber II, 22 February 2001, § 497; Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber II, 10 December 1998, § 162.

while the ICC Elements of Crimes explicitly do away with any need to prove such purpose.⁸⁶

Although the ‘compatibility check’ which is proposed by the existing solutions has the potential to ensure that the essential elements of the crime, defence, mode of liability or mental element are preserved in the process of recharacterization, it does not seem to apply a sufficient standard of equivalence. Indeed, all that the existing solutions appear to require is that an ‘analogous’ or ‘similar’ *crime* existed in the applicable law, without giving much thought as to the necessary level of identity between the latter and the law of conviction, i.e. that the *same substantive elements of crimes, defences, modes of liability and the mental element* exist in both laws.⁸⁷ Thus, the mechanism that existing solutions have proposed to ensure conformity between prior and subsequent criminal laws still leaves room for instances of substantive retroactivity.

In any event, even if recharacterization does not entail a substantive change in the content of the applicable criminal law, the fact that it may alter the denomination of the offence may be problematic in light of the principles of non-retroactivity and fair labelling.⁸⁸

Indeed, it appears that the principle of non-retroactivity under general international law encompasses not only criminalization and punishment, but also any consequence which substantially alters the situation of the accused to his/her disadvantage, including the social stigma which is attached to labels.⁸⁹ This becomes clearer when one considers the inextricable links between non-retroactivity, deterrence and retribution, two principal purposes of criminal justice as whole.⁹⁰ Indeed, it is advance knowledge of the criminal law and its severity that deters potential criminals. On the other hand, individuals can only have a sense of fair retribution if they are punished for crimes and penalties with which they were familiar. Crucially, labels play a key role in conveying such information to ordinary people, especially accused persons.⁹¹ Thus, labels should also be subject to the principle of legality to the

86 Art. 7(1)(f), footnote 14, Elements of Crimes. Note that for torture as a war crime the Elements still require a specific purpose: Art. 8(2)(a)(ii)-1, Elements of Crimes.

87 Galand, *supra* note 2, at 143; Milanovic, ‘Rome Statute Binding?’ *supra* note 4, at 51; Van Schaack, *supra* note 3, at 160, 164, 168, 186; Grover, *supra* note 54, at 165. But note that Gallant proposes a more stringent ‘compatibility check’ (that the conduct must have *constituted a crime* under some applicable law), although he does not explicitly indicate which elements of crimes must be verified for consistency. See Gallant, *supra* note 1, at 123, 132, 321, 339, 368.

88 Similarly, Grover, *supra* note 54, at 164–165.

89 *Ricardo Canese v. Paraguay* (IACHR), Series C 111, Judgment of 31 August 2004, § 175; United States Supreme Court (USSC), *Calder v. Bull* 3 U.S. (3 Dall.) 386 (1798), 390; USSC, *Collins v. Youngblood* 497 U.S. 37 (1990), 45–46; USSC, *Weaver v. Graham* 450 U.S. 24 (1981) 29, including footnote 12; B. A. Garner (ed.), *Black’s Law Dictionary* (Thomson Reuters, 2014), at 701.

90 Gallant, *supra* note 1, at 26–30; Van Schaack, *supra* note 3, at 121, 145–146; Sentencing Judgment, *Erdemović* (IT-96-22-T), Trial Chamber, 29 November 1996 (hereinafter ‘*Erdemović* Sentencing Judgment’), §§ 64–65; A. Ashworth, *Principles of Criminal Law* (6th edn., Oxford University Press, 2009), at 63, 65.

91 J. Chalmers and F. Leverick, ‘Fair Labelling in Criminal Law’, 71 *The Modern Law Review* (2008) 217, at 226, 229–230, 238; B. Mitchell, ‘Multiple Wrongdoing and Offence Structure: A Plea for

extent that they may have different deterrent and retributive effects. For instance, the stigma and the deterrent effect of labelling a conduct as an international crime such as genocide are greater than those attached to an ordinary crime such as murder, or even a less serious international crime such as the war crime of perfidy.⁹²

Furthermore, the principle of fair labelling is directly concerned with changes in labels of crimes and of other aspects of criminal liability. This is because this principle seeks to ensure that the conduct is labelled and described in a manner that is proportionate to the accused's level of blameworthiness.⁹³ Fair labelling has not only been recognized as a general principle of criminal law⁹⁴ (which makes it indirectly applicable before the ICC, under Article 21(1)(c)), but some of its essential aspects are reflected in the Rome Statute itself. For instance, it can be reasonably derived from the right of the accused to be notified 'promptly and in detail of the nature, cause and content of the charge'⁹⁵ and from the ensuing concern with the correct legal characterization of facts, encapsulated in Regulation 55 of the Regulations of the Court.⁹⁶ Moreover, it is very likely that fair labelling is nowadays an 'internationally recognized human right' within the meaning of Article 21(3) ICC Statute.⁹⁷ Thus, the Court must interpret and apply its law in accordance with that principle.

In a nutshell, recharacterization may be inconsistent with the principles of non-retroactivity and fair labelling. Not surprisingly, in the few instances where it has been singled out and discussed, several reservations have been

Consistency and Fair Labelling', 64 *The Modern Law Review* (2001) 393, at 398; H.M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press, 2014), at 32–33, 40, 53–55; V. Tadros, 'Fair Labelling and Social Solidarity', in L. Zedner and J.V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 68, at 72.

92 On the different stigmas attached to ordinary and international crimes, see *Erdemović* Sentencing Judgment, *supra* note 90, §§ 64–65; Grover, *supra* note 54, at 164; Wexler, *supra* note 73, at 358; Imre Finta, *supra* note 67, § 815; Amnesty International, *supra* note 63, at 14. On the different levels of gravity among international crimes, see *Ferdinandusse*, *supra* note 9, at 241–243; Van Schaack, *supra* note 3, at 158, 187.

93 Zawati, *supra* note 91, at 27–29, 34–35; Ashworth, *supra* note 90, at 78; Chalmers and Leverick, *supra* note 91, at 218–220; G. Williams, 'Convictions and Fair Labelling', 42 *The Cambridge Law Journal* (1983) 85, at 85.

94 Similarly, Zawati, *supra* note 91, at 33–34; D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* (2008) 925, at 926–927; Grover, *supra* note 54, at 103.

95 See Art. 67(1)(a) ICCSt. Similarly, in the context of the ICCPR: *Gombert v. France*, *supra* note 68, § 6.3.

96 See Dissenting Opinion of Judge Van den Wyngaert, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, *Katanga* (ICC-01/04-01/07-3319-tENG), Trial Chamber II, 21 November 2012, § 5.

97 Similarly, Reasons of Judge Eboe-Osuji, Decision on Defence Applications for Judgments of Acquittal, *Ruto and Sang* (ICC-01/09-01/11-2027-Red), Trial Chamber V(A), 5 April 2016, § 328.

made to its application in international criminal law.⁹⁸ More importantly, the fact that existing solutions apply this technique without careful scrutiny means that they fail to eliminate the risk of substantive retroactivity in cases of SC referrals and ad hoc declarations.

3. *Nulla Poena Sine Lege*

Despite being an essential component of the principle of legality under general international law,⁹⁹ the principle of *nulla poena sine lege* has been overlooked by most proponents of existing solutions. This is perhaps explained by the severity of maximum penalties allowed for core international crimes under CIL (i.e. death penalty and life imprisonment),¹⁰⁰ in comparison to those contemplated by the Rome Statute (i.e. a maximum of 30 years' imprisonment and life sentence in cases of extreme gravity).¹⁰¹ As more severe penalties would have been applicable under CIL at the time of the conduct, there is a general impression that statutory penalties could not be retroactively applied in cases of ad hoc declarations and SC referrals.

Nonetheless, the *nulla poena* principle risks being violated whenever CIL cannot provide a basis for the criminalization and punishment of the conduct at the time it took place. Indeed, if treaty or domestic law were the only sources of applicable penalties, then it is possible that such penalties are more lenient than those provided for in the Statute. In those cases, to comply with the *nulla poena* principle, the Court must ensure that its sentences are not more severe than those which could have been passed under the applicable law.¹⁰²

4. *Domestic Law*

Another issue that none of the existing solutions seem to address is the general applicability of domestic law by the ICC. In fact, recall that some proponents of interpretative and compatibility check solutions suggest resorting to domestic law as a possible basis for criminalization in cases where the application of the Rome Statute would be retroactive, and CIL or treaty law are of no resort. Nevertheless, aside from the specific problems arising from the recharacterization of domestic ordinary offences as international crimes, the very application

98 Gallant, *supra* note 1, at 340, 367–369; Galand, *supra* note 2, at 143; Grover, *supra* note 54, at 165; C. Kress, 'Nulla Poena Nullum Crimen Sine Lege' (Max Planck Encyclopedia of Public International Law) available online at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e854> (visited 19 January 2018), § 25.

99 See Kress, *ibid.*, § 32; Gallant, *supra* note 1, at 378–387; Lamb, *supra* note 19, at 756–758; Appeal Judgment, *Delalić et al.* (IT-96-21-T), Appeals Chamber, 20 February 2001 (hereinafter '*Delalić Appeal Judgment*'), §§ 813, 817; Judgment in Sentencing Appeals, *Tadić* (IT-94-1-A and IT-94-1-A bis), Appeals Chamber, 26 January 2000, § 5.

100 Gallant, *supra* note 1, at 385–387; *Delalić Appeal Judgment*, *supra* note 99, § 817.

101 See Art. 77 ICCSt.

102 Gallant, *supra* note 1, at 341–342, 368, 389–391; Galand, *supra* note 2, at 144.

of domestic law by the ICC may not be permitted at all. This is because Article 21(1)(c) ICC Statute only authorizes the application of ‘general principles of law *derived* by the Court from national laws of legal systems of the world’. Thus, this provision seems to preclude the direct reliance on domestic law, as advocated by some of the existing solutions.¹⁰³

One could think that Article 21(3) would provide an alternative legal basis under which domestic law may be applied. In this sense, the principle of non-retroactivity, as recognized by Article 21(3), would justify displacing or reading down Article 21(1)(c) to allow domestic law to be applied in cases where it is the only source of law previously criminalizing the conduct. However, this argument cannot be easily reconciled with the text of Article 21(3), as it seems to condition the ‘supra legality’ of human rights to the application of the law pursuant to Article 21.

4. Sketching a More Complete Solution

After a careful appraisal of the existing solutions to the retroactive application of the Rome Statute, we can now map out the essential components of what we believe is a more complete solution to that issue. Four fundamental steps can be identified.

A. Undertaking a Complete Assessment of the Rome Statute’s Nature

As we mentioned earlier, the very first step for resolving the issue of the substantive retroactivity of the Rome Statute in cases of SC referrals and ad hoc declarations is to conduct a full assessment of the Statute’s nature. This includes not only an interpretation of its relevant provisions, but also an analysis of the delegated powers which make up the Court and the Statute. This assessment will tell us what exact source(s) of substantive law was(were) meant to apply in cases of SC referrals and ad hoc declarations, which will in turn determine whether or not, in those two instances: 1) the Statute is inconsistent with the principle of non-retroactivity, and 2) the Court has the power to apply the substantive provisions of the Statute. It is perhaps the failure to conduct this assessment that may have led the proponents of existing solutions to make questionable choices of law and to unnecessarily resort to the problematic technique of recharacterization of crimes. Although we have decided to

103 M. MacAuliffe deGuzman, ‘Article 21: Applicable Law’, in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Beck/Hart, 2016) 932, at 942–943; Pellet, *supra* note 43, at 1074–1076; *Report of the Preparatory Committee on the Establishment of an International Criminal Court - Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, UN Doc. A/51/22, 13 September 1996, at 43; P. Saland, ‘International Criminal Law Principles’, in R.S.K. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute - Issues, Negotiations, Results* (Kluwer Law International, 1999) 189, at 214.

leave a full assessment of the Statute's nature to a future piece of its own, there is room for a brief discussion of its key aspects.

First, several provisions of the Rome Statute, their object and purpose and their preparatory works support the view that, in cases involving States Parties to the Statute (Article 12(2)), the substantive law is provided by the Statute itself.¹⁰⁴ Indeed, the crimes within the Court's jurisdiction were defined in great detail, and various statutory provisions refer to 'criminal responsibility under the Statute'.¹⁰⁵ Moreover, we have seen that the Statute goes beyond pre-existing treaties and CIL in several instances, which may be an indication that it was meant to operate as an autonomous source of substantive criminal law. This is confirmed by Articles 10 and 22(3), which provide that the Statute shall not prejudice the status of other sources of international law. Significantly, Article 12(2) reflects two traditional bases of *prescriptive* and *adjudicative* jurisdiction originally belonging to states parties to the Statute, namely, territoriality and active nationality.¹⁰⁶ In the same vein, Article 12(1) tells us that, by becoming parties to the Statute, states 'accept the jurisdiction of the Court *with respect to the crimes referred to in article 5*'. This suggests that acceptance of the Court's jurisdiction entails the acceptance of the substantive provisions of the Statute as law binding on individuals.

The same conclusion can be reached by looking at the Statute and the Court from a powers perspective. Indeed, as an international organization, the Court can only derive its powers from those delegated by its States Parties, *in casu*, their power to exercise *adjudicative* jurisdiction over certain facts and individuals.¹⁰⁷ Similarly, the substantive rules of the Statute could only have been created pursuant to the power of states parties to exercise *prescriptive* jurisdiction over the same facts and individuals.¹⁰⁸ This power has been collectively exercised by such states since the entry into force of the Statute.

Nonetheless, when the Court's jurisdiction is granted via ad hoc declarations and SC referrals, the identification of the substantive law is not as straightforward.

In fact, Article 12(3) does not provide many textual indications of the jurisdictional bases and substantive rules that should apply in cases of ad hoc declarations. All that Article 12(3) refers to is the state's acceptance of the 'jurisdiction of the Court', which does not in itself imply an acceptance of the Statute's substantive provisions. Similarly, although Article 11(2) allows ad

104 Similarly, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, *Ntaganda* (ICC-01/04-02/06-1707), Trial Chamber VI, 4 January 2017 (hereinafter '*Ntaganda* Second Jurisdiction Decision'), § 35 and footnote 74.

105 See e.g. Arts 24(1), 25, 28 and 30 ICCSt.

106 S.A. Williams and W.A. Schabas, 'Article 12: Preconditions to the Exercise of Jurisdiction', in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn., Beck/Hart, 2016) 672, at 681; O'Keefe, *supra* note 19, at 541; Gallant, *supra* note 19, at 789; Rome Conference, Vol. III, *supra* note 16, at 228, particularly § 4(b).

107 Y. Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge University Press, 2016), at 32–33; Galand, *supra* note 2, at 48, 124.

108 Similarly, Gallant, *supra* note 19, at 788–789; O'Keefe, *supra* note 19, at 540–541; *Ntaganda* Second Jurisdiction Decision, *supra* note 104, § 35, including footnote 74.

hoc declarations to be made by states that have joined the Statute after its general entry into force, that provision only refers to the temporal jurisdiction of the Court.

Yet, Article 12(3) does seem to treat the consent of accepting states as equivalent to the consent of States Parties. Indeed, this provision asserts that an ad hoc declaration is warranted when ‘the acceptance of a State which is not a Party to this Statute is required under paragraph 2’, as if ad hoc declarations were a substitute for the ratification of the Statute. The drafting history of Article 12(3) also reveals that ad hoc declarations are the remainder of a mechanism which allowed parties and non-parties to give their consent to the Court’s jurisdiction on a case-by-case basis.¹⁰⁹ Moreover, the fact that such declarations are regulated in the same provision dealing with the consent of States Parties is evidence that accepting states can also consent to the application of the Statute’s substantive provisions to their nationals and in their territory.¹¹⁰

From a powers perspective, this jurisdictional setting makes sense: indeed, by accepting the adjudicative jurisdiction of the Court on an ad hoc basis, non-states parties and States Parties joining the Statute after 1 July 2002 have the power to accept the substantive provisions of the Statute as law binding on the individuals over which they have prescriptive jurisdiction on the basis of territoriality and active nationality.¹¹¹

For SC referrals, there are even less textual indications regarding the applicable substantive law. Indeed, all that Article 13(b) says about such referrals is that they are not limited to situations involving states parties to the Statute, and that they should be made in accordance with Chapter VII of the UN Charter. While the *chapeau* of Article 13 makes it clear that SC referrals grant the Court jurisdiction over the relevant situation, it is unclear whether this grant must be followed by the application of the Statute’s substantive provisions.

But despite the Statute’s textual ambiguity, the object and purpose of Article 13(b), together with its preparatory works, give us enough clues on the nature of the Statute in cases of SC referrals. On the one hand, drafters not only conceived SC referrals as substitutes for ad hoc tribunals in the future, but also explicitly considered that the functioning of these triggering mechanisms should be analogous to that of those tribunals.¹¹² Significantly, both the ICTY

109 Schabas, *Commentary on the Rome Statute*, *supra* note 14, at 357; Williams and Schabas, *supra* note 106, at 684; *Report of The International Law Commission on Its Forty-Fifth Session, Draft Statute for an International Criminal Court*, UN Doc. A/48/10 (hereinafter ‘1993 Draft Statute’), 3 May–23 July 1993, at 108, Draft Art. 23 and Commentary; *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13, 4 February 1998, at 36–37, Art. 7 [21bis], § 4, and 39, Art. 9 [22], § 4.

110 O’Keefe, *supra* note 19, at 540–541.

111 Gallant, *supra* note 19, at 819–820.

112 See e.g. 1993 Draft Statute, *supra* note 109, at 109, Commentary (1) to Art. 25; *Summary of the Proceedings of the Preparatory Committee during the Period 25 March–12 April 1996*, UN Doc. A/AC-249/1, 7 May 1996, § 150.

and the ICTR derive their jurisdiction from the SC's powers under Chapter VII of the UN Charter, while the substantive law comes from previously applicable sources of the law, i.e. CIL and treaties.¹¹³ On the other hand, although universal jurisdiction was ultimately rejected as the general basis for the Court's jurisdiction and its substantive law,¹¹⁴ drafters seemed to agree that, *in cases of SC referrals*, at least the substantive law must be grounded on the principle of universality, i.e. it would have to come from CIL.¹¹⁵

By applying the powers doctrine to SC referrals, one can have a better visualization of this jurisdictional setting. In fact, by relying on the SC to grant the Court jurisdiction, states parties seem to have agreed that, in cases of SC referrals, the Court's adjudicative jurisdiction derives from the Council's powers under Chapter VII of the UN Charter. Because such powers are wide and binding on any UN member state, the Council could indirectly delegate (or re-delegate) to the Court any jurisdictional power belonging to any or all UN member states (e.g. territoriality, active or passive nationality), or even create a brand new jurisdictional basis.¹¹⁶

At the same time, it makes sense that the substantive law in cases of SC referrals is based on universal prescriptive jurisdiction as a matter of CIL. This is so for two main reasons. First, even if the SC has the power to prescribe international criminal law for individuals (which is a disputed question),¹¹⁷ it should not be able to deviate from CIL unless it has expressed an intention to

113 Gallant, *supra* note 19, at 783–784, 825–826; Galand, *supra* note 2, at 28–32; Separate opinion of Judge Patrick Robinson, Decision on Motion Challenging Jurisdiction, *Milutinović et al.* (IT-99-37-PT), Trial Chamber III, 6 May 2003, § 46.

114 Schabas, *Commentary on the Rome Statute*, *supra* note 14, at 350; H.P. Kaul, 'Preconditions to the Exercise of Jurisdiction', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 583, at 607, 613; Milanovic, 'Rome Statute Binding?' *supra* note 4, at 50–51.

115 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998. Official Records. Volume II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of Whole*, UN Doc. A/CONF-183/13(VOL-II), 1998, at 123, § 28, at 187, § 10, at 297, § 42; D.J. Scheffer, 'US Policy and the International Criminal Court', 32 *Cornell International Law Journal* (1999) 529, at 533–534.

116 Galand, *supra* note 2, at 35–36, 41–42, 53–55; Bartels, *supra* note 24, at 10; D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *JICJ* (2003) 618, at 625–626; M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', 64 *Law and Contemporary Problems* (2001) 13, at 36, 45.

117 See e.g. Gallant, *supra* note 19, at 827–828; Galand, *supra* note 2, at 71–72; A. Peters, 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I, EJIL: Talk! Blog of the European Journal of International Law, 20 November 2014, available online at <https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/> (visited 20 January 2018), at 2; Appeal Judgment, *Tadić* (IT-94-I-A), Appeals Chamber, 15 July 1999 (hereinafter '*Tadić* Appeal Judgment'), § 296; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice, 22 July 2010, ICJ Reports (2010) 403, §§ 116–117 (all in favour of the Council's prescriptive powers); and Bartels, *supra* note 23, at 11–12; Milanovic, 'Rome Statute Binding?' *supra* note 4, at 37; *Delalić* Trial Judgment, *supra* note 68, § 417 (against such powers).

do so.¹¹⁸ Secondly, the SC cannot generally violate international human rights law, unless a derogation is explicitly justified.¹¹⁹ This means that for both retro-active and prospective SC referrals the default applicable law should be CIL.

In sum, we can conclude that the substantive law in *cases involving states parties and ad hoc declarations* comes from *the Statute itself*. Conversely, the default substantive law for all SC referrals, retroactive or not, is likely to be CIL. As a result, it is only for *retrospective* ad hoc declarations that there is an inconsistency between the principle of non-retroactivity and the substantive provisions of the Statute going beyond CIL. The same inconsistency does not arise in cases of *prospective* ad hoc declarations, as the accepting state would be able to ‘prescribe’ the Statute prospectively.¹²⁰ Similarly, no inconsistency should arise, in principle, for SC referrals, as the Court has been directed to apply pre-existing CIL in those instances. However, such inconsistency could arise if the Court dismisses this directive and applies the substantive provisions of the Statute in cases of SC referrals. In those circumstances, the Court would also be acting beyond its powers, i.e. *ultra vires* the Statute.

B. Framing the Problem as a Genuine Norm Conflict

After having identified the instances where there is an inconsistency between the Statute and the principle of non-retroactivity under general international law, the next step is to frame them as norm conflicts, as suggested by interpretative and displacement solutions. Importantly, this conflict appears to be a genuine one, as it cannot be interpreted away. This is because trying to read into the Rome Statute crimes, modes of liability, defences and mental elements that existed under a different source of law would amount to recharacterizing the latter as the former. As we explained earlier, resort to this technique raises several concerns.

Recall that the conflict in question would arise because Article 21(3) ICC Statute incorporates the principle of non-retroactivity as part of the ICC’s applicable law.

C. Resorting to Article 21(3) to Solve the Conflict

The third step in resolving the issue at hand is to apply the norm displacement technique encapsulated in Article 21(3) ICC Statute: the ‘super legality’ of ‘internationally recognized human rights’, including the principles of

118 Galand, *supra* note 2, at 71–72; *Tadić* Appeal Judgment, *supra* note 117, §§ 287, 296.

119 A. Tzanakopoulos, ‘Collective Security and Human Rights’, in E. De Wet and J. Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012) 43, at 63, 66; Galand, *supra* note 2, at 130–133; *Al-Jedda v. United Kingdom*, Appl. no. 27021/8, judgment of 7 July 2011, § 102; *Nabil Sayadi and Patricia Vinck v. Belgium*, *Individual Opinion of Committee Member Sir Nigel Rodley (Concurring)*, UNHRC Communication No. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006, 29 December 2008, §§ 36–37.

120 *Supra* note 111.

non-retroactivity and fair labelling. This provision would allow the Court to displace or refuse to apply the substantive provisions of the Rome Statute which go beyond CIL or another applicable source of *international law in cases of retroactive ad hoc declarations*. Furthermore, if one does not agree that CIL is the default substantive law for SC referrals, Article 21(3) could still be used to justify the resort to an applicable source of international law and to resolve any eventual norm conflict in those instances.

D. Applying the Substantive Law as such

The last step of our proposed solution is to replace recharacterization of criminal law with a safer technique for charging, convicting and sentencing the accused. This technique consists of applying the source of international law which was previously binding on the individual *as such*, that is, without recharacterizing or replacing it with statutory provisions. In practical terms, this means that the charges, conviction and sentence of the accused will be fully dictated by the applicable law, without any reference to the Statute. As we explained earlier, the substantive law in cases of prospective and retrospective SC referrals should be CIL. Conversely, in cases of retrospective ad hoc declarations, the substantive law could be any applicable source of *international law*, such as treaties, CIL, or general principles of law.

This technique should allow the Court to comply with both principles of non-retroactivity and fair-labelling, and to remain within its powers in the retroactive scenarios identified above. For its implementation, inspiration could be drawn from the practice of the ad hoc tribunals and the application of foreign law in Private International Law. In those instances, adjudicative and prescriptive jurisdiction derive from different legal bases, which is exactly the same jurisdictional setting found in cases of SC referrals and retrospective ad hoc declarations.

5. Conclusion

We have demonstrated throughout this article that the existing solutions to the problem of the retroactive application of the Rome Statute in cases of SC referrals and ad hoc declarations have both merits and shortcomings. We have also built upon those merits and addressed the shortcomings by proposing a more complete and safer avenue for dealing with the issue at hand. It is our hope that by adopting our proposed solution in pending and upcoming retroactive cases the ICC would be able to fulfil its promise of complying with internationally recognized human rights and respecting the limits of its powers.

THE MANY SHADES OF INTERNATIONAL CRIMINAL JUSTICE

Foreword

When the International Criminal Court (ICC) was created by the Rome Treaty in 1998, and activated in 2002, the model for the future appeared to be a single permanent international tribunal that would act as a backstop (and spur) to domestic proceedings addressing atrocity crimes. Many thought that the era of ad hoc international or hybrid tribunals was over. Today, a very different picture has emerged. It has become clear that the combination of the ICC and domestic proceedings has left enormous gaps in accountability, both because the ICC has not achieved universality, and because the model is not necessarily suited to addressing all circumstances. In addition, the politics that gave rise to the ICC has changed dramatically, and support for robust, international solutions has waned over the last few years. Accordingly, a number of new forms of inquiry and accountability have arisen to fill the gap, created by the United Nations (UN) Security Council, the UN General Assembly, and the UN Human Rights Council. Following on from the articles on the then newly-created International, Impartial and Independent Mechanism for investigation of international crimes committed in the Syrian Arab Republic (IIIM) published in volume 15, issue 2 of the *Journal*, this short symposium takes the discussion forward. Zachary D. Kaufman surveys all of the different mechanisms created recently, and assesses their comparative strengths and weaknesses. Beth Van Schaack follows with an in-depth analysis of the Iraqi Investigative Team, an ad hoc investigation mechanism established by the Security Council, analysing the potential promises and perils of this new institution. Together, Kaufman, and Van Schaack demonstrate that the age of institution-building to combat impunity for atrocity crimes is far from over and that the future promises a constellation of mechanisms to support investigations and achieve some measure of justice.

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The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations

Zachary D. Kaufman*

Abstract

Atrocity crimes rage today in Iraq, Syria, Myanmar, Burundi and Yemen. Given their potential to establish facts and promote accountability, recently opened United Nations investigations of international law violations in each of these states are thus a welcome, even if belated, development. However, these initiatives prompt questions about their designs, both in isolation and relative to each other. This article describes the investigations into alleged violations in these five states, examines their respective sponsors and scopes, and presents a wide range of questions about the investigations and their implications, including their coordination with each other and their use of evidence in domestic, foreign, hybrid and international courts (such as the International Criminal Court). The article concludes that, while seeking accountability for international law violations is certainly laudatory, these particular investigations raise significant questions about achieving that goal amidst rampant human rights abuses in these five states and beyond. International lawyers, atrocity crime survivors and other observers thus await answers before assessing whether these investigations will truly promote justice.

1. Introduction

Atrocity crimes rage today in Iraq, Syria, Myanmar, Burundi and Yemen. Given their potential to establish facts and promote accountability,¹ recently opened

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1 See T. Piccone, *U.N. Human Rights Commissions of Inquiry: The Quest for Accountability*, Brookings Institution, December 2017, available online at <https://www.brookings.edu/wp-content/uploads/2017/12/fp.20171208.un.human.rights.commissions.inquiry.pdf> (visited 12 December 2017), at 1.

United Nations (UN) investigations of international law violations in each of these states are thus a welcome, even if belated, development. However, these initiatives prompt questions about their designs, both in isolation and relative to each other. This article describes the investigations into alleged violations in these five states, examines their respective sponsors and scopes, and presents a wide range of questions about the investigations and their implications, including their coordination with each other and their use of evidence in domestic, foreign, hybrid and international courts (such as the International Criminal Court (ICC)).

2. Recent UN Investigations

This part describes recent, ongoing UN investigations in Iraq, Syria, Myanmar, Burundi and Yemen. The mechanisms and contexts for each state differ, as will be examined in the following sections.

A. Iraq

On 21 September 2017, the United Nations Security Council (UNSC) unanimously passed Resolution 2379 to pursue accountability for atrocity crimes perpetrated in Iraq by the Islamic State (also known as ISIS, ISIL, Daesh and Daesh).² The UK is credited with drafting the resolution and providing approximately \$1.3 million to set up the investigative team.³ The United States contributed to the drafting process.⁴ The resolution requests the UN Secretary-General (UNSG)

to establish an Investigative Team, headed by a Special Adviser, to support domestic efforts to hold ISIL (Daesh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Daesh) in Iraq ... to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request.⁵

Many have praised the UNSC's initiative. US Ambassador to the UN Nikki Haley called the resolution 'a landmark' in 'demonstrating that justice is never

2 SC Res. 2379, 21 September 2017. Also see, B. Van Schaack, 'The Iraq Independent Investigative Team and Prospects for Justice for the Yazidi Genocide', in this issue of the *Journal*.

3 M. Nichols, 'U.N. Team to Collect Evidence of Islamic State Crimes in Iraq', *Reuters*, 21 September 2017, available online at <https://www.reuters.com/article/us-mideast-crisis-iraq-un/u-n-team-to-collect-evidence-of-islamic-state-crimes-in-iraq-idUSKCN1BW26J> (visited 12 December 2017).

4 Nikki Haley, US Permanent Representative to the United Nations, Explanation of Vote Following the Adoption of UN Security Council Resolution 2379 on Accountability for ISIS Atrocities, 21 September 2017, available online at <https://usun.state.gov/remarks/7988>; visited 12 December 2017 (hereafter Haley Explanation).

5 SC Res. 2379 § 2.

beyond reach, that no victim is voiceless, and that no perpetrator is above the law'.⁶ International human rights attorney Amal Clooney, who represents Yazidi (also known as Yezidi) victims of ISIS atrocity crimes, stated that the resolution is 'a huge milestone for all those who've been fighting for justice for victims of crimes committed by ISIS'.⁷ Iraqi Foreign Minister Ibrahim al-Jaafari declared the development 'a victory for justice, a victory for humanity, and a victory for the victims'.⁸

The desirability of such an investigative team is well understood. ISIS has perpetrated widespread and systematic murder, kidnapping, sexual violence (including forced marriage and sexual slavery) and destruction of cultural heritage.⁹ The US State Department characterized ISIS's acts as 'genocide' and 'crimes against humanity',¹⁰ and the US House of Representatives voted unanimously to do the same.¹¹ The European and Scottish Parliaments, the UK and Canadian Houses of Commons, the French Senate and National Assembly, the Iraqi and Kurdish Regional governments, and the UN's Independent International Commission of Inquiry on the Syrian Arab Republic (Syria COI) all similarly concluded that ISIS has committed genocide.¹²

6 Haley Explanation, *supra* note 4.

7 J. Pelitz, 'UN Votes to Help Iraq Collect Evidence Against Islamic State,' *Associated Press*, 21 September 2017, available online at <https://apnews.com/6bfacfeedbae43f3b806b754b574a229> (quoting Clooney).

8 *Ibid.* (quoting al-Jaafari).

9 See e.g. N. Kikoler (U.S. Holocaust Mem'l Museum Simon-Skjoldt Ctr. for the Prevention of Genocide), 'Our Generation is Gone: The Islamic State's Targeting of Iraqi Minorities in Ninewa' (2015), available online at <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf>; UN Office of the Special Representative on Sexual Violence in Conflict, *Three Years After ISIL's Attacks on Sinjar, Iraq, United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict, Pramila Patten, Demands Justice and Support for the Victims* (2017), available online at <https://reliefweb.int/report/iraq/three-years-after-isil-s-attacks-sinjar-iraq-united-nations-special-representative>; 'Iraq's Heritage Needs Protection from Islamic State – UNESCO', *Reuters*, 2 November 2014, available online at <https://www.reuters.com/video/2014/11/02/iraqs-heritage-needs-protection-from-isl?videoId=346781460>; 'ISIS Fast Facts', *CNN.com*, 24 August 2017, available online at <http://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html> (websites visited 12 December 2017).

10 John Kerry, US Secretary of State, *Remarks on Daesh and Genocide*, 17 March 2016, available online at <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>; Rex W. Tillerson, US Secretary of State, *Remarks on the 2016 International Religious Freedom Annual Report*, 15 August 2017, available online at <https://www.state.gov/secretary/remarks/2017/08/273449.htm> (websites visited 12 December 2017).

11 H.Con.Res. 75, 114th Cong. (2016).

12 Genocide Recognition, Yazda, at <https://www.yazda.org/the-recognition/>; Independent International Commission of Inquiry on the Syrian Arab Republic, "'They Came to Destroy': ISIS Crimes Against the Yazidis", UN Doc. A/HRC/32/CRP.2, 15 June 2016, available online at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A.HRC.32.CRP.2.en.pdf> (hereafter Syria COI 2016 Report); J. Moore, 'European Parliament Recognizes ISIS Killing of Religious Minorities as Genocide,' *Newsweek*, 4 February 2016, available online at <http://www.newsweek.com/european-parliament-recognizes-isis-killing-religious-minorities-genocide-423008> (websites visited 12 December 2017).

B. Syria

In March 2011, as part of the Arab Spring, anti-government protests erupted in Syria. President Bashar al-Assad's regime responded violently, and armed opposition groups fought back. All parties to the conflict have been accused of international law violations. Approximately a half-million people have been killed and more than 11 million have been displaced (over five million as refugees and over six million as internally displaced persons). Amnesty International, Mercy Corps, and others have called Syria 'the worst humanitarian crisis of our time'.¹³

On 22 August 2011, the UN Human Rights Council (UNHRC) established the Syria COI to

investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.¹⁴

The Syria COI has recommended that the UNSC refer the situation to the ICC.¹⁵

More recently, on 21 December 2016, the UN General Assembly (UNGA) created the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).¹⁶ Some experts, such as Harvard Law School Professor Alex Whiting¹⁷ and Human Rights Watch (HRW) Senior International Justice Counsel Balkees Jarrah,¹⁸ have noted that such a UNGA mechanism for investigating atrocity crimes is unprecedented.

C. Myanmar

For decades, ethnic Rohingya Muslims have faced discrimination and violence in Myanmar, particularly in Rakhine State. A recent spate of violence by the

13 For background on human rights violations in Syria, see e.g. US Department of State, *Country Reports on Human Rights Practices for 2016: Syria* (2017), available online at <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dliid=265520>; Mercy Corps, *Quick Facts: What You Need to Know about the Syria Crisis*, 23 October 2017, available online at <https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis>; Amnesty International, *Syria: The Worst Humanitarian Crisis of our Time*, 7 April 2015, available online at <https://www.amnesty.org.nz/syria-worst-humanitarian-crisis-our-time> (websites visited 12 December 2017).

14 Human Rights Council Res. S-17/1, UN Doc. A/HRC/S-17/1, 22 August 2011.

15 Syria COI 2016 Report, *supra* note 12, at 1.

16 GA Res. 71/248, 21 December 2016, at § 4.

17 A. Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach', 15 *Journal of International Criminal Justice* (2017) 231, at 232.

18 Human Rights Watch, 'Syria: UN General Assembly Adopts Resolution on War Crimes Investigations', 21 December 2016, available online at <https://www.hrw.org/news/2016/12/21/syria-un-general-assembly-adopts-resolution-war-crimes-investigations> (visited 12 December 2017) (quoting Jarrah).

Burmese government has led hundreds of thousands of Rohingya to flee to neighbouring Bangladesh. This mass exodus has been calculated to be the most rapid from any state since the 1994 genocide in Rwanda. Some officials and experts—including US Senator Ben Cardin, the US Senate Foreign Relations Committee's Ranking Member—have characterized the Myanmar military's atrocity crimes against the Rohingya as 'ethnic cleansing' and even 'genocide'. Nobel Peace Prize laureate Aung San Suu Kyi, the country's state counsellor and de facto leader, has been complacent and, arguably, complicit in these heinous offences.¹⁹

On 24 March 2017, the UNHRC adopted a two-pronged resolution on Myanmar. First, the UNHRC 'urgently' dispatched an independent international fact-finding mission (FFM) appointed by the UNHRC's President to investigate 'the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State'. The resolution requested the FFM to present to the UNHRC an update at its thirty-sixth session (in September 2017) and a full report at its thirty-seventh session (in March 2018). Second, the UNHRC extended the mandate of the Special Rapporteur on the situation of human rights in Myanmar, first established in 1992 and extended annually, for yet another year. Through this resolution, the UNHRC called upon the Myanmar government to cooperate with both the FFM and the Special Rapporteur.²⁰

Six weeks later, Aung San Suu Kyi stated that she and others in the Myanmar government 'do not agree' with the UN's investigation of the state, explaining: 'We have disassociated ourselves from the [UNHRC] resolution because we do not think that the resolution is in keeping with what is actually happening on the ground.'²¹ In June 2017, Aung San Suu Kyi blamed the FFM

19 For background on human rights violations in Myanmar, see e.g. Z.D. Kaufman, 'Give the Nobel Peace Prize Posthumously', *Foreign Policy*, 5 October 2017, available online at <http://foreignpolicy.com/2017/10/05/give-the-nobel-peace-prize-posthumously/>; 'The Rohingya Refugee Crisis is the Worst in Decades', *Economist*, 21 September 2017, available online at <https://www.economist.com/blogs/graphicdetail/2017/09/daily-chart-13>; M. Specia, 'How Years of Strife Grew Into a Rohingya Crisis', *New York Times*, 14 September 2017, at A6; Press Release, U.S. Senator Ben Cardin, Cardin Labels Burmese Rohingya Crisis 'Genocide', Presses Administration for Answers, 24 October 2017, available online at <https://www.cardin.senate.gov/newsroom/press/release/cardin-labels-burmese-rohingya-crisis-genocide-presses-administration-for-answers> (websites visited 12 December 2017).

20 Human Rights Council Res. 34/22, UN Doc. A/HRC/34/22, 3 April 2017; see also Human Rights Council Res. 34/L.8, UN Doc. A/HRC/34/L.8/Rev.1, 22 March 2017; United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Decides to Dispatch a Fact-Finding Mission to Myanmar to Establish Facts on Violations, Especially in Rakhine State*, 24 March 2017, available online at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21443&LangID=E>; United Nations Office of the High Commissioner for Human Rights, *Special Rapporteur on the Situation of Human Rights in Myanmar*, available online at <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx> (websites visited 12 December 2017).

