The Contours of International Prosecutions

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As Defined by Facts, Charges, and Jurisdiction

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ter verkrijging van de graad Doctor aan
de Vrije Universiteit Amsterdam,
op gezag van de rector magnificus
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in het openbaar te verdedigen
ten overstaan van de promotiecommissie
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door

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geboren te Amsterdam

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prof.mr.dr. Wouter Werner (Vrije Universiteit Amsterdam)

dedicated to the memory of August Jether Fry, Jr.

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Finally, I dedicate this book to the memory of my father, August J. Fry, Jr., a man of two cities who had been a Professor of English and American Literature at the VU before he passed away in 1992.

Elinor Fry
Amsterdam, 5 August 2015

Table of Contents

Table of Cases

International/Hybrid Courts and Tribunals

Extraordinary Chambers in the Courts of Cambodia (ECCC)

Case 001

Prosecutor v. KAING Guek Eav (alias 'Duch'), Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch", 001/18-07-2007-ECCC/OCIJ, PTC02, 5 December 2008

Prosecutor v. KAING Guek Eav (alias 'Duch'), Judgment, 001/18-07-2007/ECCC/TC, TC, 26 July 2010

Case 002

Prosecutor v. NUON Chea et al., Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 002/19-09-2007-ECCC/TC, TC, 22 September 2011

Prosecutor v. NUON Chea et al., Decision on the Applicability of Joint Criminal Enterprise, 002/19-09-2007/ECCC/TC, TC, 12 September 2011

Prosecutor v. NUON Chea et al., Case 002/01 Judgment, 002/19-09-2007/ECCC/TC, TC, 7 August 2014

European Court of Human Rights (ECtHR)

Fox, Campbell and Hartley v. United Kingdom, App. No. 12244/86; 12245/86; 12383/86, ECtHR (1990)

I.H. v. Austria, Judgment of 20 April 2006, ECtHR, Application No. 42780/98

Mattoccia v. Italy, App. No. 23969/94, ECtHR (2000)

Pélissier and Sassi v. France, App. No. 25444/94, ECtHR (1999)

Taxquet v. Belgium App no 926/05, ECtHR, 31 January 2009

International Criminal Court (ICC)

Situation in the Central African Republic (ICC-01/05)
Jean-Pierre Bemba Gombo (ICC-01/05-01/08)
Prosecutor v. Bemba, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388, PTC III, 3 March 2009

Prosecutor v. Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, PTC II, 15 June 2009

Prosecutor v. Bemba, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, ICC-01/05-01/08-836, TC III, 20 July 2010

Prosecutor v. Bemba, Decision on the Defence Application to Obtain a Ruling to Correct the Revised Second Amended Document Containing the Charges, ICC-01/05-01/06-935, TC III, 8 October 2010

Prosecutor v. Bemba, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2324, TC III, 21 September 2012

Prosecutor v. Bemba, Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2334, Prosecution, 8 October 2012

Prosecutor v. Bemba, Defence Submission on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, Defense, 18 October 2012

Prosecutor v. Bemba, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/0802497, ICC-01/05- 01/08-2500, TC III, 6 February 2013

Situation in the Côte d'Ivoire (ICC-02/11)
Laurent Gbagbo and Charles Blé Goudé (ICC-02/11-01/15)
Prosecutor v. Gbagbo, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, ICC-02/11-01/11-321, AC, 12 December 2012

Prosecutor v. Gbagbo, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, ICC-02/11-01/11-325, PTC I, 14 December 2012

Prosecutor v. Gbagbo, Document amendé de notification des charges [DCC], ICC-02/11-01/11-357-Anx1-Red, Prosecutor, § E.1, 25 January 2013 [in French only]

Prosecutor v. Gbagbo, ICC-02/11-01/11-T-14-ENG, Transcript of 19 February 2013

Prosecutor v. Gbagbo, Prosecution's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", ICC-02/11-01/11-474, 12 August 2013

Prosecutor v. Gbagbo, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, PTC I, 3 June 2013

Prosecutor v. Gbagbo, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", ICC-02/11-01/11-572, AC, 16 December 2013

Prosecutor v. Gbagbo, Decision on the Confirmation of Charges Against Laurent Gbagbo, ICC-02/11-01/11-656-Red, PTC I, 12 June 2014

Prosecutor v. Blé Goudé, Defence request to amend the document containing the charges for lack of specificity, ICC-02/11-02/11-126, Defense, 25 Augustus 2014

Prosecutor v. Blé Goudé, Decision on the "Defence request to amend the document containing the charges for lack of specificity", ICC-02/11-02/11-143, PTC I, 1 September 2014

Prosecutor v. Blé Goudé, Decision on the confirmation of charges against Charles Blé Goudé, ICC-02/11-02/11-186, PTC I, 11 December 2014

Situation in Darfur, Sudan (ICC-02/05)
Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09)
Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, 4 March 2009

Bahar Idriss Abu Garda (ICC-02/05-02/09)
Prosecutor v. Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09-243, PTC I, 8 February 2010

Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09)
Prosecutor v. Banda and Jerbo, Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, PTC I, 7 March 2011

Prosecutor v. Banda and Jerbo, Decision on the Joint Submission regarding the contested issues and the agreed facts, ICC-02/05-03/09-227, TC IV, 28 September 2011

Prosecutor v. Banda, Prosecution request for notice to be given of a possible recharacterisation under Regulation 55, ICC-02/05-03/09-549, Prosecution, 28 March 2014

Situation in the Democratic Republic of the Congo (ICC-01/04)
Thomas Lubanga Dyilo (ICC-01/04-01/06)
Prosecutor v. Lubanga, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, PTC I, 29 January 2007

Prosecutor v. Lubanga, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, TC I, 13 December 2007

Prosecutor v. Lubanga, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007

Prosecutor v. Lubanga, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, TC I, 13 December 2007

Prosecutor v. Lubanga, Order for the prosecution to file an amended document containing the charges, ICC-01/04-01/06-1548, TC I, 9 December 2008

Prosecutor v. Lubanga, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891-tENG, 22 May 2009

Prosecutor v. Lubanga, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, TC I, 14 July 2009

Prosecutor v. Lubanga, Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 5(2) of the Regulations of the Court, ICC-01/04-01/06-2054, TC I, 17 July 2009

Prosecutor v. Lubanga, Corrigendum to 'Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009', ICC-01/04-01/06-2061-Anx, TC I, 21 July 2009

Prosecutor v. Lubanga, Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2107, TC I, 3 September 2009

Prosecutor v. Lubanga, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205, AC, 8 December 2009

Prosecutor v. Lubanga, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-2223, TC I, 8 January 2010

Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC I, 14 March 2012

Prosecutor v. Lubanga, Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, Prosecution, 18 February 2013

Prosecutor v. Lubanga, Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, AC, 1 December 2014

Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)
Prosecutor v. Katanga and Ngudjolo, Decision on the Defences' Motions Regarding the Document Containing the Charges, ICC-01/04-01/07-648, PTC I, 25 June 2008

Prosecutor v. Katanga and Ngudjolo, Decision on the confirmation of charges, ICC-01/04-01/07-717, PTC I, 30 September 2008

Prosecutor v. Katanga and Ngudjolo, Prosecution's Consolidated Response to "Defence Objections to Admissibility in Principal and in Substance" (ICC-01/04-01-07-1558) and <Requête de la Défense en vue d'obtenir une décision d'irrecevabilité des documents liés aux témoins décédés référencés sous les numéros T-167 et T-258> (ICC-01/04-01/07-1556), ICC-01/04-01/07-1645, PTC II, 16 November 2009

Prosecutor v. Germain Katanga and Ngudjolo, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319, TC II, 21 November 2012

Germain Katanga (I CC-01/04-01/07)
Prosecutor v. Katanga, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", ICC-01/04-01/07-3363, AC, 27 March 2013

Prosecutor v. Katanga, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, TC II, 7 March 2014.

Callixte Mbarushimana (ICC-01/04-01/10)
Prosecutor v. Mbarushimana, Transcript of 16 September 2011, ICC-01/04-01/10-T-6-Red2-ENG

Prosecutor v. Mbarushimana, Decision on the confirmation of charges, ICC-01/04-01/10-465, PTC I, 16 December 2011

Bosco Ntaganda (ICC-01/04-02/06)

Prosecutor v. Ntaganda, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, PTC II, 9 June 2014

Prosecutor v. Ntaganda, Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2), ICC-01/04-02/06-501, Prosecution, 9 March 2015

Mathieu Ngudjolo Chui (ICC-01/04-02/12)

Prosecutor v. Ngudjolo, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG, TC II, 18 December 2012

Situation in the Republic of Kenya (ICC-01/09)

Situation in the Republic of Kenya, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09-19, PTC II, 31 March 2010

William Samoei Ruto and Joshua Arap Sang (ICC-01/09-01/11)

Prosecutor v. Ruto et al. and *Prosecutor v. Muthaura et al.*, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC-01/09-01/11-19, 31 March 2011

Prosecutor v. Ruto et al., Decision on the "Request by the Victims' Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact", ICC-01/09-01/11-274, PTC II, 19 August 2011

Prosecutor v. Ruto and Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, PTC II, 23 January 2012

Prosecutor v. Ruto and Sang, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-1122, TC V(A), 12 December 2013

Prosecutor v. Ruto and Sang, Decision on the Prosecutor's appeal against the "Decision on the Prosecution's request to amend the updated document containing the charges pursuant to article 61(9) of the Statute", ICC-01/09-01/11-1123, ICC, AC, 13 December 2012

Prosecutor v. Ruto and Sang, Decision on the content of the updated document containing the charges, ICC-01/09-01/11-522, TC V, 28 December 2012

Uhuru Muigai Kenyatta (ICC-01/09-02/11)

Prosecutor v. Ruto et al. and *Prosecutor v. Muthaura et al.*, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC-01/09-01/11-19, 31 March 2011

Prosecutor v. Muthaura et al., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, PTC II, 23 January 2012

Prosecutor v. Muthaura and Kenyatta, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds' individual criminal responsibility, ICC-01/09-02/11-444, Prosecution, 3 July 2012

Prosecutor v. Muthaura and Kenyatta, Order regarding the content of the charges, ICC-01/09-02/11-536, TC V, 20 November 2012

Prosecutor v. Muthaura and Kenyatta, Decision on the content of the updated document containing the charges, ICC-01/09-02/11-584, TC V, 28 December 2012

Prosecutor v. Muthaura and Kenyatta, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, ICC-01/09-02/11-687, TC V, 11 March 2013

Prosecutor v. Kenyatta, Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, ICC-01/09-02/11-875, TC V(B), 19 December 2013

Prosecutor v. Kenyatta, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983, Prosecution, 5 December 2014

Prosecutor v. Kenyatta, Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11-1005, TC V(B), 13 March 2015

Walter Osapiri Barasa (ICC-01/09-01/13)

Prosecutor v. Barasa, Under seal *ex parte*, only available to the Prosecutor and the Registrar Warrant of arrest for Walter Osapiri Barasa, ICC-01/09-01/13-1-Red2, PTC II, 2 August 2013 (unsealed 2 October 2013 pursuant to the decisions ICC-01/09-01/13-14-US-Exp and ICC-01/09-01/13-11-US-Exp)

Situation in Libya (ICC-01/11)
Saif Al-Islam Gaddafi (I CC-01/11-01/11)
Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 1 May 2012

Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, PTC I, 31 May 2013

Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, PTC I, 11 October 2013

Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Red, AC, 21 May 2014

Prosecutor v. Al-Islam Gaddafi and Al-Senussi, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC-01/11-01/11-565, AC, 24 July 2014

International Criminal Tribunal for Rwanda (ICTR)

Akayesu (ICTR-96-4)
Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, TC I, 2 September 1998

Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva (ICTR-98-41)
Prosecutor v. Bagosora et al, Judgment, ICTR-98-41-A, AC, 14 December 2011

Prosecutor v. Bagosora et al., Decision on Admissibility of Proposed Testimony of Witness DBY, ICTR-98-41-T, TC I, 18 September 2003, para. 12 (Sept. 18, 2003)

Gacumbitsi (ICTR-2001-64)
Prosecutor v. Gacumbitsi, Appeal Judgment, ICTR-2001-64-A, AC, 7 July 2006

Gatete (ICTR-00-61)
Prosecutor v. Gatete, Decision on Defence Preliminary Motion, ICTR-00-61-I, TC I, 29 March 2004

Karemera, Ngirumpatse, and Nzirorera (ICTR-98-44)
Prosecutor v. Karemera et al., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice ICTR-98-44-AR73(C), AC, 16 June 2006

Muvunyi (ICTR-2000-55A)
Prosecutor v. Muvunyi, Judgment, ICTR-2000-55A-A, AC, 29 August 2008

Ndindabahizi (ICTR-01-71)
Prosecutor v. Ndindabahizi, Judgment, ICTR- 01-71-A, AC, 16 January 2007

Ndindiliyimana, Nzuwonemeye, and Sagahutu (ICTR-00-56)
Prosecutor v. Ndindiliyimana et al., Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony, ICTR-00-56-T, TC II, 30 March 2006

Ngeze and Nahimana (ICTR-99-52)
Prosecutor v. Ngeze and Nahimana, Décision sur les appels interlocutoires, ICTR-99-52-A, AC, 5 September 2000

Nizeyimana (ICTR-00-5)
Prosecutor v. Nizeyimana, Second Amended Indictment, ICTR-00-5 5-PT, Prosecutor, 17 December 2010

Ntabakuze (ICTR-98-41A)
Prosecutor v. Ntabakuze, Appeal Judgment, ICTR-98-41A-A, AC, 8 May 2012

E. Ntakirutimana and G. Ntakirutimana (ICTR-96-10)
Prosecutor v. Ntakirutimana and Ntakirutimana, Judgment and Sentence, ICTR-96-10 & ICTR-96-17-T, TC I, 21 February 2003

Prosecutor v. Ntakirutimana and Ntakirutimana, Appeal Judgment, ICTR-96-10-A and ICTR-96-17-A, AC, 13 December 2004

Ntagerura, Bagambiki, and Imanishimwe (ICTR-99-46)
Prosecutor v. Ntagerura et al., ICTR-99-46-T, Judgment and Sentence, TC III, 25 February 2004

Prosecutor v. Ntagerura et al., Appeal Judgment, ICTR-99-46-A, AC, 7 July 2006

Rukundo (ICTR-2001-70)
Prosecutor v. Rukundo, Judgment, ICTR-2001-70-A, AC, 20 October 2010

Rutaganda (ICTR-96-3)
Prosecutor v. Rutaganda, Appeal Judgment, ICTR-96-3-A, AC, 26 May 2003

Seromba (ICTR-2001-66)
Prosecutor v. Seromba, Appeal Judgment, ICTR-2001-66-A, AC, 12 March 2008

Simba (ICTR-01-76)
Prosecutor v. Simba, Decision on Defence Motion to Preclude Prosecution Evidence, ICTR-01-76-I, TC I, 31 August 2004

Prosecutor v. Simba, Judgment, ICTR-01-76-A, AC, 27 November 2007

International Criminal Tribunal for the former Yugoslavia (ICTY)

Blaškić (IT-95-14)
Prosecutor v. Blaškić, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), IT-95-14-PT, TC, 4 April 1997

Prosecutor v. Blaškić, Appeal Judgment, IT-95-14-A, AC, 29 July 2004

Radoslav Brđanin and Momir Talić (IT-99-36)
Prosecutor v. Brđanin and Talić, Decision on Objections by Momir Talić to the Form of the Amended Indictment, IT-99-36, TC II, 20 February 2001

Prosecutor v. Brđanin and Talić, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, IT-99-36, TC II, 23 February 2001

Prosecutor Brđanin and Talić, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36-PT, 26 June 2001

Prosecutor v. Brđanin and Talić, Decision on Form of Fourth Amended Indictment, IT-99-36-PT, TC II, 23 November 2001

Rasim Delić (IT-04-83)
Prosecutor v. Rasim Delić, Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, IT-04-83-PT, PT Judge, 30 June 2006

Đorđević (IT-05-87/1)
Prosecutor v. Đorđević, Decision on Form of Indictment, IT-05-87/1-PT, TC, 3 April 2008

Furundžija (IT-95-17/1)
Prosecutor v. Furundžija, Judgment, IT-95-17/1-A, AC, 21 July 2000

Galić (IT-98-29)
Prosecutor v. Galić, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should Be Considered as the Amended Indictment, IT-98-29-PT, TC, 19 October 2001

Prosecutor v. Galić, Decision on Application by Defence for Leave to Appeal, IT-98-29-AR72, AC 30 November 2001

Prosecutor v. Galić, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galić, IT-98-29-T, TC, 3 October 2002

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Abbreviations

AC	Appeals Chamber
CoC	Confirmation of Charges (ICC)
CoI	Commission of Inquiry
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICL	international criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IR	Internal Rules (ECCC)
IS	Islamic State
JCE	joint criminal enterprise
OTP	Office of the Prosecutor
PNA	Palestinian National Authority
PTC	Pre-Trial Chamber (ICC)
RPE	Rules of Procedure and Evidence
SC	Security Council (UN)
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UN	United Nations

Frequently Abbreviated Sources

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ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955, UN Security Council Resolution 955 (1994), 8 November 1994, as last amended on 7 July 2009
ICTY RPE	Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, adopted on 11 February 1994, as last amended on 22 May 2013
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, UN Security Council Resolution 827 (1993), 25 May 1993, as last amended on 7 July 2009
IMT Charter	Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945, 82 UNTS 279, also reprinted in *The Trial of Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945 – 1 October 1946, Vol. 1* (Nuremberg: International Military Tribunal, 1947) 10-18;
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1 Introduction

Exploring the Boundaries of International Criminal Prosecutions

1.1 In Search of Common Ground

By nature, core international crimes have indistinct factual parameters. Such crimes – i.e. war crimes, crimes against humanity, and genocide – generally occur on a massive scale, spread out over a large geographical area and a long time span, involving many perpetrators at various distances from the crime scene(s). These characteristics make international crimes difficult to demarcate from start (when determining the jurisdictional scope for the investigation in its earliest stage) to finish (pronouncing the final judgment on the charges as delineated in the indictment). Accurate jurisdictional and factual demarcation of international crimes prosecutions is important, though, for many reasons and from various perspectives: victims have an interest in knowing whether the particular harm they suffered is being dealt with in the criminal case addressing the events giving rise to international criminal charges; an accused must be notified of those charges and the exact events he or she personally stands accused of; moreover, if a particular international criminal court or tribunal does not have jurisdiction over (part of) the events, which domestic or international institution will deal with what happened on the ground, or in other words, how are impunity gaps remedied?

This dissertation addresses this demarcation difficulty by exploring the jurisdictional and factual boundaries of international criminal prosecutions, an exploration that is embedded in the larger NWO-funded Vidi-project *Dealing with Divergence: National Adjudication of International Crimes*. The Vidi-project is aimed at initiating a debate on the variance between the national and international tiers of enforcement of international criminal law (ICL), and employs the concept of 'legal pluralism' to map diversity in the field of international criminal justice.[1] Based on the observation that national criminal justice systems are the primary platform for the investigation, prosecution, and adjudication of international crimes, the Vidi-project sets out to map and analyze divergence between

1 See E. van Sliedregt and S. Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in E. van Sliedregt and S. Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press 2014) 7. The concept of 'legal pluralism' has gained attention in international (criminal) law in recent years. See e.g. L. van den Herik and C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012); P. S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012); A.K.A. Greenawalt, 'The Pluralism of International Criminal Law', 86 *Indiana Law Journal* 1063 (2011). See also W.W. Burke-White, 'International Legal Pluralism', 29 *Michigan Journal of International Law* 963 (2004).

international and national criminal jurisdictions, and explore whether there is a need for convergence in how international and domestic criminal courts deal with mass atrocity crimes.

Despite different mandates and diverging procedural and substantive laws, there is one thing national, international, and hybrid courts have in common:[2] they all undertake criminal prosecutions of international crimes. If the crime is what glues the pluralistic legal order in the field of international criminal justice together, then the question of whether international crimes are indeed fundamentally different from ordinary domestic crimes cannot be ignored. Vertical harmonization, i.e. between international and domestic jurisdictions, may be desirable where the crime has certain typical characteristics that call for unified methods of investigation, prosecution, and adjudication. This may, however, in turn create horizontal pluralism, i.e. within a given domestic system the prosecution of ordinary crimes may be approached differently than the prosecution of international crimes. Obviously, national jurisdictions are not necessarily prepared or able to replicate international models, which are not homogenous themselves, and as such, there is nothing wrong with accepting vertical pluralism or 'legal diversity along the national-international axis.'[3] But the possibility that domestic systems and their practitioners may seek guidance and inspiration from lessons learned at the international level, whether positive or negative, is one that deserves to be examined.[4]

There are certain legal and factual characteristics of core international crimes that differ from ordinary domestic crimes – i.e. a single murder or robbery committed in no discernible context. Characteristics such as the contextual element of an armed conflict, the massive scale upon which such crimes and victimization occur, and the wide range of perpetrators involved act as differentiating factors relevant for the parameters of the case. The premise here is that, despite institutional and legal diversity, the crimes and their typical features are the common factors that bind the ICL field. Instead of magnifying the differences between systems' substantive and procedural laws, this dissertation departs from this crime-based common ground.

2 Van Sliedregt and Vasiliev, *supra* note 1, 12 ('This system [of international criminal justice] consists of multiple – international and hybrid – courts that are primarily tasked with ICL enforcement. […] it also includes national courts, which have increasingly engaged with ICL and international jurisprudence when exercising jurisdiction over international crimes and interpreting relevant domestic criminal code provisions.')

