



NMUN • NY

INTERNATIONAL CRIMINAL COURT  
BACKGROUND GUIDE 2012

Written By: Alex Tompkins, Alexandra Samii



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Please consult the FAQ section of [nmun.org](http://nmun.org) for answers to your questions. If you do not find a satisfactory answer you may also contact the individuals below for personal assistance. They may answer your question(s) or refer you to the best source for an answer.

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### NMUN•NY 2012 Important Dates

**IMPORTANT NOTICE:** To make hotel reservations, you must use the forms at [nmun.org](http://nmun.org) and include a \$1,000 deposit. Discount rates are available until the room block is full or one month before the conference – whichever comes first. **PLEASE BOOK EARLY!**

31 January 2012	<ul style="list-style-type: none"> <li>• Confirm Attendance &amp; Delegate Count. (Count may be changed up to 1 March)</li> <li>• Make Transportation Arrangements - DON'T FORGET! (We recommend confirming hotel accommodations prior to booking flights.)</li> </ul>
15 February 2012	<ul style="list-style-type: none"> <li>• Committee Updates Posted to <a href="http://www.nmun.org">www.nmun.org</a></li> </ul>
1 March 2012	<ul style="list-style-type: none"> <li>• Hotel Registration with FULL PRE-PAYMENT Due to Hotel - Register Early! Group Rates on hotel rooms are available on a first come, first served basis until sold out. Group rates, if still available, may not be honored after that date. See hotel reservation form for date final payment is due.</li> <li>• Any Changes to Delegate Numbers Must be Confirmed to: <a href="mailto:outreach@nmun.org">outreach@nmun.org</a></li> <li>• Preferred deadline for submission of Chair / Rapp applications to Committee Chairs</li> <li>• All Conference Fees Due to NMUN for confirmed delegates. (\$125 per delegate if paid by 1 March; \$150 per delegate if received after 1 March. Fee is not refundable after this deadline.</li> <li>• Two Copies of Each Position Paper Due via E-mail (See Delegate Preparation Guide for instructions).</li> </ul>
NATIONAL MODEL UNITED NATIONS 2012	<p>1 - 5 April – Sheraton New York 3 - 7 April - New York Marriott Marquis</p> <p>The 2013 National Model UN Conference 17 - 21 March &amp; 24 - 28 March (both at Sheraton; Sun-Thurs)</p>

## POSITION PAPER INSTRUCTIONS

**Two copies of each position paper should be sent via e-mail by 1 MARCH 2012**

### 1. TO COMMITTEE STAFF

A file of the position paper (.doc or .pdf) for each assigned committee should be sent to the committee e-mail address listed below. Mail papers by 1 March to the e-mail address listed for your particular venue. These e-mail addresses will be active when background guides are available. Delegates should carbon copy (cc:) themselves as confirmation of receipt. Please put committee and assignment in the subject line (Example: GAPLEN\_Greece).

### 2. TO DIRECTOR-GENERAL

- Each delegation should send one set of all position papers for each assignment to the e-mail designated for their venue: positionpapers.sheraton@nmun.org or positionpapers.marriott@nmun.org.

This set (held by each Director-General) will serve as a back-up copy in case individual committee directors cannot open attachments.

*Note:* This e-mail should only be used as a repository for position papers.

- The head delegate or faculty member sending this message should cc: him/herself as confirmation of receipt. (Free programs like Adobe Acrobat or WinZip may need to be used to compress files if they are not plain text.)

- Because of the potential volume of e-mail, only one e-mail from the Head Delegate or Faculty Advisor containing all attached position papers will be accepted.

Please put committee, assignment and delegation name in the subject line (Example: Cuba\_U\_of\_ABC). If you have any questions, please contact the Director-General at dirgen@nmun.org.

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### COMMITTEE

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### COMMITTEE

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### OTHER USEFUL CONTACTS

Entire Set of Delegation Position Papers .....	positionpapers.sheraton@nmun.org
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# THE 2012 NATIONAL MODEL UNITED NATIONS

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1 – 5 April (Sheraton) & 3 – 7 April (Marriott) • [www.nmun.org](http://www.nmun.org)

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Dear Delegates,

We are pleased to welcome you to the 2011 National Model United Nations (NMUN). This year's International Criminal Court directors are Alex Tompkins and Alexandra Samii. Alex completed his undergraduate legal studies in 2009 and went on to complete his M.A in International Law at University College London. He currently lives in London and he is studying for his professional legal examinations. This is his third year at NMUN and his second on staff. Alexandra graduated from Université Libre de Bruxelles, Belgium in 2011 with a Bachelor degree in Law. She currently lives and works in Canada. This is her third year at NMUN and her first year on staff.

The cases that will be brought to the Court at the 2012 NMUN are:

1. The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senusi of the Libyan Arab Jamahiriya
2. The Prosecutor v. Thomas Lubanga Dyilo of the Democratic Republic of the Congo

This background guide has been prepared to assist delegates in their preparation for the conference and it should be seen as a starting point for research. A very challenging but highly rewarding committee, involvement in the NMUN ICC simulation offers an insight into the operation of International criminal law. Lots of work will be required but as previous participants in Court simulations ourselves, we promise an exciting experience.

The International Criminal Court is the first permanent, treaty based, international criminal court set to put an end to impunity for the perpetrators of the most serious crimes under international criminal law. As such, you will be researching and writing preliminary opinions and memorials on cases about current crimes of concern to the international community. Moreover, you will be pioneers in the two first decisions of the International Criminal Court as the Court is still yet to deliver judgment in a case.

The ICC is a small committee, requiring a high level of engagement and participation, and may differ from simulations that delegates have been involved in before. There is no focus on country positions, but an opportunity for students to personally take positions on matters of International criminal law. Procedure is different to other committees; Counsel will present full oral arguments in both cases to the Court and Justices will deliberate and reach a decision based on what they have heard. The position papers required take the form of preliminary opinions and memorials and this guide will contain information to assist you in preparing these papers. We will both be available to discuss any issues that you may have with these documents up to the deadline of 1 March 2012.

Finally, we would like to wish you luck in your preparation and congratulate you on being appointed to the Court. We look forward to meeting you in April and invite you to contact us with any problems or to introduce yourself.

Sincerely,

*Sheraton Venue*  
Alex Tompkins  
Director

*Marriott Venue*  
Alexandra Samii  
Director

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## Message from the Directors-General Regarding Position Papers for the 2012 NMUN Conference

At the 2012 NMUN New York Conference, each delegation submits one position paper for each committee to which it is assigned. Delegates should be aware that their role in each committee affects the way a position paper should be written. While most delegates will serve as representatives of Member States, some may also serve as observers, NGOs, or judicial experts. To understand these differences, please refer to the Delegate Preparation Guide.

Position papers should provide a concise review of each delegation's policy regarding the topic areas under discussion and should establish precise policies and recommendations about the topics before the committee. International and regional conventions, treaties, declarations, resolutions, and programs of action of relevance to the policy of your State should be identified and addressed. Making recommendations for action by your committee should also be considered. Position papers also serve as a blueprint for individual delegates to remember their country's position throughout the course of the Conference. NGO position papers should be constructed in the same fashion as position papers of countries. Each topic should be addressed briefly in a succinct policy statement representing the relevant views of your assigned NGO. You should also include recommendations for action to be taken by your committee. It will be judged using the same criteria as all country position papers, and is held to the same standard of timeliness.

Please be forewarned, delegates must turn in entirely original material. *The NMUN Conference will not tolerate the occurrence of plagiarism.* In this regard, the NMUN Secretariat would like to take this opportunity to remind delegates that although United Nations documentation is considered within the public domain, the Conference does not allow the verbatim re-creation of these documents. This plagiarism policy also extends to the written work of the Secretariat contained within the Committee Background Guides. Violation of this policy will be immediately reported to faculty advisors and it may result in dismissal from Conference participation. Delegates should report any incident of plagiarism to the Secretariat as soon as possible.

Delegation's position papers can be awarded as recognition of outstanding pre-Conference preparation. In order to be considered for a Position Paper Award, however, delegations must have met the formal requirements listed below. Please refer to the sample paper on the following page for a visual example of what your work should look like at its completion. The following format specifications are **required** for all papers:

- All papers must be typed and formatted according to the example in the Background Guides
- Length must **not** exceed two single-spaced pages (one double-sided paper, if printed)
- Font must be Times New Roman sized between 10 pt. and 12 pt.
- Margins must be set at one inch for whole paper
- Country/NGO name, School name and committee name clearly labeled on the first page,
- The use of national symbols is highly discouraged
- Agenda topics clearly labeled in separate sections

To be considered timely for awards, please read and follow these directions:

1. **A file of the position paper** (.doc or .pdf format required) **for each assigned committee** should be sent to the committee email address listed in the Background Guide. These e-mail addresses will be active after November 15, 2011. Delegates should carbon copy (cc:) themselves as confirmation of receipt.
2. Each delegation should also send **one set of all position papers** to the e-mail designated for their venue: [positionpapers.sheraton@nmun.org](mailto:positionpapers.sheraton@nmun.org) or [positionpapers.marriott@nmun.org](mailto:positionpapers.marriott@nmun.org). This set will serve as a back-up copy in case individual committee directors cannot open attachments. These copies will also be made available in Home Government during the week of the NMUN Conference.

Each of the above listed tasks needs to be completed no later than **March 1, 2012 (GMT-5) for delegations attending the NMUN conference at either the Sheraton or the Marriott venue.**

**PLEASE TITLE EACH E-MAIL/DOCUMENT WITH THE NAME OF THE COMMITTEE, ASSIGNMENT AND DELEGATION NAME (Example: AU\_Namibia\_University of Caprivi)**

*A matrix of received papers will be posted online for delegations to check prior to the Conference. If you need to make other arrangements for submission, please contact Amanda D'Amico, Director-General, Sheraton venue, or Nicholas Warino, Director-General, Marriott venue at [dirgen@nmun.org](mailto:dirgen@nmun.org). There is an option for delegations to submit physical copies via regular mail if needed.*

Once the formal requirements outlined above are met, Conference staff use the following criteria to evaluate Position Papers:

- Overall quality of writing, proper style, grammar, etc.
- Citation of relevant resolutions/documents
- General consistency with bloc/geopolitical constraints
- Consistency with the constraints of the United Nations
- Analysis of issues, rather than reiteration of the Committee Background Guide
- Outline of (official) policy aims within the committee's mandate

Each delegation can submit a copy of their position paper to the permanent mission of the country being represented, along with an explanation of the Conference. Those delegations representing NGOs do not have to send their position paper to their NGO headquarters, although it is encouraged. This will assist them in preparation for the mission briefing in New York.

Finally, please consider that over 2,000 papers will be handled and read by the Secretariat for the Conference. Your patience and cooperation in strictly adhering to the above guidelines will make this process more efficient and it is greatly appreciated. Should you have any questions please feel free to contact the Conference staff, though as we do not operate out of a central office or location, your consideration for time zone differences is appreciated.

Sincerely yours,

*Sheraton Venue*  
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## Special Court for Sierra Leone

### I. The Taylor case (Prosecutor v. Charles Ghankay Taylor)

The Taylor case concerns the accusation against Charles Ghankay Taylor (hereinafter: the defendant), former President of the Republic of Liberia and leader of the National Patriotic Front of Liberia (hereinafter: NPFL). The defendant is charged with five counts of crimes against humanity, five counts of violations of Article 3 Common to the Geneva Conventions and Additional Protocol II and with one count of “other serious violations of international humanitarian law”. In particular, he is charged with: acts of terrorism; murder; violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment; rape; sexual slavery and other form of sexual violence; outrage upon personal dignity; other inhumane acts; conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; enslavement and pillage.

#### Statement of Facts

The crimes underlying the counts of the Indictment are alleged to have taken place within the time period from 30 November 1996 and about 18 January 2002, during which time an armed conflict was allegedly underway in various locations throughout the territory of Sierra Leone including, but not limited, to Kono, Kenema, Bombali and Kailahun Districts and Freetown. The Prosecution alleges that the defendant is individually responsible pursuant to Article 6(1) of the Statute and, in addition or alternatively, pursuant to Article 6(3) of the Statute for crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in the Amended Indictment.

The question presented is whether there are grounds for finding that the defendant has committed all or any of the crimes charged in the Indictment beyond any reasonable doubt. In this case, there are two interesting issues that deserve the attention of the Court. First of all, it will be very difficult to prove the defendant’s responsibility pursuant to Article 6 of the Statute. In particular, the following modes of liability will be a matter of discussion: command responsibility and, in addition or alternatively joint criminal enterprise (hereinafter: JCE). The second interesting point is that in case of conviction, the Court may also discuss the possibility of ordering a seizure of the defendant’s property as a form of punishment additional to the penalty. In this regard, it is interesting to determine whether the Court, in the event that it is unable to return the assets to their legitimate owners, may assign them to the State of Sierra Leone, and require that State to use these assets for the specific purpose of compensating the victims of the crimes falling under the jurisdiction of the Court.

#### Statement of Law

Command responsibility is provided under Article 6(3) of the Statute. This Article codifies the customary definition of this mode of liability. The *Delalić* Trial identifies the following essential elements of command responsibility, in addition to the commission of international crimes by subordinates provided for in the Statute: (i) the existence of a superior-subordinate relationship; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

According to the same Judgment, the ICTY concluded that “knew or had reason to know” means that “a superior may possess the *mens rea* required to incur criminal liability where: (i) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes” under the jurisdiction of the Court, “or (ii) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates”. With this theory, the superior is held criminally liable for not having prevented the crimes or for not having punished those responsible. This doctrine arises from the commander’s duty of supervision.

The doctrine of JCE is a mode of liability that is provided for under customary international law. This mode of liability is implicitly recognized under Article 6(1) of the Statute, which refers to “committ[ing]” international crimes, a term which includes various types of criminal conduct. In *Tadić* – the leading case as far as JCE is concerned – the Appeals Chamber of the ICTY held that the “objective elements (*actus reus*) of this mode of

participation in one of the crimes provided for in the Statute, with regard to each of the three categories of JCE, are as follows: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute, and the (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. As far as the *mens rea* element is concerned, the *Tadić* Judgment listed three different classes of JCE: the “basic” JCE; the “systematic” JCE, and the “extended” form of JCE. Accordingly, each category requires a different degree of *mens rea* element to be proved by the Prosecution.

### **Application of the Law**

In the Indictment, the Prosecutor relied on a very broad notion of individual criminal responsibility and referred to: “planning, instigating, ordering, committing, otherwise aiding and abetting in the commission of the alleged crimes, and participating in a common plan, design or purpose”. Starting from the interesting fact that Taylor never set foot in Sierra Leone during the armed conflict, this case highlights a particularly interesting aspect, namely, the possibility for the Prosecutor, beyond other potential forms of responsibility, to demonstrate the defendant’s command responsibility and/or, his participation in a JCE.

As a leader of the NPFL and as President of Liberia, and due to his close relations with Foday Sankoh and other senior leaders of the RUF, AFRC and Junta, it might seem at first sight more suitable to rely on command responsibility because Taylor allegedly directed the operations amounting to international crimes. However, the proof of this mode of liability poses many problems, including the establishment of the superior-subordinate relationship. This element requires proof of the effective control of the superior over his or her subordinates in the sense of having effective power to prevent and punish the commission of the offences. Only this kind of effective control shows that the defendant had real power to prevent or stop the commission of crimes by subordinates. And only the breach of this duty entails the criminal responsibility of the commander. In the present case, the existence of a superior-subordinate relationship may be even more difficult to prove beyond any reasonable doubt, also because this case deals with a relationship between a civilian superior and subordinates belonging to a paramilitary group. Indeed, a private citizen hardly possesses that sort of coercive means that military commanders are commonly entitled to for imposing discipline.

That is why it seems preferable to opt for a mode of direct liability, such as JCE, which actually seems to raise fewer problems when applied to civilian defendants charged with crimes committed as a part of large-scale atrocities. While the main issue with JCE is to demonstrate the existence of a common criminal design, in the present case the Prosecutor might be aided by what has recently been said by Appeals Chamber in *Brđanin*. In this Judgment, the Appeals Chamber of the ICTY recognized that: “the imposition of liability upon an defendant for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose; and does not require proof that there was an understanding or an agreement to commit that particular crime between the defendant and the principal perpetrator of the crime”.

In case of conviction, the Court may order the forfeiture of the property that the defendant has acquired unlawfully or by criminal conduct. Generally, international criminal tribunals do not apply such penalties. This may bring to surface the specific question of the SCSL’s power to return seized property to Sierra Leone and to require that State to use this property for compensating the damages incurred by the victims of the relevant crimes. In this regard, it is doubtful whether the victims of international crimes may be regarded as having a right to compensation. If the answer is yes, a question remains as to the way in which this right must be exercised and whether the Court could pronounce on this issue. As to the former issue, I think that it is possible to identify an international principle, recently formed, that affirms the right of victims to be compensated. This rule could be grounded on: the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*; the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the United Nations General Assembly on November 29, 1985; the *European Convention on Human Rights*, which supports the existence of an obligation *ex delicto*; the *European Convention on the Compensation of Victims of Violent Crimes* and the case law related to the *Alien Tort Claims Act*. Finally, the ICC Statute can be referred to as another example of international practice going in that direction.

Once this right has been established, it is up to the Court to ensure the fulfilment of this right. In this case, the best solution seems to be the establishment of a Trust Fund, similar in nature to that provided for under Article 79 of the

ICC Statute, in order to collect the property, proceeds and assets seized. It will then be up to the competent national courts to establish the concrete procedures for compensating the victims.

### **Conclusion**

The primary task of the Court is to prosecute those most responsible for crimes committed in Sierra Leone since 30 November 1996. Thus, the Court fulfils a duty that is incumbent upon the entire international community, that is, not to leave horrendous crimes (such as crimes against humanity, war crimes and other serious violations of international law) unpunished. Having said this, a fair trial cannot be separated from the protection of the victims' rights. To be fair, a trial should take due account of the interests of the victims, and it cannot disregard their legitimate expectations of justice and the universal quest for peace.

There are, *prima facie*, reasonable grounds for believing that Charles Ghankay Taylor is involved in the crimes committed in Sierra Leone during the armed conflict and listed in the Indictment. In view of the foregoing, with regard to personal liability, it seems rather unlikely that the Prosecutor will be able to prove, alongside direct liability, the command responsibility of the Accused. It will certainly be easier for the Prosecutor to prove the existence of a JCE among senior leaders of the RUF, AFRC and Junta. However, it must be stressed that, in order to reach a guilty verdict, all the elements of the crimes alleged in the Indictment must be carefully examined and proved beyond any reasonable doubt. In addition, the impartiality of the Court must be preserved until such time as the Prosecution presents the relevant evidence. Before reaching any decision on the liability of the defendant, the Court must take steps in order to guarantee the fundamental rights of the Accused to a fair and just trial.

## II. The RUF case (Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao)

The Revolutionary United Front (hereinafter: RUF) case concerns three alleged leaders of the RUF. Issa Hassan Sesay, Morris Kallon and Augustine Gbao were indicted separately on 17 counts (later amended to 18 counts) of crimes against humanity, war crimes, and other serious violations of international humanitarian law. According to the Prosecutor, the three accused persons held positions allowing them, “to exercise authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces”. Sesay, Kallon and Gbao are charged with: acts of terrorism; collective punishments; extermination; murder; violence to life, health and physical or mental well-being of persons, in particular, murder and mutilation; rape; sexual slavery and any other form of sexual violence; other inhumane acts; outrages upon personal dignity; conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities; enslavement; pillage; intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission; and the taking of hostages.

### Statement of Facts

The crimes underlying the counts of the Indictment are alleged to have taken place within the time period of 25 May 1997 to 15 September 2000, during which time an armed conflict was allegedly underway in various locations throughout the territory of Sierra Leone including, but not limited to, Bo, Kono, Kenema, Koinadugu, Bombali, Port Loko, the Kailahun Districts and the city of Freetown. The Prosecution alleges that the defendants – by holding senior positions within the RUF fighting forces during the entire period of the Indictment – are individually responsible for the crimes committed by these forces, pursuant to Article 6(1) of the Statute and, in addition or alternatively, pursuant to Article 6(3) of the Statute. The Prosecution further submits that the defendants participated in a joint criminal enterprise (hereinafter: JCE) with the AFRC, with the common plan “to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone [...] and] exercise control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the JCE”.

The general issue of the case is whether it can be proven beyond any reasonable doubt that the relevant crimes have been committed by the defendants. In general, to convict them for the crimes presented in the Indictment, it is necessary for the Prosecution to establish that the general requirements of Articles 2, 3 and 4 of the Statute are met. It is also necessary to demonstrate that the defendants are criminally liable for what happened pursuant to Article 6 of the Statute.