21 'Aung San Suu Kyi Rejects UN Inquiry into Crimes Against Rohingya', *Guardian*, 2 May 2017, available online at <https://www.theguardian.com/world/2017/may/03/aung-san-suu-kyi-rejects-un-inquiry-into-crimes-against-rohingya> (visited 12 December 2017).

for creating ‘greater hostility between the different communities’ in Myanmar; other officials in Myanmar also declared that their government would refuse to grant entry visas for the FFM’s members.²²

While the UN pursued its own investigation, two commissions initiated by the Myanmar government itself published their own findings in August 2017. On 8 August, the Investigation Commission for Maungdaw in Rakhine State published a summary of its final report, which either rejected allegations outright or stated that further investigation was required. Two weeks later, the Advisory Commission on Rakhine State, chaired by former UNSG Kofi Annan, published its final report, which did not investigate human rights violations but did recommend measures to address structural issues undermining prospects for peace, justice and development in Rakhine State.²³ Neither of these two commissions has adequately documented the massive human rights violations perpetrated against the Rohingya.²⁴

On 19 September 2017, during the UNHRC’s thirty-sixth session, Marzuki Darusman delivered his first address to the UNHRC in his capacity as the FFM’s chair. He stated that the FFM decided to focus on events since 2011, when a ceasefire in northern Myanmar broke down and inter-ethnic tensions heightened, leading to large-scale violence in the region in 2012. He summarized alleged human rights violations in Myanmar and requested that the government grant him and other members of the FFM access to Myanmar’s territory in order to investigate properly. Darusman also urged the Myanmar government to release the full final report of the ‘Investigation Commission for Maungdaw in Rakhine State’ so that the FFM could assess its work. In addition, Darusman stated that, given the escalating situation, it was unlikely that the FFM would be able to fulfil its mandate by March 2018.²⁵

D. Burundi

Since Pierre Nkurunziza’s controversial decision in April 2015 to run for a third term as president of Burundi, hundreds of people there have been killed, thousands have been arbitrarily imprisoned, and hundreds of thousands have fled

22 ‘Myanmar Refuses Visas to UN Team Investigating Abuse of Rohingya Muslims’, *Guardian*, 30 June 2017, available online at <https://www.theguardian.com/world/2017/jun/30/myanmar-refuses-visas-un-abuse-rohingya-muslims>; Human Rights Watch, ‘UN: Myanmar’s Threat to Block Fact-Finding Mission’, 3 August 2017, available online at <https://www.hrw.org/news/2017/08/03/un-myanmars-threat-block-fact-finding-mission> (websites visited 12 December 2017).

23 Advisory Commission on Rakhine State, *Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine* (2017), available online at <http://www.rakhinecommission.org/the-final-report/> (visited 12 December 2017).

24 See e.g. ‘Myanmar may be Seeking to Expel All Rohingya, Says UN’, *Guardian*, 13 March 2017, available online at <https://www.theguardian.com/world/2017/mar/14/myanmar-may-be-seeking-to-expel-all-rohingya-says-un> (visited 12 December 2017).

25 Human Rights Council 36th Session, 19 September 2017 (statement of Marzuki Darusman, Chairperson of the Independent International Fact-Finding Mission on Myanmar), available online at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22099&LangID=E> (visited 12 December 2017).

to neighbouring states.²⁶ On 25 April 2016, the ICC opened a preliminary examination into the situation in Burundi dating back to the previous April.²⁷ (Burundi had ratified the ICC's underlying treaty, the Rome Statute, in 2004.²⁸)

On 30 September 2016, the UNHRC established the Commission of Inquiry on Burundi (Burundi COI), with a one-year mandate, to investigate 'human rights violations and abuses in Burundi since April 2015'. The UNHRC directed the Burundi COI to present oral briefings at its thirty-fourth (in February to March 2017) and thirty-fifth (in June 2017) sessions, and a final report at its thirty-sixth session (in September 2017). Through this resolution, the UNHRC called upon the Burundi government to cooperate with the Burundi COI. Burundi, which was serving on the UNHRC at the time, voted against the resolution.²⁹ The following month, Burundi announced its decision to withdraw from the Rome Statute.³⁰

Just under a year later, on 19 September 2017, the chair of the Burundi COI, Fatsah Ouguerouz, presented his final report to the UNHRC, stating the Commission's belief 'that serious human rights violations and abuses have been committed in Burundi since April 2015 and that some are continuing to this day', including 'arbitrary arrests and detention, acts of torture and cruel, inhuman or degrading treatment, extrajudicial executions, enforced disappearances, rape and other acts of sexual violence'. Ouguerouz accused the Burundian National Intelligence Service, police, and army, as well as armed opposition groups, of committing human rights abuses. Moreover, Ouguerouz reported the Burundi COI's contention that some of the human rights violations constitute crimes against humanity. The Burundi COI compiled a partial list of alleged perpetrators of these atrocity crimes, provided it to the UN High Commissioner for Human Rights, and recommended that the ICC open an investigation into possible crimes against humanity committed in Burundi since April 2015. Ouguerouz lamented the lack of cooperation

26 For background on human rights violations in Burundi, see e.g. Human Rights Watch, *Burundi: Abductions, Killings, Spread Fear*, 25 February 2016, available online at <https://www.hrw.org/news/2016/02/25/burundi-abductions-killings-spread-fear>; B. Jeannerod, *Burundi, A Country of Fear and Violence*, Human Rights Watch, 22 November 2016, available online at <https://www.hrw.org/news/2016/11/22/burundi-country-fear-and-violence>; N. Cumming-Bruce, 'Burundi Leaders Faulted in Crimes on Humanity', *New York Times*, 5 September 2017, at A9; United Nations Refugee Agency, *Number Fleeing Burundi to Neighbouring Countries Tops 300,000*, 23 September 2016, available online at <http://www.unhcr.org/en-us/news/latest/2016/9/57e535d26/number-fleeing-burundi-neighbouring-countries-tops-300000.html> (websites visited 12 December 2017).

27 International Criminal Court, *Burundi*, <https://www.icc-cpi.int/burundi> (visited 12 December 2017) (hereafter ICC-Burundi).

28 *Ibid.*

29 Human Rights Council Res. 33/24, UN Doc. A/HRC/RES/33/24, 5 October 2016; see also United Nations Office of the High Commissioner for Human Rights, *Commission of Inquiry on Burundi*, available online at <http://www.ohchr.org/EN/HRBodies/HRC/CoIBurundi/Pages/CoIBurundi.aspx> (visited 12 December 2017).

30 'Burundi Notifies U.N. of International Criminal Court Withdrawal', *Reuters*, 26 October 2016, available online at <https://www.reuters.com/article/us-burundi-icc/burundi-notifies-u-n-of-international-criminal-court-withdrawal-idUSKCN12Q287> (visited 12 December 2017).

from Burundi, a member of the UNHRC, including that Burundi refused to grant Commission members access to its territory.³¹

Nine days later, on 28 September, the UNHRC decided to dispatch a three-person team of experts to investigate human rights violations in Burundi.³² The following day, the UNHRC extended the Burundi COI's mandate for another year. Burundi, still a member of the UNHRC, voted against this resolution as well.³³ Burundi opposes the Commission's existence and operation, rejects its report of 19 September 2017, and resists cooperating with the UNHRC.³⁴

As planned, on 27 October, Burundi's withdrawal from the Rome Statute took effect, making Burundi the first state to formally pull out of the ICC.³⁵ As was revealed later, two days before Burundi's withdrawal, the ICC authorized an investigation in the state during the relevant period while it was still a member of the Court: from 26 April 2015 until 26 October 2017.³⁶

E. Yemen

Since 2014, when civil conflict erupted in Yemen, and 2015, when Saudi Arabia and other Arab states intervened, violence, disease and food insecurity have engulfed Yemen. The Saudi-led coalition's airstrikes have killed or injured civilians and damaged Yemen's infrastructure, including hospitals and sewage facilities. Houthi rebels and their allied forces have laid banned antipersonnel landmines, abused detainees and indiscriminately shelled civilian areas. More than half a million cases of suspected cholera and approximately two thousand associated deaths have been reported. Nearly two million children are acutely

31 Human Rights Council 36th Session, 19 September 2017 (statement of Fatsah Ouguerouz, Chair, Commission of Inquiry on Burundi), available online at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIBurundi/ReportHRC36/OralBriefing19Sept2017.EN.pdf> (visited 12 December 2017).

32 United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Decides to Dispatch an Expert Team to Investigate Human Rights Violations in Burundi*, 28 September 2017, available online at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22180&LangID=E> (visited 12 December 2017).

33 Human Rights Council Res. 36, UN Doc. A/HRC/36/L.9/Rev. 1, 29 September 2017; see also United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Extends Mandate of Commission of Inquiry on Burundi*, 29 September 2017, available online at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22183&LangID=E> (visited 12 December 2017).

34 T. Miles, 'Burundi Loses Bid to Stop U.N. Atrocities Investigations', *Reuters*, 29 September 2017, available online at <http://www.reuters.com/article/us-burundi-un/burundi-loses-bid-to-stop-u-n-atrocities-investigation-idUSKCN1C418O?il>; L.J. Manishatse, 'Human Rights Council Adopts Two Resolutions on Burundi', *IWACU*, 30 September 2017, available online at <http://www.iwacu-burundi.org/englishnews/human-rights-council-adopts-two-resolutions-on-burundi/> (websites visited 12 December 2017).

35 J. Moore, 'Trying to Sidestep a Potential Scandal, Burundi Quits International Criminal Court', *New York Times*, 28 October 2017, at A4.

36 ICC-Burundi, *supra* note 27; International Criminal Court, *ICC Judges Authorise Opening of an Investigation Regarding Burundi Situation*, 9 November 2017, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1342> (visited 12 December 2017).

malnourished, and more than ten million people require immediate assistance. The heads of three UN agencies (the UN Children's Fund, the World Food Program and the World Health Organization) have jointly referred to Yemen as 'the world's largest humanitarian crisis', as has Human Rights Watch.³⁷

On 29 September 2017 (the same day the UNHRC extended the mandate of the Burundi COI), the UNHRC adopted a resolution requesting the UN High Commissioner for Human Rights to establish, by the end of the year, 'a Group of International and Regional Experts' to monitor and report on human rights violations in Yemen since September 2014. The UNHRC authorized the creation of this expert group after declining to adopt a draft resolution that would have established an international COI for Yemen. The UNHRC directed the expert group to present a written report to the High Commissioner by the UNHRC's thirty-ninth session (in September 2018).³⁸

3. Sponsors

The specific UN component sponsoring each of the five investigations introduced in Part 2 varied in ways that are relevant to their operations and outcomes. The UNSC established the investigative team for Iraq; the UNGA formed the IIIM for Syria; and the UNHRC created the Syria and Burundi COIs, dispatched the FFM for Myanmar, and authorized the expert groups for Burundi and Yemen.

That the investigation of international law violations has proceeded in the UNSC only for Iraq is unsurprising. A UNSC-backed option was not possible in the other four states because they did not provide their consent. The governments or other forces in control of Syria, Burundi, Myanmar and Yemen have

37 For background on the humanitarian crisis in Yemen, see e.g. S. Almosawa et al., "It's a Slow Death": The World's Worst Humanitarian Crisis', *New York Times*, 23 August 2017, available online at <https://www.nytimes.com/interactive/2017/08/23/world/middleeast/yemen-cholera-humanitarian-crisis.html>; J. Fisher, *UN's Top Human Rights Body Should Establish Yemen Inquiry*, Human Rights Watch, 25 September 2017, available online at <https://www.hrw.org/news/2017/09/25/uns-top-human-rights-body-should-establish-yemen-inquiry>; Human Rights Watch, *Yemen: Events of 2016*, available online at <https://www.hrw.org/world-report/2017/country-chapters/yemen>; *Statement by UNICEF Executive Director, Anthony Lake, WFP Executive Director, David Beasley and WHO Director-General, Dr. Tedros Adhanom Ghebreyesus, Following Their Joint Visit to Yemen*, 26 July 2017, available online at <https://reliefweb.int/report/yemen/statement-unesf-executive-director-anthony-lake-wfp-executive-director-david-beasley> (websites visited 12 December 2017).

38 United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Concludes Thirty-Sixth Session After Adopting 33 Resolutions and a Presidential Statement*, 29 September 2017, available online at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22189&LangID=E>; see also N. Cumming-Bruce, 'U.N. Arm Agrees to Send Team to Examine Yemen', *New York Times*, 30 September 2017, at A9 (hereafter Cumming-Bruce, 'UN Examine Yemen'); Amnesty International, *UN: Breakthrough Resolution Establishes Expert Group to Investigate Violations in Yemen*, 29 September 2017, available online at <https://www.amnesty.org/en/latest/news/2017/09/un-breakthrough-resolution-establishes-expert-group-to-investigate-violations-in-yemen/> (websites visited 12 December 2017).

all been accused of perpetrating atrocity crimes,³⁹ and thus predictably have objected to or would oppose any UN effort to hold themselves or their supporters accountable. Concerned about violations of sovereignty, Russia and China have thus blocked meaningful accountability efforts through the UNSC. Russia's obstructionism in the case of Syria⁴⁰ (to the tune of nine vetoes of relevant UNSC resolutions to date⁴¹) is likely further driven by the fact that Vladimir Putin's administration is Syria's greatest ally and accused co-conspirator.⁴² Neither Russia, China, nor any other state can veto initiatives of the UNGA or the UNHRC, enabling those institutions to be viable sponsors of investigations in Syria, Myanmar, Burundi, and Yemen.

Iraq, on the other hand, fully consented to a UN investigation, albeit on its own terms. In mid-August 2017, Iraqi Foreign Minister al-Jaafari sent a letter to the UNSC president requesting 'the international community to provide assistance, so that we can make use of international expertise in our effort to prosecute the terrorist entity ISIL' and noting that his government would work with the UK to present a relevant draft UNSC resolution.⁴³ At the same time, al-Jaafari stressed that 'Iraq must maintain its national sovereignty and retain jurisdiction, and its laws must be respected, both when negotiating and implementing the resolution'.⁴⁴ UNSC resolution 2379 faithfully fulfils al-Jaafari's requirement of protecting Iraq's sovereignty. The preamble reaffirms the UNSC's 'respect for the sovereignty, territorial integrity and unity of Iraq',⁴⁵ and an operative paragraph '[u]nderscores that the Investigative Team shall operate with full respect for the sovereignty of Iraq and its jurisdiction over crimes committed in its territory'.⁴⁶ To reinforce this principle when explaining their support for the resolution, the ambassadors to the UN of China,

39 In the case of Yemen, I am referring to the Houthi rebels that captured much of the state, including the capital, Sanaa. See e.g. Human Rights Watch, *Yemen: No Accountability for War Crimes*, 12 January 2017, available online at <https://www.hrw.org/news/2017/01/12/yemen-no-accountability-war-crimes> (visited 12 December 2017).

40 S. Sengupta, 'China and Russia Block Referral of Syria to Court', *New York Times*, 23 May 2014, at A3; UN SCOR, 68th Sess., 7180th mtg., UN Doc. S/PV.7180, 22 May 2014.

41 R. Gladstone, 'Russia Blocks Move at U.N. to Extend Syria Inquiry', *New York Times*, 25 October 2017, at A6; L. Loveluck, 'Russia Vetoes U.N. Efforts to Extend Syria Probe', *Washington Post*, 25 October 2017, at A12.

42 Human Rights Watch, *Russia / Syria: War Crimes in Month of Bombing Aleppo*, 1 December 2016, available online at <https://www.hrw.org/news/2016/12/01/russia/syria-war-crimes-month-bombing-aleppo> (visited 12 December 2017).

43 UN Security Council, *Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council*, UN Doc. S/2017/710, 16 August 2017 ('UNSC Letter 14/8/17'); see also Riham Alkousaa, 'Iraq Seeks International Help to Investigate Islamic State Crimes', *Reuters*, 16 August 2017, available online at <https://www.reuters.com/article/us-mideast-crisis-iraq-un/iraq-seeks-international-help-to-investigate-islamic-state-crimes-idUSKCN1AW2E7>.

44 UNSC Letter 14/8/2017, *supra* note 43.

45 SC Res. 2379, at preamble.

46 *Ibid.* § 5.

Bolivia and Ethiopia all stressed the importance of maintaining Iraq's sovereignty.⁴⁷

Given the UNSC's primary responsibility for 'the maintenance of international peace and security',⁴⁸ and thus the UNSC's additional enforcement powers relative to other UN bodies, the investigative team for Iraq is inherently stronger than its counterparts created by the UNGA and the UNHRC. Perhaps if the UNSC, with its enforcement capability, had sponsored the investigative bodies for Burundi and Myanmar instead of the UNHRC, then those two states would not have blocked UN investigators from entering.

A development in August 2017 further underscores the role the UNSC plays in accountability for atrocity crimes, even when it is not the sponsor of an investigative body. On 6 August, Carla del Ponte, former chief prosecutor of the UN International Criminal Tribunals for Rwanda and for the former Yugoslavia as well as one of the three members of the Syria COI, resigned from the latter in frustration over the body's lack of progress. She stated: 'I give up. The states in the Security Council don't want justice I can't any longer be part of this commission which simply doesn't do anything.'⁴⁹ She added: 'It was all about the inaction of the Security Council because if you look at all the reports we have published, we have obtained nothing in terms of injustice.'⁵⁰ Even though it was the UNHRC that created the Syria COI, del Ponte's condemnation of the UNSC is telling. Her words suggest that the UNSC is ultimately responsible for accountability in Syria because it is considered the dominant actor in this space. Investigative bodies established outside the UNSC are relatively weak.

Just as one can compare the relative strength of UN investigative bodies based on whether they are sponsored by the UNSC, so too can one assess the relative strength of UN investigative bodies outside the UNSC. Multiple types of investigative bodies exist even just within the UNHRC, including COIs, FFMs, and expert groups. COIs are the UNHRC's strongest investigative tool.⁵¹ That the governments of Saudi Arabia and Burundi sought to avoid the creation of COIs for Yemen and Burundi, respectively, and instead supported

47 Security Council Press Release, *Security Council Requests Creation of Independent Team to Help in Holding ISIL (Da'esh) Accountable for its Actions in Iraq*, UN Press Release SC/12998, 21 September 2017 (summarizing diplomats' statements).

48 Art. 24(1) UN Charter.

49 M. Kennedy, 'I Give Up': Top War Crimes Expert Resigns from U.N.'s Syria Inquiry', *National Public Radio*, available online at <http://www.npr.org/sections/thetwo-way/2017/08/07/542034643/-i-give-up-frustrated-war-crimes-expert-resigns-from-u-n-syria-inquiry> (visited 12 December 2017) (quoting Del Ponte).

50 P. Wintour, 'UN Syria Investigator Quits over Concern about Russian Obstruction', *Guardian*, 7 August 2017, available online at <https://www.theguardian.com/world/2017/aug/07/we-are-powerless-un-syria-investigator-carla-del-ponte-quits-over-lack-of-political-backing> (visited 12 December 2017) (quoting Del Ponte).

51 F. Solomon, 'The U.N. has Agreed to Investigate Myanmar's Alleged Abuse of Rohingya', *Time*, 23 March 2017, available online at <http://time.com/4710430/myanmar-rohingya-human-rights-council-probe/> (visited 12 December 2017) (identifying COIs as the UNHRC's 'most powerful investigative tool').

expert groups as a weaker, compromise option,⁵² underscores the relative strength of these two mechanisms within the UNHRC. And that Saudi Arabia—a regional power in the Middle East that reportedly threatened to retaliate against states that supported a COI for Yemen⁵³—achieved its preferred outcome, while Burundi did not, suggests that a relatively strong, aggressive state may be able to insist on a particular type of investigative body when it cannot prevent an investigation altogether.

4. Scopes

The investigative bodies for Syria, Myanmar, Burundi and Yemen do not focus on any specific suspected group of atrocity crime perpetrators. In contrast, by the terms of UNSC resolution 2379, the investigative team for Iraq must concentrate exclusively on ISIS. Yet other groups within Iraq are also suspected of committing serious human rights violations. US Senator Patrick Leahy⁵⁴ and HRW⁵⁵ have accused Iraqi and/or Kurdistan Regional Government forces of committing abuses, but such groups do not fall under the UN investigative team's mandate.

Some observers already are criticizing the scope of the investigative team for Iraq. The same day the UNSC adopted the resolution, the Global Centre for the Responsibility to Protect lamented 'the limited focus' of the resolution.⁵⁶ The NGO added: 'No voices should be marginalized or silenced in the pursuit of justice in Iraq, including those of Sunni families who have faced sectarian reprisals in territory reclaimed from ISIL.'⁵⁷ (Iraq's Sunni community fears such violence from Shiite militias.⁵⁸) The President of the Global Justice Center likewise declared: 'Only prosecuting Daesh fighters reeks of victor's justice.'⁵⁹

52 Cumming-Bruce, 'UN Examine Yemen,' *supra* note 38; Miles, *supra* note 34.

53 Cumming-Bruce, 'UN Examine Yemen,' *supra* note 38.

54 James Gordon Meek et al., 'US Ignores Evidence of Atrocities by Blacklisted Iraqi Military Unit,' *ABC News*, 31 May 2017, available online at <http://abcnews.go.com/International/us-ignores-evidence-atrocities-blacklisted-iraqi-military-unit/story?id=47745913> (quoting Leahy).

55 See, e.g., Human Rights Watch, *Iraq: Execution Site Near Mosul's Old City*, 19 July 2017, available online at <https://www.hrw.org/news/2017/07/19/iraq-execution-site-near-mosuls-old-city>; Human Rights Watch, *Iraq: Investigate Possible Mosul Abuse*, 13 July 2017, available online at <https://www.hrw.org/news/2017/07/13/iraq-investigate-possible-mosul-abuse>; Human Rights Watch, *Iraq: US-Trained Forces Linked to Mosul War Crimes*, 27 July 2017, available online at <https://www.hrw.org/news/2017/07/27/iraq-us-trained-forces-linked-mosul-war-crimes>.

56 Global Centre for the Responsibility to Protect, *Statement on Today's UN Security Council Resolution on Da'esh Accountability*, 21 September 2017, available online at <http://gcr2p.cmail20.com/t/ViewEmail/j/27D4C5151C4F82092540EF23F30FEDED/9A528AF75E9ECF6C14399806BE9B4083>.

57 *Ibid.*

58 Tim Arango, 'Iraq Celebrates a Win in Mosul as Rifts Widen,' *New York Times*, 11 July 2017, at A1.

59 Global Justice Center Press Release, 'UN Security Council Adopts Resolution – One Step Towards Justice for the Yazidi Genocide,' 21 September 2017, available online at <http://globaljusticecenter.net/press-center/press-releases/832-un-security-council-adopts-resolution-one-step-towards-justice-for-the-yazidi-genocide>.

Similarly, HRW denounced the resolution as ‘flawed,’ ‘shortsighted’ and ‘selective,’ claiming that the UNSC failed to include ‘abuses by Iraqi and international forces’ within the investigative team’s mandate.⁶⁰ HRW thus recommended broadening ‘the investigations to includes abuses by all sides in the conflict.’⁶¹

It is no coincidence that the investigative team for Iraq is constrained in its mandate and that this team is the only UN investigative body discussed in this article to which the relevant domestic government or controlling power consented. The Iraqi government presumably would not have agreed if UNSC resolution 2379 had included an investigation of offenses allegedly perpetrated by the Iraqi government itself. The investigative body for Iraq is thus the only one authorized by the UNSC *precisely* because it is the only one with a mandate that specifies its (non-state actor) target a priori. Even though, among all of the combatants, ISIS has been accused of committing the most heinous offenses in Iraq, that the corresponding UN investigation is not agnostic as to suspects will cause it to overlook other serious human rights abuses. Consequently, non-ISIS human rights violators in Iraq may be left undeterred and unpunished. Victims of such offenses will predictably and understandably feel injustice, fomenting grievances that could lead to cycles of enmity and violence.⁶²

5. Questions about the Investigations

This part poses questions about the investigations, including their operation, number, types, precedential value and product.

A. Operation of Investigations

Each investigative body faces similar logistical questions. What will be each probe’s overall cost? Which states will provide financial and technical support? Will their staff be as frustrated as del Ponte was about the Syria COI? Which courts (domestic, foreign, international and/or hybrid) will use the evidence collected, preserved and stored by the investigative teams? Will prosecutions meet internationally recognized due process standards? More generally, which transitional justice measures⁶³ — besides the investigation and prosecution of

60 Human Rights Watch, *Iraq: Missed Opportunity for Comprehensive Justice*, 21 September 2017, available online at <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice>.

61 *Ibid.*

62 See, e.g., Martha Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton University Press, 2002).

63 For an overview of transitional justice measures, see Zachary D. Kaufman, *United States Law and Policy on Transitional Justice: Principles, Politics, and Pragmatics* (Oxford University Press, 2016), at 21–40.

suspected international law violations — will be implemented in, or at least for, each state?

Some of the investigative bodies face specific operational questions. Regarding Iraq, will the investigative team's mandate eventually expand to include international law violations perpetrated in the state by groups other than ISIS?

B. Number of Investigations

Not only do the UN investigations described in Part 2 occur concurrently across five states (Iraq, Syria, Myanmar, Burundi and Yemen), but some of these investigations also operate at the same time within states (e.g. the COI and IIIM for Syria; the COI and expert group for Burundi) or simultaneously focus on the same group of atrocity perpetrators (e.g. ISIS). What, if any, significance is there in the UN's contemporaneous attention to so many states consumed by international law violations? At the very least, the trend indicates the need for international action in the face of widespread human rights abuses. But do the international community's responses reflect sincere attempts to address abuses, or are these investigations merely relatively uncontroversial window-dressing? Does the UN's establishment of multiple investigative bodies for the same state or group of atrocity perpetrators suggest an even more genuine interest in addressing those situations, concern about the shortcomings of the earlier mechanisms in each case, or a reflection of the particular complexity of a situation (e.g. Syria is the locus of both a civil war and ISIS-perpetrated atrocity crimes)? Where multiple UN investigative bodies are focusing on the same state or group of atrocity perpetrators, will they cooperate? What will happen if these multiple investigative bodies for the same situation collect conflicting evidence? And will the mere creation of these investigative bodies deter future international law violations within their corresponding states and beyond?

C. Types of Investigations

The investigations initiated for the five states discussed in this article represent four types of inquiries. One category is government-initiated probes, as in Myanmar's Investigation Commission for Maungdaw in Rakhine State. A second category is inquiries initiated by the UNGA, as for Syria. A third category is investigations initiated by the UNHRC. This category features multiple sub-categories: FFMs (as in Myanmar), expert groups (as in Burundi and Yemen) and COIs (as in Burundi and Syria). A final category is examinations initiated by the UNSC, as for Iraq. Given the UNSC's enforcement power, do the three categories of inquiries not sponsored by that body still hold value for the genuine pursuit of justice or are they feeble fallbacks in the absence of international consensus through the UNSC? Is the proliferation of investigative bodies a sign of strength and creativity or weakness and superficiality in the

pursuit of accountability? Alternatively, is backing by the UNSC overvalued, given that body's failure to add teeth to other accountability measures it has supported, such as the referral of Darfur to the ICC?⁶⁴

D. Precedential Value of Investigations

These investigations raise questions about the precedents set by their specific mandates. UNSC resolution 2379's preamble emphasizes that ISIS 'constitutes a global threat to international peace and security' and is a 'terrorist group'.⁶⁵ Will the international community also pursue atrocity prevention and accountability through the UNSC even where suspected perpetrators do not constitute a global threat or qualify as terrorist organizations? If, for example, Myanmar is indeed engulfed in genocide, as so many believe, why should the UNSC not be as concerned and engaged there as it is in Iraq, where so many have also identified genocide? Given how Myanmar is hampering the UNHRC-sponsored investigation, greater involvement by the UNSC in that situation could be helpful.

These investigations also raise questions about the precedents set by their general success. If some of these bodies fail to fulfil their mandates, will the UN seek to strengthen them or will the UN abandon them as anaemic accountability mechanisms in the face of power politics?

E. Product of Investigations

How will each UN investigation collect, preserve, and store evidence? As Andras Vamos-Goldman, Executive Director of Justice Rapid Response, has rightly asked, how will documenters ensure that such evidence is gathered in a way that will be admissible in whichever court(s) ultimately use the evidence? This question is fraught because documenters do not know the rules of procedure and evidence that will govern the information they collect and because there is no commonly accepted set of such rules.⁶⁶ Will the proliferation of these investigative bodies lead to the creation of such common standards?

UNSC resolution 2379 states that the investigative team for Iraq should collect, preserve, and store evidence 'to the highest possible standards'⁶⁷ and that

64 On 31 March 2005, the UNSC referred the situation in Darfur, Sudan, to the ICC. Security Council Press Release, *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court* UN Press Release SC/8351, 31 March 2005. Subsequently, the ICC Prosecutor and others have criticized the ICC for not helping to bring to justice individuals, including Sudanese President Omar al-Bashir, indicted by the ICC for atrocity crimes in Darfur. See e.g. UN Security Council, 7710th mtg., UN Doc. SC/12393, 9 June 2016, available online at <https://www.un.org/press/en/2016/sc12393.doc.htm> (visited 12 December 2017).

65 SC Res. 2379, 21 September 2017, at preamble.

66 A. Vamos-Goldman, 'The Importance of Professional Expertise in Gathering Evidence of Mass Atrocities', *Just Security*, 27 October 2017, available online at <https://www.justsecurity.org/46355/rules-govern-evidence-gathering-conflict-zones/> (visited 12 December 2017).

67 SC Res. 2379, at § 2.

the evidence should be used ‘in fair and independent criminal proceedings, consistent with applicable international law’.⁶⁸ While the resolution emphasizes the importance of internationally recognized due process standards, the specific prosecutorial fora are critical unknowns. The resolution states, in paragraph five (which emphasizes Iraq’s ‘jurisdiction over crimes committed in its territory’), that the evidence should be used in criminal proceedings ‘conducted by competent national-level courts, with the relevant Iraqi authorities as the primary intended recipient’.⁶⁹ Will those anticipated prosecutions within Iraq meet internationally recognized due process standards? The resolution also allows for evidence to be used as ‘determined in agreement with the Government of Iraq on a case by case basis’.⁷⁰ Some have interpreted that language to include the possibility of use by international courts.⁷¹ A hybrid tribunal (as has been employed for Bosnia and Herzegovina, Cambodia, Kosovo, Lebanon, Sierra Leone and Timor Leste⁷²) — combining lawyers, judges, and other professionals from both Iraq and the international community — might be another option. Indeed, there is precedent for such a mixed court in Iraq. The Iraqi High Tribunal, which some consider a hybrid body,⁷³ tried Saddam Hussein and certain members of his regime.⁷⁴

68 *Ibid.*, at § 5.

69 *Ibid.*

70 *Ibid.*

71 M. Nichols, ‘U.N. Team to Collect Evidence of Islamic State Crimes in Iraq’, *Reuters*, 21 September 2017, available online at <https://www.reuters.com/article/us-mideast-crisis-iraq-un/u-n-team-to-collect-evidence-of-islamic-state-crimes-in-iraq-idUSKCN1BW26J> (visited 12 December 2017).

72 For an overview of hybrid war crimes tribunals, see e.g. K. Ambros and M. Othman (eds), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone, and Cambodia* (Max Planck Institute for Foreign and International Criminal Law, 2003); C.P.R. Romano, A. Nollkaemper, and J.K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, 2004); Kaufman, *supra* note 63, at 21–40; S. Williams, *Internationalized Criminal Courts and Tribunals: Selected Jurisdictional Issues* (Hart, 2012); L. Dickinson, ‘The Promise of Hybrid Courts’, 97 *American Journal of International Law* (2003) 295; L. Dickinson, ‘Transitional Justice in Afghanistan: The Promise of Mixed Tribunals’, 31 *Denver Journal of International Law and Policy* (2002) 23; E.R. Higonnet, ‘Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform’, 23 *Arizona Journal of International and Comparative Law* (2006) 347; S. Katzenstein, ‘Hybrid Tribunals: The Search for Justice in East Timor’, 16 *Harvard Human Rights Journal* (2003) 245; S.M.H. Nouwen, ‘Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts’, 2 *Utrecht Law Review* (2006) 190; W.A. Schabas, ‘The Special Tribunal for Lebanon: Is a “Tribunal of an International Character” Equivalent to an “International Criminal Court”?’ 21 *Leiden Journal of International Law* (2003) 513; S. Williams, ‘Hybrid International Criminal Tribunals’, *Oxford Bibliographies*, 28 April 2014, available online at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml>; United Nations, *International and Hybrid Criminal Courts and Tribunals*, <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/> (websites visited 12 December 2017).

73 See e.g. Chatham House, *The Iraqi Tribunal: The Post-Saddam Cases* (2008), available online at <https://www.chathamhouse.org/sites/files/chathamhouse/field/document/Discussion%20Group%20Summary%20The%20Iraqi%20Tribunal.pdf> (visited 12 December 2017).

74 For an overview of the Iraqi High Tribunal and trial of Saddam Hussein, see e.g. M.A. Newton and M.P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (St Martin’s

Where, unlike in Iraq, the government is uncooperative with the relevant UN investigation, the forum and likelihood of justice are even less clear. In the other four states, evidence collected, preserved, and stored by the relevant UN investigative bodies may ultimately be used by one or a combination of domestic, foreign, international or hybrid courts. Each context will dictate the ultimate transitional justice mechanism. For example, given that Burundi has withdrawn from the Rome Statute, will the ICC use evidence collected by the Burundi COI and expert group? As another example, given that Syria has not ratified the Rome Statute, and Russia and China have blocked a referral of the situation from the UNSC to the ICC, the ICC does not appear to be a viable option for promoting justice in that state. At least for now, the only individuals likely to face prosecution for perpetrating atrocity crimes in Syria are lower-level offenders who have fled abroad.⁷⁵ Some European states, such as Sweden and Germany, already are arresting, prosecuting and convicting such perpetrators.⁷⁶

6. Implications

This part considers implications of the investigations, including for the ICC, genocide accountability, state cooperation and the Trump Administration's commitment to human rights.

A. *Future of the International Criminal Court*

The proliferation of investigative bodies suggests that, while the international community seeks accountability for atrocities, it does not necessarily view the ICC as the default or desired avenue. Components of the UN apparently believed that the violations of international law in Iraq, Syria, Myanmar, Burundi and Yemen were serious enough to warrant sponsoring investigations outside the ICC. Yet, in no case, at least at the time of this writing, has the UNSC referred the situation to the ICC. (That said, UN investigative bodies for both Syria and Burundi have recommended that the ICC take up each situation.) Will the outcome of investigations regarding any of these five states result in a UNSC referral to the ICC? If not, which alternative accountability mechanisms will the UNSC support, if any, and are the parameters of each

Press, 2008); M.P. Scharf and G.S. McNeal, *Saddam on Trial: Understanding and Debating the Iraqi High Tribunal* (Carolina Academic Press, 2006).

75 B. Taub, 'Does Anyone in Syria Fear International Law?' *New Yorker*, 31 August 2016, available online at <https://www.newyorker.com/news/news-desk/does-anyone-in-syria-fear-international-law> (visited 12 December 2017).

76 Human Rights Watch, *Syria: First Atrocities Trials Held in Europe*, 3 October 2017, available online at <https://www.hrw.org/news/2017/10/03/syria-first-atrocities-trials-held-europe> (visited 12 December 2017).

UN investigation intentionally designed to sidestep the ICC?⁷⁷ If the ICC does not prosecute suspected atrocity perpetrators in these five states, which are sites of the worst humanitarian crises in the world today, will the Court's already damaged credibility erode even more and will its role in international affairs be further questioned?

B. Accountability for Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) obligates states parties, including the United States,⁷⁸ 'to prevent and to punish' genocide.⁷⁹ The immediate past and current US Secretaries of State as well as many other officials and experts have characterized crimes against Yazidis, Christians and Shia Muslims as 'genocide'. Similarly, the US Senate Foreign Relations Committee's Ranking Member and other experts have characterized crimes against the Rohingya as 'genocide'. Will states parties to the Genocide Convention that agree with these determinations seek to fulfil their obligations under the treaty 'to prevent and to punish' such genocides?⁸⁰ And will such states use or collaborate with the UN investigations in Iraq, Syria and Myanmar to do so?

C. Cooperation of States

Will Myanmar and Burundi brazenly continue to refuse cooperation with the UNHRC investigations in those states? If so, will the UNSC, with its relatively stronger mandate, authorize and enforce an investigation, as it has done in Iraq? How will the UN's credibility be impacted if Myanmar and Burundi thwart such investigations?

In the particular case of Burundi, the unprecedented act of a state withdrawing from the Rome Statute after the ICC opened an investigation

77 K. Curtis, 'The World is Sidestepping the International Criminal Court to "Investigate" War Crimes in Yemen and Iraq?' UN Dispatch, 11 October 2017, available online at <https://www.undispatch.com/world-sidestepping-international-criminal-court-investigate-war-crimes-yemen-iraq/> (visited 12 December 2017) (arguing that the international community is sidestepping the ICC in at least the cases of Yemen and Iraq).

78 S.V. Roberts, 'Reagan Signs Bill Ratifying U.N. Genocide Pact', *New York Times*, 5 November 1988, at § 1, 28.

79 Art. I Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 102 Stat. 3045, 78 UNTS 277.

80 In the case of China, some doubt, for economic interests, that it is likely to support a genocide determination in the case of the Rohingya. See, e.g., Azeem Ibrahim, Opinion, 'There's Only One Conclusion on the Rohingya in Myanmar: It's Genocide', *CNN*, 23 October 2017, available online at <http://www.cnn.com/2017/10/23/opinions/myanmar-rohingya-genocide/index.html> (visited 19 December 2017) (noting that China, a party to the Genocide Convention that is constructing a branch of its 'New Silk Road' through Rakhine State to access the port of Sittwe, is likely to veto any UNSC characterization of the situation in Myanmar as 'genocide').

complicates an already challenging situation.⁸¹ Will Burundi cooperate with that investigation, which the Rome Statute requires it to do since the investigation commenced before the effective date of the state's withdrawal?⁸² If not, what, if any, consequences will (or even could) Burundi suffer for violating a treaty from which it has withdrawn?

Will Iraq continue to cooperate with the UNSC investigation within its borders? Would Iraq cease doing so if the investigation unearthed evidence of the Iraq government's own violations of international law? If so, what steps would the UNSC take to enforce resolution 2379?

Regarding Syria, if Assad leaves or is removed from power and his successor consents, would the UNSC set up an investigative mechanism for the state? Or would the Putin Administration's alliance with, and suspected crimes alongside, the Assad regime lead Russia even then to continue vetoing any meaningful UNSC accountability actions?

D. Commitment of Trump Administration to Human Rights

The Trump Administration is often criticized for abandoning the US government's traditional commitment to human rights.⁸³ But does the Administration's active support of at least some of the UN investigations mentioned in this article (e.g. Iraq) indicate that it may care about, and work to protect, human rights more than its opponents suggest? Or can the White House's support in such cases be explained better as a means to promote strategic interests rather than values? Perhaps the Trump Administration is merely following what I have argued elsewhere is the US government's traditional approach to transitional justice: balancing principles, politics and pragmatics.⁸⁴

81 See e.g. Amnesty International, *Burundi: Cynical ICC Withdrawal Will Not Derail Wheels of Justice*, 27 October 2017, available online at <https://hrj.amnesty.nl/burundi-icc-withdrawal/>; K.J. Heller, 'A Dissenting Opinion on the ICC and Burundi', *Opinio Juris*, 29 October 2017, available online at <http://opiniojuris.org/2017/10/29/does-the-icc-still-have-jurisdiction-over-crimes-in-burundi/>; A. Whiting, 'If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?', *Just Security*, 12 October 2016, available online at <https://www.justsecurity.org/33501/burundi-leaves-icc-international-criminal-court-investigate-crimes-there/> (websites visited 12 December 2017).

82 Art. 127 ICCSt.; see also A. Whiting, 'The ICC's New Burundi Investigation: Where is the Court Headed?' *Just Security*, 10 November 2017, available online at <https://www.justsecurity.org/46936/iccs-burundi-investigation-court-headed/> (visited 12 December 2017).

83 See e.g. S. Nossel, 'It's OK that Trump Doesn't Care about Human Rights', *Foreign Policy*, 19 June 2017, available online at <http://foreignpolicy.com/2017/06/19/its-ok-that-trump-doesnt-care-about-human-rights/>; S.B. Snyder, Opinion, 'Is the Trump Administration Abandoning Human Rights?' *Washington Post*, 2 July 2017, available online at <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/is-the-trump-administration-abandoning-human-rights/> (websites visited 12 December 2017).

84 Kaufman, *supra* note 63.

7. Conclusion

While seeking accountability for international law violations is certainly laudatory, the recent, ongoing UN investigations in Iraq, Syria, Myanmar, Burundi and Yemen raise significant questions about achieving that goal amidst rampant human rights abuses there and beyond. International lawyers, atrocity crime survivors and other observers thus await answers before assessing whether these investigations will truly promote justice.

