The Rome Statute of the International Criminal Court

A Commentary

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Introductions to the Third Edition

Judge Sang-Hyun Song, Former President of the ICC

In 1945, at a time where international law paid little or no regard to individuals, the creators of the Nuremberg International Military Tribunal spearheaded a most remarkable development in modern legal history:

First, the Statute of the Military Tribunal stipulated that individuals can and should be held accountable for crimes which constitute violations of international law. As was famously declared by the judges of the Tribunal in its Judgement, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

Second, the Tribunal embodied the modern conviction that individuals should only be punished through a fair trial which safeguards the rights of the accused.

As we now today, the Nuremberg proceedings had wide-ranging effects throughout the field of international law. In 1950, only four years after the final verdict against 21 defendants had been rendered, the United Nations' International Law Commission codified what is often called the legacy of Nuremberg: it adopted a text setting out some of the most fundamental principles of international criminal law recognized in the Charter and the Judgement of the International Military Tribunal. These "Nuremberg Principles" have been widely cited by international lawyers ever since, and are at the core of international criminal law today, as evidenced by the fact that they are mirrored in the Rome Statute. But these Principles are only one part of the Nuremberg Tribunal's legacy. Shortly after the judgement had been handed down, one of the alternate judges of the Tribunal, Justice John Parker, spoke about the possible legacy of the Tribunal. He said: "It is not too much to hope that what we have done [in establishing the Tribunal] may have laid the foundation for the building of a permanent court with a code defining crimes of an international character and providing for their punishment."

The 70 years after Nuremberg have seen over 40 years of an "iron curtain" that fell across Europe; the fall of the Berlin Wall; the re-emergence of the concept of international criminal justice in the establishment of the *ad hoc* International Criminal Tribunals by the United Nations in 1993 and 1994 in response to atrocities committed in the former Yugoslavia and the Rwandan genocide; and finally the high point of international criminal justice in the 20th century: the adoption of the Rome Statute in 1998.

The ICC today is a permanent, readily-available court with a broad jurisdiction, currently covering 122 States Parties. With Libya, the Court has received its second situation by way of a – unanimous – referral of the UN Security Council in 2011 (after the UN Security Council referral in 2005 of the situation in Darfur to the ICC). In addition, with the opening of a situation in Côte d'Ivoire by the end of 2011, the Court has received its first situation by way of an *ad hoc* acceptance of jurisdiction pursuant to Article 12(3) of the Rome Statute. In its past 12 years of operation, the ICC has turned into a very busy international judicial institution. Its achievements have been many and varied. Its first trials have come to an end and others are in full swing. The Court has initiated for the first time its reparations regime following the first trial judgement in the case against Mr. *Thomas Lubanga Dyilo*. Reparations proceedings have also commenced following the issuance of the trial judgment in the case against Mr. *Germain Katanga* – the first judgment that has become final before the ICC. The Appeals Chamber is seized of a number of final and interlocutory appeals, with its first appeals judgment rendered on 1 December of this year. Investigations are ongoing in nine situations in eight countries and thirteen arrest warrants still remain outstanding at the end of December 2014. In 2015, trials will start in no less than four cases. Clearly, for the

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foreseeable future the ICC will be busy carrying out the mandate it was assigned by the international community.

The most prominent achievements of the Preparatory Commission resulting from its work from 1999 through 2002, the Court's Rules of Procedure and Evidence ("Rules") as well as the Elements of Crimes, have been thoroughly tested since the Court took up its operations on 1 July 2002. States' confidence in these texts as reflected in the adoption by consensus of the Rules and the Elements of Crimes at the first session of the Assembly of States Parties ("ASP") in 2002 has not been disappointed; both texts continue to be applied and interpreted in court and the Court's jurisprudence grows steadily, as amply reflected in this Third Edition. In addition, in 2012 the judges have commenced a "lessons learnt" exercise, looking at the Court's handling of its regulatory framework in judicial proceedings with a view to identifying room for further improvement and streamlining without negatively impacting on the rights of the defence. As a first result of this exercise, the ASP adopted in November 2012 a new Rule 132*bis* in the Rules to allow a single judge instead of a three-judge Chamber to conduct a number of trial preparation functions in the period between the confirmation of charges and the start of the actual trial in order to administer the trial preparation phase more expeditiously and efficiently, whilst ensuring the right to a fair trial. Further important amendments to the Rules have ensued in the following years on the place of the proceedings, prior recorded testimony, and the accused's presence at trial. Another rule seeking to streamline translation issues during the proceedings is currently before States for consideration. The lessons learned exercise has since become a dynamic feature of the Judiciary, seeking to clarify in-built ambiguities in the Rome Statute system, such as the relationship between pre-trial and trial or the precise parameters and scope of victim participation in the proceedings.