Three issues deserve specific attention because these are likely to raise particular problems in the trial. A first problematic issue is the identification of the criminal elements of the “attacks on UNAMSIL personnel”, since this is a relatively new offence under international criminal law. Second, it seems preferable to rely on the JCE theory rather than on the doctrine of command responsibility. However, in light of the charges listed in the Indictment, it may be difficult to distinguish the precise contours of the alleged JCE referred to by the Prosecution. In particular, there can be a JCE between the RUF and the AFRC, or a JCE within the RUF alone. Moreover, these JCEs can be consecutive in time. Third, this case can also raise the particular issue of the possible inclusion of a terror campaign as part of the common plan of the JCE.

### Statement of Law

Under count 15, the defendants are charged with attacks on UNAMSIL personnel. This charge is punishable under Article 4(b) of the Statute. This Article embodies the principles of the *Convention on the Safety of United Nations and Associated Personnel*, to which the Republic of Sierra Leone acceded on 13 February 1995. According to the AFRC and CDF Judgments, Article 4(b) requires the Prosecution to demonstrate the same *chapeau* elements as those listed in Article 3: (i) a non-international armed conflict at the time of the alleged offence; (ii) a nexus between the armed conflict and the alleged offence; and (iii) the victims must be “protected persons” pursuant to both Common Article 3 and Additional Protocol II at the time of the alleged offence. Moreover, pursuant to Article 4(b) of the Statute, it must be established that: (i) the perpetrator directed an attack; (ii) the object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; and (iii) the perpetrator was aware of the factual circumstances that established that protection. As for the *mens rea* element, Article 4(b) specifically demands the conduct to be “intentional”.

To establish individual criminal responsibility, it is necessary to consider Article 6 of the Statute referring to various models of liability such as direct liability and command responsibility. JCE as a mode of liability is implicitly recognized in Article 6(1) of the Statute, which refers to “commit[ing]” international crimes, a term which includes various types of criminal conduct. In *Tadić*, the Appeals Chamber of the ICTY held that the “objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute, with regard to each of the three categories of JCE, are as follows: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute, and the (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. As far as the *mens rea* element is concerned, the *Tadić* Judgment listed three different classes of JCE: the “basic” JCE; the “systematic” JCE, and the “extended” form of JCE. Accordingly, each category requires a different degree of *mens rea* to be proved by the Prosecution.

Articles 4(2)(d) and 13(2) of Additional Protocol II prohibit acts of terrorism and other acts aimed at spreading terror among the civilian population in internal armed conflicts. These two provisions have been included in Article 3(1)(d) of the Statute of the Court. The crime prohibiting “acts of terrorism” requires the following elements to be proved: (i) indiscriminate or disproportionate acts or threats of violence directed against persons or property; (ii) the perpetrator wilfully made persons or their property the object of those acts and threats of violence; and (iii) the acts or threats of violence were carried out with the primary purpose of spreading terror, psychologically traumatizing and damaging the majority of persons or a large segment of the population. The war crime of terror is a specific intent crime.

### **Application of the Law**

The specific problem that arises with respect to count 15 is the precise definition of the elements of the underlying crime. Since no precedent can be found in international case law, it would be necessary to identify such elements according to customary international law, and to see whether a norm prohibiting such conduct in fact exists (thus respecting the *nullum crimen, nulla poena sine lege* principle). In order to do so, the Court can refer to Article 8 (2)(e) (iii) of the Statute of the International Criminal Court concerning “War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission”, as well as to the relevant Articles of the “Convention on the Safety of United Nations and Associated Personnel”.

With regard to the elements of the crime, particular attention must be given to the victims of the attack, that is, to the determination of whether the attacked persons effectively fall under the definition of “protected persons” in the sense of Common Article 3 and Additional Protocol II at the time of the alleged offence. If the defense were able to prove that this was not the case, it would not be possible to proceed with a conviction under this count. Similarly, the proof of the *mens rea* element can be problematic: Article 3(d) explicitly requires the conduct to be carried out “intentionally”. It is a matter of debate whether the term “intentionally” is to be interpreted as specific intent as opposed to knowledge or recklessness. It can be noted, however, that in the light of Article 30 ICC it seems correct to interpret this provision broadly so that it also includes mere awareness.

Turning to individual criminal liability, the establishment of individual liability for international crimes is always difficult because these are widespread crimes generally committed at the collective level. In this case, the JCE theory is of course the mode of liability which is best suited to achieve the aim of the Court to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law committed in Sierra Leone. In this case, the main problem is the determination of the criminal purpose. Under the doctrine of JCE, the criminal design must include the crimes alleged in the Indictment. From this perspective, the case under examination can be problematic.

I do not agree with the interpretation adopted by my learned colleagues of the Trial Chamber II in the AFRC case. In that case, the Prosecution issued a very similar indictment to the one in the present case. According to that Trial Judgment, “to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone” was not inherently criminal conduct. The judges in that case were misled by the expression “to gain and exercise political power”, and interpreted the common plan exclusively as an act of rebellion. Since no international rule prohibits rebellion, they found that the Prosecution erred in pleading the facts relevant to the JCE. In my opinion, this is only an element of the criminal plan. A plan like the one presented by the Prosecutor requires, for its realization, the use of several tools and the performance of various acts. Thus, it seems more correct to read the Indictment in the sense that, in carrying out the aim of gaining and exercising political power, the defendants shared the common purpose of committing particular types of international crimes.

In showing the existence of one or more JCEs, the task of our Chamber can be facilitated considerably by what has been recently held in the Appeals Judgment against *Brđanin* and which may be referred to as a precedent. Finally, the JCE theory can significantly contribute to an effective repression of the war crime of terror. This protean crime can include many offences, which can extend over time and be characterised by a continuous commission. I think it will be necessary for the prosecution to try to prove that part of the “common design” was really the desire to start a campaign of terror against the civilian population in order to obtain a stiffer penalty in case of conviction. The main difficulty with the crime of terror is to prove its mental element. For a similar case, we can think of the difficulty of proving the *mens rea* in connection with crimes of genocide or persecution. In fact, the additional requirement of specific intent crimes is that it is not enough to show that the Accused had knowledge that his conduct would result in the commission of a crime, but it is also necessary to show that he carried out that conduct with the specific purpose of spreading terror among the civilian population.

### **Conclusion**

In light of all of the above, there are *prima facie* reasonable grounds for believing that Issan Hassan Sesay, Morris Kallon and Augustine Gbao have committed the crimes alleged in the Indictment. In light of the AFRC Trial, the Prosecutor will plead the charges with increased precision, and I would expect that it will be possible to prove the existence of at least one JCE among the defendants, even though the plan might be characterised by more limited goals but certainly aiming at the commission of the crimes listed in the Indictment. The presumption of innocence must not be forgotten, and it must be proven beyond reasonable doubt that the three defendants are guilty. Only subsequent to a fair and impartial trial in which the rights of the defence are guaranteed, will it be possible to take a decision. If the Accused is found guilty, it will be for to the Court to consider aggravating or mitigating circumstances to determine the exact penalty.

## **The Role of Staff & Committee Members**

### ***Presiding Judge (Committee Director)***

The Committee Director, who acts as Presiding Judge, will have a thorough understanding of the rules of procedure and the cases tried in front of the Court. This Staff member constructs the Committee Background Guide and Update materials and, therein, will serve as the expert on questions regarding the cases before the Court. The Director is also responsible for the procedural functions of the Committee. Working with the Under-Secretary General, he or she assures that the committee operates in a smooth and efficient manner. This requires a very thorough working knowledge of the rules of procedure and a professional presence on the dais. At the simulation, the director will be known as Presiding Judge. Please note that at NMUN, the Presiding Judge, who is a staff member, will neither interfere in any substantive debate nor vote on the Court's decision.

### ***Registrar***

The ICC will have a Registrar who will assist the Presiding Judge in administrative matters. The Registrar is responsible for retaining and preserving all evidence submitted to the Court and may take on other duties as determined by the Presiding Judge. He or she may also be called upon to assist in the preparation of final decision of the Court when required. The Registrar will be hired from the pool of applicants for chair/rapporteur positions. Due to the small size of this committee, the Registrar will be chosen from outside the Court.

### ***Judges***

Judges will be assigned by their school to represent their delegation on the court. During the simulation, the Judges will hear the cases presented before them and will deliberate to reach a decision on each case at hand. Judges need to evaluate all aspects of a given case objectively and in an impartial manner. The Judges will write preliminary opinions prior to the simulation in place of position papers (please refer to the memorials/preliminary opinions' section for more details). A sample preliminary opinion will be made available to the delegates prior to the submission date.

Please note: While Trial Chambers at the ICC normally only sit three judges, the ICC simulation at NMUN will sit eight judges in order to enable more students to take part in this new committee.

### ***Office of the Prosecutor***

Two delegates who are chosen upon individual application make up the Office of the Prosecutor. During the simulation, the Prosecutors will deliver arguments and present evidence to establish the criminal liability of the Accused. Prosecutors are also required to deliver opening and closing statements. Both Prosecutors are equally responsible for preparing arguments that they will deliver in Court prior to the Conference. The Prosecutors will submit **one** indictment in place of position papers (please refer to the memorials/preliminary opinions' section for more details). Cooperation between the two Prosecutors during the preparation for the simulation is therefore crucial.

### ***Defense Counsel***

Two delegates who are chosen upon individual application act as Defense Counsel. During the simulation, the Defense Counsel will deliver arguments and present evidence to defend the Accused and secure the Accused's right to a fair and impartial trial. Defense Counsel are also required to deliver opening and closing statements. Both Counsels are equally responsible for preparing arguments that they will deliver in Court prior to the Conference. The Defense Counsel will submit **one** legal brief in place of position papers (please refer to the memorials/preliminary opinions' section for more details). Cooperation between the two Counsels during the preparation for the simulation is therefore crucial.

### ***Victims' Representatives***

Two delegates who are chosen upon individual application will form the team of Victims' Representatives. Delegates acting as victims' representatives must bear in mind that they do so in a *legal* capacity and that they are not impersonating actual victims. During the simulation, the Victims' Representatives will deliver arguments and

present evidence to establish that the represented victims have sustained damage, loss and injury. They may also present any argument that they deem to be of interest to the case at hand, even if such argument is not directly related to victims' rights. Victims' representatives are also required to deliver opening and closing statements. Both Victims' Representatives are equally responsible for preparing arguments that they will deliver in Court prior to the Conference. The Victims' Representatives will submit **one** legal brief in place of position papers (please refer to the memorials/preliminary opinions' section for more details). Cooperation between the two Prosecutors during the preparation for the simulation is therefore crucial.

## **Guidance on the Procedure of our Simulation**

### ***Case Selection***

Two cases will be approved for simulation before the International Criminal Court. The cases selected by the Presiding Judge (the Director), and approved by the NMUN-NY Directors-General, will form the substance of the Court's docket.

### ***Preliminary Opinions, Indictment and legal briefs***

As part of the preparation for the simulation, all participants will be required to submit a position paper (please refer to the sample provided at the beginning of this guide).

#### ***Preliminary Opinions (Judges only)***

The position papers for the Judges take the form of "Preliminary Opinions." Preliminary Opinions should not reflect the Judge's particular nation's position on the topics, but their own objective opinion based on their reading, research, and assessment of the issues presented in each case. It should identify what the facts and issues are for each case as well as what possible legal standards should be applied; describe how the standards should be applied to the particular facts; and conclude how the various issues should be resolved. It should be written with the utmost objectivity and reflect on a preliminary finding of fact and law.

The Judges' Preliminary Opinions should reflect:

- A statement of facts: what are the facts of the case? Judges are required to work with the facts provided in the Background Guide and should be aware that they will be presented with evidence during the simulation. This section should end with a formulation of the most pertinent issues to the case;
- A statement of the applicable law: which provisions of the Rome Statute are applicable to the case at hand? Which precedents inform the applicable provisions and their interpretation? Judges should also consult the ICC's Elements of Crime.
- An application of the law to the facts: how does the law view the situation?
- A conclusion

#### ***Indictment and legal briefs***

The Prosecutors will submit an indictment; Defense Counsel and Victims' Representatives submit legal briefs. The indictment and the legal briefs will outline the arguments/positions for each side and should reflect the following, in this order:

- A statement of facts: what are the facts of the case, as viewed in the light most favorable to your position?
- A statement of the applicable law: which provisions of the Rome Statute are applicable to the case at hand? Which precedents inform the applicable provisions and their interpretation? Choose case that support the interpretation most favorable to your position;
- A detailed argument section, which discusses how the law and facts apply to the particular case as well as a counter-argument to the anticipated arguments (how do the laws and facts support *your* case?);

Prosecutors

- An application of the law to the facts (How does the law view the situation?)
- A summary and request for the court (what do you want the Court to do?).

The writing process should involve both delegates of each party. It is crucial that delegates get into contact with each other before the conference. The Director will provide contact details as well as guidance and advice on research resources if needed. The Director may also check in with all sides in the months prior to the Conference on a regular basis.

### *Citations*

Due to the special nature of the ICC at the 2012 NMUN Conference, basic legal citation should be used by delegates. This basic legal citation, often referred to as “Bluebook citation,” is slightly different from the citation format used in this guide. For more information on the “Bluebook citation” method (basic legal citation), contact your respective director for greater detail. Also, you can refer to the following website maintained by Cornell University Law School, which discusses this citation method: <http://www.law.cornell.edu/citation/>

### *Simulation*

The Presiding Judge will guide through the session, with the assistance of the Registrar. Time limits are set for the presentation of the cases. The efficiency of the oral arguments is necessary in order to facilitate the Court docket and adjudicate possibly both cases. In addition, in order to conform to the reality of the Conference, the times below expect a maximum time of 6-7 hours of oral argument, subject to change when necessary.

Please note: At NMUN-NY, we will simulate the “trial phase.” It is assumed that the Pre-Trial Phase has concluded with a confirmation of the charges by a Pre-Trial Chamber (in the case of the Prosecutor v. Thomas Lubanga Dyilo, this actually conforms with reality). Due to the nature of a simulation and the sensitivity of the issues discussed at the ICC, certain elements of a trial at the ICC have been altered. For example, the Accused will not be present at our simulation, neither will witnesses be called into Court to present testimonies (but witness’ statements will be provided prior to the Conference).

### *Phase 1 – Convening of Court*

The Judges will meet in order to open the Court. The following will occur in the order listed below:

1. The Opening of the session;
2. The Administration of the Oath to the Judges by the Presiding Judge;
3. Set the docket of the Court; and
4. Convene the first case.

The Prosecutors, Defense Counsels and Victims’ Representatives should be present at the first session in order to prepare for the first selected case. Once the case order has been determined, the Presiding Judge will proceed to open the court.

### *Phase 2 – Opening Statements* (Maximum time is 15 minutes for each side)

The Office of the Prosecutor makes the opening statement. The opening statement should provide the Judges with an overview of the Prosecutors’ case and allow for a preview of the evidence and witness’ testimonies to be presented. The Defense Counsel will then give their opening statement, followed by the Victims’ Representatives. The opening statements should also include a presentation of the applicable law and the legal conclusions from both parties, and conclude with a set of submissions. Victims’ Representatives may make a submission for payment of reparations. Once opening statements have concluded, the Prosecutors, Defense Counsel and/or Judges may motion for a suspension of the meeting if one is desired. It is highly advisable that delegates prepare their opening statements in advance and practice it in order to make use of the allotted 15 minutes.

### *Phase 3 – Presentation of the Case and Closing Arguments* (Maximum two hours for each side, with a 30-minute extension possible)

The Office of the Prosecutor is first to present the case. A case presentation should expand on every single argument made during the opening statement, and support each argument with witness’ statements and other evidence. Once the Office of the Prosecutor has rested, the Defense Counsel and the Victims’ Representatives will present their case in a similar fashion. During the presentation of the case, all parties should present the legal conclusions they draw from the evidence presented to the tribunal. Judges may ask questions at all times during the presentation of the cases

according to the Rules of Procedure. After each side has delivered their presentation of the cases, Closing Arguments are delivered. The Closing Argument should contain a summary of the evidence presented, and the legal conclusions drawn from it. Each party closes with a set of submissions to the Court.

*Side-note regarding evidence:*

- The permitted evidence will be provided to each side prior to the simulation, with instructions for presentation and submission. All evidence that the Office of the Prosecutor, the Defense Counsel, and the Victims' Representatives plan to submit needs to be disclosed to the other parties (but not to the Judges, who will see the evidence for the first time at the Conference)
- All parties determine individually which evidence they would like to submit, and in which order
- Please note: it is difficult to simulate the examination of witnesses. In lieu of calling witnesses into Court, each side will be presented with a number of witness' statements as part of the permitted evidence.

**Phase 4 – Evidence Examination** (No Time Limit specified, although may be limited by the Presiding Judge if needed)

Once each side has completed closing arguments, the Defense Counsel, Victims' Representatives, and Prosecutors will submit each piece of marked evidence to the Judges for examination during deliberations. The Presiding Judge will then close the open session and proceed to deliberations.

**Phase 5 – Deliberation I** (No Time Limit specified, although may be limited by the Presiding Judge if needed) Judges will meet in closed session to begin debate of the issues outlined in their position papers. As a group, the Judges will work toward formulating a rough list of questions that will be addressed to the Prosecutors and/or Defense Counsels and/or Victims' Representatives and need to be answered in order to work towards a final decision. These are based on their position papers, the indictment and legal briefs presented by the Prosecution, Defense Counsels, and Victims' Representatives, and the oral proceedings that occurred. This is a time to present any major concerns or opinions, and help other Judges work through their questions.

**Phase 6 – Questioning** - (Maximum of 60 Minutes [split evenly between Judges] w/one 15-minute extension) Judges will have the opportunity to ask questions of the Prosecution, Defense Counsel and Victims' Representatives. This is where every Judge participates actively. The Presiding Judge and the Registrar monitor the questioning and maintain order. The purpose of these questions is to clarify issues, facts, and points of law. Judges should address direct questions (to one advocate or another and allowing each one to respond. Very little conversation is involved.)

**Phase 7 – Deliberation II and Judgment**

At this time, the Judges will continue the deliberation phase of the simulation. The Judges will meet until they have reached a decision and formulate an opinion. Deliberations will be closed to the conference participants. The Prosecution, Defense Counsel, and Victims' Representatives are not permitted to be present during deliberations, either. It is highly advised that they use the time to start preparations for the second case. Judges will come up with a list of issues that need decision in order to reach a judgment. Through discussion, Judges should find understanding in each other's opinions and reach a clear judgment. The discussion will then revolve around the applicable law and evidence that was presented. During this time, several votes can be taken until the Judges feel they have reached a final decision and are ready to write their opinion(s). In the case of conviction, Judges will also need to determine a sentence; in the case of a request of reparations, the Judges need to determine the appropriate form of reparation (please refer to the Rules of Procedure for more guidance on this). If there are dissensions or concurrences, each must file their own opinion with the Presiding Judge. Once this is completed, the Presiding Judge will approve the documents and then the Court will reconvene to hear the next case, starting with Phase 2.

**Phase 9 - Verdicts Given**

Verdicts for all cases heard will be presented at the General Session on the last day of the conference during a special ceremony. Once the decision has been read, each Judge will be asked to sign the order of the Court.

**Legal Research**

Look at the documents cited in the background guide and the bibliography. Delegates should visit the Web site of the ICC (<http://www.icc-cpi.int/>) to read about the working of the Court, the memorials, counter-memorials, and applications, along with any preliminary motions made by parties to the case. YOU SHOULD PRINT A COPY OF

ALL OF THE INDICTMENTS, AND ALL RELATED MATERIAL, AND BRING IT WITH YOU TO THE CONFERENCE.

You should complete your research for this committee in a similar manner to other committees. General **search engines** can help you find sources and help you narrow your research. You should also search periodicals and journals for information related to the cases and the issues included. There are also numerous legal sites on the Internet for delegates. Some, like Findlaw and the University of Minnesota Human Rights Library are free to users. Others, like Lexis-Nexis, require a subscription. Many universities have accounts with research databases like Lexis that are available for use by their students.

Once delegates have found resources for each case, they should begin applying the relevant law. In international criminal law, the primary source of law will be the **Rome Statute**. Previous judgments of the Court give you an idea on how the Court has previously interpreted different articles of the Statute. Please note that interpretations can differ between different tribunals and that sometimes, tribunals revise their previous jurisprudence. Academic articles are a very helpful tool in understanding the developments and different interpretations of a single norm.