The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide

Beth Van Schaack*

Abstract

The Security Council recently authorized the creation of a new accountability mechanism: an independent, impartial Investigative Team to collect and preserve evidence of the international crimes committed by the Islamic State in Iraq and the Levant (ISIL) in Iraq with an eye towards supporting domestic prosecutorial efforts. Although charged with investigating all atrocity crimes committed by ISIL members, the commission of what many experts consider to be a genocide against the Yazidi people emerged as one of the central motivations for this new and unprecedented initiative. And yet, the proposal has been greeted with some scepticism and has not garnered the full-throated support of many elements of the international community who would ordinarily be advocates for such an effort. For one, observers have noted that the singular focus on the crimes committed by ISIL — as heinous and deserving of censure as they are — overlooks crimes committed by other armed groups involved in the conflict. Further, Iraq's weak judicial system and the central government's insistence on employing the death penalty in any ISIL trial has prevented many abolitionist states from fully backing the measure. This issue prevented the finalization of the mechanism's Terms of Reference, which are necessary for it to begin work. Although the Yazidi people are not monolithic when it comes to their preferences for justice, glaring limitations in the Iraqi legal framework, both substantive and procedural, may not produce results that are acceptable to Yazidi victims' groups. In particular, the Iraqi Penal Code does not incorporate most

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international crimes and its provisions on sexual violence are problematic. This outcome, however, is not inevitable if local authorities are amenable to proposals for legal reform that the Team's experts will inevitably propose as part of their capacity-building mandate. Against the backdrop of a complex and ever-shifting political context, this article explores the potential for the Team, notwithstanding its inherent limitations, to advance prospects for justice for the Yazidi people.

1. Introduction

It is often said that necessity is the mother of invention. This is certainly true when it comes to the imperative to address the systemic commission of international crimes in Syria and Iraq. Given the geopolitical paralysis in the United Nations (UN) Security Council, and the concomitant inability of the International Criminal Court (ICC) to exercise jurisdiction over crimes committed in either territory,¹ the international community has established a range of accountability innovations, both within and outside of the UN. The UN General Assembly (UNGA) took the lead in 2016 with respect to Syria, creating an International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).² Although UNGA has been involved in the past in building justice institutions, it has always been with the consent and participation of the state involved.³ The IIIM is thus significantly more coercive than anything previously conceived in light of the lack of Syrian consent to its creation or operation.

Different dynamics are in play with respect to the Republic of Iraq. In August 2017, following the liberation of Mosul, the Government of Iraq requested assistance from the Security Council in ensuring accountability for international crimes committed by the Islamic State in Iraq and the Levant (ISIL)/Da'esh.⁴

- 1 The ICC has no jurisdiction over either situation *en toto* because neither Iraq nor Syria has ratified the ICC Statute. The Court could conceivably exercise jurisdiction over crimes committed in either state by nationals of ICC States Parties or if the UN Security Council referred the situation to the ICC. See discussion *infra*, 2.B., in notes 33–39.
- 2 GA Res. 71/248, 21 December 2016. Also see, preliminary responses outlining the establishment and aspirations for the IIIM by diplomats and scholars involved in the process, in F. Jeßberger (ed.), 'Current Events: Syria, International Criminal Justice, and the International, Impartial and Independent Mechanism', 15 *Journal of International Criminal Justice* (JICJ) (2017) 209–256.
- 3 The hybrid tribunal for Cambodia, for example, was constituted at the instigation of the General Assembly. See B. Van Schaack, 'The General Assembly & Accountability for International Crimes', Just Security, 27 February 2017, available online at <https://www.justsecurity.org/38145/general-assembly-accountability-international-crimes/> (visited 24 January 2018).
- 4 Yuriy Vitrenko, Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the UN addressed to the President of the Security Council, UN Doc. S/710/2017, 16 August 2017, available online at <https://undocs.org/S/2017/710> (visited 24 January 2018).

The letter indicated a distinct preference for the pursuit of domestic criminal proceedings under Iraqi law, noting:

It is ... important to bring to justice, in accordance with Iraqi law, the members of the terrorist gangs of ISIL who have committed such crimes Iraq must maintain its national sovereignty and retain jurisdiction, and its laws must be respected, both when negotiating and implementing the resolution.⁵

With Iraq's consent in hand, the Security Council was able to reach consensus around the need to promote criminal accountability and moved forward with a resolution that had been tabled by the UK.⁶ In Resolution 2379, the Council asked the Secretary-General to establish an 'Investigative Team', headed by a Special Adviser, to:

support domestic efforts to hold ISIL (Daesh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Daesh) in Iraq, to the highest possible standards ... to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request⁷

The Council called for the drafting of Terms of Reference (ToR) that are 'acceptable to the Government',⁸ giving Baghdad something approaching a veto on the scope of work of what would later become the Iraq Investigative Team (IT). The IT was also directed to coordinate with the Analytical Support and Sanctions Monitoring Team, which the Security Council established in 2004 to monitor the implementation and efficacy of anti-terrorism sanctions,⁹ and other analogous mandated bodies. The latter includes a Fact-Finding Mission (FFM) dedicated to Iraq that emerged from a special session at the

5 *Ibid.* Although a draft of a resolution to create the Investigative Team (IT) was in the works for months, the USA made it clear that any initiative could not realistically move forward without the consent of the government of Iraq. This consent was finally forthcoming in the form of this letter, as earlier urged by human rights lawyer Amal Clooney, who represents a number of Yazidi victims in their quest for justice. P. Walker, 'Amal Clooney: Full Transcript of Human Rights Lawyer's UN Speech on Isis', *The Independent*, 10 March 2017, available online at <http://www.independent.co.uk/news/world/americas/amal-clooney-speech-in-full-transcript-human-rights-lawyer-isis-iraq-speech-un-united-nations-a7622176.html> (visited 24 January 2018). Iraq had resisted the effort on the grounds that it has years of experience prosecuting terrorism crimes.

6 Speech by UK Foreign Secretary Boris Johnson on Bringing Daesh to Justice at the 71st UN General Assembly ministerial week: 'Our Aim Has Got to be Justice for All of Daesh's Victims', 19 September 2016, available online at <https://www.gov.uk/government/speeches/our-aim-has-got-to-be-justice-for-all-of-daeshs-victims> (visited 24 January 2018) ('We are uniting to fight Daesh, and I believe we should unite to bring them to justice.') (hereinafter Johnson Speech). It has been speculated that the UK's keenness to pursue this initiative is an effort to demonstrate an internationally-engaged post-Brexit Britain. It also marks a sharp change in policy since the 2017 London attacks; prior to this point, British policy had been focused on promoting reconciliation rather than accountability.

7 SC Res. 2379, 21 September 2017, § 2.

8 *Ibid.*, §§ 4, 7.

9 SC Res. 1526, 30 January 2017.

Human Rights Council,¹⁰ also convened at the request of the Government of Iraq;¹¹ and the Independent International Commission of Inquiry on the Syrian Arab Republic (Syrian COI), which has been collecting information about ISIL crimes in neighbouring Syria.¹² In addition, the IT will no doubt coordinate with non-governmental documentation organizations and various domestic investigative bodies.¹³

Although charged with investigating all atrocity crimes committed by members of ISIL, the commission of what many experts consider to be a genocide against the Yazidi people emerged as one of the central motivations for the IT's formation.¹⁴ The call for justice for these crimes has been resounding and unrelenting.¹⁵ And yet, this new accountability mechanism — one of the first of its kind¹⁶ — has been greeted with some scepticism and has not garnered the full-throated support of many elements of the international community who would ordinarily be advocates for such an effort. For one, observers have

10 Human Rights Council Res. 22/1, 3 September 2014.

11 Letter dated 26 August 2014 from the Permanent Representative of Iraq to the UN Office at Geneva addressed to the President of the Human Rights Council, UN Doc. A/HRC/S-22/1, 29 August 2014, available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/151/76/PDF/G1415176.pdf?OpenElement> (visited 24 January 2018). The FFM operated from September 2014 to March 2015. See *Report of the Office of the UN High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups*, UN Doc. A/HRC/28/18, 13 March 2015.

12 See The Independent Int'l Commission of Inquiry on the Syrian Arab Republic, '*They Came to Destroy: Isis Crimes Against the Yazidis*', UN Doc. A/HRC/32/CRP.2, 15 June 2016 (hereinafter *They Came to Destroy*).

13 J. Neurink, 'Our Duty is to Record ISIS Crimes against the Kurdish Yazidi', *Rûdaw*, 4 July 2015, available online at <http://www.rudaw.net/english/interview/07042015> (visited 24 January 2018) (interview with principals of the Iraqi Investigation and Gathering Evidence Commission (CIGE) in Duhok).

14 See e.g. *Search Results for 'Yazidis'*, Genocide Watch, available online at <http://genocidewatch.net/?s=yazidi> (visited 15 December 2017) (showing various documents and reports describing a genocide underway).

15 See e.g. E.M. Lederer, 'Amal Clooney Urges World Leaders Not to Let Isis Get Away with Genocide in Passionate Address to UN', *The Independent*, 10 March 2017, available online at <http://www.independent.co.uk/news/world/americas/amal-clooney-isis-genocide-yazidis-iraq-united-nations-security-council-passive-response-nadia-murad-a7621871.html> (visited 24 January 2018); S. Sengupta, 'For a Yazidi Woman, Justice for ISIS Crimes is Still Elusive', *New York Times*, 17 August 2017, available online at <https://www.nytimes.com/2017/08/17/world/middleeast/for-a-yazidi-woman-justice-for-isis-crimes-is-still-elusive.html?r=0> (visited 24 January 2018); L. Kelly, 'There's Still No Justice for Yazidi Genocide Victims, Human Rights Activists Say', *Washington Times*, 3 August 2017, available online at <https://www.washingtontimes.com/news/2017/aug/3/human-rights-activists-still-no-justice-yazidi-gen/> (visited 24 January 2018).

16 A precedent for the IT can be found in the International Independent Investigation Commission (IIIC) established in 2005 to assist Lebanese authorities in their investigation of the terrorist bombing that killed former Prime Minister Rafiq Hariri. See SC Res. 1595, 5 April 2005. Once the Special Tribunal for Lebanon (STL) was established, the IIIC was in many respects folded into the STL's Office of the Prosecutor. See Letter dated 12 November 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/669, 14 November 2007 (noting that Canadian lawyer Daniel Bellemare would be dual-hatted as IIIC Commissioner and the Prosecutor of the STL).

noted that the IT's singular focus on the crimes committed by ISIL — as heinous and deserving of censure as they are — overlooks crimes committed by other armed groups involved in the conflict.¹⁷ Further, Iraq's weak judicial system and the central government's insistence on employing the death penalty in any ISIL trial has prevented many abolitionist states from fully backing the measure. As a practical matter, the independence referendum held by the Kurdistan Regional Government (KRG) in September 2017¹⁸ has complicated hopes for coordination between Erbil and Baghdad and the creation of a truly national justice programme when it comes to gaining access to witnesses, victims, forensic evidence, and suspects.

Against the backdrop of this complex and ever-shifting political context, this article explores the potential for the IT, notwithstanding its inherent limitations, to advance prospects for justice for the Yazidi people with reference to its mandate and ToR with an eye towards identifying opportunities and challenges presented by this unprecedented investigative mechanism. Although the Yazidi people are not monolithic when it comes to their preferences for justice, glaring limitations in the Iraqi legal framework, both substantive and procedural, may not produce results that are acceptable to Yazidi victims' groups. This outcome, however, is not inevitable if local authorities are amenable to proposals for legal reform that the IT experts will inevitably propose as part of their capacity-building mandate. Moreover, the IT is ultimately only an investigative body; it has no prosecutorial powers or formal ability to influence the imposition of charges or the criminal justice process writ large. As a result, it will be obliged to work with local, regional, and national authorities to ensure that potential evidence is fully exploited and that appropriate charges are brought. Although there may be a temptation among victims' groups for swift justice resulting in the ultimate penalty, the IT should also protect against local prosecutions going the way of the Iraqi High Tribunal (IHT), which was perceived as deeply flawed and failed to earn the respect of the international community.¹⁹ Much of the IT's efficacy will thus depend on who ends up staffing it, with many urging the appointment of individuals with solid experience investigating and prosecuting international criminal law violations (as opposed to career diplomats or human rights advocates) who also possess the diplomatic acumen to navigate the region's roiling political waters and the sensitivity to work with the most vulnerable of victims.

17 Z. Kaufman, 'New UN Team Investigating ISIS Atrocities Raises Questions about Justice in Iraq and Beyond', *Just Security*, 28 September 2017, available online at <https://www.justsecurity.org/45411/expect-team-investigating-isis-atrocities-iraq/> (visited 24 January 2018). Also see Z.D. Kaufman, 'The Prospects, Problems, and Proliferation of Recent UN Investigations of International Law Violations', in this issue of the *Journal*.

18 'Iraqi Kurds Decisively Back Independence in Referendum', *BBC News*, 27 September 2017, available online at <http://www.bbc.com/news/world-middle-east-41419633> (visited 24 January 2018).

19 See generally M. Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal', 38 *Cornell International Law Journal (CILJ)* (2005) 327.

2. The Iraq Investigative Team: Opportunities and Challenges

Although the crimes against the Yazidi people have been well-documented by a number of expert organizations, these efforts do not necessarily work to a criminal law standard, which is the remit of the IT.²⁰ Although a creature of the Security Council, Chapter VII is not specifically invoked, and the IT's powers are not unlimited. Partly in reaction to Iraqi demands, the Security Council imposed a range of constraints on the mandate of the IT; some of these have relevance to the Yazidi people's quest for justice, others less so. The IT's exclusive focus on ISIL crimes, although unfortunate from the perspective of equal justice, will not hinder the collection of potential evidence of crimes against the Yazidi people. Turning such evidence into full-scale prosecutions will depend on overdue domestic legal reforms and the existence of political will among prosecutorial authorities in Baghdad and Erbil. Additional potential impediments to a full accounting for the genocide may arise due to the poor state of the Iraqi legal system, including significant gaps in the Iraqi Penal Code (IPC) when it comes to the ability to charge all the relevant international crimes, including genocide and sexual violence. The IT may be able to partially compensate for these shortfalls through the capacity building element of its mandate, assuming the right Special Adviser and staff are appointed. The fact that the IT will be funded through assessed contributions helps to ensure its financial stability and independence, so long as appropriate funds are forthcoming.

A. A Mandate to Investigate ISIL Only

UN Security Council Resolution (UNSCR) 2379's singular focus on crimes committed by ISIL leaves the IT with no express mandate to look into crimes committed by governmental forces,²¹ at the federal or regional level (e.g., Kurdistan Regional forces); parastatal militia, such as the Popular Mobilization Forces that are composed primarily of Shi'a volunteers; or international forces for that matter.²² In fact, UNSCR 2379 suggests that Iraq will be

20 An exception is found in the non-governmental Commission on International Justice & Accountability (CIJA), which began investigating the crimes of the Assad regime with an eye towards criminal prosecutions. CIJA has recently expanded its focus to include crimes committed by ISIL. See 'Wanted: A Court to Try ISIL for War Crimes', *The National*, 24 September 2016, available online at <https://www.thenational.ae/world/wanted-a-court-to-try-isil-for-war-crimes-1.231329> (visited 24 January 2018). The author serves on CIJA's Advisory Board.

21 See J.G. Meek et al., 'US Ignores Evidence of Atrocities by Blacklisted Iraqi Military Unit', *ABC News*, 31 March 2017, available online at <http://abcnews.go.com/International/us-ignores-evidence-atrocities-blacklisted-iraqi-military-unit/story?id=47745913> (visited 24 January 2018).

22 This was expressly by design from the outset. See Johnson Speech, *supra* note 6 ('I want to make one point absolutely clear, I think that this the campaign should focus exclusively on Daesh. The accountability of other actors in area — Syria, Iraq, and Libya — must be dealt with, but I think that there are other ways elsewhere where that accountability can be pursued.').

in a position to dictate ‘any other uses’ of the evidence generated ‘on a case by case basis.’²³ Although having Baghdad’s consent will be crucial to the IT’s ability to operate in the country,²⁴ it comes at the expense of an impartial investigation that follows the evidence rather than one targeting a single armed group, no matter how heinous.²⁵ Beyond the Iraq context, there is a risk that other regimes, for example, in Syria and Yemen, will cite the IT’s limited focus as support of their own preferred version of one-sided justice.

Although this is a significant flaw in the IT’s mandate, it will not necessarily undermine prospects for accountability for the Yazidi people, given that ISIL fighters have been their primary persecutors. That said, it is not clear if authorities in Baghdad will be content if the IT prioritizes harm to the Yazidi people — or to other national minorities for that matter²⁶ — as compared with other forms of violence committed by ISIL, including acts of terrorism against forces, citizens, and property associated with the central or regional governments. This is particularly true following the independence referendum. Although in the past the Yazidis enjoyed an erstwhile affinity with the KRG, this relationship has soured following the *peshmerga*’s withdrawal during ISIL attack and other perceived failures of the KRG and the Kurdistan Democratic Party (KDP).²⁷

UNSCR 2379 makes preambular reference to holding leaders to account and also envisages the IT supporting proceedings against lower level figures. In particular, the preamble anticipates that prosecuting ‘those who bear the greatest responsibility, including in terms of leadership, which can include regional or

23 SC Res. 2379, *supra* note 7, at § 5 (‘with the relevant Iraqi authorities as the primary intended recipient as specified in the Terms of Reference, and with any other uses to be determined in agreement with the Government of Iraq on a case by case basis’).

24 The final ToR mandate that Iraqi authorities must cooperate with the Investigative Team: ‘The Investigative Team shall liaise with the coordinating or steering committee, which will be designated by the Government of Iraq to ensure that the Investigative Team is free from interference in the conduct of its work and provide it with all necessary assistance to fulfil its mandate.’ (§ 44). Draft on file with the author.

25 See Human Rights Watch, *Iraq: Missed Opportunity for Comprehensive Justice* (2017), available online at <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice> (visited 24 January 2018).

26 See Minority Rights Grp. Int’l, *Crossroads: The Future of Iraq’s Minorities after ISIS* (2017), available online at <http://minorityrights.org/wp-content/uploads/2017/06/MRGRepIraqENGMay17FINAL2.pdf> (visited 24 January 2018) (noting that neither Baghdad nor Erbil are fully integrating a host of national minorities into stabilization, peacebuilding, and transitional justice measures).

27 In particular, the KRG failed to set up a promised inquiry into the circumstances in which the *peshmerga* withdrew from Sinjar during the ISIL attack in 2014. See N. Kikoler, ‘Our Generation is Gone’: *The Islamic State’s Targeting of Minorities in Ninewa*, November 2015, available online at <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf> (visited 24 January 2018) (hereinafter *Our generation is gone*), at 10. Furthermore, there is an economic and physical blockade on Sinjar — ostensibly to restrict the operations of the Kurdistan Worker’s Party (PKK) — which has prevented many Yazidis from returning to their homes. See Human Rights Watch, *Iraq: KRG Restrictions Harm Yazidi Recovery* (2016), available online at <https://www.hrw.org/news/2016/12/04/iraq-krp-restrictions-harm-yezidi-recovery> (visited 24 January 2018). And, many Yazidi have preferred to separate themselves from the Kurdish Sunni Muslim majority given continued sectarian tensions.

mid-level commanders, and the ordering and commission of crimes' will help to expose that such criminality is central to ISIL's ideology, strategic objectives, and tactics of terrorism and to assist with countering violent extremism efforts.²⁸ There is no other language in the resolution's operative paragraphs or the ToR limiting the IT's collection efforts to evidence implicating 'those most responsible' for abuses or to leaders, as has been seen in the constitutive documents of other accountability mechanisms.²⁹ It will be important, however, to distinguish cases involving the perpetration of international crimes from those involving Sunni men who have become associated with ISIL based upon their mere survival or residence within areas under ISIL occupation.³⁰

Victims are often ambivalent about whether they would prefer to see cases brought against an armed group's leadership corps — who planned, ordered, unleashed, or enabled the execution of a campaign of mass violence — as compared to the more immediate perpetrators who directly committed the crimes against them. Although Yazidi victims would undoubtedly take comfort in seeing ISIL leader Abu Bakr Al-Baghdadi in the dock, many may prefer to have direct perpetrators punished, regardless of level. Indeed, many Yazidi victims were enslaved by ISIL fighters for significant periods of time. They know their tormentors' names, and the *noms de guerre* many ISIL recruits took on, along with a host of other details about ISIL cadre who are deserving of prosecution.³¹

B. The Focus on Supporting Proceedings Destined for Iraqi Domestic Courts

In keeping with Iraqi preferences, the Security Council clearly indicated that Iraqi domestic proceedings are to be the *primary* beneficiary of the work of the Investigative Team:

Evidence of crimes collected and stored by the Team in Iraq should be for eventual use in fair and independent criminal proceedings...conducted by competent national-level

28 SC Res. 2379, *supra* note 7, preamble.

29 Other international accountability initiatives have more expressly limited their focus to those deemed 'most responsible' for abuses. See Agreement Between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-UN, Art. 1 (6 June 2003), 2329 UNTS 117 ('The purpose of the present Agreement is to regulate the cooperation between the UN and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations'); Agreement Between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN-Sierra Leone (16 January 2002), 2178 UNTS 137. The statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda did not contain any such limitation.

30 Human Rights Watch (HRW), *Iraq: Displacement, Detention of Suspected 'ISIS Familie'* (2017), available online at <https://www.hrw.org/news/2017/03/05/iraq-displacement-detention-suspected-isis-families> (visited 24 January 2018).

31 Interview with Pari Ibrahim (1 December 2017).

courts, with the relevant Iraqi authorities as the primary intended recipient as specified in the Terms of Reference ...³²

The Iraqi legal system is federated and multilayered, which complicates the introduction of a new multilateral mechanism. In addition to trials under federal control, there are regional proceedings before KRG courts. Indeed, the KRG holds the largest collection of suspected Daesh fighters, including some from the middle ranks and others who arrived as part of mass surrenders, and so its system will be crucial to any justice response. This assumes the suspects are not transferred to Baghdad, which has been contemplated as a bargaining chip to get the Kurdistan embargo lifted.

Putting aside issues involving the substantive legal framework, which will be taken up below, a limited focus on domestic prosecutions may not satisfy Yazidi demands for justice. The Yazidi victim groups and their advocates originally focused on triggering the ICC, which is often perceived as the gold standard of international justice, notwithstanding its inherent limitations and persistent setbacks.³³ Access to the ICC is limited, however, by its jurisdictional framework. It cannot exercise full jurisdiction over crimes committed in Iraq or Syria, because neither state is a party to the ICC Statute, and in May 2014, Russia and China vetoed a draft Security Council resolution (backed by 13 other Council members) that would have referred the situation in Syria to the ICC.³⁴ No parallel effort to push the Council to refer the situation in Iraq to the ICC has coalesced, although there have been calls for Iraq to ratify the ICC Statute.³⁵

Although full territorial jurisdiction is unavailable, the ICC could nevertheless exercise personal jurisdiction over the nationals of ICC Member States who are active in these spillover conflicts.³⁶ Given that thousands of foreign

32 SC Res. 2379, *supra* note 7, § 5.

33 *ISIL: Nationals of ICC States Parties Committing Genocide and Other Crimes against the Yazidis* (2015), available online at <https://www.freeyezidi.org/wp-content/uploads/Corr-RED-ISIL-committing-genocide-ag-the-Yazidis.pdf> (report prepared by Yazidi victim organizations for the ICC Office of the Prosecutor and requesting an investigation). See Free Yazidi Found, *FYF and Yazda Submit Report to the ICC* (2015), available online at <https://www.freeyezidi.org/blog/publications/fyf-and-yazda-submit-report-to-the-icc-click-here-for-redacted-version/> (visited 24 January 2018); C. McFadden, J. Whitman, and H. Rappleye, 'Amal Clooney Takes on ISIS for "Clear Case of Genocide" of Yazidis', *NBC News*, 19 December 2016, available online at <https://www.nbcnews.com/storyline/isis-uncovered/amal-clooney-takes-isis-clear-case-genocide-yazidis-n649126> (visited 24 January 2018).

34 'Russia, China Block Security Council Referral of Syria to International Criminal Court', *UN News Centre*, 22 May 2014, available online at <http://www.un.org/apps/news/story.asp?NewsID=47860#Wjm0DyMrInV> (visited 24 January 2018).

35 Parliamentarians for Global Action (PGA), 'Iraq: PGA Calls on Iraq to Ratify the Rome Statute of the International Criminal Court', 11 August 2014, available online at <http://www.pgaction.org/news/pga-calls-on-iraq-to-ratify-rome-statute.html> (visited 24 January 2018).

36 See generally A.M. Brennan, 'Prosecuting ISIL Before the International Criminal Court: Challenges and Obstacles', 19 *ASIL Insights*, 17 September 2015, available online at <https://www.asil.org/insights/volume/19/issue/21/prosecuting-isil-international-criminal-court-challenges-and-obstacles> (visited 24 January 2018); J. Trahan, 'New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction Over Foreign Fighters)', *Just Security*,

fighters from ICC States Parties have joined ISIS (from Jordan, France, Australia, and elsewhere), some have likely committed crimes amounting to offences under international criminal and humanitarian law.³⁷ To date, however, the ISIL's leadership is primarily made up of individuals hailing from Syria and Iraq.³⁸ The Court's implicit and explicit gravity thresholds have so far prevented the ICC Prosecutor from moving forward against any ICC Member State nationals with respect to the current conflicts, because the relevant crime base is likely still too small to justify opening a new preliminary examination — the process by which the ICC's Office of the Prosecutor determines whether a reasonable basis exists to proceed with a full-scale investigation.³⁹ Of course, it remains possible that the ICC might someday be in a position to assert full jurisdiction over the crimes that are the subject of the IT's investigations. Iraq (or Syria or an independent Kurdistan for that matter) could grant the Court retrospective jurisdiction by virtue of Article 12(3) ICC Statute, either as part of a larger ratification process or on an ad hoc basis.

Given these barriers to eventual trials before the ICC, attention has shifted to domestic courts, including in third countries where ISIL members may be found. Although the IT is intended to prioritize support for prosecutions in Iraq, there is an opening in its mandate for the provision of assistance to prosecutions proceeding elsewhere, particularly in other national courts.⁴⁰ Specifically, UNSCR 2379 states that when it comes to information generated by the IT, 'any other uses [besides in Iraqi proceedings are] to be determined

12 November 2014, available online at <https://www.justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/> (visited 24 January 2018).

37 See R. Norton-Taylor, 'Up to 30,000 Foreign Fighters Have Gone to Syria and Iraq Since 2011 – Report', *The Guardian*, 17 November 2015, available online at <https://www.theguardian.com/world/2015/nov/17/30000-foreign-fighters-syria-iraq-2014-terrorism-report> (visited 24 January 2018). The Soufan Group estimated in December 2015 that there were approximately 30,000 foreign fighters in the region, over 5,000 from Western Europe. See M. Reardon, 'The Real Threat of Foreign Fighters in Syria', *Al Jazeera*, 13 December 2015, available online at <http://www.aljazeera.com/indepth/opinion/2015/12/real-threat-foreign-fighters-syria-151213100618715.html> (visited 24 January 2018).

38 P. Hutcheon, 'RAF Fighters Preparing to Target Daesh Leadership', *The Herald*, 5 December 2015, available online at <http://www.heraldscotland.com/news/14126898.RAFfighters.preparing.to.target.Daesh.leadership/?ref=mr&lp=17> (visited 24 January 2018).

39 See Statement of the Prosecutor of the ICC, Fatou Bensouda, on the Alleged Crimes Committed by ISIS, ICC, 8 April 2015, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1> (visited 24 January 2018). The OTP does have an open preliminary examination focused on the conduct of the UK's armed forces during Operation Iraqi Freedom and the subsequent occupation. See *Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq*, 13 May 2014, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014> (visited 24 January 2018).

40 UNSCR 2379 calls for the creation of evidence in such a way that 'ensure[s] the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request ...'. See SC Res. 2379, *supra* note 7, § 2.

in agreement with the Government of Iraq on a case by case basis'.⁴¹ With Security Council approval and pursuant to separate ToR, the IT can collect information about 'acts that may amount to war crimes, crimes against humanity, or genocide' committed in other states by ISIL members.⁴² This would cover international crimes perpetrated in neighbouring Syria, including the trafficking of Yazidi women and girls or the use of child soldiers, but may not reach acts of terrorism committed in countries farther afield, such as in Europe,⁴³ unless such acts also constitute war crimes or crimes against humanity.⁴⁴

There are a handful of ISIL cases going forward in courts around the globe that might benefit from the investigations undertaken by the IT. Current cases include those involving foreign fighters who have returned from the battlefield as well as individuals from the region who have slipped into asylum states.⁴⁵ There have been fewer cases in the USA so far. Nasrin As'ad Ibrahim (also known as, Umm Sayyaf), the widow of ISIL leader Abu Sayyaf, is now in Kurdish custody after having been convicted of terrorism and issued a 20-year sentence. She has also been charged in the USA with the provision of material support to a foreign terrorist organization under a statute with a broad extraterritorial reach.⁴⁶ The USA could additionally charge her with war crimes or slavery, because one of her victims was a US citizen: humanitarian aid worker Kayla Mueller.⁴⁷ Such charges have not been forthcoming, because

41 This provision on Iraqi consent could be interpreted to apply only to IT evidence that might be used in international proceedings, and not to cases proceeding in other national courts, but it is open to both interpretations.

42 SC Res. 2379, *supra* note 7. § 11.

43 The British had this possibility in mind, however, when they proposed the initiative. Johnson Speech, *supra* note 6 ('Our aim has got to be justice for all Daesh's victims: the Sunni and Shia Arabs who are still suffering under its murderous rule; the minorities who have been so pitilessly targeted; the victims elsewhere in the Middle East; and of course those who are maimed and killed in the terrorist attacks in Europe and elsewhere, and indeed in this country, here in the United States').

44 Dozens of attacks and thousands of injuries and deaths around the world have been attributed to ISIL. See T. Lister et al., 'ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043', CNN, 13 February 2017, available online at <http://www.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html/> (visited 24 January 2018).

45 'Dutch Find 30 Suspected War Criminals Among Last Year's Refugee Wave', *The Guardian*, 29 February 2016, available online at <https://www.theguardian.com/world/2016/feb/29/refugees-europe-dutch-war-criminals-migration> (visited 24 January 2018); HRW, *Syria: First Atrocities Trials Held in Europe* (2017), available online at <https://www.hrw.org/news/2017/10/03/syria-first-atrocities-trials-held-europe> (visited 24 January 2018).

46 18 USC § 2339B (2015). See Criminal Complaint, *United States v. Nisreen Assad Ibrahim Bahar* (E.D. Va. 8 February 2016) (No. 1:16mj63), available online at <https://www.justice.gov/opa/file/822211/download> (visited 24 January 2018). Umm Sayyaf was captured in a raid by special forces that killed her husband. See J. Reed, *Background Reading on Umm Sayyaf's Transfer to Kurdish Authorities*, Just Security (7 August 2015), available online at <https://wp.me/p5Gh3-6zH> (visited 24 January 2018).

47 See B. Van Schaack, *Iraq and Syria: Prospects for Accountability*, Just Security (22 February 2016), available online at <https://www.justsecurity.org/29427/iraq-syria-prospects-accountability/> (visited 24 January 2018) (noting potential for Sayyaf to be prosecuted in the USA).

Sayyaf is not yet ‘present in’ the USA, as is required by these statutes.⁴⁸ It remains to be seen whether she will be extradited in the USA to stand trial⁴⁹ on any additional charges (a prospect that seems unlikely).⁵⁰

Generating a ready cache of evidence might spur the filing of additional extraterritorial cases. These cases in foreign courts have the benefit of preventing host states from serving as safe havens for potential war criminals from Iraq and Syria. However, such proceedings are largely inaccessible to the bulk of victims and so will not carry the expressive impact of local trials. Victims might also resent perpetrators receiving a higher quality of justice in developed legal systems abroad — being billeted in relatively well-appointed prisons and enjoying opportunities for rehabilitation — than they would receive at home. Such cases are also expensive and hard to prosecute remotely, so many states resort to immigration remedies rather than charging individuals for the underlying international criminal law violation.⁵¹ All that said, it is preferable for these prosecutions to move forward remotely rather than for the suspects to be extradited to Iraq, given that Iraqi institutions are already overwhelmed with potential cases and procedural protections remain inadequate.⁵²

Although the IT is primarily meant to supplement domestic prosecutions, there is language in Resolution 2379 that would also support the sharing of information with an international or hybrid tribunal that might subsequently be in a position to assert jurisdiction. Although there has been significant attention paid to the need for a tribunal dedicated to the conflict in Syria, a single regional tribunal covering both conflicts might be the most efficient and comprehensive response to the crimes committed. A tribunal that is not limited by arbitrary geographic boundaries would reflect the high degree of spillover between these two conflicts and the fact that ISIL fighters have long

48 The United States’ War Crimes Act gives federal courts jurisdiction over war crimes committed by or against US persons so long as the perpetrator is present in the USA. 18 USC § 2441 (2006).

49 There is a 1934 extradition treaty between Iraq and the USA that has been used sparingly. See A. Deeks, *Dusting off the US-Iraq Extradition Treaty?*, Lawfare, 11 May 2012, available online at <https://www.lawfareblog.com/dusting-us-iraq-extradition-treaty> (visited 24 January 2018).

50 It has been alleged that the charges against her are ‘more of an “insurance policy” in case Iraqi officials fail to charge her or she is ever transferred to another country or she escapes prison’. N.A. Yousseff and S. Harris, ‘Feds Charge ISIS Widow in American’s Death but Won’t Say Who Killed Her’, *The Daily Beast*, 8 February 2016, available online at <https://www.thedailybeast.com/feds-charge-isis-widow-in-americans-death-but-wont-say-who-killed-her> (visited 24 January 2018).

51 See M. Kersten, ‘A Matter of Justice, Not Immigration: What to do with War Criminals Posing as Refugees’, *Justice in Conflict*, 7 March 2016, available online at <https://justiceinconflict.org/2016/03/07/a-matter-of-justice-not-immigration-what-to-do-with-war-criminals-posing-as-refugees/> (visited 24 January 2018); B. Van Schaack, ‘Salvadoran General Deemed Deportable in the Absence of Criminal Charges’, *Just Security* (17 March 2015), available online at <https://www.justsecurity.org/21146/salvadoran-general-deemed-deportable/> (visited 24 January 2018).

52 HRW, *Iraq: Flawed Prosecution of ISIS Suspects*, (2017), available online at <https://www.hrw.org/news/2017/12/05/iraq-flawed-prosecution-isis-suspects> (visited 24 January 2018) (hereinafter *Flawed Prosecution*).

straddled the border between the two nations. That said, building support for a regional institution — even one dedicated solely to ISIL crimes⁵³ — will be politically difficult, if not impossible, particularly given the different postures of the governments of Iraq and Syria towards the international community.

Another alternative recipient of the evidence gathered by the IT could be a subnational hybrid or mixed court located in Kurdistan. Although just such a proposal was circulating several years ago,⁵⁴ it seems to have lost momentum for the time being, particularly given tensions between Erbil and Baghdad following the referendum. And so, in the absence of other available fora with jurisdiction, at least in the early days of its operation, the IT will be focused on feeding evidence into Iraqi domestic proceedings, which raises a number of potential concerns given the operative legal framework and legal traditions.

C. Limitations in the Iraqi Legal Framework

Even assuming that the Iraqi authorities do take cognizance of some cases involving harm to Yazidi victims, extant Iraqi federal law is insufficient on a number of fronts to ensure a full accounting of harms to the Yazidi people. At the moment, the IPC contains a number of standard domestic crimes, such as murder and assault.⁵⁵ The IPC is silent, however, when it comes to the international criminal law canon: genocide, war crimes, and crimes against humanity. Efforts to draft new penal legislation nationally or in the KRG have been stalled, in part because there was inadequate international assistance. Even absent the incorporation of international crimes into Iraqi law, prosecutors could charge much of the harm to the Yazidi people under ordinary criminal law, of course, particularly for crimes that were committed on Iraqi territory.⁵⁶ Such charges, however, may not respond to convictions among the Yazidis, supported by authoritative determinations,⁵⁷ that they have been the victims of genocide and other international crimes.⁵⁸ Charges of murder, etc. do not

53 See S. Res. 340, 114th Cong. (2016), (supporting the creation of an international criminal tribunal to punish ISIL crimes).

54 B. Duerr, 'Could Kurdish Tribunal Succeed Where International Law Has Failed?' IPI Global Observatory, 13 December 2016, available online at <https://theglobalobservatory.org/2016/12/kurdistan-regional-government-iraq-war-crimes-icc/> (visited 24 January 2018).

55 Code Penal [C. Pen.] [Penal Code] (Iraq), No. 111 of 1969, July 1969, available online at <http://www.refworld.org/docid/452524304.html> (visited 24 January 2018) (hereinafter Iraqi Penal Code). Kurdistan has enacted its own legislation in a number of sectors, including a counter-terrorism law, but it does not have its own complete penal code. See The Kurdistan Parliament, Kurdistan Regional Government, available online at <http://cabinet.gov.krd/p/p.aspx?l=12&p=229> (visited 24 January 2018).

56 See Iraqi Penal Code, *supra* note 55, at § 405 *et seq.* (defining murder); § 410 *et seq.* (assault and wounding).

57 Kikoler, *Our Generation is gone*, *supra* note 27.

58 See B. Baser and M. Toivanen, 'The Politics of Genocide Recognition: Kurdish Nation-Building and Commemoration in the post-Saddam Era', 19 *Journal of Genocide Research* (2017) 404.

carry the expressive function of an indictment for crimes against humanity.⁵⁹

The IPC also contains some glaring flaws when it comes to sexual and gender-based violence (SGBV). For example, the rape definition is not compatible with international law standards.⁶⁰ Most importantly, any charges or verdicts appear to be automatically vacated if the perpetrator subsequently marries the victim.⁶¹ This provision, however, might in turn be nullified by a different legal stipulation within Iraq's 1959 Personal Status Law prohibiting 'forced marriage',⁶² which might render post-rape marriages unlawful. The IPC also contains a crime of kidnapping, which is being used for some rape cases,⁶³ and a relatively progressive provision on international trafficking.⁶⁴ Although not entirely consistent with the Palermo Protocol,⁶⁵ the trafficking provisions could be invoked to capture aspects of the harm to the Yazidi

59 See generally R. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', 43 *Stanford Journal of International Law* (2007) 39 (arguing that international crimes differ from domestic crimes in ways that impact their expressive function when enforced).

60 See Iraqi Penal Code, *supra* note 55, at § 393 *et seq.* Further, there is a three-month statute of limitations on rape.

61 See Iraqi Penal Code, *supra* note 55, at § 398 ('If the offender mentioned in this Section then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, then the sentence will be quashed'). See also *ibid.*, § 427 (establishing the same result for kidnapping).

62 Personal Status Law (1959), Law No. 1988, Art. 9, available online at <http://gipi.org/wp-content/uploads/2009/01/iraqi.personal.status.law.1959.english.translation.pdf> (visited 24 January 2018) ('No relative or non-relative has the right to force marriage on any person, whether male or female, without their consent.'). The KRG's domestic violence law also prohibits forced marriage and other forms of intimate violence. See Act No. 8 from 2011 The Act of Combatting Domestic Violence in Kurdistan Region-Iraq, Art. 2 (prohibiting forced marriage and assault within a family).

63 See J. Ensor, 'I Got Four Yazidi Virgins as Part of My ISIL Salary and Had Sex with a Different One Every Night', *The Telegraph*, 31 July 2017, available online at <http://www.telegraph.co.uk/news/2017/07/31/quivering-isil-suspects-face-investigations-court-mosul-atrocities/> (discussing kidnapping charges). See IPC, Art. 421.