Another significant development since the Second Edition of this Commentary is the monumental agreement on the definition of the crime of aggression during the Kampala Review Conference in June 2010. After years of tireless efforts of the ASP's Special Working Group on the Crime of Aggression in elaborating proposals on a provision on the crime of aggression, States Parties adopted by consensus a new Article 8*bis* in the Rome Statute defining the crime of aggression, as well as legal provisions defining the exercise of jurisdiction over the crime of aggression in Article 15*bis*, accompanied by relevant provisions in the Elements of Crimes (ICC-RC/Res.6 of 11 June 2010). The marvel of this renewed victory of the rule of law could only be overshadowed by the preconditions outlined in the resolution regarding the activation the Court's jurisdiction over the crime of aggression at the earliest in 2017 provided the necessary amount of ratifications until then.

No less important is the amendment to article 8(2)(e) of the Rome Statute regarding certain war crimes in non-international armed conflict as adopted during the Review Conference in Kampala. The amendments concern the war crimes of employment of poison or poisoned weapons (xiii); asphyxiating, poisonous or other gases, and all analogous liquids (xiv); and bullets which expand or flatten easily in the human body (xv). The inclusion of these crimes in the Rome Statute is testimony of the increasing convergence of the law of international armed conflict with the law applicable in armed conflict of a non-international character. Further, it demonstrates that the Statute is open to amendments in order to react to major developments in customary international law.

Through its operations since its inception, the Court has raised the visibility of accountability for atrocity crimes and has galvanised the willingness of States to enforce the rule of law. In clarifying the development of international criminal law through its jurisprudence, the ICC pays tribute to the legacy of the *ad hoc* tribunals and contributes to the rising culture of accountability, both on the international plan and in the context of national legal systems. However, while the establishment of the ICC since the Rome Statute of 1998 has been a major accomplishment in the international judicial community, the Court today still faces several important challenges. To make the Rome Statute system truly comprehensive we must achieve universality. More than 70 States have yet to join, including the world's most

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populous countries. A majority of the world's population therefore remains outside the Rome Statute's legal protection and limits the reach and applicability of its provisions.

The principle of complementarity, while one of the foundational pillars of the Rome Statute system, bears important challenges for both the ICC and its States Parties. The principle refers to the primacy of the national jurisdictions on the one hand, and the complementary role of the ICC to provide justice when it is not forthcoming at the national level. The ICC is merely a safety net that ensures accountability when the national jurisdictions are unable for whatever reason to carry out that task. Accordingly, the strengthening of national justice systems is crucial for establishing a credible and comprehensive system of deterrence and prevention against atrocity crimes, and to ensure accountability where crimes have occurred. Complementarity is also the area where the link between Rome Statute issues and wider questions of the rule of law and development is best seen. The fight against impunity cannot succeed in a vacuum; it must be mainstreamed across all relevant policies and States in particular have to pay their share.

With the Rome Statute strengthening the rights of victims to participate in court proceedings and its reparations regime, a new challenge has emerged for the ICC: the capability of the Court to manage the expectations of its stakeholders, and victims in particular. The ICC's Outreach and Victim Participation sections actively engage with victims and communities affected by Rome Statute crimes, informing them of their rights to participate in the proceedings pursuant to the ICC's legal framework. However, in the adjudication of mass crimes with often thousands of victims, to ensure meaningful participation of all these victims is an immensely difficult task and inevitably some victims will feel left out by the process.

Another crucial aspect for the credibility and strength of the ICC is the cooperation of States with the ICC and the enforcement of its orders under Part 9 of the Rome Statute. The ICC has no police force of its own, it has to rely entirely on States to execute its arrest warrants or to assist with a number of other core investigative activities. Without the cooperation of States the ICC is powerless. Unfortunately, several suspects subject to ICC arrest warrants have successfully evaded arrest for many years. Political will to bring these persons to justice is crucial. The continued lack of execution of arrest warrants is a constant reminder that more remains to be done.