3 Ibid 16.

4 Ibid 38 (noting that '[t]heorists of pluralism ought to be aware of how pluralism is experienced on the ground in refining their normative arguments.').

1.2 Questions of Demarcation in International Criminal Law

The main research question addressed in this dissertation is: what are the (factual and jurisdictional) outer limits of an international criminal prosecution? This question is dealt with on a number of levels ranging from the specific contours of a case against a particular accused to the jurisdictional reach of a court like the International Criminal Court (ICC). But first it must be noted that the approach taken, namely one from a demarcation angle based on the nature of the crime, means that the question of defining international crimes is not answered along the lines of legal formalist concerns, i.e. exploring the sources of law which provide for international crimes' definitions.[5] For the purpose of this dissertation's primary research question, crime definitions are accepted as a given based on the statutes of international criminal courts or tribunals that prosecute international crimes. In other words, the distinction between core international crimes and transnational or ordinary crimes does not form part of the demarcation that poses challenges and is relevant to the research questions in this dissertation. The international criminal courts and tribunals' *subject-matter* jurisdiction is clearly defined regarding war crimes, crimes against humanity, and genocide, and these definitions will be followed in this research.

The instigation for a focus on demarcation, which is unique in ICL scholarship to date, was one of the most contentious issues in contemporary international criminal prosecutions: the alleged lack of precise fact-finding. The assumption that international criminal trials are capable of determining who did what to whom during a mass atrocity has been severely challenged in recent years,[6] and insofar as the problems faced are not forum-specific, they are probably also encountered by domestic systems prosecuting international crimes. Existing research into fact-finding impediments experienced at the international criminal courts and tribunals led to the following observation: proving an international crime is fundamentally different from proving an ordinary crime. *What* needs to be proven is unique, such as the contextual elements in international crime definitions, and *how* it needs to be proven is different; the great volumes of evidence add to complex and lengthy

5 See e.g. J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011). See also S. Vasiliev, 'The Making of International Criminal Law', in C. Brölmann & Y. Radi (eds), *Research Handbook on the Theory & Practice of International Lawmaking* (Edward Elgar Publishing 2015).

6 See N.A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010). See also A. Zahar, 'Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press 2010) 600-10; M. Witteveen, 'Closing the Gap in Truth Finding: from the Facts of the Field to the Judge's Chambers' in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: an Interdisciplinary Approach* (Intersentia 2010) 383-412.

trials, and some practical circumstances, such as the absence of physical evidence linking the accused to the crime(s), lead to a high reliance on eyewitness testimony.[7]

Exploring the outer limits of international criminal prosecutions entails researching those legal aspects that influence demarcation: jurisdiction, charges, and identifying material facts by adequately distinguishing them from background information and evidence for the purpose of the indictment. The arrival at these three aspects is a logical consequence of the practical fact-finding issues noted in the previous paragraph, since those impediments are likely transposed and carried along post-investigation, namely to the charging phase of a criminal prosecution. If an investigation suffers from difficulties of establishing exactly who did what to whom when and where, framing the charges with sufficient specificity is also likely to pose challenges. This creates a problem of a legal nature potentially detrimental to the rights of the accused. The principle of the specificity of charges ensures the right of the defense to be informed promptly and in detail of the nature, cause and content of the charge as well as the ability to mount his or her defense.[8] However, in international criminal proceedings, prosecutors are faced with considerable challenges of case demarcation caused by international crimes' largely vague factual parameters, and consequently, charges indeed often suffer from a lack of specificity.[9] Moreover, drafting charges to the required degree of detail entails identifying amongst the large amounts of complex facts the material ones, i.e. crucial or ultimate facts, and distinguishing them from non-crucial information and evidence. How are the factual parameters in an international crime case set in the face of all these challenges?

The fact that core international crimes have blurry boundaries due to the complexity and scale of the events that constitute them not only creates a demarcation problem on the micro level in light of charging and evidentiary practices. It also begs the question on the macro level of what the jurisdictional boundaries are for a permanent yet complemen-

7 See e.g. Combs, *supra* note 6, 12 ('the vast bulk of the evidence presented to the current international tribunals comes in the form of witness testimony.'); International Bar Association, 'Witnesses before the International Criminal Court', July 2013, 6, *available at* www.ibanet.org/Article/Detail.aspx?ArticleUid=4470a96b-c4fa-457f-9854-ce8f6da005ed (accessed 22 April 2015). A high reliance on eye-witness testimony is problematic as such evidence is generally not regarded as very reliable: see e.g. X. Agirre Aranburu, 'Methodology for the Criminal Investigation of International Crimes,' in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Intersentia 2010) 367 (advising that documentary evidence ought to be prioritized in international criminal prosecutions, Agirre Aranburu notes that '[c]ontrary to witness testimony, a document cannot (legally) change its content, and it is not vulnerable to pressure, faulty recollection and other human frailties.'). See also generally D. Walton, *Witness Testimony Evidence: Argumentation, Artificial Intelligence, and Law* (Cambridge University Press 2008).

8 See H. Friman et al., 'Charges', in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 455-456.

9 See e.g. W. Jordash and J. Coughlan, 'The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy', in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press 2010); C. Eboe-Osuji, '"Vague" indictments and Justice at the International Criminal Tribunals: Learning from the World of Common Law', in C.P.M. Waters (ed.) *British and Canadian Perspectives on International Law* (Martinus Nijhoff 2006).

tary court like the ICC. There are two sides to the matter of jurisdiction as demarcation tool in respect of this particular court: (i) the extent of the institutional influence of the ICC in case of a conflict of jurisdiction, and (ii), situational demarcation in relation to the triggering of the ICC's jurisdiction. Regarding the first side to this coin, the question arises whether the risk that national proceedings might fall short in due process terms is a ground for the ICC to exercise jurisdiction over a case, thereby affecting the scope of an international criminal prosecution. With respect to the other side, noting that the ICC makes a strict distinction between situations on the one hand, at which point crimes are under investigation without having targeted individuals for prosecution yet, and on the other hand, cases against specific suspects, the question emerges: are similar demarcation problems discernible at the situation stage of investigations at the ICC in relation to jurisdictional matters? Following the primary research question that explores the outer limits of international criminal prosecutions, these sub-questions on the micro and macro level are addressed in order to gauge how the contours of international criminal prosecutions materialize.

1.3 Methodology and Scope

This study employs a conventional doctrinal legal research method,[10] i.e. a focus on the law and its interpretation in practice, as opposed to the political, sociological, or cultural factors that exert influence on practice and shape specific interpretations in specific cases. This method entails reviewing the international and hybrid criminal tribunals' governing legal documents (such as Statutes, Rules of Procedure and Evidence, Regulations, etc.), case law, policy documents (for example, policy papers released by the Office of the Prosecutor (OTP) of the ICC), and literature for a discourse analysis. Comparative methods are used only insofar as the primary sources (laws and case law relevant to the research question) of the international and hybrid criminal courts are studied and compared to one another, assuming one court may be viewed as a system on its own, a self-contained legal order.

While touching upon domestic approaches in respect of procedural and evidentiary law where appropriate, this dissertation focuses primarily on those international criminal courts that were founded for the purpose of dealing with core international crimes. This includes not only contemporary courts, but occasionally goes back to the Nuremberg and Tokyo tribunals as well as the Control Council Law No. 10 military trials insofar those prosecutions may provide valuable insights regarding the issues under scrutiny. This is done most notably where, in addition to (case) law, the post-WWII indictments are scru-

10 T. Hutchinson and N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', 17(1) *Deakin Law Review* 83 (2012).

tinized for the purpose of mapping how pleading principles have developed throughout the history of international crimes prosecutions.[11] The aim, however, is not to provide a *methodical comparative overview* of the law and practice in all of the potentially relevant jurisdictions, but instead it is to tackle the relevant issues with reference to the most pertinent case studies and examples or courts whose practice is most illustrative of the challenges.

The perspective adopted in this dissertation is a legal one and does not focus on political considerations, which may inform the exercise of prosecutorial discretion. This approach is chosen, because it highlights important areas of concern relevant to the (procedural) practice of contemporary international criminal prosecutions. Any such research is bound to have a slight focus on the ICC, and this dissertation is no exception. This is justifiable for the following reason: the UN ad hoc Tribunals are winding down – the Special Court for Sierra Leone (SCSL), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have officially gone into residual mode – and the ICC holds center stage as the only permanent international criminal court. Ultimately, however, the answers to the main research question aim to have value for other – including domestic – systems as well. Which lessons can (national) systems learn from international experiences when dealing with the complexities of prosecuting international crimes?

1.4 Roadmap

The chapters in this dissertation, which consists of articles previously published or accepted for publication as indicated per chapter and that were last updated in July 2015 to reflect more recent developments, deal with demarcation issues on various levels, taking the nature of international crimes as point of departure. The first part of this dissertation, titled The Nature of the Crime, deals with this point of departure in Chapter 2 by exploring the *sui generis* nature of international crimes and the goals usually associated with international criminal justice. It examines how international crimes' typical features, that set them apart from ordinary crimes, affect evidence law and practice.

The second part of this dissertation, titled Factual Demarcation at Case Level, discusses demarcation at the micro level of individual cases. Chapter 3 explores the factual scope of an international criminal prosecution by seeking to ascertain the following: how specific should the charges in an international crimes case be, which circumstances play a role in answering this question, and what influences (lack of) specificity? The focus is therefore on case demarcation in light of an investigation or a case against an identified suspect or accused, and centers on the indictment phase of criminal proceedings. The Chapter searches

11 See Chapter 3.

for pleading principles as developed at the international criminal courts and tribunals, and researches the difference between material facts, subsidiary facts, and evidence. This Chapter also contains a review of all historical post-WWII indictments, both the international ones and the military ones. Chapter 4 continues researching case demarcation at the micro level by taking a closer look at Regulation 55 of the ICC's Regulations of the Court. Pursuant to this provision, the Chamber may modify the legal characterization of facts in its final judgment as long as the new legal label does not exceed the facts and circumstances described in the charges. Building upon the pleading principles as identified in the foregoing chapter, Chapter 4 addresses the question which changes are permissible. It not only scrutinizes the ICC's relevant case law to date, but also explores additional feasible types of recharacterization, i.e. with respect to changes regarding the contextual elements, the underlying (sub)categories of crimes or the form of participation. It then assesses for each type of alteration of a legal characterization of facts whether it (hypothetically) exceeds the facts and circumstances described in the charges of a case.

Continuing the demarcation theme, the third part of this dissertation, titled Jurisdictional Reach of the International Criminal Court, consists of chapters dealing with demarcation at the macro level, addressing jurisdictional delimitation of the ICC. Chapter 5 deals with admissibility in light of the due process thesis – the idea that, through the principle of complementarity, the ICC positively influences domestic due process protections. It scrutinizes critiques of the due process thesis by assessing whether there is a legal basis for the Court's influence through an analysis of the admissibility grounds of Article 17 and Article 20(3) of the ICC Statute. Chapter 6 addresses the other side of the coin and makes demarcation at the macro level more concrete by researching situational demarcation in light of the ICC triggering and jurisdictional scheme. The Chapter explores the outer limits of the ICC's factual reach by examining whether the jurisdictional scheme of the ICC Statute, which in fact regulates the first step of demarcation, at times leads to inherently unrealistic conditions or demarcation difficulties. It uses two case studies pertaining to the Middle East and North Africa region to do so: (1) the ICC's problematic jurisdiction over foreign fighters joining the ranks of the Islamic State (IS);[12] and (2) Palestine's accession to the ICC Statute.

This dissertation is supplemented with two appendices. Appendix 1 is a visual aid for understanding the difference between material facts, subsidiary facts, and evidence, as well as how those items relate to the charges, the indictment, the defense's right to be put on notice, and the standard of proof. Appendix 2 lists the pleading principles as identified in

12 The Islamic State (IS) can also be referred to as the Islamic State of Iraq and Syria (ISIS), the Islamic State of Iraq and the Levant (ISIL), or as Daesh, sometimes spelled Da'ish or Da'esh. In this dissertation, the simplest, shortest version (i.e. Islamic State or IS) is used, but in no way should this choice be taken as the opinion that this group is either Islamic or a state.

international case law in Chapter 2, and clarifies the degree of specificity required for international crime charges. The Appendices accompany Chapters 2, 3, and 4.

Part I
The Nature of the Crime

2 The Nature of International Crimes and Evidentiary Challenges

Preserving Quality While Managing Quantity[*]

2.1 Introduction

Scholarship no longer regards international criminal procedure as a collection of predominantly common law and civil law particles but has started viewing it as a *sui generis* system.[13] This is not surprising. International criminal courts and tribunals have been developing procedures and practices that would enable them to deal with the complexities and extremities of prosecuting the notoriously fact-rich cases involving international crimes. At the same time, the tribunals have had to overcome the institutional handicaps of investigating crimes committed far away with little cooperation on the ground and without police forces of their own. These unique challenges, as well as the fact that the tribunals are composed of professionals from different domestic legal systems, could not but lead to the gradual consolidation of international criminal procedure as a distinctive system.

Furthermore, an increasing amount of scholarly attention focuses on how these courts deal with the challenge of attaining reliable evidence.[14] The jurisprudence from the ICC demonstrates that such attention is well warranted, as acquiring high-quality evidence has proved to be a major hurdle in practice. For instance, the unanimous judgment acquitting Mathieu Ngudjolo Chui was the consequence of evidentiary deficiencies in the form of the incredibility of all three key witnesses.[15] In the *Situation in Kenya*, Chief Prosecutor Fatou Bensouda filed a notification in early 2013 stating that her office was dropping the charges, which had been confirmed by the Pre-Trial Chamber, against one of the accused,

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* This Chapter was published as: E. Fry, 'The Nature of International Crimes and Evidentiary Challenges: Preserving Quality While Managing Quantity', in *Pluralism in International Criminal Law*, E. van Sliedregt and S. Vasiliev (eds), Oxford University Press 2014.

13 J.D. Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law', 14 *UCLA Journal of International Law and Foreign Affairs* 77 (2009), 81; R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 429. See generally J.D. Jackson and S.J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012); G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013).

14 See generally Combs, *supra* note 6; Zahar, *supra* note 6; Witteveen, 'Closing the Gap', *supra* note 6; de Vos, *supra* note 6.

15 See *Prosecutor v. Ngudjolo*, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-tENG, TC II, 18 December 2012, paras 124, 138-41, and 157-9 (witness P-250); paras 171-83, 189-90 (witness P-279); paras 202, 204-7, 209, 211-3, 218-9 (witness P-280).

Francis Muthaura, due to the limited amount of witnesses willing and able to testify.[16] Regarding another accused in the same situation, Kenya's President Uhuru Kenyatta, Bensouda requested in December 2013 that the trial be postponed for three months, stating her office's inability to proceed after one witness had asked to withdraw and another had admitted to lying.[17] Such problems continued to haunt the *Kenyatta* case, and eventually, the charges against him were dropped in March 2015.[18] In the *Laurent Gbagbo* case, the Pre-Trial Chamber adjourned the hearing on the confirmation of charges, urging the prosecutor to provide further evidence in a decision containing a slap on the wrist for the OTP's high reliance on reports of non-governmental organizations and press articles, i.e. anonymous hearsay evidence.[19]

For domestic practitioners – the primary actors expected to investigate and prosecute international crimes both now and (even more so) in the future – it will be very useful to know what is typical for those crimes, and which problems are inherent to the efforts of constructing and proving these cases in court, regardless of the institutional framework employed for those purposes. Evidentiary difficulties as identified by scholarship and case law of the international criminal tribunals are not all forum-neutral, but it is reasonable to assume that some are. In dealing with this category of cases, domestic courts face certain evidentiary challenges, too, as shown by a recent Dutch case. In March 2013, the Dutch District Court in The Hague convicted Yvonne Basebya for incitement to commit genocide in Rwanda in 1994, but acquitted her of all other charges due to a lack of evidence. The decision emphasized that in establishing the facts in the case the court faced formidable evidentiary challenges, such as the time that had passed since the crimes took place and the precariousness of witnesses' memories.[20]

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16 *Prosecutor v. Muthaura and Kenyatta*, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, ICC-01/09-02/11-687, TC V, 11 March 2013, paras 9-11. In relation to the ICC's other Kenya case *Ruto and Sang* and witness-related issues see also ICC Press Release, 'Ruto and Sang Case: ICC Trial Chamber V(a) states that interfering with witnesses is an offence against the administration of justice and may be prosecuted', ICC-CPI-20130918-PR941, 18 September 2013. *Prosecutor v. Barasa*, Under seal *ex parte*, only available to the Prosecutor and the Registrar Warrant of arrest for Walter Osapiri Barasa, ICC-01/09-01/13-1-Red2, PTC II, 2 August 2013 (unsealed 2 October 2013 pursuant to the decisions ICC-01/09-01/13-14-US-Exp and ICC-01/09-01/13-11-US-Exp).

17 *Prosecutor v. Kenyatta*, Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, ICC-01/09-02/11-875, TC V(B), 19 December 2013, paras 2-3.

18 *Prosecutor v. Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11-1005, TC V(B), 13 March 2015.

19 *Prosecutor v. Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, PTC I, 3 June 2013, paras 27-35.

20 Basebya was acquitted of committing genocide as an intellectual perpetrator, abetting genocide, attempted genocide, conspiracy to commit genocide, murder, and war crimes. See District Court The Hague, Judgment of 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292, unofficial English translation *available at* <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:8710> (accessed 13 October 2013).

Despite the presence of forum-neutral evidentiary challenges in the investigation and prosecution of international crimes, the discourse has thus far been controlled by the conceptual divide between the international and national tiers of criminal adjudication. This Chapter suggests a change of methodological perspective. Focusing on the nature of the crime and keeping the domestic practitioner in mind, it raises the following interrelated questions. To what extent are the above-mentioned challenges inherent to the kind of court, i.e. forum-specific, and to what extent are they typical for the nature of international crimes? To be able to answer this twofold query we must first explain what makes international crimes different. If international crimes are indeed distinguishable from 'regular' domestic crimes, and the difficulties faced at the international level are not forum-specific but crime-specific, then international criminal tribunals and domestic courts face similar evidentiary challenges. Solutions to these challenges developed by the international tribunals will also be a useful source of guidance for the investigative and prosecutorial endeavors at the national level. Such solutions may then be found in crime-focused analysis instead of through a *sui generis* approach to scrutinizing the law and practice of international criminal prosecutions. Although some of the evidentiary challenges in investigating, prosecuting, and adjudicating international crimes are universal and not forum-specific, the nature of such crimes could arguably serve as a harmonizing factor for procedures and practices utilized in this category of cases across the board. The idiosyncrasies of international criminality may operate as a constraint on the growing pluralism between international and national criminal procedure, at least in the cases involving international crimes.

In testing these ideas, this Chapter starts by discussing the idiosyncrasies of international crimes and the special challenges of investigating, prosecuting, and adjudicating them, including the distinct goals typically associated with international criminal justice (Section 2.2). It then continues by connecting these characteristics to the debate on evidentiary hurdles intrinsic to the investigation and prosecution of international crimes. Section 2.3 examines how those hurdles affect evidentiary processes, regardless of the forum – national or international – in which the crimes are prosecuted.

2.2 The Nature of International Crimes: Differentiating Factors

The distinction between ordinary and international crimes is not a black and white division. While the ICTY and ICTR allow prosecuting someone for international crimes when that person has already been convicted of committing the same acts defined as regular crimes at the national level,[21] the ICC takes a more conduct-based approach. The PTC confirmed that the Rome Statute does not make the strict distinction between ordinary and interna-

21 Art. 10(2) ICTY Statute and Art. 9(2) ICTR Statute.

tional crimes. Article 20(3) allows for a successful *ne bis in idem* challenge whenever a person has been tried by another court for the same conduct as described in the crime definitions of the ICC Statute.[22] Hence, the legal characterization of conduct as 'ordinary' or 'international' is of less importance within the ICC's framework. Nevertheless, certain conduct, i.e. a conglomeration of facts, can be legally characterized as an international crime, while other conduct, for instance a single murder in no discernible context, cannot. Moreover, by labelling something as an international crime, certain objectives (history-telling, fighting impunity, and restoring international peace and security, all further discussed below) enter the playing field. Therefore, for the purpose of this Chapter, the phrase 'international crime' will be used to denote a distinctive type of crime, although the conduct definable as such can also be prosecuted as an ordinary crime at the national level.

This section will attempt to capture the special nature of international crimes by considering the three factors differentiating them from ordinary criminality: (i) the goals and functions of international criminal justice and international criminal trials (*why* an international crime needs to be adjudicated upon); (ii) elements of the legal definitions: the ingredients and circumstances that comprise an international crime (*what* needs to be proven?); and (iii) the practical challenges of finding reliable evidence while managing the sheer volume of facts and the magnitude of the case (*how* is an international crime proven?).

2.2.1 Goals of international criminal justice

Traditional goals of domestic criminal law usually include retribution for wrongdoing, general and individual deterrence, incapacitation, and rehabilitation.[23] These naturally also play a role in relation to international crimes. Holding individual perpetrators accountable for crimes is generally thought to be the first and foremost objective that (international) criminal courts and tribunals pursue.[24] But international criminal justice is often said to have certain broader goals that go beyond the traditional confines of the regular domestic criminal trial.[25] Trials dealing with mass atrocities such as war crimes, crimes against humanity, and genocide serve greater purposes determinative of the future of the societies in which the international crimes were committed.[26] These goals include restoring international peace and security, fighting impunity, providing justice or 'closure'

22 *Prosecutor v. Al-Islam Gaddafi and Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, PTC I, 31 May 2013, para. 86.