Below, you find a compiled list of some of the more commonly used documents in international criminal law:

- *Statute of the International Criminal Court (The Rome Statute);*
- *Geneva Conventions;*
- *Convention on the Prevention and Punishment of the Crime of Genocide;*
- *Rome Statute and its Elements of Crime;*
- *IMT Statute;*
- *Caselaw of the IMT, ICTY, ICTR and ICC.*

Academic writings, a subsidiary source of international law, also play an important role in international criminal law. As international criminal law also touches upon serious violations of human rights, the following documents, although cited less, can be of importance:

- *The Universal Declaration of Human Rights;*
- *International Covenant on Civil and Political Right;*
- *International Covenant on Economic and Social Rights;*
- *Torture Convention;*
- *Refugee Convention.*

Sources for international legal research:

- The University of Minnesota Human Rights Library (<http://www1.umn.edu/humanrts/>)
- American Society of International Law ([www.asil.org](http://www.asil.org))
- The United Nations treaty database (<http://untreaty.un.org/>)
- Lexis-Nexis ([www.lexis.com](http://www.lexis.com))
- Findlaw ([www.findlaw.com](http://www.findlaw.com))

## Introduction to international criminal law and international criminal procedure

International criminal law is a subset of international law but differs from general international law by its goal. While general international law is traditionally concerned with rights and responsibilities of states and inter-state relations, international criminal law contains prohibitions addressed to individuals.<sup>1</sup> The development of international criminal law was sparked in the 1990s with the establishment of *ad hoc* tribunals for the former Yugoslavia and Rwanda, although first developments date back further (please refer to the history section for more information on this). As the International Criminal Tribunal for the Former Yugoslavia's (ICTY) Appeal Chamber stated in the *Tadic*-case, "A state-sovereignty approach has been gradually supplanted by a human-being-oriented approach...International law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings."<sup>2</sup> In the following sections, we will analyze international criminal law from the angle of substantive law and from the angle of the international criminal procedure in front of the ICC.

### *Substantive international criminal law*

#### *Sources of international criminal law: Article 21 Rome Statute*

Sources of ICL differ from the sources of general international law contained in Article 38 (1) (a)-(d) of the *Statute of the International Court of Justice (ICJ Statute)*. The ICC has its own set of sources.<sup>3</sup> The *ICJ Statute* considers as sources of international law: treaty law, customary law, general principles of law and subsidiary means of determining the law that are judicial decisions and writings of qualified publicists. According to Article 21 (1) of the *Rome Statute*, the sources in front of the ICC are:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including (...).<sup>4</sup>

The *Rome Statute*, the *Elements of Crime* and the *Rules of Procedure and Evidence* are the first sources to be considered in any case and they have an equal status under Article 21. However, in case of conflict, the *Rome Statute* supersedes the latter two.<sup>5</sup>

The second set of sources under Article 21 comprises treaties, principles and rules of international law, including those of the law of armed conflict. A link can be made to Article 38 of the *ICJ Statute*.<sup>6</sup> Indeed, principles and rules of international law are also covered by customary international law, which is one of the sources of international law that can be applied in front of the ICJ. International law of armed conflict implies the application of the *Hague Conventions* of 1899 and 1907 but also the *Geneva Conventions* of 1949 and their two *Additional Protocols* of 1977. Thus, provisions found within these Conventions can be applied even if they cannot be found directly in the *Rome Statute*.<sup>7</sup>

The last source in the pyramidal hierarchy of sources is general principles derived from domestic laws. Again, a connection with the *ICJ Statute* can be made, as Article 38 (1) (c) of the *ICJ Statute* also refers to general principles. According to the *Rome Statute*, this source is only subsidiary, only to be applied if both other sources cannot be applied to the case. The role of domestic law illustrates the role of comparative law in international tribunals. International judges already apply such general principles before *ad hoc* Tribunals.<sup>8</sup>

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<sup>1</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 1.

<sup>2</sup> ICTY, *Prosecutor v. Tadic (Case No. IT-94-I-AR72)*, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, 1995, para. 97.

<sup>3</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 6.

<sup>4</sup> Rome Statute, Art. 21, 1998.

<sup>5</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 91.

<sup>6</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 92.

<sup>7</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 92.

<sup>8</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 92.

## ***Offences covered by the Rome Statute***

### *Genocide*

Genocide is defined in Article 6 of the *Rome Statute*. The definition of genocide in the *Rome Statute* is drawn from the *1948 Convention on the Prevention and Punishment of the Crime of Genocide*, that is

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”<sup>9</sup>

What distinguishes genocide from the other offences covered by the Rome Statute is the necessity of a high *dolus specialis*, which is the special intent to destroy in whole or in part a national, ethnical, racial or religious group as such.<sup>10</sup>

Whereas crimes against humanity and war crimes also provide for prosecution for killing or murder, this element of high specific intent is not necessary. Rather, intent on the act of murder/killing itself suffices.<sup>11</sup> But what are the protected groups protected by Article 6 of the *Rome Statute*? Until the *Akayesu*-case, protected groups were interpreted narrowly: only national, ethnical, racial or religious groups were considered protected groups. In the *Akayesu*-case, the ICTR Trial Chamber interpreted protected groups extensively as “any stable and permanent group.”<sup>12</sup> However, no other case law or state practice followed this interpretation.<sup>13</sup>

In the *Akayesu*-case, the judges also tried to provide a definition for each of the protected groups: “national, racial, ethnical, religious groups.” This has been criticized as these notions can overlap.<sup>14</sup> Thus, an alternative approach has been suggested by William Schabas, which has been followed by the ICTY Trial Chamber in the *Krstic*-case: the protected groups contained in Article II of the *1948 Convention* (Article 6 of the *Rome Statute*) form an exhaustive list, but the four groups are not given distinct and different meanings.<sup>15</sup>

Concerning the identification of the group, a balance must be found between an objective and a subjective approach. Whether or not a protected group exists must be “assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators.”<sup>16</sup> In order to prove genocide, three elements must be put together: a material element (violation of one of the five listed prohibited acts), a contextual element (a context of manifest pattern against a protected group or a destructive conduct addressed to the group) and at last the mental element (special intent to destroy in whole or in part a protected group as such).<sup>17</sup>

### *Crimes against humanity*

Article 7 of the *Rome Statute* covers crimes against humanity. Crimes against humanity are any of the eleven acts contained in Article 7 committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. The acts must be part of a widespread or systematic attack (contextual element, or *nexus*). The prosecutor has to prove either one or the other. But the attack must have reached some degree of intensity. From this standpoint, some amount of both elements is necessary.<sup>18</sup>

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<sup>9</sup> Rome Statute, Art. 6, 1998.

<sup>10</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 36.

<sup>11</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 36.

<sup>12</sup> ICTR, *Prosecutor v. Jean-Paul Akayesu (Case No. ICTR-96-4-T)*, *Judgement*, 1998, para. 516.

<sup>13</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 169.

<sup>14</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 171.

<sup>15</sup> Schabas, *Genocide*, para 109-14. ; ICTY, *Krstic, T. Ch. I*, 2.8.2001, paras. 555-6.

<sup>16</sup> ICTR, *Prosecutor v. Semanza, (Case No. ICTR-97-20-T)*, *Judgment and Sentence*, 2003, para. 317.

<sup>17</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 177.

<sup>18</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 194.

A widespread attack is a large-scale attack with a high number of victims. However, a numerical limit does not exist. It is appreciated on a case-by-case basis.<sup>19</sup> A systematic attack on the other hand relates to the high degree of organization of the attack (the planning, the use of resources, the political objectives etc).<sup>20</sup> In the *Tadic*-case, the ICTY held that a systematic attack required a “pattern or methodical plan” or “organized pattern of conduct.”<sup>21</sup> Contrary to war crimes, an attack in case of a crime against humanity does not necessarily need an intervention of armed forces.

The attack must be directed against any civilian population, Article 7 (1) *Rome Statute*. According to Article 7 (2) (a) *Rome Statute*, such an attack exists where multiple acts (same or different types) have been perpetrated against civilians. There is a controversy as to whether a policy element is needed in the attacks directed against the civilian population.<sup>22</sup> A crime, even if it is widespread, does not constitute a crime against humanity by itself. The acts perpetrated must rather be connected to each other in order to be qualified as an attack in the sense of Article 7 *Rome Statute*. The question is whether a policy element is mandatory in order to prove a crime against humanity. Authorities are divided on this issue. On the one hand, Article 7 (2) (a) of the *Rome Statute* indicates that the attack must be carried out “pursuant to or in furtherance of a State or organizational policy.” On the other hand, jurisprudence from international criminal tribunals, especially the ICTY, rejects this element.<sup>23</sup> This question also leads to another question: If such a policy element was required, is it necessary to prove a secret plan or can it be deduced from the circumstances or an inaction?<sup>24</sup>

In order to establish that a crime against humanity can be attributed to an individual perpetrator, a link between the alleged perpetrator and the attack must be made. Such a link is proven if the accused committed a prohibited act that falls objectively within a broader attack of which he was aware.<sup>25</sup> The decisive criterion is knowledge. The ICC does not require this knowledge to be detailed.<sup>26</sup> Knowledge, next to intent to commit one of the acts listed in Article 7 (1) *Rome Statute*, constitutes the mental element in crimes against humanity. Such a specific mental element does not have to be proven for war crime.<sup>27</sup>

### *War Crimes*

War crimes are defined in Article 8 of the *Rome Statute*. War crimes generally refer to grave breaches of the *Geneva Conventions*. However, the definition of war crimes under the *Rome Statute* differs considerably from the ICTY and ICTR statutes. While those simply refer to the *Geneva Conventions*, Article 8 contains a closed list of actions that can be constitutive of war crimes both for international armed conflicts as well as non-international armed conflicts. War crimes constitute the oldest category amongst the four types of offences. They have been punished since the first days of international criminal law and were codified in the *Nuremberg Charter* and subsequently in the *Geneva Conventions*. One of the main problems up to the mid-90s concerned the scope of international responsibility for war crimes. Except for common Article 3 of the *Geneva Conventions* and *Additional Protocol II*, the *Geneva Conventions* only protected victims of international armed conflict, but not of internal armed conflicts.<sup>28</sup> The drafters of the *Geneva Conventions* explicitly excluded the latter.

The ICTY followed this interpretation when it adopted its Statute in May 1993, limiting its jurisdiction to a range of war crimes to international armed conflicts.<sup>29</sup> But innovation was on its way when the Statute of the ICTR was adopted a year later. The Security Council stated that war crimes in internal armed conflicts should also be punished.<sup>30</sup> A year after, the ICTY surprisingly followed this track by interpreting its Statute broadly by establishing two types of war crimes: those committed during internal armed conflict and those committed in international armed

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<sup>19</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 194.

<sup>20</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 194.

<sup>21</sup> ICTY, *Prosecutor v. Tadic, Opinion and Judgment*, 1997, para. 648.

<sup>22</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 195.

<sup>23</sup> Schabas, *Introduction to International Criminal Law*, 2004, p. 197.

<sup>24</sup> Schabas, *Introduction to International Criminal Law*, 2004, p. 196.

<sup>25</sup> Schabas, *Introduction to International Criminal Law*, 2004, p. 200.

<sup>26</sup> Schabas, *Introduction to International Criminal Law*, 2004, p. 200.

<sup>27</sup> ICTY, *Prosecutor v. Tadic, Opinion and Judgment*, 1997, para. 656.

<sup>28</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 53.

<sup>29</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 2.

<sup>30</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 53.

conflicts. In the *Tadic*-case, the judges justified their interpretation by the evolution of customary international law.<sup>31</sup> Keeping in mind these developments, there were no longer doubts about the scope of war crimes when the *Rome Statute* was adopted in 1998. Both international/internal armed conflicts are covered by Article 8 of the *Rome Statute*. However, contrary to the ICTR and ICTY Statutes, the *Rome Statute* only covers the closed list set out in Article 8. This article provides for war crimes committed during international armed conflicts as well as during non-international armed conflicts. Within the subset of non-international armed conflicts, there are two categories: armed conflicts under Article 3 common to the *Geneva Conventions* and armed conflicts under *Additional Protocol II*. This detailed organization of war crimes is said to have a negative effect because as detailed as it is, loopholes exist for defense arguments. In the *Kupreskic*-case, the ICTY stated that, “an exhaustive categorization would merely create opportunities for evasion of the letter of prohibition.”<sup>32</sup> The main characteristic of war crimes in comparison to the other categories is that it does not have a jurisdictional threshold in the form of a nexus element or *dolus specialis*. It can thus cover isolated acts committed by individual soldiers without orders of a higher authority.<sup>33</sup> This is not possible for crimes against humanity and genocide as they both have a jurisdictional threshold. However, you do need to establish the existence of either an international or a non-international armed conflict. Especially for the latter, a certain threshold (“protracted” armed violence) is required.<sup>34</sup> Therefore, Article 8 has been called a “*non-threshold threshold*.”<sup>35</sup>

How can a war crime be established? Firstly, an armed conflict must exist either internally or internationally. From a temporal perspective, a war crime can be committed after the conclusion of the conflict.<sup>36</sup> From a territorial perspective, a war crime can in some cases be covered by Article 8 even if committed in a state different from the one where the original conflict started as long as there is a connection to the original conflict. The judges of the ICTY in the *Tadic*-case put emphasis on that. According to them, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>37</sup> Secondly, the Prosecutor must prove that the perpetrator had knowledge of the existence of an internal/international armed conflict. The relevant criterion is awareness of the facts (the context) that led to the armed conflict.<sup>38</sup> Thirdly, there must be a *nexus* (a connection) between the act perpetrated and the conflict. This condition has been developed by case law of *ad hoc* Tribunals such as in the *Kunarac*-case. The Trial Chamber of the ICTY explained that a *nexus* does not require that

“the offences be directly committed whilst fighting is actually taking place, or at the scene of combat. Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.”<sup>39</sup>

In the *Akayesu*-case, the Appeals Chamber of the ICTR ruled that there are no specific restrictions on persons who could be charged with war crimes (e.g. only members of the armed forces etc). If such restrictions existed, “international humanitarian law would be lessened and called into question,” as such restrictions would enable impunity of those who are criminally responsible.<sup>40</sup>

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<sup>31</sup> ICTY, *Prosecutor v. Tadic (Case No. IT-94-1-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, 1995.

<sup>32</sup> ICTY, *Prosecutor v. Kupreskic et al. (Case No. IT-95-16-T), Judgment*, 2000, para. 563.

<sup>33</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 55.

<sup>34</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 55.

<sup>35</sup> Von Hebel and Robinson, *Crimes within the Jurisdiction*, p. 124.

<sup>36</sup> Schabas, *An Introduction to International Criminal Court*, p. 56.

<sup>37</sup> ICTY, *Prosecutor v. Tadic (Case No. IT-94-1-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, 1995, para. 70.

<sup>38</sup> ICC, *Elements of Crimes, Art. 8, Introduction*.

<sup>39</sup> ICTY, *Prosecutor v. Kunarac et al. (Case No. IT-96-23 and IT-96-23/1-A), Judgment*, 2001, para. 568.

<sup>40</sup> ICTY, *Prosecutor v. Akayesu (Case No. IT-96-23 and IT-96-23/1-A), Judgment*, 2001, para. 568.

## *Crimes of aggression*

Crimes of aggression were not defined when the Rome Statute was adopted but are now defined as a consensus on a definition was reached at the Review Conference on the Crime of Aggression in Kampala in Uganda in 2010. The definition of the crime of aggression is based on United Nations General Assembly resolution 3314 (XXIX) of December 14, 1974 and is defined as a “crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter.”<sup>41</sup> However, the ICC will not be allowed to prosecute for this crime until at least 2017 as the exercise of its jurisdiction depends on a decision to be taken after January 1, 2017 by the same majority of States Parties required for the adoption of an amendment to the Statute, and one year after the ratification or acceptance of the amendments by thirty States Parties.<sup>42</sup>

### ***Individual criminal responsibility (Articles 25 et seq.)***

As the ICC has been established in order to try individuals and not States, establishing individual criminal liability is necessary in order to enforce international criminal law.

#### *Article 25: individual criminal responsibility*

Article 25 covers individual criminal responsibility of those who organize and incite genocide, crimes against humanity, war crimes and the crime of aggression, whether they are the principal offenders or accomplices who aid or abet principal offenders. Complicity is addressed in Article 25 (3) (b) which covers individuals who “order, solicit or induce” crime. Article 25 (3) (c) covers complicity by those who “aid, abet or otherwise assist” in the crime. The *Rome Statute* does not indicate whether there is a certain degree that must be reached for complicity to be established. But it is clear that the simple presence at the place where the crimes are perpetrated is not sufficient to establish individual criminal responsibility. This does however not apply to the responsibility of commanders and other superiors, as the failure to intervene can be constitutive of incitement to the crime.<sup>43</sup>

Moreover, the *Rome Statute* also refers to direct and public incitement to commit genocide. It constitutes an offence even if the goal is not reached.<sup>44</sup> The *Rome Statute* requires an overt act as evidence of conspiracy without having to prove that the crime was committed.

In addition to that, paragraph (3) (d) of Article 25 addresses the question of “the commission or attempted commission of (such) a crime by a group of persons acting with a common purpose.” Those who take part are liable for acts committed by the other members of the group if their participation is intentional and either made in knowledge of the intention of the group or in order to further their criminal activity or the purpose of the group.<sup>45</sup> The case law of the ICTY has developed the concept of “joint criminal enterprise” as a way to induce individual criminal liability. Joint criminal enterprise enables to condemn someone for crimes committed by others if such crime was reasonably foreseeable because of a common plan.<sup>46</sup> Joint criminal enterprise simply requires that the accomplice shared a “common plan” with the principal perpetrator.<sup>47</sup> The judges of the ICC may be influenced by this theory in their interpretation of Article 25 of the *Rome Statute* and apply it in the cases that will be brought to them. For the *Tadic*-case, the ICTY Appeals Chamber wrote in its judgment that negligence is not enough for this theory to be applied, “what is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.”<sup>48</sup> This has been largely criticized by many voices in the literature.<sup>49</sup>

Article 25 (3) (f) covers liability for attempted crimes. The question is what acts prior to committing the actual act should be considered. The *Rome Statute* states that, “actions that commences (the crime's) execution by means of a

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<sup>41</sup> *Official Records of the Review Conference*, 2011, page 6, para 33.

<sup>42</sup> *Official Records of the Review Conference*, 2011, page 6, para 33.

<sup>43</sup> ICTY, *Prosecutor v. Tadic (Case No. IT-94-I-A)*, Judgment, 1999, para. 192.

<sup>44</sup> Rome Statute, Art. 25 (3) (e), 1998.

<sup>45</sup> Rome Statute, Art. 25 (3) (d), 1998.

<sup>46</sup> Schabas, W., *The UN International Criminal Tribunals*, 2006, p. 309.

<sup>47</sup> Schabas, W., *The UN International Criminal Tribunals*, 2006, p. 309.

<sup>48</sup> ICTY, *Prosecutor v. Tadic (Case No. IT-94-I-A)*, Judgment, 1999, para. 222.

<sup>49</sup> Schabas, W., *The UN International Criminal Tribunals*, 2006, p. 315.

substantial step should be taken into account.” However, the Statute enables the defendant to plead that he has voluntarily abandoned doing so.

#### *Article 28: Responsibility of commanders and other superiors*

Article 28 of the *Rome Statute* covers the responsibility of commanders and other superiors. The concept of superior responsibility was already applied by the ICTY, which had jurisdiction over “persons who through their position of political or military authority, are able to order the commission of crimes within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes.”<sup>50</sup> The *Rome Statute* requires proof of guilt beyond reasonable doubt in order to link the commander to the crimes committed by its subordinates. But in the absence of evidence, would it still be possible to convict the commander? The ICTY was reluctant to this when it had to indict Milosevic for crimes against humanity. Indeed, although the press had established him as the commander of the crimes against humanity, the judges required more evidence in order to give their judgment.<sup>51</sup> Ultimately, no judgment was delivered due to Milosevic's death. The solution that the ICC found and that is contained in Article 28 of the *Rome Statute* is to condemn a commander because of negligence in preventing the crime if direct proof of his involvement cannot be found. The ICTY on the other hand does not apply this in its case-law as the example of the the *Celebici*-case shows.<sup>52</sup> This reluctance to consider the argument of negligence can be understood about the principle *nullum crimen sine lege* (there must be no crime or punishment unless it has been fixed by the law).<sup>53</sup>

#### *Article 30: The mental element*

The mental element or *mens rea* (translated as guilty mind) of the crime is the subjective element thereof whereas Articles 25 (individual criminal responsibility) and 28 (responsibility of commanders and other superiors) are part of the objective elements of the crime. The mental element consists of perpetrating a criminal act intentionally and knowingly. Article 30 defines these two elements as

“2.(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. (...)”knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>54</sup>

In theory, this *mens rea* is necessary but in practice most of the time, the *mens rea* is already contained in the definition of the crime. For genocide, it is the intent to destroy, for crimes against humanity a widespread or systematic attack directed directly against a civilian population with knowledge of the attack and for war crimes in the long list of crimes with adjectives such as “wilfully” or “treacherously.” However, *mens rea* with regard to the specific acts in question such as killing and abducting will still have to be established. This is true for all acts listed in the various punishable offences in the *Rome Statute*. In the case of indirect commission or superior responsibility, the mental element can be difficult to prove, contrary to direct commission. Article 30 states that it is applicable unless “otherwise provided.”<sup>55</sup> Thus, Article 28 (negligence suffices to establish command responsibility) and 25 (3) (d) (ii) (liability of participants in criminal acts even if they don't know the specific intent of their colleagues) do not require the establishment of intent.