Finally, as a judicial body the ICC interacts and cooperates with international and national political actors, such as the United Nations Security Council, the African Union, regional organisations and national governments. Therefore, it is crucial that the ICC delineates a boundary and establishes a place for itself amongst these political bodies without becoming one itself. Just as national judicial systems must separate themselves from the executive, so must the ICC separate itself from the influences of the national and international political actors around it. In order for this challenge to be met, the ICC will need unwavering support from the international community to continue its work within the independent and judicially responsible mandate it has been assigned.

I wish to commend Professor Otto Triffterer on his continuous efforts by assembling an array of such distinguished legal experts and their respective works for the publication of this Third Edition. Additional praise is in order for Professor Kai Ambos and his tireless editing work making this volume a reality. It must be recognized that the activities of the ICC are driven by its founding document, the Rome Statute, and its mandate to prosecute the gravest crimes of international concern. This Commentary represents a most valuable contribution to a more erudite understanding and interpretation of the Rome Statute and therefore a powerful tool to document and supplement the development of international criminal law. This third, updated, edition is a further brick in the solidifying wall of the evolving system of international justice.

The Hague, December 2014

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Judge Silvia Fernandez De Gurmendi, President of the ICC

As the 18th Anniversary of the Rome Conference approaches, the International Criminal Court is entering a time of great change and challenges. The ICC has seen a major change in personnel with several ofthe ICC's longest-serving Judges completing their service at the Court and six new judges joining the ranks of the Judiciary. A new Presidency of the ICC has been elected earlier in 2015 and, at the end of the year, the ICC will move to its new permanent premises in The Hague. Now in its thirteenth year the Court is still growing; its workload is increasing, its jurisdiction expanding and, according to recent studies, its deterrent effect is growing. The goals envisaged by the participants at the Rome Conference almost two decades ago are beginning to be realised.

However, this growth brings new and complex challenges for the ICC. As the Court confirms its presence as an important actor in the international community and the Court's profile in the international legal system grows, so too do the voices of both its supporters and its critics. Its increased jurisdiction may raise concerns, especially as the Court is called to investigate politically sensitive and divisive situations. At the same time, the ICC's visibility in the world today leads to increased calls on it to investigate and prosecute alleged atrocities. The ICC does so when and where it can but is limited by its jurisdiction, which can only be expanded by States or by the UN Security Council, and its reliance on States to enforce its decisions and aid it in its work As its workload increases so too does the Court's need for additional resources. However, pressure to keep costs down exists in tandem with calls to intervene and end impunity for atrocities. This pressure has been particularly strong at a time when the world is facing great economic difficulties. As an institution with a mandate to end impunity for the most serious crimes known to mankind, the Court must stand firm and remain committed to this cause. This is part of the burden of the Court's success.

Nevertheless, the Court does not exist in a vacuum. In recognition of the need to work to achieve its goals as efficiently and effectively as possible, the Court has recently undertaken a series of internal reform initiatives. These are not mere cost-cutting exercises, but are part of the natural evolution of the ICC as a judicial institution into a fully-fledged, functioning international court. The *Re*Vision project, a large-scale review and reform of the structure of the Registry, is a key example of how the ICC is streamlining its structure and seeking to improve. The Office of the Prosecutor has developed its new strategic plan for the coming years to discharge its duties and utilise its resources in the most effective manner. Both the Chambers and Presidency are also undertaking initiatives to contribute to the smooth functioning of the Court. In particular the Judiciary's 'Lessons Learned' exercise is striving to find ways to streamline the judicial process by developing best practices and proposing amendments to the Rules ofProcedure and Evidence or the Regulations ofthe Court as necessary. Of course all of the efforts to increase efficiency at the Court remain subject to the fundamental values enshrined in the Rome Statute, such as fair trial procedures and rights of victims.

With these changes and the increase in the ICC's case-Ioad, we can expect the Court's body of jurisprudence to develop rapidly. Both the reform initiatives mentioned above and case-Iaw at the Trial and Pre-Trial level may lead to evolutions in the Court's procedure. Furthermore, as cases reach the Appeals level we can expect more authoritative decisions on both procedural and substantive matters of international criminal law. The Triffterer Commentary on the Rome Statute of the International Criminal Court, its first edition just one year younger than the Rome Statute itself, has been of immense importance for academics and practitioners alike. Providing detailed and comprehensive analysis on the provisions of the Statute and other legal texts, of their origins in international law and of the context in which they were adopted at the Rome Conference, it is a book of great authority and has been immensely helpful and influential in the early jurisprudence of the Court.