23 M. Damaška, 'What is the Point of International Criminal Justice?', 83 *Chicago-Kent Law Review* 329 (2008), 331; B. Swart, 'Damaška and the Faces of International Criminal Justice', 6 *Journal of International Criminal Justice* 87 (2008), 100.

24 Swart, *supra* note 23, 100.

25 Cryer et al., *supra* note 13, 30; Damaška, *supra* note 23, 331.

26 Cryer et al., *supra* note 13, 30.

for victims, and recording history,[27] or in other words 'the objective of "educating" people of "historical truths" through law.'[28]

The self-imposed goals of international criminal justice are plentiful, and scholars have raised questions as to whether international criminal institutions have enough strength to carry the weight of all of them.[29] At the same time, it may prove impossible to determine in any empirical sense how the objectives specific for international criminal justice play a role in the daily realities of international criminal courts and tribunals.[30] Still, it is possible to theorize about the potential influence of those special goals on evidentiary issues.

2.2.1.1 Fighting impunity

Ending impunity for international crimes by punishing the perpetrators is perhaps the most obvious objective of international criminal justice.[31] But this goal is only partially inherent to the nature of international crimes. As a slogan, 'fighting impunity' was launched at the international level. It can be found, among others, in the preamble of the ICC Statute. But as a notion it also closely resembles a more traditional objective of criminal law, namely retribution for wrongdoing. Fighting impunity may therefore be viewed as an objective of international criminal justice seen as a whole and it is typical for international criminal law in that sense. However, as a criminal trial's function, it is not necessarily typical for the prosecution and adjudication of international crimes, because the rationale behind punishing perpetrators in an individual case can be any of the traditional objectives of criminal law enforcement, i.e. retribution, general and individual deterrence, incapacitation, and rehabilitation.[32]

Even though fighting impunity is only a general goal of international criminal justice, and not by definition a separate objective of individual trials dealing with international crimes, it still harbors the potential of affecting evidentiary issues in specific cases. Xabier Agirre Aranburu points out, for instance, that the '[i]nvestigation of international crimes is often affected by a certain tendency to downgrade the presumption of innocence of the accused due to the extreme gravity of the crime and the high expectations created by the

27 Ibid 30-5; J. Jackson, 'Faces of Transnational Justice: Two Attempts to Build Common Standards Beyond National Boundaries', in J. Jackson et al. (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Hart Publishing 2008) 226. See also Report of the UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc. S/2004/616, 23 August 2004, para. 38.

28 M. Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law* 1 (2002), 34.

29 Damaška, *supra* note 23, 331; Ohlin, *supra* note 13, 84.

30 Swart, *supra* note 23, 107.

31 J.D. Ohlin, 'Goals of International Criminal Justice and International Criminal Procedure', in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 59.

32 Ibid.

proceedings.'[33] Considering the gravity and moral reprehensibility of international crimes in combination with the general objective of fighting impunity in an atmosphere of public outcry, the dangerous temptation to lower the standard of proof and demote the presumption of innocence may surface.[34] From a normative perspective, it is unacceptable for the objective 'fighting impunity' to have the effect of lowering evidentiary standards, as such standards contribute to truth-finding and are indispensable for the protection of the rights of the accused. From a practical perspective, at least some awareness of the 'inquisitorial temptation' is therefore of vital importance.

2.2.1.2 Restoring international peace and security

Restoring international peace and security as objective of international criminal justice is often mentioned as typical feature of international crimes prosecutions. But it only plays an explicit role with respect to a limited number of international criminal tribunals, namely the *ad hoc* tribunals for the former Yugoslavia and Rwanda, and the permanent ICC.[35] The first two international criminal tribunals were established by the UN Security Council acting under Chapter VII of the UN Charter, which authorizes the UNSC to make binding law if there is a breach of, or threat to, international peace and security.[36] With respect to the ICC, the UNSC may refer situations to the Court acting under the same chapter, triggering the ICC's jurisdiction.[37] The situations in Darfur (Sudan) and Libya were brought within the jurisdictional scope of the Court this way.[38]

Maintaining and restoring international peace and security in the sense of the UN Charter is a goal of international criminal justice at the macro (institutional) level, because the UNSC as the guardian of international peace and security is also the sponsor of the tribunals' mandates and the trigger of their jurisdiction. However, whether restoring peace and security in general is typical for international crimes cases to the extent that it can be

33 Agirre Aranburu, 'Methodology', *supra* note 7, 358. Agirre Aranburu lists a number of ways in which the 'inquisitorial temptation' *may* surface in international criminal investigations, for instance: (1) in situations that are politically charged, '[c]hoosing the subject matter by opportunistic criteria rather by the objective gravity and legal requirements may mislead the investigation and turn it into a plain *fraud of law*'; (2) suspect-driven as opposed to offence-driven investigations, which 'tends to develop a "target-oriented" inertia, a deliberate or unconscious assumption that the suspicion must be corroborated, rather than tested objectively'; and (3) an increased emphasis on the suffering of victims combined with a decreased emphasis on the role of the suspect.

34 Ibid 356, 358-59.

35 See generally L. Reydams and J. Wouters, 'The Politics of Establishing International Criminal Tribunals', in L. Reydams, J. Wouters, and C. Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) 6-80.

36 Chapter VII of the UN Charter permits the UNSC to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and take military and non-military action to 'restore international peace and security.' This includes, for instance, the use of force or the launching of peacekeeping operations.

37 Art. 13(b) ICC Statute.

38 UN Security Council, Resolution 1593, S/RES/1593 (2005), 31 March 2005; UN Security Council, Resolution 1970, S/RES/1970 (2011), 26 February 2011.

viewed as a differentiating factor at the micro level (of individual trials and related evidentiary issues) is far from obvious. In the (national) criminal justice discourse, prosecutions of ordinary domestic crimes are usually not deemed to pursue the goal of restoring peace and security. However, if left unprosecuted, particularly in high-profile cases and on a wide scale, ordinary crimes are bound to disrupt social peace and public order in any given country. Hence, it is possible to argue that regular prosecutions in fact aim to protect the law and order on the *national* scale, in a sense comparable to the tribunals' supposed contribution to maintaining international peace. If so, restoring international peace and security is not a unique characteristic inherent in the nature of international crimes. In any event, the goal is too far removed from the context of an actual trial, and does not directly affect evidentiary processes.

2.2.1.3 Preserving the historical record for didactic purposes

As the philosopher Santayana famously stated, those who do not remember the past are condemned to repeat it.[39] Within the legal context, a similar chain of thought is often followed in the sense that 'the best way to prevent recurrence of genocide, and other forms of state-sponsored mass brutality, is to cultivate a shared and enduring memory of its horrors – and to employ the law self-consciously towards this end.'[40] In his opening statement at the beginning of the *Eichmann* trial in Jerusalem in 1961, Attorney-General Gideon Hausner seemed less confident about the trial's role in this larger scheme: 'I doubt whether in this trial we […] will succeed in laying bare the roots of the evil. This task must remain the concern of historians, sociologists, authors and psychologists, who will try to explain to the world what happened to it.'[41] In any event, history-telling is generally regarded as the most idiosyncratic objective of prosecuting international crimes.[42]

The idea that we can learn from the past leads to the assumption that recording history in criminal trials for the purpose of strengthening collective memory is a form of didacticism. There is thus a connection between the goal of history-telling on the one hand, and the broader didactic aims of reinforcing collective memory, learning from the past, and propagating human rights principles on the other hand. For the purpose of this Chapter, they can be discussed jointly, because they are likely to similarly affect the amount of information considered at trial. In order to explore whether and how these supposed objectives of international criminal justice affect evidentiary processes, it is useful to give

39 G. Santayana, *The Life of Reason; or the Phases of Human Progress. Vol. 1: Reason in Common Sense* (Dover Publications 1980) 284.

40 M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers 1997) 6.

41 *Israel v. Adolf Eichmann*, Opening statement of Attorney-General Gideon Hausner, Criminal Case 40/61, District Court of Jerusalem, *available at* www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-006-007-008-01.html (accessed 28 October 2013).

42 Swart, *supra* note 23, 107.

an overview of the debate on the history-telling purpose of trials. This may expose possible influences and tensions between that purpose and the evidentiary aspects.

Is history-telling to remain the concern of historians alone? Lawyers generally state that the primary goal of a criminal trial is to establish the truth in relation to the charges brought against the accused. But many international criminal courts and tribunals have issued lengthy judgments in which they also provide detailed accounts of the background of conflicts that led to the crimes.[43] However, the goal of recording history in international criminal trials, or the idea that the 'process of subjecting evidence to forensic scrutiny will set down a permanent record of the crimes that will stand the test of time,'[44] has not gone without criticism.

There are roughly three schools of thought on the didactic goal of trials in cases involving international crimes. The first school of thought perceives the broader goal of history-telling as a legitimate (or even primary) objective of an international criminal trial. This is known as didactic legality or didactic history.[45] The proponents of 'didactic legality', such as Lawrence Douglas and Mark Osiel, argue that there is room for undertaking education through history-telling in trials involving international crimes without undermining the legitimacy of the process. Douglas concedes that a criminal trial serves the primary purpose of answering the guilt/innocence question, but he continues by saying that it is not a trial's sole purpose: extralegal interests of collective instruction are amongst its valid functions.[46] Osiel emphasizes the importance of story-telling within the legal context for the creation of collective memory.[47]

The second school, known as liberal legalism, advocates the idea that a criminal trial should serve only one purpose, and that is to determine the guilt or innocence of the accused.[48] One of this school of thought's more famous, and perhaps one of its first advocates, is Hannah Arendt. In her well-known book, she states that '[t]he purpose of a trial is to render justice, and nothing else. Even the noblest of ulterior purposes […] can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.'[49] Even though Attorney-General Hausner was aware of the difficulties of exposing the 'roots of the evil', during the *Eichmann* trial he still maintained that history was at the center of the proceedings: '[i]t is not an

43 See e.g. *Prosecutor v. Tadić*, Judgment, IT-94-1-T, TC II, 7 May 1997, paras 53-192; *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, TC I, 2 September 1998, paras 78-111; *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC I, 14 March 2012, paras 67-91.

44 Cryer et al., *supra* note 13, 31.

45 See e.g. L. Douglas, *The Memory of Judgment; Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001); Osiel, *supra* note 40. See also R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press 2011) 16.

46 Douglas, *supra* note 45, 2.

47 Osiel, *supra* note 40, 2.

48 Wilson, *supra* note 45, 2-3; Douglas, *supra* note 45, 2.

49 H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (rev edn, Penguin Group 2006) 253.

individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history'. Arendt objected to this notion concluding that '[i]t was bad history and cheap rhetoric',[50] and observing that the didactic purpose pursued in the *Eichmann* trial led to breaches of due process rights.[51] Legal liberalism asserts that the sole function of a criminal trial is to determine whether the alleged crimes occurred and whether the accused can be held criminally responsible for them. When a court attempts to answer broader questions, such as why the underlying conflict occurred, or tries to resolve a clash of competing historical interpretations, it undermines due process, which ultimately damages the credibility of the legal system as a whole.

Douglas nuances the legal liberalists' assertion that setting history-telling as a goal in a criminal trial will automatically violate the rights of the accused. As he puts it, '[t]o succeed as a didactic spectacle in a democracy, a trial must be justly conducted insofar as one of the principal pedagogic aims of such a proceeding must be to make visible and public the sober authority of the rule of law.'[52] In other words, these trials must be fair or else they would not be successful in getting the lessons across they are meant to convey to the general public. A blatantly unfair trial is not a convincing teacher. Douglas also notes that some legal liberalists express a related view, namely not so much that it is inappropriate for courts to try to write history, nor will the rights of the accused necessarily be violated if the history-writing objective is pursued; however, courts will inevitably fail in any attempt to do so.[53] Judges may not have the capacity to produce a nuanced picture of events, since they function under time constraints and are bound by considerations of legal relevancy.[54] From the perspective of the historian, judge-painted historical pictures will seem 'fragmentary, foreshortened, and locked in an arbitrary time frame'.[55] Osiel notes this stance, too, and observes that '[t]he prevailing opinion is now that the attempt to combine the two endeavors is very likely to produce poor justice or poor history, probably both.'[56]

The judges in the *Eichmann* trial in Jerusalem were cognizant of their shortcomings as historians. They articulated the third school of thought, which is closely related to the second but milder in its articulation: the by-product doctrine. In their judgment they wrote:

> [a]s for questions of principle which are outside the realm of law, no one has made us judges of them, and therefore no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought

50 Ibid 19.
51 Ibid 221. See also Wilson, *supra* note 45, 4.
52 Douglas, *supra* note 45, 3; cf. Ohlin, *supra* note 13, 93 n75.
53 Douglas, *supra* note 45, 3. See also Wilson, *supra* note 45, 6.
54 Damaška, *supra* note 23, 336.
55 Ibid.
56 Osiel, *supra* note 40, 80.

> to these questions. […] Without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the witness box, will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial.[57]

These three schools of thought focus on the question whether courts should promote the didactic history-telling objective. On a more practical note, though, regardless of whether they ought to, can they? Wilson conducted empirical research on how practitioners understand the combination of history and law in courtrooms.[58] He does not unequivocally subscribe to any of the schools of thought discussed above. On the one hand, he does not advocate a greater role than currently exists for history and historians in international criminal trials – international criminal courts and tribunals should not be overloaded with too many diverging functions. On the other hand, Wilson believes that these courts are indeed capable of shaping valuable historical narratives.[59] His research shows that practitioners often insist that the goal of history-telling is not a burden that should be placed on the shoulders of judicial institutions.[60] Providing historical truth, or historical narratives, is merely a by-product of international crimes proceedings. At times, judges have insisted that the portions of their judgments concerning history should be interpreted as background information and contextual material, not as proven facts.[61] The by-product doctrine is therefore a form of legal liberalism that accepts the inevitable effect criminal proceedings involving international crimes have on historical narratives. However, this third school of thought explicitly distances itself from the idea that it is a trial's purpose. That does not mean that judicial institutions should not take this inevitable side-effect into consideration or that history as such does not play a role in the adjudication of international crimes.

Setting didactic history-telling as a general objective of international criminal justice is rather harmless in the sense that it does not automatically lead to infringing the rights of the accused. It does not necessarily affect the scope of the trial, either. But when this objective is set as a function at the trial level, or as a prosecution's explicit goal, it may have a differentiating effect as the amount of information relevant to the case will increase, as will the amount of elements that need to be proven.

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57 *Israel v. Adolf Eichmann*, Judgment, Criminal Case 40/61, District Court of Jerusalem, 11 December 1961, para. 2.

58 Wilson, *supra* note 45.

59 Ibid 16, 18.

60 See generally ibid. See also W. Schabas, *Unimaginable Atrocities* (Oxford University Press 2012) 161.

61 Schabas, *supra* note 60, 162.

2.2.2 What to prove

The goal of didactic history-telling may influence the scope of the truth-finding process, but substantive criminal law norms govern it in the most direct sense, serving as restrictions on the search for the truth.[62] Substantive elements, such as the factual allegations pertaining to the individual crimes charged, the contextual elements of the crimes, and the criminal responsibility of the accused, demarcate the scope of the case and comprise the material facts establishing the innocence or guilt of the accused. With respect to international crimes, there is a thin line here. International crime definitions contain contextual elements that refer to the historical and political context. Courts prosecuting and adjudicating international crimes will inevitably focus on more than just the specific conduct charged, as is the case with conventional crimes.[63] International crimes are crimes of context because their definitions contain 'elements that operate as qualifiers of gravity and restrictors of international jurisdiction to extraordinarily offensive crimes.'[64]

The political and historical context being part of the definitions of international crimes is not their only typical and challenging aspect when it comes to substantive law. Another such aspect concerns the theories of individual criminal liability and, more specifically, the ways of linking intellectual perpetrators to the atrocities committed on the ground. This challenge arises not only in relation to the didactic goal of history-telling, but also in relation to the pragmatic task of attributing crimes to the leadership. Since prosecution of international crimes is aimed at the most responsible and usually the furthest removed perpetrators, linkage problems inevitably arise regardless of any additional goals pursued. Broader goals of international crime prosecutions, a context in which the crimes take place, and individual culpability are aspects of international criminal law that should not be seen as isolated notions. This section will address the connections between them in greater detail.

2.2.2.1 Crimes of context

The adjudication of international crimes is more likely than conventional criminal prosecutions to involve evidence relating to the context, because the historical and political context in which such crimes take place is relevant for proving them. Consider, for instance, that the political and historical context in which a domestic crime such as a single murder takes place (or even multiple murders by a serial killer) generally does not matter for understanding or proving the crime in court.[65]

62 M. Damaška, 'Truth in Adjudication', 49 *Hastings Law Journal* 289 (1998), 293.
63 Damaška, *supra* note 23, 337.
64 Agirre Aranburu, 'Methodology', *supra* note 7, 367.
65 Koskenniemi, *supra* note 28, 12.

In relation to an international crime, there are three key ways in which context plays a role. First, it can in fact be part of the crime definition, and consequently, subject of the truth-finding endeavor. For example, war crimes are classified as such only where certain acts take place within the context of an (international or internal) armed conflict.[66] Crimes against humanity are defined as occurring as part of a widespread or systematic attack against a civilian population.[67] As to genocide, it is not clear-cut whether contextual elements are part of the crime definition. To all the different acts which may constitute genocide (killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, and imposing measures intended to prevent births) the ICC Elements of Crimes add that '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group *or* was conduct that could itself effect such destruction.'[68] Usage of the word 'or' leaves both options open. Conversely, the ICTY Appeals Chamber in *Jelisić* held that 'the existence of a plan or policy is not a legal ingredient' of the crime of genocide, i.e. that the context is not a mandatory element, but may play a role in proving the crime.[69] Antonio Cassese formulated the middle-ground position: 'a contextual element is not required […] for some instances of genocide, whilst it is needed for other categories.'[70]

The second way in which context plays a role in international crimes prosecution has been mentioned above with reference to the ICTY Appeals Chamber's holding in *Jelisić*. Context can be used for proving certain elements of crimes, such as the existence of a plan or policy to commit genocide, which may be relied upon for establishing the mandatory elements of that crime. This does not mean that the context forms a part of the substantive merits of the case or in itself amounts to such an element. The ICC uses context in a similar manner. For instance, in the decision adjourning the hearing on the confirmation of charges in the case against Laurent Gbagbo, the PTC held that when the prosecutor identifies particular incidents that constitute the attack against the civilian population (in relation to crimes against humanity), 'the incidents are "facts" which "support the [contextual] legal elements of the crime charged".'[71] As will be discussed in Chapter 3, such facts fulfill an evidentiary purpose and may be regarded as subsidiary facts or pattern evidence,

66 Arts 2 and 3 ICTY Statute; Art. 4 ICTR Statute; Art. 8 ICC Statute.

67 Art. 5 ICTY Statute; Art. 3 ICTR Statute; Art. 7 ICC Statute. The ICC Statute adds an element, namely that a crime against humanity is a crime committed in furtherance of a state or organizational policy.

68 Arts 6(a)(4), 6(b)(4), 6(c)(4), and 6(d)(4) ICC Elements of Crimes (emphasis added).

69 See *Prosecutor v. Jelisić*, Judgment, IT-95-10-A, AC, 5 July 2001, para. 48 ('the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.').

70 A. Cassese, 'Genocide' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 335.

71 *Gbagbo* Adjournment Decision, *supra* note 19, para. 21.

depending on how they are used.[72] The individual incidents are not contextual elements of the crime against humanity; the attack, however, is such an element.

The third way in which context is relevant is when facts are used for the construction of a narrative or as background information. For example, the Dutch court used context implicitly in the *Basebya* case.[73] Jurisprudence from the ICC, however, makes explicit that a narrative shedding light on the prosecution's theory of the case is an important aspect of presenting evidence at the confirmation stage of the proceedings. At that stage, the prosecution must demonstrate 'a clear line of reasoning underpinning [the] specific allegations'.[74] It may do so by presenting certain contextual facts (also at times referred to as 'subsidiary facts').[75] Such facts are only to be considered 'as background information or as indirect proof of the material facts'.[76] Chapter 3 explores these different types of facts and evidence elaborately, but for now it is worth noting that ICC jurisprudence does not necessarily equate subsidiary facts with circumstantial evidence, despite the similarities between the notions "circumstantial evidence" and "indirect proof." Rather, '[t]he [material] "facts and circumstances" underlying charges are to be distinguished from other factual allegations which may be contained in a DCC [Document Containing the Charges] as a whole. These other allegations may provide general background information or indicate intermediate steps in the prosecution's chain of reasoning.'[77]

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72 See *infra* Chapter 3, Section 3.3.

73 See e.g. *Basebya* Judgment, *supra* note 20, 4.18, 4.34, 5.1.

74 See e.g. *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, PTC I, 29 January 2007, para. 39; *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243, PTC I, 8 February 2010, para. 37; *Prosecutor v. Banda and Jerbo*, Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red, PTC I, 7 March 2011, para. 37; *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465, PTC I, 16 December 2011, para. 40.

75 *Banda and Jerbo* CoC, *supra* note 74, paras 36, 39; *Prosecutor v. Muthaura et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, PTC II, 23 January 2012, paras 59-60, 158-9; see also Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, *Gbagbo* Adjournment Decision, *supra* note 19, para. 34 n39.

76 *Banda and Jerbo* CoC, *supra* note 74, para. 37.

