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ARTICLE

The State of the International Criminal Court, of Special Tribunals and of International Criminal Law: A Concise Review

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Abstract

International criminal law has changed rather dramatically in the last three decades. Whereas in the early 1990s the field was an almost exotic specialization of penal law, it has now developed into a thriving part of the law. Nowadays, most law schools have specialists in international criminal law which has usually developed into an important field of research. An important factor in this development has been the performance of three Special Criminal Tribunals established by the United Nations Security Council. In this article their institutional record as well as their importance for the development of international criminal law will be reviewed. In both senses, on the basis of a necessarily concise review, it is submitted that the performance of the tribunals must be considered a success. The International Criminal Court (ICC) is already twenty years in existence. Its performance cannot be judged equally successfully, however. In particular as an institution it cannot point to records comparable to those of the Special Criminal Tribunals. Still, although it is undoubtedly fragile, the ICC has become a relevant feature of modern international law and in international relations (as a brief examination of its potential role regarding the Special Military Operation in Ukraine shows). Notwithstanding its institutional weaknesses, the importance of the ICC manifests itself in its Statute which can be seen as a codification of international criminal law. The strong increase in the domestic administration of international crimes as a consequence of the principle of the complementarity of the Statute is taken into consideration.

Keywords Special Criminal Tribunals · International Criminal Court · Complementarity · Domestic administration of justice · Special Tribunal for Lebanon · Extraordinary Chambers in the Courts of Cambodia

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1 Introduction

In July 1998, after 5 weeks of tense negotiations, a proposal for a permanent International Criminal Court was finally brought to a vote. A total of 120 states voted in favour, 21 abstained and 7 voted against. The International Criminal Court (ICC) was really to be established and the principles under which it would operate, the crimes it would punish, the jurisdiction it would have over whom and its enforcement capabilities were determined. It was all laid down in the ICC's Statute. Work on such a court had already been taken up after the First World War, but without success,[1] and then again after the end of the Second World War when, separately, the Nuremberg Tribunal for Nazi Germany and the Tokyo Tribunal for the Far East were founded and had operated. These war tribunals were examples and in a sense also the predecessors of a permanent international criminal court.[2] In 1950 the International Law Commission (ILC) of the UN presented the 'Nuremberg Principles' highlighting their customary law character. In 1954 the ILC's first Draft of a 'Code of Crimes against the Peace and Security of Mankind' saw the light of day.[3] The Cold War prevented further progress for almost 40 years.[4] In the meantime new wars, new civil wars and new perverse regimes produced new villains who were not and could not be brought to international justice. Often, they could enjoy a pleasant retirement after horrific deeds were committed during their time in office. Idi Amin, President of Uganda, Jean-Bédel Bokassa, President and then the self-proclaimed Emperor of the Central African Republic, or Hissène Habré, President of Chad, are only a few examples from Africa. But well, all this would change from 1998 onwards when an agreement was reached on the ICC and, in particular from 2002 when, in The Hague, the new International Criminal Court really began to operate. Expectations were high for a new century, for a new episode in the history of mankind where international justice would be administered much better than before.

In the following pages I will briefly review the beginning of the new Court (Sect. 2), followed by Sect. 3 on the foundation of the first three Special Tribunals by the United Nations and their records.[5] Section 4 will review the major contributions of these Special Tribunals to international criminal law. In Sect. 5 the current state of Special Tribunals will be examined with a focus on the Cambodia and the Lebanon Tribunals (the latter recently showing a remarkable revival). Section 6 brings us back to the ICC, primarily to a survey of its main problems. The possible role of the ICC regarding the war in Ukraine is the subject-matter of Sect. 7. Section 8 is on 'complementarity' and its positive effect on the domestic administration

[1] See, e.g., Werle and Jessberger (2014), pp. 2 and 3.

[2] Werle and Jessberger (2014), pp. 5–11.

[3] ILC, 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal', in ILC Yearbook 1950, Vol. II, p. 374. For the 1954 'Code of Crimes against the Peace and Security of Mankind' see: ILC Yearbook 1954, Vol. II, pp. 151–152.

[4] The next Draft of the 'Code of Crimes against the Peace and Security of Mankind' was produced in 1991, followed by Drafts in 1994 and 1996. See, for a discussion of the ILC's work on the 'Code of Crimes against the Peace and Security of Mankind', Crawford (2002), pp. 23 et seq.

[5] The Special Panels for Serious Crimes in East Timor is omitted from this exercise. See, for a brief reference, Sect. 5 below.

of international justice. Moreover, in that last section some conclusions are drawn on the state of the ICC and international criminal law.

2 The ICC in Its Initial Phase

The Court did not have an easy start. Those held responsible in its first trials, Lubango Dyilo, Mathieu Ngudjolo Chui and Germain Katanga, did not particularly capture the imagination. They had all been active in the wars in Central Africa. Moreover, their cases seemed to take an endless amount of time. After a trial lasting four years, Ngudjolo Chui was acquitted in December 2012; the acquittal was confirmed in February 2015. *Prosecutor v. Lubanga* took from March 2006 until March 2012 to reach a decision. Also, the *Katanga* case took almost 7 years before a decision could be reached. In comparison, 2 years after his arrest the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced Dusan Tadić—although he also was not among the most exciting of suspects.

After this difficult initial period, the ICC gradually improved somewhat. Some relatively easy cases were brought to an end, such as the *Al Mahdi* case (9 years for events in Tombouctou, Mali). Also some more difficult ones took place, like *Prosecutor v. Ntaganda* (another Congolese war lord who received a custodial sentence of 30 years, confirmed on appeal),[6] and in particular *Prosecutor v. Ongwen* (the child soldier who, in the end, was himself sentenced to 25 years, *inter alia*, for actively using child soldiers).[7]

Certainly, a court like this was allowed some time to learn its trade and fortunately for the ICC the general tide appeared to be positive. The following two developments, in particular, I believe, were and are helpful for the ICC: (1) The increasing successes in, roughly, the same period of the Special Tribunals founded by the UN Security Council showed that there was room for international criminal procedures; (2) The 'complementarity principle', Article 1 of the ICC Statute, proved and proves to be a remarkable impetus for the administration of international justice in domestic courts.

3 Special Tribunals

The UN Security Council reacted to the 1991 Balkan Wars dissolving Yugoslavia. The sight of concentration camps and stories and footage of all kinds of other atrocities triggered a majority in the Security Council to set up a Special, or ad hoc,

[6] Appeals Judgment of 30 March 2021 in *Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06 A A2), notably para. 1170 in respect of the conviction, and the sentencing judgment of the same day (ICC-01/04-02/06 A A3), in particular para. 284.

[7] See the lengthy verdict at pp. 1068–1076, para. 3116, in particular on Counts 69 and 70, of the judgment of Trial Chamber IX of 4 February 2021 in *Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15); on 6 May 2021, Ongwen was sentenced to 25 years imprisonment, see the Disposition under b), at p. 139 (the Appeals judgment is still pending).

International Criminal Tribunal for the Former Yugoslavia.[8] In 1993 the ICTY could begin its work. In 1994 the atrocities in Rwanda took place; in 1995 the ICTR, the International Criminal Court for Rwanda, began operating.[9]

The start of the ICTY was rather slow as it did not appear to be so simple to conduct international trials like this. They appeared rather complicated, in particular if the modern rights of suspects had to be taken into account. For one thing, one also needed a real suspect in the dock, and for quite a while nobody serious was apprehended. Hence by 1998, when the negotiations to set up the ICC were ongoing, in a sense the ICTY, or the ICTR for that matter,[10] could hardly be said to be an example to be followed. For the time being the ICC clearly had to do its own work. But in the new century soon enough the record of these Special Tribunals improved drastically: suspects of atrocities were apprehended in increasing numbers and these individuals were increasingly important. Their trials promptly followed at both tribunals, including convictions for many.