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As the ICC grows and its body of jurisprudence increases, case-law will become ever-more relevant to the interpretation and application of the provisions of the Rome Statute. The continuing mandate of *ad hoc* international courts and tribunals means that the ICC will not be the only institution interpreting and developing international criminal law through judicial decisions. Comparative analysis between the jurisprudence of the ICC and that of other international criminal justice bodies will be essential in order to minimise fragmentation of the law. By taking cognisance of developments outside the ICC, this Commentary can highlight discrepancies and controversies in jurisprudence, inviting the Court to reflect on those issues in its case-law. Through this, the Commentary can continue to encourage the inclusive and consistent development of international criminal law, as it has done for the past seventeen years.

I wish to take this opportunity to express a word of appreciation to Professor Kai Ambos who has shouldered the responsibility of editing the third edition of the Commentary. This Commentary is immensely important to all of those who have an interest in the International Criminal Court, and indeed those who have an interest in international criminal justice as a whole. I am confident that I can speak for both those at the International Criminal Court and the wider international community, in congratulating Professor Ambos and indeed all contributors on compiling this edition which includes a great variety of experts from the ICC and many other important institutions. I am sure that this and future editions of the Commentary will continue to provide helpful, in-depth analysis of the Rome Statute for many years to come.

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PART 1
ESTABLISHMENT OF THE COURT

Article 1*
The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

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Content

A. Historical development

1 The scope and contents of an introductory article for a Statute establishing an international criminal judicial body underwent several changes from the inception of such an idea and throughout the drafting process of article 1. As early as 1926, drafts by the ILA and the AIDP used the heading 'Purpose of the Court' or 'Tribunal'. All the drafts contained the words 'is *hereby* established' or 'il est institué', thus indicating that jurisdiction was meant to be established *eo ipso* when the treaty entered into force, as opposed to requiring a further act of implementation[1].

2 However, this changed when the UN, after the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, installed a Committee on International Criminal Jurisdiction. At that time it was undisputed that such jurisdiction was an inherent part of the international community's legal system, the law of nations, yet the modes of its establishment and exercise were still unclear. Accordingly, the Draft Statute presented by the Committee in 1951, and its revised version in 1953, used the words 'is *thereby* established'; this phrase was meant to comprise all possible modes of establishment, for example, a permanent or an *ad hoc* Tribunal, created by resolution of the General Assembly or by the Security Council. '[T]hereby' was seen as referring to aspects outside the document itself, thus indicating the need for some act of implementation to give the draft effect as an international document[2]. During the ensuing development, drafts inclined towards a treaty-based realisation contained the words 'is *hereby* established', indicating that adoption and ratification should be self-executing; others, especially those prepared to compromise on the question of the mode of establishment, continued to use 'is *thereby* established'.

3 The 1994 ILC Draft Statute employed the first of the above-mentioned varieties, i. e. a more neutral wording. It corresponded with the original task assigned to the ILC by the General Assembly 'to consider further and analyse the issues concerning the question of an International Criminal Jurisdiction', and 'to elaborate the Draft Statute for such a Court as a matter of priority'[3] and of 'preparing a widely acceptable consolidated text of *a convention* for an international criminal court'[4]. Even though the last mandate made it clear that *a*

[1] Emphasis added; see for a Draft Statute presented by Bellot to the ILA and its Draft agreed upon at the Vienna Conference 1926 as well as for the AIDP Draft 1928 in French, von Weber, *Internationale Strafgerichtsbarkeit* (1934)136, 144, 155 *et seq.* For the Convention for the Creation of an International Criminal Court of the League of Nations which especially intended to fight terrorism see *League of Nations O.J.Spec.Supp.* 156 (1936) Doc. C. 547 (I). M.384 (I). 1937. V (1938), reprinted in: Bassiouni, *International Criminal Law: Enforcement* (1987) 191 *et seq.* For the history especially of the AIDP see Bouzat, in: Bassiouni (ed.), *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) XI *et seq.*; Jescheck (1990) 102 *ZStW* 658 *et seq*.