77 *Prosecutor v. Muthaura and Kenyatta*, Order regarding the content of the charges, ICC-01/09-02/11-536, TC V, 20 November 2012, para. 13. Judge Silvia Fernández de Gurmendi observed that 'facts of a subsidiary nature will usually emerge from "circumstantial evidence"'. See Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, *Gbagbo* Adjournment Decision, *supra* note 19, para. 34 n39. While not clarifying the distinction between material and subsidiary facts any further, the AC has endorsed the use of the term 'subsidiary facts' on several occasions: see *Prosecutor v. Lubanga*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205, AC, 8 December 2009, para. 90 n163; *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", ICC-01/04-01/07-3363, AC, 27 March 2013, para. 50; *Prosecutor v. Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of

This Chapter, dealing with the characteristics of the crime as such, focuses primarily on the first type of use of context, i.e. when it is indeed part of the crucial facts underpinning the crime definition. From the perspective of the court's reach, the contextual elements in the definitions of international crimes narrow the scope of material jurisdiction. Only conduct that took place within a specific context may be characterized as an international crime. However, compared to domestic crimes, contextual elements in international crime definitions widen a trial's scope as they increase the number of crime ingredients that need to be proven, and consequently, the amount of direct and indirect evidence that will be presented. The contextual elements also pose additional evidentiary challenges. Next to certain other peculiar requirements of international crime definitions, e.g. the special intent for the crime of genocide, such elements are in fact most difficult to establish.[78] They therefore enhance the complexity and magnitude of the process of gathering and presenting evidence.

2.2.2.2 Modes of liability

A typical characteristic of international crimes prosecutions is the distinction between crime base evidence and linkage evidence.[79] In a conventional criminal case, the starting point for police investigators is the occurrence of a crime, after which a suspect will be sought. But in international crime cases, courts and tribunals, whether national or international, are often faced with a reversal of this sequence. Certain suspects will already have been identified, after which the individual crimes and the suspects' connection to them will be investigated. The identified suspect is linked to the crime, the occurrence of which is known through open source materials such as NGO reports, news articles, and social media, instead of identifying the suspect based on his or her putative link to the crime.

Linking the crime(s) to the alleged perpetrator remains one of the biggest challenges in international criminal justice. Yet, linkage evidence is more determinative for the decision on individual criminal responsibility and for the outcome of the case than crime base evidence, which may be less disputed at trial.[80] Since prosecutions focus on the most responsible perpetrators that are generally far removed from the actual crime scene, investigators and prosecutors dedicate a considerable amount of their effort to unearthing linkage evidence. Moreover, these perpetrators are not only far removed, but they also hardly ever act alone. With the political and historical context being an element of international crime definitions, individualization inevitably comes under a certain amount of pressure.

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charges pursuant to article 61(7)(c)(i) of the Rome Statute", ICC-02/11-01/11-572, AC, 16 December 2013, para. 37.

78 Agirre Aranburu, 'Methodology', *supra* note 7, 367.

79 M. Klamberg, *Evidence in International Criminal Procedure: Confronting Legal Gaps and the Reconstruction of Disputed Events* (US-UB Universitetsservice 2012) 97.

80 Ibid 98.

Koskenniemi goes even further, stating that 'in the end, individualisation is […] impossible'.[81] There is always the danger that the connection between the accused and the crime will be established through 'broad interpretations and assumptions about the political and administrative culture.'[82]

In order to translate the complex realities into legal qualifications, theories of liability, such as Joint Criminal Enterprise, (indirect) co-perpetration, superior and command responsibility, and aiding and abetting as a form of complicity in crime have been developing at the international criminal courts and tribunals. An attempt to contribute to the fascinating debates on these theories is beyond the scope of this Chapter.[83] Clearly, linkage issues and related theories of attribution are central to dealing with international crimes, but just like the contextual elements in crime definitions, they do not necessarily affect evidentiary rules or principles directly. However, the position of the accused vis-à-vis the crime(s) raises the same practical question as contextual elements do, namely: how are international crimes to be proven? This third differentiating factor, discussed below, lies at the heart of the dialectic relationship between substantive and procedural law.

2.2.3 How to prove

As Damaška pointed out, in the twentieth century we have 'witnessed not only the growing uncertainty about the concept of objective truth, but also the realization of the fallibility of our fact-finding methods, particularly when human behavior is the object of investigation.'[84] In the international criminal justice discourse, a similar observation may be made. In addition to the legal linkage problems discussed above, factually linking the (intellectual) perpetrator to the atrocity is often difficult when prosecuting and adjudicating international crimes. As noted, international crimes prosecutions target the most responsible perpetrators higher-up in the political and military hierarchies that are not always well-defined or meticulously documented,[85] and people that are usually the farthest removed from the scene of the crime. Therefore, 'assigning individual liability may turn out to be a laborious

81 Koskenniemi, *supra* note 28, 16.

82 Ibid.

83 See e.g. the chapters by J.D. Ohlin, G. Werle and B. Burghardt, and J. Stewart in Van Sliedregt and Vasiliev, *Pluralism*, *supra* note 1. See also J.D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability', 25 *Leiden Journal of International Law* 771 (2012); E. van Sliedregt, 'The Curious Case of International Criminal Liability', 10 *Journal of International Criminal Justice* 1172 (2012).

84 Damaška, 'Truth in Adjudication', *supra* note 62, 294.

85 M. Witteveen, 'Dealing with Old Evidence in Core International Crimes Cases: The Dutch Experience as a Case Study', in M. Bergsmo and C. Wui Ling (eds), *Old Evidence and Core International Crimes* (Torkel Opsahl Academic EPublisher 2012) 67.

and intricate task, requiring the use of a variety of sources and long hours of painstaking analysis.'[86]

Moreover, there are certain typical fact-finding impediments that afflict the processes of investigation and prosecution of international crimes. These include cultural differences between witnesses and criminal justice professionals, language issues and translation errors, and unreliability of witnesses.[87] Not all of these are necessarily caused by the nature of the crime. For instance, language and cultural differences pose no comparable difficulties when an international crime is prosecuted in the country where the atrocities took place.[88] However, there are several issues concerning witnesses that are a re-occurring theme when dealing with international crimes.

First, the ICC acquittal of Mathieu Ngudjolo Chui in the *Situation in the DRC*, the dropping of charges against Muthaura as well as Kenyatta in the *Situation in Kenya* show how difficult it is to find (and hold on to) reliable witnesses, and how the lack thereof may make the prosecution lose or drop its case. Save for exceptional situations such as in Nuremberg, a considerable reliance on witness testimony is inevitable when prosecuting international crimes.[89] This presents investigators and prosecutors with a number of problems. Kenneth Mann points to such problems with evidence in the *Demjanjuk* trial in Israel: 'the testimony came from witnesses whose memories were created in extremely traumatic settings, based on events that had occurred many years earlier.'[90] The Hague District Court in the *Yvonne Basebya* case also devoted a considerable portion of its judgment to analyzing the reliability of witness statements. It observed that they are 'based on the memory of the witnesses' and that '[a]lthough most memories of sincere witnesses are reliable, memories are never a complete and accurate rendition of reality. Human perceptivity is limited, matters are forgotten and mistakes may be made when remembering things.'[91] The court acknowledged that assessing credibility and reliability of witnesses was a difficult task since the alleged crimes during the Rwandan genocide took place over 20 years ago. Time lapse calls for great prudence, and '[t]his cautiousness is all the more rele-

86 Agirre Aranburu, 'Methodology', *supra* note 7, 355-6.

87 See generally Combs, *supra* note 6.

88 The ECCC are an exception to this: although technically a domestic court with jurisdiction over (international) crimes committed by the Khmer Rouge regime in Cambodia between 1975 and 1979, the ECCC is joined by the United Nations Assistance to the Khmer Rouge Trials. Consequently, three different languages (Khmer, French, and English) are required for all official interactions in court proceedings. Based on the author's personal observations while at the ECCC, the questionable quality of simultaneous translations in the courtroom sometimes causes portions of testimony to be lost in translation, given the difficulty of immediately translating words *and* culture into another language.

89 See Combs, *supra* note 6, 12 ('the vast bulk of the evidence presented to the current international tribunals comes in the form of witness testimony.').

90 K. Mann, 'Hearsay Evidence in War Crimes Trials', in Y. Dinstein and M. Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff 1996) 352.

91 *Basebya* Judgment, supra note 20, at 8.11.

vant since this case concerns events in […] a country which was torn by deep political and ethnic differences and an armed conflict as a result of all this.'[92] Criminal courts dealing with old core crimes cases will encounter these problems to a great extent, as has also been noted, for instance, with respect to the ECCC.[93]

There is often some amount of delay when investigating and prosecuting international crimes. Whether it be a time lapse of 20, 30, 50, or only a few years, this can cause problems with finding and preserving evidence, and dealing with the fading memories of witnesses. But also newer cases will suffer from the problem that witnesses have been through an extremely traumatic experience, trauma being a factor diminishing the factual accuracy of witness recollections, and will have told their stories on several previous occasions, for instance to journalists, NGO workers, and members of UN commissions of inquiry. One might think of domestic cases where the level of traumatization is similarly grave, such as sexual crimes cases, but in those instances it is unlikely that the victim witnesses will have told their story repeatedly to other (non-judicial) fact-finders. The ICC, conversely, does encounter this problem, as nowadays journalists and human rights researchers are generally at the crime scene before the Court starts its investigation. These non-judicial fact-finders will have talked to potential witnesses before the Court's investigators get the opportunity to do so.[94]

2.3 Quantity Affects Quality

As already briefly stipulated in the previous sections, some objectives of international criminal justice, the typical features of international crimes, and doctrines of individual criminal responsibility lead to an increase in the amount of information relevant for a specific case. But compared to the meticulous documentation kept by the Nazi regime, modern-day war criminals generally do not leave a paper trail usable in criminal prosecutions.[95] The significant role played by witnesses is typical for the prosecutions of international crimes as there are usually not enough written records or forensic evidence to serve as linkage evidence. However, the complexity of the crime and the physical distance of the alleged perpetrator from the offense make such evidence crucial – in fact, most evidence

92 Ibid. See also Witteveen, 'Old Evidence', *supra* note 85, 70-1.

93 See generally A. Cayley, 'Prosecuting and Defending in Core International Crimes Cases Using Old Evidence', in M. Bergsmo and C. Wui Ling (eds), *Old Evidence and Core International Crimes* (Torkel Opsahl Academic EPublisher 2012).

94 There are a number of comprehensive scholarly projects dealing with this subject, for instance the Harvard Group of Professionals on Monitoring, Reporting and Fact-finding, the Initiative on Human Rights Fact-Finding, Methods, and Evidence by NYU's Center for Human Rights and Global Justice, and the project titled 'From Fact-Finding to Evidence: Harmonizing Multiple Investigations of International Crimes' launched by Leiden University and The Hague Institute for Global Justice.

95 Combs, *supra* note 6, 12.

in core crimes cases *is* linkage evidence.[96] Considering the issues surrounding reliability of witness recollections regarding events that happened a long time ago, an increase in quantity of proof may be the response of parties in practice to the lack of quality of individual pieces of evidence. Such additional evidence may be more witness testimony or other types of evidence in corroboration. At the international criminal tribunals this is not a solution in the normative sense, though. These institutions' evidentiary regimes rest on the principle of free assessment of proof not requiring a multiplicity of pieces of evidence; the presentation of excessive and repetitive witness evidence may be discouraged in light of the manageability of the trial. But in practice, the gathering and usage of multiple sources is an understandable tactics employed by the parties when trying to prove a fact.

Given the often poor quality of the available evidence, the increase in the amount of information and evidence that potentially comes under consideration by the court is inevitable. Scale and quantity are more than bare numbers, as in quantity itself lie problems. This section draws a link between the features of international crimes discussed above and evidentiary challenges. It does so by examining the following hypothesis: the quantity of information affects the quality of evidence, and eventually, could affect the law governing the admission and presentation of evidence. Measures that are designed to reduce the quantity of evidence in international crimes cases, in particular taking judicial notice of adjudicated facts and facts of common knowledge, will therefore be discussed.

2.3.1 On scope and quantity

As noted previously, the didactic purpose of history-telling may entail a significant increase in the amount of information considered legally relevant to a particular case. Didactic legalism is likely to welcome the expansion of the scope of (supposedly) relevant evidence as it allows for the educational value of the trial to take center stage. However, this also means that the larger historical context, including parts of it that are outside the scope of the acts of the accused or the strict crime definition, becomes the subject of truth-finding at trial. This can be problematic on two levels. First, when a criminal trial concerns larger historical and political events, it will necessarily involve an interpretation of that context. The interpretation of the context is exactly the thing that is disputed in relation to the individual acts of the accused, which is the subject of the trial.[97] Consider, however, the following example articulated by Koskenniemi: Milošević was on trial, not Western leaders, which presumes the correctness, from the ICTY's perspective, of the Western view of the political and historical context of the Yugoslav wars. However, the accused understandably

96 N.H.B. Jørgensen, 'Judicial Notice', in K.A.A. Khan, C. Buisman and C. Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010) 720-1.

97 Koskenniemi, *supra* note 28, 16.

contested this view, and therefore contested the context. If the Tribunal's view of the historical context had remained uncontested, it might have increased the trial's educational value, but the position of the prosecutor would have been automatically vindicated, potentially turning it into a show trial.[98] To refer to contemporary international criminal trials as show trials is controversial, but Koskenniemi rightly points out a potentially treacherous paradox that is created here. He explains that

> to convey an unambiguous historical "truth" to its audience, the trial will have to silence the accused. But in such case, it ends up as a *show trial*. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of truth represented by the prosecutor and relativize the guilt that is thrust upon him by the powers on whose strength the Tribunal stands.[99]

The second problem with allowing more contextual information into evidence is that it diametrically opposes international criminal law's most basic foundation as it was articulated in the Nuremberg judgment: international crimes are committed by men, not by abstract entities.[100] The concept of individual criminal responsibility constituted emancipation from collective responsibility, and more specifically, it meant breaking away from the theory of immunity of state officials.[101] The so-called 'fight against impunity' is based on the belief that international crimes should be subjected to individual criminal responsibility, not (only) state responsibility. Admittedly, individualization has its limits in this respect: these crimes inevitably take place within a certain context or system, and therefore imply collective criminality.[102] To borrow from Van Sliedregt: '[t]his type of "system-criminality" generates "system-responsibility" which, by bringing in collective elements, puts pressure

98 Ibid 16-7.

99 Ibid 1, 35.

100 IMT Judgment, 223.

101 E. van Sliedregt, 'Criminal Responsibility in International Law: Liability Shaped By Policy Goals and Moral Outrage', 14 *European Journal of Crime, Criminal Law & Criminal Justice* 81 (2006), 84. See also A. Gattini, 'A Historical Perspective: From Collective To Individual Responsibility and Back', in A. Nollkaemper and H. van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press 2009) 101-26.

102 See J.G. Stewart, 'Overdetermined Atrocities', 10 *Journal of International Criminal Justice* 1189 (2012), 1190 ('In fact, if there were one overarching tension in the ongoing struggle for defensible standards of blame attribution in this discipline, it might be between our exclusive focus on individual accountability and the pervasive influence of collectivities that furnish a long line of willing substitute perpetrators, thereby diluting the significance of individual agency upon which criminal liability is predicated.'). However, Stewart does not argue that individualization is impossible: 'it is too early to concede that individual criminal responsibility is structurally incapable of accounting for the collective nature of most international crimes.' Ibid 1217.

on the principle of individual criminal responsibility.'[103] International criminal law scholars and practitioners are engaged in a constant balancing act of collective elements and individualization.[104] The question arises whether this area of tension can endure more pressure. As Damaška points out, 'deeper background issues tend to dwarf the subject of individual culpability, and it becomes clear that it is best for judges to limit their inquiries into the larger context to the very minimum required by the definition of international crimes.'[105] Including history-telling as a trial's objective, and widening the trial's substance under scrutiny even further, may put additional pressure on the principle of individual criminal responsibility.

It is therefore disputable whether setting additional objectives in international crimes cases is desirable at the micro (trial) level. Insofar as the context is part of the crime definition, an increase in the amount of evidence is unavoidable but perhaps only to that extent legitimate. Quantity may lead to quality on the one hand, but it can also lead to evidence debris and other unwanted side-effects on the other. For instance, quality may improve where the fact that requires proof is of a quantitative nature. When trying to demonstrate that an armed attack was in fact widespread, having a plurality of witnesses that can testify to incidents that help corroborate that element of a crime against humanity affects the strength of the case in a positive way. However, where quantity leads to so much evidence that it clogs up the system and creates unmanageable trials, the quality of the proceedings as a whole may be affected negatively. Scrutinizing large quantities of evidence becomes difficult and time-consuming for all parties involved and may create ambiguity as to the scope of the case, potentially infringing upon the accused's right to be tried without undue delay and to be notified of the charges against him or her.

2.3.2 Enhancing judicial economy

When discussing the quantity of evidence and what needs to be proven, it is also important to note what does not need proof. Not all of the material facts need to be proven at the international criminal tribunals, and that may solve part of the quantity problem. Broader solutions such as judges' managerial powers and negotiated justice aside, two evidentiary rules come to mind that are intended to stimulate judicial economy, and which allow a court to consider a fact established without requiring evidence to prove its existence: first,

103 Van Sliedregt, *supra* note 101, 82. See also A. Chouliaras, 'From "Conspiracy" to "Joint Criminal Enterprise": In Search of the Organizational Parameter', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press 2010) 547.

104 See Ohlin, *supra* note 13, 97.

105 Damaška, *supra* note 23, 341.

agreed facts, and second, judicial notice of facts of common knowledge and adjudicated facts.[106]

Parties may agree upon facts that then do not require formal proof. For instance, Rule 65*ter*(H) of the ICTY RPE states that the pre-trial judge shall record the points of agreement and disagreement on matters of fact and law. The ICC RPE contains a similar provision in Rule 69 concerning the agreements on facts, which the Chamber may consider as having been proven unless the interest of justice requires otherwise. Parties may agree upon any (type of) fact. The scope of agreed facts is therefore broad in theory, but because it depends on the willingness of the parties to agree on them the amount of agreed facts is usually marginal in practice.[107]

Judicial notice is a tool that allows a court to take certain facts as proven without hearing evidence. Rule 94 of the ICTY and ICTR RPE states that the court may take judicial notice of facts of common knowledge (or 'notorious' facts), adjudicated facts, and of the *authenticity* of documentary evidence (such as UN documentation).[108] The rule originated in the common law, but can also be found in civil law systems.[109] As Nina Jørgensen illustrates, the most telling example of the use of judicial notice of notorious facts is the decision of a United States Circuit Court to judicially notice the 'traditional features of a snowman.'[110] An example at the international level is when the ICTR took judicial notice of the occurrence of genocide in Rwanda in 1994 as a fact of common knowledge,[111] a shortcut that was also followed by the Dutch court in *Basebya*.[112] The rationale behind rules of judicial notice is to speed up trials by not devoting time to proving issues that are blatantly obvious, and to enhance consistency in factual findings between various chambers.[113]

At first glance, taking judicial notice of certain facts and recognizing agreed facts appear to save a substantial amount of time. However, these evidentiary rules also expose evidence law as an area of law that is a balancing act of various fair trial rights. For example, the right to be tried without undue delay may benefit from judicially noticing certain facts, but at the same time, judicially noticed facts should not form the decisive basis for a con-

106 See generally Jørgensen, *supra* note 96, 695-722; J.G. Stewart, 'Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent', 3 *International Criminal Law Review* 245 (2003).

107 Jørgensen, *supra* note 96, 698. See e.g. *Prosecutor v. Banda and Jerbo*, Decision on the Joint Submission regarding the contested issues and the agreed facts, ICC-02/05-03/09-227, TC IV, 28 September 2011.

108 The SCSL RPE contains an almost identical Rule 94. The ICC, however, does not have a similar provision. Art. 69(6) ICC Statute merely states that '[t]he Court shall not require proof of facts of common knowledge but may take judicial notice of them.' The provisions and case law from the *ad hoc* tribunals are therefore the most useful in light of this section.

109 Jørgensen, *supra* note 96, 695.

110 *Eden Toys Inc. v. Marshall Field and Co*, 675 F 2d 498 (2nd Cir.), 1982, n 1.

111 *Prosecutor v. Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice ICTR-98-44-AR73(C), AC, 16 June 2006, para. 35.

112 *Basebya* Judgment, *supra* note 20, 5.31.

113 Jørgensen, *supra* note 96, 696; Stewart, *supra* note 106, 245.

viction, as that would violate the right of the accused to a fair trial. Regular evidentiary procedures of proving a fact in court allow the accused to exercise a number of rights, such as the rights to defend himself or to examine witnesses.[114] While judicially noticed facts cannot be relied upon for establishing individual criminal liability directly, they may be used to do so indirectly.[115] It has been suggested that the matter should not be a balance between equally fundamental interests, but a protection of the fundamental right to a fair trial while improving judicial economy.[116]

Furthermore, it can be disputed whether dispensing with the need for formal proof truly speeds up trials. While the Court is obliged to judicially notice facts of common knowledge, adjudicated facts or the authenticity of documentary evidence may be judicially noticed at the request of a party, after hearing the parties.[117] This implies an obligation for the opposing party to dispute the accuracy of the suggested facts.[118] Having to respond to long lists of facts offered for notice by the prosecution places a significant burden on the defense. As one ICTY Trial Chamber recognized, 'since the admission of an adjudicated fact only creates a presumption as to its accuracy, the admission may consume considerable time and resources during the course of the proceedings, thereby frustrating, in practice, the implementation of the principle of judicial economy.'[119]

While in theory a valuable tool for restricting the quantity of evidence, taking judicial notice of certain facts should not be overestimated as a practical solution. Unfortunately, the same can be said of agreed facts; in reality, parties are not likely to reach such agreements often. If these rules are to decrease evidence quantity in relation to international crimes across the international-national boundary, additional mechanisms need to be developed to remedy their practical shortcomings.