#### *Exclusion of criminal responsibility*

The *Rome Statute* contains several grounds on which criminal responsibility can be excluded. Article 26 addresses the exclusion of jurisdiction over persons under eighteen. The ICC does not have jurisdiction over individuals younger than eighteen years old. Article 29 deals with the non-applicability of statute of limitations. Article 31 mentions a number of grounds for excluding criminal responsibility, most importantly mental incapability and self-defense. Article 32 covers mistake of fact (which leads to exclusion of criminal responsibility) and mistake of law

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<sup>50</sup> ICTY, *Prosecutor v. Martić (Case No. IT-95-11)*, Judgment, 1996, para. 21.

<sup>51</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 105.

<sup>52</sup> ICTY, *Prosecutor v. Delalić (Case No. IT-96-21-A)*, Judgment, 2001, para. 241.

<sup>53</sup> Schabas, *An Introduction to International Criminal Law*, p. 107.

<sup>54</sup> Rome Statute, Art. 30, 1998.

<sup>55</sup> Rome Statute, Art. 30, 1998.

(which does not). Article 33 addresses superior orders, which can under certain circumstances constitute a ground for exclusion of responsibility, and prescription of law.

Article 27 provides irrelevance of official capacity. The official capacity of the defendant in front of the ICC does not influence his or her individual criminal responsibility, whether the defendant be a head of a state or a member of the government. Moreover, immunity as a head of state does not affect the jurisdiction of the Court. This was held by the ICJ in its *Yerodia*-case and was confirmed in the Special Court for Sierra Leone *Taylor*-case.<sup>56</sup>

### ***Summary of steps to go through***

First, identify which offences could be affected and relate them to the facts. Then search in the different sources that can be used in front of the Court – investigate whether all elements of crime are fulfilled. Finally, establish international criminal responsibility and *mens rea*. Look whether there are defences that can be invoked.

## **International criminal procedure**

### ***Procedural law***

Jurisdiction of the Court must be distinguished from admissibility. Jurisdiction refers to the legal parameters under which the Court can act. Jurisdiction of the ICC must be established in terms of jurisdiction *ratione materiae*, jurisdiction *ratione temporis*, and jurisdiction *ratione loci*. Admissibility is only to be examined once jurisdiction of the ICC has been established.

### ***Jurisdiction of the Court***

#### *Ratione materiae*

Jurisdiction *ratione materiae* relates to the subject matter of any given trial. The ICC can prosecute genocide, crimes against humanity, war crimes and crimes of aggression, Article 5 *Rome Statute*.

#### *Ratione temporis*

The ICC does not have jurisdiction over acts carried out before the entry into force of the *Rome Statute* on July 1, 2002. Only crimes for which the court has jurisdiction *ratione materiae* that were perpetrated after that date can be brought to the ICC. National courts can still punish the crimes that occurred prior to that date and if the state refuses to proceed, universal jurisdiction over such crimes could be used as a tool by another state.<sup>57</sup>

#### *Ratione Loci*

If the crime has been committed on the territory of a state party, the ICC has jurisdiction regardless of the nationality of the offender, Article 12 (2) (a) *Rome Statute*. Territory is interpreted broadly: it extends to the land territory of the whole state and board vessels and aircrafts registered in the state party.<sup>58</sup> The ICC has also jurisdiction if the offender is a national of a state party to the *Rome Statute*, Article 12 (2) (b). Lastly, a state may also accept *ad hoc* jurisdiction for acts committed on its territory or over its nationals, Article 12 (3).

### ***Trigger mechanisms: three under Article 13 of the Rome Statute***

There are three trigger mechanisms that can be classified in two categories: the Prosecutor's power to initiate an investigation and referrals.

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<sup>56</sup> SCSL, *Prosecutor v. Charles Taylor (Case No. SCSL-2003-01-1)*, *Decision on Immunity from Jurisdiction*, 2004.

<sup>57</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 70.

<sup>58</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 70.

*The Prosecutor may begin an investigation on his or her own initiative*

The Prosecutor has the power to investigate *proprio motu*, which means on his or her initiative. However, in order to prevent any politically motivated investigation, the Prosecutor's powers are limited by Article 15 of the *Rome Statute*. Prior to opening the investigation, he must get an authorization from the Pre-Trial Chamber. Moreover, his powers are limited by the principles contained in the concept of jurisdiction, admissibility and rules regarding evidences. The case *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11)* was submitted to the Court after investigation *proprio motu* of the Prosecutor.

*A State Party to the ICC Statute may refer the case to the Prosecutor*

The situation in the Democratic Republic of Congo, which resulted in the case *Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06)*, amongst others, was submitted by the Democratic Republic of Congo. Originally, the concept of referral was to be one state referring events in *another* state to the ICC. In practice, as the Congo situation shows, it has turned out to be a mechanism of self-referral. Similarly, the situations in the Central African Republic and Uganda are the result of self-referrals.

*The Security Council may refer a situation to the Prosecutor, acting under its Chapter VII powers (even where it concerns crimes committed in the territory of a non-State Party).*

The case *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi (Muammar Gaddafi), Saif Al-Islam Gaddafi and Abdullah Al-Senussi (ICC-01/11-01/11)* was submitted by referral of the Security Council. There was substantial political debate on this trigger mechanism, as the ICC is supposed to be independent from the UN.

#### ***Admissibility issues: complementarity (Article 17 Rome Statute)***

Admissibility issues address the balance that must be found between national legal systems and the ICC. Article 17 of the Statute provides that a case will be ruled inadmissible if it is already appropriately dealt with by a national legal system. The idea is that both legal systems must be complementary to one another. This principle is called complementarity.

Complementarity has several aspects. Article 17 (1) of the Statute provides that if a case is already investigated or prosecuted by a State that has jurisdiction or if after the investigation it has decided not to prosecute, the case should be ruled inadmissible by the ICC. However, if the state is "unwilling or unable genuinely" to investigate or prosecute, the case will be admissible. Indicators to determine unwillingness or inability are contained in Article 17 (2) and (3) respectively, but the term "genuinely" is left to the interpretation of the Court. Unwillingness can be proven if a state is going through the process but has in fact no will to go through with it. The Statute says that in that case, an assessment of the quality of the justice must be made and the national system should be compared to the due process standards provided for by international law. Inability covers all situations in which a state cannot reach the accused or collect evidence or testimonies and is thus unable to further pursue the proceedings against the accused. The Statute clearly states that inability should be interpreted as "total or substantial collapse or unavailability of its national system." Whether complementarity is a necessary requirement when the Security Council refers a case to the ICC is an issue of dispute. It seems that the admissibility criterion has been left intentionally unresolved in the writing process of the Rome Statute.<sup>59</sup> Moreover, if a case has already been tried by a national court, double jeopardy is prohibited under the principle *non bis in idem*, Article 20 *Rome Statute*.

#### ***Proceedings before the ICC (Articles 53 et seq.)***

The proceedings before the ICC are particular as the Court Chambers have large powers and can intervene during the proceedings. The three trigger mechanisms analyzed earlier are the three sources of initiation of prosecution. Afterwards, the Court must rule on jurisdiction and admissibility issues. Regarding the investigation, the Prosecutor must investigate "incriminating and exonerating circumstances equally."<sup>60</sup> At any moment after the initiation of the investigation, the Prosecutor may ask for a warrant of arrest from the Pre-Trial Chamber. The latter will evaluate if there are reasonable grounds to believe the person has committed a crime within the jurisdiction of the Court. Once,

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<sup>59</sup> Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 1999.

<sup>60</sup> Rome Statute, Art. 54 (1), 1998.

he or she has been arrested, the accused may be brought to the Court by two ways: surrender from the State where the accused is staying, or voluntary presentation by the accused himself. Subsequently, the Pre-Trial Chamber will hold a confirmation hearing to confirm the charges. Charges are only to be confirmed if there is sufficient evidence to establish substantial grounds to believe that the accused committed the crimes charged, Article 61 (7) *Rome Statute*. After the confirmation of charges, the Trial phase will start. All relevant and necessary evidence will be accepted.<sup>61</sup> The defense has the right to examine witnesses on the same basis as the Prosecutor.<sup>62</sup> During the trial phase, victims may present their views and concerns through legal representatives, Article 68 (3) *Rome Statute*, as long as this does not prejudice the accused's right to a fair and impartial trial. By the end of the trial, the Trial Chamber will render a decision, and in case of conviction, establish a sentence. The judgment can be subject to appeal to the Appeals Chamber. During the appeal, the execution of the sentence is suspended.

## Annotated Bibliography

### *Introduction to international criminal law and international criminal procedure*

Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E. (2007). *An Introduction to International Criminal Law and Procedure*. United Kingdom: Cambridge University Press.

*Written by four international lawyers who also have experience in teaching, this book covers both aspects of material law and procedural aspects of the International Criminal Court. Delegates are highly encouraged to read this book as international criminal law is explained in an accessible yet detailed way in order to understand international criminal law and the proceedings in front of the Court in a clear and complete manner..*

International Criminal Tribunal for the former Yugoslavia. (1999). *Prosecutor v. Tadic* (Case No. IT-94-1-A). Judgment of July 15, 1999. Retrieved August 22, 2011 from <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>

*As the International Criminal Court has not ruled on a case yet, the Tadic judgment is a key decision regarding war crimes. A landmark case of international criminal law, the Tadic-case will surely influence the decisions of the judges of the International Criminal Court. Therefore, delegates are encouraged to read it as an introduction to international humanitarian law and international criminal law.*

International Criminal Tribunal for the former Rwanda. (2001). *Prosecutor v. Akayesu* (Case No. IT-96-23 and IT-96-23/1-A). Judgment of February 22, 2001. Retrieved August 22, 2011 from <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>

*As the International Criminal Court has not ruled on a case yet, the Akayesu judgment is a landmark case regarding genocide. Nevertheless, it is highly disputed and has been criticized in literature. Delegates are thus invited to read it as it enables debate.*

The Rome Statute. (1998). Retrieved August 22, 2011 from <http://untreaty.un.org/cod/icc/statute/rome.htm>

*The Rome Statute is essential for delegates as it is the only source of law that the International Criminal Court uses in order to render its judgments. Delegates should read the Rome Statute and compare it with the doctrinal and case-law evolution of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for the former Rwanda. Delegates are also highly encouraged to bring a print copy of the Rome Statute to the Conference.*

Schabas, W. (2004). *An Introduction to the International Criminal Court*. United Kingdom: Cambridge University Press.

*William Schabas, Human Rights Law Professor, covers all the essentials of substantive international criminal law and the procedural aspects in front of the International Criminal Court in this book. Delegates are highly encouraged to read this book as it also covers controversial points that delegates could use as arguments during the simulation.*

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<sup>61</sup> Rome Statute, Art. 69 (3), 1998.

<sup>62</sup> Rome Statute, Art. 67 (1) (e), 1998.

Boas, G. and Schabas W. (2003). *International Criminal Law Developments in the Case Law of the ICTY*. The Netherlands: Martinus Nijhof Publishers.

*This book focuses particularly on the international and criminal law developments that have taken place in the judgments of the International Criminal Tribunal for the former Yugoslavia and the ad hoc International Criminal Tribunal for Rwanda. Delegates are invited to read the commentaries on the judgments of relevant cases that might influence the International Criminal Court for the arguments they would like to submit to the Court.*

Dormann, K. (2003). *Elements of War Crimes under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press.

*Delegates are encouraged to consult this book as it analyzes the negotiating history that led to the adoption of the elements of war crimes. As it presents existing jurisprudence relevant to the interpretation of the war crimes in the International Criminal Court Statute and provides critics on the substance of the crimes, delegates should consider this source necessary to the understanding of war crimes in international criminal law.*

Cassese, A., Gaeta, P. and Jones, J. (2002). *The Rome Statute of the International Criminal Court: A Commentary* Oxford: Oxford University Press

*This Commentary examines to what extent the Rome Statute codifies the case law developed by the ad hoc Tribunals for Yugoslavia and Rwanda and national courts or departs from it. It is a great read to understand some of the recent developments of international criminal law. Delegates are invited to use this book as a tool for a better understanding of the Rome Statute.*

Triffterer, O. (1999). *The Rome Statute of the International Criminal Court Observers' Notes. Article by Article*. Germany: Baden-Baden.

*This Commentary gives a detailed article-by-article analysis of the Statute as well as the "Elements of Crime" and the "Rules of Procedure and Evidence." Each provision of the Rome Statute is explained in-depth, pointing delegates to controversies surrounding single articles. Delegates are encouraged to read the commentary when facing difficulties understanding specific provisions of the Rome Statute.*

Cassese, A. (1998). On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law. *European Journal of International Law*, 9 (2).

*This article focuses on the obstacles to the prosecution and punishment of individuals accused of violations of international humanitarian law by international or national tribunals. Cassese argues that state sovereignty is an obstacle to the effective enforcement of international criminal justice although tribunals are vital in the struggle to uphold the rule of law. Delegates should consider this source as a good introduction to the challenges of implementing international criminal law.*

## **History of the International Criminal Court**

### ***Introduction and Functions***

The International Criminal Court (ICC) was created by the Rome Statute, which came into force on July 1, 2002, and has been signed and ratified by 114 states.<sup>63</sup> The ICC is empowered to prosecute individuals for certain violations of international law, set out in the Rome Statute, for which individual criminal responsibility can be established.<sup>64</sup> The Court may hear cases where the violations of international law are allegedly committed by a national of a state party to the Rome Statute, allegedly committed within the territory of a state party, or when an investigation of the actions of an individual is carried out following the UN Security Council referring a situation to the Court.<sup>65</sup> The Court is

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<sup>63</sup> *The Rome Statute of the International Criminal Court*, 1998.

<sup>64</sup> International Criminal Court, *The ICC at a glance*, 2011.

<sup>65</sup> International Criminal Court, *Jurisdiction and Admissibility*, 2011.

situated at The Hague in the Netherlands, where 18 judges hear cases.<sup>66</sup> The first case, *The Prosecutor v Thomas Lubanga Dyilo*, began in 2009 and is still ongoing.<sup>67</sup>

The ICC is an independent permanent Court, which should not be confused with temporary tribunals such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, which have specific mandates to investigate and prosecute individuals for actions taking place in the 1990s.<sup>68</sup> It should also be considered that the ICC is not affiliated with the International Court of Justice, the judicial organ of the United Nations, which hears cases between state parties and is not able to consider the actions of individuals.<sup>69</sup> The ICC is independent from the United Nations, but maintains a close working relationship with the Security Council.<sup>70</sup>

## **History**

Formal international cooperation in tackling issues of criminality can be traced back to the response to piracy and slavery in the nineteenth century.<sup>71</sup> In 1856, the Paris Declaration Respecting Maritime Law, a bilateral treaty made between the United Kingdom and France, sought to abolish all forms of piracy in combat.<sup>72</sup> This treaty was subsequently ratified by many other states, and is an early example of an international agreement on prohibition and criminalization of certain acts.<sup>73</sup> In 1890, a specially convened conference created the General Act for the Repression of the African Slave Trade, which called upon all signatories to criminalize slave trading.<sup>74</sup> Despite this progress in achieving the first form of international criminal law, these early efforts lacked any enforcement mechanisms.<sup>75</sup> The creation of a judicial body was not contemplated at this time, and international criminal law was not seen as a priority within the international community.<sup>76</sup>

Soon afterward however, The Hague Conventions of 1899 and 1907 resulted in the creation of an initial framework of what has become known as the “laws of war,” including rules that soldiers should wear distinctive emblems and carry arms openly, certain forms of prohibited weapons, and an affirmation that prisoners of war should be humanely treated.<sup>77</sup> This progress was built upon by the Geneva Conventions of 1864, 1906, 1929, and 1949, which created a new legal framework for conduct during wartime and are signed and ratified by all members of the United Nations.<sup>78</sup> The conventions cover the treatment of the wounded and sick in armed forces in the field, the condition of wounded, sick, and shipwrecked members of armed forces at sea, the treatment of prisoners of war and the protection of civilian persons in time of war.<sup>79</sup> The extensive content of the conventions provided a benchmark for later attempts to form international consensus on criminal issues.<sup>80</sup>

The Treaty of Versailles, signed in 1919 after World War I, included a provision that Kaiser Wilhelm be criminally tried for his role as an “author of war.”<sup>81</sup> The Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties was also created following the War.<sup>82</sup> Following the recommendations of the Commission, an Ad Hoc Tribunal was agreed upon and set up in Leipzig to prosecute Kaiser Wilhelm for initiating the first World

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<sup>66</sup> International Criminal Court, *Structure of the Court*, 2011.

<sup>67</sup> *The Prosecutor v Thomas Lubanga Dyilo*, 2006.

<sup>68</sup> The International Criminal Tribunal for the Former Yugoslavia, *About the ICTY*, 2011.

The International Criminal Tribunal for Rwanda, *Home*, 2011.

<sup>69</sup> International Criminal Court, *Frequently Asked Questions*, 2011.

<sup>70</sup> International Criminal Court, *Structure of the Court*, 2011.

<sup>71</sup> BBC, *The Law Against Slavery*, 2011.

<sup>72</sup> British State Papers, *Declaration Respecting Maritime Law*, 1856.

<sup>73</sup> *Slavery Convention*, 1926.

<sup>74</sup> *Slavery Convention*, 1926.

<sup>75</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>76</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>77</sup> *Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 1907.

<sup>78</sup> ICRC, *The Geneva Conventions of 1949, and their additional protocols*, 2011.

<sup>79</sup> *Convention relative to the Treatment of Prisoners of War*, 1949.

*Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1949.

*Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949.

*Convention relative to the Protection of Civilian Persons in Time of War*, 1949.

<sup>80</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>81</sup> *The Versailles Treaty*, 1919.

<sup>82</sup> Schabas, *An Introduction to the International Criminal Court*, 2001.

War.<sup>83</sup> The Ad Hoc Tribunal did not enjoy a great deal of success, however, as the Kaiser had fled to the Netherlands, who refused to extradite him to face trial.<sup>84</sup> Preliminary trials began against 12 military officers but collapsed as political will for the Leipzig Tribunal subsided.<sup>85</sup>

There followed a period of inactivity as focus turned to the new international legal landscape incorporating the League of Nations.<sup>86</sup> The onset and end of World War II brought with it a strong will among states to have recourse to punish individuals responsible for breaches of international law.<sup>87</sup> In 1943, the Allies established the United Nations War Crimes Commission.<sup>88</sup> The work done by this Commission enabled the establishment of the International Military Tribunal at Nuremberg through the London Charter of the International Military Tribunal (London Charter).<sup>89</sup> The London Charter, borrowing heavily from the Hague and Geneva Conventions, detailed three categories of crimes available to the International Military Tribunal: crimes against peace, defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;” war crimes, defined as: “violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;” and crimes against humanity, defined as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war” and further as “persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>90</sup> The Charter also clarified that “leaders and organizers participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed.”<sup>91</sup>

Following the fall of Nazi Germany, several high-ranking officials were tried and convicted by the International Military Tribunal, which saw the first full implementation of the crimes that the ICC uses today.<sup>92</sup> Prosecutions followed in Japan, which used the same model as Nuremberg to create the International Tribunal for the Far East.<sup>93</sup> The trials in Japan were legally similar, although the application of the law was irregular and highly politicised, and as a result the International Military Tribunal for the Far East is regarded as having being less successful.<sup>94</sup> The end of the International Military Tribunals also resulted in the publication of the Nuremberg Principles in 1950, which codified all crimes punishable under international law and also documented rules of procedure designed to secure a fair trial.<sup>95</sup> By 1950, an international criminal legal system had been formed and had been operated in post-war Germany and Japan, albeit with varying degrees of success.<sup>96</sup>

Priority within the newly formed United Nations turned to economic restoration and cooperation, and away from criminal punishment.<sup>97</sup> The International Law Commission (ILC) worked on international criminal codes, and

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<sup>83</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>84</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>85</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>86</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>87</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>88</sup> The National Archives, *Second World War: war crimes 1939-1945*, 2011.

<sup>89</sup> Charter of the International Military Tribunal, *London Agreement*, 1945.

<sup>90</sup> Article 6, Charter of the International Military Tribunal, *London Agreement*, 1945.

<sup>91</sup> Article 7, Charter of the International Military Tribunal, *London Agreement*, 1945.

<sup>92</sup> Schabas, *An Introduction to the International Criminal Court*, 2001.