[2] See for the two Draft Statutes 1951, Report of the Committee, UN Doc. A/AC.48/4, Annex I of 5 Sept. 1951, also 1951 Draft Statute, reprinted in: (1952) *AJIL*, Supp. and the second revised 1953 Draft Statute, Annex to the Report (hereinafter: Draft Statutes 1951 or 1953).

[3] See G.A. Res. 40/41 of 28 Nov. 1988 and 46/44 of 9 Dec. 1991 as well as 47/33 of 25 Nov. 1992 and 48/31 of 9 Dec. 1993.

[4] See G.A. Res. 50/46 of 11 Dec. 1995 (emphasis added).

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treaty-based establishment should be pursued, the ILC was averse to limiting the possible avenues too early and therefore repeated its original, neutral version. Since then all relevant documents within the Preparatory Committee contained both versions. Even though the Updated Siracusa Draft in its article 2*bis*(1) by adopting the words 'is *hereby* established' continued the line of the ILA and the AIDP supporting a treaty-based Court, the subsequent Zutphen Draft included both versions until the Rome Conference decided in favour of the ILA/AIDP view[5].

The development of the remaining terminology in article 1 cannot be reconstructed with similar precision. It was the Updated Siracusa Draft which finally amended article 1 of the ILC Draft Statute by including an article *2bis*(1) on the 'Purpose of the International Criminal Tribunal'. Yet, the aim of extending the complementary international criminal jurisdiction to 'other international crimes which the States Parties may add to those crimes listed in article 20' (now article 5) … or by conferring jurisdiction from the State to the Tribunal', was not accepted by the majority of States present at the Preparatory Committee and the Rome Conference[6]. There appeared to be a reluctance to making the Court dependent on States conferring jurisdiction, since this seemed to endanger the idea of the inherent nature of an international criminal jurisdiction and its independent operation. 4

In the last session of the Preparatory Committee, the Norwegian Government broadened the text of article 1 of the 1994 ILC Draft Statute by suggesting that the Court 'shall have the power to prosecute', that it should not have general jurisdiction but only 'for the most serious crimes of international concern', mentioning the complementarity principle. This proposal summarised the discussions and was inserted, with a few minor changes such as substituting 'the power to prosecute persons' with 'shall have the power to bring persons to justice', into the final Consolidated Draft. The Rome Conference added that of the most serious crimes punishable under international law, only those 'referred to in this Statute' should fall within the jurisdiction of the Court[7]. 5

B. Analysis and interpretation of elements

1. 'An International Criminal Court … is hereby established'

The reference in article 1 to 'hereby' is not to the adoption of the Statute on 17 July 1998 by the Rome Conference but to 1 July 2002, the date of its entry into force in accordance with article 126. 6

Even though the Court was as such established on that date, the Assembly of States Parties first had to prepare its practical implementation. The Assembly is not an organ of the Court, yet with the entry into force of the Statute it, too, came into existence (article 112(1)). The Assembly was invited for its first session by the Secretary-General of the UN after the deposit of the 60th instrument of ratification, acceptance, approval or accession, under article 126(1). The Assembly had to elect the judges, to adopt its own rules of Procedure under article 112(9) and the Rules of Procedure and Evidence under article 51. 7

1 July 2002 also marks the beginning of its temporal jurisdiction; referrals, declarations of acceptance of jurisdiction or accession as a State Party to the Rome Statute must not relate to any events which occurred before this absolute barrier. 8

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[5] For the 1994 ILC Draft Statute, 1996 Preparatory Committee II and for the Zutphen Draft see Bassiouni (ed.), *International Criminal Court: Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998); for the Updated Siracusa Draft see Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002) 941.

[6] See for the Updated Siracusa Draft commentary on article 2bis(2) to (4).

[7] For the Norwegian proposals of 24 Mar. 1988 see UN Doc. A/AC.249/1989/WG.8/DP.1. The Report of the Drafting Committee to the Committee on the Whole of 13 July 1998 already contained this addition 'as referred to in this Statute'. See UN Doc. A/CONF.183/C.1/L.64.

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2. 'a permanent institution'

9 The notion of 'a permanent institution' was discussed from the beginning[8]. The emphasis on this element lost some of its importance after the avenue of creation *by treaty* was chosen. The idea was not contained in the Convention for the creation of an International Criminal Court of the League of Nations, for example, but it gained importance after the establishment of two *ad hoc* Tribunals, the ICTY and the ICTR[9].