64 Combating Trafficking in Persons Law No. 28 of 2012 (Iraq), available online at <http://www.ilo.org/dyn/natlex/natlex4.detail?plang=en&pisn=94253&p.country=IRQ&p.count=232&p.classification=04&p.classcount=6> (visited 24 January 2018) (hereinafter 2012 Trafficking Law). The trafficking law allows for the prosecution of trafficking for the purpose of sexual abuse, slavery, or prostitution (the latter is unacceptable to victims). *Ibid.*, at Art. 1. See generally Office to Monitor Trafficking in Persons, Trafficking in Persons Report (US Dept of State 2017), available online at <https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271208.htm> (visited 24 January 2018) (profiling Iraq's anti-trafficking infrastructure and legal framework). Iraq's amnesty law does not cover acts of trafficking. See 2016 General Amnesty, Art. 4(5), *infra* note 76.

65 The offence is defined as:

Article 1: First: For purposes of this law, the term "Human Trafficking" shall indicate recruiting, transporting, housing, or receiving individuals by force, threat to use force, or other means, including by coercion, kidnapping, fraud, deception, misuse of power, exchange of money, or privileges to an influential person in order to sell and exploit the trafficked individuals by means of prostitution, sexual abuse, unpaid labor, forced labor, enslavement, beggary, trading of human organs, medical experimentation, or by other means.

community.⁶⁶ Iraqi courts can also exercise universal jurisdiction over ‘trading in women, children, slaves’ and so could prosecute human trafficking networks that are active in neighbouring Syria.⁶⁷ Although the UN and Iraq signed a Joint Communiqué to enable cooperation on the prevention of, and response to, conflict-related sexual violence in 2016,⁶⁸ the government has yet to strengthen the Iraqi legal framework around SGBV. Moreover, it will take time to reform a legal culture where marriage is a ‘cure’ for rape. As such, Yazidi victims may have little faith in the Iraqi authorities’ willingness and ability to provide a full accounting for all that has befallen them.

Given these inherent limitations, the IPC is ripe for legal reform, which has been identified as part of the IT’s capacity-building mandate per its ToR. Specifically, the Investigative Team, in cooperation with other UN agencies is to help ‘the Government of Iraq to develop and implement relevant legislation, including on war crimes, crimes against humanity and genocide.’⁶⁹ Offering targeted reforms on international crimes and SGBV should be a priority of the IT once it becomes operational. Indeed, Iraq could potentially enact a war crimes statute that goes beyond the ICC Statute, which contains a number of gaps when it comes to non-international armed conflicts (NIACs), such as the conflict in Iraq.⁷⁰

To the extent that there have been domestic proceedings against ISIL members anywhere in Iraq, these have largely involved terrorism charges under omnibus counter-terrorism legislation.⁷¹ Such charges can carry the death

Art. 1, 2012 Trafficking Law, *supra* note 64. Iraqi law requires proof of a monetary transaction, which is not an element of the offence of trafficking under the relevant international treaty. See Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 15 November 2000, 2237 UNTS 319 (‘Palermo Protocol’). Iraq ratified the Palermo Protocol in 2009.

66 Although trafficking is not generally treated as a crime against humanity, it does encapsulate several enumerated crimes against humanity, including enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, SGBV, persecution, enforced disappearances, and other inhumane acts, and could be prosecuted as such, so long as sufficient evidence to satisfy the other *chapeau* elements of the offence exists. Art. 7 ICCSt.

67 Iraqi Penal Code, *supra* note 55, at Chapter, sub-Section 2, § 13.

68 S. Sattar, ‘UN and Iraq Sign Agreement on Response to Conflict-Related Sexual Violence’, *BasNews*, 24 September 2016, available online at <http://www.basnews.com/index.php/en/news/iraq/300757> (visited 24 January 2018).

69 Paragraph 41, TOR, *supra* note 23.

70 See B. Van Schaack, ‘Mapping War Crimes in Syria’, 92 *International Law Studies* (2016) 282 (detailing gaps in the ICCSt’s war crimes provisions addressed to the conduct of hostilities in NIACs).

71 Anti-Terrorism Law No. 13 of 2005 (Iraq) (hereinafter Anti-Terrorism Law). The law has been subject to criticism for being overbroad and vague. See ABA Center for Human Rights, *Compliance of Iraq’s Anti-Terrorism Law (2005) with International Human Rights Standards* (2014), available online at https://www.americanbar.org/content/dam/aba/administrative/human_rights/ABA%20Center%20for%20Human%20Rights%20Analysis%20of%20Iraq%20CT%20Law.authcheckdam.pdf (visited 24 January 2018). See N. Houry, *The Justice Question After ISIS*, HRW (2017), available online at <https://www.hrw.org/news/2017/08/25/justice-question-after-isis> (visited 24 January 2018). Indeed, until the fall of Mosul, the only justice meted out by Iraq was the mass trial and

penalty regardless of the severity of the offence or degree of participation of the accused.⁷² These cases are proceeding in dedicated counter-terrorism courts⁷³ and operate according to procedures that are not fully fair to the accused.⁷⁴ Some of these prosecutions involve kidnapping charges, which subsume acts of sexual violence, but are otherwise devoted to terrorism crimes. So far, no Yazidi crimes have been prosecuted domestically in Kurdistan, despite clear evidence of wrongdoing and extensive documentation by the KRG and others. In general, the counter-terrorism prosecutions there are not open to the public. Moreover, many cases involve Sunni men who were picked up in mass arrests in previously ISIL-controlled territory and who may have had little involvement with the group other than simply trying to survive under ISIL occupation.⁷⁵ This may be mitigated by a divisive amnesty law⁷⁶ that is meant to distinguish between ISIL members who committed acts of violence and forced recruits whose convictions were based on mere membership in, or the provision of non-lethal material support to, ISIL.⁷⁷ This amnesty law has not been fully implemented, however.

Although, both Baghdad and Erbil are prioritizing terrorism prosecutions, the IT is not likely to significantly enhance these proceedings in their current incarnation, because its work is limited to ‘collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide’.⁷⁸ Terrorism charges per se would only fall within the IT’s ambit if the underlying violent acts also constituted these so-called

execution of ISIL affiliates convicted in relation to the massacre of Iraqi forces at Camp Speicher. See ‘Camp Speicher Massacre Trial Begins in Iraq’, *Al Jazeera*, 27 December 2015, available online at <http://www.aljazeera.com/news/2015/12/trial-starts-suspects-isil-massacre-iraq-151227144148919.html> (visited 24 January 2018).

72 A. Abel Sadah, ‘Iraq in Crisis Over Terror Death-Penalty Law’, *Al-Monitor*, 4 February 2013, available online at <https://www.al-monitor.com/pulse/en/originals/2013/01/irp-terrorism-sadah-w-arabic-version.html> (visited 24 January 2018). See Iraq Anti-Terrorism Law, Arts 1–4, *supra* note 71.

73 Several courts in Baaj have been repurposed to take cases involving suspected ISIL members charged under the anti-terror law of 2005. The choice of Baaj was controversial, however, because the area was associated with ISIL and is far from where the Yezidis currently find themselves. ‘Yezidis Cautiously Welcome Iraq Court Tasked with Prosecuting ISIS’, *Rûdaw*, 6 December 2017, available online at <http://www.rudaw.net/english/middleeast/iraq/12062017> (visited 24 January 2018).

74 Houry, *supra* note 71.

75 See *Flawed Prosecution*, *supra* note 52.

76 General Amnesty of 2016, Art. 4, Law No. 27 of 2016, available online at <https://www.moj.gov.iq/view.2608/> (exempting certain crimes of violence from the amnesty law including rape and human trafficking) (hereinafter 2016 General Amnesty). The law also provides a right of judicial review for those convicted under the anti-terrorism law based on confessions extracted under duress. *Ibid.*, at Art. 9. This amnesty was preceded by several other amnesties promulgated in connection with previous conflicts and reconciliation processes that remain in force. E.g. Law No. 19 of 2008 (on file with the author).

77 S. al-Qaher, ‘Iraqi Parliament Approves Controversial Amnesty Law’, *Al-Monitor*, 30 August 2016, available online at <https://www.al-monitor.com/pulse/originals/2016/08/general-amnesty-law-terrorism-national-reconciliation-iraq.html> (visited 24 January 2018).

78 SC Res. 2379, at *supra* note 7, § 2.

atrocity crimes, such as attacks on civilians. Battlefield attacks against Iraqi Security Forces are not likely to constitute war crimes,⁷⁹ crimes against humanity or genocide and so would not be the subject of investigation by the IT.⁸⁰ It may be possible, however, to charge many of these same individuals with involvement in atrocity crimes as well, assuming the authorities are willing to broaden their indictments. If the existing legal framework is beyond amendment, it might be possible to conceptualize SGBV and other forms of violence against Yazidi victims as a tactic of terrorism⁸¹ that could come into evidence at the merits phase or as aggravating circumstances during sentencing.

There was some hope that the Yazidis would have better luck with the local Kurdistan government, which has espoused — with varying degrees of zeal and genuineness — the plight of the Yazidi people⁸² and has been collecting documentation on ISIL for years. The KRG has, for example, established special investigative committees on genocide and on mass graves.⁸³ The genocide commission is interviewing victims, but has little access to ISIL perpetrators who are in the custody of the security services. These two efforts are under-resourced and lack technical expertise and would benefit from international assistance. Even in Kurdistan, however, all prosecutions have proceeded under a terrorism framework and none has addressed genocidal violence against the Yazidi. As such, some Yazidi groups have pinned their hopes on proceedings orchestrated by the central government. That said, there is lingering concern that the KRG will not share what it has collected with the IT given language in UNSCR 2379 reifying Iraqi sovereignty.⁸⁴

79 *Persons Protected Under IHL*, ICRC (10 October 2010), available online at <https://www.icrc.org/en/document/persons-protected-ihl> (visited 24 January 2018) (protected persons include civilians; the wounded, sick, and shipwrecked; prisoners of war; religious and medical personnel; persons rendered *hors de combat*, etc.).

80 Combatants can be the victim of war crimes, of course, but generally such charges involve custodial abuses, perfidy, or the use of means or methods of warfare that cause superfluous harm or unnecessary suffering. See e.g. M. Chulov, 'Bodies of Soldiers Killed by Isis Exhumed from Tikrit Mass Grave', *The Guardian*, 7 April 2015, available online at <http://www.theguardian.com/world/2015/apr/07/isis-bodies-soldiers-exhumed-mass-grave-tikrit> (visited 24 January 2018).

81 See Judgement, *Galić* (IT-98-29-A), Appeals Chamber, 30 November 2006 (prosecuting the crime of terrorizing the civilian population).

82 See *Fact Sheet: About the Kurdistan Regional Government*, Kurdistan Reg'l Gov't <http://cabinet.gov.krd/p/p.aspx?l=12&p=180> (visited 24 January 2018) (calling for the international community and the Iraqi Ministry of Human Rights to recognize the commission of genocide against the Kurdish people, such as the Anfal campaign, without mention of ISIL's persecution of the Yazidis).

83 The KRG established a High Committee for the Recognition of Genocide against Yazidi Kurds and other Ethnic and Religious Nationalities. CIGE, *supra* note 13, is a sub-committee of the Genocide Committee and has taken statements from ISIL escapees and used geographic information system technology to map mass graves. See H. Lynch and C. Johannes, 'Kurdish Officials Use New Technologies to Document ISIS Crimes', *Rûdaw*, 5 March 2017, available online at <http://www.rudaw.net/mobile/english/kurdistan/030520176> (visited 24 January 2018).

84 SC Res. 2379, *supra* note 7, preamble ('Reaffirming its respect for the sovereignty, territorial integrity, independence and unity of Iraq ...'). Indeed, the Kurdish representative in New York was not allowed to attend the meeting at which UNSCR 2379 was being negotiated on the theory that his community's concerns would be represented by the Iraqi Permanent Representative and his team.

Even if Iraq were to update its Penal Code or if the KRG were to promulgate its own penal legislation, *nullum crimen sine lege* (NCSL) concerns may arise if ISIL members are charged with crimes in connection with conduct predating any legal reform effort.⁸⁵ There are a number of ways that these *ex post facto* concerns can be resolved to enable prosecutions of ISIL members for their involvement in international crimes. First, the international human rights articulation of the prohibition on *ex post facto* legislation makes exception for domestic penal legislation addressed to criminal conduct that was prohibited by international law at the time the accused acted. Specifically, the International Covenant on Civil and Political Rights (ICCPR) articulates the principle of NCSL in Article 15(a), but in the next breath 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.’⁸⁶ This was the position taken by a Spanish court adjudicating international crimes committed during the Argentine ‘dirty war’ under a subsequently-enacted international crimes act.⁸⁷

Secondly, international crimes have already been at least partially incorporated into Iraqi law in the form of the Statute for the IHT,⁸⁸ which was set up to prosecute Saddam Hussein and other Ba’athists following the 2003 Iraq War (‘Operation Iraqi Freedom’). By way of background, the Security Council in UNSCR 1483 (2003) authorized the USA and the UK acting as the Coalition Provisional Authority (CPA) to, inter alia, administer the territory of Iraq, which was to include enabling accountability for the ‘crimes and atrocities committed by the previous Iraqi regime’ identified in the Resolution’s

85 The Iraqi Constitution, adopted by referendum in 2005, contains a prohibition on *ex post facto* legislation. Constitution, 15 October 2005, Art. 19(2) (Iraq), Constituent Project, available online at <https://www.constituteproject.org/constitution/Iraq.2005.pdf?lang=en> (hereinafter Iraqi Constitution) (‘There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offense may not be imposed.’). See also Art. 19(9) and (10).

86 Art. 15 ICCPR. This exception to non-retroactivity was drafted with the offences committed in World War II in mind. See e.g. *R. v. Finta*, [1994] 1 SCR 701 (‘A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, however, is an exception to the rule against *ex post facto* laws.’). Such an international law exception also finds expression in Art. 7(3) ECHR, which states: ‘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 recognized by civilized nations.’

87 See *Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo*, 19 April 2005, available online at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html>. But see A. Gil Gil, ‘The Flaws of the *Scilingo* Judgment’, 3 JICJ (2005) 1082 (arguing that the Spanish court violated the principle of legality).

88 Law of the Iraqi Higher Criminal Court Law No. 10 of 2005, available online at [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/\\$FILE/IST.statute.officialEnglish.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/$FILE/IST.statute.officialEnglish.pdf) (visited 24 January 2018).

preamble.⁸⁹ The Council was not willing to create an international tribunal, notwithstanding the scale of the abuses in and around in Iraq, in part because some Council members considered the war in Iraq to have been illegal.⁹⁰ For its part, the USA wanted an 'Iraqi-led' process and resisted efforts to bring the process under a UN banner.⁹¹ In any case, many Iraqis were reticent to grant the UN a role in the process in light of the oil-for-food debacle and the long history of crushing UN sanctions.⁹²

On 10 December 2003, just three days before the capture of Saddam Hussein, the CPA promulgated Order No. 48 and established what was then called the Iraqi Special Tribunal (IST).⁹³ After the interim government began exercising Iraq's sovereignty following the passage of UNSCR 1546 and the holding of elections,⁹⁴ the newly elected Transitional National Assembly annulled the IST Statute and replaced it with the Statute of the IHT in 2005.⁹⁵ The IHT was by all measures a domestic court — staffed by Iraqi personnel⁹⁶ — that was internationalized by the presence of international advisors selected by the International Bar Association and others and by the training and administrative

89 The CPA announced that it was vested with 'all executive, legislative, and judicial authority necessary to achieve its objectives' by virtue of two sources of law: the relevant UNSCRs (which authorized measures under Arts 41 and 48 of the UN Charter) and the international law of armed conflict. CPA, Regulation 1, § 1(2) (16 May 2003). UNSCR 1483 also obliged Member States to deny safe haven to members of the previous Iraqi regime and to support actions to bring them to justice.

90 M.P. Scharf, 'The Iraqi High Tribunal: A Viable Experiment in International Justice?' 5 *JICJ* (2007) 258, at 261.

91 E. Stover et al., 'Bremer's Gordian Knot: Transitional Justice and the US Occupation of Iraq', 27 *Human Rights Quarterly* (2005) 830, 838–839.

92 T. Parker, 'Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal', 38 *CILJ* (2005) 899, 900.

93 Coalition Provisional Authority Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal, CPA/ORD/9 Dec 2003/48, available online at <http://www.loc.gov/law/help/hussein/docs/20031210.CPAORD.48.IST.and.Appendix.A.pdf> (visited 24 January 2018) ('CPA Order No. 48'). The order delegated to the Interim Governing Council, which had been appointed by the CPA, authorization to establish the tribunal; a draft Statute purporting to be the result of extensive consultations between the CPA and the Governing Council appeared as an appendix to this order.

94 UNSCR 1546 presaged the end of the occupation of Iraq and the installation of a democratically-elected government: see UN Doc. S/RES/1546, 8 June 2004.

95 See Law of the Supreme Iraqi Criminal Tribunal, Al-Waqa'I Al-Iraqiya — No. 4006 (18 October 2005), available online at <http://gji.org/wp-content/uploads/2009/02/iraqstatuteengtrans.pdf> ('IHT Statute'); G. Mettraux, 'The 2005 Revision of the Statute of the Iraqi Special Tribunal', 5 *JICJ* (2007) 287, 288 (noting the 'Iraqization' of the new Statute, which diminished the role of international personnel and weakened certain procedural guarantees).

96 See Art. 28 ISTSt. (*supra* note 93). Art. 4(d) ISTSt. contemplated that non-Iraqi judges might be appointed, but this was never pursued. Art. 33 of the IHTSt. (*supra* note 95) prohibited the appointment of anyone who had been a member of the Baath party, which may have 'dilute[d] the pool of qualified jurists significantly'. M. Newton, 'The Iraqi High Criminal Court: Controversy and Contributions', 862 *International Review of the Red Cross* (2006) 399, at 406.

support provided by the US Department of Justice's Regime Crimes Liaison Office (RCLO).⁹⁷

The IHT and IST Statutes incorporated the crimes of genocide, crimes against humanity, and war crimes⁹⁸ — which had heretofore been virtually unknown in Iraqi law — as well as the full gamut of forms of responsibility, including superior responsibility.⁹⁹ The substantive crimes are defined in a way that is largely consistent with the ICC Statute, which came as somewhat of a surprise given that the IHT Statute was drafted with significant US input at a time when the Bush Administration's stance towards the ICC was decidedly hostile.¹⁰⁰ The IHT was empowered to treat ICL jurisprudence as 'persuasive authority' in interpreting its own ICL provisions.¹⁰¹ The Statute also incorporated a range of fair trial guarantees reminiscent of Article 14 ICCPR¹⁰² and mandated the creation of a witness protection regime.¹⁰³

The IHT's temporal jurisdiction was strictly limited to coincide with Ba'athist rule (from 17 July 1968 to 1 May 2003)¹⁰⁴ — essentially putting 'a dictator's entire reign on trial'.¹⁰⁵ As such, its constitutive statute was an exercise in *ex*

97 Scharf, *supra* note 90, at 259 ('the [IHT] merits the characterization internationalized domestic tribunal. ... [It] is not fully international or even international enough to be dubbed a hybrid court'). On the RCLO, see Stover, *supra* note 91, at 841. Although CPA Order Number 48 and the original Statute envisioned the appointment of non-Iraqi judges, this did not come to pass. Instead, foreign lawyers (mostly from the USA) were relegated to an advisory role. The pool of qualified advisors was limited, however, by the fact that the UN Secretary-General prohibited senior personnel from the ad hoc tribunals to participate in any training programs. Stover, *supra* note 91, at 843.

98 See Arts 10–14 IHT Statute. The IHTSt. also incorporated certain crimes under Iraqi law, namely those concerned with the administration of justice (e.g., attempts to manipulate the judiciary), the wastage of national resources, the abuse of position, and a provision that sounds of the crime of aggression. On the latter, sub-paragraph 14(c) makes reference to Art. 1 of Law No. 7 of 1958, which prohibits 'using the country's armed forces against the brotherly Arab countries, threatening to use such forces or instigating foreign powers to jeopardize its security or plotting to overthrow the existing regime or interfere in their internal affairs against its own interest, or spending money for plotting against them or giving refuge to the plotters against them or attacking in international fields or through publications their heads of state.' See C. McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013) 146 (translating Art. 1 of Iraq Law No. 7 of 1958).

99 Art. 15 ISTSt.

100 Indeed, the American Servicemembers Protection Act, an anti-ICC measure, was enacted into law in 2002. Pub.L. 107–206, H.R. 4775, 116 Stat. 820.

101 *Ibid.*, at Art. 17.

102 *Ibid.*, at Art. 20.

103 *Ibid.*, at Art. 22.

104 *Ibid.*, at Art. 1(b). It also was empowered to exercise jurisdiction over crimes committed outside of Iraq, which might have covered the invasion of Kuwait and the international armed conflict with Iran (1980–1988) ('The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of ... crimes ... in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait.'). However, these extraterritorial provisions were never activated.

105 A.M. Smith, 'Transitional Justice in Iraq: The Iraqi Special Tribunal and the Future of a Nation', 14 *International Affairs Review* (2005) 5, 13.

post facto legislation.¹⁰⁶ The provisions codifying the crime of genocide and grave breaches of the 1949 Geneva Conventions enjoyed the firmest legal footing, since Iraq had ratified the relevant treaties prior to 1968, even though it had not incorporated these crimes into its penal code.¹⁰⁷ In any case, in the *al-Dujail* proceedings against Hussein and others, the IHT ruled that its Statute did not constitute impermissible retroactive legislation because the conduct in question was unlawful under either conventional or customary ICL during the period in question. It also concluded that the underlying conduct — the constitutive acts that make up the *actus reus* of war crimes and crimes against humanity — was unlawful under Iraqi penal law and the laws of the nations of the world at the time it was committed.¹⁰⁸

Similar arguments could be marshalled following any contemporary amendments to the current IPC, strengthened by the *Dujail* precedent. As such, the IHT Statute offers a fount of substantive law as well as a source of fair notice to potential ISIL defendants. In fact, the IHT could theoretically be reconstituted¹⁰⁹ with the present conflict in mind with a simple amendment to the language on temporal jurisdiction and perhaps on personal jurisdiction, which is limited to Iraqi nationals or persons ‘residing within Iraq’.¹¹⁰ That said, the IHT carries some negative baggage. It was plagued by allegations of political interference (on the part of the Iraqi authorities and the USA)¹¹¹ as well as threats to judges and defence counsel.¹¹² In part due to its controversial origins

106 See Art. 2(1) Iraqi Penal Code.

107 In 1956, Iraq ratified the four Geneva Conventions of 1949, which oblige states to prosecute war crimes when committed in international armed conflicts. Common Art 3 of these treaties also contain a range of prohibitions relevant to non-international armed conflicts, although such acts are not expressly penalized or subject to universal jurisdiction. Likewise, Iraq ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1959.

108 *The Public Prosecutor in the High Iraqi Court et al. v. Saddam Hussein Al Majeed et al.*, 1/E First/2005, 5 November 2006, available online at <http://www.asser.nl/upload/documents/3272012.3403305-11-2006%20-%C2%A0Iraqi%20High%20Tribunal%20Judgement%C2%A0Saddam%20Hussein.pdf>. The decision was upheld on appeal. *Prosecutor v. Hussein et al.*, 29/c/2006, 26 December 2006, available online at <http://www.worldcourts.com/ist/eng/decisions/2006.12.26.Prosecutor.v.Hussein.et.al.pdf> (websites visited 24 January 2018). For a survey of arguments deployed by courts to satisfy the NCSL principle, see B. Van Schaack, ‘*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law & Morals’, 97 *Georgetown Law Journal* (2008) 119.

109 But see Art. 95 of the Iraqi Constitution, which prohibits the ‘establishment of special or extraordinary courts’.

110 *Ibid.*, at Art. 1(2).

111 M.P. Scharf, ‘Is it International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice’, 2 *JICJ* (2004) 330, 331 (noting the risk that the IHT would ‘be seen by both Iraqis and outsiders as a puppet of the Occupying Power, and as a tool for vengeance by Saddam Hussein’s enemies, rather than as the cornerstone of a new judicial system committed to the rule of law’). Scharf later adopted a more sanguine view of the IHT. M.P. Scharf and A. Kang, ‘Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL’, 38 *CILJ* (2005) 911, 912.

112 Chatham House, *The Iraqi Tribunal: The Post-Saddam Cases 6* (2008), available online at <http://www.chathamhouse.org/sites/files/chathamhouse/field/field.document/Discussion%20Group%20Summary%20The%20Iraqi%20Tribunal.pdf> (visited 24 January 2018).

and in part due to perceived procedural flaws, the IHT never earned the support, or respect, of the international community, perhaps unfairly.¹¹³ Relying on it to prosecute contemporary atrocity crimes might revive the scepticism surrounding this institution. Furthermore, the IHT was stood up during a rare moment of domestic consensus among the Sunni, Shiites, and Kurds within Iraq. This degree of political consensus is unlikely to repeat itself under the current climate.

D. Due Process and the Death Penalty

Resolution 2379 makes oblique reference to due process concerns that have been repeatedly raised with respect to the Iraqi judicial system¹¹⁴ when it states that the information gathered ‘should be for eventual use in fair and independent criminal proceedings, consistent with applicable international law’.¹¹⁵ Most troubling is the continued availability — and pervasiveness — of the death penalty in Iraq. Although a de facto moratorium is in place in Kurdistan,¹¹⁶ Iraq has one of the highest rates of capital punishment and executions in the world.¹¹⁷ Indeed, a death sentence was recently handed down in the first case involving a foreign fighter in Iraq, a Russian national charged with ‘carrying out terrorist operations’ against Iraqi security forces.¹¹⁸

113 See Cherif Bassiouni, *supra* note 19.

114 See generally Amnesty International, *Iraq 2016/2017*, available online at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/iraq/report-iraq/> (visited 24 January 2018) (detailing weaknesses in the judicial system, particularly with respect to ISIL prosecutions); UN Assistance Mission for Iraq/Office of the High Commissioner for Human Rights, *Report on the Death Penalty in Iraq*, October 2014, available online at <http://www.ohchr.org/Documents/Countries/IQ/UNAMILHRODP.1Oct2014.pdf> (hereinafter UNAMI/OHCHR *Death Penalty Report*).

115 SC Res. 2379, *supra* note 7, § 5.

116 ‘Capital Punishment in Kurdistan: Over 250 Convicts on Death Row’, *Rûdaw*, 14 March 2017, available online at <http://www.rudaw.net/english/kurdistan/140320174> (visited 24 January 2018). Kurdistan abolished the death penalty in 2003. See Law No. 6 of 2003, Art. 11 (Kurdistan). It was then reinstated but has been subject to a de facto moratorium since 2008. Law No. 6 of 2006, Law on Re-enforcing Articles of Part Two of the Criminal Procedure Code, Art. 1, available online at <http://gjpi.org/library/primary/kurdistan-region-legislation/> (visited 24 January 2018). Although there have been a handful of individuals executed since the moratorium was put in place, some individuals sentenced to die have had their sentences commuted to life imprisonment.

117 Individuals can be sentenced to death for committing a range of offences well beyond those involving the taking of life; the most common charge concerns violations of Iraq’s anti-terrorism legislation. See UNAMI/OHCHR, *Death Penalty Report*, *supra* note 114. Kurdistan has its own anti-terrorism legislation as well. See Anti-Terrorism Law No. 3 of 2006.

118 J. Ensor, ‘Iraq Sentences Russian Isil Fighter to Death by Hanging in First Ruling of Its Kind on Foreign Jihadists’, *The Telegraph*, 13 September 2017, available online at <http://www.telegraph.co.uk/news/2017/09/13/iraq-sentences-russian-isil-fighter-death-hanging-first-ruling/> (visited 24 January 2018).

Additional mass executions followed.¹¹⁹ Unlike other international or quasi-international tribunals, the IHT could order the death penalty, which ultimately truncated its own lifespan once the key defendants were executed before the next sequence of indictments against them were issued. The availability of the death penalty also deprived the IHT of international assistance on the part of abolitionist states.

The availability of the death penalty in Iraq similarly complicates the provision of international assistance to domestic judicial proceedings. Debate over how to handle the death penalty delayed the completion of the Investigative Team's ToR, which were supposed to be issued on 20 November 2017, but were then subject to multiple extensions. An early draft indicated that '[t]he Investigative Team will only share evidence for use in criminal proceedings in which capital punishment will not be carried out.'¹²⁰ Several abolitionist states insisted that this proscription was an important factor in their support for the measure, but they obviously found a way to accommodate Iraqi preferences and legal traditions because this language does not appear in the final ToR.¹²¹ In contrast, the USA has been a strong supporter of the IT and likely would not oppose recourse to the death penalty. Iraq, for its part, was not expected to cede the availability of death penalty, particularly with respect to its own citizens (although it might bow to international demands with respect to any foreign defendants). As such, this issue remains to be finessed at the operational level once a Special Adviser has been appointed.

Although the European donors might be in a position to influence Iraqi prosecutors to forgo the death penalty if available, this stance may run counter to the expectations and preferences of some Yazidi victims. No systematic study

119 In December 2017, Iraq executed 38 men for terrorism crimes. *UN Rights Wing 'Appalled' at Mass Execution in Iraq*, UN News Centre, 15 December 2017, available online at <http://www.un.org/apps/news/story.asp?NewsID=58301#.Wk68nd-nFPw> (visited 24 January 2018).

120 Draft ToR, on file with the author.

121 'Iraq - UN - Adoption of Security Council Resolution 2379 on the Fight Against Impunity for Crimes Committed by Daesh', *Fr. Diplomatie*, 21 September 2017, available online at <https://www.diplomatie.gouv.fr/en/country-files/iraq/events/article/iraq-un-adoption-of-security-council-resolution-2379-on-the-fight-against> ('It is also important to be able to use evidence that has been collected in procedures upholding human rights and the rejection of the death penalty'). The international community has found a way to work with states that still employ the death penalty. For example, in a tenuous compromise, the international community is comfortable providing rule of law and other assistance to the Democratic Republic of Congo, because there is a de facto moratorium on the death penalty in place in the country since 2003. See Democratic Republic of the Congo, Death Penalty Database, available online at <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Democratic+Republic+of+the+Congo> (visited 24 January 2018). Likewise, although European states will not extradite individuals to the USA if they will be subject to the death penalty, they will provide mutual legal assistance through MLAT arrangements. Dept of Justice, *US/EU Agreements on Mutual Legal Assistance and Extradition Enter into Force*, 1 February 2010, available online at <https://www.justice.gov/opa/pr/useu-agreements-mutual-legal-assistance-and-extradition-enter-force> (visited 24 January 2018).

of Yazidi attitudes in this regard has been conducted.¹²² Many victims' groups will insist that they want fair proceedings, but they have little faith in the Iraqi or Kurdistan judicial system. At the same time, many victims will likely see capital punishment as the ultimate penalty and will demand it for perpetrators found guilty of horrific crimes against members of their community. Victims and victims' groups may not be amenable to arguments that the death penalty violates fundamental human rights in light of the nature of the allegations against ISIL suspects.

The Iraqi judicial system does not enjoy high degree of trust among victims' groups, although many victims have indicated their willingness to participate in criminal trials so long as they can do so safely and with their dignity intact. It will be important to establish procedures that can ensure witnesses' and victims' informed consent to participate in investigations and prosecutions as well as measures for witness protection. There have been instances of male family members controlling victims' interactions with human rights investigations. Furthermore, Iraq will need to enhance its witness protection programme to ensure secure transportation to and from proceedings, the ability of victims and witnesses to testify remotely or with image- or voice-altering devices, and a process to expunge names and identifying information from public records. Victims and witnesses will also need psychosocial support, particularly young people and male and female victims of SGBV. The IHT Statute enabled certain forms of witness protection, including *in camera* proceedings, although there was room for improvement.¹²³

E. Capacity Building and Cooperation

The Security Council's directive that the IT engage in capacity building marks another area where the new mechanism could make a tangible contribution to justice for Yazidi victims. The Investigative Team will include Iraqi investigative judges and other criminal law experts 'on an equal footing alongside international experts'¹²⁴ with an eye towards improving the Iraqi institutional capabilities.¹²⁵ This possibility of enhancing the domestic legal system marks one of the motivations behind the emergence of the hybrid tribunal model, which involved international and domestic personnel (judges, prosecutors, defence counsel, administrators, and support staff) working in tandem with their local counterparts.¹²⁶ Presumably, instructional opportunities created by

122 But see K. Wirya and D. van Zoonen, 'The Yazidis: Perceptions of Reconciliation and Conflict', MERI, 11 October 2017, available online at <http://www.meri-k.org/publication/the-yazidis-perceptions-of-reconciliation-and-conflict/> (visited 24 January 2018).

123 B. Arabi, *Memorandum to the Iraqi Governing Council on the Statute of the Iraqi Special Tribunal*, Human Rights Watch (2003), available online at <https://www.hrw.org/legacy/backgrounder/mena/iraq121703.htm#17> (visited 24 January 2018).

124 SC Res. 2379, *supra* note 7, § 5.

125 *Ibid.*, § 9.

126 See B. Van Schaack, 'More than a Domestic Mechanism': Options for Hybrid Justice in Sri Lanka', in B. Fonseka (ed.), *Transitional Justice in Sri Lanka: Moving Beyond Promises* (Centre

the IT will apply to regional, and not just national, justice personnel. At the moment, the UN Development Programme (UNDP) is working to rebuild the judicial infrastructure, and the UN Assistance Mission for Iraq (UNAMI) is supposed to be helping with investigations, but there will be significant additional needs when it comes to training personnel, etc. UNAMI does not have an express rule of law component, so there are few competent lawyers to carry out the policy work around the necessary reforms.¹²⁷

The ability of the IT to effectuate this element of its mandate may hinge on where it is headquartered. At the moment, Baghdad remains highly insecure, and it is difficult to get into the KRG because direct flights from Istanbul were suspended post-referendum.¹²⁸ Geneva or The Hague or elsewhere in Europe where there are caches of evidence offer a remote option. Initiating the investigative work remotely is not entirely without precedent; the UN International, Independent Investigation Commission (UNIIC), established to investigate the assassination of Lebanese Prime Minister Rafik Hariri in February 2005,¹²⁹ was initially located on a British base in Cyprus. This venue not only responded to security concerns but also ensured that the investigative team was close to the territory in question.

One additional area where Iraqi expertise falls short concerns forensics. The International Commission on Missing Persons (ICMP) is providing some training to local investigators, helping in the recovery and identification of human remains regardless of sectarian origin, establishing a chain of custody and evidentiary database, and preserving evidence of ISIL massacres,¹³⁰ but there are inadequate funds for fully disinterring and identifying victims.¹³¹ The need to preserve mass graves around Sinjar has become acute, particularly given how contested that territory is not only vis-à-vis ISIL but also between the federal and Kurdish forces.¹³² In addition, the KRG has begun to undertake some

for Policy Alternatives, 2017) 331 (discussing models for integrating international staff into transitional justice mechanisms).

127 See *UN Assistance Mission for Iraq*, UN Iraq, available online at <http://www.uniraq.com/index.php?option=com.k2&view=item&layout=item&id=943&Itemid=637&lang=en> (visited 21 December 2017). UNAMI's mandate was extended in July 2017. See UN Doc. S/RES/2367, 14 July 2017.

128 Indeed, the fact that there has been a ban on flights from Istanbul has made it difficult for non-governmental organizations to engage in Kurdistan as well, because the only options are to fly through Baghdad or go overland.

129 SC Res. 1595, 7 April 2005.

130 International Commission on Missing Persons, *Iraq*, available online at <https://www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/> (visited 24 January 2017). Physicians for Human Rights is similarly engaged.

131 Upon the fall of the Hussein regime, it assisted with the drafting of the 2006 Law on the Protection of Mass Graves, which fell under the purview of the now disbanded Ministry of Human Rights. See Ministry of Human Rights, Law on the Protection of Mass Graves, Law No. 5 (2006), available online at <https://www.icmp.int/wp-content/uploads/2014/08/law-on-protection-of-mass-graves.pdf> (visited 24 January 2018). The law was passed to address missing persons who disappeared during the Saddam Hussein regime but remains in force.

132 The Sinjar Mountain region is not technically in Kurdistan, although the *peshmerga* have controlled this region on the ground.

forensic work, but it may not be to international standards. The control of this territory has shifted over time, making it difficult to undertake the painstaking archaeological work necessary. Accordingly, the IT may find itself collecting evidence at sites that have been compromised or contaminated.

There has been little discussion of the consequences that would flow were Iraq, or the regional authorities, to fail to cooperate with the IT. In principle, the team should have the ability to return to the Security Council if it experiences problems with access, information sharing, or other aspects of its work. The Council is empowered to enforce its resolution. However, as we have seen too often in the past, the Security Council does not always follow-up on its Chapter VII mandates to ensure they are effectuated even when it has the power to do so.¹³³ Further, it is not clear how the Council would react were Iraq to withdraw its consent to this exercise.

E. Funding

Importantly, the Investigative Team shall be funded through assessed contributions rather than through voluntary contributions. Additional funding will be provided through a Trust Fund established by the Secretary-General to accept voluntary contributions.¹³⁴ The UK has already pledged to contribute.¹³⁵ This funding scheme marks an important departure from other accountability efforts in the past.¹³⁶ The Syria IIIM, for example, is entirely dependent upon voluntary contributions, which will limit its ability to remain focused on its task because principals will be distracted by fundraising. The need to go hat in hand may also undermine the IIIM's independence. There is a risk that the IT will absorb all international funding available for justice work in Iraq, thus starving other worthy civil society projects, whether international, regional, or domestic.

3. Conclusion

A fuller assessment will have to wait until the IT is set up and starts operating. The IT's ability to forge a productive partnership with local authorities will be crucial to the success of the Team, both in terms of identifying and preserving evidence of ISIL's crimes and also ensuring fair domestic proceedings under

133 M. Nichols, 'ICC Prosecutor Slams UN Council over Inaction on Sudan's Darfur', *Reuters*, 17 June 2014, available online at <https://www.reuters.com/article/sudan-un-icc/icc-prosecutor-slams-un-council-over-inaction-on-sudans-darfur-idUSL2N00Y17E20140617> (visited 24 January 2018).

134 SC Res. 2379, *supra* note 7, § 13.

135 Security Council Press Release, *Security Council Requests Creation of Independent Team to Help in Holding ICIL/Daesh Accountable for its Actions in Iraq*, SC/129998, 21 September 2017, available online at <https://www.un.org/press/en/2017/sc12998.doc.htm> (visited 24 January 2018).

136 While the ICTY and ICTR enjoyed a steady and dependable budget through assessed contributions, subsequent tribunals were dependent on voluntary contributions.

an appropriate legal framework. Most important may be an effort in legal reform to bring Iraqi penal law into alignment with international criminal law and international fair trial standards. This will ensure robust prosecutions that produce unimpeachable results. The Yazidis deserve nothing less. And yet, the risk remains that the IT will create high expectations but few results. Besides their justifiable demands for justice, many Yazidis also want the international community to launch a more systemic effort to rescue the thousands of their loved ones who are still missing as well as a credible commitment from the international community for protection in the event that ISIL re-emerges as an existential threat. The IT with its focus on investigating past crimes is unlikely to be able to respond to either of these imperatives.

Challenges in the Implementation of the Reparation Award against Hissein Habré

Can the Spell of Unenforceable Awards across the
Globe be Broken?

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Abstract

The sentencing of former Chadian president Hissein Habré to life imprisonment by the Extraordinary African Chambers (EAC) for war crimes, crimes against humanity and torture was hailed as a landmark moment in the fight for justice for victims. The Senegal-based EAC also awarded a significant reparations award to be implemented in Chad in favour of over 7000 victims. In this respect, the EAC's reparations mandate is a manifestation of the development of a more victim-centred form of justice, even though its implementation presents considerable challenges. Some of those challenges, such as shortage of funds, have been common among court-ordered reparations across the globe including at the International Criminal Court. However, other challenges are novel. The development of forms of reparations beyond compensation in a cross-border setting such as the Habré case raises new implementation challenges. This article considers the various challenges facing the implementation of the EAC award and attempts to offer recommendations so as to overcome them in future cases. It argues that overcoming the challenges of implementation of court-ordered reparations requires a multi-pronged approach addressing the different facets of those challenges, ranging from the fundraising necessary to overcome the insufficiency of the sentenced' person assets

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to issues related to state cooperation and state responsibility for the violations committed.