<sup>93</sup> Schabas, *An Introduction to the International Criminal Court*, 2001.

<sup>94</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>95</sup> International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 1950.

<sup>96</sup> Schabas, *An Introduction to the International Criminal Court*, 2001;

Cherif Bassiouni, M. *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>97</sup> Van Schaack, and Slye, *Concise History of International Criminal Law: Chapter 1 of Understanding International Criminal Law*, 2007.

although recommendations received little attention, important groundwork was established.<sup>98</sup> The failure of the United Nations to act in the situations in Yugoslavia and Rwanda in the 1990s led to the creation of a strong political will among states to create a solution and a deterrent for perpetrators of war crimes and crimes against humanity.<sup>99</sup> The Ad Hoc Committee on the Establishment of an International Criminal Court was mandated by the General Assembly in 1994, leading to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda being established in 1994 and 1995 respectively.<sup>100</sup> Academics began calling for a permanent international court to operate as a constant deterrent and not only on an *ad hoc* level.<sup>101</sup> Distinguished academics and lawyers began drafting the Rome Statute in 1994, with the final version being opened for ratification in 1998.<sup>102</sup> The Statute came into force on July 1, 2002, and the Court began working, with the first trial hearing taking place in 2009.<sup>103</sup>

### ***Institutions of the Court***

The ICC is comprised of three independent institutions; the office of the Prosecutor, the office of Public Counsel for the Defence, and the office of Public Counsel for Victims.<sup>104</sup>

The office of the Prosecutor plays a key role in the operation of the Court; it investigates situations that are referred to the Court and also has the power to conduct investigations.<sup>105</sup> Once the Prosecutor is satisfied that there are reasonable grounds to suspect crimes have been committed, it may refer a case to the Court's Pre-Trial chamber, which will analyze the Prosecutor's submissions and, if satisfied that sufficient evidence has been presented, issue an International Arrest Warrant.<sup>106</sup> The office then constructs the case against the accused and oversees the prosecution in full at the Court, employing and working with lawyers who conduct the case before the Court.<sup>107</sup>

The office of the prosecutor is led by Mr. Luis Moreno-Ocampo, who is the first Prosecutor of the ICC.<sup>108</sup> Mr. Moreno-Ocampo graduated from the University of Buenos Aires Law School in 1978 and began work for the Argentine Government, rising to prominence for his role in the 'Trial of the Juntas' in 1985.<sup>109</sup> The trial, which saw nine senior commanders and three former heads of state prosecuted, was the largest prosecution of government figures since the Nuremberg trials.<sup>110</sup> Following this work, Mr. Moreno-Ocampo enjoyed a stellar career in private legal practice, securing the extradition of the former Nazi Germany Schutzstaffel (SS) Commander Erich Priebke; he has also represented Diego Maradona.<sup>111</sup>

The office of Public Counsel for the Defence is an independently constituted body that exists for the purpose of protecting the rights of Defendants coming before the ICC.<sup>112</sup> Defendants are invited to choose their own Counsel from a list of approved lawyers that are then paid to represent the defendant throughout the trial.<sup>113</sup> The office also provides a dispute resolution service between lawyers and defendants, which is frequently used, as defendants often complain about their lawyers.<sup>114</sup>

The office of Public Counsel for Victims provides a method for the views and concerns of victims to be presented to the Court by specially appointed lawyers.<sup>115</sup> Victims themselves do not play a role in the proceedings; rather, their lawyers may express opinions held by the victim.<sup>116</sup> Individuals or organizations may be victims for the purposes of the Court; a victim is defined as a "natural person who has suffered harm as a result of the commission of a crime

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<sup>98</sup> Paulus, *Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court*, 2003.

<sup>99</sup> Schabas, *An Introduction to the International Criminal Court*, 2001.

<sup>100</sup> International Criminal Court, *Chronology of the International Criminal Court*, 2011.

<sup>101</sup> Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court*, 1997.

<sup>102</sup> Schabas, *An Introduction to the International Criminal Court*, 2001.

<sup>103</sup> Human Rights Watch, *Courting History, The Landmark International Criminal Court's First Years*, 2008.

<sup>104</sup> International Criminal Court, *The Prosecutor*, 2011.

<sup>105</sup> International Criminal Court, *The Prosecutor*, 2011.

<sup>106</sup> International Criminal Court, *How the Court Works*, 2011.

<sup>107</sup> International Criminal Court, *The Prosecutor*, 2011.

<sup>108</sup> International Criminal Court, *The Prosecutor*, 2011.

<sup>109</sup> International Criminal Court, *The Prosecutor*, 2011.

<sup>110</sup> International Criminal Court, *The Prosecutor*, 2011.

<sup>111</sup> The Daily Telegraph, *Jose Luis Moreno Ocampo: Profile*, 2011.

<sup>112</sup> International Criminal Court, *How the Court Works*, 2011.

<sup>113</sup> International Criminal Court, *Counsel authorised to act before the Court*, 2011.

<sup>114</sup> International Criminal Court, *Structure of the Court, Defence*, 2011.

<sup>115</sup> International Criminal Court, *Structure of the Court, Victims*, 2011.

<sup>116</sup> International Criminal Court, *Structure of the Court, Victims*, 2011.

within the jurisdiction of the Court.”<sup>117</sup>

### ***Practical Considerations and Outlook***

Compared with the age and pace of development of advanced domestic criminal legal systems, the International Criminal Court is a very new Court; indeed, it has only been actively hearing cases for two years.<sup>118</sup> The Court has faced criticism in the past for the situations that the Prosecutor has investigated, with some noting that the accused are disproportionately from less powerful African states.<sup>119</sup> This criticism is further compounded by the decision taken by the United States not to become a member of the Court.<sup>120</sup> The absence of the United States has led some to argue that the ICC cannot be considered an equal, truly international Court without one of the world’s most important states.<sup>121</sup> The United States has had some involvement with the Court, however, most recently attending the ICC review conference in 2010.<sup>122</sup>

The ICC continues to evolve, and in at the review conference in Kampala, Uganda the Rome Statute was amended to include the crime of aggression.<sup>123</sup> This was defined as the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations,” with aggression being defined as “the use of armed force against the territorial integrity or political independence of another state.”<sup>124</sup> The amendment requires ratification by all members and is estimated to be available to the Prosecutor in all cases by 2017.<sup>125</sup>

## **Annotated Bibliography**

### ***Committee History***

Cherif Bassiouni, M. (1997). From Versailles to Rwanda in Seventy-Five years: The Need to Establish a Permanent International Criminal Court. *Harvard Human Rights Journal*. 10(62): p.11 – 62.

*This article gives a comprehensive discussion of the history of international criminal law, including detailed factual statements and analysis of the political environment prior to the establishment of the Permanent International Criminal Court. This is essential reading to understand the pace of development and problems faced along the way.*

The Economist. (n.d.) *The International Criminal Court: Why Africa Still Needs It*. Retrieved September 1, 2011, from <http://www.economist.com/node/16274301>

*This article discusses the key criticism of the selection of the investigated situations by the Prosecutor focusing on Africa, the continent most investigated. The focus on African nations in investigations by the Prosecutor is a key criticism against the Court. This freely available article provides a preliminary analysis of criticisms facing the International Criminal Court.*

The Economist. (n.d.) *International Justice: Courting Justice*. Retrieved September 1, 2011, from <http://www.economist.com/node/16219717>

*This article, from May 2010, seeks to concisely document the initial operation of the Court in the years since it was formed. This is a good resource for students to attain further perspective on the*

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<sup>117</sup> International Criminal Court, *Structure of the Court, Victims*, 2011.

<sup>118</sup> Human Rights Watch, *Courting History, The Landmark International Criminal Court’s First Years*, 2008.

<sup>119</sup> The Economist, *The International Criminal Court: Why Africa Still Needs It*.

<sup>120</sup> *The Economist. International Justice: Courting Justice*.

<sup>121</sup> *The Economist, International Justice: Courting Justice*.

Human Rights Watch, *Courting History, The Landmark International Criminal Court’s First Years*, 2008

<sup>122</sup> Kampala ICC Review Conference, *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression*, 2010.

<sup>123</sup> Kampala ICC Review Conference, *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression*, 2010.

<sup>124</sup> Kampala ICC Review Conference, *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression*, 2010.

<sup>125</sup> *ICC Review Conference: Kampala 2010*.

*progress of the Court. The review conference in Kampala, Uganda in 2010 gave an opportunity to reflect on the Court so far, which is valuable for the purposes of the history section of the Background Guide.*

Human Rights Watch. (2008). *Courting History, The Landmark International Criminal Court's First Years*. Retrieved August 11, 2011, from [http://www.hrw.org/sites/default/files/reports/icc0708\\_1.pdf](http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf)

*This is an interesting article seeking to analyze the success and operation of the ICC in its formative years. It provides a good overview of the challenges facing the Court at inception and the ways in which the Court has developed. This article seeks to provide an objective analysis of the perception and operation of the Court and highlights the progress of the Court in the short time it has been operating.*

International Committee of the Red Cross. (n.d.). *The Geneva Conventions of 1949, and their additional protocols*. 2011. Retrieved on September, 24 from <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

*The Geneva Conventions are of great importance when considering the development of international cooperation, consensus, and the development of the international criminal legal system. The length and content of the Conventions make them difficult to understand fully, and this article can be a useful tool to deal with this problem. The International Committee of the Red Cross (ICRC) list important facts about the conventions and have useful summaries of important provisions.*

International Criminal Court. (2011). *Chronology of the International Criminal Court*. Retrieved on August 31, 2011, from <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm>

*The International Criminal Court Web site has a great deal of useful information, and this section can help give a useful summary to students. The history of international criminal law contains many different documents and elements and this section can be useful as a good tool for consolidation of reading. Students should attempt to have a good understanding of the origins of the Court in order to achieve the most from the simulation.*

International Criminal Court. (2011). *Jurisdiction and Admissibility*. Retrieved August 31, 2011, from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1016152](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016152)

*This discusses what is perhaps the most controversial and different aspect about the ICC – the jurisdictional issues surrounding its operation. This section of the ICC Web site has been constructed to deal with these issues and answers all questions concerning the jurisdiction of the Court. Students should use this as an initial resource to aid their understanding of the Court.*

International Criminal Tribunal for the Former Yugoslavia. (2011). *About the ICTY*. Retrieved on September 23, 2011, from <http://www.icty.org/sections/AbouttheICTY>

*The Ad Hoc International Criminal Tribunal for the Former Yugoslavia was one of the initial Courts set up by the United Nations Security Council. The Permanent International Criminal Court is entirely separate and unrelated to the Ad Hoc Tribunals; however the ICTY is very interesting and applies much of the same law that is available to the ICC under the Rome Statute. Students should be careful in preparation to appreciate the differences between the Ad Hoc Tribunals, the International Court of Justice and the International Criminal Court.*

Schabas, W. (2001) *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press. *Schabas was one of the lawyers involved in drafting the Rome Statute in 1998 and has a primary knowledge and insight into the development of international criminal law. In this Chapter, available online, Schabas gives a detailed history of the history of International Criminal Law. This is an excellent source that conveys a deep understanding in one chapter.*

Van Schaack, B. and R. Slye. (2007). *A Concise History of International Criminal Law: Chapter 1 of Understanding International Criminal Law*. Santa Clara University School of Law.

*The international criminal legal system is new and consistently evolving, but still remains based upon principles of traditional criminal law. The fundamental principles of criminal law such as the Actus Reus and the Mens Rea of a crime are covered here. This article is useful for the purposes of*

*achieving understanding of criminal law, and also neatly links principles into the International system.*

## **I. The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah Al-Senussi**

*Please note: Throughout the drafting process, events in Libya changed drastically. Muammar Gaddafi was first reported dead on October 20, 2011. At the time of publication, there are contradicting statements regarding the whereabouts and conditions of Saif al-Islam Gaddafi and Abdullah Al-Senussi. The ICC has not yet issued an official statement regarding Muammar Gaddafi's death. It is expected that the ICC will take several months to confirm the death. Once the death is confirmed, it is expected that the Pre-Trial Chamber will take a decision to terminate the proceedings. Directors of the ICC at NMUN-NY 2012 will monitor all developments closely and inform delegates through updates.*

### ***The Accused***

The arrest warrant issued by the International Criminal Court (ICC) on June 27, 2011 specifies three persons identified by the Office of the Prosecutor as involved in designing a state policy targeting civilians and subsequently implementing this policy in contravention of the Rome Statute.<sup>126</sup> Muammar Mohammed Abu Minyar Gaddafi (Muammar Gaddafi) was, at the time of the arrest warrant, acting as the military commander and disputed *de facto* head of state in the Libyan Arab Jamahiriya (Libya); Saif al-Islam Gaddafi was acting as the *de facto* Prime Minister of Libya; and Abdullah Al-Senussi was the head of Military Intelligence for Gaddafi's Libyan regime.<sup>127</sup> Muammar Gaddafi and Saif Al-Islam Gaddafi have claimed that the ICC cannot prosecute them because they hold positions within a "revolutionary movement" with Muammar Gaddafi being the "leader of the revolution."<sup>128</sup> Article 27 of the Rome Statute, however, details that the Statute "shall apply equally to all persons without any distinction based on official capacity."<sup>129</sup> At the time of writing, the civil unrest within Libya leaves an uncertain situation as to the governance of the state, and the ICC, along with private individuals, is seeking to secure the arrest of the accused.<sup>130</sup>

### ***Procedural History***

Following calls for an international response to the civil unrest within Libya and the actions of the Gaddafi regime, the UN Security Council unanimously voted to refer the situation in Libya to the ICC Prosecutor on February 26, 2011, citing events taking place after February 15, 2011.<sup>131</sup> The Security Council stressed the need to hold accountable those responsible for the attacks, including those carried out by forces under the control of the Gaddafi regime; it was the first time in the history of the ICC that a situation was referred with unanimity.<sup>132</sup> The arrest warrant was only the second international arrest warrant issued for an acting head of state.<sup>133</sup> Five days later, having considered the evidence, the ICC Prosecutor announced his belief that there was a reasonable basis to believe that crimes against humanity had been committed within Libya since February 15, 2011.<sup>134</sup> The ICC Prosecutor conducted an investigation with the information before him, including documents attained by *The Guardian*, and requested the issuance of three warrants of arrest for the accused on May 16, 2011.<sup>135</sup> The Pre-Trial Chamber considered the Prosecutor's requests, conducting a preliminary analysis of the case, and agreed, issuing on June 27, 2011 three warrants of arrest on the basis that there are reasonable grounds to believe that crimes against humanity were committed by the accused in contravention of the Rome Statute.<sup>136</sup> On September 9, 2011,

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<sup>126</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

<sup>127</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

<sup>128</sup> ynet news, *Gaddafi: Leader of Revolution will not step down*, 2011.

<sup>129</sup> The Rome Statute of the International Criminal Court, 1998, Article 27.

<sup>130</sup> The Guardian, *Gaddafi wanted dead or alive, says rebel leader*, 2011.

<sup>131</sup> BBC News, *Libya: UN Security Council votes sanctions on Libya*, 2011.

<sup>132</sup> Financial Times, *UN unanimously backs Gaddafi sanctions*, 2011.

<sup>133</sup> Aljazeera, *ICC issues Gaddafi arrest warrant*, 2011.

<sup>134</sup> International Criminal Court, *ICC Prosecutor: Gaddafi used his absolute authority to commit crimes in Libya*, 2011.

<sup>135</sup> International Criminal Court, *ICC Prosecutor: Gaddafi used his absolute authority to commit crimes in Libya*, 2011.

<sup>136</sup> International Criminal Court, *Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi*, 2011.

INTERPOL, the international policing organization, issued an arrest warrant for Muammar Gaddafi, Saif-Al Islam Gaddafi and Abdullah Al-Senussi, following a request from the ICC Prosecutor.<sup>137</sup>

### ***History of Conflict and Statement of Facts***

In 1969, a movement led by Gaddafi carried out a bloodless coup by overthrowing King Idris, who had held power since 1951.<sup>138</sup> The new Gaddafi-led regime promised a state based on unity, freedom, and socialism, and had the support of the Libyan people, who had become disillusioned with the monarchy.<sup>139</sup> King Idris has overseen a comprehensive defeat against Israel in the Six-Day war in 1967, and there was a perception that the monarchy had become corrupt and too close to Western influences.<sup>140</sup> Libya has a population of around 6.4 million and a Gross Domestic Product (GDP) of around \$70 billion.<sup>141</sup> There are also issues of religion and its influence on politics, which the Gaddafi regime intertwined into its ruling philosophy.<sup>142</sup> The key economic activity in Libya is the extraction of its oil reserves, of which it has the ninth highest amount in the world.<sup>143</sup> Oil is therefore a key political issue in Libya in its relations with the international community and within domestic politics; it has led to popular discontent, as the profits of oil becomes concentrated in the hands of the elite.<sup>144</sup> King Idris' activities in negotiating oil contracts with western states was thought to be a key factor in the uprising against him, and Gaddafi's call for socialism in 1969.<sup>145</sup> In 1977, Gaddafi proclaimed that Libya was now to be a 'Jamahiriya', a new form of state administration centering on thousands of committees taking governmental decisions across the nation.<sup>146</sup> Despite the Jamahiriya and Gaddafi's socialist roots, Gaddafi became known as a dictator, holding all the significant power within the state without technically holding office.<sup>147</sup>

In early 2011, civil uprisings against undemocratic political regimes occurred in Tunisia and Egypt, named "the Arab Spring" by commentators.<sup>148</sup> The Gaddafi regime in Libya had become increasingly unpopular, and the Arab Spring appeared to be interpreted by Libyan citizens as a source of encouragement.<sup>149</sup> Shortly after the Egyptian regime fell, demonstrations and protests against the Gaddafi regime began.<sup>150</sup> Senior figures in the Gaddafi regime met in order to discuss how to react to the unrest and allegedly created a policy aimed at "detering and quelling, by any means, including by the use of lethal force, the demonstrations of civilians against the regime."<sup>151</sup> According to evidence seen by the Prosecutor, Muammar Gaddafi and Saif Al-Islam Gaddafi allegedly played a key role in drafting the policy.<sup>152</sup> It is thought that both men had further impact in implementing the policy by instructing Abdullah Al-Senussi to execute the policy through the Libyan state military and security forces.<sup>153</sup> Libyan security forces, allegedly under instruction from Al-Senussi, began to implement the policy from February 15 onwards, using force against civilians taking part in anti-regime demonstrations in Tripoli, Misrata and Benghazi.<sup>154</sup> Civilians perceived by pro-Gaddafi forces to be dissidents were also victims of the attacks, which took the form of killing, injuring, arresting, and imprisoning civilians, purportedly in their hundreds.<sup>155</sup> There were also allegations of systematic

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<sup>137</sup> Reuters, *Interpol issues arrest warrant for Muammar Gaddafi*, 2011.

<sup>138</sup> BBC News, *On this day: 1969, Bloodless Coup in Libya*, 2011.

<sup>139</sup> BBC News, *On this day: 1969, Bloodless Coup in Libya*, 2011.

BBC News, *Timeline: Libya*, 2011.

<sup>140</sup> Chapin Metz, H. *Libya: A Country Study, The Revolution and Social Change* 1987.

<sup>141</sup> Economy Watch, *Libya Economic Statistics and Indicators*, 2011.

<sup>142</sup> The Economist, *Libya's new order, Can the joy last?*, 2011

<sup>143</sup> U.S Energy Information Administration, *Libya Country Analysis Brief*, 2011.

<sup>144</sup> U.S Department of State, *Background Note: Libya*, 2011.

Boyle, *How Gaddafi became a Western backed Dictator*, 2011.

RT, *The West is to be forgotten, we will not give them our oil: Gaddafi*, 2011.

<sup>145</sup> U.S Department of State, *Background Note: Libya*, 2011.

<sup>146</sup> Mathaba, *Great Jamahiriya: Power, wealth and arms in the hands of the people*, 2011.

<sup>147</sup> BBC, *Profile: Muammar Gaddafi*, 2011.

<sup>148</sup> The Guardian, *Arab spring: an interactive timeline of Middle East protests*, 2011.

<sup>149</sup> The Wall Street Journal, *'Arab Spring' gives way to an uncertain autumn*, 2011.

<sup>150</sup> The Guardian, *Libyan protestors clash with police in Benghazi*, 2011.

<sup>151</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

<sup>152</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

ORSAM, *Libya: Too early for the victory announcement*, 2011.

<sup>153</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

<sup>154</sup> Reuters, *Heavy fighting near Libya's Misrata airport: rebels*, 2011.