10 The 1994 ILC Draft Statute included this element in article 4 under the heading 'Status and legal capacity', emphasizing in its Report the permanent character. This was repeated in paras. 18 and 19 of the Report of the 1995 *Ad Hoc* Committee and in both Siracusa Drafts in article 4. The Preparatory Committee continued in this vein emphasizing in addition the 'full-time' character of the Court. In its proposed article 4 it repeated the wording of the 1994 ILC Draft Statute[10] which also was adopted unchanged in article 4 of the Zutphen and the Consolidated Draft. At the end of the Rome Conference this element was incorporated into article 1 because it was felt that it did not fit under the heading of article 4, 'Legal status and powers of the Court'[11].

11 The experiences in dealing with crimes under international law after the Second World War convinced the community of nations of the need for a permanent institution which could react immediately. Article 3 of the 1953 Draft Statute had provided 'Sessions shall be called only when matters before it require consideration'. One of the arguments for giving the court a permanent character was that a 'permanent court would obviate the need for setting up *ad hoc* Tribunals for particular crimes, thereby ensuring stability and consistency in international criminal jurisdiction'[12]. The flexibility to adjust the size of the Court to the needs of practice was provided for by the article 35(1), (2) and (4), in that judges of the ICC 'shall be elected as full-time members of the Court' but shall not all 'be required to serve on the full-time basis',

Transitional justice scenarios that have arisen after the 1998 Rome Conference, however, demonstrate that there is ample space – and need – for alternatives compared to the traditional exercise of a permanent international criminal court, for example by the use of regional hybrid courts etc.[13].

3. 'the power to exercise its jurisdiction' 'as referred to in this Statute'

12 The Court does not have the power to try any crimes under international criminal law unless they fall under one of the provisions listed in the Statute. Unlike the ICTY in its (in-) famous *Tadić Jurisdiction Decision* of 2 October 1995 it cannot extend its jurisdictional reach by reference to international customary law[14]. The Statute can, of course, be amended to include new or repeal existing offences.

13 Once a provision conferring substantive jurisdiction over a particular type of crime on the Court is repealed, the Court must discontinue any proceedings based on such a provision, or in the case of multiple charges based on the same facts remove any characterisation related to

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[8] See for this Draft Bellot, the Draft by the ILA Vienna Conference 1926 and also the 1951 and 1953 Draft Statutes.

[9] See articles 1 and 8 of the ICTY and articles 1 and 7 of the ICTR Statute.

[10] See 1996 Preparatory Committee I, para. 22 in connection with 1996 Preparatory Committee II, paras. 3 *et seq.*

[11] Emphasis added. 1994 ILC Draft Code, article 1 and 4 and for the change between 9 and 13 July 1998 compare UN Doc. A/CONF.183/C.1/L.58 (9 July 1998), respectively UN Doc. A/CONF.183/C.1/L.64 (13 July 1998), where the words 'shall be a permanent institution' had been included into an article 1 proposed in the Report of the Drafting Committee to the Committee of the Whole.

[12] *Ad Hoc* Committee Report, para. 12.

[13] See Stahn (2005) 18 *LeidenJIL.* 425; Ambos and Othman (eds.), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003).

[14] *Prosecutor v. Tadić*, No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oćtober 1995, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> accessed 24 February 2015.

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the repealed offence from the counts charged, under the effect of the *lex mitior* rule of article 24(2), because in the context of the Rome Statute that is equivalent to a decriminalisation, even if the crime in question remains an offence under customary law. This scenario must be distinguished from the withdrawal by a State Party from the Statute. Article 127(2) orders that such a withdrawal shall not 'prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective'.

The word 'Statute' has to be interpreted restrictively and excludes any other source of law, especially the Rules. This follows also from article 51(5) according to which 'in the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'. 14

b) 'over persons for the most serious crimes of international concern'. Taking into account the historical development of the Statute, especially the limitation of the Draft Statute 1953 compared to the Draft Statute 1951, the first of which included the word 'natural' before 'person'[15], the scope of the term 'person' seems rather wide and could include natural and legal persons, such as corporations, for example. The consequences of the elimination of the word 'natural' were, however, not expressly considered. It was not included in the 1994 ILC Draft Statute nor in any of the following Drafts for article 1 or the proposal reported by the Preparatory Committee. 15