Since 1993 until its closure in 2017, the ICTY managed to bring all of the 161 persons indicted by its Prosecutor to justice. There are no fugitives awaiting arrest. In the end 20 of these indictments were withdrawn, and 17 individuals died before or during their trial—including Slobodan Milošević, the former President of Yugoslavia and of Serbia. 19 Suspects were acquitted, 90 were convicted, 13 were transferred to national courts and 2 are still facing a retrial before the MICT, the Mechanism of International Criminal Justice, the residual Court to deal with all matters concerning the Tribunals upon their closure.[11] The sentences, up to life imprisonment, are being served in 14 European countries.[12] Of course, all kinds of things went wrong at the ICTY, but still, it is no exaggeration to say that the Tribunal eventually became a great success.

The Rwanda Tribunal has been equally successful. From 1994 until its closure in 2015, the ICTR had indicted 93 persons. Proceedings were conducted against 82 individuals, of whom 14 were acquitted. Two cases were withdrawn and 2 defendants died before judgment. Ten Cases were referred to national courts. Most of those sentenced by the ICTR ended up serving their sentence in two African countries, in Benin and Mali. When the ICTR closed, 6 individuals were still fugitives.[13] One of

[8] On 25 May 1993, the Security Council adopted Resolution 827 (S/RES/827) without a vote; the ICTY Statute is annexed to this Resolution.

[9] On 8 November 1994, the Security Council adopted Resolution 955 (S/RES/955) to which the ICTR Statute was annexed.

[10] The ICTR had no lack of serious suspects, but faced, *inter alia*, a lack of support from the Rwandese government, long delays in prosecution, poor trial management together with financial and administrative mismanagement (see, e.g., Bantekas 2010, p. 411).

[11] On 22 December 2010, the Security Council adopted Resolution 1966 establishing the International Residual Mechanism for Criminal Tribunals (S/RES/1966); the Statute of the Mechanism is annexed to the Resolution.

[12] See: https://www.icty.org/en/cases/key-figures-cases; for where the sentences are being served, see: https://www.irmct.org/en/about/functions/enforcement-of-sentences.

[13] See: https://news.un.org/en/story/2015/12/519212-un-tribunal-rwandan-genocide-formally-closes-major-role-fight-against-impunity; for where the convicted are serving their sentences, see https://unictr.irmct.org/en/news/more-ictr-convicts-transferred-mali-and-benin-serve-their-sentences.

these, Félicien Kabuga, the suspected financial strongman behind the genocide was finally arrested in 2020 and transferred from France to face trial at the MICT in The Hague. He is accused of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and of three counts of crimes against humanity. Tracking and apprehending the last fugitives is a major task for the Mechanism.

In 2002 a third, smaller Special Tribunal was set up to deal with the atrocities in Sierra Leone.[14] It operated within the legal system of Sierra Leone and is therefore also referred to as an 'internationalized' or 'hybrid' tribunal. Also this Special Tribunal may be said to have operated successfully. From 2002 until its closure in 2013, it had indicted 13 individuals. Of those, 9 were sentenced and 3 had died before trial. The one fugitive has probably died as well. The trials took place in Freetown, the capital of Sierra Leone, but the most famous of the SCSL trials, against the notorious Charles Taylor, the former President of neighbouring Liberia, known for the 'blood diamonds', took place in The Hague for security reasons. While most of those convicted are serving their sentence in Rwanda, Taylor is serving his 50 years of imprisonment in the UK. The SCSL has its own residual mechanism to deal with, for example, matters relating to prisoners.[15]Also the Sierra Leone Tribunal has made its contribution to the impressive record of the Special Tribunals.

4 The Special Tribunals and International Criminal Law

Besides successfully accomplishing their purposes and objectives as institutions, these tribunals have also contributed tremendously to the development of international criminal law by the way they have applied the law and interpreted and explained it. Here, I will only give some examples.

Initially, the ICTY was facing rather tricky questions by defence lawyers who tried to put the whole undertaking of Special Tribunals in doubt, for example, was the Security Council actually legally allowed to set up a tribunal? The judges answered that establishing such a tribunal was, indeed, an acceptable legal act of the Council.[16] Another fundamental issue also raised in the early phase of the ICTY was: what rules of international criminal law apply in civil war? In the early phases of the Balkan Wars it was not always crystal clear whether the armed conflict took place within the Republic of Yugoslavia, between the central government and insurgent parts or between the government of Yugoslavia and newly independent states, like Croatia and Bosnia Herzegovina. International criminal law applies traditionally

[14] The Special Court for Sierra Leone (SCSL) was not established by way of a Security Council Resolution but by a Treaty between the UN and the government of Sierra Leone; its Statute is part of the Treaty (for the text of the Treaty see UN Doc. S/2002/246, Appendix II). The Tribunal is close to a 'hybrid' tribunal (see Sect. 5) '[…] but it is more accurately classified with the ad hoc tribunals because it is a creature of international law, not domestic law' (Schabas 2008, p. 6; similarly Werle and Jessberger 2014, pp. 121–122).

[15] See: http://www.rscsl.org/ also for the results of the SCSL.

[16] *Tadić* (IT-94-1-T), Decision on the Defence Motion on Jurisdiction of 10 August 1995, which was upheld by the Appeals Chamber in its Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, *Tadić* (IT-94-1-AR72). See Schabas (2008), pp. 49–50, for further references.

and primarily to international war, war between states. Non-international armed conflict seemed to be hardly addressed in the relevant treaties. What rules are there for such non-international armed conflict? Well, customary humanitarian law provides quite a number of applicable rules, the ICTY Appeals Chamber found. Moreover, it decided that just like for violations of rules applicable in international armed conflict, individuals can also be held responsible for violations of the rules of non-international armed conflict. And this was indeed done in the judgments.[17]

On a number of occasions the Special Tribunals had to deal with the command responsibility of military commanders. Early in the ICTY case law this 'classical' doctrine was not only further explained but was also elaborated upon with respect to persons other than military commanders which is now an established part of customary law.[18]

The ICTY case law on joint liability for international crimes in the form of participation in a 'joint criminal enterprise'(JCE) has been ground-breaking, although not uncontroversial.[19] From the *Tadić* case all the way up to the 2017 and 2020 Appeals judgments in *Karadžić* and in *Mladić*, the JCE legal concept has retained its crucial place in the ICTY judgments and in the jurisprudence of other tribunals.[20]

The ICTY and the ICTR both have impressive case law on sexual crimes, e.g., further explaining the legal definition of rape. The ICTY moved away from the condition of coercion or the use of force as the defining condition of rape. In the *Kunarać et al.* case, the Tribunal established the crucial criterion of whether or not the act took place against the victim's will; the ICTR followed suit.[21]

The ICTR is the first tribunal that dealt extensively and in detail with the various forms of the crime of genocide. It explored the 1948 Genocide Convention in detail, applying it to the atrocities committed in Rwanda.[22]

[17] See, *Tadić* (IT-94-1-AR72), Appeals Chamber Decision, above n. 16, in particular paras. 128–137.

[18] The Statutes of the ICTY (Art. 7.3) and the ICTR and SCSL (Art. 6.3) contain provisions to this extent, and so, albeit somewhat differently, does the ICC Statute in Art. 28. In the ICTY case law see in particular, *Mucić et al.* (IT-96-21-A), Appeals Chamber judgment of 20 February 2001, para. 195; see also the ECCC judgment of the Pre-Trial Chamber (PTC 75) of 11 April 2011 in *Ieng Sary et al.* (case no. 002/19-09-2007-ECCC/PTC), para. 458.