1. Introduction

On 27 April 2017, the Appeals Chamber of the Senegal-based Extraordinary African Chamber (EAC) confirmed a life sentence against former dictator Hissein Habré for war crimes, crimes against humanity, and torture committed during his rule in Chad between 1982 and 1990.¹ Though a major accomplishment, this final appellate verdict did not bring an end to the victims' 26-year long battle for justice. Despite having been shut down after completing their mandate, the EAC left behind a reparation award to be implemented in favour of over 7000 victims in Chad.² The final victory for justice hinges on the successful implementation of such reparations.

Issued in 2013, the EAC Statute reflected a shift to a form of criminal justice that, alongside its mandate to punish perpetrators, is victim-focused with a strong reparations' mandate.³ Its reparations' mandate attests to the development and diversification of forms of reparations beyond financial compensation, the most widely awarded form of reparations before domestic courts.⁴ Thus, the EAC could order reparations in the form of restitution, compensation and rehabilitation.⁵

This shift towards a more victim-focused criminal justice was first codified at the international level in the Rome Statute of the International Criminal Court (ICC).⁶ The EAC award represents the first attempt to codify a similar system within the domestic judiciary of a state, which is empowered to order individual as well as collective reparations that could be implemented through a Trust Fund.⁷ Unfortunately, as this article will show, the implementation of

1 Appeals Judgment, *Hissein Habré*, Extraordinary African Chambers (EAC), Appeals Chamber, 27 April 2017, available online, in the original French, at <http://www.chambresafricaines.org/pdf/Arr%C3%AAtint%C3%A9gral.pdf> (visited 1 February 2018).

2 Appeal Judgment on Reparations, *Hissein Habré*, Appeals Chamber of the EAC, 27 April 2017. This segment of the Judgement begins at page 132 of the pdf. document appended at the link given, *supra* note 1.

3 For more details on the growing importance of victims' rights, see C. Bassiouni, 'International Recognition of Victims' Rights', 6 *Human Rights Law Review* (2006) 203–279; C. Hoyle and L. Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court', 12 *Journal of International Criminal Justice* (JICJ) (2014) 681–703.

4 REDRESS Trust, *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions* (2015), available online at <https://goo.gl/qhe4Tk> (visited 1 August 2017), at 92.

5 Art. 27(1) Statute of the Extraordinary African Chambers (EACSt).

6 L. Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014), at 86. For a detailed discussion of the ICC reparations regime's drafting history, see C. Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court', 17 *International Criminal Law Review* (2017) 351–377.

7 Art. 27(2) EACSt.

court-ordered reparations — particularly in case of international crimes — has faced significant hurdles across the globe.

The implementation phase is an integral part of the victims' right to an effective remedy.⁸ Without this, reparations awards do not go further than the paper on which they are printed. The success of judicial proceedings cannot only be measured by their 'technical perfection' if they systematically result in awards that cannot be translated into reality for victims.⁹

The EAC's verdict also comes at a time of renewed growth of universal jurisdiction proceedings that is partly due to increasingly effective human rights litigators assisting victims in their quest for justice.¹⁰ Furthermore, the development in the forms of reparations discussed above is inevitably going to lead to more and novel challenges in their implementation, particularly in cross-border settings where the award is delivered in one state to be implemented in another. In short, the challenges facing the implementation of court-ordered reparations are likely to not only increase but also to arise more often.

The aim of this article is to identify the different challenges facing the implementation of court-ordered reparations and suggest ways to overcome them by taking the EAC award as a case in point. The first section will preliminarily explain that the reparations award itself — by setting out the parameters of implementation — plays a significant role in ensuring its successful enforcement. The second section will discuss the challenges posed by the insufficiency of funds and suggest ways to overcome them, by allowing for the disbursement of reparations through fundraising or by tracing and recovering the sentenced person's assets. The third section will deal with forms of reparations that are not primarily monetary in nature (e.g. rehabilitation in the form of psychological support.) The EAC declined to award such measures which, it is argued, by their very nature could not be enforced in Chad. In this regard, this article will assess whether the international legal framework related to the recognition and enforcement of foreign judgments is sufficiently developed to permit the implementation of forms of reparations that are not monetary in nature.

Lastly, the final section will discuss the challenges of securing the cooperation of third states where court-ordered reparations are supposed to be implemented. Furthermore, this section will also discuss Chad's own responsibility for the violations committed by its former president Habré and how the EAC award's implementation on its territory could potentially be a catalyst to hold Chad liable for those violations.

8 On the relationship between the awards' implementation and the right to an effective remedy see *infra*, Section 2.B.

9 I. Bottiglieri, *Redress for Victims of Crimes under International Law* (Springer, 2004), at 65.

10 For example, with respect to 2015, in 2016 there was a 30% increase of universal jurisdiction cases around the world. See TRIAL International, 'Make way for Justice #3: Universal Jurisdiction Annual Review 2017', 27 March 2017, available online at <https://trialinternational.org/latest-post/make-way-for-justice-3-closing-the-net-on-impunity/> (visited 1 August 2017).

This article's analysis will ultimately demonstrate how the implementation stage raises numerous challenges, all of a different nature. Hence, the award's successful implementation requires a multi-pronged approach to ensure that reparations do not remain theoretical and illusory for victims.

2. The EAC's Powers over the Trust Fund: More than Meets the Eye

A. An Example not to be Followed: The *Chambres d'assises'* Decision on Reparations

The EAC were specialized chambers established within the Senegalese domestic court system as part of an agreement between Senegal and the African Union (AU) to prosecute those most responsible for international crimes committed in Chad from 1982 to 1990.¹¹ The EAC displayed an international component, as foreign judges sat on its bench and some of its funding was external.¹² The law applicable before the EAC was primarily constituted by their Statute, to be supplemented by the Senegalese Code of Criminal Procedure.¹³ Despite such international characters, the EAC remained essentially a domestic court exercising universal jurisdiction.¹⁴

In the first decision on reparations, the *Chambre d'assises* (or the First Instance Chamber) awarded the civil parties compensation only.¹⁵ The lawyers of the civil parties before the EAC had requested, in addition to compensation,¹⁶ collective reparations in the form of funds for income-generating development projects, building monuments in memory of the victims, teaching the history of the Habré regime in schools, commemorating 30 May as a day

11 Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System, 22 August 2012, available online at <http://www.chambresafriaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf> (visited 25 August 2017).

12 R. Brody, *Victims bring a Dictator to Justice: The Case of Hissein Habré*, *Brot für die Welt*, June 2017, available online at <https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2.Downloads/Fachinformationen/Analyse/Analysis70-TheHabreCase.pdf> (visited 30 July 2017), at 13.

13 Art. 17(1) EACSt. The Statute itself, in several instances, directly referred to the Code of Criminal Procedure, e.g. with regard to the powers of the Prosecutor or the modalities of civil parties' participation in the proceedings. See respectively, Arts 12(3) and 14(5) EACSt.

14 S. Williams, 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?' 11 JICJ (2013) 1139–1160, at 1140; C. Sperfeldt, 'The Trial Against Hissène Habré: Networked Justice and Reparations at the Extraordinary African Chambers', 21 *The International Journal of Human Rights (IJHR)* (2017) 1243–1260, at 4.

15 Judgment on Reparations, *Hissein Habré*, EAC, First Instance Chamber, 29 July 2016, §§ 59–68. The Reparations Judgment is also available as an annex at the end of the Judgment of the Chamber of First Instance rendered on 30 May 2016 at <http://www.chambresafriaines.org/pdf/Jugement.complet.pdf> (visited 1 February 2018).

16 *Ibid.*, §§ 2–26.

against impunity and building centres that would provide vocational training to the children of the victims of Habré's crimes.¹⁷

The *Chambre d'assises* declined to award such collective reparations. It found that the request for collective reparations was too general and lacked the precision necessary for the Court to determine their implementation's feasibility.¹⁸ The *Chambre d'assises* refused to order the third and fourth forms of collective reparations, i.e. teaching the Habré regime's history and commemorating the 30th of May, arguing that it lacked the authority to impose the ensuing obligation on the state of Chad given that it was not a party to the proceedings.¹⁹

The decision suffered from a major shortcoming: it did not address the award's implementation modalities. The *Chambre d'assises*' silence also covered the potential role of the Trust Fund which, according to the Statute, is an organ in charge of implementing the EAC's reparations awards.²⁰ The *Chambre d'assises* appeared to act as if ruling on an ordinary domestic case, by ordering an amount of monetary compensation and expecting the right-holder to pursue the decision's execution through domestic enforcement mechanisms. In their appeal against the reparations' order, the civil parties faulted the decision for failing to put in place a comprehensive reparations order, one that would take implementation challenges into account in the wake of the EAC's dissolution.²¹

The implementation of reparations involving mass claims such as the *Habré* award raises significant challenges and it would be unlikely to succeed in the absence of long-term supervision and management by an administrative body such as the Trust Fund. These include challenges related to the cross-border aspect of implementation, the great number of victims, the lack of sufficient funds, the difficulty of accessing some areas in Chad and locating and identifying victims, since many of them apparently do not possess official documentation to prove their identity. Simply enforcing the verdict in Chad according to its domestic law was not a viable option to ensure that the award reaches all victims. All three reparations orders delivered to date by the ICC — *Lubanga*, *Katanga* and *Al-Mahdi* — were made through the Trust Fund and according to an implementation plan set by the ICC, although the number of participating victims in those three cases did not exceed 1000 victims, unlike at EAC.²² The *Chambre d'assises* neither developed a comprehensive implementation plan nor did entrust its development to any other entity.

17 *Ibid.*, § 69.

18 *Ibid.*, § 70.

19 *Ibid.*, § 71.

20 Art. 27(2) EACSt.

21 Appeals Submission of Abaifouta Clément et al. against the Reparations Verdict, *Hissein Habré*, EAC Appeals Chamber, 5 December 2016, available online at <https://goo.gl/K9swSW> (visited 6 August 2017), §§ 48–49.

22 Order for Reparations, *Lubanga Dyilo* (ICC-01/04-01/06-3129-AnxA), Appeals Chamber, 3 March 2015, § 75; Order for Reparations, *Katanga* (ICC-01/04-01/07-3728-tENG), Trial Chambers II, 24 March 2017, § 307; Reparations Order, *Al Mahdi* (ICC-01/12-01/15-236), Trial Chamber VIII, 17 August 2017, § 136.

Furthermore, according to the Statute, the EAC were set to be dissolved following the delivery of the final award, thereby leaving the implementation stage with no judicial supervision.²³ The dissolution of the very chamber that delivered the reparations order highlighted even further the importance of having a dedicated authority to manage and supervise the implementation stage.

The *Chambre d'assises*' silence over the award's implementation was not explained in the verdict. It is not clear whether the *Chambre d'assises* ruled out having recourse to the Trust Fund or if this was regarded as beyond its jurisdictional mandate due to the EAC Statute's ambiguity.

In fact, the EAC Statute did 'not provide a functioning, stand-alone framework for an effective reparations order'.²⁴ Throughout the proceedings, and in the absence of a clear provision in the Statute, there was looming uncertainty on the EAC's powers over the Trust Fund, and on the mandate and structure of the Trust Fund. Article 27(2) of the Statute provided that the EAC 'may order that a reparations award for compensation be made by the intermediary of the Trust Fund'.²⁵ This provision is similar to its counterpart in the Rome Statute stating that '[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund'.²⁶

Nevertheless, unlike the EAC Statute, the ICC Statute is complemented by Rules of Procedure and Evidence (RPE) and Regulations of the Court that further organize the relationship between the ICC and the ICC Trust Fund for Victims (ICC TFV) during the implementation stage. These rules govern crucial issues such as the identification of victims who should benefit from the order, and the implementation of individual or collective reparations.²⁷ On the basis of this framework, the ICC instructs the Trust Fund on the implementation of reparations orders. In this respect, ICC Chambers have, *inter alia* instructed the Trust Fund to: prioritize individual awards over collective ones²⁸; take into account the views and proposals of victims regarding the appropriate modalities of reparations and programmes²⁹; fundraise in order to complement the totality of the award in light of the accused's indigence³⁰ and prioritize certain victims over others.³¹

No similar rules for issuing instructions to the Trust Fund were at the EAC's disposal. The AU created the Trust Fund only in July 2016, while the *Chambre d'assises* was about to deliver its decision on reparations.³² By the time the

23 Art. 37(1) EACSt.

24 Sperfeldt, *supra* note 14, at 10.

25 Art. 27(2) EACSt.

26 Art. 75(2) ICCSt.

27 Chapter II and III Regulations of the ICC Trust Fund for Victims (ICC TFV).

28 Reparations Order, *Al Mahdi*, *supra* note 22, § 140.

29 Order for Reparations, *Lubanga Dyilo*, *supra* note 22, § 79.

30 Reparations Order, *Al Mahdi*, *supra* note 22, § 138.

31 Order for Reparations, *Katanga*, *supra* note 22, § 310.

32 *Decision on the Hissein Habré Case*, AU Dec.615(XXVII), 17–18 July 2016, available online at <https://www.au.int/web/sites/default/files/decisions/31274-assembly.au.dec.605-620.xxvif.pdf> (visited 5 August 2017); EAC Judgment on Reparations, *Hissein Habré*, *supra* note 15, § 71.

EAC were dissolved, the Trust Fund regulations had not been adopted yet. Additionally, Senegalese law could not provide the EAC with guidance since no mechanism similar to the Trust Fund exists in the Senegalese legal system.

B. Implementation of Reparations' Awards and the Right to Effective Reparations

The absence of a framework guiding the implementation of the reparations award delivered by the *Chambre d'assises* and the resulting risk of non-enforceability of the decision risked denying victims access to an effective remedy as guaranteed by international law.

Under international law, victims have a right to an 'effective remedy' for the violations they have suffered.³³ In that regard, states must guarantee those who claim to be victims of violations an effective and equal access to justice irrespective of who is found responsible for the violations.³⁴ The right to an effective remedy includes the right to receive reparations.³⁵ The forms of reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³⁶ Reparations should be adequate, effective, prompt and proportionate to the harm suffered.³⁷ In order to guarantee this right to victims, judges have to ensure that the reparations ordered are appropriate in light of the harm suffered by the victim and the nature of the crime in the case at hand.³⁸

However, ensuring the effectiveness of reparations means not only that in each case their nature must be adequate to repair the harm, but also that they have to be actually implemented in favour of the victims. In that regard, the Inter-American Court of Human Rights has stated that

in order to satisfy the right to access to an effective remedy it is not sufficient that final judgments be delivered in the appeal for legal protection proceedings, ordering protection of plaintiffs' rights. ... *The enforcement of judgments should be considered an integral part of the right to access to the remedy.* The contrary would imply the denial of this right.³⁹

33 Arts 2(3), 9(5) and 14(6) International Covenant on Civil and Political Rights (1966); *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 21 March 2006, § 3(d).

34 *Basic Principles on the Right to a Remedy and Reparation*, *supra* note 33, § 3(c).

35 *UN Human Rights Committee General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 29 March 2004, § 16.

36 *Basic Principles on the Right to a Remedy and Reparation*, *supra* note 33, § 18; *UN CAT General Comment No. 3: Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012, §§ 2, 6 and 18.

37 *Basic Principles on the Right to a Remedy and Reparation*, *supra* note 33, § 15.

38 Judgment on the Appeals against the 'Decision Establishing the Principles and Procedure to be Applied to Reparations' of 7 August 2012, *Lubanga Dyilo* (ICC-01/04-01/06 AA2A3), Appeals Chamber, 3 March 2015, § 200.

39 *Acevedo-Jaramillo et al. v. Peru*, IACtHR (2006) Series C, No. 144, § 220 (emphasis added).

It is at this juncture that the *Chambre d'assises*' verdict suffered a shortcoming by delivering an award with no mechanism to oversee and manage the award's implementation. Whilst such mechanism — i.e. the Trust Fund — was provided for in the Statute, the *Chambre d'assises* still omitted to refer to it.

While the legal framework governing the implementation of the reparations award lacked clarity, the EAC were not operating in a legal black hole. Judges had the above-mentioned international standards, governing the issue of effective reparations, for the purpose of interpreting their powers under the EAC Statute beyond what meets the eye.

The Statute itself referred to international law and standards relevant to victims, which include their right to an effective remedy, as reflected in Article 27(4): '[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law.' Hence, guided by the victims' right to an enforceable award under international standards the EAC could view its jurisdictional reach to include determining the tasks and competences of the Trust Fund in order to ensure the successful implementation of the reparations. The link between the victims' right to reparations and the EAC's mandate over the Trust Fund was also mentioned in the civil parties' appeals brief, stating that the operationalization of the Trust Fund is 'essential ... to ensure the respect of the right to reparations that is recognized to victims'.⁴⁰

The absence of a textual basis in both the EAC's legal framework and Senegalese law was not necessarily a bar for the EAC to exercise their jurisdiction over the Trust Fund. An *amicus* brief submitted by the NGO REDRESS to the Appeals Chamber argued that on the basis of the principle of *effet utile* used to interpret treaties, the EAC should interpret its powers to include instructions to the Trust Fund even in the absence of a clear provision granting it the competence to do so.⁴¹

The principle of *effet utile* is a corollary of the principle that states have to comply with their obligations in good faith (*pacta sunt servanda*) and 'helps extend the meaning of the wording past its literal sense'.⁴² According to the principle of *effet utile*, rights enshrined in treaties are meant to be 'practical and effective' as opposed to 'theoretical or illusory'.⁴³

Indeed, as mentioned before, without a proper institutional design for implementation, the right to reparation is more likely to remain theoretical or illusory, thus denying victims access to an effective remedy. Relying on the principle of *effet utile* is not only restricted to the interpretation of substantive rights but also procedural provisions. In that regard, the Inter-American Court of Human Rights stated that the *effet utile* principle 'applies not only to

40 Appeals Submission of Abaifouta Clément et al., *supra* note 21, § 64.

41 REDRESS, *Demande d'autorisation de présenter une soumission d'amicus curiae concernant la question des réparations*, Hissein Habré, Appeals Chamber of the EAC, February 2017, §§ 21–40.

42 S. Reinhold, 'Good Faith in International Law', 2 *UCL Journal of Law and Jurisprudence* (2013) 40–63, at 61.

43 *Airey v. Ireland*, Appl. No. 6289/73, judgment of 9 October 1979, § 24.

the substantive provisions... but also to procedural provisions, such as the one concerning compliance with the Court's judgments'.⁴⁴

Thus, the Trust Fund being a *passage obligé* to ensure an effective remedy to victims, the *Chambre d'assises* had to interpret its powers to extend to exercising jurisdiction over the Trust Fund by entrusting it with clear guidelines on the implementation of the award. Without such an interpretation, the award would be left with no viable mechanism of enforcement and, hence, the victims' right to reparations risked being stymied.

C. The Appeals Chamber Takes Ownership of the Trust Fund: the Reparations Award

The Appeals Chamber's decision on reparations was a major breakthrough compared to the ruling of the *Chambre d'assises* as it provided clarity on the modalities of implementation of the reparations order that it had laid out. It called on the AU to speedily and efficiently put the Trust Fund in place, leading to the latter's creation in July 2016,⁴⁵ and 'invited the Trust Fund to consider that its mission is to ensure' that all victims are provided with 'full, effective and adequate reparations'.⁴⁶ The Appeals Chamber also ordered the Trust Fund to disburse the reparations it ordered to 7396 civil parties.⁴⁷ Furthermore, it tasked the Trust Fund to assess further applications for reparation in favour of victims — like those who have not participated in the proceedings or those whose civil party status was rejected by the Appeals Chamber — other than those identified in the judgment.⁴⁸

While the Appeals Chamber turned down the civil parties' request for specific forms of collective reparations, it ordered the Trust Fund to 'work for the establishment of collective and moral reparations' and left it for the Trust Fund to specify.⁴⁹

The Appeals Chamber appeared to adopt a holistic approach to ensure the reparations' successful implementation. For example, beyond the above-mentioned instructions, it noted that Habré's assets were insufficient to fund the reparation order's implementation. To remedy this, it tasked the Trust Fund with identifying and recovering additional Habré's assets.⁵⁰ There was no legal basis in Senegalese law or the EAC Statute that could be relied upon to empower the Trust Fund with such task. Nevertheless, statements by the Appeals Chambers on specific issues clearly indicate that it viewed its mandate to ensure that not only reparations be ordered but that they be also successfully implemented. For example, the *Chambre d'assises* had not set the overall

44 *Albán-Cornejo et al. v. Ecuador*, IACtHR (2009), § 6.

45 EAC Appeals Judgment on Reparations, *Hissein Habré*, *supra* note 2, § 611.

46 *Ibid.*, § 610.

47 *Ibid.*, *Dispositif* at 226.

48 *Ibid.*, § 608–609; Art. 28(2) EACSt.

49 EAC Appeals Judgment on Reparations, *Hissein Habré*, *supra* note 2, § 612.

50 *Ibid.*, § 613. See also *infra*, Section 3(A–B).

amount for which Habré was to be held liable, which was to be calculated on the basis of the harm suffered by the victims. The Appeals Chamber remedied such omission by clearly indicating the amount that Habré was liable to pay and noted the importance of having overall liability determined for the purpose of the ‘enforcement of the EAC verdict and the importance of the effectiveness of reparations without which *the value of these proceedings would be greatly diminished*.’⁵¹ The Appeals Chamber understood that providing redress to victims was a rationale underpinning the creation of the EAC. The Court would only be paying lip service if it stopped at issuing a reparations award without being cognizant and mindful of the implementation gap that stood between that verdict and the thousands of victims in Chad.

3. Circumventing the Indigence of the Accused

A. *Insufficiency of Funds in Court-Ordered Reparations: A Systematic Déjà Vu*

The unavailability of assets is probably the greatest challenge in funding court-ordered reparations. Due to their nature as the product of a court ruling, the obligation to fund them rests on the convicted person and stems from his/her civil responsibility for the harm caused. Such assets might not be available because the convicted person is, as it is common, indigent. Furthermore, in some cases, the high number of victims, which can reach thousands, could make it impossible for the convicted person to pay for the entire reparations, even where he/she is not indigent.

As a consequence of the shortage of funds, over the years, very few victims of gross violations of human rights have managed to obtain court-ordered reparations. The vast majority of victims in universal jurisdiction cases in Europe,⁵² the USA (under the Alien Tort Claims Act)⁵³ and in domestic war crimes trials in the Democratic Republic of Congo⁵⁴ have not succeeded in enforcing their monetary awards and actually obtain reparations. This situation has resulted in a ‘wide gap between the awarding of millions of dollars to victims of serious human rights violations as a matter of formal judgment, and the far from perfect state of actual execution of the judgment which has left victims mainly without compensation.’⁵⁵

51 *Ibid.*, § 937 (emphasis added).

52 REDRESS, ECCHR, FIDH and TRIAL, *Driving Forward Justice: Victims of Serious International Crimes in the EU*, October 2014 available online at <http://www.redress.org/downloads/publications/eu-international-crimes-victims-directive-report-17October2014.pdf> (visited 1 August 2017), at 47.

53 Bottiglieri, *supra* note 9, at 65.

54 FIDH, RDC: *Les victimes de crimes sexuels obtiennent rarement justice et jamais réparation*, October 2013 available online at <https://www.fidh.org/IMG/pdf/rapporttrdc.pdf> (visited 20 November 2017), at 61.

55 Bottiglieri, *supra* note 9, at 65.

One trend has been the establishment of trust funds at the national level to provide compensation to victims who were unable to obtain compensation before courts (for example, because of the accused's indigence).⁵⁶ The establishment and development of such trust funds are in line with international standards.⁵⁷ However, such initiatives are, at this stage, unlikely to remedy the problem of shortage of assets in cases of mass claimants such as the *Habré* trial. These entities are funded by states as opposed to voluntary contributions and possess far less complex structure and mandate than the Trust Fund envisaged for the implementation of the EAC award. Such trust funds are usually set up in the context of ordinary crimes, and for this reason the available resources might not be sufficient in mass claims cases.⁵⁸ Furthermore, they are designed for compensation awards and not necessarily for the implementation of collective reparations programs.⁵⁹ Also, such trust funds can have geographical restrictions based on the place where the crime was committed and thereby exclude victims of crimes tried in universal jurisdiction proceedings. For example, under EU law, only victims of violent international crimes committed in a EU member states can access trust funds of the said kind.⁶⁰

In sum, the abovementioned national trust funds are unlikely to break the curse of insufficiency of assets that has been systematically leaving victims of international crimes with unenforceable awards, particularly in universal jurisdiction proceedings. As such, national trust funds need to grow to have a mandate commensurate with what is required to implement court-ordered reparations in cases like the Trust Fund in Habré before the EAC. To overcome the shortage of resources, national trust funds should have the ability to diversify and find sustainable fundraising sources beyond their current exclusive reliance on the state's budget. Furthermore, their mandate should grow beyond disbursing compensation to devising and implementing non-monetary forms of reparations. Finally, national trust funds should find an international dimension to allow them to provide reparations to victims that might not be located in the state where the proceedings are taking place, such as the case of Habré's victims.

56 Bassiouni, *supra* note 3, at 225.

57 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 29 November 1985, § 13; *Basic Principles on the Right to a Remedy and Reparation*, *supra* note 33, § 16.

58 In some cases, such national trust funds are not even supposed to provide a compensation that is commensurate with the harm suffered. For example, in the Netherlands, the Violent Offences Compensation Fund does not provide 'full compensation'. It is supposed to provide financial support to allow the victim to 'move forward'. See Violent Offences Compensation Fund, *Have you Been a Victim of Violence? The Violent Offences Compensation Fund Can Help*, July 2016, available online <https://schadefonds.nl/wp-content/uploads/2016/06/Brochure-SchadefondsEN-0616.pdf> (visited 28 January 2018), at 3.

59 EU Directive 2004/80/EC, requiring EU member states to establish trust funds for victims at the national level, mentions compensation as the only form of reparation that trust funds can provide. See Art. 1, EU Council Directive 2004/80/EC Relating to Compensation to Crime Victims, 29 April 2004.

60 *Ibid.*, Arts 1–2.

The EAC's reparations order in the *Hissein Habré* case faces similar challenges in terms of shortage of funds. Habré's frozen assets, consisting of less than 1 million Euros (estimated), drastically fall short of the amount required to pay the reparations ordered by the EAC, totalling to approximately 124 million euros.⁶¹ Nevertheless, Habré is believed to possess more than the frozen assets. For example, he is suspected to have fled Chad with an estimated amount of 11.8 million euros when he lost power.⁶² The Trust Fund can avail itself of two avenues to secure funding: the first avenue is to recover Habré's assets as instructed by the Appeals Chambers' order, the second avenue would consist in voluntary contributions as provided for in the EAC Statute.⁶³

B. Forfeiture of Assets

The Appeals Chamber ordered the Trust Fund to use Habré's assets only for the benefit of the victims and not to cover the Trust Fund's operational costs,⁶⁴ in line with the idea that all of the convicted person's assets 'belong' to reparations and victims. In fact, an order for reparations delivered by a court such as the EAC in the context of the *Habré* case is the equivalent to a civil debt against the convicted person, hence 'the judgment can be satisfied by *any assets* belonging to the perpetrator and not only by the proceeds of the crime'.⁶⁵ The ICC RPE, at Rule 221(2), also provides that priority in the allocation of the convicted person's assets should be given to the enforcement of reparations awards.⁶⁶ Other examples of the same kind include the funding of reparations for victims of former president Marcos in the Philippines,⁶⁷ and the 2016 Colombia peace deal with the FARC that ear-marked the armed group's assets for reparations.⁶⁸

61 EAC Appeals Judgment on Reparations, *Hissein Habré*, *supra* note 2, *dispositif* at 226.

62 A. Grovestins, 'Victims' Lawyers Start Battle to Seize Habré's millions', Justice Hub, 4 August 2016, available online at <https://justicehub.org/article/ex-chadian-dictator-hissene-habre-ordered-pay-millions-victims>. (visited 4 November 2017).

63 Art. 28(1) EACSt.

64 EAC Appeals Judgment on Reparations, *Hissein Habré*, *supra* note 2, § 614.

65 C. Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations', in O. Bekou and D. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 227–247, at 234 (emphasis added); Judgment on the Appeal of the Prosecutor against the Decision of [Redacted], Situation [Redacted], (ICC-ACRed-01/16), Appeals Chamber, 15 February 2016, § 1.

66 Rule 221(2) ICC RPE.

67 Republic Act No. 10368 (Philippines), 'An Act Providing for Reparation and Recognition of Victims of Human Rights Violations during the Marcos Regime, Documentation of Said Violations, Appropriating Funds therefore and for Other Purposes', 25 February 2013.

68 Final Agreement to Put an End to the Conflict and for the Construction of a Stable and Durable Peace (Colombia), 12 November 2016, available online at http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos_compartidos/24-11-2016NuevoAcuerdoFinal.pdf (visited 5 August 2017) at 186; A. Alsema, 'Colombia Freezes \$3 Million in Alleged FARC Assets', Colombia Reports, 31 July 2017, available online at <https://colombiareports.com/colombia-freezes-3-million-alleged-farc-assets/> (visited 5 August 2017).

Recovering assets fund reparations in Habré's case could prove very challenging for several reasons. First, such efforts would only be initiated at the end of lengthy court proceedings during which Habré may have taken measures to hide or shift his assets. No significant efforts have been carried out prior or during the proceedings to trace and freeze such assets, even though the freezing of the accused's assets on a 'precautionary or provisional basis is a vital opportunity to safeguard assets for eventual reparations proceedings.'⁶⁹ Such delay might prove fatal for the successful recovery of Habré's assets. As a rule, therefore, this issue should be considered from the outset and soon as the investigation stage.⁷⁰ Otherwise 'victory in court may prove a pyrrhic one and attempts to enforce may prove complex, time-consuming, and ultimately fruitless.'⁷¹

Secondly, the freezing order's enforcement depends both on the legal framework where the proceedings are taking place and the legal framework of the state where assets are located. It is one thing to obtain a court order to freeze a defendant's assets abroad and another one to successfully enforce that order in the country where the assets are located. For example, some states would not recognize such orders as enforceable automatically before conducting further hearings before their national courts.⁷² Furthermore, a court would not be willing to issue such orders before obtaining credible information about the existence of such assets and their location. For, example, British courts can issue 'worldwide freezing orders' on a defendant's assets to secure enforcement for an eventually favourable verdict for the plaintiff. However, to issue such orders, the court requires information about the existence and location of the defendant's assets.⁷³ Hence, in the absence of information on the location of such assets, such as is the case for Habré, the claimants would have to avail themselves of the expertise of asset tracers or financial investigators along with the associated costs of bringing in such experts.

⁶⁹ Ferstman, *supra* note 65, at 233.

⁷⁰ At the ICC, the Office of the Prosecutor conducts financial investigations for the purpose of identifying assets for potential reparations awards. *Report on Cooperation Challenges Faced by the Court with Respect to Financial Investigations* (October 2015), available online at <https://www.icc-cpi.int/iccdocs/other/161027-ICC-Rep-Eng.pdf> (visited 2 November 2017), at 2.

⁷¹ REDRESS, *Enforcement of Awards for Victims of Torture and Other International Crimes*, May 2006, available online at <http://www.redress.org/downloads/publications/master.enforcement%2030%20May%202006.pdf> (visited 3 August 2017), at 52.

⁷² For instance, in Belgium, a foreign judgment cannot be granted recognition for the purpose of enforcement if the defendant proves that his or her due process rights were violated during the proceedings in the country where the judgement was delivered. See Art. 25 Belgium Code of Private International Law, July 2004. For more on this issue see REDRESS, *Enforcement of Awards for Victims of Torture...*, *ibid*.

⁷³ UK, Civil Jurisdiction and Judgments Act 1982 c. 27, s 25; UK, Civil Procedure Rules, Part 25 (see in particular Rule 25.1(g)). The UK Court of Appeal determined that the claimant must demonstrate not just a 'likelihood' that the defendant owns assets, but either have a 'good arguable case' or show 'grounds for belief' that such assets exist. See *Ras Al Khaimah Investment Authority v Bestfort Development LLP* [2017] EWCA Civ 1014, § 39.

The expertise in transnational enforcement and in asset tracing is not habitually found among human rights lawyers, including victims' lawyers in the *Habré* case. Such lack of expertise could explain the lack of credible information, even up until the verdict stage, as to the location of potential assets. It would be difficult to envisage all the challenges that will arise in the recovery process, should assets be identified, given how unprecedented and *sui generis* the situation is. The right-holders of the compensation awards are the victims themselves and not the Trust Fund. Hence, it is not clear to what extent the Trust Fund would have the standing to initiate the process of recovery. Furthermore, the Appeals Chambers set the overall liability amount for Habré without taking into account that the amount will increase if more victims are identified as beneficiaries by the Trust Fund. As mentioned previously, even victims who have not participated in the proceedings can claim reparations according to the Statute.⁷⁴ With more victims identified as beneficiaries by the Trust Fund, the overall amount needed for compensation is likely to increase. Since the share of newly admitted victims is not included in the Appeals Chamber's verdict (based exclusively on the number of admitted civil parties), individuals who will be recognized as victims entitled to reparations at the post-verdict stage would have to obtain an amended overall liability figure from the ordinary Senegalese courts, and seek enforcement on that basis.⁷⁵

The publicity around the case may also play a role in securing third states' cooperation in the successful recovery of assets. High-profile causes or cases are more likely to translate into practical and legal steps meant to assist in the process of repatriating assets. For example, in an apparent effort to support the transition during the 'Arab Spring', the EU had publicly indicated that the identification and return of assets to Tunisia and Egypt was 'a priority' to the EU and amended its legal framework to facilitate the process.⁷⁶

Moreover, information about hidden assets may be provided by investigative journalists who are attracted by high-profile cases, usually bound to a wider readership. Investigative journalists' capacity to deal even with very large-scale cases was shown in the 'Panama papers' affair, that uncovered the location of assets shielded from taxes belonging over 100 politicians around the world.⁷⁷ Another example of their investigative skills is constitute by the effective tracking of ICC-defendant Jean-Pierre Bemba Gombo's assets back to the

74 Art. 28(2) EACSt.

75 Senegalese courts are competent to look into issues arising from the EAC proceedings following their dissolution. Art. 37(3) EACSt.

76 The Council of the EU Press Release, 'Egypt and Tunisia: Council Facilitates Asset Recovery', 26 November 2012, available online at <http://www.consilium.europa.eu/uedocs/cms.data/docs/pressdata/EN/foraff/133818.pdf> (visited 5 August 2017).

77 ICIJ, *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption: Millions of Documents Show Heads of State, Criminals and Celebrities Using Secret Hideaways in Tax Havens*, 3 April 2016, available online at <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html> (visited 3 August 2017).

Dutch brewer Heineken.⁷⁸ Even in the event that the information obtained by journalists would not be admissible in court, having leads as to the location of assets could increase pressure on states to further investigate and proceed to freezing and repatriation of assets.

C. Voluntary Donations

When the primary avenue for funding reparations' awards (i.e. the sentenced person's assets) shows to be insufficient, voluntary contributions could represent a possible remedy.

Success in attracting voluntary contributions rests on several factors and in particular, again, on the public attention generated and received by the case. This may depend on many circumstances, such as the magnitude and circumstances of the alleged crimes, the profile of the perpetrator and/or victims, the type of court prosecuting the case, etc. Moreover, victim's legal representatives, victims' organizations and victims directly also play a role in raising the case's public profile. For instance, victim movements may undertake a sort of 'harm-related activism', featuring emotional appeals and showing symbols of victimization, justice and compassion.⁷⁹ The *Habré* trial is a case in point of the relentless fight by victims, lawyers and human rights organizations for justice. Such a fight became reality when it met with a favourable political context in Senegal with the coming to power of Macky Sall, after years of rejection during then-president Abdoulaye Wade's rule.⁸⁰ Ensuring the successful implementation of reparations is not much different from that process, as it requires designing 'a political strategy aimed at, on the one hand, making political groups aware of the importance of reparations, and on the other, building a social and political alliance in favor of such programs.'⁸¹

Nevertheless, finding resources for reparations might prove challenging. In general, reparation proceedings and their implementation do not appear to attract as much attention as the criminal trial itself. In the case at hand, the media attention towards Habré's trial died down since his final conviction.

Furthermore, within the framework of court-ordered compensation, the accused is often perceived as the one and only duty-holder.⁸² The ICC TFV has noted that 'governments, foundations and individuals may find it difficult to financially contribute to the reparation of harm caused by a convicted person.'⁸³ Reparations in general, and particularly monetary compensation, do

78 B. Duerr, 'Beer and Bemba: How ICC Big Fish Links to Heineken', International Justice Tribune, 13 April 2016, available online at <https://www.justicetribune.com/blog/beer-and-bemba-how-icc-big-fish-links-heineken> (visited 3 August 2017).

79 H. Rombouts, *Victim Organizations and the Politics of Reparation: A Case Study on Rwanda* (1st edn., Intersentia, 2004), at 87.

80 Brody, *supra* note 12, at 13.

81 A. Segovia, 'Financing Reparations Programs: Reflections from International Experience', in P. De Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006) 650–675, at 667.

82 ICC TFV Victims' First Report on Reparations, *Lubanga Dyilo* (ICC-01/04-01/06-2803-Red), Trial Chamber I, 1 September 2011, § 139.

83 *Ibid.*

not attract donors — including states — as much as social or humanitarian programs do.⁸⁴ Such trend is apparent in the contributions provided to the ICC TFV. Donors have been reluctant to provide contributions ear-marked to the TFV's mandate to implement court-ordered reparations, but much more willing to fund the TFV's assistance mandate, which is more akin to a humanitarian/development program.⁸⁵

The EAC Trust Fund is entrusted with attracting voluntary contributions and organizing a donors' conference. The degree of success of these fundraising efforts depends on the availability of relevant expertise, namely fundraising and communication advisers that are able to develop and implement a strategy for attracting further funding. To this date, however, not even the ICC's TFV has hired a fundraising expert, and this might explain the modest donations the ICC Trust Fund has attracted over time in contrast to other victims' funds which have the advantage of such expertise.⁸⁶

Fundraising efforts could prove less challenging when a reparation award has already been delivered, as opposed to fundraising for potential future reparations. Furthermore, donations are more likely to occur under the spotlight, i.e. during public fundraising events. In one such event, the Netherlands ear-marked an amount for the full payment of the compensation awards in the *Katanga* reparations order delivered by the ICC in March 2017.⁸⁷ The donation was announced at a public event organized by the ICC TFV, during which it highlighted its work in the Democratic Republic of the Congo (DRC) and Uganda.

Victims' associations and civil parties' lawyers could carry out fundraising and outreach work. Victims' lawyers in the *Habré* case have undertaken fundraising efforts, including by making appeals for contributions for reparations as they did during the 29th AU summit, the first to be held after the delivery of the reparations award.⁸⁸ Through professional campaigning and fundraising work, the Trust Fund will have to build an image that inspires confidence in donors to reassure them that the funds are going to be spent effectively. Victims' lawyers and associations might not have the time and resources to dedicate themselves to such tasks that require full-time efforts and that also

84 Segovia, *supra* note 81, at 655–659.

85 *Report to the Assembly of States Parties on the Projects and the Activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016*, ICC-ASP/15/14, 16 August 2016, § 53.

86 C. McCarthy, *Reparations and Victim Support to the International Criminal Court* (1st edn., Cambridge University Press, 2012), at 59; *Report of the Secretary-General: United Nations Voluntary Fund for Victims of Torture*, UN Doc. A/67/264, 7 August 2012, § 5.