The development of article 1 and other articles of the Statute suggest that only natural persons were meant[16], for example, articles 25(1) and 26. Yet, the Special Tribunal for Lebanon, for example, held in 2015 that it had contempt power over legal persons[17]. The discussion has become more controversial in recent years with some authors advocating that consideration might be given to the extension to legal persons.[18] 16

Jurisdiction is limited to 'the most serious crimes of international concern'. The wording here differs somewhat from other instances in the Statute such as paragraphs 4 and 9 of the Preamble or article 5. The difference, it is suggested, will be without any practical impact. However, there have been comments in the literature about the proper manner of establishing what the 'most serious crimes' are, not least under the prosecution policy of the Office of the Prosecutor.[19] 17

c) Complementarity 'to national criminal jurisdictions'. The concept of 'complementarity' is not explained in article 1 but addressed in article 17. Hence, complementarity means that national jurisdictions take priority unless the competent State is 'unwilling or unable genuinely to carry out the investigation or prosecution'. This must be clearly distinguished from the question of acceptance of jurisdiction or how a situation is referred to the Court, under articles 12 and 13. Even a UN Security Council referral does not mean that the Court is absolved from the examination of admissibility under article 17, as was made abundantly clear by the decision on admissibility in the case against Gaddafi and Al-Senussi based on the situation in Libya, where the Court held that as far as one of the accused was concerned, Libya retained domestic control and the case against him was accordingly held to be inadmissible[20]. 18

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[15] See the Report of the Drafting Committee to the Committee of the Whole, UN Doc. A/CONF.183/CP.1/L.64 of 13 July 1998: 'The Drafting Committee will return to the issue of 'persons' in connection with the definition of the term'.

[16] For the question of a responsibility of legal persons see, for example, Triffterer (1989) 60 *RIDP* 29, 61 *et seq.*; id., in: Hankel and Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen* (1995) 169, 215 *et seq.* and id. (1996) 67 *RIDP* 341, 347 *et seq.* all with further references.

[17] :*In the Case against Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali al Amin*, No. STL-14-06, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel, 23 January 2015, <www.stl-tsl.org/en/the-cases/stl-14-06/filings-stl-14-06/orders-and-decisions-stl-14-06/f0004-ar126-1> accessed 24 February 2015. **1** 16.

[18] Kyriakakis (2008) 19 *CLF* 115; Burchard (2010) 8 *JICJ* 919; Kremnitzer (2010) 8 *JICJ* 909.

[19] El Zeidy (2008) 19 *ILF* 35; Rastan (2012) 23 *CLF* 1; Smeulers et al. (2015) 15 *ICLR* 1.

[20] Augustinyova (2014) 53 *ILM* 273.

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19 In recent years, and especially after the Kampala Review Conference[21] complementarity has taken on an additional meaning under the term of 'positive complementarity' which relates to the interaction between the Court and the domestic legal systems with the aim of enhancing domestic compliance with the international criminal law environment of the ICC. The Court actively engages in a number of what might commonly be called 'outreach activities' in order, for example, to lobby for accession to and implementation of the Rome Statute by States or to raise the relevant rule of law standards in the jurisdictions of existing States Parties.[22] The drafters of the Statute probably did not foresee this development to such a degree. While in principle such an interaction may appear worthwhile, a note of caution might nonetheless be apposite because these activities do, of course, draw on the already strained resources of the Court in addition to its core mandate. As such, its positive complementarity activities are akin to the Court instituting a form of active foreign policy effort, something which as an independent judicial body it may conceptually be ill-suited for and which, given its undoubtedly political overtones, should from a pragmatic point of view more naturally be within the remit of the Assembly of States Parties themselves.

4. 'The jurisdiction and functioning … shall be governed by the provisions of this Statute'

20 The Statute is the main source but the reference here is necessarily also to the subsidiary law, i. e. the Regulations which the Statute authorizes the Court to adopt, and the Rules of Procedure and Evidence, the drafting of which the Assembly of States Parties is tasked with, under articles 51 and 52 of the Statute.