[19] The JCE has not been included in the ICC Statute. See Werle and Jessberger (2014), pp. 205–207.

[20] See on the JCE jurisprudence of the ICTR and the SCSL, Werle and Jessberger (2014), p. 200, fn. 202. The discussion on the finesses of JCE has become a very extensive one (see, e.g., Werle and Jessberger 2014, pp. 200–204).

[21] *Kunarać* (IT-96-23/-23/1-A), judgment of 12 June 2002, para. 128; see, e.g., the judgment of 20 December 2012 of the ICTR Trial Chamber in the *Ngirabatware* case (ICTR-99-54-T), para. 1381.

[22] In the trial judgment of 2 September 1998 Jean-Paul Akayesu was convicted of *inter alia* genocide (ICTR-96-4-T). On appeal the conviction and the sentence to life imprisonment were confirmed (ICTR-96–4-A). In the same period Jean Kambanda, Prime Minister of Rwanda at the time of the atrocities, was also convicted of genocide and sentenced to life imprisonment (ICTR-97-23-S). On 19 October 2000, his conviction and sentence were confirmed on appeal (ICTR-97-23-A). On 2 August 2001, the ICTY Trial Chamber also convicted a defendant of genocide. It concerned one of the chief commanders of the Srebrenica onslaught of July 1995, General Radislav Krstić. He was sentenced to 46 years imprisonment, *inter alia*, for committing genocide as a participant in a JCE (IT-98-33-T). On 19 April 2004, however, this conviction was set aside by the Appeals Chamber. Krstić's conviction for aiding and abetting genocide was upheld and his sentence was reduced to 35 years (IT-98-33-A).

The ICTR was the first international tribunal since the Nuremberg Tribunal in the case against *Julius Streicher*,[23] that, in various cases, convicted persons of incitement to horrendous crimes. In particular in the 'Media' Trial, three suspects were sentenced to long prison terms for incitement to genocide.[24] Like the ICTY, the ICTR also contributed to the definition of rape in international criminal law, including as a means of perpetrating genocide.[25]

The SCSL, in the 'AFRC' Trial, was the first international court which convicted individuals for the use for child soldiers.[26] It also was the first to conclude that forced marriage is a crime against humanity.[27]

International adjudication is done in institutions, but the work is done by judges, prosecutors, defence lawyers, and by individuals. It does make a great difference if such individuals are really committed, are really convinced that combating impunity for heinous crimes, multiple murders, torture, rape, whatever, is something that must be done. Individuals like Nino Cassese, the first President of the ICTY (and later of the Special Tribunal for the Lebanon—see below) are really needed in order to obtain successes. Cassese, for example, will forever be connected to the Appeals Chamber decisions declaring that, under customary international law, much of the horrendous behaviour prohibited in international armed conflict is also prohibited in non-international armed conflict, i.e., in a civil war.[28] Among the valiant efforts of individuals, the never ceasing pursuit of prosecutor Carla del Ponte should certainly be mentioned. She managed to have ever bigger fish imprisoned in the ICTY's Detention Unit in The Hague and before the Court, culminating in the 2001 apprehension of the Serbian leader Slobodan Milošević, who had just stepped down as the third President of the Federal Republic of Yugoslavia.[29]

These three Special Tribunals, in particular the ICTY and the ICTR, have of course also been criticized. Notably, the concept and use of JCE or the rather broad interpretation of genocide proved to be controversial. Other commentators often loosely aimed their comments at the lawyers: it is all much too costly, what are the benefits, does it prevent new atrocities? Does it bring peace? Is justice served? And

[23] Streicher was sentenced to death for persecution as a crime against humanity. The Nurnberg Charter did not include genocide (see Werle and Jessberger 2014, p. 322).

[24] *Nahima et al.* (ICTR-99-52-A), ICTR Appeals Chamber judgment of 28 November 2007. Before the Media Trial, the *Radio Télévision Libre des Mille Collines (RTLM)* case (ICTR-97-32-1), Trial Chamber judgment of 1 June 2000 set the pace, and in the *Bikindi* case (ICTR-01-72-T), the Trial Chamber Judgment of 2 December 2008 followed suit.

[25] Already in the *Akayesu* trial judgment of 2 September 1998 (ICTR-96-4-T), p. 731.

[26] In 1998, the Armed Forces Revolutionary Council briefly controlled Sierra Leone. See the judgment of the Trial Chamber of 20 June 2007 in *Brima et al.* (SCSL-04-16-T), confirmed by the Appeals Chamber judgment of 22 February 2008 (SCSL-04-16-A).

[27] *Idem*, the judgment of the Trial Chamber in *Brima et al.*, para. 713; also the judgment of the SCSL Trial Chamber of 18 May 2012 in the *Taylor* case (SCSL-03-01-T), paras. 426 et seq.

[28] See *Tadić* (IT-94-1-AR72), above n. 16.

[29] In order to gain an impression of how difficult all of this really was, I strongly recommend her 2008 'memoir' (del Ponte 2009), so appropriately entitled 'The Hunt: Me and the War Criminals' (originally published as 'La Caccia; Io e i criminali di guerra' in Lugano, Switzerland on 8 April 2008). The book caused quite a stir due to the accusation that leading persons in Kosovo had been involved in horrendous organ trafficking during the 1998–1999 Kosovo War.

what may that be, actually? Lawyers are often not too effective at defending themselves, they tend to be best at criticizing the work of other lawyers. Let me be frank: I believe that the Special Tribunals were worth the money spent, even more so when the high quality of the procedures and judgments is taken into account, including the guarantees for the defendants and their lawyers. In that light I am for instance unimpressed by the argument that in the 1990s the administration of justice in domestic courts in the places where the atrocities had been committed would have been a real alternative. Notably in Central Africa, but also in Cambodia, or in the Balkans for that matter, the domestic system of criminal justice was still very far from well-functioning or adequate to take on these kinds of complex cases, it was not independent from local politics, or it was simply not safe in the face of violent attempts to free prisoners. For example, it was for a good reason that the *Charles Taylor* case before the SCSL took place in The Hague and not in Freetown where all the other trials of the SCSL had been held. Also, it seems very sensible to have the Lebanon Tribunal not in Beirut but in Leidschendam near The Hague, in a very secure location that is reminiscent of a modern castle.[30]

In the 1990s and in the first decade of this century, domestic courts were simply not equipped for these often extremely complicated and, certainly, also costly court cases. It was not accidental that as soon as the ICC started functioning, states like Uganda, the Central African Republic, the Democratic Republic of Congo, and other governments in the area were eager to refer cases to the newly founded International Criminal Court.

5 The State of Special Tribunals in 2022

Where are we in 2022 as far as Special Tribunals are concerned? The MICT, the residual mechanism for the ICTY and ICTR, is in some respects something more than a residual mechanism. It embodies both the finalization of the work of the ICTY and the ICTR, but to some extent also their continuation. In March 2019 and June 2021, respectively, the Mechanism produced the Appeals verdicts—life imprisonment—in the cases of Radovan Karadžić and Ratko Mladić. These cases were in many respects the culmination of the administration of justice with respect to the Balkan Wars.[31] The judgments and the way the cases were conducted are impressive, also legally. I believe that some important legal results can still be expected from the remaining MICT cases. In particular, this may be true in the case of

[30] See, below, Sect. 5.