2.4 Conclusion

This Chapter shows that certain typical features of international crimes set these crimes apart from ordinary crimes. Such features lead to an exponential increase of information that must be considered and managed at all stages of investigation, prosecution, and adjudication. The amount of information can help prove the relevant fact where, due to subpar quality of individual pieces of evidence, it serves the purpose of corroboration (and

114 See e.g. Art. 21 ICTY Statute; Art. 20 ICTR Statute; Art. 67 ICC Statute. See also Stewart, *supra* note 106, 269.

115 *Karemera et al.*, Decision on Judicial Notice, *supra* note 111, paras 47-51; Jørgensen, *supra* note 96, 709.

116 Jørgensen, *supra* note 96, 709.

117 Rule 94 ICTY and ICTR RPE.

118 Stewart, *supra* note 106, 272.

119 *Prosecutor v. Krajišnik*, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, IT-00-39-T, TC I, 24 March 2005, para. 16.

not merely repetition). But quantity also leads to time- and information-management problems that should not be underestimated, and that may contribute to difficulties discussed in Part II and III of this dissertation. This Chapter does not come up with new evidentiary rules allowing to better deal with the tremendous amount of information relevant in the prosecutions of international crimes. Instead, it mainly illustrates the point that the search for procedural solutions that may prove effective in international crimes cases both at the international and national level should proceed from the systematic review of the unique characteristics of international crimes. Such a review will also be indispensable for identifying the problems intrinsic in core crimes prosecutions, such as demarcation difficulties, and the extent to which the available solutions provide an adequate response to those problems. Hence, it could be useful for any investigation, prosecution and adjudication of international crimes, whether conducted by an international criminal tribunal, a hybrid court, or a domestic court. Essentially, the Chapter suggests a change of perspective on the law of evidence and approach to a case's factual scope, and advocates for a different methodology that focuses on the crime, not the court.

All courts are likely to encounter the same evidentiary challenges if these are inherent to the type of crime. Forum-neutral solutions may be the answer. In addition to the horizontal harmonization of international criminal law and procedure at the international level that has led to much scholarship on the *sui generis* nature of these bodies of law, vertical harmonization across the national-international divide will occur if one assumes that the type of crime is in fact the binding, overarching factor. While national courts can learn from the best practices developed by international courts and tribunals, any harmonization in accordance with the type of crime, i.e. vertical harmonization, will also lead to collateral, horizontal pluralism within any given national system. In respect of justice for international crimes, pluralism and harmonization are in fact mutually inclusive phenomena.

In any event, the effect of the typical features of international crimes on principles or rules of evidence should be left to a minimum, the pursuance of additional goals at the micro-level is better avoided, and the temptation to downgrade the presumption of innocence should be resisted. Such tendencies would defy the purpose of international criminal justice as '[i]t would indeed be a disheartening irony if a justice system, designed to contribute to the protection of human rights, could properly function only by disregarding humanistic values'.[120] This would lead to legal fictions and trials of preferred outcomes, in which case we would be getting as lost in our ideology of fighting impunity, as many of the perpetrators of international crimes got lost in theirs.

120 Damaška, *supra* note 23 355.

Part II
Factual Demarcation at Case Level

3 International Crimes and Case Demarcation

What Are We Trying To Prove?[*]

3.1 Introduction

This Chapter opens Part II, which explores factual demarcation on the micro level of an individual case. Cases involving international crimes are not easy to demarcate. International crimes generally occur on a massive scale over a prolonged period of time involving many different perpetrators at various levels of command and resulting in copious amounts of victims. Who did what to whom, when and where exactly? The degree of specificity to which these elements ought to be defined is not as easy to determine as one might think, and with international crimes lack of specificity seeps in at every level. Temporal, geographical, and personal (meaning the identity and the number of both perpetrators and of victims) demarcation of the case presents ample challenges. It has done so ever since the first international criminal prosecutions. In a memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General dated 22 January 1945 the difficulties of prosecutions of large-scale crimes were forewarned as follows:

> The names of the chief German leaders are well known, and the proof of their guilt will not offer great difficulties. However, the crimes to be punished have been committed upon such a large scale that the problem of identification, trial and punishment of their perpetrators presents a situation without parallel in the administration of criminal justice. In thousands of cases, it will be impossible to establish the offender's identity or to connect him with the particular act charged.[121]

While modern day international criminal tribunals have come a long way in dealing with these challenges, vague indictments – the main document that contains the nature (legal characterization) and the cause (underlying facts) of the charges – remain an issue until

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121 Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, 22 January 1945, International Conference on Military Trials: London, 1945, § IV, *available at* http://avalon.law.yale.edu/imt/jack01.asp (accessed 19 April 2015).

this day. This has two reasons. First, unspecific charges stem from difficulties with, for instance, pinpointing the exact day a crime took place, in which village it happened, or which (physical) perpetrators were involved. These are factual problems of specificity, usually reflected by vaguely worded indictments with phrases such as 'on or about' (a certain date) to indicate when something happened or with references to entire provinces instead of towns or villages to indicate where something happened. Second, vague charges are caused by more abstract evidentiary matters, such as unclear distinctions between material facts – meaning those encompassed in the charges and subject to proof – and subsidiary facts – meaning those that serve as indirect proof or background information without needing to be judicially established. Questions may arise as to which facts should be part of the indictment, and how different types of facts relate to the evidence supporting the charges. This unclear distinction caused problems in the *Gbagbo* case at the International Criminal Court (ICC). The Pre-Trial Chamber (PTC) adjourned the hearing on the confirmation of charges and requested the Prosecution to gather more evidence relating to a number of incidents allegedly constituting the 'attack' as element of the charged crime against humanity, deeming those incidents material facts, but which incidents the Prosecution itself had *not* regarded as being part of the material facts charged. Rather, it had intended to use those incidents as subsidiary facts to demonstrate a certain pattern.[122] Such confusion of material and subsidiary facts is not only time-consuming to rectify – litigation on this matter went on for almost a year –, it also leaves the defense in the dark with respect to the charges' factual parameters.

Case demarcation solidifies with the charging document or indictment, which then puts the accused on notice as to the case against him or her. Allowing the defense to know the case against him or her is crucial from a fair trial perspective, and the indictment is the core document on which that knowledge depends. This right and the indictment are therefore at the heart of the demarcation dilemmas discussed in this Chapter. The indictment should not be confused, though, with other official documents such as the arrest warrant, issued by a judicial organ and intended to secure an accused's presence at trial, or to prevent a suspect from obstructing the investigation or committing further crimes,[123] nor with pre-trial briefs, issued by the prosecution or the defense after the indictment has been filed and setting out how that party intends to argue its case.[124]

The indictment's effect of providing notice to the accused demonstrates the unique and fundamental dual purpose of the accusatory instrument: (1) to inform the accused

122 *Gbagbo* Adjournment Decision, *supra* note 19, paras 36, 44; *Prosecutor v. Gbagbo*, Prosecution's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", ICC-02/11-01/11-474, 12 August 2013, paras 3, 23, 26, 29.

123 See e.g. Art. 58(1)(b) ICC Statute; Arts 19(2) and 20(2) ICTY.

124 See e.g. Rule 65 *ter* (E) & (F) ICTY RPE.

about the charge(s), and (2) to settle the factual scope of the trial.[125] While both aspects are imperative to an effective defense, there are two interests at stake here that seem to pull in opposite directions. On the one hand, the principle of the specificity of charges ensures the right of the defense to be informed promptly and in detail of the nature, cause and content of the charge as well as the ability to mount his or her defense. On the other hand, prosecutors are faced with considerable challenges of case demarcation caused by international crimes' largely vague factual parameters. In international criminal justice, it is difficult to find definitive answers to the five W's (*who*, *what*, *when*, *where* and *why*?), intended as formula for ascertaining the complete story on any given topic, due to the massive scale of the events, the array of actors involved, the difficult access to direct or high-quality evidence, and investigations taking place long after the events. While the accused's interests are of paramount importance in light of due process protection and the legitimacy of the court and its proceedings in general, the prosecution's task to state a case must remain a realistic endeavor.

This Chapter seeks to ascertain the following: how specific should the charges in an international crimes case be, which circumstances play a role in answering this question, and what influences (lack of) specificity? The focus is therefore on case demarcation in light of an investigation or case against an identified suspect or accused and centers on the indictment phase of criminal proceedings. It does not include investigation demarcation in the sense of prosecutorial discretion regarding determining who to investigate or indict. Case demarcation can only take form and be examined fruitfully once a suspect or accused has been identified.[126] Investigations of a preliminary nature into situations of mass atrocity, where prosecutors face complex questions of which potentially responsible persons to focus investigative and prosecutorial efforts on, lie outside the ambit of this Chapter. The law and practice of amending charges is also excluded. Although related, it is beyond this Chapter's query, because it does not pertain to factual and evidentiary case demarcation in the strictest sense, as it should take form at the indictment stage. Rather, it relates to subsequent procedural matters of *shifting* boundaries, not *placing* them.

Section 3.2 starts with reviewing the issue of vague indictments as dealt with by the historical Nuremberg, Tokyo, and Control Council Law No. 10 trials, as well as case law from the modern day UN tribunals and the ICC regarding ambiguous charges and general pleading principles. This is the first type of case demarcation, which focuses on factual specificity. Section 3.3 deals with the second type of case demarcation, which may be regarded as legal demarcation of evidentiary matters, and that has never before been examined in international criminal justice scholarship. It deals with various types of facts and evidence and the importance of distinguishing them, and explores the differences

125 Friman et al., *supra* note 8, 383.

126 Other types of demarcation (jurisdictional and situational) are discussed in Part III.

between material facts and subsidiary facts, pattern evidence and evidence of similar conduct. Section 3.4 highlights the defense's perspective by looking at the right to be put on notice, a number of related rights and the principle of *ne bis in idem*, also known as double jeopardy protection. The analysis of these three issues shows that courts have developed relatively sound pleading principles over the last decades, but have mostly ignored the issue of evidentiary precision in the sense of consistently distinguishing different types of evidence and facts.

3.2 Indictments

Disagreements as to how definite the charging instrument ought to be are found in many domestic legal systems and are as such not unique to prosecutions of international crimes. However, it is a recurring theme with international criminal trials, mainly because of the perceived prosecutorial difficulties in proving such complex crimes of a massive scale, which the international crimes of war crimes, crimes against humanity and genocide undoubtedly are when focusing on high-level accused.

Bringing charges is generally done slightly differently in adversarial systems compared to inquisitorial systems; the common law tradition is known for its concise indictments, while the civil law tradition employs more elaborate and comprehensive indictments. It is useful to briefly note this difference, because the drafters of the Nuremberg indictment felt the distinction between the two legal systems indeed played an important role. However, neither legal family represents a pure model. Variations exist among legal systems belonging to one tradition and some systems are mixed.[127] Also, similarities between the two exist where general principles are derived from international human rights instruments.[128] Furthermore, both legal families have had a significant influence on the charging practices of the contemporary international criminal courts and tribunals, which have had to combine and balance the differences between domestic practices, often leading to experimentalism and procedural uncertainty. The importance of distinguishing between the two major legal traditions regarding the issue at hand – indictments involving international crimes – should therefore not be overvalued. In this dissertation, the problem of case demarcation is approached from a crime-based perspective, not a system-based perspective.[129] This means that the court, or the legal system, in which the crime is prosecuted ought neither be a differentiating factor nor eventually the focus; the massive scale and complex nature of international crimes is.

127 Friman et al., *supra* note 8, 460.
128 Ibid.
129 See also *supra* Chapter 2.

3.2.1 IMT, IMTFE and Control Council Law No. 10

The form of the first international indictment of the Nuremberg International Military Tribunal (IMT) is said to be the result of a compromise between the common law countries and the civil law countries. The IMT's Chief U.S. Prosecutor Robert Jackson later stated that the Soviet lawyers advocated for a detailed indictment with a complete statement of all evidence against the accused, while the American and British lawyers would have found a simple indictment charging the crimes that would later be proved more appropriate. Supported by the French and Soviet (civil law) lawyers and more in accordance with the German (civil law) practice, the indictment at the IMT more or less turned out as envisaged by the Soviet delegation, according to Jackson.[130] Indeed, the Soviet prosecutor, General R.A. Rudenko, left a considerable mark on the endeavor, as he was the one who suggested dividing the indictment into four counts, with each delegation being responsible for one count.[131] Some accounts of the drafting process talk of a slightly less than harmonious process, namely one that was controlled by the Americans.[132] Jackson allegedly had a clear strategy to ensure American control over the prosecution's case, as evidenced by a memorandum sent to trial counsel Robert Storey in which Jackson wrote he intended on 'keeping control of the bulk of the case in American hands.'[133]

The Tribunal's Charter reads, in relevant part, that the 'Indictment shall include full particulars specifying in detail the charges against the Defendants.'[134] The indictment of 66 pages with four counts against 23 individuals and 6 organizations relayed the particulars on individual criminal responsibility, criminality of groups and organizations, and violations of international treaties, agreements, and assurances in three narrating appendices. Count

130 R.H. Jackson, 'Some Problems in Developing an International Legal System,' 22 *Temple Law Quarterly* 147 (1948), 151. For the discussion on the form of the indictment between Justice Jackson and General Nikitchenko see also Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, Document XXI: Minutes of Conference Session of 3 July 1945, London, 1945, 154, *available at* www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf (accessed 19 April 2015) (General Nikitchenko stating that '[i]n the opinion of the Soviet Delegation this procedure would on the one hand insure a fair trial since the defendant would be given every chance to refute the evidence produced against him and would, on the other hand, insure him promptness of trial since most of the preliminary work would have been done before.')

131 See D.A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account, Volume I* (University Press of America 1998) 97.

132 Ibid.

133 T. Taylor, *The Anatomy of the Nuremberg Trials* (Back Bay Books 1992) 99. (Taylor quotes a memorandum sent by Jackson to Robert Storey on 17 September 1945, in the midst of drafting, saying: 'I do not think division of work is advisable in view of the situation concerning our fellow-prosecutors. Candidly, I think we must utilize Committee 4 [chaired by Jackson] as the basis for keeping control of the bulk of the case in American hands. To this end, I think … that Committee 4 will have to take primary responsibility for the development of the case in all its aspects on the questions of common plan conspiracy and individual and organizational responsibility.' Taylor himself adds: 'For "Committee 4" read "Jackson."')

134 Art. 16(a) IMT Charter.

1 dealt with the common plan and conspiracy, and was done in such a comprehensive manner by Committee 4 led by the Americans that it left very little substance for Committee 1 led by the British in charge of count 2. Count 2 on crimes against peace was a one-pager only charging the actual attacks and occupied countries. Count 3 and 4, drafted by both Committees 2 and 3 headed by the Soviets and the French respectively, dealt with war crimes and crimes against humanity, and were more comprehensive.[135]

The indictment itself, i.e. the four counts, did not mention the accused individually. It only referred to them as 'all the defendants.' The defendants' names and specific roles were listed in appendix 1, which devoted one short paragraph to each defendant stating their occupation and activities during the war as well as one- or two-sentence explanations of their involvement in each count. The printed version of the indictment's official English translation took up more than 65 pages.[136] Compared to a contemporary international indictment against only one high-level accused, as often encountered at the ICTY for instance, the Nuremberg document was rather concise. For instance, the indictment against Radovan Karadžić at the ICTY consists of 11 counts explained in 40 pages, and includes 7 tables listing specific incidents relating to the crimes charged.[137] Despite the Nuremberg indictment's potential flaws against modern day standards, the trial record does not reveal any defense grievances with respect to vagueness. Most litigation centered on issues such as fitness to stand trial,[138] and the legality principle.[139]

Nuremberg's counterpart, the International Military Tribunals for the Far East (IMTFE) in Tokyo, has a different history. While the U.S was the main driving force behind the tribunal coming into being, it is said that the indictment was completely dominated by the assigned sub-committee's British chair, Comyns-Carr.[140] Others, however, have suggested that Comyns-Carr merely merged various suggestions made by the 11 Allied powers involved in the drafting process, concluding that the indictment was a mix of common law and civil law features.[141] In any event, discussions on the level of detail required in an

135 Taylor, *supra* note 133, 79-80.

136 Sprecher, *supra* note 131, 104.

137 *Prosecutor v. Karadžić*, Prosecution's Marked-Up Indictment, IT-95-5/18-PT, TC III, 19 October 2009.

138 See e.g. Motion on Behalf of Defendant Gustav Krupp von Bohlen for Postponement of the Trial as to Him, Nuremberg Trial Proceedings Vol. 1, 4 November 1945, *available at* http://avalon.law.yale.edu/imt/v1-09.asp (accessed 19 April 2015); Motion on Behalf of Defendant Hess for an Examination by a Neutral Expert with Reference to his Mental Competence and Capacity to Stand Trial, Nuremberg Trial Proceedings Vol. 1, 7 November 1945, *available at* http://avalon.law.yale.edu/imt/v1-26.asp (accessed 19 April 2015).

139 Motion Adopted by All Defense Counsel, Nuremberg Trial Proceedings Vol. 1, 19 November 1945, *available at* http://avalon.law.yale.edu/imt/v1-30.asp (accessed 19 April 2015).

140 P.R. Piccigallo, *The Japanese On Trial: Allied War Crimes Operations in the East, 1945–1951* (University of Texas Press 1979) 14; N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press 2008) 69.

141 Boister and Cryer, *supra* note 140, 70.

indictment such as had occurred in Nuremberg, presumably because of the strong Soviet presence, seems not to have occurred during the drafting process in Tokyo.

The IMTFE Charter stated that the 'indictment shall consist of a plain, concise, and adequate statement of each offence charged,'[142] which is different from the text of the Nuremberg Charter, which spoke of 'full particulars specifying in detail.' The difference is likely the result of the U.S. dominance of the entire IMTFE project, but it cannot be said with certainty that this difference in wording directly influenced the difference in form of the indictments. The indictment's drafters probably had the biggest influence, and the final result of their efforts did not go without criticism. The Tokyo indictment departed from the Nuremberg example in the sense that it contained a much greater number of individual charges, creating many overlaps in relation to the underlying factual substance of the charges.[143] Five appendices accompanied the indictment to provide the particulars of the numerous counts, but these were grouped thematically instead of per charge.[144] There were 28 defendants in total and 55 counts that were divided into three groups: (i) crimes against the peace, (ii) murder, and (iii) conventional war crimes and crimes against humanity.[145] Similar to the Nuremberg indictment, the defendants' names and occupations were listed in one of the appendices, yet hardly any specifics were provided regarding the defendants' individual movements and activities during the war.

Quite a bit of litigation relating to the vagueness of the indictment unfolded. The defense argued that the indictment failed to provide the essential facts to adequately support the charges,[146] and that it neglected to specify times, places and their clients' involvement in each of the crimes charged.[147] The Prosecution argued that as long as the beginning and end of the conspiracy were specified, details relating to when important events occurred, where they occurred and who was involved were to be left as matters of proof.[148] The defense's complaints were all dismissed before the final judgment was rendered. President Webb opined that time and place had to be stated broadly.[149] Furthermore, it was unnec-

142 Art. 9(a) IMTFE Charter.

143 Boister and Cryer, *supra* note 140, 70.

144 *U.S. et al. v. Araki et al.*, Indictment (Annex 6 to the Judgment), IMTFE, 29 April 1946, *reprinted in* N. Boister and R. Cryer, *Documents on the Tokyo Military Tribunal* (Oxford University Press 2008) 16-69, *also available at* http://werle.rewi.hu-berlin.de/tokyo.anklageschrift.pdf (accessed 19 April 2015) [hereinafter IMTFE Indictment].

145 Ibid.

146 *U.S. et al. v. Araki et al.*, Motion to Dismiss the Indictment, 25 May 1946, Paper no. 85, *Motions Presented to the Court Vol. 1, 3 May 1946–14 October 1946*, IMTFE, Tokyo, Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by Boister and Cryer, *supra* note 140, 71).

147 *U.S. et al. v. Araki et al.*, Motion for Bill of Particulars, no date, Paper no. 56, *Motions Presented to the Court Vol. 1, 3 May 1946–14 October 1946*, IMTFE, Tokyo, Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by Boister and Cryer, *supra* note 140, 71).

148 Boister and Cryer, *supra* note 140, 73.

149 Proceedings in Chambers Saturday 25 May 1946: On a Motion by Hiranuma, Kiichiro; Matsuoka, Yosuke; Shigemitsu, Mamoru; Togo, Shigenori; and Umezu, Yoshijiro, for Bill of Particulars; A Motion by All the

essary to specify the actual role an accused played in a conspiracy or to state the location where it took place.[150] In the end, the Tribunal's judgment dismissed 45 of the 55 counts, not due to lack of specificity, but on grounds of redundancy, lack of jurisdiction, and merging counts due to overlap.[151]

Most of the indictments in the ensuing 12 Nuremberg cases – the subsequent trials conducted under Control Council Law No. 10 in Nuremberg by U.S. military tribunals – were rather elaborate; they targeted certain crimes more narrowly and focused on defendants of a lower level than at the IMTs. While elaborateness does not necessarily preclude vagueness, the indictments did not seem to suffer from too much lack of specificity compared to the Tokyo indictment, although that may also only appear to be so because it was not litigated. However, from the indictments alone it is not always clear what role the defendants played in which acts that constituted the crimes. The assertions on underlying facts and personal involvement remained rather vague, and some indictments only specified defendants' positions and related responsibilities in general. For example, the indictment in the *Medical* case (or *'Doctors' Trial*) specified the horrific experiments that were conducted upon concentration camp prisoners during the war, and stated which of the 23 defendants were involved. With respect to most accused, however, it did not specify individual acts or factual connections to the crimes. It merely stated the defendants 'are charged with special responsibility for and participation in these crimes.'[152] The same format was followed in other cases, too. For instance, in the *Justice* case indictment, the Ministry of Justice was named as the main entity that had committed the crimes listed in each of the paragraphs that all ended with a sentence naming the defendants as responsible without specifying their precise actions.[153] The same was done in the *RuSHA* case indictment.[154] Similarly, in the *Milch* case, the sole defendant Erhard Milch's involvement was explained in general terms relating to his membership of the Central Planning Board and his several

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Accused for a Bill of Particulars; and other motions, *Proceedings in Chambers, Vol. 1, 8 May 1946–24 July 1946*, Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by Boister and Cryer, *supra* note 140, 72).