<sup>155</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

sexual assault by Gaddafi forces, who were purportedly issued Viagra.<sup>156</sup> Unrest in Libya continued, and saw a large group of armed “rebels” forming and moving quickly across the country, taking control of the Libyan capital of Tripoli in three days.<sup>157</sup> The rebel groups eventually seized Tripoli in August 2011 and formed a National Transitional Council which is currently governing the country.<sup>158</sup>

### *Charges*

In all criminal law there are two elements that must be satisfied in order to prove a crime: *Actus Reus* (proof of the act) and *Mens Rea* (proof of the required mental element).<sup>159</sup> In order to be satisfied of the *Actus Reus* being present, the ICC must be convinced beyond reasonable doubt that the acts allegedly committed by the accused did occur, and they can be attributed to the accused.<sup>160</sup> Article 30 of the Rome Statute details the ICC requirements for the satisfaction of the *Mens Rea*; the material elements of the crime must be committed with intent and knowledge.<sup>161</sup> Intent is divided into two parts: conduct-related, in which the accused “means to engage in the conduct,” and consequence-based, in which the accused “means to cause that consequence or is aware that it will occur in the ordinary course of events.”<sup>162</sup> The knowledge requirement is defined as an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>163</sup> The burden of proof rests with the Prosecutor to prove the existence of the *Actus Reus* and the *Mens Rea*.<sup>164</sup> At the arrest warrant stage, the Court must be satisfied that there are reasonable grounds to believe that the crimes have been committed. Later, when confirming charges, the Pre-Trial Chamber must be satisfied that there are substantial grounds to believe that the crimes have been committed, and in order to convict the accused, the Court must be convinced that it has been proved beyond reasonable doubt that the crimes have been committed.<sup>165</sup>

The pre-trial chamber and the Office of the Prosecutor consider that there are reasonable grounds to believe that the accused:

- (i) intended to bring about the objective elements of the foregoing crimes;
- (ii) knew that their conduct was part of a widespread or systematic attack against the civilian population pursuant to the State policy, set up by them, of targeting civilians perceived to be political dissidents;
- (iii) were well aware of their senior leadership role within the structure of the Libyan State apparatus and of their power to exercise full control over their subordinates; and
- (iv) were aware and accepted that implementing the plan would result in the realization of the objective elements of the crimes.<sup>166</sup>

As a result of this analysis of the evidence seen by the Prosecutor, the accused are charged as being criminally responsible as indirect perpetrators under Article 25(3)(a) of the Rome Statute for crimes against humanity on two counts: murder and persecution under Article 7 of the Rome Statute.<sup>167</sup> Although the events in Libya continued to escalate far beyond the initial scope of the ICC arrest warrant, the Court needs to be satisfied beyond reasonable doubt that the accused are responsible for acts of murder and/or persecution as part of a widespread or systematic attack against the civilian population in order to convict the accused.<sup>168</sup>

*Nexus element: Widespread or systematic attack against the civilian population*

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<sup>156</sup> Reuters, *U.S. envoy: Gaddafi troops raping, issued Viagra*, 2011.

<sup>157</sup> The Guardian, *Libya rebels' Tripoli assault*, 2011.

<sup>158</sup> BBC News, *Libya Profile*, 2011.

<sup>159</sup> Van der Vyver and Bederman, *Prosecutor v. Jean Pierre Bemba Gombo (Decision pursuant to article 67(1)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo)*, 2010.

<sup>160</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

<sup>161</sup> The Rome Statute of the International Criminal Court, 1998, Article 30.

<sup>162</sup> The Rome Statute of the International Criminal Court, 1998, Article 30.

<sup>163</sup> The Rome Statute of the International Criminal Court, 1998 Article 30.

<sup>164</sup> International Criminal Court, *The Prosecutor*, 2011.

<sup>165</sup> Van der Vyver and Bederman, *Prosecutor v. Jean Pierre Bemba Gombo (Decision pursuant to article 67(1)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo)*, 2010.

<sup>166</sup> International Criminal Court, *Questions and Answers in the case of The Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 2011.

<sup>167</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

<sup>168</sup> International Criminal Court, *Questions and Answers in the case of The Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 2011.

In order to be qualified as a crime against humanity, any act listed in Article 7 Rome Statute needs to be committed as part of a widespread or systematic attack against the civilian population. This element describes the context in which the conduct must take place.<sup>169</sup> An attack is defined as the multiple commissions of any of the acts enlisted in Article 7. However, unlike for war crimes, there is no need to establish the existence of an armed conflict (although an attack can be situated in the context of an armed conflict).<sup>170</sup>

The Prosecutor needs to prove that the attack was either systematic or widespread. A widespread attack is an attack on a large scale, and with a high number of victims. A numerical limit does not exist though.<sup>171</sup> Contrary to the widespread attack, which relates more to the *quantitative* scope of the attack, “systematic” is a *qualitative* criterion and relates to the degree of strategic planning prior to the attack.<sup>172</sup> In the *Tadic*-case, the ICTY held that a systematic attack required a “pattern or methodical plan” or “organized pattern of conduct.”<sup>173</sup>

While a systematic attack involves a policy element by its definition, it is controversial whether or not a policy element is required to establish the existence of a widespread attack. If an attack can be qualified as widespread by simply examining its quantitative dimension, a policy element might not be considered necessary. On the other hand, the formulation of Article 7 (2) (a) Rome Statute seems to imply that the attack must have been committed pursuant to or in furtherance of a State or organizational policy, regardless of whether the attack was systematic or not. Several scholars support such a reading.<sup>174</sup> At the same time, case law, especially from the ICTY, has rejected this element.<sup>175</sup>

If a policy element is found to be required, other questions arise. It seems to be clear that a *de facto* policy is sufficient and that there needs to be no written or declared policy.<sup>176</sup> However, it is unclear whether it needs to be proven that the accused actively supported such a policy or whether condonement is sufficient. According to the Elements of Crimes, “[i]t is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.”<sup>177</sup> However, the Elements of Crimes also suggest that such active promotion can also take place “by a deliberate failure to take action”.<sup>178</sup> It therefore remains unclear what threshold applies when establishing whether or not there has been a policy.

Lastly, the attack needs to be directed against the civilian population. If the attack in the sense of Article 7 Rome Statute coincides with an armed conflict, the definition of “civilian population” in international humanitarian law applies. Article 50 (1) of the First Additional Protocol to the Geneva Conventions defines civilians as any person who is not listed in Article 4 (A) of the Third Geneva Convention. Article 4 (A) of the Third Geneva Convention relates to combatants that can be taken as prisoners of war, and lists members of the armed forces, members of militias and organized resistance groups and other combatants. The Court will therefore need to establish whether the victims of an attack were civilians in the sense of Article 50 (1) First Additional Protocol to the Geneva Conventions. If the Court finds that there was no armed conflict in Libya, the distinction between civilians and combatants does not apply. This distinction is exclusively reserved for times of armed conflict. Consequently, any individual, even if part of the armed forces, can be considered as “civilian” in the sense of Article 7 Rome Statute if there was no armed conflict at the time of commission.<sup>179</sup>

The *Mens Rea* requirement also concerns the nexus element. The accused can only be convicted if they knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>180</sup>

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<sup>169</sup> International Criminal Court, *Elements of Crimes Article 7*, Introduction Nr. 2.

<sup>170</sup> Ambos, *International Criminal Law [Internationales Strafrecht]*, 2006, p. 212.

<sup>171</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 194.

<sup>172</sup> Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2007, p. 194.

<sup>173</sup> ICTY, *Prosecutor v. Tadic, Opinion and Judgment*, 1997, para. 648.

<sup>174</sup> Ambos, *International Criminal Law [Internationales Strafrecht]*, 2006, p. 214.

<sup>175</sup> Schabas, *Introduction to International Criminal Law*, 2004, p. 197.

<sup>176</sup> Ambos, *International Criminal Law [Internationales Strafrecht]*, 2006, p. 215.

<sup>177</sup> International Criminal Court, *Elements of Crimes Article 7*, Introduction Nr. 3.

<sup>178</sup> International Criminal Court, *Elements of Crimes Article 7*, Introduction Nr. 3, Footnote 6.

<sup>179</sup> Ambos, *International Criminal Law [Internationales Strafrecht]*, 2006, p. 217.

<sup>180</sup> International Criminal Court, *Elements of Crimes Article 7*, Introduction Nr. 2.

### *Murder*

Article 7(1)(a) of the Rome Statute prohibits as a crime against humanity the act of murder when knowingly committed as part of a widespread or systematic attack directed against any civilian population.<sup>181</sup> Murder occurs if it can be proven beyond reasonable doubt that one or more persons were killed.<sup>182</sup> It seems likely that the evidence presented to the Court will detail the occurrence of murder; however, it will be for the Court to decide beyond reasonable doubt whether the actions of the accused can be considered as part of a widespread or systematic attack, and whether the individuals targeted can be sufficiently categorized as a civilian population.<sup>183</sup> The accused are charged as indirect perpetrators according to Article 25(3)(a) of the Rome Statute, allegedly responsible for formulating and implementing the policy that resulted in murder; the Court will need to be satisfied of this in order to rule that murder was committed.<sup>184</sup>

### *Persecution*

Article 7(1)(h) of the Rome Statute prohibits as a crime against humanity: Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.<sup>185</sup>

Persecution is further defined in Article 2(g) as “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>186</sup> Accordingly, the Prosecutor will need to prove that there was a deprivation of fundamental rights against an identifiable group on one of the identified grounds, most likely the political ground.<sup>187</sup> It must also be proven that the persecution occurred *because* of the identity of the group.<sup>188</sup> As with murder, the Court must be satisfied that the accused can be considered indirect perpetrators, due to their role in the consequences brought about by the creation and implementation of the state policy, to rule that the accused were responsible for persecution.<sup>189</sup>

### *Defenses*

The Court will only be able to convict the accused in the event that the Prosecutor can prove beyond reasonable doubt that all elements of the crimes against humanity were present.<sup>190</sup> The office of Public Counsel for the Defence will seek to prove that there is not sufficient evidence to prove the elements beyond reasonable doubt, but may also attempt to use the grounds for exclusion of criminal responsibility under Article 31 of the Rome Statute.<sup>191</sup> Under Article 31(c), criminal responsibility provides an exclusion of responsibility on account of reasonable defense of self, another or property “essential for the survival of the person or property which is essential for accomplishing a military mission.” In order for this provision to be used, the defense must be against “an imminent and unlawful use of force” and must be “proportionate to the degree of danger.”<sup>192</sup>

### *Conclusion*

The Court will be presented with legal arguments, evidence, and victim testimony as to the events that took place following February 15, 2011 concerning the formulation and implementation of a state policy targeting civilians perceived to be political dissidents. The manner in which the targeting took place is alleged to amount to crimes against humanity on two counts; Murder and Persecution under Article 7 of the Rome Statute. In order to convict, the Court will need to be satisfied beyond reasonable doubt that these crimes have been committed by the accused, who

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<sup>181</sup> The Rome Statute of the International Criminal Court, 1998, Article 7 (1)(a).

<sup>182</sup> International Criminal Court, *Elements of Crimes Article 7 (1) (a)*, Element 1.

<sup>183</sup> Van der Vyver and Bederman, *Prosecutor v. Jean Pierre Bemba Gombo (Decision pursuant to article 67(1)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo)*, 2010.

<sup>184</sup> Van der Vyver and Bederman, *Prosecutor v. Jean Pierre Bemba Gombo (Decision pursuant to article 67(1)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo)*, 2010.

<sup>185</sup> The Rome Statute of the International Criminal Court, 1998, Article 7 (1)(h).

<sup>186</sup> The Rome Statute of the International Criminal Court, 1998, Article 2 (g).

<sup>187</sup> The Rome Statute of the International Criminal Court, 1998, Article 7 (1)(h).

<sup>188</sup> The Rome Statute of the International Criminal Court, 1998, Article 2(g).

<sup>189</sup> International Criminal Court, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, 2011.

<sup>190</sup> Van der Vyver and Bederman, *Prosecutor v. Jean Pierre Bemba Gombo (Decision pursuant to article 67(1)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo)*, 2010.

<sup>191</sup> The Rome Statute of the International Criminal Court, 1998, Article 31(c).

<sup>192</sup> The Rome Statute of the International Criminal Court, 1998, Article 31(c).

may seek to argue under Article 31(c) that they were acting proportionately in self-defense against the rebel uprising, which they may attempt to classify as an unlawful use of force.

In order to reach a conclusion regarding the criminal liability of the three Accused, delegates need to answer the following questions: Did an act of murder and/or persecution occur? Was such act part of a widespread or systematic attack against the civilian population? Was there an attack? If so, was it widespread or systematic? If so, was it directed against the civilian population? Are the accused individually responsible? Did they indirectly commit acts of murder and/or persecution? If so, did the accused have intent to commit acts of murder and/or persecution? If so, did the accused know that the acts were committed as part of a widespread or systematic attack?

## Annotated Bibliography

### *I. The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah Al-Senussi*

BBC News. (2011). *Profile: Muammar Gaddafi*. Retrieved on September 24, 2011, from <http://www.bbc.co.uk/news/world-africa-12488278>

*Muammar Gaddafi has been in power in Libya since 1969, in which time there has been great change in Libya. It is important to understand the background information contained in this source in order to appreciate how Gaddafi has led the country. Gaddafi's personal ideology for the country and the relationship with the West, detailed information on which can be found in this source.*

BBC News. (2011). *Timeline: Libya*. Retrieved September 24, 2011, from <http://news.bbc.co.uk/1/hi/world/africa/1398437.stm>

*This timeline runs from the 7th Century, through to the present day, and contains valuable information on Libya, including the state of the country under Gaddafi's predecessor. A key discussion point in analysis of the Arab Spring has been the dynamics of the country and the relationship between these and the future of the country under new leadership. This source can also act as a useful summary for students wishing to consolidate their learning.*

Boyle, P. (2011). *How Gaddafi became a Western backed Dictator*. Retrieved on September 24, 2011, from <http://links.org.au/node/2179>

*Gaddafi's political interaction with Western states, has been a widely discussed element of his tenure as Leader of the Revolution in Libya. In this article, the relationship forged with Western oil companies and politicians is analysed, and includes how the Dictator's place in world politics is affected by his interaction with the Western private sector. This is useful material in order for students to appreciate the nature of the Libyan economy.*

Chapin Metz, H. (1987). *Libya: A Country Study, The Revolution and Social Change*. Retrieved on September 24, 2011, from <http://countrystudies.us/libya/45.htm>

*Social conditions in Libya are complicated, with immense wealth flowing through the country in the form of the oil reserves, but with a low level of participation in the oil industry among citizens. Political structure in the form of the Jamahiriya and socialist ideals are discussed here. Crucially, the source seeks to analyze how the philosophical ideals interact with the actual situation on the ground in Libya.*

The Guardian. (2011). *Arab spring: an interactive timeline of Middle East protests*. Retrieved September 1, 2011, from <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>

*This timeline put together by The Guardian covers the entire "Arab Spring" on an interactive timeline, separated by state. Each event is linked to the relevant Guardian coverage from the time, which allows for a holistic analysis of the events of the "Arab Spring" and how they relate to Libya. This is an excellent resource to enable students to achieve an understanding of the timescale of the "Arab Spring."*

International Criminal Court. (2011). *Questions and Answers in the case of The Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Retrieved August 15, 2011, from <http://www.icc-cpi.int/iccdocs/doc/Q-Gaddafi-Eng.pdf>

*This press release in the format of Questions and Answers provides a good resource to deal with fundamental questions concerning this case. It clarifies time periods, for example "What happened after the Security Council referred the situation to the ICC." This is a good accompaniment to preliminary reading on the ICC and the Gaddafi case.*

International Criminal Court. (2011). *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi Warrant of Arrest for Saif Al-Islam Gaddafi, Warrant of Arrest for Abdullah Al-Senussi*. Retrieved August 15, 2011, from the International Criminal Court's Web site.

*The arrest warrant documents, available on the ICC Web site, give the full content of the charges issued and facts as understood by the ICC. These are valuable resources, particularly in order to see the viewpoint of the Court on the occurrences. Students should use the arrest warrants as the basis of their legal understanding of the case. At this stage in the case, with the burden of proof on the prosecution to prove the guilt of the accused, the prosecution arrest warrant will contain the main preliminary legal argument.*

Mathaba. (2011). *Great Jamahiriya: Power, wealth and arms in the hands of the people*. Retrieved September 24, 2011, from <http://www.mathaba.net/info/>

*This Libyan Web site is pro-Gaddafi and discusses the positive points of the Jamahiriya system by which the Country is run by hundreds or thousands of small community committees. This is an excellent resource in terms of appreciating Libyan Politics and culture from the perspective of supporters of the regime. The Web site has a wealth of material about all aspects of Libyan political theory and Gaddafi.*

U.S Department of State. (2011). *Background Note: Libya*. Retrieved on September 24, 2011, from <http://www.state.gov/r/pa/ei/bgn/5425.htm>

*The US State Department Web site contains useful in depth analyses of Countries. This discussion of Libya includes its economic status and its oil exports, but also contains a discussion of domestic Libyan politics. This source will be useful for students wishing to consider the Western view of Libya.*

Van der Vyver J.D, Bederman, D.J. (2010). *Prosecutor v. Jean Pierre Bemba Gombo (Decision pursuant to article 67(1)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo)*. *The American Journal of International Law*, Vol. 104, No. 2, p. 241-247.

*This analysis of the trial of Jean Pierre Bemba Gombo from the Democratic Republic of Congo provides valuable insight into the operation of criminal law within the ICC. This includes clarification of issues of burden of proof and how the proof against the accused must be formulated to succeed. This article also contains basic principles of criminal law generally, and can be used as a starting point to become comfortable with criminal litigation.*

## **II. The Prosecutor v. Thomas Lubanga Dyilo of the Democratic Republic of Congo**

### ***Introduction – History of the conflict***

The conflict in the Democratic Republic of Congo (DRC) finds its roots in the 1994 Rwandan genocide when, because of the genocide in Rwanda, Hutu fighters fled to then eastern Zaire.<sup>193</sup> With the support from Zairean President Mobutu Sese Seko, the Hutu fighters attacked Rwanda.<sup>194</sup> In 1996, troops from Rwanda and Uganda entered eastern Zaire with Laurent-Désiré Kabila as their Congolese rebel ally.<sup>195</sup> In May 1997, Mobutu was defeated

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<sup>193</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Questions and Answers, 2011.

<sup>194</sup> Thom, *The Journal of Conflict studies*, Congo-Zaire's 1996-97 Civil War in the Context of Evolving Patterns of Military Conflict in Africa in the Era of Independence, Vol. XIX No. 2, 1999.

<sup>195</sup> Clark, *The African Stakes of the Congo War*, 2002, p. 188.

and Kabila made himself President and changed the country's name from Zaire to Democratic Republic of Congo (DRC).<sup>196</sup> He then turned himself against the Rwandans, whom he had originally supported.<sup>197</sup> This conflict between the Rwandans and Kabila intensified as numerous states joined the conflict: the governments of Zimbabwe and Namibia supported Kabila while Uganda and Burundi backed up Rwanda.<sup>198</sup> This conflict is sometimes referred to as Africa's first world war.<sup>199</sup>

In addition to this conflict, there was also a fight about natural resources in DRC in the region of Ituri.<sup>200</sup> The Ituri conflict is rooted in long-standing ethnic grievances involving two ethnic groups, the Hema and the Lendu.<sup>201</sup> Since 1996, both of these ethnicities, along with four different militia groups and the Uganda Army, fought for the acquisition and control of the gold-rich Ituri region in the northeast corner of the DRC.<sup>202</sup> The competition for land and resources increased the violence and fighting between the Hema and Lendu ethnicities over the years, and in 1999, the Ituri land-dispute erupted into an inter-ethnic war that caused the death of 50,000 militias and civilians.<sup>203</sup>

The Office of the Prosecutor (OTP) of the International Criminal Court (ICC) filed charges against Thomas Lubanga Dyilo, charging him with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities between July 1, 2002 and December 31, 2003 in the North Eastern Ituri district of DRC. Thomas Lubanga Dyilo allegedly held the positions of President of the Union des Patriotes Congolais (UPC) and the Commander-in-Chief of its military wing, the Forces Patriotiques pour la Liberation du Congo (FPLC) at that time.<sup>204</sup> During the second half of 2002 and throughout 2003, the FPLC conducted large-scale military operations in Ituri, mostly against the Lendu militia forces and Lendu civilians. The proposed indictment alleges that Lubanga, jointly with his subordinate FPLC commanders, controlled and executed deliberately a plan to enlist and conscript children regularly in large numbers, including children under the age of fifteen.<sup>205</sup> It is alleged that Lubanga provided an organizational, infrastructural and logistical framework to enable this by financing the UPC and the FPLC, negotiating the provision of military equipment, continuously inspecting various FPLC training camps encouraging children to fight and convincing families to provide their children to the FPLC using children as his bodyguards.<sup>206</sup>

### ***The Accused***

Thomas Lubanga Dyilo was born in the province of Ituri in 1960. As a former Congolese rebel, he has allegedly masterminded the massacre of 400 people and he is accused, by the Prosecutor of the International Criminal Court, of numerous human rights violations during the Ituri conflict in DRC between 2002 and 2003.<sup>207</sup> Lubanga, who is an ethnic Hema militia, allegedly led the UPC from 2000, and two years later, allegedly served the military wing of the UPC, the Patriotic Forces for the Liberation of Congo (PFLC), whose goal was to impose dominance of the Hema ethnic group over the Lendu civilians and other non-Hema people.<sup>208</sup> In 2002, the UPC seized Bunia, capital of the Region of Ituri, allegedly operating under his control and asked the Congolese authorities for the autonomy of this province.<sup>209</sup> Lubanga was arrested on June 13, 2002, in Kinshasa but was released ten weeks later in exchange for a kidnapped government minister.<sup>210</sup> In March 2003, the UPC was forced out of Bunia by the Ugandan army.<sup>211</sup> Lubanga later moved to Kinshasa and registered the UPC as a political party. However, he was arrested again on

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<sup>196</sup> BBC, *Democratic Republic of Congo Country Profile*, 2011.