[31] Judgment of 20 March 2019 in *Prosecutor v. Radovan Karadžić* (MICT-13-55-A). The Appeals Chamber largely confirmed the conviction by the ICTY Trial Chamber but changed his sentence from 40 years to life imprisonment. In the judgment of 8 June 2021 in *Prosecutor v. Ratko Mladić* (MICT-13-56-A) the Appeals Chamber also largely confirmed Mladić's conviction including his sentence of life imprisonment.

Félicien Kabuga. His case will more or less complete the remarkable story of the Rwanda Tribunal.[32]

Besides the MICT, the world still has two functioning Special Tribunals established at the instigation of the UN Security Council, but forming part of a domestic legal system. They are called 'hybrid' or internationalised tribunals: the Special Tribunal for the Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (the ECCC) are the most important examples.[33] Their current state is not in all respects very fortunate.

At least in a formal sense, the ECCC, founded in 2006, and the STL of 2007 are still in existence. They operate within the Cambodian and the Lebanese judicial system, respectively, but with substantial international participation. The reason for establishing them was certainly a valid one. In a brief period of four years, 1975–1979, the brutal Khmer Rouge regime led by Pol Pot was responsible for the deaths of an estimated 2 million people. Since 2006, although not with regard to Pol Pot who had already died, the Cambodia Tribunal has completed procedures in respect of, and passed judgments on, the most senior leaders of the Khmer Rouge who are still alive.[34] I believe that the jurisprudence of the ECCC is of an impressive quality. It made good and ample use of what, at the time, modern international criminal law had to offer, including what the other tribunals had explained.

[32] The case against Félicien Kabuga (*Prosecutor v. Félicien Kabuga*; MICT-13-38) will be an important step in the case law on the individual responsibility of individuals for international crimes when such individuals are neither military commanders nor political leaders. We may say: in the sequence of the trials of, e.g., industrialists, in the subsequent trials before the Nuremberg Military Tribunals after the Second World War (see, e.g., Werle and Jessberger 2014, p. 542). The other substantial case is the retrial against Jovica Stanišić and Franko Simatović, major officials in the security services of the Republic of Serbia. The MICT Trial Chamber convicted both of inter alia crimes against humanity. Each was sentenced to 12 years imprisonment. The Appeal in their case is still pending (MICT-15-96-A).

[33] In a sense, as said (see above n. 14) the SCSL can also be thus categorized, but here the international aspect prevails over the domestic side. In the cases of the Special Panels in East Timor, the War Crimes Chamber in Bosnia and Herzegovina, and the two Courts that are the subject of this Section, although 'internationalised', the domestic element is rather dominant.

[34] In its judgment of 26 July 2010, in case 001 the ECCC Trial Chamber found Kaing Guek Eav alias 'Duch', the former chairman of the notorious Khmer Rouge S-21 Security Centre in Phnom Penh, guilty of crimes against humanity and grave breaches of the Geneva Conventions. He was sentenced to 30 years imprisonment. In his appeals judgment of 3 February 2012, the ECCC Supreme Court Chamber upheld the conviction but extended his sentence to life imprisonment. In the judgment of 7 August 2014 in case 002/1, Nuon Chea, Deputy Secretary of the Communist Party of Kampuchea, and Khieu Sampan, former Head of State of Kampuchea, were convicted of crimes against humanity related to the massive displacement of people and to executions. On 23 November 2016, the Supreme Court Chamber of the ECCC in an appeals judgment reversed some convictions and upheld the rest. The sentences of life imprisonment imposed on both defendants for crimes against humanity were upheld. In the judgment of 16 November 2018 in case 002/2, the so-called *Senior Leaders* case, the Trial Chamber of the ECCC found Nuon Chea and Khieu Samphan guilty of crimes against humanity (including rape, forced marriage, and murder), grave breaches of the Geneva Conventions and the genocide of the Vietnamese. The Chamber also convicted Nuon Chea of genocide of the Cham people. The Trial Chamber ruled that the accused had failed to prevent and punish the crimes that occurred, even though they knew or had reason to know that the crimes were being carried out. Both accused were again sentenced to life imprisonment (002/19-09-2007/ECCC/TC). Case 002/2 is still in the appeals phase. For these cases: https://www.internationalcrimesdatabase.org. See for an assessment of the ECCC, including cases 001 and 002/1, Meisenberg and Stegmiller (2016).

Notwithstanding setbacks and justified criticism, it has confirmed part of its purpose and opportunity to bring justice regarding horrendous crimes. Also the attention that the procedures have drawn in Cambodian society bears witness to this. A 2010 survey showed that more than 350,000 Cambodians had observed or participated in the court's proceedings, including some 67,000 people in rural areas who attended ECCC community video screenings.[35] Still, now, despite valiant efforts by hard-working judges and prosecutors, the ECCC seems to have stalled. It gradually became more and more embroiled in the intricacies of Cambodian national policies. The question is whether or not the Tribunal will be able to continue its work in an acceptable way in two remaining important cases. The basic problem seems to be that these two cases may have an effect that digs somewhat deeper into modern-day Cambodia: they touch upon circles that are close to the present leader Hun Sen.[36]

It is said that the Special Tribunal for Lebanon is the first tribunal of an international character to prosecute 'terrorist crimes'. Like the ECCC it is also hybrid, part of the Lebanese legal system. It is being paid for by both the United Nations and by Lebanon. Primarily, it is intended to shed some light on the terrible explosion on 14 February 2005 in Beirut that killed the then Prime Minister of Lebanon, Rafic Hariri, and 22 others. Ever since then, other bombings and attacks have taken place in Lebanon and the STL in principle also has jurisdiction to investigate them. The Tribunal certainly faced and still faces a most difficult task in the turmoil of Lebanese and wider Middle Eastern politics. At the end of the day, at least so far, the Tribunal does not seem to have made much of a contribution to the state of international criminal law.

Other than the preceding Special Tribunals and the ICC, the STL is allowed to conduct trials *in absentia,* without the defendant being present. In its operational period from 2009 until recently its Trial Chamber has produced one judgment, indeed *in absentia*. On 18 August 2020 in the case *Ayyaz et al.*, Salim Jamil Ayyaz was found guilty; on 11 December of that year he was sentenced to five concurrent sentences of life imprisonment.[37] The other indicted persons were found not guilty. Rather surprisingly, Ayyaz did not appear to be related to the Syrian Assad regime, but to the powerful Hezbollah organization within Lebanon, although this affinity was not made explicit in the verdict.[38] Whether he will ever be apprehended and end up in prison to serve his life sentence is very much to be seen.

This then seemed to be all for the STL and, as such, perhaps not a great result. Last year, it almost seemed as if the Tribunal would not even be able to conduct the appeals procedure in the *Ayyaz et al*. case. In June last year, upon the collapse of the Lebanese economy (Lebanon pays almost 50% of its costs) the Tribunal seemed to be lost because it was totally out of funds. The latest messages, however, are that

[35] [35] See: Pham et al. (2011), p. 26.

[36] See, for more detail Open Society Justice Initiative (2011), pp. 2–3, 15, 29; Boyle (2018).

[37] Judgment of 18 August 2020, *Prosecutor v. Ayyaz et al.* (STL-11-01/T/TC). The case is still in the appeals phase.