150 *U.S. et al. v. Araki et al.*, Order Dismissing Motion for Bill of Particulars, 25 May 1946, Paper no. 86, *Orders on Motions Presented to the Court, Vol. I, 29 April 1947–27 December 1946*, IMTFE, Tokyo, Northcroft Archive, Macmillan Brown Library, University of Canterbury, New Zealand (cited by Boister and Cryer, *supra* note 140, 72).

151 IMTFE Judgment, §§ 447-454. See also Boister and Cryer, *supra* note 140, 73.

152 *U.S. v. Karl Brandt et al.* (Medical Case or Doctors' Trial), Indictment, U.S. Military Tribunal, 25 October 1946, § 6 (count two – war crimes), *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=2 (accessed 19 April 2015).

153 *U.S. v. Josef Alstötter et al.* (Justice Case), Indictment, U.S. Military Tribunal, 1947, §§ 10-18, 22-30, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=21 (accessed 19 April 2015).

154 *U.S. v. Ulrich Greifeldt et al.* (RuSHA Case), Indictment, U.S. Military Tribunal, 1947, §§ 11-22, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=162 (accessed 19 April 2015).

high positions in the German air force.[155] The same can be said of the defendants in the rather short *Pohl* case's indictment. The 17 accused were hardly individualized apart from their held positions.[156]

The more elaborate indictments, such as in the cases of the *Ministries*, *I.G. Farben*, *Krupp*, *High Command*, and *Flick*, of which the last three also included appendices explaining company and military structures as well as defendants' histories, were very similar to contemporary international indictments with respect to the level of detail.[157] They included more specifics than the four cases mentioned in the paragraph above. Conversely, the *Einsatzgruppen* case indictment and the *Hostage* case indictment were both concise yet very specific and factually comprehensive in a different way than the other post-war charging documents. The *Einsatzgruppen* indictment identified the number of victims made by the various units and the dates the killings took place.[158] The level of the indictment's specificity was the result of the fact that most of the information supporting the charges came from Otto Ohlendorf's earlier testimony at the IMT. Ohlendorf, who had been Major General of the SS, member of the SD and Commanding Officer of Einsatzgruppe D, had given a remarkably extensive and candid testimony about the crimes committed by his and other units.[159] The *Hostage* case indictment displayed a similar level of specificity; dates and numbers of victims were included in the document's four counts.[160]

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155 *U.S. v. Erhard Milch et al.* (Milch Case), Indictment, U.S. Military Tribunal, 1946, §§ 4-5, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=14 (accessed 19 April 2015).

156 *U.S. v. Oswald Pohl et al.* (Pohl Case), Indictment, U.S. Military Tribunal, 1947, §§ 5-10, (count 1: each paragraph's final sentence(s) stating which defendant was part of which *Amtsgruppe*), §§ 13-26 (counts 3,4,5 on war crimes, crimes against humanity and membership in a criminal organization only speak of 'all of the defendants' without making any reference to the accused individually), *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=36 (accessed 19 April 2015).

157 *U.S. v. Ernst von Weizsäcker et al.* (Ministries Case or Wilhelmstrasse Trial), Indictment, U.S. Military Tribunal, 1947, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf (accessed 22 April 2015); *U.S. v. Carl Krauch et al.* (I.G. Farben Case), Indictment, U.S. Military Tribunal, 1947, § 7, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=67 (accessed 19 April 2015; *U.S. v. Alfried Krupp, et al.* (Krupp Case), Indictment, U.S. Military Tribunal, 1947, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf (accessed 22 April 2015); *U.S. v. Wilhelm von Leeb, et al.* (High Command Case),), Indictment, U.S. Military Tribunal, 1947, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf (accessed 22 April 2015); *U.S. v. Friedrich Flick at al.* (Flick Case), Indictment, U.S. Military Tribunal, 1947, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf (accessed 22 April 2015).

158 *U.S. v. Otto Ohlendorf et al.* (Einsatzgruppen Case), Indictment, U.S. Military Tribunal, 1947, §§ 6-9, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=176 (accessed 19 April 2015).

159 Transcript of Otto Ohlendorf's testimony, 3 January 1946, IMT Proceedings vol. 4 (part 1 of 3), 311-54, *available at* http://avalon.law.yale.edu/imt/01-03-46.asp#ohlendorf (accessed 19 April 2015); see also K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011) 63-64.

160 *U.S. v. Wilhelm List et al.* (Hostage Case), Indictment, U.S. Military Tribunal, 1947, §§ 5, 9, 12, 15, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=139 (accessed 19 April 2015).

Here, too, the reason for precision of facts had an evidentiary basis. Documentary evidence was readily available and the case benefited from evidence presented at the IMT trial.[161]

As noted, lack of specificity in charging does not appear to have been argued at the IMT or the subsequent trials in Nuremberg as it had been in Tokyo. However, a certain amount of inevitability in this respect was stipulated in one of the subsequent proceedings. In the *Justice* case judgment, the judges called to mind that:

> Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. […] The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that the apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.[162]

Although some of these early (international and military) indictments were very elaborate, the specific acts with which the accused were charged remained vague at times, in the sense that the link between the accused and the crimes charged was mostly demonstrated by the position held by the accused. Moreover, the temporal scopes of these indictments were relatively precise yet very wide, making the cases less defined (although to some extent this fits the nature of the charge of conspiracy): the Nuremberg indictment included Hitler's first attempt to come to power in 1923 and covered the entire period until 8 May 1945;[163] the Tokyo indictment covered a span from 1 January 1928 to 2 September 1945;[164] the *I.G.*

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161 T. Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10, 15 August 1949, 80, *available at* www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf (accessed 19 April 2015).

162 *U.S. v. Josef Alstötter et al.* (Justice Case), Judgment, *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (Nuernberg, October 1946 - April 1949), vol. III*, 984-985.

163 *U.S. et al. v. Goering et al.*, Indictment (Count 1), IMT, 6 October 1945, *reprinted in* 1 *Trial of the Major War Criminals Before the International Military Tribunal* 27 (1948), 41, *available at* http://avalon.law.yale.edu/imt/count1.asp (accessed 19 April 2015). Count 2, 3, and 4 covered the period from 1 September 1939 to 8 May 1945 (*available at* http://avalon.law.yale.edu/imt/count.asp (accessed 19 April 2015)).

164 IMTFE Indictment, *supra* note 144.

Farben case indictment goes back to 1932 when the alliance of the corporation with Hitler and the Nazi Party was formed, and defendants Beutefish and Gattineau, representing Farben, met with Hitler to discuss business;[165] the *Ministries*, *High Command*, *Krupp*, *Pohl* and *Justice* case indictments all cover events from January 1933 – when Hitler was appointed Chancellor by President Paul Von Hindenburg – to April or May 1945; the other indictments in the subsequent proceedings covered smaller time spans (from September 1939 to April or May 1945).[166]

Only the IMTFE record shows that litigation occurred on the issue of vagueness, and even there, all objections along these lines were discarded. Were these indictments flawed from a contemporary perspective? They usually contained the following elements: (1) the defendant's link to the legal definition of the crime (X committed crime Y), (2) statements of general facts (without reference to defendants), and (3) the defendant's professional position or occupation preceding and during the war. Lacking was the following crucial element, without which conducting a defense becomes an extremely difficult task: the link between the defendant, i.e. the physical person, not their employment position, and the facts, not the crime definition, committed by them. As will become apparent in the next subsection, compared to contemporary international criminal tribunals, these indictments were not nearly specific enough, most notably in relation to the defendants' individual acts.

3.2.2 The contemporary ad hoc and hybrid institutions

The Statutes of the ICTY and the ICTR both state that the prosecutor 'shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.'[167] The SCSL and the Special Tribunal for Lebanon (STL) do not contain such a provision in their statutes, but provide guidance in their Rules of Procedure and Evidence (RPE). The SCSL RPE specifies that '[t]he indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence.'[168] It also states that it 'shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.'[169] The STL RPE provides, identical to the equivalent provisions in the ICTY and ICTR RPEs, that '[t]he indictment shall set forth the name and particulars of the suspect and a concise

165 I.G. Farben Case, Indictment, *supra* note 157, § 7.
166 With the exception of the temporally narrower *Einsatzgruppen* case indictment, which, apart from the common membership count, only dealt with crimes committed between May 1941 and July 1943.
167 Art. 18(4) ICTY Statute; Art. 17(4) ICTR Statute.
168 Rule 47(C) SCSL RPE.
169 Ibid.

statement of the facts of the case and of the crime with which the suspect is charged.'[170] The Internal Rules of the ECCC use a different phrasing, stating that '[t]he Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.'[171]

It is important to keep in mind that specificity of charges is something different from the *scope* of indictments. Breadth or narrowness with respect to facts and time periods does not necessarily preclude specificity, even though in practice breadth and vagueness may be linked. In light of this, it is worth noting that when it comes to scope, the ad hoc Tribunals have gone through an interesting development as well. Initially, ICTY and ICTR prosecutors' approach to charging mirrored the international precedent of the IMT and IMTFE, and many of the early indictments included a wide range of offenses and historical background.[172] After Slobodan Milošević's death in March 2006 before the completion of his trial, the judges at the ICTY amended the RPE in order to create more options for trial chambers to encourage prosecutors to reduce indictments.[173] In the *Karadžić* case, the Trial Chamber used Rule 73 *bis* to urge the prosecutor to trim the indictment by limiting the number of charges, crimes scenes and witnesses.[174] It noted that Rule 73 *bis* (D) and (E) allow for four forms of direct or indirect action by a Chamber, namely: (i) the Chamber can invite the Prosecution to reduce the number of counts charged; (ii) the Chamber can fix the number of crime sites; (iii) the Chamber can fix the number of incidents; and (iv) the Chamber can direct the Prosecution to select the counts upon which to proceed.[175]

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170 Rule 68(D) STL RPE; see also Rule 47(C) ICTY and ICTR RPEs.

171 Rule 67(2) ECCC Internal Rules. The same provision can be found in Art. 35 new (a) ECCC Law. The ECCC Law, however, does not specify what the Closing Order, which refers to either the indictment or a dismissal order issued by the Co-Investigating Judges, must contain.

172 See e.g. *Prosecutor v. Milošević*, Amended Indictment, IT-02-54-T, Prosecutor, 22 November 2002, paras 52-79, ('additional facts') later amended by *Prosecutor v. Milošević*, Second Amended Indictment, IT-02-54-T, Prosecutor, 28 July 2004, containing 66 counts. See also J. Locke, 'Indictments,' in L. Reydams, J. Wouters and C. Ryngaert (eds), *International Prosecutors* (Oxford University Press 2012) 616.

173 The following sentence (emphasized) was added to Rule 73 *bis* (D) ICTY RPE in May 2006, two months after Milošević's death in March 2006: 'After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may *invite the Prosecutor to reduce the number of counts charged in the indictment* and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.' The following sentence (emphasized) was added to Rule 73 *bis* (E) at the same time: 'Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 ter, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, *may direct the Prosecutor to select the counts in the indictment on which to proceed*. Any decision taken under this paragraph may be appealed as of right by a party.'

174 *Prosecutor v. Karadžić*, Order to the Prosecution under Rule 73 *bis* (D), IT-95-5/18-PT, TC, 22 July 2009, paras 5-6.

175 Ibid para. 3.

There is no similar provision at the ICTR, but the Rwanda Tribunal has experienced a similar development towards streamlining indictments in pursuance of more manageable cases. The early indictments at the ICTR were grouped thematically, much like the subsequent trials in Nuremberg, and involved many defendants.[176] The Tribunal later switched from a 'multi-accused' to a 'single-accused' approach, narrowing the scope of indictments.[177] This was given an extra push by the ICTR completion strategy imposed by the UN Security Council.[178]

While the scope of indictments is a matter of prosecutorial discretion, requirements relating to specificity of charges are legal matters. These have evolved, too, and the idea that there exists a certain amount of inevitability when it comes to vague indictments has gradually lost support in the jurisprudence of the contemporary international criminal tribunals. An early Trial Chamber decision in *Blaškić* provided that 'an indictment, by its very nature and given the very initial phase in which it is reviewed, is inevitably concise and succinct,'[179] and gave the basic principles regarding content: 'the indictment must contain certain information which permits the accused to prepare his defense (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise.'[180] The ICTY Appeals Chamber judgment in *Kupreškić et al.* provided more detailed guidance and is a leading authority at the international tribunals with respect to the issue of specificity of charges.[181] The judges reminded that: '[a] decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused.'[182] In large part, this consideration is influenced by the position – both physically and legally – of the accused:

> In a case based upon individual responsibility where the accused is alleged to have personally done the acts pleaded in the indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so

176 See e.g. ICTR Press Release, Bagosora, Ntabakuze and Nsengiyumva given life sentences; Kabiligi acquitted, ICTR/INFO-9-2-582.EN, 18 December 2008 (Military I Case); ICTR Press Release, Appeals Chamber Delivers Judgment in Military II Case, ICTR/INFO-9-2-752.EN, 11 February 2014 (Military II Case). See also Locke, *supra* note 172, 618.

177 Locke, *supra* note 172, 619. See also e.g. *Prosecutor v. Nizeyimana*, Second Amended Indictment, ICTR-00-5 5-PT, Prosecutor, 17 December 2010.

178 Locke, *supra* note 172, 618. See generally P. Ng'arua, 'Specificity of Indictments in ICTR Genocide Trials,' in R. Henham and P. Behrens (eds), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate 2007) 175-184.

179 *Prosecutor v. Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), IT-95-14-PT, TC, 4 April 1997, para. 21.

180 Ibid para. 20.

181 See generally Chile Eboe-Osuji, *supra* note 9.

182 *Prosecutor v. Kupreškić et al.*, Appeal Judgment, IT-95-16-A, AC, 23 October 2001, para. 89.

> far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a reasonable range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.[183]

The scale of the crimes plays a role here, too, since magnitude 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.'[184]

Thus, there are two factors that determine the required degree of specificity: (i) the proximity of the accused to the crime (geographically but more importantly in terms of mode of liability: if the accused *directly* committed the crime, the material facts comprising the crime must be pleaded in great detail); and (ii) the nature of the crime, including the scale and magnitude. If the accused is alleged to have personally committed the crime, as opposed to being charged as an accessory or under command or superior forms of liability, the material facts will include such details as the identity of the victim, the location and the approximate date of the events in question, and the means by which the offense was committed.[185] As noted by the ICTR Appeals Chamber, 'the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual.'[186] The demanded degree of specificity is therefore a sliding scale from extreme precision to the relative ambiguity depending on the position of the accused: '[a]s the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the pros-

183 *Prosecutor v. Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, IT-99-36, TC II, 20 February 2001, para. 22 (summarizing and citing *Kupreškić* Appeal Judgment, *supra* note 182, para. 89, and *Prosecutor v. Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, IT-97-25, TC II, 11 February 2000, para. 18). See also *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgment and Sentence, TC III, 25 February 2004, para. 32.

184 *Kupreškić* Appeal Judgment, *supra* note 182, para. 89; *see also Krnojelac* 11 February 2000 Decision, *supra* note 183, para. 18; *Brđanin and Talić* Decision on Objections by Talić, *supra* note 183, para. 22.

185 *Ntagerura* Trial Judgment, *supra* note 183, paras 32, 35; *Prosecutor v. Gatete*, Decision on Defence Preliminary Motion, ICTR-00-61-I, TC I, 29 March 2004, para. 8 (citing *Kupreškić* Appeal Judgment, *supra* note 182, para. 89); *Prosecutor v. Galić*, Decision on Application by Defence for Leave to Appeal, IT-98-29-AR72, AC 30 November 2001, para. 15.

186 *Prosecutor v. Ntakirutimana and Ntakirutimana*, Appeal Judgment, ICTR-96-10-A and ICTR-96-17-A, AC, 13 December 2004, para. 74.

ecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.'[187] Consequently, the required degree of specificity is lower where criminal responsibility is based on accomplice liability or superior responsibility.[188] In this context, it is vital for the accused to know from the indictment just what that alleged proximity is.[189]

In relation to the nature of the crimes, the *Kupreškić* AC explained that when a crime involves an extended number of victims, for instance because of an exponential number of attacks over a prolonged period of time and in a great number of locations, the prosecution need not specify every victim. However, if the prosecution possesses such information, it should name the victims.[190] With regard to the scale of international crimes, the SCSL Trial Chamber in *Sesay* allowed similar vagueness with respect to locations:

> it is inaccurate to suggest that the phrases "various locations" and "various areas including" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example "within the Southern or Eastern Province" or "within Sierra Leone." This is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases "such as" and "including but not limited to" would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is therefore the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of said phrases in the context herein.[191]

187 Galić Decision, *supra* note 185, para. 15. See also *Ntagerura* Trial Judgment, *supra* note 183, para. 33: 'Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime. Where superior responsibility is alleged, the relationship of the accused to his subordinates is most material, as are his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.' (References omitted)

188 *Ntagerura* Trial Judgment, *supra* note 183, para. 35; *Prosecutor v. Rasim Delić*, Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, IT-04-83-PT, PT Judge, 30 June 2006, para. 85.

189 *Prosecutor v. Brđanin and Talić*, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, IT-99-36, TC II, 23 February 2001, para. 13.

190 *Kupreškić* Appeal Judgment, *supra* note 182, para. 90.

191 *Prosecutor v. Sesay et al.*, Decision and Order on Defence Preliminary Motion For Defects in the Form of the Indictment, SCSL-2003-05-PT, TC I, 13 October 2003, para. 23.

In sum, and as identified by ICTY and STL trial chambers,[192] there are a number of general principles relating to indictments that can be derived from the ad hoc Tribunals' case law: (1) the indictment must contain enough detail to inform the accused clearly of the nature and cause of the charges to allow him or her to prepare a defense;[193] (2) all material facts substantiating the charges must be pleaded, but it is not required to plead the evidence used to prove the material facts;[194] (3) each of the material facts must be pleaded expressly, however, in some circumstances it may suffice if they are expressed by necessary implication;[195] (4) an indictment must be considered as a whole, not as a series of paragraphs existing in isolation;[196] (5) whether a fact is material depends on the nature of the prosecution case;[197] (6) decisive in this respect is the nature of the alleged criminal conduct charged against the accused, and more specifically, the proximity of the accused to the events alleged

192 See e.g. *Prosecutor v. Stanišić and Župljanin*, Decision on Mićo Stanišić's and Stojan Župljanin's Motions on Form of the Indictment, IT-08-91-PT, TC II, 19 March 2009, paras 7-17; *Prosecutor v. Ayyash et al.*, Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, STL-11-01/PT/TC, TC, 13 September 2013, para. 17.

193 *Prosecutor v. Furundžija*, Judgment, IT-95-17/1-A, AC, 21 July 2000, paras 61, 147; *Kupreškić* Appeal Judgment, *supra* note 182, para. 88; *Prosecutor v. Blaškić*, Appeal Judgment, IT-95-14-A, AC, 29 July 2004, para. 209; *Prosecutor v Stakić*, Appeal Judgment, IT-97-24-A, AC, 22 March 2006, para. 116; *Prosecutor v. Simić et al.*, Appeal Judgment, IT-95-9-A, AC, 28 November 2006, para. 20. See also *Ntabakuze v. The Prosecutor*, Appeal Judgment, ICTR-98-41A-A, AC, 8 May 2012, para. 30, and the line of authority at the ICTR cited there.

194 *Prosecutor v. Naletilić and Martinović*, Appeal Judgment, IT-98-34-A, AC, 3 May 2006, para. 23; *Blaškić* Appeal Judgment, *supra* note 193, para. 210; *Stakić* Appeal Judgment, *supra* note 193, para. 116; *Furundžija* Appeal Judgment, *supra* note 193, paras 61, 147, 153; *Prosecutor v. Ntagerura et al.*, Appeal Judgment, ICTR-99-46-A, AC, 7 July 2006, para. 21; *Simić* Appeal Judgment, *supra* note 193, para. 20.

195 *Prosecutor v. Halilović*, Appeal Judgment, IT-01-48-A, AC, 16 October 2007, para. 86; *Blaškić* Appeal Judgment, *supra* note 193, para. 219; *Prosecutor v. Rasević*, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, IT-97-25/1-PT, TC II, 28 April 2004, para. 18; *Prosecutor v. Mrkšić*, Decision on Form of the Indictment, IT-95-13/1-PT, TC II, 19 June 2003, para. 12; *Prosecutor v. Hadžihasanović and Kubura*, Decision on Form of Indictment, IT-01-47-PT, TC II, 7 December 2001, para. 10; *Prosecutor v. Brđanin and Talić*, Decision on Form of Fourth Amended Indictment, IT-99-36-PT, TC II, 23 November 2001, para. 12; *Brđanin and Talić* Decision on Objections by Talić, *supra* note 183, para. 48.