87 ICC TFV Press Release, 'Trust Fund for Victims Decides to Provide \$1 Million for the Reparations Awarded to Victims in the *Katanga* Case, Welcomes Earmarked Donations of €200,000 from the Netherlands', 18 May 2017, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1305> (visited 5 August 2017).

88 A. Sylvestre-Treiner and N. Lamli, 'Reed Brody : « Si l'UA parvenait à restituer l'argent aux victimes de Hissène Habré, elle frapperait un grand coup »', *Jeune Afrique*, 3 July 2017, available online at <http://www.jeuneafrique.com/453397/societe/reed-brody-lua-parvenait-a-restituer-largent-aux-victimes-de-hissene-habre-frapperait-grand-coup/> (visited 10 August 2017).

have to be sustained over a long period of time, during which it will attempt to shore up the inevitable loss of interest that occurs over time.

With the support of victims' lawyers, the Trust Fund should invest in the high-profile character of the *Habré* case to attract support and resources for the implementation stage. Such resources need not only be financial, but could also consist in providing the Trust Fund with human expertise. For example, Switzerland seconded an outreach officer to work full time for the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁸⁹ Having been the trial of a former Head of State for international crimes, including gender-based ones, the *Habré* case could be appealing to potential donors (most notably states), including those on the African continent who see it as an example of an 'African solution to African problems'.

Capitalizing on the appeal of the case, the under-resourced 'Habré' Trust Fund could find creative ways to acquire asset-tracing and fundraising expertise, while at the same time minimizing the costs.

4. Dead End: Collective Reparations

The debate over collective reparations during the proceedings before the EAC, and its outcome, were emblematic of the limitations that any domestic court would face in ordering forms of reparations that are non-monetary in nature in the context of transnational proceedings.

The Appeals Chambers upheld the *Chambre d'assises*' decision with regard to collective reparations. The Appeals Chambers found that, in light of the sovereignty issues they raise, none of the collective reparations requested by the civil parties could be successfully implemented without the host state's consent.⁹⁰ Hence, the Appeals Chamber reached out to Chad to seek its views on the matter.⁹¹ Chad's negative response prompted the Appeals Chambers to deny awarding collective reparations as requested by the civil parties.⁹² However, unlike the *Chambre d'assises*, the Appeals Chambers did not entirely close the door to collective reparations. Indeed, the Appeals Chamber 'invited' the Trust Fund to collaborate with victims' associations and 'interested states' in order to implement some forms of collective and symbolic reparations.⁹³ Torn between the impossibility to enforce collective reparations on one side, and the awareness that compensation alone would not sufficiently repair the harm suffered by victims on the other, thus, the Appeals Chamber left it to the Trust Fund to seek a way out.⁹⁴ Still, the Appeals Chamber's recognition of

89 OSJI, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 7 December 2007, available online at <https://www.opensocietyfoundations.org/sites/default/files/eccc.2007.1211.pdf> (visited 3 August 2017), at 11.

90 EAC Appeals Judgment on Reparations, *Hisssein Habré*, *supra* note 2, §§ 845–861.

91 *Ibid.*, § 862.

92 *Ibid.*, § 875.

93 *Ibid.*, §§ 612 and 847.

94 *Ibid.*, § 842.

the need for several forms of reparations to remedy harm suffered by victims of international crimes is a welcome development, and joins the increasing trend of viewing compensation in itself as an insufficient measure.⁹⁵

The proceedings before the EAC, nonetheless, show that the said development might not be enforceable in practice. Sovereignty might not be the only barrier to implementing collective reparations. The legal framework governing the recognition of foreign judgments in international private law is another hurdle. Certain forms of collective reparations, such as establishing a rehabilitation centre, do not fall within the classic scheme of recovering pre-quantified debt.⁹⁶ Even when foreign judgments' enforcement requires the performance of an obligation, like injunctions or the production of documents, these are usually limited in scope and time.⁹⁷ Collective reparations' implementation, on the contrary, may be open-ended in scope and time. Moreover, some states require that foreign judgments shall be enforced in accordance with the host state's laws.⁹⁸ Accordingly, should the latter not recognize under its national law the kind of reparations in question, enforcement could be denied.

The enforcement of collective reparations' awards would require ad hoc agreements among states or a permanent treaty setting out the applicable legal regime. In this sense, a multilateral treaty bringing together as many states as possible would harmonize the different national enforcement regimes. Current conventions related to the enforcement of foreign judgments do not address the enforcement of such type of awards, which would require a special regime particularly in light of their longer time-span.⁹⁹ In the same vein, existing initiatives to develop an international framework for the enforcement of foreign judgments are not sufficient. For example, the proposed draft Hague Convention on the recognition and enforcement of foreign judgments specifically excludes non-monetary awards from its scope of application.¹⁰⁰

95 *Basic Principles on the Right to a Remedy and Reparation*, *supra* note 33, § 15; *General Comment No. 3 of the Committee against Torture*, *supra* note 36, § 9; ICTJ Press Release, 'Court-Ordered Reparations for Sexual Violence Must Go Beyond Money to Truly Help, Says New ICTJ Paper', 12 Avril 2017, available online at <https://www.ictj.org/news/court-ordered-reparations-sexual-violence-must-go-beyond-money-truly-help-says-new-ictj-paper> (visited 1 August 2017).

96 P. De Miguel Asensio, 'Recognition and Enforcement of Judgments: Recent Developments', in P. Torremans (ed.), *Research Handbook on Cross-border Enforcement of Intellectual Property* (Edward Elgar Publishing Limited, 2014) 381–420, at 479. It is worth noting that the trend of enforcement of foreign non-monetary judgment is recent in private international law, particularly among common law countries. For example, in Canada it was not until 2006, following a decision by the Supreme Court, that some foreign non-monetary awards could be granted recognition and enforced. See *Pro Swing Inc. v. Elta Golf Inc* [2006] Supreme Court of Canada 52.

97 De Miguel Asensio, *supra* note 96, at 479.

98 S.G.A. Pitel, 'Enforcement of Foreign Non-Monetary Judgments in Canada (And Beyond)', 3 *Journal of Private International Law* (2007) 241–260, at 247.

99 See for example, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968); The Hague Convention on Foreign Judgments in Civil and Commercial Matters (1971).

100 Art. 12 Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments, available online at: <https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafddb.pdf> (visited 5 November 2017).

In light of the increase in the variety of court-ordered reparations and in the frequency of cross-border proceedings, the current legal hurdles for the enforcement of collective reparations in foreign countries are likely to prejudice victims.

5. Implementation of Reparations against a Former Head of State: State Responsibility and Cooperation

A. State Cooperation and Reliance on Intermediaries at the Implementation Stage

While the EAC had a strong reparations mandate that reflected, to some extent, that of the ICC, it did not have the necessary powers to enforce such a mandate against states. States Parties to the Rome Statute are under an obligation to cooperate with the ICC, including at the stage of implementation of reparations.¹⁰¹ The Appeals Chamber found in *Lubanga* that such an obligation also means that states 'are enjoined not to prevent the enforcement of reparation orders or the implementation of awards'.¹⁰² In addition, the ICC noted that state cooperation is 'especially necessary' at the stage of implementation of reparations.¹⁰³ In contrast, the EAC cannot avail itself from such cooperation duties, not even in relation to Chad, where the reparations are to be implemented.

The EAC could carry out investigations and outreach activities in Chad because of a judicial cooperation agreement signed by Senegal and Chad.¹⁰⁴ The absence of a similar agreement to govern reparations leaves the implementation stage at the mercy of Chad's political will.¹⁰⁵ Host states are likely to oppose the implementation of reparations on their territory in situations where such reparations recognize situations of victimhood that they are responsible for, or with which they do not sympathize politically. While Chad was not openly opposed to the *Habré* trial, it attempted to limit prosecutions to Hissein Habré only. The incumbent president, Idriss Déby, was indeed a high-ranking member of the Habré regime. Hence, the implementation of reparations for crimes committed during the Habré era could entail more publicity for crimes that Déby might have, at the very least, been aware of at the time of their commission.

One way of practically bypassing the sovereignty issue would be to implement reparations through intermediaries, such as victims' lawyers and

101 Art. 86 ICCSt.; Reparations Order, *Al Mahdi*, *supra* note 22, § 36.

102 Order for Reparations, *Lubanga Dyilo*, *supra* note 22, § 50.

103 Reparations Order, *Al Mahdi*, *supra* note 22, § 36.

104 Arts 16–17, *Accord de coopération judiciaire entre la République du Sénégal et la République du Tchad pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1 décembre 1990*, 3 May 2013, available online at <http://forumchambresafraicaines.org/cooperation-judiciaire/> (visited 31 January 2017).

105 In the event that Chad impedes the work of the AU-created Trust Fund, the AU could consider imposing sanctions pursuant to Article 23(2) of its Constitutive Act for failure to comply with 'decisions and policies of the Union'. Resorting to such sanctions remains a political decision taken by the Assembly of the AU. It is highly unlikely that the AU would resort to such measure against Chad for mere lack of cooperation (or compliance) with the Trust Fund.

associations, which can prove indispensable due to their knowledge of the local context. Furthermore, intermediaries are more likely to enjoy the victims' trust, which can prove challenging to obtain in some circumstances due to the traumatization they suffered. The ICC TFV can rely on intermediaries to facilitate the disbursement of reparations awards.¹⁰⁶ In Cambodia, local and international NGOs — as intermediaries — have implemented reparations for the violations committed by the Khmer Rouge in the form of memorialization and psycho-social support. Such programs offered the advantage of being 'more sustainable than placing most responsibilities on the ECCC which exists only temporarily.'¹⁰⁷

Furthermore, such reliance on intermediaries can prove useful, if not indispensable, in situations where beneficiaries are located across several countries. For example, while based in Berlin, the German Foundation Remembrance, Responsibility and Future provided compensation to victims of the Nazi regime in 89 countries, relying in some countries on intermediaries such as the International Organization for Migration.¹⁰⁸ However, reliance on intermediaries is likely to raise many challenges. For instance, reliance on intermediaries can expose them to security risks depending on the host state's attitude towards the reparations process. Furthermore, reliance on intermediaries could avoid or at least diminish the breadth of victims' communications with the Trust Fund. Other challenges include the difficulty in monitoring such intermediaries' work, a higher risk for confidentiality about beneficiaries, and a risk of favouritism for certain victims over others — particularly in situations of unhealthy competition between local intermediaries.

Yet, resorting to intermediaries does not necessarily bypass, at least on a theoretical level, the sovereignty conundrum absent the consent of the host state. Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts states that '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'¹⁰⁹ These persons are, according to the International Law Commission, akin to 'individuals or groups of private individuals' who are instructed to carry out particular missions in foreign countries.¹¹⁰

Hence, Article 8 may cover acts of local intermediaries in situations where they are implementing reparations set out in a foreign court's judgment, as they

106 Section IV ICC TFV Regulations.

107 C. Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia', 12 *International Criminal Law Review* (2012) 457–489, at 487.

108 For more information about the German Foundation 'Remembrance, Responsibility and Future', see G. Saathoff, U. Gerlant, F. Mieth and N. Wühler (eds), *The German Compensation Program for Forced Labor: Practice and Experiences* (Stiftung Erinnerung Verantwortung und Zukunft, 2017).

109 Art. 8 ILC Articles on Responsibility of States for Internationally Wrongful Acts.

110 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, Supplement No. 10 (A/56/10), chp.IV.E.1, 2001, available online at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9.6.2001.pdf> (visited 15 January 2018), at 47.

could be considered to be acting upon the instructions of such foreign court.¹¹¹ Moreover, such implementation is likely to be undertaken with funds provided by the foreign state. In those situations, the intermediaries' acts undertaken on the host's states territory would be attributable to the state where the verdict was issued. Absent the consent of the host state, the intermediaries' conduct might amount to an undue intervention in the host state's internal affairs.¹¹²

B. The Missing Link: State Responsibility

Crimes committed by state officials, such as Habré, raise the question of state responsibility and the resulting obligation to provide reparations. The EAC had jurisdiction to order reparation against natural persons only,¹¹³ shielding the state from effective accountability. As states cannot be held criminally liable, reparations are the primary means through which they are held to account.¹¹⁴ Hence, focusing only on individual criminal responsibility results in a system of 'partial responsibility' that 'undermines the [...] objective ending impunity and delivering justice to victims.'¹¹⁵

The identity of the person who 'pays' reparations is important for victims, 'as the culpable person is made to acknowledge and remedy their suffering.'¹¹⁶ And victims are likely to perceive the state as liable for the violation its agents have committed, independently of whether such agents have been held into account.¹¹⁷ In March 2015, twenty officials were convicted in Chad for human rights violations committed during the Habré regime and were ordered to pay individual and collective reparations jointly with the Chadian State,¹¹⁸ but the verdict has not been implemented to date.¹¹⁹

A state could provide recognition for the human rights violations it committed by participating in or facilitating the implementation of reparations against the convicted persons. Although insufficient, the state's constructive involvement at this stage is at least a positive step.

In this regard, the ICC TFV has launched, under its assistance mandate, projects in Côte d'Ivoire that seek to collaborate with the government in a state-sponsored reparation program.¹²⁰ Initiatives like this one would

111 Under the international law of state responsibility, all organs of a state (which include the judiciary) fall under the category of 'state' for the purpose of attribution of conduct even if they have a separate legal personality. A state cannot be permitted 'to escape its international responsibilities by a mere process of internal subdivision'. See *Ibid.*, at 37.

112 GA Res. 25/2625, 24 October 1970.

113 Art. 10(1) EACSt.

114 L. Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court', 17 *IJHR* (2013) 368–390, at 380.

115 *Ibid.*, at 377.

116 Moffett, *supra* note 12, at 185.

117 For more on this issue within the context of the trial of the Khmer Rouge in Cambodia see Sperfeldt, *supra* note 107, at 481.

118 Brody, *supra* note 12, at 15.

119 *Ibid.*

120 ICC TFV Press Release, 'Trust Fund for Victims Decides to Launch Assistance Programme in Côte d'Ivoire', 17 May 2017, available online at <https://goo.gl/jBsdgr> (visited 5 August 2017).

ultimately encourage governments in acknowledging their responsibility and providing reparations, without replacing the state's prominent role in fulfilling that obligation. Such programs encourage a system of 'reparative complementarity' under the Rome Statute 'whereby the state is primarily responsible for reparations with the ICC only ordering reparations in the cases before it.'¹²¹ Similarly, the EAC Trust Fund's work could set off a momentum towards Chad recognizing and providing reparations, in its capacity as a state, for the human rights violations committed by its former leader. Nonetheless, it should be noted that sometimes the local government's involvement at the implementation stage could be detrimental to the process, depending on the state's political stance towards the crimes or the victims, particularly when access to the victims' identities may raise security issues.

Chad has funded the EAC¹²² and has pledged to provide funds to the Trust Fund. Such steps, along with facilitating the work of the Trust Fund, could be akin to providing reparations by Chad. However, to be perceived as reparations measures, these steps would have to be associated with a public acknowledgement that they stem from a perceived responsibility for the related crimes.¹²³ In fact, an acknowledgement or apology may have a positive impact on victims, depending on the context and setting in which it is granted.¹²⁴ Nonetheless one should remind that, in situations of gross human rights violations like the one under the EAC's scrutiny, symbolic and moral reparations, on their own, are highly unlikely to meet the required criteria of appropriateness and proportionality in reparations.¹²⁵ Chad would certainly provide relief to victims by making such an acknowledgment and linking it to steps taken to assist the Trust Fund. Nevertheless — considering that Chad unsuccessfully attempted to join the EAC proceedings as a civil party as an alleged victim of Habré's crimes, and seeking itself reparations — such public acknowledgment currently appears to be quite unlikely.¹²⁶

121 Moffett, *supra* note 114, at 377.

122 Brody, *supra* note 12, at 28.

123 *Report by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/69/518, 8 October 2014, § 4.

124 REDRESS Trust and Queens University Belfast Human Rights Centre's Observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, *Al Mahdi* (ICC-01/12-01/15-17-188), Trial Chamber VIII, 2 December 2016, §§ 78–82.

125 The ICTJ argues that apologies, while insufficient alone to repair the harm, 'can be an important step toward reconciliation and sustainable peace.' See ICTJ, *More Than Words Apologies as a Form of Reparation*, December 2015, available online at <https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf> (visited 5 November 2017), at 20.

126 Chad attempted to join the proceedings as a civil party claiming to be a victim of the war crime of pillage. Such an attempt would have given Chad access to the case file, including the names of witnesses and other evidence. On that basis, victims' lawyers opposed the move arguing, among other things, that the crime of pillage can be committed only against the enemy and not by a state official against his or her own government. Chad's application was eventually rejected on the basis that the crime of pillage was not included in the indictment. See Brody, *supra* note 12, at 28. The jurisdictional issue that resulted in the dismissal of Chad's requested constituted a missed opportunity for a Court, in this case the EAC, to pronounce itself on the merits of such type of applications. Despite its cynical motivation, Chad's move raises the issue of whether a state could claim victim's status for conduct of its own agents.

6. Conclusion

The *Habré* case has once again demonstrated that a clear strategy about potential reparations and their implementation should be established at the beginning of the judicial process, without waiting until the delivery of the reparations' award. When criminal proceedings start, reparations are often sidelined, even by victims' lawyers, because attention is focused on proving criminal charges. Nevertheless, the more steps to ensure the enforcement of a potential reparation award — such as identifying and freezing the defendant's assets, advocating with states and international organizations to prepare and facilitate awards' enforcement, and fundraising — are undertaken early, the stronger its prospects of success will be.

The *Habré* case experience should ring alarm bells about the systemic hurdles that the enforcement of reparations awards continue to face in similar situations across the globe.

Whilst the need to provide effective remedies to victims has received growing attention, and forms of reparations have been more and more diversified, international enforcement mechanisms have not been accordingly strengthened. States, practitioners, lawyers, civil society organizations and other relevant stakeholders should work on improving the different facets pertaining to the implementation of reparations awards. If no such work is undertaken, the ever-increasing heap of unenforceable awards should make us wonder whether this 'kind of litigation truly serves the ends of justice or whether justice is instead becoming a display of legal skills, of little practical benefit for the victims.'¹²⁷

127 Bottiglierio, *supra* note 9, at 65.

Syrian Torture Investigations in Germany and Beyond

Breathing New Life into Universal Jurisdiction in
Europe?

Wolfgang Kaleck and Patrick Kroker*

Abstract

The article discusses current developments in national prosecutions of international crimes committed in Syria and their potential to challenge international and national law for prosecuting these crimes. While most national authorities engaging in investigations and prosecutions of international crimes have so far employed a 'no-safe-haven approach', investigating and indicting suspects present on their territory, civil society organizations favour investigations against high-level perpetrators still in Syria, demanding state authorities follow a 'global-enforcer approach'. The article discusses the approach taken by German authorities where universal jurisdiction legislations allows a more strategic approach for the prosecution of international crimes and where the prosecutorial strategy of 'structural investigations' sets a promising example of how states can balance the two aforementioned prosecutorial concepts and thus contribute substantially to the fight against impunity for international crimes committed in Syria.

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1. Introduction: International Crimes Committed in Syria, their Documentation and the Lack of Accountability

Almost every imaginable international crime has been committed in Syria by one or several of the parties to the armed conflict. These include, among others, sexual violence, the recruitment of child soldiers, the use of human shields and illegal weapons such as barrel bombs or chemical weapons, indiscriminate military attacks on civilians and the siege of civilian areas with severe consequences for the besieged population. The crimes against the Yazidi population committed by the Islamic State in Iraq and the Levant (ISIS) — partly within Syria — including the widespread sexual enslavement of women and girls amount to genocide according to the findings of the Independent and International Commission of Inquiry on the Syrian Arab Republic (CoI Syria).¹

One of the most commonly committed crimes in Syria was and still is torture, often alongside enforced disappearances in illegal detention facilities — a practice resorted to by almost all conflicting parties as a means not only to punish opponents but also to terrorize the part of the civilian population that is perceived as being sympathetic to them. Since the beginning of the uprising in 2011, in an extension and intensification of the existing decade-long practice of systematic torture of political opponents, the Syrian government has resorted to torture on a massive scale as a counter insurgency strategy.² According to a conservative estimate, 17,723 people are believed to have died in custody across Syria between March 2011 and December 2015.³

Next to being a revolution that turned into a civil war, the armed conflict in Syria has from the very beginning been a proxy war. Of the regional powers, Qatar and Turkey actively supported different groups of the fractured opposition to the Assad-controlled military, while Iran strongly intervened on the side of government forces. Russia began its direct military intervention in October 2015 on the side of the Syrian government while a US-led coalition of eight countries has conducted a partly secret air war campaign. Analysts have concluded that the coalition bombing of, among others, military targets

1 'They came to destroy': ISIS Crimes Against the Yazidis, UN Doc. A/HRC/32/CRP.2, 15 June 2016 (hereafter 'They came to destroy').

2 Human Rights Watch (HRW), *Torture Archipelago: Arbitrary Arrests, Torture and Enforced Disappearances in Syria's Underground Prisons in March 2011* (2012), available online at <https://www.hrw.org/report/2012/07/03/torture-archipelago/arbitrary-arrests-torture-and-enforced-disappearances-syrias> (visited 15 November 2017); *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, UN Doc. A/HRC/31/CRP.1, 3 February 2016 (hereafter 'Out of Sight, Out of Mind'); Amnesty International (AI), *'It breaks the Human': Torture, Disease and Death in Syria's Prisons* (2016), available online at <https://www.amnesty.org/en/documents/mde24/4508/2016/en/> (15 November 2017).

3 M. Price, A. Gohdes and P. Ball, *Technical Memo for Amnesty International Report on Deaths in Detention*, Human Rights Data Analysis Group, 17 August 2016, available online at <https://hrdag.org/wp-content/uploads/2016/08/HRDAG-AI-memo-2.pdf> (visited 15 November 2017).

of the ISIS in Syria and Iraq⁴ has led to the reported death of nearly 10,000 civilians.⁵

Concurrently, many Western corporations have profited from the ongoing violence in Syria and are under suspicion of having contributed to the commission of international crimes by one of the parties to the conflict during the course of their operations in Syria. This is true not only for arms suppliers and surveillance technology providers but also for manufacturers of building materials.⁶

The vast majority of international crimes, including torture, enforced disappearance and sexual violence, have been committed in a systematic way by the Syrian government, benefitting from a long-standing culture of impunity. While many members of non-state armed groups, be they foreign fighters or fighters from the region, involved in the commission of international crimes fled Syria and are being internationally investigated and prosecuted (albeit mainly under antiterrorism laws) by national prosecution authorities, the prospects of the Syrian government of benefiting further from a long-established culture of impunity are constantly rising with the government gaining military ground and thus also improving its standing in international peace negotiations. This article is, therefore, focused on accountability for international crimes committed by the Syrian government. This focus does not undermine the responsibility of all other parties to the conflict involved in the commission of international crimes in Syria. It is equally important for their acts to be investigated and prosecuted.

From the very beginning of the Syrian uprising, Syrian and international non-governmental organizations (NGOs), as well as international bodies, reported on the excessive violence, amounting to international crimes, employed by state authorities in Syria in response to the uprising. The first international body to confirm this assertion was the United Nations (UN) Human Rights Council in April 2011.⁷ In September of the same year, a report of the UN High Commissioner for Human Rights found 'patterns of human rights violations that may amount to crimes against humanity' in Syria.⁸ Since its establishment in August 2011, the Independent and International Commission of Inquiry on the Syrian Arab Republic (CoI) has published more than 20 reports

4 Jordan, Canada, Australia, France, UK, the Netherlands, Belgium and Denmark; this coalition has on occasion been joined by aircraft from the United Arab Emirates, Saudi Arabia, Bahrain and Turkey.

5 See the constantly updated data collected by airwars.org; regarding its methodology available online at <https://airwars.org/methodology-new-draft/> (visited 15 November 2017).

6 The cases of Lafarge, now Lafarge Holcim and Qosmos will be discussed *infra*, at 175. For the possible criminal responsibility of the Russian corporation Rosoboronexport for the provision of arms to the Syrian government, see C. Plomp, 'Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court', 30 *Utrecht Journal of International and European Law* (2014) 4–29.

7 In its report HRC Res. S-16/1 of 29 April 2011, the Commission uttered its concerns about 'the death of hundreds of people' and the 'alleged deliberate killings, arrests and instances of torture of peaceful protesters by the Syrian authorities'.

8 *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic*, UN Doc. A/HRC/18/53, 15 September 2011.

documenting human rights violations committed by various sides of the conflict, including the Syrian government, armed groups opposing the government as well as ISIS.⁹ In its February 2012 report, the CoI noted that ‘widespread, systematic and gross human rights violations, amounting to crimes against humanity’ by governmental forces was occurring with the apparent knowledge and consent of the highest levels of the state.¹⁰ A number of reports directly refer to individual criminal responsibility.¹¹ In fulfilment of its mandate, the CoI is compiling lists of potential suspects and has regularly presented them to the UN Security Council.¹²

There are two major shortcomings of the work of the CoI. First, it lacks access to the territory. It is, therefore, relying on findings of organizations and their investigators on the ground or having to conduct remote interviews with Syrians who have fled the country. It can be concluded that the CoI’s dependence on second-hand information increases the risk of manipulation of the received information.¹³ A second shortcoming relates to the mandate of the CoI according to which it is not explicitly tasked with securing evidence to standards suitable for (international) criminal investigations. The extent to which the information collected by the CoI can be utilized for the purposes of international and national investigatory and prosecutorial efforts thus remains unclear.¹⁴

The task of responding to these two shortcomings is being undertaken on the one hand by Syrian NGOs dedicated to documenting past and ongoing human rights violations,¹⁵ and on the other by an international NGO.¹⁶ The

9 SC Res. 2209, 6 March 2015: exception to some extent concerning the alleged use of chemical weapons; SC Res. 2235, 7 August 2015: creating an Organization for the Prohibition of Chemical Weapons (OPCW) Joint Investigative Mechanism (JIM) to identify those responsible; SC Res. 2314, 31 October 2016, SC Res. 2319, 17 November 2016: extended JIM’s mandate until November 2017, HRC Res. S-17/1, 22 August 2011, UNHRC Res. S-17/1, 22 August 2011.

10 *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69, 22 February 2012.

11 For example, in *Out of Sight, Out of Mind*, *supra* note 2, the CoI noted that there are ‘reasonable grounds to believe that high ranking officers [might be] ... individually criminally liable for the crimes committed in ... detention centres’, at 64.

12 See *supra* note 10, UN Doc. A/HRC/28/69, 5 February 2015.

13 For a discussion about the challenges in obtaining reliable and credible testimony, see M. Foster Lynch, ‘Collecting Data on Violence: Scientific Challenges and Ethnographic Solutions’, in T. Seybolt, J. Aronson and B. Fischhoff (eds), *Counting Civilian Casualties: An Introduction to Recording and Estimating Nonmilitary Deaths in Conflict* (Oxford University Press, 2013) 123–142 and N. Combs, *Fact-Finding Without Facts* (Cambridge University Press, 2010).

14 ‘United Nations Website’, *Syria: UN Chief Guterres Clarifies Tasks of Panel Laying Groundwork for Possible War Crimes Probe*, available online at <http://www.un.org/apps/news/story.asp?NewsID=56050> (visited 15 November 2017).

15 See, for example, the Violations Documentation Center (<http://vdc-sy.net/en/>), the Syrian Network for Human Rights (<http://sn4hr.org/>), and the Syrian Center for Statistics and Research (<http://www.csr-sy.org>).

16 Center for International Justice and Accountability (CIJA), *Written Testimony before The Commission on Security and Cooperation in Europe by Chris Engels Deputy Director for Investigations and Operations the Commission for International Justice and Accountability*, 22 September 2016, available online at <https://www.csce.gov/sites/helsinkicommission.house.gov/files/1.Chris%20Engels.Testimony.pdf> (visited 15 November 2017).

latter is mainly funded by Western governments, and was created in 2012 with the mandate of collecting and analysing evidence for crimes committed in Syria in accordance with the standards of international criminal law.¹⁷

Despite unprecedented levels of documentation of international crimes committed in Syria, there has so far been a complete lack of accountability for these crimes at the international level.¹⁸ Although Syria signed the Rome Statute on 29 November 2000, it has never ratified it and is thus not a State Party barring one avenue of jurisdiction for the International Criminal Court (ICC). A referral by the UN Security Council, the other avenue for the ICC to be granted jurisdiction,¹⁹ was vetoed by the permanent UN Security Council Members Russia and China in May 2014.²⁰ In addition to this, Russia has so far almost systematically vetoed all resolutions containing condemnation of human rights violations or calls for accountability for crimes committed by Syrian government forces or their allies.²¹

Amid growing frustration with the deadlocked UN Security Council and the unavailability of other realistic international accountability measures, such as an international criminal tribunal or a hybrid tribunal,²² the UN General Assembly (GA) created in December 2016, on the initiative of some of its members, an International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).²³

The mission of the IIIM is to 'collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings... in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes...'.²⁴ In its presumed role as 'a legal assistant that bridges the gap

17 See, for example, W. Kaleck and C. Terwindt, 'Non-Governmental Organisation Fact-Work: Not Only a Technical Problem', in M. Bergsmo (ed.), *Quality Control in Fact-Finding* (Torkel Opsahl academic EPublisher, 2013) 402–427.

18 I. Elliott, 'A Meaningful Step towards Accountability? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria', 15 *Journal of International Criminal Justice (JICJ)* (2017) 239–256, at 240.

19 SC Res. 1970, 26 February 2011.

20 UN Doc. S/2014/348, 22 May 2014.

21 28 February 2017, on a draft resolution for accountability for chemical attacks in Syria: S/2017/712, S/PV.7893; 5 December 2016: UN Doc. S/2016/1026, S/PV.7825; 8 October 2016: UN Doc. S/2016/846, S/PV.7785; 22 May 2014: UN Doc. S/2014/348, S/PV.7481; 19 July 2012: UN Doc. S/2012/538, S/PV.6810; 4 February 2012: UN Doc. S/2012/77, S/PV.6711; 4 October 2011: UN Doc. S/2011/612, S/PV.6627.

22 C. Wenaweser and J. Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice', 15 *JICJ* (2017) 211–230, at 217 stating that 'it was presented against the background of the well-documented siege and assault of Aleppo'.

23 UN Doc. A/RES/71/248, 21 December 2016.

24 *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/L.48, 19 December 2016, § 4.

between fact-finders and prosecutors’²⁵ the powers of the IIIM have been described as ‘quasi-prosecutorial’.²⁶

The establishment of the IIIM is remarkable for two reasons. First, the creation of such a mechanism presents a ‘creative and innovative’ approach to international criminal justice on the international level.²⁷ Secondly, with the vote for the IIIM, the majority of states in the GA constructed a path capable of overcoming the deadlock of the UN Security Council veto on matters of justice. By the same token, a potential precedent was set for similar situations in the future.²⁸

Bearing in mind its mission to securing evidence, structuring it into case files and conducting further investigations into persons responsible for international crimes committed in Syria, the praise the IIIM currently receives, however, focuses on its future prospects of accountability rather than on any current effective impact.²⁹ Despite the fact that the IIIM, once functional, will probably contribute to national prosecutions brought under universal jurisdiction (UJ) principles, one has to consider the fact that prosecutorial and investigative authorities, particularly in European countries with an inquisitorial model, seek to and are often even obliged to conduct investigations themselves. How far this work can be outsourced to the IIIM, or at least facilitated by their preparation of case files, remains to be seen.

A functioning IIIM would have already embarked upon the preparatory investigation work usually undertaken by the ICC or a special tribunal, which in turn would have increased the possibility for accountability efforts to be achieved at the international level.³⁰ It is to be hoped that the creation of the IIIM has helped to gather political support for the idea from previously unconvinced states and sparked interest in taking another step towards a tribunal or Security Council referral to the ICC.³¹ Additionally, the existence of an international quasi-prosecutorial mechanism established by the GA, whose mandate explicitly refers to accountability efforts through national courts by means of UJ, further legitimizes national investigations and prosecutions of international crimes under UJ in the sense that such efforts cannot as easily be dismissed as arbitrary or as violating state sovereignty.

2. UJ as an Accountability-option for Crimes in Syria

With no possibility of effective and fair trials in the country where the crimes were committed and impunity at an international level, UJ seems to be — at

25 Wenaweser and Cockayne, *supra* note 22, at 214.

26 *Ibid.*

27 Wenaweser and Cockayne, *supra* note 22, at 219.

28 A. Whiting, ‘An Investigation Mechanism for Syria: The General Assembly Steps into the Breach’, 15 JICJ (2017) 231–237, at 237.

29 Wenaweser and Cockayne, *supra* note 22, at 213: ‘offers concrete hope for justice in Syria’. Whiting, *ibid.*, at 236: ‘a bridge to a future moment when the conditions and political will exist to provide for accountability in Syria’.

30 Wenaweser and Cockayne, *ibid.*, at 219 and Whiting, *supra* note 28, at 237.

31 Draft Statute for a Syrian [Extraordinary] [Special] Tribunal to Prosecute Atrocity Crimes, 27 August 2013, available online at <http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf> (visited 15 November 2017).

least at present — a last resort for accountability for international crimes in Syria. Against the backdrop of the development of UJ in the past 15 years, it is all the more important to outline its current application and its concrete potential with respect to accountability for crimes in Syria.

A. The Current State of UJ

At the end of the 1990 s and the beginning of the 2000 s, there were vivid applications of UJ with investigations and trials being held in states such as Belgium and Spain. In this context, a significant series of investigations and trials was initiated concerning crimes committed in Argentina, Chile, Guatemala and Haiti, followed by Rwanda, Congo, Algeria and Afghanistan inter alia.

Concurrent with the establishment of the ICC, in order to complement the Rome Statute, newly adopted national codes, such as the Code of Crimes against International Law (*Völkerstrafgesetzbuch* or CCAIL) in Germany, began to enact the crimes laid out in the Rome Statute in domestic legislation. Yet the hope that important cases involving high political costs, such as those against Pinochet and Videla, would follow remained unfulfilled since, for example, no proceedings were initiated against Russian or American torturers for the crimes committed in Chechnya and Guantanamo.

Spain, as one of the few states allowing the application of UJ in Europe in the first half of the 2000 s, came under increasing political pressure.³² Too many cases against powerful states, such as the USA and China, were conducted by the national investigative and prosecutorial authorities in Spain. As a result, the principle of UJ was heavily restricted in both Belgium in 2003 and in Spain in 2009 as well as in 2014. UJ from then on was applied only in a small number of cases with territorial or personality links to both countries.³³

At a more technical level, professionalism and cooperation among European authorities improved with war crimes units from many European Union (EU) Member States actively investigating international crimes and coordinating their work within the EU Genocide Network.³⁴ Prosecutors,

32 See M. Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law* (2011) 1–35, at 1; M. Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from Global Enforcer to No Safe Haven Universal Jurisdiction', 13 *JICJ* (2015) 245–256; W. Kaleck, *Double Standards: International Criminal Law and the West* (Torkel Opsahl Academic EPublisher, 2015), at 61–76; M. Verhaeghe, 'The Political Funeral Procession for the Belgium UJ Statute', in W. Kaleck, M. Ratner, T. Singelstein et al. (eds), *International Prosecution of Human Rights Crimes* (Springer, 2007) 139–148.

33 A. O'Sullivan, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony* (Routledge, 2017), at 187–190.

34 For an analysis of the different war crimes units, see the following report by Human Rights Watch from 16 September 2014: *The Long Arm of Justice: Lessons from the Specialized War Crimes Units in France, Germany, and the Netherlands*, available online at <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and> (visited 15 November 2017).

judges and sections of the public became increasingly familiar with UJ cases as an established legal avenue addressing the commission of international crimes abroad. Despite this, the understanding and application of UJ shifted from being a 'global-enforcer approach', according to which states may exercise UJ as a result of their role in preventing and punishing international crimes committed anywhere in the world, to a narrow 'no-safe-haven' conception according to which states preferred to exercise UJ in order for their territory not to be a refuge for suspects involved in the commission of international crimes.³⁵

B. UJ Cases in Europe Regarding Syria

The trend described above is also reflected in the context of ongoing investigations and prosecutions with respect to international crimes committed in Syria in various EU Member States.³⁶ The reasons for the regional concentration on Europe are twofold. First, the continent has traditionally been a stronghold for the application of the principle. According to a study by Amnesty International, while UJ is a widely established principle in theory with laws in 163 of 193 UN Member States allowing for the application of UJ over one or more international crimes,³⁷ Canada and Australia are the only non-European states in which the principle has been applied in a significant number of cases,³⁸ although some singular, yet important, investigations and trials have taken place in countries such as Argentina,³⁹ South Africa,⁴⁰ or Senegal.⁴¹

35 Langer, 'Universal Jurisdiction is Not Disappearing', *supra* note 32, at 247.

36 Elliott, *supra* note 18, at 247.

37 AI, *Universal Jurisdiction: A Preliminary Survey of Legislation around the world – 2012 Update* (2012), available online at <https://www.amnesty.org/en/documents/ior53/019/2012/en/> (visited 15 November 2017).

38 Langer, 'Diplomacy of Universal Jurisdiction', *supra* note 32, at 1.

39 Investigations proceeded in an Argentine case involving the commission of crimes against humanity in Spain's 1930s civil war. TRIAL International, *Make way for Justice # 3: Universal Jurisdiction Annual Review 2017* (2017), available online at <https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP.A4.012.pdf> (visited 15 November 2017) (hereafter '*Make way for Justice # 3*'), at 6–7 and 'Argentinean Court Considers Spanish Civil War Inquiry', *The Guardian*, 14 April 2010, online available at <https://www.theguardian.com/world/2010/apr/14/spain-civil-war-argentina-inquiry> (visited 15 November 2017); Ricardo Miguel Cavallo served as an officer in the military junta *El Proceso* from 1976 to 1983 in Argentina. He was arrested, extradited and indicted under the principle of UJ by Spain and eventually stood trial in Argentina, see for example: W. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008', 30 *Michigan Journal of International Law* (2009) 931–980, at 956.

40 G. Werle and P.C. Bornkamm, 'Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in *SALC v. National Director of Public Prosecutions*', 11 *JICJ* (2013) 659–675.

41 R. Brody, 'Victims bring a Dictator to Justice: The Case of Hissène Habré', April 2017, available online at <https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2.Downloads/Fachinformationen/Analyse/Analysis70-The.Habre.Case.pdf> (visited 15 November 2017).

Secondly, European countries are in some ways closer to the Syrian war than many other non-European countries, particularly because of the presence in European territory of individuals who have fled the armed conflict. Thus, not only survivors, witnesses and those otherwise affected but also Syrian oppositionists, activists and lawyers as well as human rights NGOs are in close proximity to European law enforcement and prosecutorial authorities.

Several countries are investigating international crimes committed in Syria, including allegations of international crimes committed by ISIS against the Yazidi population. In seven national jurisdictions, cases of war crimes or crimes against humanity committed in Syria are ongoing or have been concluded.⁴² In almost all cases, the investigations initiated by judicial authorities were triggered by the presence of a suspect in their territory.

As a result, a number of investigations and trials against low-level perpetrators in European jurisdictions for crimes committed in Syria are completed or underway.⁴³ Most of them ended with convictions, such as in Austria, where a 27-year old Syrian asylum seeker in Tyrol and former member of the oppositional Farouq Brigade was sentenced to life imprisonment in May 2017 for the multiple murders of several governmental soldiers near Homs between 2013 and 2014.⁴⁴

In Sweden, 28-year old Mouhannad Droubi, previously recruited by the Free Syrian Army (FSA) in May 2012 and who had applied for asylum in Sweden in 2013, was sentenced to eight years' imprisonment for war crimes and torture-like assault.⁴⁵ Two further sentences were handed down in May and September of 2017. The former resulted in a life sentence for Haisam Omar Sakhanh, who was found guilty of a war crime for killing seven Syrian army soldiers during his membership of a non-state armed groups opposed to the Syrian government. The latter concluded in a prison sentence of eight months for Mohammad Abdullah, who was found guilty of a war crime because he violated the dignity of five dead or severely injured people by posing for a photograph with his foot on one of the victims' chest. The conclusion of this trial marks the first conviction of a soldier previously belonging to the Syrian army.