[38] *Idem*, paras. 122–126 at pp. 32–33 is the closest judgment yet that implies that Hezbollah was involved, but the judgment submits that proving such an affiliation is not necessary for a verdict in the case.

the financial worst-case scenario has been prevented and that at least the appeals phase in the *Ayyaz et al.* case might be able to take place.[39] Then, on the 10th of March of this year, matters took a surprising turn. On that day the STL appeared to be still alive and even kicking! From its seat in Leidschendam in the Netherlands, its Appeals Chamber announced that it had largely agreed with an appeal by the STL Prosecutor against the verdict on Mehri and Oneissi in the original *Ayyaz et al.* case. In the 18 August 2020 judgment Mehri and Oneissi had been found not guilty by the Trial Chamber, and were duly acquitted. However, the Appeals Chamber agreed with the Prosecutor's Appeal against that decision and found that it had been established beyond reasonable doubt that both Merhi and Oneissi '[…] knowingly and willingly entered into an agreement to participate in the commission of a terrorist act, namely, the assassination of Mr Hariri' [in 2005].[40] The Appeals Chamber also stated that these two and Ayyaz were members of the so-called Green Network which was a 'covert Hezbollah network acting as the mission command of the attack'.[41] This was serious investigative work by the STL which would score well in a Netflix crime series! It was all based on a very detailed study of telephone communications. I cannot say that it added to my knowledge of the state of international criminal law, but impressive as an institutional result it most certainly is.

The responsible level of co-operation in the Security Council that made the Special Tribunals possible in the 1990s, and to some extent in the decade thereafter, is now difficult to envisage. Still new special courts, hybrid or not, are not to be completely excluded. The ISIS/Daesh crimes in the Iraq-Syrian war may still be a candidate in the near future, although as a result of the Russia-Ukraine conflict all such initiatives may, of course, be blocked.[42] But also if new Special Tribunals are to be established, it is useful to take the following into account:

(1) The cases tend to be complicated and (very) costly, as are the investigations (police, forensic research, other technical experts, etc.), the prosecution, and the courts themselves;

[39] The STL Prosecutor also began a second case against Salim Ayyaz. This second case (Case STL-18-10) relates to three attacks against Marwan Hamade, Georges Hawi and Elias El-Murr on 1 October 2004, 21 June 2005 and 12 July 2005, respectively. The case is currently in the pre-trial phase. Proceedings against Salim Jamil Ayyash continue *in absentia*. However, due to the financial problems of the STL, it is still to be seen if this case can proceed.

[40] So far (i.e., 13 May 2022) the STL has only published a summary of the Appeals Judgment of 10 March 2022. See https://www.stl-tsl.org/crs/assets/Uploads/20220310-Summary-of-Appeal-Judgment-EN.pdf, pp. 5 and 6. On 16 June Merhi and Oneissi were each sentenced to life imprisonment (see: https://mailchi.mp/6b821cab6edc/appeals-chamber-sentences-hassan-habib-merhi-and-hussein-hassan-oneissi-to-life-imprisonment-in-the-case-of-prosecutor-v-merhi-and-oneissi?e=451a604b7d).

[41] *Idem*, p. 4: 'Turning to the impact of these conclusions on the acquittals of Messrs Merhi and Oneissi, the Appeals Chamber finds that it has been established that the Green Network was a covert Hezbollah network acting as the mission command of the attack and that its members were Messrs Badreddine, Ayyash, and Merhi'.

[42] There is at least considerable (European) pressure on the United Nations to make possible the prosecution of persons responsible for international crimes against the Yazidi population in Iraq. See, e.g., https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24014&lang=en. See n. 77, below for a recent German domestic case.

(2) The question remains to be answered with more precision what the effects are on perpetrators, on the victims, on potential perpetrators (do they have the effect of deterrence and prevention?);
(3) Also with greater precision it has to be determined what the beneficial effect is on the population at large who lived through the period when these crimes were committed.

New tribunals are likely, of course, to be better and at least less costly as a great deal has already been learned by their predecessors. Moreover, the state of international criminal law to be applied is certainly now much better and clearer than it was twenty or even ten years ago, and impunity for the often so horrific acts concerned is now much less acceptable than it was before.[43]

An initiative to undertake legal action may also have a different although not necessarily less serious source than the UN Security Council. Hissène Habre, a particularly horrific and cruel President of Chad, had fled to Senegal. Instead of enjoying his later years in comfort there, Habré in the end died in prison after being sentenced by the Extraordinary African Chambers in the Courts of Senegal (EACCS) to spend the remainder of his life in prison.[44] Certainly, considerable pressure on the Senegalese government was necessary to obtain that result, notably from Belgium, and the whole case took ridiculously long to start (Habré's crimes had been committed between 1982 and 1990). But in the end on 27 April 2017 the Appeals Chamber of the internationalised, i.e., in this case 'Africanised', EACCS confirmed the judgment of the EACCS Trial Chamber which found Habré guilty of leading a 'Joint Criminal Enterprise' ('Entreprise Criminelle Commune') in Chad, and also convicted him of crimes against humanity and war crimes, including murder and torture.[45] Apart from its Statute, the legal basis of the convictions in Senegal was clearly provided by previous international jurisprudence.[46] The world has changed. Almost 7400 victims of Habré and his regime also heard their case for reparations decided earlier by the Chamber. This reparation decision was confirmed by the EACCS Appeals Chamber.[47]

Following an Exchange of Letters in 2014 between the President of Kosovo and the High Special Representative of the European Union for Foreign Affairs and Security Policy, the Kosovo Specialist Chambers (KSC) has been established and has started operating. It is funded by the European Union and some other

[43] See, e.g., Sadat (2021a), pp. 13-14 where she (critically) assesses the virtues of the contribution of the Special Tribunals, concluding (cautiously) in a positive manner.

[44] Judgment of 30 May 2016 in *Ministère Public c. Hissein Habré*, Chambre Africaine Extraordinaire d'Assises, p. 536, http://www.chambresafricaines.or/pdf/Jugement_complet.pdf.

[45] Judgment of 27 April 2017 of the Chambre Africaine Extraordinaire d'Assises d'Appel in *idem*; https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/E72F1D64576D82F5C125828800395230/CASE_TEXT/HISSEIN%20HABR%C3%89%20Judgment.pdf.

[46] See, pp. 416 et seq. of the Trial Judgment, above n. 44.

[47] *Idem*. In 2015 in Chad itself 20 direct collaborators of Habré were convicted by the domestic courts. See under point 21 at: https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal.

contributing countries. The KSC operates within the legal system of Kosovo but is staffed by international judges and has an international Specialist Prosecutor's Office. The KSC is limited to alleged crimes committed between 1 January 1998 and 31 December 2000. So far, the KSC has produced two administrative judgments.[48] The important trial judgments in *Prosecutor v. Mustapha Shala* and in *Prosecutor v. Thaci et al*., are expected in 2023.[49]

6 The ICC and Its Problems

Although the ICC, as said, certainly had quite some credit in its first difficult decade, it had also soon become clear that the new Court differed very considerably from the Special Tribunals, certainly from the three most successful ones. Let us look at some of the major differences and problems the ICC faced, and in part still faces.

The Tribunals, being founded by the Security Council, in the end could appeal for its support. The ICC is not a UN Security Council product. It is an undertaking of states and 123 states are now party to the ICC's Statute. Still, important countries like the USA, China and Russia are not parties thereto. So far, the ICC has had a problematic relationship with the Security Council. Under Article 13.b of the ICC Statute the Security Council can refer a situation to the Court. On the two occasions that this has actually occurred, the necessary follow-up support from the Council has been almost entirely lacking. Most prominently this occurred with respect to the Sudanese President Omar Al Bashir. With the full support of the Security Council—expressed in its Resolution 1593 of 2005—the ICC had issued an indictment against him and against some others regarding their role in the horrific events in the Darfur region of Sudan.[50] In 2015, however, the South African government did not see fit to cooperate with the Court and to transfer Al Bashir to The Hague although two South African courts had found that the South African police should have arrested him. The Security Council did not appear to be prepared to stand up for the Court. This South African episode, in particular, demonstrated a major weakness of the ICC: the Court depends on the voluntary co-operation of states; it cannot rely on UN background powers.[51]

Also in the Libyan cases, after initial support from the Council, the main suspects, among them Saif, the son of the deposed dictator Al Khaddafi, did not end up

[48] On 18 May 2022 Hysni Gucati and Nasim Haradinaj were each sentenced to 4½ years imprisonment for offences against the administration of justice. Both cases are currently on appeal (KSC-CA-2022-01).