<sup>197</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, 2011.

<sup>198</sup> BBC, *Democratic Republic of Congo Country Profile*, 2011.

<sup>199</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Questions and Answers, 2011.

<sup>200</sup> Human Rights Watch, *The International Criminal Court Trial of Thomas Lubanga*, 2009.

<sup>201</sup> IRIN, *DRC: IRIN Focus on Hema-Lendu conflict*, 1999.

<sup>202</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Questions and Answers, 2011.

<sup>203</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Questions and Answers, 2011.

<sup>204</sup> OTP, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OIP monthly media briefing, 28 August 2006*, 2006, p. 1.

<sup>205</sup> OTP, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OIP monthly media briefing, 28 August 2006*, 2006, p. 2.

<sup>206</sup> OTP, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OIP monthly media briefing, 28 August 2006*, 2006, p. 2.

<sup>207</sup> Office of the Prosecutor, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OTP monthly media briefing, 28 August 2006*, 2006, p. 1.

<sup>208</sup> IRIN, *DRC: Who's who in Ituri - militia organisations, leaders*, 2005.

<sup>209</sup> Office of the Prosecutor, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OTP monthly media briefing, 28 August 2006*, 2006, p. 2.

<sup>210</sup> IRIN, *Chronology of key events: 2 August 1998 – 14 December 2002*, 2002.

<sup>211</sup> IRIN, *DRC: Who's who in Ituri - militia organisations, leaders*, 2005.

March 19, 2005, because of the killing of nine Bangladeshi United Nations peacekeepers in Ituri on February 25, 2005.<sup>212</sup> He was subsequently detained in Kinshasa's central jail.<sup>213</sup> Human Rights Watch has accused Lubanga of carrying out "ethnic massacres, murder, torture, rape and mutilation, as well as the recruitment of child soldiers" in the Ituri region.<sup>214</sup> One year after his arrest in March 2005, he was transferred from the DRC to the ICC detention center in The Hague under the first warrant of arrest ever issued by the ICC.<sup>215</sup>

### ***Procedural History***

#### *The arrest warrant*

On March 3, 2004, the Congolese government authorized the ICC to investigate and prosecute "crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the *Rome Statute*, on 1 July 2002".<sup>216</sup> On June 23, 2004, the Prosecutor announced publicly that he would start an investigation on the DRC conflict.<sup>217</sup> On January 12, 2006, the Prosecutor seized the Chamber in order to issue a warrant of arrest against Mr. T. Lubanga Dyilo.<sup>218</sup> On February 10, 2006, the Pre-Trial Chamber I (PTC) found there were reasonable grounds to believe that Lubanga was criminally responsible for the war crimes of "conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities".<sup>219</sup> On March 17, 2006, PTC I announced publicly the warrant of arrest.<sup>220</sup> Mr T. Lubanga Dyilo was thus no longer in custody in DRC but was in custody of the ICC. This was the first time someone had been arrested under such a warrant.<sup>221</sup> However, the fact that the indictment was only limited to the count of conscription and enlisting of children has been heavily criticized in academia and by the public, as T. Lubanga Dyilo is believed to have allegedly committed other war crimes including murder and sexual violence.<sup>222</sup> In response to these critics, the Prosecutor argues that using child soldiers is nevertheless a very serious crime that must be punished.<sup>223</sup> Despite long delays, Lubanga's case was the ICC's first trial. The trial opened in the end of January 2009.

#### *The Trial*

On March 20, 2006, Mr T. Lubanga Dyilo appeared for the first time in front of the PTC I (public hearing).<sup>224</sup> On October 5, 2006, the ICC decided that the confirmation of charges would take place on November 6, 2006. The decision on the confirmation of charges eventually took place on January 29, 2007. The PTC I decided that there was sufficient evidence to hold a trial. However, the trial was delayed because the ICC halted the trial, as there were reasonable grounds to believe that the trial would not be fair since the prosecutor did not allow the defendant to access exculpatory information.<sup>225</sup> Moreover, some pieces of evidence were not available to the judges either.

Approximately 200 documents had not been shared by the Prosecutor.<sup>226</sup> However, the Prosecutor explained that if these documents were not shared it was because he had entered into confidentiality agreements with other organizations (United Nations organizations and non-governmental organizations) under Article 54 (3) (e) of the *Rome Statute*.<sup>227</sup> Under this provision, third parties are encouraged to agree to sharing evidence but information may not be disclosed without their consent. Nevertheless, the Trial Chamber decided that these agreements and subsequent non-disclosure of evidence had affected Lubanga's rights to a fair trial in such a way that it was impossible "to piece together the constituent of a fair trial".<sup>228</sup>

<sup>212</sup> IRIN, *DRC: Who's who in Ituri - militia organisations, leaders*, 2005.

<sup>213</sup> BBC, Profile: DR Congo militia leader Thomas Lubanga, 2009.

<sup>214</sup> HRW, *DR Congo: ICC Arrest First Step to Justice*, 2006.

<sup>215</sup> RedOrbit, *Congo suspect to face war crimes charges*, 2006.

<sup>216</sup> ICC Press Release, The Office of the Prosecutor of the International Criminal Court opens its first investigation, 2004.

<sup>217</sup> ICC Press Release, The Office of the Prosecutor of the International Criminal Court opens its first investigation, 2004.

<sup>218</sup> ICC Press Release, *Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo*, 2006.

<sup>219</sup> ICC Trial Chamber I, *Situation in the Republic Democratic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, 2008, p. 8.

<sup>220</sup> ICC Press Release, *Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo*, 2006.

<sup>221</sup> ICC, *Newsletter November 2006 # 10*, 2006, p. 1.

<sup>222</sup> Human Rights Watch, *The International Criminal Court Trial of Thomas Lubanga*, 2009.

<sup>223</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Questions and Answers, 2011.

<sup>224</sup> ICC, *Newsletter November 2006 # 10*, 2006, p. 1.

<sup>225</sup> ICC Case Information Sheet, *The Prosecutor v. Thomas Lubanga Dyilo, Case n°ICC-01/04-01/06*, 2011.

<sup>226</sup> IWPR, *Comment: Fair Trial vs. Confidentiality*, 2008.

<sup>227</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Background, 2011.

<sup>228</sup> ICC The Appeals Chamber, *Situation in the Republic of Congo, The Prosecutor v. Thomas Lubanga Dyilo*, 2008, p. 3.

The Prosecutor asked the Trial Chamber to lift the suspension of the trial. On September 3, 2008, the Trial Chamber rejected the Prosecutor's request for the same reason they decided to suspend the trial.<sup>229</sup> On July 2, 2008, the Trial Chamber decided to set Lubanga free. Notwithstanding this, the Prosecutor appealed this decision. The Appeals Chamber decided the trial should still be suspended but Lubanga should be kept in jail.<sup>230</sup> Eventually, the trial could proceed as on November 18, 2008, the judges decided that the requisites of a fair trial were at last fulfilled as the evidence in question had been disclosed.<sup>231</sup> The Trial was rescheduled for January 26, 2009.

However, in July 2010, the Trial Chamber ordered a second halt of proceedings and ordered immediate release of Lubanga when the Prosecutor refused to disclose the identity of an intermediary who had helped the Prosecutor during the investigation to find witnesses at the request of the judges.<sup>232</sup> The Prosecutor appealed once again the stalling of the proceedings and the release of the Accused. He argued that if this information had not been disclosed, it was because no protective measure had been taken in order to guarantee the safety of the intermediary.<sup>233</sup>

The Appeals Chamber differed from the Trial Chamber and considered that the Trial Chamber should have imposed sanctions on the Prosecutor before deciding to stall the proceedings in order to meet the requirements of a fair trial. For this reason, the Appeals Chamber lifted the stay of proceedings and subsequently as the trial would continue, it implied that Lubanga could no longer be released.<sup>234</sup> The trial restarted on October 25, 2010.

### **Charges**

Mr Lubanga is charged with three counts of war crimes during 2002-2003 for recruiting, enlisting, and using children under the age of 15 to participate actively in hostilities, which stole the lives of 30,000 children.<sup>235</sup> Since Lubanga allegedly occupied the position of leader of both the UCP and its former military wing, the PFLC, the Prosecutor of the ICC considers that Lubanga also had the power and the authority of adopting and implementing policies, such as the use of child soldiers, which is an offence under international criminal law.<sup>236</sup> Children enlisted, recruited and sent to battlefield can be considered as victims of war crimes.<sup>237</sup> Enlisting children under the age of fifteen constitutes a war crime punishable under Article 8 (2) (b) (xxvi) or Article 8 (2) (e) (vii) of the Statute; the conscription of children under the age of fifteen constitutes a war crime punishable under article 8 (2) (e) (b) (xxvi) or Article 8 (2) (vii) of the Statute; and using children under the age of fifteen to participate actively in hostilities is punishable as a war crime under Article 8 (2) (b) (xxvi) or Article 8 (2) (e) (vii) of the Statute.

The difference between Articles 8 (b) and 8 (e) is that Article 8 (b) applies to international armed conflicts whereas Article 8 (e) applies to non-international armed conflicts. Article 8 (b) covers mainly "Hague Law" as most of the crimes enlisted are drawn from the Regulations annexed to the 1907 Hague Convention IV.<sup>238</sup> However, it also introduces "new crimes" as war crimes, such as the protection of peacekeeping missions.<sup>239</sup> Population transfer within an occupied territory and transfer by an occupying power of its own civilian population into the occupied territory sanctioned under Article 8 (b) (viii) is such a "new crime" that gave rise to controversy.<sup>240</sup> Moreover, several provisions of paragraph (b) include prohibited weapons. Sexual offences (such as rape and sexual slavery) are also covered by the *Rome Statute* and constitute "new law."<sup>241</sup> In connection with the specific charges against Thomas Lubanga, a charge unknown to the "Hague Law," namely conscripting or enlisting children under the age of

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<sup>229</sup> HRW, *The Status of the ICC Trial of Thomas Lubanga*, 2008.

<sup>230</sup> Coalition for the International Criminal Court, *Cases & Situations, Democratic Republic of Congo, Lubanga Case*.

<sup>231</sup> ICC Press Release, Stay of proceedings in the Lubanga case is lifted - trial provisionally scheduled for 26 January 2009, 2008.

<sup>232</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Background, 2011.

<sup>233</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Background, 2011.

<sup>234</sup> Open Society Justice Initiative, *The Lubanga Trial at the International Criminal Court*, Background, 2011.

<sup>235</sup> Office of the Prosecutor, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OTP monthly media briefing, 28 August 2006*, 2006, p. 1.

<sup>236</sup> Office of the Prosecutor, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OTP monthly media briefing, 28 August 2006*, 2006, p. 2.

<sup>237</sup> ICC Press Release, *Statement by Luis Moreno-Ocampo, Prosecutor of the ICC at the Press Conference in relation with surrender to the Court of Mr Thomas Lubanga Dyilo*, 2006.

<sup>238</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 60.

<sup>239</sup> Rome Statute, *Art. 8 (b) (iii)*, 1998.

<sup>240</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 61.

<sup>241</sup> Rome Statute, *Art. 8 (b) (xxii)*, 1998.

fifteen into the national armed forces or to use them to participate actively in hostilities, has to be resolved.<sup>242</sup> This provision is drawn from the 1989 *Convention on the Rights of the Child* and the *Additional Protocol I to the Geneva Conventions*.<sup>243</sup> The terms “conscripting” and “enlisting” refer to passive action as opposed to “recruiting” which refers to active action.<sup>244</sup> During the drafting history of the *Rome Statute*, the term “recruiting” appeared.<sup>245</sup> However, it was replaced by “conscripting or enlisting”, which simplifies the burden of proof. Under the current terminology of the *Rome Statute*, the simple act of putting down the name of a person under fifteen on a list of the national armed forces constitutes a war crime.

While paragraph (b) applies to international armed conflicts, paragraph (e) applies to non-international armed conflicts within the scope of Protocol Additional II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (1979).<sup>246</sup>

Article 8 (e) can only be applied “to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.<sup>247</sup> In 2007, the PTC held that the armed groups in question needed to have the ability to plan and carry out military operations for a prolonged period to fall within the scope of Article 8 (e).<sup>248</sup> Article 8 (e) does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.<sup>249</sup> Like Article 8 (2) (b) (xxvi), Article 8 (2) (e) (vii) also prohibits the use of child soldiers under the age of fifteen, but specifically for non-international armed conflicts.

### ***War Crimes under the Rome Statute***

When trying to establish Lubanga's criminal liability for war crimes, delegates should first determine whether the question at hand is an international or a non-international armed conflict at the time of the commission of the alleged crime. The ICTY, in the *Tadic*-case, interpreted armed conflicts broadly: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>250</sup>

At the Rome Conference, the terms “Conscription” and “Enlistment” were subject to a literal interpretation: “Conscription refers to the compulsory entry into the armed forces. Enlistment (...) refers to the generally voluntary act of joining armed forces by enrolment, typically on the 'list' of a military body or by engagement indicating membership and incorporation in the forces.”<sup>251</sup>

The second step is the establishment of one of the war crimes listed in Article 8 of the *Rome Statute*. Thirdly, the *nexus* between the act perpetrated and the conflict must be proven. As the ICTY held in its *Kunarac*-case, “humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”.<sup>252</sup>

Delegates representing the defendants should bear in mind that though Article 8 of the *Rome Statute* is very detailed, this does not necessarily constitute an advantage for the Prosecutor. Indeed, the burden of proof is even harder, because for all detailed elements provided in Article 8 must be fulfilled in order to establish that a war crime has been committed. This constitutes a loophole for the defendant. The *Kupreskic*-case of the ICTY supported this

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<sup>242</sup> Rome Statute, Art. 8 (b) (xxvi), 1998.

<sup>243</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 63.

<sup>244</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 63.

<sup>245</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 63.

<sup>246</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 64.

<sup>247</sup> Rome Statute, Art. 8 (f), 1998.

<sup>248</sup> Proceedings of the Bruges Colloquium, *Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting legal categories to contemporary realities*, Iris Müller: Non International Armed Conflict under Article 1(1) AP II and 8(2)(F) ICC Statute (EN/FR), 2010, p. 42.

<sup>249</sup> Rome Statute, Art. 8 (f), 1998.

<sup>250</sup> ICTY, *Prosecutor v. Tadic (Case No. IT-94-1-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, 1995, para. 70.

<sup>251</sup> Triffterer, *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, 1999.

<sup>252</sup> ICTY, *Prosecutor v. Kunarac et al. (Case No. IT-96-23 an IT-96-23/1-A)*, Judgment, 2001, para. 568.

hypothesis when it stated in 2000 that an “exhaustive categorization would merely create opportunities for evasion of the letter of prohibition”.<sup>253</sup>

### ***Individual criminal responsibility, Article 25 of the Rome Statute***

Article 25 covers individual criminal responsibility of those who organize and incite war crimes whether they are the principal offenders or accomplices who aid or abet principal offenders.<sup>254</sup> In the present case, the indictment stated individual criminal responsibility of Lubanga as a co-perpetrator of the offenses. Therefore, direct commission as a principal offender has to be proven under Art 25 (3) (a) of the *Rome Statute*.<sup>255</sup> This means that the Prosecution has to prove that Thomas Lubanga in fact did commit an act of conscription or enlisting or recruiting.

### ***Mental element, Article 30 Rome Statute***

The mental element or *mens rea*, the subjective element of crime must be proven in addition to the objective elements (material offence and Article 25 of the *Rome Statute*). As Lubanga is charged with direct commission, the Prosecution will have to prove knowledge and intent of the acts. However, in order to prove direct commission under Article 25 (3) (a) of the *Rome Statute*, negligence does not suffice. Negligence can only be used as an argument in front of the ICC when proving responsibility of a commander for acts he or her did not directly commit him- or herself, which is not the case here.<sup>256</sup>

In the present case, M. Lubanga is allegedly responsible, as co-perpetrator, of war crimes consisting of: enlisting and conscripting of children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003 (punishable under article 8 (2) (b) (xxvi) of the *Rome Statute*); enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 2 June 2003 to 13 August 2003 (punishable under article 8 (2) (e) (vii) of the *Rome Statute*).<sup>257</sup> With regards to this form of individual criminal responsibility, both international and non-international conflict have to be established.

### ***Summary of steps to go through***

First, identify whether war crimes (namely the crime of conscription or enlisting of children under fifteen years) were committed in the present case. Then search, following the hierarchical order of sources that can be invoked in front of the Court according to Article 21 of the *Rome Statute*, for the arguments that are in your favor. Investigate whether all elements of crime are fulfilled. Controversial arguments in academia are at your advantage as they can be debated in session and thus not only enable the Court to rule on a divided question but also maybe help you win the case. Afterwards, establish international criminal responsibility both objectively and subjectively too if necessary. Finally, do not forget to prepare yourself for the counter-arguments of the Prosecutor or the Defendant depending who you will be representing in the simulation of the ICC to stay in character and conduct yourself as the lawyers that you are.

In order to reach a decision on the criminal liability for the commission of war crimes, delegates will have to discuss the following questions:

- Did an international armed conflict/a conflict not of an international character take place at the time of the alleged commission of the crime?
- Did Thomas Lubanga Dyilo directly conscribe or enlist one or more persons into the national forces, or use one or more persons to participate actively in hostilities?
- Was the recruited person under the age of fifteen years?
- If so, did the conduct take place in the context of and was associated with an international armed conflict?
- If so, did Thomas Lubanga Dyilo have intent to commit the act of recruiting?

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<sup>253</sup> ICTY, *Prosecutor v. Kepreskic et al. (Case No. IT-95-16-T)*, Judgment, 2000, para. 563.

<sup>254</sup> Schabas, *An Introduction to the International Criminal Court*, 2004, p. 101.

<sup>255</sup> OTP, *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OIP monthly media briefing, 28 August 2006*, 2006, p. 2.

<sup>256</sup> Rome Statute, Art. 28, 1998.

<sup>257</sup> ICC Pre-Trial Chamber I. *Situation in the Republic Democratic of Congo, The Prosecutor v. Thomas Lubanga Dyilo, Under Seal, Warrant of Arrest*, 2006, p. 4.

- Did Thomas Lubanga Dyilo know that or should have known that the person in question was under fifteen?
- Was Thomas Lubanga Dyilo aware of factual circumstances that established the existence of an armed conflict?