42 *Make way for Justice # 3*, *supra* note 39, at 70; Sweden, France, the USA, Germany, Austria, Spain and Switzerland. In Spain however, in order to circumvent jurisdictional restrictions for international crimes, the allegations of arbitrary detention, forced disappearance, torture and execution are being investigated as a potential crime of state terrorism, enshrined in Art. 573 of the Spanish Criminal Code. Sweden and Germany have the largest number of ongoing or concluded trials.

43 HRW, *These were the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts* (2017) available online at <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts> (visited 15 November 2017), at 33–35.

44 K. Connolly and O. Bowcott, 'Austrian Court Jails Asylum Seeker for War Crimes in Syria', *The Guardian*, 11 May 2017, available online at <https://www.theguardian.com/world/2017/may/11/austria-jails-syrian-man-who-boasted-of-killings-in-homeland> (visited 15 November 2017).

45 'Swedish Court Sentences Syrian Rebel to Life for War Crimes', *Reuters*, 16 February 2017, available online at <http://www.reuters.com/article/mideast-crisis-syria-sweden-idUSL8N1G12S8> (visited 15 November 2017).

In Germany, three trials have been concluded at the time of the writing of this article.⁴⁶ In the first trial, Aria L., a German national, was sentenced to two years' imprisonment by the Higher Regional Court of Frankfurt for the war crime of treating a person who is to be protected under international humanitarian law (IHL) in a gravely humiliating or degrading manner in the context of a non-international armed conflict in Syria, punishable according to Section 8(1)(9) CCAIL. During his three-week long participation in the fighting in Binnish, Idlib, in February 2014, he had posed in pictures in front of two severed heads mounted on metal spears belonging to murdered members of Assad's forces.

In the second trial, German national Abdelkarim El B. was sentenced to eight and a half years' imprisonment by the Higher Regional Court of Frankfurt for membership in a terrorist organization and for having mutilated the body of an enemy soldier, thus having treated a person protected under IHL in a gravely humiliating or degrading manner (Section 8(1)(9) CCAIL). The accused was a registered member of ISIS and had participated in the fighting on the frontline close to Aleppo between September 2013 and February 2014.

The third trial concerns Suliman A.S. who was convicted for aiding a war crime and was sentenced to three and half years in prison by the Higher Regional Court in Stuttgart on 20 September 2017. Suliman A.S. was charged with committing a war crime against humanitarian operations (Section 10(1)(1) CCAIL) for directly attacking personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the UN for his then alleged participation in the kidnapping of the UN worker Carl Campeau on 17 February 2013. He was further charged with being a member of the terrorist organization Jabhat al-Nusra but he was eventually acquitted of these charges. Campeau worked in Syria as a legal adviser to the UN Disengagement Observer Force, observing and keeping the ceasefire between Israel and Syria in the Golan Heights area.

Dissatisfied with the prosecution of mid- and low-level perpetrators accidentally present in Europe, civil society organizations have tried to use available legal means to work towards a more systematic approach to accountability for international crimes in Syria. NGOs engaged in strategic litigation have teamed up with Syrian lawyers, human rights groups, documentation organizations as well as survivors to make use of the respective UJ laws in different countries.⁴⁷

In Spain, lawyers filed a criminal complaint against nine Syrian officials for the alleged enforced disappearance, torture and killing of Abdulmuemen Ahaj Hamdo in an illegal government prison in Damascus in 2013.⁴⁸ The

46 For more details on current investigations and proceedings in Germany, see *infra*, at 180 *et seq.*

47 See also Elliott, *supra* note 18, at 242; several criminal complaints submitted to support the structural investigations in Germany will be discussed *infra*.

48 'Guernica 37 – International Justice Chambers and its partner in Madrid G37 – Despacho Internacional, are filing a criminal complaint before the Spanish National Court against members of the Syrian security forces and intelligence for the commission of crimes of state

complaint was for the commission of the crime of (state) terrorism and only indirectly for crimes against humanity and war crimes. Following an appeal by Spain's state prosecutor against the opening of the case, the Spanish High Court ruled that the case had to be dismissed since the claimant, the sister of the deceased, had acquired Spanish nationality only after the crime had been committed.⁴⁹

The involvement of external actors, such as transnational corporations, in international crimes committed in Syria has already been mentioned above. Such involvement has resulted in two ongoing investigations in France. In 2012, French NGOs filed a criminal complaint against the French company Qosmos alleging complicity in torture and war crimes by selling surveillance technology to the Syrian government.⁵⁰ In November 2016, French and German NGOs filed a joint criminal complaint for commercial activities in an area under ISIS control that allegedly amounted *inter alia* to financing of terrorism and complicity in war crimes as well as crimes against humanity by the (then) French company Lafarge. A judicial investigation into the case was opened in June 2017.⁵¹

In October 2016 another case regarding enforced disappearance and torture as crimes against humanity was filed by International Federation for Human Rights (FIDH) together with Obeida Dabbagh, brother and uncle of Mazzen Dabagh and Patrick Dabbagh. The father and son were taken by the Syrian air force intelligence to a detention facility on al-Mezzeh military airport in Damascus in November 2013.⁵² Three judges have been tasked with investigating enforced disappearance and torture as crimes against humanity of the two victims who also held French nationality. As in Spain, victim nationality is a prerequisite for the assertion of jurisdiction.

terrorism', Guernica 37, 1 February 2017, available online at <http://guernica37.org/wp-content/uploads/2017/02/170127-Press-Release-Syria-2.pdf> (visited 15 November 2017).

49 Re-Post of a *The New York Times* article, 'Spain Court Drops Complaint against Syrian Security Forces', 21 July 2017, available online at <http://guernica37.org/2017/07/new-york-times-spain-court-drops-complaint-against-syrian-security-forces/> (visited 15 November 2017).

50 For more information, see website of FIDH: <https://www.fidh.org/en/region/europe-central-asia/france/15116-france-opening-of-a-judicial-investigation-targeting-qosmos-for-complicity> (visited 15 November 2017).

51 For more information, see website of ECCHR: <https://www.ecchr.eu/en/business-and-human-rights/lafarge-syria.html> (visited 15 November 2017) and L'association Sherpa: <https://www.asso-sherpa.org/french-company-lafarge-sued-for-financing-isis-and-complicity-in-war-crimes-and-crimes-against-humanity-in-syria> (visited 15 November 2017).

52 *Make Way for Justice* # 3, *supra* note 39, at 26; see also: FIDH, 'The Case of Two Disappeared Franco-Syrians in a Bashar al-Assad Jail Referred to the French Justice', 24 October 2016, available online at <https://www.fidh.org/en/region/north-africa-middle-east/syria/the-case-of-two-disappeared-franco-syrians-in-a-bachar-el-assad-jail> (visited 15 November 2017) and FIDH 'Syria: French Judges Open Enquiry into Disappearance of Franco-Syrian Father and Son in Bashar al-Assad's Jails', 7 November 2016, available online at <https://www.fidh.org/en/impacts/syria-french-judges-open-enquiry-into-disappearance-of-franco-syrian> (visited 15 November 2017).

3. New Perspectives for ‘Global-enforcer Approaches’ to UJ? Structural Investigations in Germany

When prosecutors employ a strict ‘no-safe-haven approach’, cases like the ones filed by civil society organizations that are aimed at combating impunity in Syria in a strategic as opposed to coincidental manner, have limited chances of success. The result is that only (mostly low- or mid-level) perpetrators accidentally in Europe can be made to face prosecution in the near future for atrocities committed in Syria. For all those who wish for accountability mechanisms to address the amount and the gravity of the crimes that are in addition, part of a policy decided upon at the highest levels of government and military leadership, this is a disappointing perspective in light of the absence of other accountability options.

Yet, prosecutorial strategies employing a wider and more flexible approach do exist. In the following sections, the article turns to structural investigations as tools for combating impunity in Syria and their possible outcomes. Beginning with an introduction to the principles and practice of UJ in Germany, the prosecutorial strategy of structural investigations are described in general and in particular with regard to crimes in Syria before discussing its potential as a tool for combating impunity in Syria.

The discussion will focus almost exclusively to the situation in Germany, the country that has by far the greatest number of ongoing investigations and cases relating to international crimes committed in Syria. It also has, together with Norway, the least strict UJ requirements for such proceedings in Europe. It should be noted, however, that the strategy of structural investigations is also employed in France with the limitation that French law that prescribes jurisdiction over international crimes only if one or more of the victims is French or if a suspect has established his or her regular residence on French territory or, in the case of the crime of torture, if a suspect is located in French territory.⁵³

A. UJ for International Crimes in Germany

The CCAIL (*Völkerstrafgesetzbuch*) came into force on 30 June 2002, section 1 of which provides the legal basis for the principle of UJ. The Office of the Federal

⁵³ In September 2015, the French Minister of Foreign Affairs requested the Paris Prosecutor of the French unit for the prosecution of genocide, crimes against humanity, war crimes and torture to open a preliminary investigation for crimes against humanity, war crimes and torture. See ‘France investigates Syria’s Assad for crimes against humanity’, *Reuters*, 30 September 2015, available online at <http://www.reuters.com/article/us-france-syria-assad-idUSKCN0RU11320150930> (visited 15 November 2017) and see also Arts 689, 689–681, 689–611 of the French *Code de Procédure Pénale*. The request is based on a set of over 50,000 photographs smuggled out of Syria by a former photographer of the military police of the Syrian government now known under the codename ‘Caesar’. The photographs display thousands of tortured corpses of persons who died in government-run detention facilities operated by the Syrian intelligence agencies.

Prosecutor (*Generalbundesanwaltschaft*) is vested with discretion not to investigate in cases 'without any link to Germany'.⁵⁴ The reason behind this regulation is to avoid overloading the national justice system with international investigations while at the same time enabling the prosecutor to participate in international prosecutorial investigative action and to prepare (national or international) prosecutions in order to impede impunity for international crimes that might otherwise go unpunished.⁵⁵

In the first years of the existence of the CCAIL, the Office of the Federal Prosecutor objected to opening investigations based on controversial discretionary decisions in cases against former US-State secretary for defence Donald Rumsfeld and others regarding torture in Abu Ghraib, Guantanamo as well as other sites. The Federal Prosecutor asserted in the first case 2004/2005 that Germany, in analogy to Article 17 of the Rome Statute, had no jurisdiction in the matter because there were ongoing US court martial trials against soldiers and low-ranking officers in the Abu Ghraib torture cases. In a second case 2006/2007 he dismissed the case because there was no reasonable likelihood of a conviction in Germany.⁵⁶ Even more disputed was the failure to initiate proceedings against the former Uzbek interior minister Zokirjon Almatov, although he was present in Germany for medical treatment in autumn 2005.⁵⁷ Furthermore, Almatov had been listed on a European sanctions list as one of the main suspects in the Andijan Massacre in May 2005, in which over 1000 predominantly Muslim demonstrators were murdered, as well as in the operation of a massive torture apparatus under his authority in Uzbekistan.⁵⁸

Critics have held that far fewer investigations than were possible were opened by the Office of the Federal Prosecutor because of a lack of resources in the first decade after 2002.⁵⁹ With the establishment of a specialized war

54 T. Beck and C. Ritscher, 'Do Criminal Complaints Make Sense in (German) International Criminal Law? A Prosecutor's Perspective', 13 *JICJ* (2015) 229–235, at 2–3: 'It is only in cases of offences committed abroad without any link to Germany whatsoever that the German Federal Prosecutor General (*Generalbundesanwalt*), responsible for the prosecution of international crimes, is enabled to exercise his/her discretion to dispense with prosecution under the strict requirements of section 153f German Code of Criminal Procedure.'

55 See BT Drs. 14/8524 (Draft of the German government for the introduction of the Code of Crimes Against International Law), at 37: 'to prevent impunity of perpetrators of international crimes through international solidarity in criminal prosecution' (translated by authors, the original texts reads '*die Straflosigkeit der Täter völkerrechtlicher Verbrechen durch international solidarisches Verhalten bei der Strafverfolgung zu verhindern*'), available online at <http://dip21.bundestag.de/dip21/btd/14/085/1408524.pdf>, visited 15 November 2017).

56 Kaleck, *supra* note 39, at 927–980, 953, 953.

57 S. Zappalà, 'The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?' 4 *JICJ* (2006) 602–622, at 602.

58 Sullivan, *supra* note 33, at 185–187 and Kaleck, *supra* note 39, at 952 as well as see e.g. the case of Uzbek Minister of Interior Almatov in 2005, information available at <https://www.ecchr.eu/en/our.work/international-crimes-and-accountability/uzbekistan.html> (visited 15 November 2017).

59 HRW, 'Universal Jurisdiction in Europe: The State of the Art' (2006), at 63, available online at <https://www.hrw.org/sites/default/files/reports/ij0606web.pdf> (visited 15 November 2017) and

crimes unit at the Federal Prosecutor's office in 2010 and resources increasing, two trials were eventually opened in 2010 concerning Rwanda as well as the Eastern Democratic Republic of Congo (DRC). In the first trial, a Hutu major was convicted and sentenced by the Higher Regional Court in Frankfurt for genocide (as codified in the Criminal Code before entry into force of the CCAIL) in Rwanda in April 1994.⁶⁰ In the second trial, two leading figures of a Hutu-militia named *Forces Démocratique de la Liberation de Ruanda* (FDLR) who resided in Germany were convicted for war crimes in September 2015. The appeal against the verdict is still pending at the time of writing.⁶¹

The war crimes unit at the Federal Prosecutor's office is currently staffed with seven prosecutors, which is an increase of two prosecutors in comparison to the founding year in 2010.⁶² The prosecutors are assisted in their investigations by the Central Department for the Investigations of War Crimes and Crimes against Humanity (*Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch*) of the Federal Police. The Central Department is currently composed of 17 staff members, an increase by almost 100 percent in comparison to 2015, with another increase planned for 2018.⁶³

B. Structural Investigations in Germany

The German Federal Prosecutor can initiate investigations if there is an initial suspicion that a crime falling under the CCAIL has been committed. If a suspect or a victim of such a crime is of German nationality or if a suspect is present on German territory, he is obliged to investigate. In cases of pure UJ, the Federal Prosecutor has the above-mentioned discretion to open an investigation or to decline to do so.⁶⁴ If a defined suspect can be identified, investigations will be directed against this person. In other cases, the Prosecutor may

N. Geißler and F. Selbmann, 'Fünf Jahre VStGB – Eine kritische Bilanz', *Humanitäres Völkerrecht - Informationsschriften* (2007) 160.

60 K. Ambos, 'The German *Rwabukombo* Case: The Federal Court's Interpretation of Co-perpetration and the Genocidal Intent to Destroy', 14 *JICJ* (2016) 1221–1234; P. Kroker, 'Universal Jurisdiction in Germany: The Case of Onesphore R. before the Higher Regional Court in Frankfurt', 54 *German Yearbook of International Law* (2011) 671–687.

61 P. Kroker, 'Weltrecht in Deutschland? Der Kongo-Kriegsverbrecherprozess: Erstes Verfahren nach dem Völkerstrafgesetzbuch', ECCHR, 2016, available online: <https://www.ecchr.eu/de/unsere-themen/voelkerstrafataten-und-rechtliche-verantwortung/kongo-kriegsverbrecherprozess.html> (15 November 2017).

62 BT Drs. 18/12487 (Reply of the German government to a request submitted by the Green party and parliamentarians regarding the criminal prosecution of international crimes committed in Syria in Germany), at 5, available online at <http://dip21.bundestag.de/dip21/btd/18/124/1812487.pdf> (visited 15 November 2017).

63 BT Drs. 18/12533 (Reply of the German government to a request submitted by the Green party and parliamentarians regarding the investigation of international crimes committed in Syria in Germany), at 5, available online at <http://dip21.bundestag.de/dip21/btd/18/125/1812533.pdf> (visited 15 November 2017).

64 See *supra* note 56.

open 'structural investigations'. This investigatory technique, employed since 2011 by the Federal Prosecutor for international crimes⁶⁵ is not explicitly foreseen in the German Code of Criminal Procedure,⁶⁶ nor is it explicitly excluded. It entails investigations with full investigatory powers that are not (yet) directed against specific persons but that exist for the purpose of investigating (and collecting evidence on) specific structures, within which international crimes have been allegedly committed.⁶⁷ These investigations thus take into consideration that international crimes are normally committed within (or by) a certain structure and in a specific context and that knowledge and evidence about both is helpful or even necessary in order to conduct investigations against individuals that are alleged to have committed these crimes. The investigators are meant to collect all relevant information that can be obtained in the country, particularly by witness-testimonies and open sources.

Evidence thus collected and secured on international crimes before a specific suspect has been identified can serve different purposes. First, it can enable the prosecutor to react swiftly when a suspect enters Germany in the future triggering the duty to investigate. This would put the prosecutor, for example, in a position to be better prepared, should a situation such as the above-mentioned visit of the Uzbek interior minister Zokirjon Almatov to Germany recurs.⁶⁸ Secondly, such evidence can also facilitate substantially future proceedings in a third state or before an international court, if a specific case falls under the latter court's jurisdiction, because it can be shared by way of judicial cooperation.⁶⁹ This is why the prosecutorial strategy of structural investigations is sometimes referred to as anticipated legal assistance to other states or tribunals.⁷⁰ Thirdly, the knowledge and evidence gathered by

65 A. Schüller, 'The Role of National Investigations and Prosecutions in the System of International Criminal Justice – Developments in Germany', 4 *Sicherheit und Frieden* (2013) at 229.

66 The German Code of Criminal Procedure (CCP) is available online in English at <https://www.gesetze-im-internet.de/englisch-stpo/> (visited 15 November 2017).

67 See *supra* note 62, at 4, available online at <http://dip21.bundestag.de/dip21/btd/18/124/1812487.pdf> (visited 15 November 2017). Question 11: 'In the course of structural investigations against unknown suspects information and evidence regarding structures are being collected and preserved.' (translated by authors, original text reads: 'In den Strukturverfahren gegen unbekannte Täter werden Erkenntnisse und Beweise zu einer Struktur gesammelt und gesichert.')

68 See *supra* note 59.

69 See *supra* note 66 and A. Schüller and C. Meloni, 'Quality Control in the Preliminary Examination of Civil Society Submissions', in *Quality Control in Preliminary Examination: Reviewing Impact, Policies and Practices* (Torkel Opsahl Academic EPublisher, forthcoming).

70 C. Kreß, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime', 7 *JICJ* (2009) 789–809, at 789, 801 and regarding anticipated legal assistance, see W. Kaleck, 'Strafverfolgung nach dem Völkerstrafgesetzbuch: Ein kurzer Blick in die Zukunft – ein Kommentar zum Beitrag von Martin Böse', in J. Geneuss and F. Jeßberger (eds), *Zehn Jahre Völkerstrafgesetzbuch: Bilanz und Perspektiven eines 'deutschen Völkerstrafrechts'* (Nomos, 2013) 177–185 and P. Frank and H. Schneider-Glockzin, 'Terrorismus und Völkerstraftaten im bewaffneten Konflikt', 1 *Neue Zeitschrift für Strafrecht* (NSfZ) (2017) 5 and see Schüller and Meloni, *supra* note 69, at 6: 'This means that the Federal Public Prosecutor General secures evidence in order to be prepared to act upon requests by other States or international courts in the future. In order to be prepared and not to lose evidence over time, testimonies can be taken and stored.'

structural investigations can lead to the opening of an investigation against a specific person even if that person is not in Germany, if there is an ‘initial suspicion’ that he or she has committed an international crime.⁷¹ If there is strong suspicion in this regard, the Federal Prosecutor can request the issuance of an arrest warrant against a suspect at the Federal Supreme Court.

C. Structural Investigations regarding Syria

Currently six structural investigations are ongoing in Germany. Two of these relate to Syria. On 15 September 2011, the Federal Prosecutor began a structural investigation with respect to crimes committed by the Syrian government. The ‘Caesar photos’ are of paramount importance to these investigations.⁷² The second structural investigation is concerned with crimes committed by non-state actors, such as ISIS and all other armed opposition groups and militia in Syria and Iraq and is ongoing since 1 August 2014. In particular, the investigation is focused on crimes perpetrated against the Yazidi community, particularly in Northern Iraq and Syria,⁷³ which, according to the finding of the CoI, amount to ‘the crime of genocide as well as multiple crimes against humanity and war crimes’.⁷⁴ These investigations gained momentum with the admittance of 1100 Yazidi women and children by a quota of the state government of Baden-Württemberg (and in the meantime also other German states) as refugees since 2014.

With the growing number of refugees, including a large number of survivors of international crimes, the number of leads requiring further investigations has increased significantly. In Germany as in other European countries, asylum seekers from Syria and Iraq are regularly asked if they have been affected by, witnessed or committed international crimes, such as torture, executions, or use of chemical weapons. Despite the clear obligation of the German authorities enshrined in Article 4 of EU-directive 2012/29/EU,⁷⁵ they are not informed about the reason for these questions nor about their rights and duties as potential witnesses, victims or suspects. If individuals have provided information in this regard which is sufficiently concrete and well founded, this is transmitted to the Federal Police. Asylum seekers are then potentially called to testify to the Federal Police. Within the huge number of potential witnesses within the Syrian exile community, those called to testify with priority can provide information about suspects present in Germany or countries that are part of the Europol-network. In this way, German authorities have so far received an estimated 2800 indications of international crimes committed in

71 Section 114 CCP (*supra* note 66).

72 Frank and Schneider-Glockzin, *supra* note 70, at 6.

73 *Ibid.*

74 *They came to destroy*, *supra* note 1.

75 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ (L) 315, 57-73, 14 November 2012.

Syria. In 300 of these cases, witnesses were able to name perpetrators. Up till May 2017 more than 200 witnesses have testified in the two structural investigations. The investigations against armed opposition groups have so far led to 22 person-specific investigations against 28 suspects for war crimes committed in Syria.⁷⁶

Three concluded trials resulted from these investigations and were described above.⁷⁷ While four individuals have been arrested for suspicion of having committed a war crime while being a member of a terrorist organization, one trial is ongoing at the time of writing of this article, namely: In May 2017, what is to be expected to be the most extensive international crimes case in relation to Syria in a German court so far, was opened before the Higher Regional Court in Düsseldorf (case-file number 5 StS 3/16). The accused Ibrahim al E, a 41-year old Syrian national, is alleged to have commanded a militia comprising of at least 150 fighters. The militia, itself belonging to the group Ghoraba-as-Sham, part of the FSA, is said to have controlled a neighbourhood in northeastern Aleppo since 2012 by means of pillaging as well as unlawfully detaining and torturing opponents and enemy fighters upon the order of the accused, in some instances in his presence (Section 8(1)(3) CCAIL) and pillaging (Section 9(1) CCAIL). The trial was scheduled to last until September 2017 but has not been completed by the time of writing. Another opening of a trial for war crimes in Syria is to be expected in the coming months.⁷⁸

Much less can be reported when it comes to the prosecution of crimes committed by the Syrian government. In this context, seven person specific investigations against 10 suspects have been conducted thus far with the first one ongoing since 2014. None of the suspects have been indicted so far.

D. Prospects of More Strategic Investigations of Crimes in Syria

So far, the only proceedings to have advanced to stages beyond initial investigations in Germany are those directed against low- or mid-level-suspects who were accidentally present on Germany territory, the authorities thus following a 'no-safe-haven approach'. Nevertheless, these cases and the growing collection of evidence will likely lead to broader and deeper knowledge and a stock of information on the various crimes committed in Syria since 2011. Furthermore, it is to be predicted that investigative mechanisms such as the IIIM will identify potential suspects in the exile Syrian communities all over

76 BT Drs. 18/12288 (Reply of the German government to a request submitted by the Green Party and parliamentarians regarding the criminal prosecution of international crimes committed in Syria in Germany), at 2–3, available online at <http://dip21.bundestag.de/dip21/btd/18/122/1812288.pdf> (visited 15 November 2017).

77 P. Kroker and A.L. Kather, 'Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany', EJIL:Talk! Blog of the European Journal of International Law, 12 August 2016, available online at <https://www.ejiltalk.org/author/pkrokerandakather/> (visited 15 November 2017).

78 Frank and Schneider-Glockzin, *supra* note 70, at 3.

Europe, which may increasingly include individuals previously affiliated with the Syrian government and former members of its militias — and allow for their prosecution under the current ‘no-safe-haven approach’.

The following section will discuss, how the aforementioned prosecutorial technique of structural investigations allows the German Federal Prosecutor to move away from a pure ‘no-safe-haven approach’ towards a more nuanced approach including elements of ‘global-enforcer approach’. This might enable the Office to balance the worry of overburdening the national justice system with an unlimited number of UJ cases — one of the rationales behind a no-safe haven approach — with elements of a ‘global-enforcer approach’ that currently seems to be the only option for prosecutors of bringing those responsibility for crimes in Syria to face justice in the foreseeable future. After discussing the possibility of the German Federal Prosecutor to conduct investigations into high-level suspects independent of their current residence, it will be shown, how civil society organizations try to support investigative action in this sense. The discussion then turns to possible outcomes of a more strategic approach on a concrete legal and technical as well as on a more abstract and political level.

1. Investigations against High-level Suspects?

It has been discussed that the rationale for structural investigations as currently conducted in Germany is to collect and secure evidence for three different purposes, covering the range between strict ‘no-safe-haven approach’ to ‘global-enforcer approach’ to UJ: first, by way of being prepared to react quickly if suspects enter German jurisdiction, the prosecutor follows a classical ‘no-safe-haven approach’; secondly, to make the collected evidence and information available to other prosecutorial authorities and — if it is ever be created — to an international court or tribunal for Syria by way of legal assistance, as explicitly announced with regards to the situation in Syria.⁷⁹

Such anticipated legal assistance tends more towards a ‘global-enforcer approach’ given the fact that knowledge about ongoing investigations is shared by European prosecutors in the EU Genocide Network under the roof of Eurojust. This network of those European prosecution offices specialized in the investigation and prosecution of genocide, crimes against humanity, and war crimes was established to ensure close cooperation between the national authorities in investigating and prosecuting international crimes to provide a forum for sharing of knowledge best practice. This means that information gathered by way of structural investigations can be exchanged with other prosecution authorities independent of particular cases in a specific jurisdiction, thus going beyond a pure ‘no-safe-haven approach’.

The third purpose may be described as follows. German law does not prevent the prosecutor from going even further and to investigate high-level suspects

⁷⁹ *Ibid.*, at 5; Jeßberger and Geneuss (eds), *supra* note 70.

residing in Syria. Even if one were to demand that the German prosecutor only investigate cases that have any link to Germany, it is evident that the effects of the Syrian war and of the international crimes committed therein are felt well beyond its borders in European countries including Germany. These effects present a link to Germany that can be seen as sufficiently strong for the German prosecutor to employ a more strategic approach towards investigating suspects that bear the most responsibility for these crimes. In this vein, the Federal Prosecutor stated in a recently published article that his investigations regarding Syria are not only a necessary part of a peace-building process in the affected country but also within Europe itself because of the effects that these conflicts have on conflicts and international crimes in its vicinity.⁸⁰ In the same article, he further argues that in light of the uncertainty surrounding whether an international court will ever be able to exercise jurisdiction, national prosecutorial authorities need to seek every opportunity to bring suspects before courts.⁸¹ This could be an indication that Germany assumes a proactive role to seek the extradition of high-level perpetrators where there is enough evidence to prosecute them. Another indication confirming this assumption is an international arrest warrant issued in late 2016 by the Federal Prosecutor against an ISIS leader for committing war crimes and genocide against religious Yazidi minority in August 2014.

2. Initiatives by Civil Society Organizations

Civil society organizations have actively tried to push the Federal Prosecutor to follow the last of the three approaches outlined above. In March 2017, a Berlin-based and two Syrian NGOs and lawyers together with nine Syrian torture survivors submitted a criminal complaint against high-level officials of the Syrian government to the Office of the Federal Prosecutor.⁸² The complaint targets six officials known by name and further unknown officials of the Syrian military intelligence for torture, enforced disappearance and other crimes against humanity and war crimes committed. The claimants, as well as another seven survivors appearing as witnesses and as civil parties, were detained in three notorious detention centres under the control of the suspects and were either tortured themselves or were witnesses to torture.

80 *Ibid.*, at 1.

81 *Ibid.*, at 5, translated by authors, the original quote reads: *‘Da ungewiss ist, ob ein internationales Strafgericht jemals hierzu berufen sein wird, werden die nationalen Strafverfolgungsbehörden wachsam sein und jede Möglichkeit, Verdächtige vor Gericht zu bringen, ausschöpfen müssen’*; see also: BT Drs. 14/ 8524 (Draft legislation of the German government regarding the introduction of the Code of Crimes against International Law), available online at <http://dip21.bundestag.de/dip21/btd/14/085/1408524.pdf> (visited 15 November 2017).

82 For more information see website of ECCHR: <https://www.ecchr.eu/en/international-crimes-and-accountability/syria/torture-under-assad.html>, the Syrian Center for Legal Researches and Studies (CLS): <http://www.sl-center.org>, the Syrian Center for Media and Freedom of Expression (SCM): <https://scm.bz/en/> (visited 15 November 2017).

The detention centres belong to branches 215, 227 and 235 of the Syrian military intelligence, where the majority of the deaths by torture documented by the above mentioned military photographer ‘Caesar’ have occurred. Along with the witness testimonies, the complaint contains documentary evidence of and analyses of command structures of the intelligence apparatus of the Syrian government and present leads to further evidence available in other European countries. With the complaint falling within the ambit of structural investigation regarding international crimes in Syria, no formal admissibility decision of the Federal Prosecutor or a court was required to start investigating the facts brought to the prosecutor’s attention.⁸³ In November 2017, the same organizations handed in two further complaints against high-level suspects responsible for torture and other crimes at five detention centres run by the Syrian Air Force Intelligence as well as the notorious military prison Saydnaya.⁸⁴ Additionally, a criminal complaint and a high-resolution set of the Caesar-photos containing metadata, which had until then not been in the possession of any international or national investigation or prosecution authority, was submitted by the ‘Caesar-Files Support Group’ to the Federal Prosecutor.

3. Possible Outcomes

Within a few weeks of the submission of the complaint in March 2017, the first 12 witnesses were called to testify. This indicates that these criminal complaints were taken seriously by the Federal Prosecutor. Despite the fact that — contrary to French and Italian practice — trials *in absentia* are not possible in Germany and that therefore, individual investigations into high-level suspects might not lead to formal accusations and trials in front of German courts, the possibility of investigations into the activities of such persons *in absentia* is not seriously questioned.⁸⁵ Ultimately this could lead to the Federal Prosecutor demanding arrest warrants against high-level suspects from Syria, which would be issued by the investigation judge at the Federal Supreme Court (*Bundesgerichtshof*) if the legal requirement is satisfied, namely of a strong suspicion that, according to the results of the investigations conducted so far, it is highly probable that the accused committed the crime.⁸⁶

The execution of such an arrest warrant outside of Germany (with extradition following) depends on the legal assistance regulations that exist between the states involved. These consist of international (bilateral or multilateral)

83 For the latest update on the case, see <https://www.ecchr.eu/en/our.work/international-crimes-and-accountability/syria.html> (visited 15 November 2017).

84 AI, *Human Slaughterhouse: Mass hangings and extermination at Saydnaya prison, Syria* (2017) available online at <https://www.amnesty.org/en/documents/mde24/5415/2017/en/> (visited 15 November 2017).

85 Werle and Bornkamm, *supra* note 40, at 666–667.

86 See *supra* note 66: The legal requirements are laid down in section 112 German Code of Criminal Procedure and the procedure in sections 114, 125 and 162 of the German Code of Criminal Procedure.

treaties containing the contractual obligations that states have with each other in this regard. A very advanced system for this kind of judicial cooperation is in place among EU Member States: the European Arrest Warrant (EAW). The EAW is a 'a judicial decision issued by a [EU] Member State with a view to the arrest and surrender by another [EU] Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'.⁸⁷ The noteworthy characteristic of the EAW is that it obliges other Member States to execute an arrest warrant issued by another Member State limited by legal principles and standards such as the double criminality requirement.⁸⁸ More often than not the execution of such arrest warrants manifests with remarkable differences concerning the implementation of these duties in different national legal systems.⁸⁹

In the absence of such an advanced system of mutual judicial recognition and cooperation, a national arrest warrant could be published and communicated in the Schengen Information System (SIS), a governmental database maintained by the European Commission with 28 Member States plus four states which are not part of the EU,⁹⁰ if it concerns a suspect present in the Schengen area, or, if the suspect is believed to be present elsewhere, via Interpol. Within the Schengen system, states are obliged 'to extradite between themselves persons being prosecuted by the legal authorities of the requesting Contracting Party'.⁹¹ The agreement, therefore, also contains rules that stipulate facilitated conditions for extradition among the Member States.⁹²

Interpol does not issue or execute arrest warrants but collects and publishes requests for arrest by its 190 Member States. A Member State thus notified of the issuing of an arrest warrant by another member state against a person present on its territory, will handle this information according to its national law and its international obligations vis-à-vis the state that issued the arrest warrant. The extradition procedure would normally include a judicial decision on the legality of the extradition request and a political decision by the executive if the extradition is granted. In Germany, the former would be taken by the competent Higher Regional Court whereas the latter will be handled by the Federal Ministry of Justice in coordination with the Federal Foreign Office and

87 Art. 1(1) Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ (L) 190, 1-20, 18 July 2002.

88 L. Klimek, *European Arrest Warrant* (Springer International Publishing, 2015), at 67-90.

89 *Ibid.*, at 203-217.

90 EU Members States are: Ireland, Bulgaria, Cyprus, Romania, Croatia, France, Germany, Belgium, the Netherlands, the UK, Luxembourg, Spain, Portugal, Italy, Austria, Greece, Finland, Sweden, Denmark, Estonia, the Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, the for non-EU States being Iceland, Liechtenstein, Norway and Switzerland.

91 Art. 63, The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ (L) 239, 19-62, 22 September 2000.

92 Arts 59-66, The Schengen acquis.

all other ministries whose political competences are affected by the extradition request.⁹³

4. *More than Pure Symbolism?*

With international arrest warrants being the most far-reaching effect, one might pose the question if the justice efforts discussed in this article serve more than pure symbolism. As Kai Ambos rightly points out, the purposes of punishment in ICL ‘must be elaborated’.⁹⁴ Undeniably the traditional purposes such as the preventive effect through deterrence and norm stabilization will still have their place.⁹⁵ Some observers, especially from media and politics, will evaluate the impact of ICL proceedings mainly based on the final result and consider those proceedings as incomplete and, therefore, a failure if the suspect is not sentenced and punished. But it is important to recognize the effects of the earlier stages of these proceedings in earlier stages as well as their interim results. The very existence of ICL as implemented in the Rome and national statutes may well have deterrent as well as norm stabilizing effects to which the opening of investigations, the collection of evidence on a large scale, and prosecution measures like seizing of documents or arrest warrants can then contribute.

Henceforth, the criticism that a certain measure has purely symbolic impact does not take into account the majority of the common theories of punishment. From the authors’ point of view it is, therefore, important to distinguish between different possible messages and evaluate them in order to later assess the impact of a certain procedure or procedural step.

In cases of arrest warrants, for example, there are a number of important messages that can be communicated if a court, like the highest criminal court in Germany or similar bodies in other European states issue arrest warrants. These decisions will be based on a thorough assessment of facts, combined with the legal arguments around the responsibility based on command responsibility or indirect perpetrators as commanders of repressive military and state institution (*Mittelbare Täterschaft kraft Organisationsherrschaft*).⁹⁶ Such

93 Section 74 of the German Act on International Cooperation in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*). An English translation can be found at <https://www.gesetze-im-internet.de/englisch-irg/index.html> (visited 15 November 2017).

94 K. Ambos, ‘Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law’, 33 *Oxford Journal of Legal Studies* (2013) 293–315.

95 G. Werle and F. Jeßberger, *Principles of International Criminal Law* (3rd edn., Oxford University Press, 2014), at 34–36.

96 T. Weigend, ‘Perpetration through an Organization: The Unexpected Career of a German Legal Concept’, 9 *JICJ* (2011) 91–111; J. Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’, 25 *Leiden Journal of International Law* (2012) 165–219; N. Jain, ‘Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration’, 61 *American Journal of Comparative Law* (2013) 831–871; K. Ambos, ‘The *Fujimori* Judgment: A President’s Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus’, 9 *JICJ* (2011) 137–158.

decisions can on the one hand not only serve to (re-)establish the rule of law, in Syria and the region but also globally, and as a confirmation of the absolute prohibition of torture on the other. They will present an independent judicial decision, which, at least in civil law countries, takes into account inculpatory as well exculpatory evidence and can, therefore, serve as a factual as well as a legal stock for future investigations of high-level perpetrators at the national as well as the international level. They thus ultimately also serve the 'acknowledgement and truth seeking aspects of [international criminal] trials'.⁹⁷

The cases of Chilean and Argentinean high-level perpetrators such as Pinochet, Videla and others have shown that international arrest warrants issued abroad can be precursors to prosecution elsewhere, especially in the countries where the crimes have been perpetrated. Moreover, in the case of Syria, arrest warrants could have the effect of setting the agenda in peace negotiations e.g. in which a demand can be made that no suspect of international crimes will become part of a new government. Once a new government is formed, it might even respond positively to demands for extraditing suspects. Further, investigations into high-level perpetrators can lead to targeted sanctions and freezing of their international assets and property. Last but not least, a message is conveyed to those perpetrators who are still in power in Syria that they may no longer be able to freely travel around the world.

This was also an unexpected outcome of the various proceedings against CIA agents and their superiors in the CIA extraordinary rendition programme after 9/11 and against US military torture in Guantanamo. European Court of Human Rights (ECtHR) judgments as well as arrest warrants, summons and trials *in absentia* in Germany, France and Italy led to a situation where hundreds of CIA agents and their superiors involved in the respective programme as well as high-level military commanders were warned against travelling to or via western Europe since their presence might invoke further proceedings and prosecutorial measures, such as interrogations and the issuance of arrest warrants against them.⁹⁸

4. Conclusion

The history of international criminal law shows that the prospects of justice are dependent on politics. This is true even for the most ambitious project in international criminal law so far, the ICC, which without state cooperation and funding cannot proceed with its investigations. Particularly powerful states such as the USA, Russia and China manage to shield themselves and their allies from prosecutions. Similar observations can be made with respect to UJ cases. Critical voices such as Máximo Langer have pointed out that

⁹⁷ Werle and Jeßberger, *supra* note 95, at 36.

⁹⁸ Kaleck, *supra* note 39, and A. Schüller, 'Bringin CIA Torture to Justice', Open Democracy, 29 April 2015, available online at <https://www.opendemocracy.net/opensecurity/andreas-sch%C3%BCller/ending-impunity-bringing-cia-torture-to-justice> (visited 15 November 2017).

‘universal jurisdiction will not establish a minimum international rule of law in the sense of either holding a substantial share of the perpetrators of international crimes accountable, or being applied equally across defendants’. It follows that UJ will never substantially close the ‘impunity gap’ regarding international crimes given that high-cost, most mid-cost and many low-cost defendants are beyond the reach of the UJ enforcement regime and states have incentives to concentrate on defendants against whom there is broad agreement in the international community and whose own states of nationality are not willing to defend.⁹⁹

In summary, this article argues for the examination of the possibilities the principle of UJ in a more nuanced manner. The repercussions of — particularly the first UJ cases in Europe regarding Latin America — were more significant than public and scholarly attention in north Atlantic states might suggest. The first wave of cases led to far-reaching results: Cases against Chilean and Argentinean perpetrators most notably in Spain, Germany, Italy and France including trials *in absentia*, international arrest warrants as well as extradition warrants against high-level perpetrators, such as Pinochet, Videla and dozens of others led to hundreds of prosecutions and judgments in Chile and Argentina.¹⁰⁰ Legal scholar Naomi Roht-Arriazas has described the interdependence of the trials in Europe and Latin America as the ‘Pinochet effect’,¹⁰¹ which in the context of the ICC, may be seen as ‘positive complementarity’ in action.¹⁰² The assumption is that a certain external pressure leads at a very minimum to increased efforts by states where the crimes have been committed to investigate and prosecute those crimes (in order to prevent an international tribunal or a court in a third country from intervening), or in the best case, such as in Argentina, to trials and judgments against perpetrators of crimes against humanity.