[49] The trial case of *Pros. v. Salih Mustafa* (KSC-BC-2020-5) concerns a commander of the Kosovo Liberation Army. The pre-trial case of *Pros. v. Thaci et al.* is the most prominent KSC case. Hashim Thaci was Prime Minister of the Provisional Government of Kosovo and the KLA Commander-in-Chief; the other three indicted persons were all senior officials of the KLA in the years 1998/9.

[50] UN Doc.S/RES/1593 (2005); see the decision of Pre-Trial Chamber I of 4 March 2009 (ICC-02/05-01/09), in particular pp. 79–84.

[51] See Ngari (2017), and Pre-Trial Chamber II, Situation in Darfur, Sudan in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (ICC-02/05-01/09, Decision of 6 July 2017). Even though he has no longer been in power for a considerable length of time Omar Al Bashir is still not in The Hague detention unit.

before the Court although they apparently even preferred to be tried there, among other reasons because they believed that their trial would be fairer (and probably safer) than a trial in Libya.

In the case of the 2007 post-election killings in Kenya, after some support from the Security Council, there was no effective follow-up. The cases of the Kenyans Kenyatta and Ruto were perhaps the most damaging ones from the point of view of avoiding justice. The two main suspects deemed to be responsible for the post-election atrocities in 2007, Kenyatta and Ruto, had been elected and then sworn in as President and Vice-President of Kenya in 2013. The cases which the Prosecutor had developed against them fizzled out as witnesses retracted testimonies or disappeared altogether. Eventually, in December 2014, the Prosecutor had to withdraw the charges against Kenyatta.[52] In April 2016, a Trial Chamber of the Court decided to terminate the case against Ruto.[53] Quite a number of African presidents and premiers also appeared to be displeased by the attempts of the ICC to try their new colleagues.[54]

These and some later unfortunate events in the second decade of its existence eventually led to an Independent Expert Review of the Court's performance. In 2020, this Independent Expert Review produced no less than 384 recommendations for improvement, 76 of them being prioritized. They range from speeding up procedures to more extensive outreach to the public in order to explain its activities.[55] This may also include better and more efficient treatment of victims or the family members of victims.

Apart from unfortunate cases, in terms of dark clouds hanging over the ICC there is also the attitude of the US government, notably of the Bush and Trump administrations.[56] Under Trump, the US government even went as far as to declare that the Court was a 'threat to US national security'[57] and took all kinds of unfriendly measures, such as revoking the US Visa of the Court's Prosecutor, in the light of a looming initial investigation into events in Afghanistan which may or may not have involved the US military. Under President Biden, the Court and its officials are less *persona non grata* in the United States, although US co-operation with the Court,

[52] On 5 December 2014 the ICC Prosecutor filed a notice of withdrawal of charges in *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11), 13 March 2015, Trial Chamber V(B) decided on the withdrawal of charges against Kenyatta.

[53] On 5 April 2016, Trial Chamber V(A) decided, by majority, that the case against William Samoei Ruto (and Joshua Arap Sang) was to be terminated (ICC-01/09-01/11).

[54] See, e.g., the letter of 10 September 2013 by the African Union to the ICC (https://www.icc-cpi.int/sites/default/files/itemsDocuments/pr943/130910-AU-letter-to-SHS.pdf) and the reply from the Court on 13 September 2013 (https://www.icc-cpi.int/sites/default/files/itemsDocuments/pr943/130913-VPT-reply-to-AU.pdf).

[55] Independent Expert Review of the International Criminal Court and the Rome Statute System (2020). See, Sadat (2021b), pp. 26–27, 29.

[56] See Leila Sadat's and Mark Drumble's fine examination of the relationship until the Trump administration: Sadat and Drumble (2016).

[57] Sadat (2021b), pp. 23–24.

e.g., regarding Afghanistan, is still not on the horizon. However, the war in Ukraine may provide a change in attitude.[58]

Of course, the image of the Court and its faring may also improve once again, e.g., if, after all, Al Bashir appears before the Court in The Hague, or, even better, if the new Prosecutor, Karim Kahn, scores an interesting success regarding the Russian 'Special Military Operation' in Ukraine. It will make the Court's future seem very much brighter all of a sudden. Still, it seems fair to say that for a really brighter future for the Court it does need to proceed more expeditiously, with more (cost-) efficiency and its message must be made clearer including and in particular to the victims of the often horrific deeds that the Court has to deal with.

7 The ICC and the War in Ukraine

The use of massive military force, a state of war, declared or not, involves what is often called 'a license to kill'[59] and to destroy property on the often rather uncertain ground of military necessity. Such a licence tends to evolve soon enough into killing not only the military opponent but also killing and maiming others. After a while this no longer occurs because these civilians were unfortunately in the way—collateral damage—, but also because they are civilians of the enemy. The same tends to happen with property, it is more and more loosely related to military necessity. By then we have long entered the realm of violations of humanitarian law, of international crimes, of war crimes, of crimes against humanity, perhaps even of genocide. But for the time being there is no court of law to be seen and everything, after all, has to be proved beyond reasonable doubt. At the most, there are now court martials, military courts composed of officers who might intervene in the behaviour of their own military personnel. Perhaps the domestic courts begin to try enemy soldiers caught on the battlefield. The 'real' courts of law are for later, after at least the cessation of hostilities, after a cease fire has been agreed upon. And perhaps even a considerable time after that.

Where are we lawyers when an actual war is taking place? What role is there for the ICC, for international criminal law? It all looks inadequate, powerless, does it not? Let us see.

Since 17 July 2018 the ICC has the right to indict persons responsible for the crime of aggression.[60] This 'core' crime together with genocide, crimes against

[58] See, e.g., a March 15, 2022 Report on Foreign Policy: Lynch (2022).

[59] But see the interesting discussion in Clapham (2021), pp. 266–279.

[60] The jurisdiction of the ICC over the crime of aggression will not apply to all ICC members, but only to those that accepted the Court's jurisdiction over the crime and have not 'opted out' of this acceptance before the aggression was committed (as Art. 15 bis. 4 allows). The two other conditions stipulated in Art. 15 bis. of the Statute have been met. An agreed threshold of 30 ratifications (Art. 15 bis. 2 of the Statute) was obtained and the Assembly of State Parties of the ICC passed a resolution allowing the Court to use its jurisdiction for this crime (as Art. 15 bis. 3 of the Statute requires; the resolution entered into force on 17 July 2018). See, e.g., the 'aggression factsheet' of the Coalition for the International Criminal Court at: https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICC-%20Factsheet%20Crime%20of%20Aggression%20Final-%20changes%2027Nov2019.pdf.

humanity and war crimes is, one can say, the successor to the crime against peace of which, among other crimes, the main Nazis were convicted at Nuremberg. The most famous one perhaps, and the first to be hanged in Nuremberg, was Von Ribbentrop, Hitler's Minister of Foreign Affairs. On 16 October 1946 Joachim von Ribbentrop was executed for having committed that crime against peace among other war crimes under the Nuremberg Charter. Whereas at the time and following the Nuremberg trials criticism was voiced against this crime against peace (in my view unjustified), the existence of the crime against peace has been further confirmed in various ways following the tribunals of Nuremberg and Tokyo.