196 *Prosecutor v. Hadžihasanović and Kubura*, Judgment, IT-01-47-T, TC, 15 March 2006, para. 266; *Prosecutor v. Prlić et al.*, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, IT-04-74-PT, TC I, 18 October 2005, para. 78; *Prosecutor v. Prlić et al.*, Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment, IT-04-74-PT, TC I, 22 July 2005, paras 13 and 50; *Mrkšić* Indictment Decision, *supra* note 195, para. 28; *Rutaganda v. The Prosecutor*, Appeal Judgment, ICTR-96-3-A, AC, 26 May 2003, para. 304; *Gacumbitsi v. The Prosecutor*, Appeal Judgment, ICTR-2001-64-A, AC, 7 July 2006, para. 123; *Prosecutor v. Seromba*, Appeal Judgment, ICTR-2001-66-A, AC, 12 March 2008, para. 27. See also *Hadžihasanović and Kubura* Decision, *supra* note 195, para. 38.

197 *Halilović* Appeal Judgment, *supra* note 195, para. 86; *Naletilić and Martinović* Appeal Judgment, *supra* note 194, para. 24; *Kupreškić* Appeal Judgment, *supra* note 182, para. 89; *Blaškić* Appeal Judgment, *supra* note 193, para. 210.

in the indictment;[198] (7) if the accused person is alleged to have personally committed the acts giving rise to the charges against him, the material facts would include such details as the identity of the victim, the place and the approximate date of the events in question, and the means by which the offense was committed. As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him;[199] (8) thus, the legal qualification of the accused's liability, including the particulars thereof, must be expressly pleaded in the indictment;[200] (9) if the state of mind (*mens rea*) of the accused is relevant to the charges, the indictment must either (i) contain the state of mind as a material fact, or (ii) set forth the evidentiary facts – i.e. facts that prove material facts, more on which below in Section 3.3 – from which the state of mind is to be inferred;[201] and finally, (10) a date – and by analogy other specifics such as location – may be considered to be a material fact if it is necessary to inform the accused clearly of the charges so that he or she may prepare his or her defense, but a reasonable range of dates may be pleaded where precise dates cannot be specified (a broad range of dates does not of itself invalidate a paragraph in an indictment).[202] With respect to these principles, ICTY Chambers have stated that when particulars (dates, locations, victims, etc.) are known to the prosecution, it should specify those details in the indictment regardless of whether they may be deemed material facts.[203]

In relation to the eighth principle listed above, there are a few additional clarifications that may be deduced from case law. For instance, the prosecution must include in the indictment whether physical commission or participation in a Joint Criminal Enterprise (JCE) is charged.[204] In other words, it is insufficient to merely make a broad reference to

198 *Halilović* Appeal Judgment, *supra* note 195, para. 86; *Ntagerura* Appeal Judgment, *supra* note 194, para. 121; *Prosecutor v. Krnojelac*, Appeal Judgment, IT-97-2S-A, AC, 17 September 2003, para. 132; *Kupreškić* Appeal Judgment, *supra* note 182, para. 89; *Blaškić* Appeal Judgment, *supra* note 193, para. 210.

199 *Galić* Decision, *supra* note 185, para. 15; *Kupreškić* Appeal Judgment *supra* note 182, paras 88-90.

200 *Simić* Appeal Judgment, *supra* note 194, para. 22; *Krnojelac* Appeal Judgment, *supra* note 198, para. 138. See also *Prosecutor v. Đorđević*, Decision on Form of Indictment, IT-05-87/1-PT, TC, 3 April 2008, para. 9; *Prosecutor v. Krnojelac*, Decision on From of Second Amended Indictment, IT-97-2S-PT, TC II, 11 May 2000, para. 16; *Prosecutor v. Kvočka et al.*, Judgment, IT-98-30/1-A, AC, 28 February 2005, para. 28.

201 *Mrkšić* Indictment Decision, *supra* note 195, para. 11; *Prosecutor Brđanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36-PT, 26 June 2001, para. 33. See also *infra* Section 3.3.1 on evidentiary facts.

202 *Ndindabahizi v. The Prosecutor*, Judgment, ICTR- 01-71-A, AC, 16 January 2007, paras 19, 20; *Tadić* Trial Judgment, *supra* note 43, para. 534; *Brđanin and Talić* Decision on Objections by Talić, *supra* note 183, para. 22; *Rukundo v. The Prosecutor*, Judgment, ICTR-2001-70-A, AC, 20 October 2010, para. 163; *Prosecutor v. Bagosora et al.*, Judgment, ICTR-98-41-A, AC, 14 December 2011, para. 150.

203 *Kupreškić* Appeal Judgment, *supra* note 182, para. 90; *Prosecutor v. Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, IT-98-30/1, TC, 12 April 1999, para. 23.

204 *Simić* Appeal Judgment, *supra* note 194, para. 22; *Krnojelac* Appeal Judgment, *supra* note 198, para. 138.

Article 7(1), which deals with individual criminal responsibility, of the ICTY Statute. Whether or not the type of JCE is to be pleaded expressly is unclear. Most chambers at the ad hoc Tribunals dictate that the type of JCE must be specified,[205] but some state that this is only preferable.[206] But all chambers seem to agree that when charging JCE, the indictment must also include the nature, purpose, and time or period over which the joint criminal enterprise is said to have existed, the identity of its members insofar this is known, but at least by reference to their category as a group, and the nature of the accused's participation in that enterprise.[207]

In case of accomplice liability, the Prosecutor must plead clearly the acts – meaning the 'particular acts' or 'the particular course of conduct'[208] – by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.[209] Additional sorts of particulars are required when charging command or superior responsibility. The material facts that must be pleaded in the indictment include the accused's position as a superior of identified subordinates over whom he or she had effective control – in the sense of a material ability to prevent or punish criminal conduct[210] – and the subordinates' acts for which he or she is allegedly responsible.[211] Also, the accused's knowledge – who must have known or had reason to know – of the crimes must be indicated.[212] And finally, the conduct of the accused by which he or she may be found to have failed to take the necessary and

205 *Stanišić and Župljanin* Decision, *supra* note 192, para. 13; *Simić* Appeal Judgment, *supra* note 194, para. 22 referring to *Ntagerura* Appeal Judgment, *supra* note 194, para. 24; *Kvočka* Appeal Judgment, *supra* note 200, para. 28; *Ntagerura* Trial Judgment, *supra* note 183, para. 34.

206 *Krnojelac* Appeal Judgment, *supra* note 198, para. 138. See also Friman et al., *supra* note 8, 387.

207 *Stanišić and Župljanin* Decision, *supra* note 192, para. 13; *Đorđević* Decision, *supra* note 200, para. 9; *Krnojelac* 11 May 2000 Decision, *supra* note 200, para. 16; *Kvočka* Appeal Judgment, *supra* note 200, para. 28; *Simić* Appeal Judgment, *supra* note 194, para. 22; *Ntagerura* Trial Judgment, *supra* note 183, para. 34; *Prosecutor v. Brima et al*., Appeal Judgment, SCSL-2004-16-A, AC, 22 February 2008, paras 72-86; *Prosecutor v. Taylor*, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, SCSL-03-1-T, TC II, 27 February 2009, paras 66-68.

208 *Blaškić* Appeal Judgment, *supra* note 193, para. 213; *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, IT-97-25, TC II, 24 February 1999, para. 13; *Krnojelac* 11 February 2000 Decision, *supra* note 183, para. 18; Brđanin and Talić Decision on Objections by Talić, *supra* note 183, para. 20.

209 *Brđanin and Talić* Decision on Objections by Talić, *supra* note 183, para. 20; *Ntagerura* Trial Judgment, *supra* note 183, para. 33.

210 *Prosecutor v. Mucić et al. (Čelebići Camp)*, Appeal Judgment, IT-96-21-A, AC, 20 February 2001, para. 256.

211 *Stanišić and Župljanin* Decision, *supra* note 192, para. 14; *Prosecutor v. Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, IT-01-48-P, TC, 17 December 2004, para. 14; *Blaškić* Appeal Judgment, *supra* note 193, para. 218.

212 *Stanišić and Župljanin* Decision, *supra* note 192, para. 14; *Prosecutor v. Mejakić et al*., Decision on Zeljko Mejakić's Preliminary Motion on the Form of the Indictment, IT-02-65-PT, TC III, 14 November 2003, para. 3; *Blaškić* Appeal Judgment, *supra* note 193, para. 218.

reasonable measures to prevent such acts or to punish the persons who committed them must be specified.[213]

While SCSL Chambers at times appeared to follow ICTY and ICTR case law with respect to indictment specificity,[214] the SCSL prosecution employed a worrisome charging method that in practice circumvented some of the safeguards provided by the general principles listed above, and arguably, failed to provide sufficient notice to the accused. The first Chief Prosecutor David Crane devised a charging strategy that moved away from the practice of relatively detailed indictments at the ICTY and ICTR, which he thought were too long, inexact, and 'fraught with potential legal land mines.'[215] He opted for what he referred to as a form of 'notice pleading,' making the indictments 'simple and direct.'[216] This method of charging, reminiscent of the indictments in the subsequent proceedings in Nuremberg and federal civil procedure in the US,[217] stated the crimes' standard legal categorization and a brief stipulation of the alleged form of liability, but it often failed to include the link between the two and the accused's actual acts and omissions.[218]

As previously noted, the indictment at the SCSL had to be accompanied by a separate case summary setting out the allegations the prosecutor proposed to prove in making the case, potentially remedying the lack of specificity in the indictment if the two were read together. However, the case summary could not plead material facts that were not in the indictment, and the document was not susceptible to amendment by the Court.[219] In other words, the case summary, which in light of how concise the indictments were at the SCSL likely contained vital information from a defense's perspective, could be changed by the prosecution throughout the trial without permission from the Court, because the case summary was not considered part of the indictment.[220] This arguably resulted in ever-fluctuating factual parameters of the case throughout the trial, which was an issue in, for instance, the case against Sesay, Kallon and Gbao, also known as the RUF case. Defense

213 *Stanišić and Župljanin* Decision, *supra* note 192, para. 14; *Mejakić* Decision, *supra* note 212, para. 3; *Ntagerura* Trial Judgment, *supra* note 183, para. 33.

214 See e.g. *Brima* Appeal Judgment, *supra* note 207, paras 37-41; *Taylor* Decision, *supra* note 207, paras 66-68; *Prosecutor v. Taylor*, Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", SCSL-2003-01-T, TC II, 1 May 2009, paras 14-16.

215 D. Crane, 'Symposium: International Criminal Tribunals in the 21st Century: Terrorists, Warlords, and Thugs', 21 *American University International Law Review* 505 (2006), 511.

216 Ibid.

217 Federal Rules of Civil Procedure (U.S.) 8.

218 See e.g. *Prosecutor v. Sesay et al.*, Corrected Amended Consolidated Indictment, SCSL-04-15-PT, 2 August 2006. See also W. Jordash and S. Martin, 'Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone,' 23 *Leiden Journal of International Law* 585 (2010), 591.

219 *Taylor* Decision, *supra* note 207, para. 61; *Prosecutor v. Norman et al.*, Decision on Amendment of the Consolidated Indictment, SCSL-04-15-T, TC I, 16 March 2005, paras 51-52.

220 *Norman et al.* Decision, *supra* note 219, para. 52.

counsel identified the cause of this issue as the erroneous application of two legal standards:[221] (i) overreliance on the exception – as established by the ICTY – that less specificity is required when the crimes' massive scale makes detailed charging unrealistically demanding,[222] and (ii) qualifying evidence, sometimes constituting new charges or new material facts, as not new as long as it was a "building block constituting an integral part of, and connected with, the same *res gestae* [things done] forming the factual substratum of the charges in the indictment."[223] The SCSL created a charging practice that will most likely cease to exist along with the Court itself, which is now in residual mode, but it is nevertheless an interesting example of blurred case demarcation and confusion of charges and evidence, upon which will be elaborated on further below (Section 3.3).

The ECCC, while having a completely different system, applies the specificity requirements as articulated by the ad hoc Tribunals. Modeled on the French civil law system, the Court has a separate Office of Co-Investigating Judges, which conducts the investigation and concludes the pre-trial phase with the issuance of a Closing Order (indictment) comparable to a dossier in an inquisitorial system. The Closing Order, either indicting a person and sending him or her to trial or dismissing the case, is an elaborate document that forms the parameters of the case if indeed it leads to a trial.[224] Despite its unique system impacting the way in which charges are brought, and while formally not bound by the jurisprudence of other tribunals, in Case 001 against Kaing Guek Eav alias "Duch," the ECCC's Pre-Trial Chamber decided that international standards will be applied regarding requirements of specificity in the Closing Order, because the Internal Rules do not provide further guidance.[225] Indeed, also in Case 002/01 against the two surviving accused Nuon Chea and Khieu Samphan the Trial Chamber relied on ICTY and ICTR case law on general pleading principles when discussing the factual parameters of the case and the rights of the accused in this respect.[226] The example of the ECCC is consistent with the crime-based approach of this dissertation: the legal system does not cause issues of case demarcation to arise, nor does the legal system influence the way in which specificity of charges can be safeguarded. The general pleading principles can be legitimately applied in both dominantly adversarial and inquisitorial systems.

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221 *See* Jordash and Martin, *supra* note 218, at 593.

222 See e.g. *Sesay et al*. Indictment Decision, *supra* note 191, para. 7.

223 See e.g. *Prosecutor v. Sesay et al*., Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, SCSL-04-15-T, TC I, 27 February 2006, para. 10; *Prosecutor v. Sesay et al*., Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041, SCSL-04-15-T, TC I, 20 March 2006, paras 11, 13.

224 Rule 67 ECCC Internal Rules.

225 *Prosecutor v. KAING Guek Eav (alias 'Duch')*, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch", 001/18-07-2007-ECCC/OCIJ, PTC02, 5 December 2008, para. 46.

226 *Prosecutor v. NUON Chea et al*., Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 002/19-09-2007-ECCC/TC, TC, 22 September 2011, paras 17-23.

3.2.3 *Bringing charges at the ICC*

Like the ECCC, the ICC has a different procedural framework than the ad hoc Tribunals. Especially regarding the charging instrument, matters are handled differently. At the contemporary international criminal tribunals, as was also standard procedure at the Nuremberg and Tokyo Tribunals, the indictment is the basis for arrest.[227] At the ICC, however, the document providing the basis for arrest is the arrest warrant, which follows a separate procedure and involves a lower standard of proof than the confirmation of charges process.[228] Moreover, not every suspect is brought into custody, and an indictment is not a precondition for the issuance of an arrest warrant. Whether or not present – he or she may waive this right[229] – the suspect is subject to a confirmation of charges process whereby the Pre-Trial Chamber decides whether the case will proceed to trial; the charging instrument or indictment is then referred to as the 'Document Containing the Charges' (DCC).[230] Because of these procedural differences, as well as some substantive differences relating to crimes and modes of liability, Pre-Trial Chambers have stated that the ICTY's and ICTR's case law is of limited relevance at the ICC.[231] However, in the *Lubanga* Appeal Judgment on his conviction of 1 December 2014, the Appeals Chamber relied heavily on the ad hoc Tribunals' case law dealing with pleading rules without adding such a caveat.[232]

Article 61(3) of the Rome Statute, dealing with the confirmation of charges before trial, holds that the prosecutor must provide the accused with a copy of the DCC and the evidence upon which the prosecutor intends to rely at the confirmation of charges hearing within a reasonable time before that hearing.[233] It does not indicate what should be in the DCC, nor do the Rules provide any particular guidance. However, Regulation 52 of the Regulations of the Court states that the DCC referred to in Article 61 shall include: '[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial' as well as '[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.' In line with Article 74(2) of the Statute, a

227 Arts 19(2) and 20(2) ICTY Statute; Arts 18(2) and 19(2) ICTR Statute. See also Rule 55 ICTY and ICTR RPEs.

228 Art. 58 ICC Statute (the applicable standard being 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court').

229 Art. 61(2)(a) ICC Statute.

230 Art. 61(3)(a) ICC Statute. See also Locke, *supra* note 172, at 605 n4.

231 *Prosecutor v. Katanga and Ngudjolo*, Decision on the Defences' Motions Regarding the Document Containing the Charges, ICC-01/04-01/07-648, PTC I, 25 June 2008, paras 6-8; *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 44. See also Art 21(2) ICC Statute.

232 *Prosecutor v. Lubanga*, Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, AC, 1 December 2014, paras 122, 127.

233 Rule 121(3) ICC RPE.

'charge' is composed of the facts and circumstances underlying the alleged crime as well as of their legal characterization.[234] Furthermore, Article 74(2) of the Statute makes it clear that it is those facts and circumstances that form the basis for the charges confirmed at the pre-trial stage that are determinative of 'the factual ambit of the case for the purposes of the trial and circumscribe [the trial] by preventing the Trial Chamber from exceeding that factual ambit.'[235] In fact, this flows directly from the nature of a confirmation of charges decision: it sets the factual subject matter of the trial, while the confirmed charges 'fix and delimit […] the scope of the case for the purposes of the subsequent trial.'[236]

The 'facts described in the charges' have been defined by the Appeals Chamber as those 'factual allegations which support each of the legal elements of the crime charged.'[237] The facts described in the charges must be distinguished from 'the evidence put forward by the Prosecutor at the confirmation hearing to support a charge […], as well as from background or other information that, although contained in the document containing the charges or the confirmation decision does not support the legal elements of the crime charged.'[238]

There is not an abundance of ICC case law dealing with the (lack of) specificity of charges. Yet, there are examples of chambers, most recently the Appeals Chamber in the abovementioned *Lubanga* Judgment, relying amply on ICTY and ICTR case law despite the procedural differences between these courts. For example, the PTC in the *Bemba* case followed and referred to the ad hoc Tribunals when holding that 'in case of mass crimes, it may be impractical to insist on a high degree of specificity.'[239] It continued by explaining that, similar to the way stated at the ad hoc Tribunals, when dealing with such crimes it is not necessary for the prosecution to show for each individual killing the identity of the victim and the direct perpetrator, nor is it necessary to specify the precise number of victims; evidence referring to 'many' killings or 'hundreds' of killings may very well be used.[240]

In the *Mbarushimana* case, in which the charges against the suspect were not confirmed, the issue of specificity – in this case in relation to locations – played a more prominent role. The defense had raised a number of issues in this respect, namely the prosecutor's wording that locations 'include but are not limited to,' as well as phrases such as 'and neighboring villages,' 'surrounding villages' and 'the village of W673 and W674 […] in

234 *Prosecutor v. Ruto and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, PTC II, 23 January 2012, para. 44.

235 *Banda and Jerbo* CoC Decision, supra note 74, para. 134.

236 *Ruto and Sang* CoC Decision, *supra* note 234, para. 44; Banda and Jerbo CoC Decision, supra note 74, para. 34.

237 *Lubanga* Regulation 55 Judgment, *supra* note 77, para. 90 n163.

238 Ibid. See also *Ruto and Sang* CoC Decision, *supra* note 234, para. 47.

239 *Banda and Jerbo* CoC Decision, supra note 74, para. 134.

240 *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, PTC II, 15 June 2009, para. 134.

Masisi territory in the second part of 2009.'[241] The prosecutor took the stance that use of the words 'include but not limited to' allowed it to prove other events to establish the same crime, and submitted it was permissible to charge a pattern of crimes in a defined period and geographical area, including specific incidents as examples.[242] In the decision that declined to confirm the charges against Mbarushimana, the Pre-Trial Chamber was alarmed by the prosecution's approach, and gave it valuable guidance as to charging practices:

> The Chamber is concerned by this attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute. The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.[243]

The Chamber further held that broad geographic and temporal parameters lack enough detail to inform the suspect regarding the location and dates of the alleged crimes.[244] In the *Ruto and Sang* case, the use of the word 'including' when referring to specific locations was similarly held to be too ambiguous because it implies that the specified locations are exemplary and not exhaustive.[245]

In relation to modes of liability, the PTC offered some guidance in the *Katanga and Ngudjolo* case. When co-perpetration in accordance with Article 25(3)(a) of the Rome Statute is charged, the co-perpetrators' roles and contributions to the common plan must be clearly specified. In this context, it is considered impermissibly vague to use open-ended language such as that the accused contributed 'in at least the following ways.'[246] However,

241 *Mbarushimana* CoC Decision, supra note 74, para. 79.
242 *Prosecutor v. Mbarushimana*, Transcript of 16 September 2011, ICC-01/04-01/10-T-6-Red2-ENG, at 22-23. See also *Mbarushimana* CoC Decision, supra note 74, para. 80.
243 *Mbarushimana* CoC Decision, supra note 74, para. 82.
244 Ibid para. 85.
245 *Prosecutor v. Ruto and Sang*, Decision on the content of the updated document containing the charges, ICC-01/09-01/11-522, TC V, 28 December 2012, paras 32-33.
246 *Katanga and Ngudjolo* Decision on Defences' Motions, *supra* note 231, paras 33-34.

it is not necessary to identify every single member of a common plan when those others are not considered co-perpetrators of the relevant crimes.[247]

This approach was confirmed and elaborated upon, once again referring to the ad hoc Tribunals, by the Appeals Chamber in the *Lubanga* Appeal Judgment. The Chamber, reminding that Lubanga was charged and convicted based on the notion of co-perpetration based on a common plan, formulated three points of which the accused must then be notified with sufficient detail: '(i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators.'[248] Regarding the underlying criminal acts, the Appeals Chamber stated that 'the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims to the greatest degree of specificity possible in the circumstances.'[249]

While in the past having reiterated to not follow the ad hoc Tribunals' case law in relation to pleading principles due to alleged limited relevance, there are many overlaps in how the ICC and the ICTY and ICTR deal with issues of lack of specificity. Moreover, in the *Lubanga* Appeal Judgment, the Appeals Chamber relied heavily on the ad hoc Tribunals' case law without asserting its alleged limited relevance. Rightfully so, because the different procedure for bringing charges at the ICC does not necessarily warrant an alternate approach in this respect as shown by, for instance, the ECCC's willingness to be guided by ad hoc Tribunal jurisprudence. As a relatively young court, the ICC may therefore benefit from the pleading principles discussed above.