C. Relationship to other international criminal courts

21 There is a general concern about the proliferation of international/-ised criminal courts and tribunals[23] and consequently the question arises how the relationship of the ICC to other courts with potentially overlapping jurisdiction should be treated. The Statute makes no provision for this matter. It is doubtful whether one could simply apply the complementarity rule to such international institutions. If one looks at the international tribunals currently in existence, and with the ICTY and ICTR winding down through the instrument of the ineptly named 'Mechanism' MICT, the matter would appear to be of mere academic interest. To that extent, as far as any tribunal set up by the Security Council directly under Chapter VII, such

[21] First ICC Review Conference: Resolutions and Declarations, RC/11 <www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf> accessed 24 February 2015; Report of the Bureau on stocktaking: Complementarity, Taking stock of the principle of complementarity: bridging the impunity gap, Assembly of State Parties, ICC-ASP/8/51, 18 March 2010 <www.icc-cpi.int/en_menus/asp/complementarity/Documents/ICC-ASP-8-51-ENG.pdf> accessed 24 February 2015; Report of the Bureau on complementarity, Assembly of State Parties, ICC-ASP/11/24, 7 November 2012 <www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-24-ENG.pdf> accessed 24 February 2015; Report of the Bureau on complementarity (including draft resolution), Assembly of State Parties, ICC-ASP/12/31, 15 October 2013 <www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-31-ENG.pdf> accessed 24 February 2015; Report of the Bureau on complementarity, Assembly of State Parties, ICC-ASP/13/30, 28 November 2014 <www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-30-ENG.pdf> accessed 24 February 2015; Review Conference on the Rome Statute, Assembly of State Parties, RC/ST/CM/INF.2, 30 May 2012 <www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-CM-INF.2-ENG.pdf> accessed 24 February 2015; Resolution ICC-ASP/12/Res.4, Complementarity, 27 November 2013 <www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res4-ENG.pdf> accessed 24 February 2015.

[22] Burke-White (2008) 49 *HarvILJ* 53; *id.* (2008) 19 *CLF* 59; Stahn (2008) 19 *CLF* 87; Schabas (2008) 19 *CLF* 5; id. (2010) 49 *ILM* 5; Bergsmo et al. (2010) 2 *GoJIL* 791; Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity, From Theory to Practice* (2011); Jessberger and Geneuss (2012) 10 *JICJ* 1081; Tillier (2013) 13 *ICLR* 507. See critically on the debate as to whether human rights violations in domestic proceedings can trigger the Court's jurisdiction van der Merwe (2015) 15 *ICLR* 40.

[23] Pocar, in: Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (2011) 1705.

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as the ICTY or ICTR, is concerned, the solution would tend towards the primacy of the latter.[24] Tribunals established for non-States Parties' territories and/or citizens, regardless by whom, will mostly not come into conflict with the Court's reach by definition; a referral by the UN Security Council in such scenarios is politically highly unlikely, not least given the resource implications, and would not be binding on the Court under article 17 in any event. Tribunals established by an agreement between the UN and certain States, for example, Sierra Leone, for a particular conflict should have priority because they are specifically tailored to cater for those situations in the knowledge that the ICC already exists. National courts with a hybrid international element, such as in Kosovo under UNMIK and soon possibly under EULEX, or Cambodia, would seem to fall under the complementarity umbrella in principle, yet the fact that the international involvement in those courts will often be based on the intervention of or at least the consensus within the UN or the EU with the very aim of providing for a working national system, should make a declaration of admissibility difficult. This leaves the issue of other treaty-based courts to which States Parties to the Rome Statute are also parties and whose jurisdiction would overlap with that of the ICC. That this is not merely an academic question can be seen at the example of the tensions between the African Union and the Court in recent years and the AU's previously declared intention to create its own criminal court.[25] While that particular conflict may have been defused by the recent changes to the law on the duty to attend the trial for sitting Heads of State, the general problem is unlikely to go away because these regional courts can be considered as shielding the suspects from the jurisdiction of the ICC. This also raises the doctrinal question of whether the Rome Statute is hierarchically superior to any bilateral treaties any of the States Parties may conclude after acceding to the Statute (see, for example, the commentary below under article 98) or whether the simple *lex posterior* rule applies. It is unclear whether the Rome Statute has anything approaching supranational elements over and above, for example, the reporting mechanism under article 87 to the UN Security Council for non-compliance by non-States Parties following a Security Council Referral, with obligations under the Statute. It seems that if States Parties can avoid the effects of complementarity by reforming their national system so that it is compliant with the Statute, the argument that they might be able to transfer part of their sovereignty to a credible regional court with the same effect cannot be dismissed out of hand.

[24] Bohlander, in: Cassese et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 687.

[25] See Murungu (2011) 9 *JICJ* 1067.