Already in Nuremberg it was clarified that the illegality of a war under international law is not sufficient to make it also an 'aggressive war'. It is not a matter of 'just' an illegal war, the aim behind it should be the complete or partial annexation of the territory of a country or countries involved or to subjugate these countries permanently. The 'mental' element, the 'aim' can be proven, e.g., by way of statements by the political leadership of the state committing such acts revealing the intentions behind these acts.

The modern variant of the crime against peace, now called the 'crime of aggression' as it has been included in the amended version of the Statute of the ICC, is the fruit of prolonged negotiations finally leading to an ingenious and almost incomprehensible compromise solution. However, the compromise did not so much concern the content of the Crime but in particular the complex requirements for the jurisdiction of the ICC. But apart from these specific ICC complexities, the crime of aggression is now certainly with us even if the ICC in quite a number of situations may not be the Court to have jurisdiction to apply it. As already said above, the ICC Statute is generally seen as the codification, the catalogue of modern international criminal law. In the Statute the crimes are laid down (and they are occasionally modified and amended). However, the ICC is not likely to see a trial against, e.g., Putin or his Minister of Foreign Affairs, Lavrov, because neither the Russian Federation nor Ukraine are a party to the ICC, and that is required, at least for the crime of aggression. Karim Kahn, since 2021 the ICC Prosecutor, has already declared this in his first reaction of 25 February 2022 after the outbreak of the hostilities on 24 February.[61]

What, then, can be expected of the ICC Prosecutor, of the ICC, with respect to this most serious conflict raging between the Russian Federation and Ukraine? Well in his second Declaration of 28 February 2022, the Prosecutor announced promisingly '[…] I have decided to proceed with opening an investigation into the Situation in Ukraine, as rapidly as possible'.[62] The jurisdictional basis for this investigation will be a declaration of 8 September 2015 addressed to Von Hebel, Registrar of the ICC at the time when Ukraine accepted the jurisdiction of the Court under

[61] See https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following. Commentators generally seem to reject the possibility of holding leaders responsible for the crime of aggression in a domestic case; the matter is highly controversial (see, e.g., the discussion on the very considerable legal obstacles in Ruys 2017, pp. 26–33).

[62] See https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

Article 12.3 of the ICC Statute. In its Declaration Ukraine extended the jurisdiction of the Court from 20 February 2014 onwards for an open-ended period of time to encompass 'ongoing alleged crimes committed on its territory'.[63]

The problem with this Declaration, as such a perfect possibility for states to accept the jurisdiction of the ICC, may be that it is in fact an extension in time of an earlier Ukrainian Declaration made in respect of the events in Crimea and in the Donbass area in 2014 (dated 9 April 2014).[64] Hence, if it is 'only' an *extension* to that first Declaration, it may be that the jurisdiction of the Court will be limited to crimes related to Crimea and the Donbass 'Republics' of Donetsk and Lugansk. The use of the term 'ongoing alleged crimes' points perhaps in that direction. This would of course be unfortunate in view of the military situation as it evolved from February 2022 onwards.

As a result of this first Ukrainian Declaration, on 28 February, the Prosecutor announced an extension of the preliminary examination of the Situation in Ukraine to include alleged crimes occurring after 20 February 2014 in Crimea and Eastern Ukraine.[65] Moreover, he concluded that on the basis of this preliminary examination, although not concerning the crime of aggression, he is of the opinion that there is a 'reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine in relation to the events already assessed during the preliminary examination by the Office'.[66] In this same statement, the Prosecutor also mentions an alternative and less cumbersome route than taking the initiative himself (an investigation *proprio moto*, based on Art. 15 of the Statute). If an ICC state party under Article 14 of the ICC Statute refers the situation to the Prosecutor's Office, that would allow him to speed up matters considerably.

The reaction was quite immediate. On 1 and 2 March, some 40 states, including the complete EU membership asked for such a referral. Still on the same 2 March the Prosecutor submitted the Situation in Ukraine to Pre-Trial Chamber II.[67] In addition, he said, if the crimes fall within his jurisdiction, then also any new alleged crimes, now including genocide, committed within the recently expanded conflict will be investigated. In doing so, the Prosecutor adds that he will '[…] seek the partnership and contributions of all States in order to address our need for additional resources across all situations addressed by my Office'.[68] He has recently done so by formally joining a Joint Investigation Team (JIT) that Ukraine, Lithuania and Poland, under

[63] See https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine.

[64] See https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf.

[65] Declaration of the ICC Prosecutor of 28 February 2022, see above n. 62.

[66] Declaration of the ICC Prosecutor of 2 March 2022, see https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.

[67] Pre-Trial Chamber 2 was selected by the Presidency of the Court (see: ICC-01/22, at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_01686.PDF).

[68] Declaration of the ICC Prosecutor of 2 March 2022, above n. 66.

the auspices of Eurojust, had established to investigate the developments in Ukraine. This is the first time the ICC has joined such an investigation team.[69]

Moreover, on 17 May, the Prosecutor announced that his office has deployed '[…] a team of 42 investigators, forensic experts and support personnel to Ukraine to advance our investigations into crimes falling into the jurisdiction of the International Criminal Court […] and provide support to Ukrainian national authorities'. In the same Declaration he could also announce that '[…] 21 States have now indicated their willingness to second national experts in support of the work of the Office, while 20 States have committed to provide financial contributions'.[70]

Pre-Trial Chamber II will now decide on the validity of the Prosecutor's request for a case against Russian (and perhaps Ukrainian) individuals suspected of responsibility for genocide, crimes against humanity or war crimes, and if affirmatively decided, will send out arrest warrants.

We may thus carefully conclude that matters are moving. Mr Kahn may not be able to prosecute the crime of aggression with respect to the Ukrainian war, but he may very well be allowed to prosecute the 'other' three international crimes of the ICC Statute: genocide, crimes against humanity and war crimes. Although, so far, the ICC has not found sufficient grounds to prosecute such crimes that may have been committed in the Crimea and Donbass area between 2015 and March 2022, this may change now that the Russian 'special military operation' can be taken into account. Mr Kahn may come with convincing evidence persuading Pre-Trial Chamber II that he has jurisdiction and that there is a plausible case against responsible individuals, like Putin and Lavrov, and others.

8 Complementarity, or Domestic Cases on International Crimes; Some Conclusions

The presence of an International Court focussed upon 'the enforcement of international justice' has made a difference to the state of the world although that difference is hard to quantify. But one thing is clear: both the successes of Special Tribunals and the ICC have inspired states to create the possibility in their legal systems to bring cases concerning international crimes, notably crimes against humanity and genocide.[71] Moreover, many states have enacted legislation allowing universal jurisdiction for serious crimes committed abroad by persons other than their own

[69] Statement of 25 April 2022; see: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint. On 31 May Estonia, Latvia and Slovakia also joined this JIT. In the European Union Agency for Criminal Justice Cooperation (Eurojust) the national judicial authorities of the EU Member States co-operate in a wide variety of ways (see: https://www.eurojust.europa.eu/).

[70] Statement of 17 May 2022, see: https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine. The Prosecutor also specifically welcomed the secondment of a significant number of Dutch national experts to his Office in support of his mission in Ukraine.