## Annotated Bibliography

### ***II. The Prosecutor v. Thomas Lubanga Dyilo of the Democratic Republic of Congo***

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*This Human Rights Watch article is contemporary to the issuance of the warrant and offers background to the Ituri conflict and Thomas Lubanga Dyilo's involvement. On the other hand, this article is also interesting as it suggests that although Lubanga played an important role in this conflict, others were also involved, Lubanga is thus not solely responsible. However, he is the only accused whose case is the trial phase.*

Human Rights Watch. (2009). *The International Criminal Court Trial of Thomas Lubanga*. Retrieved August 23, 2011, from <http://www.hrw.org/news/2009/01/22/international-criminal-court-trial-thomas-lubanga>

*Delegates are invited to read the following article as it covers the trial, the Ituri conflict and the use of child soldiers in a questions and answers format with adequate numbers and figures reported by Human Rights Watch that can be implemented in the pleadings in front of the International Criminal Court.*

Institute for War and Peace Reporting. (2008). *Comment: Fair Trial vs. Confidentiality*. Retrieved August 18, 2011 from <http://iwpr.net/report-news/comment-fair-trial-vs-confidentiality>

*This article addresses the question of the suspension of the case taken by the Trial Chamber in 2008 and the difficulty to reach to a balance between a fair trial and confidentiality. Indeed, one of the procedural matters in this trial is the disclosure of evidence by the Prosecutor. This article shows the difficulty to satisfy both requisites in this trial.*

International Criminal Court. (2010). *Case Information Sheet, The Prosecutor v. Thomas Lubanga Dyilo, Case n°ICC-01/04-01/06*, 2011. Retrieved September 15, 2011 from <http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>

*This is a case information sheet covering the alleged crimes committed by Lubanga and the key judicial developments both prior and during trial. Delegates are encouraged to read it in order to have a global view of the evolution of the case in front of the real International Criminal Court up to August 30, 2011. This is also a handy source for in-court argumentation, if an overview of the charges is needed.*

International Criminal Court. (2006). *Newsletter November 2006 # 10*. Retrieved November August 22, 2011 from [http://www.icc-cpi.int/NR/rdonlyres/B75835FA-167E-4E9D-BC37-06239D316DD4/146439/ICCNL10200611\\_En1.pdf](http://www.icc-cpi.int/NR/rdonlyres/B75835FA-167E-4E9D-BC37-06239D316DD4/146439/ICCNL10200611_En1.pdf)

*The newsletter of the International Criminal Court is a good introduction to the case as it covers the chronology of the events of the Lubanga case up to November 2006. It equally offers a background to the case and to the proceedings in front of the Court. Delegates are encouraged to read it as it offers a good overview of the case.*

International Criminal Court Office of the Prosecutor (OIP). (2006). *Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OIP monthly media briefing, 28 August 2006*. Retrieved August 28, 2011 from: <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2006/d>

*Delegates are strongly advised to read this statement of the OIP as it covers the indictment against Thomas Lubanga Dyilo charging him with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities, allegedly between July 1, 2002 and December 31, 2003 in the North Eastern Ituri district of DRC. The charges are explained with underlying facts, enabling a clear understanding of the aim of the trial.*

International Criminal Court Pre-Trial Chamber I. (2006). *Situation in the Republic Democratic of Congo, The Prosecutor v. Thomas Lubanga Dyilo, Under Seal, Warrant of Arrest*. Retrieved September 10, 2011 from: <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>

*This is the warrant of arrest issued by the Pre-Trial Chamber I. It is important for delegates to consider this source as the charges of war crimes held against Thomas Lubanga Dyilo have been issued in the warrant by the Pre-Trial Chamber I for the first time in this document after having examined the Prosecution's application for a warrant of arrest of Thomas Lubanga Dyilo filed on January 16, 2006.*

International Criminal Court Press Release. (2004). *The Office of the Prosecutor of the International Criminal Court opens its first investigation*. Retrieved August 23, 2011 from <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>

*This is the press release of the Office of the Prosecutor of the International Criminal Court announcing the opening of its first investigation for the Lubanga case. Delegates should start their research by reading this Press Release as the opening of investigations is the starting point of the procedure in front of the International Criminal Court. Indeed, before issuing the first warrant of arrest of the International Criminal Court, an investigation was started by the Prosecutor and this is the official press release of the first decision to start an investigation by the International Criminal Court by covering the steps that led to the opening of the investigation and the stake of a trial in front of this Court.*

Open Society Justice Initiative. (2011). *The Lubanga Trial at the International Criminal Court*. Retrieved August 22, 2011 from <http://www.lubangatrial.org>

*Delegates are invited to use this website in order to understand the background of the case, the charges against Thomas Lubanga Dyilo and access a live video covering the trial and both the Prosecutor's and the Defense's arguments. This website is regularly updated and is a good way to follow any change that could affect the case at hand.*

United Nations Special Representative of the Secretary-General for Children and Armed Conflict. (2008). *Situation in the Republic Democratic of Congo, The Prosecutor v. Thomas Lubanga Dyilo in the case of The Prosecutor v. Thomas Lubanga Dyilo, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, Submitted in application of Rule 103 of the Rules of Procedure and Evidence*. Retrieved September 18, 2011 from [http://www.un.org/children/conflict/\\_documents/AmicuscuriaeICCLubanga.pdf](http://www.un.org/children/conflict/_documents/AmicuscuriaeICCLubanga.pdf)

*This document has been annexed to the Lubanga case. It constitutes a good source to enable a debate on the evidence of conscription or enlistment during the simulation. In the following document, the United Nations Special Representative of the Secretary-General on Children and Armed Conflict submits this amicus curiae brief pursuant to Decision inviting her observations of Trial Chamber I of the International Criminal Court dated February 18, 2008, which granted her to submit written observations on the definition of 'conscripting or enlisting' children, the manner to distinguish both and their interpretation.*

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**INTERNATIONAL CRIMINAL COURT**  
**RULES OF PROCEDURE AND EVIDENCE**

**INTRODUCTION**

*Please note that several of these Rules reflect provisions of the Rome Statute or the Rules of Procedure and Evidence of the International Criminal Court. Other provisions have been added to respond to the needs of a simulation.*

Interpretation of the rules shall be reserved exclusively to the Directors-General or his or her designate.

**SECTION A. GENERAL PROVISIONS**

**Rule 1**  
**Use of terms**

In the present document:

- “**Article**” refers to articles of the Rome Statute;
- “**Accused**” refers to a person against whom charges have been confirmed by a Pre-Trial Chamber;<sup>258</sup>
- “**Court**” refers to the International Criminal Court;
- “**Investigation**” refers to all activities undertaken by the Prosecutor under the Rome Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed;
- “**Party**” refers to the Prosecutors or the Defense Counsels;
- “**Presiding Judge**” refers to the Committee Director or his or her designate;
- “**Rules**” refer to the Rules of Procedure and Evidence;
- “**Statute**” refers to the Rome Statute of the International Criminal Court;
- “**Victim**” refers to any natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court and may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

**Rule 2**  
**Language**

The working language of the Court shall be English at all times.

**SECTION B. JUDGES, PRESIDING JUDGE, AND REGISTRAR**

**Rule 3**  
**Status of judges**

The Judges, in the exercise of their functions, are of equal status.

**Rule 4**  
**Solemn declaration of Judges**

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<sup>258</sup> For the purpose of the simulation, it is assumed that a Pre-Trial Chamber has confirmed charges in both cases at hand.

1. Before taking up duties each Judge shall make the following solemn declaration:

"I solemnly declare that I will without fear or favor, affection or ill-will, serve as a Judge of the International Criminal Court, honestly, faithfully, impartially, and conscientiously."

2. This declaration shall be made at the first public sitting at which the Judge is present.
3. The text of the declaration, signed by the Judge and witnessed by the Directors-General or his/her representative, shall be kept in the records of the Court.

#### **Rule 5**

##### **Absence of Judges of the Court**

1. If a Judge is, for illness or other urgent personal reasons, or for reasons of authorized Court business, unable to continue sitting in a part-heard trial for a period which is likely to be of short duration, the Presiding Judge may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.
2. In case of urgency, the Presiding Judge may convene the Court at any time.

#### **Rule 6**

##### **Solemn declaration of the Presiding Judge**

1. Before taking up duties the Presiding Judge shall make the following solemn declaration:

"I solemnly declare that I will without fear or favor, affection or ill-will, serve as the Presiding Judge of the International Criminal Court, honestly, faithfully, impartially, and conscientiously, and that I will faithfully observe all the provisions of the Rome Statute and of the Rules of Procedure and Evidence"

2. This declaration shall be made at the first public sitting at which the full Court is present.
3. The text of the declaration, signed by the Judge and witnessed by the Directors-General or his/her representative, shall be kept in the records of the Court.

#### **Rule 7**

##### **Functions of the Presiding Judge**

1. The Presiding Judge shall preside at all plenary meetings of the Court, co-ordinate the work of the Court as well as exercise all the other functions conferred on him by the Rome Statute and the Rules.
2. The Presiding Judge may after appropriate consultation issue Practice Directions, consistent with the Rome Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Court.
3. The Presiding Judge shall, in addition to the discharge of his or her judicial functions, be responsible for the proper administration of justice. In particular, in coordination with the Judges, the Prosecutor, the Defense Counsel, and the Victims' Representatives, the Presiding Judge shall take all appropriate measures aimed at furthering the conduct of fair, impartial and expeditious trials and appeals.
4. The Presiding Judge shall be the regular channel of communications to and from the Court, and in particular shall effect all communications, notifications and transmission of documents required by the Rome Statute or by these Rules and ensure that the date of dispatch and receipt thereof may be readily verified.
5. The Presiding Judge shall, in addition to the discharge of his or her judicial functions:
  - a) keep a General List of all cases, entered and numbered in the order in which the documents instituting proceedings are received by the Court;
  - b) transmit to the parties copies of all pleadings and documents annexed upon receipt thereof;

- c) be present, in person or by his/her representative, at meetings of the Court, and be responsible for the preparation and conduct of such meetings;
  - d) sign all judgments and orders of the Court;
  - e) be responsible for the printing and publication of the Court's judgments and orders, the pleadings and statements, and of such other documents as the Court may direct to be published;
  - f) deal with enquiries concerning the Court and its work;
  - g) ensure that information concerning the Court and its activities is made accessible;
  - h) have custody of the seals and stamps of the Court, of the archives of the Court, and of such other archives as may be entrusted to the Court; and
  - i) make rulings on any procedural or substantive matter before the Court.
6. The Court may at any time entrust additional functions to the Presiding Judge.
  7. The Presiding Judge may, at any time, amend the Rules of the Court in order to maintain order and the progressive work of the Court.
  8. In the discharge of his/her functions, the Presiding Judge shall be responsible to the Directors-General and/or his or her designates.

**Rule 8**  
**The Registrar**

The Presiding Judge may appoint a Registrar to assist him or her in the exercise of required duties throughout the trial proceedings.

**SECTION C. INTERNAL FUNCTIONING OF THE COURT**

**Rule 9**  
**Plenary Meetings**

1. The quorum for each plenary meeting of the Court shall be three Judges of the Court.
2. The obligation of Judges of the Court to hold themselves permanently at the disposal of the Court entails attendance at all such meetings, unless they are prevented from attending by illness or for other serious reasons duly explained to the Presiding Judge, who shall inform the Court.

**Rule 10**  
**Deliberations**

1. The deliberations of the Court shall take place in private and remain secret.
2. Only Judges take part in the Court's judicial deliberations. The Presiding Judge, or his/her representative, and the Registrar, as may be required, shall be present. No other person shall be present except by permission of the Presiding Judge.

## **SECTION E. THE PROSECUTION**

### **Rule 11 Functions of the Prosecutors**

1. Each Prosecutor shall perform all the functions provided by the Rome Statute in accordance with the Rules.
2. The Prosecutors' powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutors' direction.

### **Rule 12 Conduct of Investigations**

*Please note that at the NMUN-NY Conference, Prosecution, Defense and Victims' Representatives will be provided with evidence for each case prior to the Conference. Such evidence includes witness' testimonies, reports, pictures, etc. Delegates will not be required to conduct their own investigations. If delegates wish to use evidence other than the one provided by staff, a request for admission may be sought from the Directors-General prior to the Conference.*

1. The Prosecutor shall, in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Rome Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.
2. In the conduct of an investigation, the Prosecutor may collect and examine evidence, including any books, documents, witness' testimonies, photographs, and other tangible objects.
3. The Prosecutor shall be responsible for the retention, storage and security of information and physical material obtained in the course of the Prosecutor's investigations until formally tendered into evidence.

## **SECTION F: COUNSEL**

### **Rule 13 Obligations of Counsel**

In the performance of their duties, counsel shall be subject to the Rome Statute, the Rules, the Code of Professional Conduct for Counsel, and any other document adopted by the Court that may be relevant to the performance of their duties.

### **Rule 14 Assignment of Counsel**

1. Whenever the interests of justice so demands, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive, which is set out by the Presiding Judge and approved by the Judges.
2. Subject to any order of a Chamber, Counsel will represent the accused and conduct the case to finality. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances. In the event of such withdrawal, the Defense shall assign another Counsel to the indigent accused.

### **Rule 15 Misconduct of Counsel**

1. If one or more Judges of the Court finds that the conduct of a counsel is offensive, abusive, or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Court may, after giving counsel due warning:

- (i) refuse audience to that counsel; and/or
  - (ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Court.
2. The Presiding Judge may publish and oversee the implementation of a Code of Professional Conduct Counsel.

## **SECTION G: VICTIMS REPRESENTATIVES**

### **Rule 16**

#### **Participation of victims in the proceedings**

1. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at trial. Such presentation shall be conducted in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. The Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
3. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.

### **Rule 17**

#### **Victims' Representatives**

1. Victims may not act in Court, but must be represented by a legal expert (Victims' Representative).
2. Where there are a number of victims, the Presiding Judge shall, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, to choose a common legal representative.<sup>259</sup>

## **SECTION H: PROCEEDINGS BEFORE THE COURT**

### **Rule 18**

#### **Disclosure of Evidence**

1. Prior to the trial chamber proceedings, the Prosecution shall permit Defense Counsel to inspect any books, documents, photographs, testimonies, and other tangible objects in the possession or control of the Prosecution, which are intended for use by the Prosecution as evidence at trial.
2. Paragraph 1 of this Rule applies *mutatis mutandis* to the Defense Counsel.

### **Rule 19**

#### **Contempt of the Court**

The Court, in the exercise of its inherent power, may hold in contempt any person who knowingly and willfully interferes with its administration of justice, including any person who:

- a) discloses information relating to proceedings in knowing violation of an order of the Court;
- b) without just excuse fails to comply with an order to attend before or produce documents before the Court;

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<sup>259</sup> For the purposes of our simulation, Victims' Representatives will be given additional information on the group of victims they are representing for each case.

- c) threatens, intimidates, causes any injury, or offers a bribe to, or otherwise interferes with any person, with the intention of preventing that person from complying with an obligation under an order of a Judge or the Court; or
- d) knowingly assists an accused person to evade the jurisdiction of the Court.

**Rule 20**  
**Records of Proceedings and Preservation of Evidence**

1. The Presiding Judge, with the assistance of the Registrar, shall cause to be made and preserve a full and accurate record of all proceedings.
2. The Presiding Judge shall retain and preserve all physical evidence offered during the proceedings subject to any Practice Direction or any order which a Chamber may at any time make with respect to the control or disposition of physical evidence offered during proceedings before that Chamber.

**Rule 21**  
**Open Sessions**

1. All proceedings, other than deliberations, shall be held in public, unless the Court decides otherwise.
2. The Court may order that public be excluded from all or part of the proceedings for reasons of protecting the interest of justice.
3. The Court shall make public the reasons for its order.

**Rule 22**  
**Control of Proceedings**

The Court may exclude a person from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

**Rule 23**  
**Joint and Separate Trials**

1. In joint trials, each accused shall be accorded the same rights as if he were being tried separately.
2. The Court may order that persons accused jointly be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

**Rule 24**  
**Opening Statements**

1. Before presentation of evidence by the Prosecutor, each party may deliver an opening statement. The Defense Counsel may elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defense.
2. The Victims' Representatives may deliver an opening statement after the opening statements of the parties. Should the Defense Counsel opt to deliver their opening statement after the presentation of the case by the Prosecutor, the Victims' Representatives may opt to deliver their opening statement after conclusion of the presentation of the case by the parties.
3. No opening statement shall exceed fifteen minutes.

**Rule 25**  
**Presentation of evidence**

1. Each party is entitled to present evidence. Unless otherwise directed by the Court in the interests of justice, evidence at the trial shall be presented in the following sequence:
  - (i) Evidence for the prosecution;

- (ii) Evidence for the defense;
  - (iii) Evidence for the victims' representatives;
  - (iv) Prosecution evidence in rebuttal;
  - (v) Defense evidence in rejoinder.
2. Judges are entitled to ask questions during the presentation of evidence. Such questions shall be submitted in written form to the Presiding Judge. The Presiding Judge may interrupt the presentation of evidence at his/her discretion for questions to be answered.
  3. Parties subject to a question may motion for a suspension of the formal meeting to prepare their answer. Such suspension shall not exceed fifteen minutes, and may be extended once.

**Rule 26**  
**Closing Arguments**

1. After the presentation of all the evidence, the Prosecution shall and the Defense and Victims' Representatives may present a closing argument. The Prosecution may present a rebuttal argument to which the defense may present a rejoinder.
2. The parties shall make a submission to the Court and address matters of sentencing in closing arguments. Victims' Representatives shall make a request for reparations to the Court and address form and amount of said reparation in accordance with Article 75.

**Rule 27**  
**Deliberations and Sentencing**

1. After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Members of the Court shall deliberate in closed session. The Judges may call the parties and victims' representatives to Court for additional questions.
2. The Judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the Judges. A finding of guilty may be reached only when a majority of Judges are satisfied that guilt has been proved beyond reasonable doubt.
3. The Judges shall vote separately on each count contained in the indictment. If two or more accused are tried together, separate findings shall be made as to each accused.
4. If the Court finds the accused guilty on one or more of the counts contained in the indictment, it shall also determine the penalty to be imposed in respect of each of the counts.
5. A person convicted by the Court may be sentenced to imprisonment for a specific number of years. In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 78.
6. The Court shall indicate whether multiple sentences shall be served consecutively or concurrently.
7. The Court shall issue a separate decision regarding any reparation request submitted by the Victims' Representatives. The decision shall determine the form and amount of reparation, and, subject to the provisions of Articles 75 and 79, specify whether reparation shall be made by the convicted person or through the Trust Fund.

## **SECTION I: RULES OF EVIDENCE**

### **Rule 28 General Provisions**

*Please note that at the NMUN-NY Conference, Prosecution and Defense may only refer to evidence that has been provided to them or has been approved by the Director-General prior to the Conference. Article 69 of the Rome Statute does not apply at NMUN-NY 2012.*

1. The rules of evidence set forth in this Section shall govern the proceedings before the Court. The Court shall not be bound by national rules of evidence.
2. The Court shall have the authority, in accordance with the discretion described in Article 64 (9), to assess freely all evidence submitted in order to determine its relevance or admissibility.
3. The Court shall admit any relevant evidence. The Court shall exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

### **Rule 29 Testimony of Witnesses**

Testimony of witnesses may be submitted in written form only. Each written testimony shall indicate the name of the witness, unless protective measures for the witness have been ordered.

### **Rule 30 Agreements as to evidence**

The Prosecution and the Defense may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, the Court may consider such alleged fact as being proven, unless the Court is of the opinion that a more complete representation of the alleged facts is required in the interests of justice, in particular the interests of the victims.

## **SECTION J. JUDGMENTS**

### **Rule 31 Judgments and Opinions; Decision on Reparation**

1. Judgments indicate the substantive result of the case before the Court and outline the rights and duties of the accused to the case under the applicable law.
2. Opinions are explanatory memoranda, which outline the legal position of a member or members of the Court regarding the judgment reached in the case. Judges of the Court disagreeing with a judgment may file dissenting opinions in which they outline their specific disagreements with the judgment. Judges of the Court agreeing with the judgment but disagreeing with the opinion expressed by the majority of Judges may file separate opinions in which they outline their specific disagreements with the opinion.
3. Decisions on reparation are annexed to the Judgment. Any decision on reparation shall specify the injury, loss or harm suffered by the victims, the rights infringed by the injuring act and determine an appropriate reparation.
4. If the Judges agree to the adoption of a proposed amendment, the proposal shall be modified accordingly and no vote shall be taken on the proposed amendment. A document modified in this manner shall be considered as the proposal pending before the Court for all purposes, including subsequent amendments. No opinion may be amended without the express consent of its authors, although a Member of the Court may concur with any judgment or opinion.

5. Rules of Procedure during deliberation can be considered by the Court, with the Presiding Judge's consent; or, if the Presiding Judge so chooses, determine the rules which shall apply to the deliberation. At that time, the rules shall be considered adopted by the Court.
6. When the Court has completed its deliberations and adopted its judgment, the parties and victims' representatives shall be notified of the date and time at which it will be read.
7. The judgment shall be read at a public sitting of the Court and shall become binding on the Accused on the day of the reading.

**Rule 32**  
**Content of Judgments**

1. The judgment shall contain:
  - a) the date on which it is read;
  - b) the names of the Judges participating in it;
  - c) the names of the Accused;
  - d) the names of the Prosecutors, Defense Counsel, and Victims' Representatives;
  - e) a summary of the proceedings;
  - f) the submissions of the parties;
  - g) a statement of the facts;
  - h) the reasons in point of law;
  - i) the operative provisions of the judgment, including a decision on reparation;
  - j) the number and names of the judges constituting the majority;
  - k) a statement as to the text of the judgment which is authoritative.
2. Any Judge of the Court may, if he/she so desires, attach his/her individual opinion to the judgment, whether he/she dissents from the majority or not; a Judge of the Court who wishes to record his/her concurrence or dissent without stating his/her reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court.
3. One copy of the judgment duly signed and sealed, shall be placed in the archives of the Court and another shall be transmitted to each of the parties. The Presiding Judge shall send copies to the Secretary-General of the National Model United Nations.
4. Once opinions for each case on the Court's docket have been issued, the Presiding Judge will adjourn the Court session.