Both the trials and their effects on the societies of Chile and Argentina are underestimated. At the same time, neither the judgment against former ruling president Videla nor the case of the Operation Condor were accompanied by echoing repercussions in Europe or the US.¹⁰³

99 Langer, ‘Diplomacy of International Law’, *supra* note 32, at 2, 31.

100 W. Kaleck, *Kampf gegen die Straflosigkeit. Argentinien Militärs vor Gericht* (Wagenbach, 2010).

101 N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, 2006).

102 L. Nichols, ‘The Strategy of Positive Complementarity’, in *idem*, *The International Criminal Court and the End of Impunity in Kenya* (Springer Series in Transitional Justice, 2015) 29–46; WW. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 *Harvard International Law Journal* (2008) 53–108.

103 Available online at <http://www.ijrcenter.org/2016/06/07/argentine-court-convicts-former-dictator-for-conspiracy-in-operation-condor/>: ‘An Argentine court has convicted and sentenced former dictator Reynaldo Bignone and 14 other former Argentine military officers of crimes against humanity for their roles in Operation Condor, a transnational conspiracy behind the kidnapping, torture, killing and forced disappearance of hundreds of political dissidents during the 1970s and 1980s. Bignone was convicted of participating in an illicit association, kidnapping and the forced disappearance of over 100 people. The ruling is the first time a

In comparison, the first successful UJ case in Africa, the *Hissène Habré* trial concluded with the final verdict announced by the Extraordinary African Chambers in Dakar in May 2017. This achievement was a product of a politically fortunate set-up in Senegal, the persistent pressure of survivors as well as their supporters and an outcome of the previously initiated UJ proceeding in Belgium in combination with the ruling of the International Court of Justice (ICJ) in The Hague.¹⁰⁴

UJ laws are accompanied by various requirements in different European countries such as the presence of the suspected person in the forum state, a link to the forum state or that the crimes have been committed against or by citizens or residents of the forum state. As has been discussed in Part 2.A. of this article, a slight turn away from the principle of UJ and a turn towards the principles of passive and active nationality as well as territoriality have become apparent over the last few years. Consequently, the attempts of national prosecutorial authorities as well as international NGOs resemble more an opportunistic 'no-safe-haven approach' in the sense that they depend massively of the presence of suspects on European territory than on strategic engagement.

Perhaps the best example of the strategic approach discussed above were the US investigations of Nazi crimes after World War II, which relied on the political study of Franz Neumann 'Behemoth' and especially in the Nuremberg follow-up trials, prosecuted the columns of the Nazi system, the business leaders, Reichswehr generals, doctors and lawyers.¹⁰⁵ Instead of employing this Nuremberg line of prosecution from the top to the lower levels, prosecutions are now usually focused on low-level suspects randomly noticed on European soil or European citizens involved in or affected by the commission of international crimes abroad. Even in those cases in which suspects are known to be travelling or do in fact travel to European states, investigative judges and prosecutors are often reluctant to open investigations or issue summons and arrest warrants. Such reluctance may be explained by a lack of time, diplomatic considerations or the sheer complexity of the cases.

The structural investigations regarding Syria are an exception to this trend. They demonstrate that a more nuanced approach to UJ offers an avenue to fill the gaps in (the incomplete and imperfect) system of international criminal law. Additionally, they allow for strategic investigations into atrocity crimes

court in the region has publicly determined that dictators in Argentina, Bolivia, Chile, Brazil, Uruguay and Paraguay collaborated in the cross-border conspiracy to eliminate leftist dissidents, some of whom had previously evaded their reach by fleeing to neighbouring countries. Additionally, the case is a rare example of a domestic court's prosecution of a former head of state for transnational crimes, and is also noteworthy because the defendants were convicted on the basis of their participation in the international conspiracy rather than on individual criminal charges.'

104 Brody, *supra* note 41.

105 See e.g. K.C. Priemel, 'Mehr Exempel als Modell', in F. Jeßberger, W. Kaleck, T. Singelstein (eds), *Die Nürnberger Prozesse gegen deutsche Industrielle und die Ursprünge des Wirtschaftsvölkerstrafrechts* (Nomos, 2015) 25–64, at 42–45.

for which there are no other judicial forum. This prosecutorial technique further enables the authorities to investigate powerful actors at least in the beginning, without directly being exposed to political pressure since they are not focused on specific incidents or suspects, thus avoiding strong political reactions and interference by states whose elite might be under investigation.¹⁰⁶ Yet, structural investigations can ultimately yield tangible results in the form of arrest warrants issued against persons most responsible for heinous crimes if individual investigations against them are opened. They thus allow the German Federal Prosecutor to balance the rationale of ‘no-safe haven’ approach and to avoid what Langer calls the ‘high political cost’, namely an approach that takes into consideration the important role of national jurisdictions in the patchwork of international justice.¹⁰⁷

The combination of trials against suspects arrested on European territory and the initiation of broader investigations against those who bear the most responsibility as discussed in this article show that the ‘no-safe haven’ and the ‘global-enforcer approach’ can complement each other and that this combination can serve as an interesting model for a modern and pragmatic approach to revitalizing UJ in Europe.

Survivors of massive crimes, family members, affected communities, local and global human rights organizations as well as lawyers, therefore, have a responsibility of communicating that the realistic and pragmatic use of UJ despite its restrictions has the potential to tackle the immeasurable horror of these crimes and to overcome the complete silence that often results soon after. In light of the sheer mass, complexity and systematicity of the crimes and abuses in Syria, justice and redress will most likely only be approximated in small steps and never fully achieved. But even these small steps alongside the results of ongoing investigations have to be communicated — to the legal community as well as to a broader public in order to establish the consensus amongst societies on the need to exercise UJ despite its eventual costs. Not only in the society affected by the crimes, but also in the societies in which the substitutional criminal justice for Syria is currently taking place, in order to seek support for these efforts, it is only by mobilizing public support that the interests of justice can prevail over short-term political and economic interests.

States should have UJ laws in place that allow for such flexibility and that enable international justice to function in situations where the main institutions vested with prosecutorial powers are blocked for political reasons. It follows that countries with restricted UJ laws must modify their laws in order to enable the judiciary to do such meaningful and immensely important work, thus assuming their responsibility as part of transnational efforts to address the most heinous crimes in Syria and elsewhere. One can only hope that the horrific crimes happening in Syria leave an impact on lawmakers and lead them to reconsider the no-safe-haven approach they currently pursue and to

¹⁰⁶ Schüller and Meloni, *supra* note 69.

¹⁰⁷ Langer, ‘Universal Jurisdiction is Not Disappearing’, *supra* note 32, at 253 ff.

reopen jurisdictions by modifying their laws in a way that specialized war crimes units can collect evidence, share it with other prosecution authorities and have the opportunity to request arrest warrants against suspects outside the country again. This is vital for the international justice project generally to be credible in the sense that it equally and effectively applies to all crimes that are of 'concern to the international community as a whole'.¹⁰⁸

108 O'Sullivan, *supra* note 33, at 208–209: "This move to what some call a "no-safe-haven" model obscures the structural forces (political and economic) that are in play in modern conflicts, including neoliberal policies and the hegemony of global north. This produces a tendency towards institutionalizing the "de facto impunity long enjoyed by the powerful" and reproducing "one-sided narratives of complex conflicts".

BOOK REVIEWS

Jamie Rowen, *Searching for Truth in the Transitional Justice Movement* (Cambridge University Press, 2017) 182 pp. (Hardback) \$99.99 ISBN 978-1-1071-08769

Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes under International Law* (Asser Press, 2017) 421 pp. (Hardback) €149.99 ISBN 978-9-4626-52002

Why do truth commissions emerge following some conflicts but not others? Jamie Rowen tackles this question in *Searching for Truth in the Transitional Justice Movement*. Rowen approaches this topic through a detailed study of three jurisdictions: the former Yugoslavia, Colombia, and the United States. Although truth commissions did progress in Colombia, they stalled in both the former Yugoslavia in the wake of the Balkan Wars as well as in the United States in regard to the conduct of US officials after the events on 11 September 2001. Rowen unpacks what happened and what failed to happen — and why — in each of these three jurisdictions.

Rowen delivers a lively, careful, and engaging account as to why truth commissions arise in some places but not in others. Along the way, Rowen shares with readers stories from those individuals who animate the human rights movements and those individuals — hungry for justice — who are touched by such movements. Rare among academics, and utterly refreshing, Rowen's book is less about best practices than it is about what is best for people. On this note, Rowen's book is courageous. She eschews the allure of universality and commonality to conclude that what may be 'best' differs across time and places.

Rowen's focus on individuals and the idiosyncratic, rather than machineries and the systemic, prompts a set of deeper ruminations on transitional justice, a process that she considers reified in crucial ways through truth commissions. Rowen identifies malleability as a key characteristic of truth commissions.

Rowen presents the truth commission as shape-shifter, as ambiguous, and as cypher. She nonetheless refrains from casting aspersions upon a malleable entity as one that lacks decisiveness or presents as characterless, irresolute, or wishy-washy. Instead, Rowen unfurls malleability as dyad: vice and virtue, asset and liability, foible and strength. For me, Rowen's insights evoke the Rolling Stones song:

But what's confusing you
Is just the nature of my game
Just as every cop is a criminal
And all the sinners saints
As heads is tails.¹

Rowen's book presents malleability in a way that renders the concept less confusing and more natural. While malleability, indeed, may frustrate at times, Rowen also remediates its value when it comes to promoting accountability, improving survivor well-being, and preventing future violence. There is a fine line between flaccidity, on the one hand, and agility, suppleness, and adaptability, on the other. It is because of the intrinsic malleability of truth commissions that, according to Rowen, 'actors in strikingly different political contexts see the utility of creating them.'² Truth commissions, in this sense, hold a generative plasticity. 'In many places', Rowen adds, 'calling for a truth commission became a default strategy — the "something" that many view as preferable to doing nothing.'³

Reflexively, readers may juxtapose the plasticity of the truth commission with the apparent rigidity of law. Tangibility, after all, is one of the putative qualities of criminal law: we believe that we know it when we see it in operation, and we have a set of standards by which to measure it. These standards are due process. Outputs, as well, can be quantified: acquittals, convictions, and sentences.

1 Rolling Stones, 'Sympathy for the Devil', *Beggars Banquet* (1968).

2 J. Rowen, *Searching for Truth in the Transitional Justice Movement* (Cambridge University Press, 2017), at 4.

3 *Ibid.*, at 5.

In contrast, a standard operating definition for what counts as a truth commission remains lacking. That said, Rowen's finding that '[e]ven where actors promoted truth commissions, they did so in ways that did not challenge the prevalent belief that retribution is important, if not necessary' is of great interest to international criminal lawyers.⁴

Rowen rightly notes the absence of a national truth commission in the United States following 11 September 2001. The American experience with truth commissions, however, is somewhat more granular. Many international legal scholars may be surprised to learn that the United States has had actual experiences with truth and reconciliation commissions. These experiences are not national. They occurred at subnational and city levels. These experiences, nonetheless, unwind riveting and largely underappreciated stories of the search for justice and also the generative politics through which truth commissions are created. Experts invested in international justice have much to learn from local efforts, including those that make little to no reference to international law or norms.

One example is from North Carolina. The Greensboro Truth and Reconciliation Commission was established to examine the 'context, causes, sequence and consequences' and make recommendations for community healing around a tragedy in the city of Greensboro, which occurred on 3 November 1979.⁵ That day witnessed the deaths of five anti-Ku Klux Klan (KKK) demonstrators and the wounding of eight others along with one KKK member and a news photographer. This truth commission came into existence in light of community frustration: after two criminal trials, and a civil trial that found members of the Greensboro Police Department jointly liable with KKK and Nazi members for the wrongful death of one victim, many in the Greensboro community still did not feel that justice had been served. For this reason, the community launched a democratic process to nominate and select the seven members of this independent commission, which was

empaneled in 2004. This Commission brought perpetrators, survivors and victims' families into the public arena to recount the tragic events of that day, explore realities of systemic and structural racism, and thereafter reach a broad series of recommendations.⁶ Ultimately, however, the City Council of Greensboro rejected the process and report. The Council, instead, merely issued a statement of regret for the violence.

The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission represents a second example.⁷ In 2012, the state of Maine and the Wabanaki tribal governments committed to a joint entity to investigate and document an era in Maine's history when indigenous children were being sent into 'foster' care at an alarmingly high rate. This entity was the first truth and reconciliation commission established in the United States endorsed by government. It was one of the first in the world to examine issues of indigenous child welfare — well before the widely recognized national initiative in Canada. The Maine-Wabanaki Commission focused on placing the state and its child welfare system under scrutiny and sought systemic reconciliation between the child welfare practices of tribes and the state.

Rowen structures her book around national jurisdictions. In other words, she turns to *places* as units of analysis. Discussion could also be grounded in *conceptual spaces*, to wit, *kinds* of human rights abuses and *types* of abusers. It is on this latter note that the compelling book, authored by Leonie Steinl, enters the mix as a complement to Rowen's innovative work. Steinl examines how law and justice suffuse and infuse child soldiers. Steinl normatively interrogates how questions around child soldiers should intersect with transitional justice initiatives. Steinl picks up the toughest questions: how to approach the child who, subject to a variety of conditions, murders, maims or mangles others? What does justice mean for these others, which could well include children; and what does it mean for the child who commits the hurt, who too is a victim?

4 *Ibid.*

5 See the website of the Greensboro Truth and Reconciliation Commission, available online at <http://www.greensborotrc.org> (visited 6 February 2018).

6 The recommendations are available online at <http://www.greensborotrc.org/overallrecs.pdf> (visited 6 February 2018).

7 See the report issued by the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission, available online at <http://www.mainewabanakitrc.org/report/> (visited 8 February 2018).

Although Steinl's book is based on a doctoral dissertation she defended at the University of Hamburg in 2016, it reads like the work of an assured and reflective senior scholar. Steinl advances a convincing case that child soldiers ought to be treated with dignity, which means they should also, depending on the circumstances, be considered as actors. Unlike many authors who soothe themselves in the occlusion of the passive voice, Steinl is refreshingly clear in her deployment of the active voice. When it comes to children committing acts of atrocity, she is categorical: 'I hold the view that child soldiers can benefit from accountability under the condition that the accountability measures are crafted and executed in a child-adequate fashion.'⁸ Steinl contests totalizing narratives, however, well-intended, that simplify child soldiers as innocent victims, or in contrast, as baleful demons. She situates herself in an approach to militarized youth that draws from ethnographic theory. Steinl addresses complex questions on gender and violence, recognizing that, falling among the paradoxes of war, 'is that it can, in some ways, actually have positive effects on gender equality' and that failing to recognize the agency of youth can doubly disadvantage girls and young women within processes of societal reconstruction.⁹

Steinl's work is normative, in that she sets out why her approach is beneficial. Nonetheless, her project is also expository. Steinl offers one of the most deeply researched accounts of practices of child soldiers globally as well as a meticulous survey of law and policy. She deftly canvasses national legislative and judicial proceedings, including domestication of the Statute of the International Criminal Court, and concludes — correctly — that child soldiers, as a matter of *lex lata*, 'can be held domestically accountable for crimes under international law provided that they meet the relevant domestic standards for criminal responsibility such as the applicable minimum age',¹⁰ taking into account the special rights of children, defenses, and mitigating

factors. Steinl, however, goes well beyond to consider traditional processes, amnesties, cleansing ceremonies, and reparation.

Steinl makes a powerful case that truth commissions specifically, and transitional justice generally, can advance the best interests of child soldiers. For this to happen, she argues, transitional justice frames must shed their predilection to construct child soldiers as passive victims. Steinl's sophisticated treatment of situational authority unspools the complexities of violence and the confounding ambiguity of many perpetrators. The criminal law divides binarily into guilty or innocent, right or wrong, victim or victimizer, persecutor or persecuted. In actuality, however, these categories may be far more fluid. Steinl challenges reductive parsimony when it comes to child soldiers. In this regard, she situates herself in a dynamic research stream that has come to visit and revisit how to *talk about* discomfiting questions while avoiding sensationalism or dismissiveness. Examples are the Kapo violence in the Nazi concentration camps,¹¹ men's experiences of forced marriage,¹² sexual violence during armed conflict,¹³ and the role of women as atrocity perpetrators.¹⁴

Steinl remains bashful when it comes to the prospect of criminally prosecuting children who perpetrate acts of atrocity.¹⁵ While she underscores the existence of a duty to prosecute, and that *lex lata* permits that duty to apply to children, at the same time, Steinl inclines towards 'leav[ing] behind' the duty to prosecute in such instances and instead

8 L. Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law* (Asser Press, 2017), at 36–37.

9 *Ibid.*, at 30–33.

10 *Ibid.*, at 189.

11 M.A. Drumbl, 'Victims who Victimise', 4 *London Review of International Law* (2016) 217.

12 O. Aijazi and E. Baines, 'Relationality, Culpability and Consent in Wartime: Men's Experiences of Forced Marriage', 11 *International Journal of Transitional Justice* (2017) 463.

13 S. Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', 18 *European Journal of International Law* (2007) 253.

14 L. Sjoberg, *Women as Wartime Rapists: Beyond Sensation and Stereotyping* (New York University Press, 2016).

15 Steinl states that: 'In the case of child soldiers, criminal prosecutions do not pose an ideal solution to the quest for accountability.... As such it is... of particular importance to examine alternative approaches towards achieving accountability'. See Steinl, *supra* note 8, at 277.

advancing a 'duty to hold accountable' or a 'duty to end impunity'.¹⁶ This move, coupled with a broader understanding of how impunity can be thwarted, vivifies a rich array of transitional justice mechanisms. For Steidl such mechanisms, including truth commissions, would do well to present the child soldier three-dimensionally as actor, victim, and witness. She notes that this has not happened as yet. Steidl laments how truth commissions have been inhibited in how they approach child soldiers because of fears that any conversation which they initiate portraying child soldiers as other than passive victims would be instrumentalized in abusive forms. It is wise to worry about this concern. We learn, nonetheless, from Steidl's detailed review of truth commissions in South Africa, Sierra Leone, and Liberia, that passive victim narratives approach children dismissively and even condescendingly by failing to fully explain the aetiology of violence and to build a vibrant culture of children's rights.

Steidl advocates for the restorative potential of truth commissions, and other justice modalities, which she sees as best actuated when these mechanisms speak in ways that transcend the constraints of preordained imagery and facile conceptions. Steidl posits a paradigm of 'restorative transitional justice'. The rub, of course, lies in the details. What does this mean on the ground? What does this look like in practice? Much of restorative justice literature is a bit tired: well-versed and often rehearsed. The bottom line, however, remains clear and Steidl is right to underscore it. Operational experiments with restorative transition justice will not be robust until the grip of criminal law on the imagination of post-conflict justice begins to relax.

Rowen flags truth commissions as a solution when there may be none other politically, while Steidl incubates these commissions where it may simply be the best fit ontologically. Both books differ in tone, style, and approach. Yet, when read together, these books make a vivid case for expanding justice beyond courtrooms and jailhouses. In this regard, both books are indispensable reads for

all those concerned with developing a meaningful transitional justice paradigm.

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Claus Kreß and Stefan Barriga (eds),
The Crime of Aggression: A Commentary,
Vols 1 and 2 (Cambridge University Press,
2016) 1583 pp. (Hardback) \$350 ISBN
978-11-0701-526-5

A definition of the crime of aggression was reached at the Review Conference of the Rome Statute of the International Criminal Court (ICC) in Uganda in 2010.¹ The ICC Statute has been the subject of many commentaries,² the crime of aggression, which was left undefined during discussions in Rome,³ certainly deserved its own commentary. This book is written to fill this gap. Its uniqueness is, therefore, unquestionable since considered alone, the crime of aggression has been the subject of countless international law

1 N. Blokker and C. Kreß, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', 23 *Leiden Journal of International Law* (2010) 889.

2 See amongst others, W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford University Press, 2016); O. Triffterer and K. Ambos, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn., C.H. Beck/Hart/Nomos, 2008), at 1954; A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), at 2018.

3 Art.5(2) ICCSt., which entered into force on July 2002, states that: 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.'

textbooks,⁴ many of which were authored by many of the contributors to this book. The editors, Claus Kreß and Stefan Barriga, in collaboration with leading scholars, produced what they describe as a 'landmark' commentary, 'which will be the authoritative guide for all practitioners, scholars and simply those who wish to get the bottom of the provisions' legal complexities.⁵ This authority does not only lie in the fact that over 50 scholars contributed, the book has succeeded in bringing together those same experts who played an influential role in the drafting history of the crime of aggression. These experts were either members of the Special Working Group on the Crime of Aggression, which drafted the resolution amending the ICC Statute, or active negotiators and participants to the Review Conference. More than guidelines to interpreting the crime of aggression, this book provides a living account of the legislative history of one of the most challenging issues of international criminal law.

Kreß opens the book with an introduction, which aims to situate the crime of aggression within the broader international legal order. It provides an exhaustive and comprehensive overview of the main issues raised by the effort of the international community to incriminate aggression ranging from the end of First World War to the adoption of the ICC Statute in 1998. This introduction sets the scene for the historical part of the book in

which the key moments, actors and roles regarding the incrimination of aggression are assessed.⁶ The introduction is written in a language accessible to lawyers as well as to other social scientists. Nevertheless, lawyers would have to read the book further to have an in-depth knowledge of theoretical and practical issues concerning the prosecution of the crime of aggression. Parts II and III of the book are devoted to tackling those matters.

The heart of the book rests in Part III, which concentrates on the main legal problems raised by the prosecution of aggression. For the remainder of the book, Part II on the history of the prosecution of aggression, Part IV on the crime of aggression and national law, and Part V on the crime of aggression and the future of the world order constitute an enrichment of the legal discussion through an interdisciplinary character. Addressing the subject of the prosecution of aggression demands no less. The crime of aggression, whatever can be said — its history is telling in this regard — is a political crime by nature. Expanding the debate — as the editors successfully do — to national,⁷

4 See, for instance, C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013), at 382; S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer, 2014), at 334; O. Solera, *The Crime of Aggression and the International Criminal Court: Lessons from the Past, Challenges for the Future* (Graduate Institution of International and Development Studies, 2006), at 524; M. Politi and G. Nesi, *The International Criminal Court and the Crime of Aggression* (Ashgate, 2004), at 193; P. Wilson, *Aggression, Crime and International Security: Moral, Political and Legal Dimensions of International Relations* (Routledge, 2009), at 192; L. May, *Aggression and Crimes against Peace* (Cambridge University Press, 2008).

5 C. Kreß and S. Barriga (eds), *Crime of Aggression: A Commentary*, Vol. I (Cambridge University Press, 2017), at xxxix.

6 K. Sellars, 'The First World War, Wilhelm II and Article 227: The Origin of the Idea of "Aggression" in International Criminal Law', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 21; K. Sellars, 'The Legacy of the Tokyo Dissents on "Crimes against Peace"', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 113; T. Bruha, 'The General Assembly's Definition of the Act of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 142; N. Strapatsas, 'The Practice of the Security Council Regarding the Concept of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 178; D. Akande and A. Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 214; J. Crawford, 'The International Law Commission's Work on Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 233; R.S. Clark, 'Negotiations on the Rome Statute, 1995-98', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 244.

7 K. Turkovic and M. Munivrana Vajda, 'Croatia', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 863; E. Hoven, 'Germany', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 880; A. Parmas, 'Estonia', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 895; S.V. Glotova, 'Russia', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 922; R. O'Keefe, 'United Kingdom', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 938; A.R. Coracini, '(Extended) Synopsis:

regional,⁸ civil society,⁹ and doctrinal perspectives,¹⁰ account for the complexity of a subject for which an agreement within the international community has long been sought.

The editors may have provided too much space to states' perspectives in this book. This criticism could be made for those chapters analysing selected national legislations on the crime of aggression and states' views in the context of the negotiations that led to the adoption of the current regime in Kampala. However, this choice is justified both by the nature of the crime — which interweaves states' and individuals' conduct — and by the need to prove that the agreement gained in the last minutes of the Review Conference on the conditions for the prosecution of the crime of aggression was not an unanimous one. Although states' views hold direct interest for political and international relations scientists, who are concerned with the power dynamics underpinning the prosecution of aggression, those states' views hold interest for lawyers determining the customary elements of the crime.

Part III examines the crime of aggression under current international law. This part opens with a chapter containing interpretative tools to interpret the crime of aggression.¹¹ The central argument is that the distinct

nature of the discipline of international criminal law — which simultaneously consists of international and criminal law — demands that interpretation of this crime under the ICC Statute is based on the principle of legality rather than on the systematic approach embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Leena Grover draws her analysis from Article 22 of the ICC Statute, which requires a strict interpretation of crimes and prohibits interpretation by analogy. For her, teleological interpretations must not be relied upon since it would give primacy to the fight against impunity to the detriment of the rights of the accused. This line of reasoning places too much emphasis on the criminal character of international criminal law, which instead, is foremost an international law matter. The provisions under the ICC Statute on crimes are drafted in diplomatic and political language specific to public international law, as opposed to criminal law. Hence, using the interpretative methods of the Vienna Convention would be common sense. The ad hoc tribunals built their success by heavily relying on these methods. The omissions contained in the definition of the crime of aggression make it likely that judges may be tempted to fill them in using these interpretative guidelines, which are customary law. In addition, this chapter only addresses the interpretation of crimes, while leaving unanswered the question of those interpretative tools applicable to procedural provisions of the crime of aggression. This topic was contested in Kampala and previously.

The legal framework of the crime of aggression, as analysed in Part III, is dialectical. On one hand, part of the regime is purely substantive or material, relating to the crime's elements. These material elements are addressed by two chapters of the book.¹² The principle of legality applies unquestionably to these elements, as discussed by Roger S. Clark, in Chapter 16. However, other methods of interpretation may come into play as state practice leaves open the possibility that the ICC may determine other acts of aggression, should they

The Crime of Aggression under Domestic Criminal Law', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 1038; 'Selected National Laws and Regional Instruments on the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1079.

8 M.M. El Zeidy, 'The Arab World', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 960; N.H.B. Jorgensen, 'Asia', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 993.

9 N. Weisbord, 'Civil Society', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1310.

10 M. Koskeniemi, 'A Trap for the Innocent...', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1359; J. MacMahan, 'Unjust War and the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1386; F. Mégret, 'What is the Specific Evil of Aggression?' in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1398; J.D. Ohlin, 'The Crime of Bootstrapping', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1454; D. Scheffer, 'Amending the Crime of Aggression under the Rome Statute', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1480.

11 L. Grover, 'Interpreting the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 375.

12 C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 412; R.S. Clark, 'Individual Conduct', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 565.

reach the intensity and severity of those listed in the definition adopted in Kampala.¹³

Regarding the manner of interpreting crimes within the ICC Statute, some contributions in the book have exaggerated the peculiarities of the crime of aggression.¹⁴ They seem to draw this distinctiveness on the fact that aggression is the supreme international crime. However, in doing so, Grover may not have taken into account that the principle of legality has raised challenges not only with respect to the crime against peace, but also international crimes more generally. It is difficult to argue that the ad hoc tribunals have strictly applied the principle of legality. Rather, international criminal law has developed through an abundant reliance by the ad hoc tribunals to teleological rules of interpretation.

Chapter 16 examines the application of general principles of criminal law, as enshrined in the ICC Statute, to the crime of aggression, which were not amended in Kampala, with the exception of the addition of Article 25(3)*bis* of the ICC Statute to confirm that principles of individual criminal responsibility should apply to the crime of aggression. Chapter 16 may, therefore, be covering unnecessary ground considering that the Review Conference in Kampala did not add anything to the general principles. The same may be said of other chapters in this edited collection, which rehearse issues which are not specific to the crime of aggression.¹⁵ Instead of focusing on interpreting the adopted provisions on aggression, some chapters tackle the *travaux préparatoires* at length, which represents an overlap with earlier literature.¹⁶

The two main substantive elements of the crime of aggression, namely, the conduct of states and individuals, do not represent new law. They were borrowed and reshaped from principles inherited from the Nuremberg and Tokyo judgments, General Assembly Resolution 3314 (XXIX), 14 December 1974, and the works of the International Law Commission.¹⁷ Indeed, the crime of aggression was a crime under customary law prior to the Review Conference.¹⁸ The Review Conference should be regarded as a codification process designed to bring clarity to a legal regime, which may, at times, be entangled with the use of force regime. The space devoted to these two forms of conduct is amply deserved. The prosecution of aggression necessitates a determination of what type of use of force is accepted as legal under the law of nations. This issue is complicated by recent developments on humanitarian interventions and the responsibility to protect, which may have softened the prohibition on use of force of the United Nations Charter.¹⁹ In a convincing line of argument, Kreß draws the necessary nuances between the acts of aggression, by reference to General Assembly Resolution 3314 (XXIX), and other situations, within which legality or triggering conditions remain highly contested. These situations concern collective security, self-defence or use of force by, or in support of, national liberation movements.

Analogous to state conduct, individual conduct also represents a codification of customary law. It requires that the prosecuted individual be in a 'leadership position', that is, 'in a position effectively to exercise control over or to direct the political or military action

13 Art. 8*bis*(2)(g) ICCSt.

14 A. Reisinger Coracini and P. Wrangé, 'The Specificity of the Crime of Aggression', in Kreß and Barriga (eds), *supra* note 5.

15 H. Kreicker, 'Immunities', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 675; P. Wrangé, 'The Crime of Aggression, Domestic Prosecutions and Complementarity', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 704.

16 See, S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), at 835. This is a pernicious effect of the fact that most of the contributors are living actors of the drafting history of the crime of aggression. Their enthusiasm may justify their tendency to expand their

commentaries far beyond mere interpretation of the amended provisions. After all, supplementary means of interpretation of treaty provisions include the recourse to 'the preparatory work of the treaty and the circumstances of its conclusion', Art. 32 Vienna Convention on the Law of Treaties.

17 See Draft Code of Crimes against the Peace and Security of Mankind, Part II, including the Draft Statute for an International Criminal Court, *Yearbook of the International Law Commission*, Vol. II (1996), § 46.

18 C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, X, at 421.

19 Art. 2(4) United Nations Charter.

of a State.²⁰ Indeed, from the failure after the First World War to indict Willem II to the Nuremberg and Tokyo tribunals, attempt or prosecution of the crime of aggression has consistently targeted the abuse of military power by state leaders.²¹ The Review Conference reaffirmed this principle with more clarity. Nevertheless, scholars have not waited until the adoption of amendments to the ICC Statute on crime of aggression to investigate these topics at length.²² The real novelty with this crime does not lie in its constitutive elements, but the conditions of its prosecution considering links with the collective security regime. The doctrinal contribution of the book should be assessed in this regard.

The editors dedicated seven chapters to analysing the conditions of exercise of jurisdiction by the ICC over the crime of aggression.²³

Specific contributions address peripheral issues such as immunity,²⁴ complementarity,²⁵ and victims' rights.²⁶ The importance of such issues cannot be questioned. However, the key issue on jurisdiction remains institutional relations between the regimes of collective security — with the Security Council situated at the top — and international criminal law, as guarded by the ICC. To have a glimpse of this issue, the reader should turn to specific chapters in the book.²⁷ In particular, Chapter 17, authored by Stefan Barriga and Niels Blokker,²⁸ argues that decision to separate a state's referral and prosecutor's *proprio motu* investigations from referral by the Security Council was reached only at the final stage of the negotiations in Kampala. In the drafting history of the crime of aggression, this is the sole issue on which the Working Group could not rely on previous practice.

The entry into force of the amendments on the crime of aggression was not an easy issue prior to and during the Review Conference.²⁹ This question is addressed — somewhat confusedly — in the ICC Statute, which provides

20 Art. 8bis(1) ICCSt.; Kreß, *supra* note 18, at 585.

21 This was the opinion of the Special Working Group on the crime of aggression. However, for an opposing view see K.J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', 18 *European Journal of International Law* (2007) 477.

22 I.K. Müller-Schäke, 'Defining the Crime of Aggression Under the Statute of the International Criminal Court', 14 *Leiden Journal of International Law* (2001) 409; C. Kreß, 'The Crime of Aggression before the First Review of the ICC Statute', 20 *Leiden Journal of International Law* (2007) 851; N. Blokker, 'The Crime of Aggression and the United Nations Security Council', 20 *Leiden Journal of International Law* (2007) 867; A. Cassese, 'On Some Problematic Aspects of the Crime of Aggression', 20 *Leiden Journal of International Law* (2007) 841; L. May, 'Act and Circumstance in the Crime of Aggression', 15 *Journal of Political Philosophy* (2007) 169; A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *European Journal of International Law* (2009) 1117; N. Goussac, 'Territoriality and the Crime of Aggression', 6 *New Zealand Yearbook of International Law* (2009) 169; N. Strapatsas, 'The Crime of Aggression', 16 *Criminal Law Forum* (2005) 89.

23 S. Barriga and N. Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 621; N. Blokker and S. Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', in Kreß and

Barriga (eds), *ibid.*, Vol. 1, 646; S. Barriga and N. Blokker, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 652; Kreicker, *supra* note 15; Wrangé, *supra* note 15; E. Chaitidou, F. Eckelmans and B. Roche, 'The Judicial Function of the Pre-Trial Division', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 752; E. Pobjie, 'Victims of the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 816.

24 Kreicker, *supra* note 15.

25 Wrangé, *supra* note 15.

26 Pobjie, *supra* note 23.

27 S. Barriga and N. Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 621; N. Blokker and S. Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 646; S. Barriga and N. Blokker, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', Kreß and Barriga (eds), *ibid.*, Vol. 1, 652.

28 See Barriga and Blokker, *supra* note 27.

29 Art. 5(2) ICCSt., spoke of amendments 'in accordance with articles 121 and 123'.

for a multiple-step system on entry into force. First, the individual state accepts the amendments. Secondly, the 30th instrument of ratification is required to be deposited. Even there, there is an ulterior Rubicon to be crossed, namely the activation of the jurisdiction of the Court, which will depend on the cumulative conditions of the deposition of the 30th instrument of ratification and the formal decision of state parties, as from January 2017, to allow the Court to take aggression cases. Consequently, up until that activation, the crime of aggression would remain dormant as if the Review Conference and the entry into force have both never taken place.

The importance gained by the issue of entry into force explains why that of jurisdictional filters was less contentious in Kampala. Prior to the Review Conference, it had been agreed that the non-determination of the existence of an act of aggression by the Security Council should not prevent the Court from ascertaining its jurisdiction, the entry into force remained the only way where states could retake control over the prosecution of aggression.

Chapter 17 engages with Articles 15 *bis*(7) and 15 *bis*(8) of the ICC Statute, which govern the interaction between the ICC and the Security Council for the prosecution of aggression. The only jurisdictional filter remaining is the requirement that the prosecutor should seek approval for prosecution, in cases where the Security Council fails to determine the existence of an act of aggression. The adopted provisions make it specific to this crime that the green light would be given by the ICC's Preliminary Division six months after the prosecutor has notified the Security Council of a potential crime of aggression for investigation and the Council has remained silent.³⁰ In addition, with no outside determination of an act of aggression prejudicing the ICC's own finding,³¹ it appears that beyond a jurisdictional filter, this represents institutional coordination between the ICC and the Security Council. However, it cannot be claimed — at least for now — that such coordination would be successful. The book provides a useful guide for a

common understanding of the respective roles held by the ICC and the Security Council.

In a nutshell, *Crime of Aggression: A Commentary* should be the cornerstone volume on the crime of aggression. The editors have succeeded in a risky task: to account for the complexity of interpreting the crime of aggression in a language accessible to a wider audience. The richness of the book lies in the editors' endeavour to provide the readers with all elements needed to comprehensively interpret the crime of aggression. This work is essential reading for international criminal lawyers and other social scientists. In 2016, Palestine became the 30th state to ratify the amendments on the crime of aggression. The year after, in its final hours on 14 December 2017, the 16th Assembly of States Parties to the ICC Statute decided to activate the Court's jurisdiction over the crime of aggression to take effect on 17 July 2018.³² Despite remaining controversies,³³ it is hoped that — particularly in such times where the use of force in international relations may be trivialized — state parties to the ICC Statute find in this book an encouragement to launch a first case to the ICC.

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32 ASP, *Activation of the Jurisdiction of the Court over the Crime of Aggression*, Res. ICC-ASP/16/Res.5, adopted at the 13th Plenary Meeting, 14 December 2017.

33 N. Stürchler, 'The Activation of the Crime of Aggression in Perspective', EJIL: Talk! Blog of the European Journal of International Law, 26 January 2018, available online at <https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (visited 16 February 2018); D. Akande, 'The International Criminal Court Gets Jurisdiction Over the Crime of Aggression', EJIL: Talk! Blog of the European Journal of International Law, 15 December 2017, available online at <https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/> (visited 16 February 2018).

30 Art. 15*bis*(8) ICCSt.

31 Art. 15*bis*(9) ICCSt.

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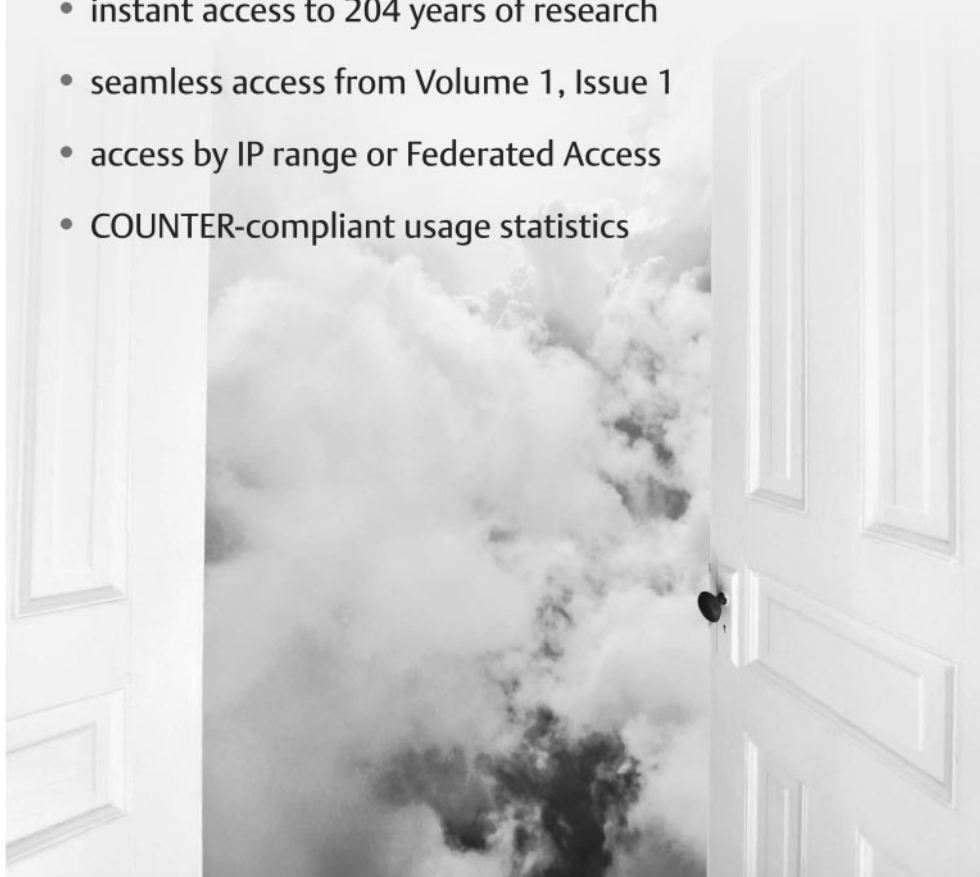
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