[71] See: https://ihl-databases.icrc.org/ihl-nat.

nationals. In several states trials have taken place or have started, based on that principle.[72] As far as the ICC is concerned its Rome Statute has brought 'positive complementarity'. In principle the Court is complementary to national courts. They are supposed to undertake the main caseloads, not the ICC or Special Tribunals, otherwise international criminal justice cannot be effective. After all, to mention just one example, it is estimated that during the 1991–1995 Balkan War perhaps some 200,000 war crimes and other international crimes were committed.[73]

When a state 'is unwilling or unable genuinely to carry out the investigation or prosecution' (according to Art. 17 Statute), a case may be admissible before the ICC.[74] Allowing 'universal jurisdiction' in one way or another in national legal systems is a precondition for effective domestic prosecution. Quite a number of states have, indeed, changed their laws to allow the domestic prosecution of international crimes. The ICTY had already shown such a catalytic effect on domestic war crimes procedures in the former Yugoslavia, often with international help. Such 'internationalized' courts were established in the courts of Bosnia Herzegovina and in those of Kosovo.

Purely domestic courts like the *Cour d'Assises de Paris* or the *Rechtbank Den Haag* (The Hague District Court) have established special arrangements to deal with international crimes, and so have domestic offices of prosecutors and police departments. Of course these courts apply their own procedural rules but if it comes to administering justice to those suspected of international crimes committed, e.g., by non-nationals and outside the national territory they can now apply the principles and rules of genocide, of crimes against humanity, of war crimes. In effect we find them applying what is laid down in the Statute of the ICC, and as interpreted in the jurisprudence of the Special Tribunals and of the ICC. Again some individuals have pushed this development. I am fortunate to have known the Dutch judge Roel van Rossum, who sadly passed away in 2015. He was absolutely instrumental in pursuing at The Hague District Court the first wave of Dutch cases concerning international crimes as soon as, in 2002, a change in Dutch law made that possible.[75]

The number of cases concerning international crimes in national courts has increased exponentially to many hundreds in the last ten years.[76] They recently include, e.g., the case against Anwar Raslan, a former Syrian colonel, at the *Oberlandesgericht* in Koblenz, Germany. On 13 January of this year he was sentenced

[72] See: https://trialinternational.org/resources/universal-jurisdiction-database, and the International Crimes Database at the TMC Asser Institute in The Hague, https://www.internationalcrimesdatabase.org/Home.

[73] It has also been argued that the effects of procedures before international tribunals are not always beneficial for the ethnic relations concerned, notably regarding attitudes in the former Yugoslavia [see, e.g., Milanovic 2016 (and the sources cited)]. It seems to me that (extreme) nationalistic politics preserving and shielding such attitudes may be among more interesting explanations than an alleged failure of the role of the ICTY.

[74] See the discussion of the 'admissibility test' in Werle and Jessberger (2014), pp. 103–106.

[75] In 2002 the *Wet Internationale Misdrijven* [International Crimes Act, WIM] entered into force. See, for more detail and references to the first set of cases before The Hague District Court, Post (2013), pp. 345–349.

[76] See, above n. 71.

to life imprisonment for the torturing of more than 4000 people in the main Syrian horror prison of Al Khatib.[77] On 30 November 2021, the 5th Senate of the *Oberlandesgericht* Frankfurt/Main convicted the 29-years-old Taha Al-J. Al-J had bought a woman and her five-year old daughter, both Yazidi, as slaves in Syria. He kept and abused them in Fallujah (Iraq) where as a result the child died. He was convicted of genocide, a crime against humanity resulting in death, a war crime against persons resulting in death, aiding and abetting a war crime against persons in two cases, and bodily harm resulting in death. He was sentenced to life imprisonment.[78] At the *Cour d'Assises de Paris* the case against Claude Muhayima, a suspected Rwandese génocidaire opened in November 2021, is the fifth case of its sort in Paris.[79]

Of course, we should be careful not to exaggerate the benefits of this development. More domestic court cases on international crimes is not necessarily the same thing as more trials that are good, fair or just. The danger of 'political' trials always lurks around the corner, in particular regarding ongoing conflicts. To keep the quality of the domestic administration of international crimes under scrutiny is a rather difficult although also an important task of the ICC.[80] But in view of its limited resources, this is not a task that it can satisfactorily execute on its own. The Court and its officials (badly) need the support of others, in particular of the academic legal community to scrutinize what happens.

It is not an exaggeration also to include these hundreds of cases on international crimes before national courts among the results of the appearance of the ICC and of the Special Tribunals in the international theatre and to include them in the state of international criminal law. I submit that without the jurisprudence of the Special Tribunals and the ICC, including the impact of the Statute of the ICC, international criminal law would not be so incomparably more healthy and more important than it was 30 years ago. Although a historical perspective may not be that popular in these dynamic times, we should not forget how insignificant the administration of international criminal justice really was before the early 1990s. At that time international criminal law in law schools was not much more than 'the law of extradition'. Usually, one colleague kept him/herself busy with such an exotic part of the law as international co-operation in criminal matters was. At times, he or she would receive

[77] As reported by the Commission for International Justice and Accountability (CIJA) on 13 January 2022, https://cijaonline.org/news/koblenz-syria-verdict-anwar-raslan, and by the Court in Koblenz https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/lebenslange-haft-ua-wegen-verbrechens-gegen-die-menschlichkeit-und-wegen-mordes-urteil-gegen-ein-1/.

[78] In addition, the defendant must pay EUR 50,000 in reparation for the non-material damage caused. See: https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/higher-regional-court-frankfurtmain-sentences-taha-al-j-to-lifelong-imprisonment. Both the prosecutor and the defendant may appeal against the judgment (at the Federal High Court, the *Bundesverfassungsgericht*). See also https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/beginn-der-hauptverhandlung-gegen-amin-m-wegen-kriegsverbrechen-gegen-personen for the case against Amin M, another member of IS, which began on 15 June 2022 in the same Frankfurt Court.

[79] The first case of this kind before the *Cours d'Assises de Paris* was the case against Pascal Simbikangwa. In 2014 he was convicted of aiding and abetting genocide and crimes against humanity in Rwanda, and sentenced to 25 years imprisonment (see: https://www.internationalcrimesdatabase.org/Case/2241/Simbikangwa/).

[80] Again, see Werle's admissibility test, above n. 74.

a phone call where a muffled voice would ask if Spain or Brazil and the United Kingdom had an extradition treaty, and that was it.

The ICC, today, still remains a fragile institution with an uncertain future, one may say. But it is certainly not irrelevant. Our expectations were of course rather high. The world was becoming a better place. In view of the state of the world in which the ICC started operating at the beginning of the century, such expectations were exaggerated. In 2022, faced again with a cruel conflict, it is still wise not to expect too much from the Court. However, for the benefit of humanity and the sake of justice, and the ICC itself, it is advisable for the Prosecutor to speed up procedures as much as he can and to take the initiative regarding the administration of international justice. Otherwise, the world may soon see a proliferation of 'political' domestic trials regarding the Ukraine, involving, e.g., prisoners of war, local administrators, etc., or even an aberration as 'Nuremberg 2.0'.[81]

Law and certainly international law works slowly, but time tends to be on its side. The ICC is still worthy of support so that it can realize more of its potential to put an end to impunity for perpetrators of 'grave crimes that threaten the peace, security, and well-being of the world'.[82] I think that lawyers, and not exclusively lawyers, have a duty to fight for that objective, just like Nino Cassese, Roel van Rossum, Carla Del Ponte and many others with them, saw fit to do so.

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[81] As recently reported, e.g., in the English newspaper *The Guardian* (https://www.theguardian.com/world/2022/may/28/kremlin-mulls-nuremberg-style-trials-based-on-second-world-war-tribunals).

[82] Referring to the Preamble to the ICC Statute, see Sadat (2021b), p. 30.

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