3.3 Case Demarcation: What Is Material?

In part, the prosecution's theory of the case becomes clear through context and background information revealing the narrative upon which the case is built.[250] Without such information, the account of the events as pleaded in the indictment accompanied only by a list of evidence could become incomprehensible. As discussed in Chapter 2, this is especially true for international crime cases. Due to the crimes' massive scale, the facts underlying the charges and the supporting evidence are usually of great quantity, and massive amounts of information are hard to navigate for Chambers and the accused without a compass in the form of a little explanation.

247 Ibid paras 23-26.
248 *Lubanga* Appeal Judgment, *supra* note 232, para. 123.
249 Ibid.
250 For different types of use of context, see also *supra* Chapter 2 at Section 2.2.2.1.

The need for this extra narrative element has been recognized by ICC Chambers. Generally, it has been stated that providing a narrative that sheds light on the prosecution's theory of the case is an important aspect of presenting evidence at the confirmation stage of the proceedings. At that stage, the prosecution 'must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations.'[251]

As shown by the cases and general pleading principles discussed in this Chapter, the seemingly simple question of what is part of the case and what is not, or how materiality of a certain fact is determined, has a far from straight-forward answer in international crime cases. It is of course of paramount importance to establish this accurately, because it goes to the very heart of the criminal trial as tool for ascertaining the truth with respect to the conduct of an accused. This has everything to do with standards of proof and the right of the accused to be put on notice of the nature and cause of the charges against him or her, the latter of which will be discussed in Section 3.4. It is those facts that are material, which include the individual crimes charged, the accused's criminal responsibility and the contextual elements,[252] that need to be proven to the requisite standard of proof – at the trial stage, for instance, beyond a reasonable doubt – and that eventually, may form the basis of a conviction. In other words, the material facts are those upon which the verdict is critically dependent,[253] and from which the conclusion of law is eventually drawn.

However, material facts are not the only facts involved in framing a case against a suspect. Evidentiary facts (as they are referred to at the ICTY and ICTR)[254] or subsidiary facts (as they are referred to at the ICC)[255] are of a particular significance, too. In common law, evidentiary facts have been defined as those subsidiary facts introduced to prove material facts.[256] At the ICC, subsidiary facts have been defined as facts providing background information or indirect proof of material facts.[257] While it seems illogical that facts would prove facts, it may be understood as creating the following chain: *direct* evidence going to subsidiary (evidentiary) facts constitutes *indirect* evidence going to material facts. Material facts are then proven by inference from subsidiary (evidentiary) facts. For the purpose of

251 See e.g. *Lubanga* CoC Decision, supra note 74, para. 39; *Abu Garda* CoC Decision, *supra* note 74, para. 37; *Banda and Jerbo* CoC Decision, *supra* note 74, para. 37; *Mbarushimana* CoC Decision, *supra* note 74, para. 40.

252 *Gbagbo* Adjournment Decision, *supra* note 19, para. 19.

253 *NUON Chea* Decision, *supra* note 226, para. 19.

254 See e.g. *Blaskić* Appeal Judgment, *supra* note 193, at para. 219; *Prosecutor v. Simba*, Judgment, ICTR-01-76-A, AC, 27 November 2007, para. 264.

255 See e.g. *Banda and Jerbo* CoC Decision, *supra* note 74, para. 37.

256 See e.g. *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951): 'Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.' In common law, material facts are usually referred to as 'ultimate facts,' but that terminology is not used at the international criminal courts and tribunals. See also Black's Law Dictionary (5th ed., West Publishing Company 1979) 500.

257 *Banda and Jerbo* CoC Decision, *supra* note 74, para. 37.

this Chapter, it will be assumed that evidentiary facts and subsidiary facts refer to the same type of facts despite the different terminology used at the ad hoc Tribunals and the ICC, and the term 'subsidiary facts' will be used hereafter.

While the ad hoc Tribunals never devoted much attention to the distinction between facts of a subsidiary nature and material facts, the ICC PTC reiterated in numerous Confirmation of Charges decisions that the facts and circumstances underlying the charges must be distinguished from other facts not mentioned in the charges but otherwise subsidiary or related to them.[258] Yet, it is not always clear how material facts are to be distinguished from subsidiary facts and background information, and what role or status these other types of information have.

In addition to the need for drawing a sharper line between material facts and other facts, a distinction must also be made between facts and evidence. Again, this may seem an easy query. Yet, how is evidence distinguished from facts, for instance, when subsidiary facts are used to support other evidence, to demonstrate the material facts or to show a certain pattern? Can subsidiary facts even take on all these roles? It is well established that material facts must be distinguished from evidence tendered to prove those facts – the latter does not need to be stated by the prosecution in the indictment.[259] However, confusion in this respect was highlighted, for instance, by the *Gbagbo* case mentioned in the introduction to this Chapter and more elaborately dealt with further below: the prosecution used a number of incidents, which it classified as subsidiary facts, to support evidence demonstrating the features of the charged incidents constituting the attack (as part of a crime against humanity), but these subsidiary facts were interpreted by the PTC as material facts *constituting* the attack, resulting in the confirmation of charges hearing being adjourned and the prosecution being sent off to conduct further investigations.[260] Moreover, if indeed used to show a pattern or certain features, it raises the question whether these additional incidents perhaps should have been regarded not as subsidiary facts, but as a type of similar fact evidence.

The question whether a fact is a material fact, the answer to which demarcates the case and puts the accused on notice, will therefore be explored here from two different angles: how are material facts distinguished from other facts, and how are facts distinguished from evidence?

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258 See e.g. *Banda and Jerbo* CoC Decision, *supra* note 74, para. 36; *Ruto and Sang* CoC Decision, *supra* note 234, para. 47.

259 See e.g. *Kupreškić* Appeal Judgment, *supra* note 182, para. 88. See also *supra* pleading principle no. 2 in Section 3.2.2.

260 Gbagbo Adjournment Decision, *supra* note 19, paras 44-45.

3.3.1 Subsidiary facts and background information

A closer look at the *Gbagbo* pre-trial saga reveals how blurred boundaries between different types of facts and evidence became entangled with the issue of uncertain case delineation. Laurent Gbagbo, former President of Côte d'Ivoire, stands accused of four counts of crimes against humanity in the context of post-electoral violence in his home country between 16 December 2010 and 12 April 2011. On 17 January 2013, the prosecution filed the DCC identifying four incidents ('charged incidents') during which the crimes against humanity allegedly had taken place. In a separate subsection titled 'attack against a civilian population' it described a series of attacks, including the four charged incidents, as well as 41 other incidents.[261] This subsection of the DCC was not placed under the heading dealing with the actual charges, in which the four incidents were once again explicitly referred to.

The hearing on the confirmation of charges was held from 19 till 28 February 2013.[262] This hearing is part of the confirmation of charges process – unique to the ICC and unrelated to the issuance of arrest warrants – that is used as screening to make sure only persons against whom a relatively strong case exists are subjected to a trial.[263] On the basis of the hearing, the PTC will determine whether 'there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.'[264] It may then either (i) confirm the charges and commit the person to trial, after which the case is transferred to a Trial Chamber, (ii) decline to confirm the charges, or (iii) adjourn the hearing and request the prosecutor to either collect more evidence or amend the charges.[265] In the *Gbagbo* case, the PTC adjourned the hearing on the confirmation of charges on 3 June 2013 – this is possible even though the actual hearing has already taken place.[266] It urged the prosecution to gather more evidence or conduct further investigations, as well as provide an updated DCC and a new list of evidence.[267] More specifically, the Chamber stated that none of the 45 incidents discussed, taken on their own, could establish the existence of an 'attack' in the sense of Article 7(2) of the Rome Statute. Even though not all 45 incidents needed to be proven to the required threshold, as least 'a sufficient number of incidents' must meet the requisite standard of proof.[268] Putting aside evidentiary issues

261 *Prosecutor v. Gbagbo*, Document amendé de notification des charges [DCC], ICC-02/11-01/11-357-Anx1-Red, Prosecutor, § E.1, 25 January 2013 [in French only]; *Gbagbo* Adjournment Appeal Judgment, *supra* note 77, para. 1.

262 *Gbagbo* Adjournment Decision, *supra* note 19, para. 11 (and accompanying n17 for transcripts).

263 Art. 61 ICC Statute. See also Friman et al., *supra* note 8, 399.

264 Art. 61(7) (chapeau) ICC Statute.

265 Art. 61(7)(a), (b) & (c) ICC Statute.

266 *Prosecutor v. Bemba*, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388, PTC III, 3 March 2009, para. 37; *Gbagbo* Adjournment Decision, *supra* note 19, at para. 13.

267 *Gbagbo* Adjournment Decision, *supra* note 19, paras 44, 45.

268 Ibid para. 23.

relating to a high reliance on NGO reports and press articles, which in large part caused the judges to remain unconvinced, the PTC made it clear that it considered *all* 45 incidents to be constituting the attack.[269] Accordingly, none of these incidents were considered to be subsidiary facts or background information, and all of them were treated as being part of the facts and circumstances described in the charges.

The prosecution's appeal of the PTC's decision claimed a different intent with respect to the 41 additional – i.e. not-charged – incidents, and stated that '[the prosecution] also led evidence in relation to another 41 incidents to support evidence from the Charged Incidents that goes to demonstrating the features of the attack, but in relation to which the Prosecution did not plead any material facts […].'[270] It continued by explaining that 'the purpose of the [41 incidents] was to support evidence from the Charged Incidents that goes to proof of the attacker's pattern of conduct as well as pattern of victimization.'[271] Judge Silvia Fernández de Gurmendi sided with the Prosecution in her dissent to the PTC's decision, adding that the prosecution had made a clear distinction between the charged allegations and other facts by adding separate sections to the DCC dealing only with the charges.[272] She opined that the subsidiary facts did not constitute the attack, but 'merely serve to prove, together with *all* available evidence, the attack and/or its widespread or systematic nature.'[273]

The Appeals Chamber confirmed the PTC's majority decision. It noted that the wording of the DCC does not automatically lead to the conclusion that the prosecution intended to use only the four charged incidents to establish the attack, and it concluded that the prosecution did not make a clear enough distinction between the four charged incidents and the other 41 incidents.[274] Moreover, the AC was not convinced that the distinction between material facts and subsidiary facts was even warranted here, because the incidents were all separate events. It explained: '[…] the prosecutor did not present any contextual information or any other factual allegations that would provide a basis for making such a distinction, or serve to explain the alleged link between the 41 Incidents and the four Charged Incidents.'[275] In other words, in order to claim to be using facts as subsidiary facts, the prosecution must at least establish some kind of connection between

269 Ibid para. 36.

270 *Gbagbo* Prosecution's Appeal, *supra* note 122, para. 3. This also follows from the transcripts of the confirmation of charges hearing. See e.g. *Prosecutor v. Gbagbo*, ICC-02/11-01/11-T-14-ENG, Transcript of 19 February 2013, p.45 ('[…] the Prosecution has selected four incidents that are representative of the crimes committed by the pro-Gbagbo forces in a sustained series of attacks put into motion by Mr Gbagbo during the post-election violence, and during the next few days the Prosecution will summarise its core evidence regarding these four incidents.').

271 *Gbagbo* Prosecution's Appeal, *supra* note 122, para. 18.

272 *Gbagbo* Adjournment Decision, *supra* note 19, para. 35 (Dissenting Opinion Judge Fernández de Gurmendi).

273 Ibid para. 41.

274 *Gbagbo* Adjournment Appeal Judgment, *supra* note 77, paras 43, 44.

275 Ibid para. 46.

those facts and the material facts. Bearing in mind subsidiary facts may also be referred to as evidentiary facts, this makes a lot of sense: a piece of evidence connects to an alleged fact.

In the *Gbagbo* case, the prosecution seemed to have had two different intentions with the additional 41 incidents: to use them to demonstrate a pattern, and to support other evidence that in turn supported the material facts. These two types of usages, however, do not seem to correspond to the definition of 'subsidiary fact.' PTCs have made it clear that in assessing the prosecution's case at the confirmation stage, subsidiary facts are only to be considered 'as background information or as indirect proof of the material facts.'[276] In other words, these other factual allegations offer general background information or 'indicate intermediate steps in the prosecution's chain of reasoning.'[277] Moreover, 'subsidiary facts […] are of relevance only to the extent that facts described in the charges may be inferred from them.'[278] As the AC noted in *Gbagbo*, a link between the subsidiary facts and the material facts must be discernible.

Other information, i.e. non-essential information or subsidiary facts, indeed seem to have a dual function at the ICC: (i) it may provide a narrative intended to enhance understanding of the alleged events, and (ii) it may be used to infer the existence of material facts. Conflating the term 'subsidiary' on the one hand and 'background information' on the other is likely to cause confusion, though, despite that they are indeed linked. While subsidiary facts may lead to a greater understanding of the prosecution's theory of the case, they do not necessarily serve the (exclusive) purpose of providing background information. Strictly speaking, they are intended to demonstrate or support the existence of the facts underlying the charges, in other words the material facts. In a way, they provide a narrative of what factually happened, and act as glue connecting the evidence with the material facts, which indeed provides a background. To illustrate, take a single murder as example. The material facts are likely to be: (i) the victim was killed, (ii) the accused did the act that killed the victim, and (iii) the accused intended to kill the victim. A subsidiary fact could be, for instance, that the accused was seen beating the victim on the same day the killing took place. That subsidiary fact – which naturally in itself should be supported by evidence, but which taken on its own does not constitute a material fact in a murder case – in turn aids to prove the material fact, creating a chain of reasoning that paints the

276 *Banda and Jerbo* CoC Decision, *supra* note 74, para. 37.

277 *Muthaura and Kenyatta* Order regarding Charges, *supra* note 77, para. 13. See also *Gbagbo* Adjournment Decision, *supra* note 19, para. 34 n39 (Dissenting Opinion Judge Fernández de Gurmendi), where Judge Fernández de Gurmendi observed that 'facts of a subsidiary nature will usually emerge from "circumstantial evidence"'. While not clarifying the distinction between material and subsidiary facts any further, the AC has endorsed the use of the term 'subsidiary facts' on several occasions: see *Lubanga* Regulation 55 Judgment, *supra* note 77, para. 90 n163; *Katanga* Regulation 55 Judgment, *supra* note 77, para. 50; *Gbagbo* Adjournment Appeal Judgment, *supra* note 77, para. 37.

278 *Ruto and Sang* CoC Decision, *supra* note 234, para. 47.

full factual picture of the prosecution's case. Appendix 1 to this dissertation provides a visual aid for making this distinction.

The *Gbagbo* Pre-Trial Chamber, reiterating the importance of factual and legal demarcation at the confirmation stage, argued for a clear distinction between the facts and circumstances underlying the charges (material facts) and other factual allegations supporting the existence of the material facts (subsidiary facts).[279] It also emphasized that subsidiary facts are not part of the charges and are therefore not subject to the confirmation of charges process. Judge Christine van den Wyngaert articulated a logical conclusion to such reasoning in a separate opinion to a decision in the *Muthaura and Kenyatta* case where the Majority explicitly authorized the prosecution to keep other factual allegations (considered to be background information or other information of a subsidiary nature) in the updated DCC.[280] She disagreed with including subsidiary facts in a DCC altogether. She argued that the DCC should only contain the material facts, and should not include any unnecessary background information or subsidiary facts. The correct place for such information is the pre-trial brief.[281] She pointed out that the DCC has a very specific and fundamental purpose: it demarcates the case legally and factually, while the pre-trial brief tells the defense how the prosecution intends to plead the case. It is therefore imperative that the facts and circumstances contained in the DCC are 'clear, precise, and unambiguous.'[282] Allowing both material facts and subsidiary facts in a DCC complicates matters needlessly, and turns a DCC into a dual-functioning hybrid between a charging instrument and a pre-trial brief.[283]

Indeed, keeping subsidiary facts out of the charging instrument delimits the case more clearly, and reduces any potential confusion as to which facts are material. But it is possible to imagine exceptions to this rule. At the ICTY, for instance, while there is limited case law dealing with the issues surrounding evidentiary or subsidiary facts in general, Trial Chambers have held – this is pleading principle no. 9 discussed in Section 3.2.2 – that where the state of mind of the accused is relevant to the charges, the prosecution must plead in the indictment either (i) the specific state of mind as a material fact (in which case the facts by which that material fact is to be established are ordinary matters of evidence and need not be pleaded further); or (ii) the evidentiary facts – the term used at the ICTY for subsidiary facts – from which the state of mind is to be inferred.[284] This has only been

279 *Prosecutor v. Gbagbo*, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, ICC-02/11-01/11-325, PTC I, 14 December 2012, para. 27.

280 *Prosecutor v. Muthaura and Kenyatta*, Decision on the content of the updated document containing the charges, ICC-01/09-02/11-584, TC V, 28 December 2012, para. 13.

281 Ibid para. 3 (Separate Opinion Judge Van den Wyngaert).

282 Ibid para. 4 (Separate Opinion Judge Van den Wyngaert).

283 Ibid para. 5 (Separate Opinion Judge Van den Wyngaert).

284 *Stanišić and Župljanin*, *supra* note 192, para. 16; *Mrkšić* Indictment Decision, *supra* note 195, para. 11; *Blaskić* Appeal Judgment, *supra* note 193, para. 219. See also *Prosecutor v. Ayyash et al.*, Decision on Alleged Defects in the Form of the Amended Indictment, STL-11-01/PT/TC, TC, 12 June 2013, para. 58.

held with respect to *mens rea* as an exception to having to plead all the material facts explicitly, and nothing similar has been dealt with at the ICC. This is a very logical exemption, though, one that perhaps may be transplanted to the ICC. The state of mind of an accused is not likely directly observable and will almost always need to be inferred from other facts.

Looking at the definition of subsidiary facts, and how they are only found in the indictments at the ad hoc Tribunals by way of a narrow exception, the question arises whether in the *Gbagbo* case the 41 incidents were supposed to have been used as subsidiary facts, material facts, or as something else. If they were included to support the material facts, for instance the attack, they might be considered subsidiary facts. If this had been crystal clear, it might even not have been that detrimental to have them in the DCC, because confusion were likely avoided. If they were indeed crucial to, or part of, the attack, they might be regarded as material facts and must form part of the charges. If the additional incidents were not as such directly linked to the primary charged incidents, namely the attack, but were used to show a pattern, they could be a type of similar fact evidence, in which case they should not have been in the DCC as it would have been a matter of proof.

3.3.2 Between proof and pleading: patterns of conduct and similar fact evidence

In the June 2013 *Gbagbo* Decision, the PTC pulled the other 41 incidents into the realm of material facts, i.e. facts which need to be proven to the required standard of proof. This did not lead to the factual parameters of the case drastically changing, though. Still speaking of four charged incidents (during which four counts of crimes against humanity – rape, murder, other inhumane acts or attempted murder, and persecution – were allegedly committed), the PTC eventually confirmed the charges on 12 June 2014, after the prosecution had gathered more evidence as it had been directed to do.[285] Other acts were mentioned in the Confirmation of Charges Decision as well, but their exact purpose remained ambiguous.[286] They were not part of the four charged incidents during which the four counts of crimes against humanity took place; some acts were used to show a pattern,[287] while in relation to other acts the Chambers merely stated it took 'note of the evidence establishing that the following events took place.'[288]

The prosecution in this case had stated earlier that it intended to use the other not-charged incidents not as material facts as such, nor to support the material facts, but to

285 *Prosecutor v. Gbagbo*, Decision on the Confirmation of Charges Against Laurent Gbagbo, ICC-02/11-01/11-656-Red, PTC I, 12 June 2014, paras 267-277.
286 Ibid paras 73-77.
287 Ibid para. 75.
288 Ibid para. 77.

support the evidence underlying the material facts in relation to proof of the accused's pattern of conduct and the pattern of victimization.[289] As noted, this does not seem to adhere to the definition of subsidiary facts, which are used to prove material facts, not to support the underlying evidence. The ensuing decision confirming the charges did not touch upon this subject, but the use of the word 'incident' was perhaps unfortunate, too. The definition of crimes against humanity does not speak of 'incidents'; it only demands the commission of multiple acts.[290] In this case, one incident already encompassed a plurality of acts, and moreover, one incident did not correspond one-on-one to one count of a crime against humanity. In any event, matters got very confused, but strangely, none of the actors involved suggested that all of this might have been a misinterpretation of pattern of conduct evidence, despite its similarities and hints in that direction.

In international crime cases, information about other events or acts not charged in the indictment is often introduced to demonstrate a certain pattern. For a series of acts or incidents to be qualified as a pattern, they must show common features of, for instance, the perpetrator, the victims or the modus operandi.[291] Pattern evidence, often equated with the notion of 'similar fact evidence' or 'evidence of similar conduct,' is a well-known phrase from common law systems and it is also used at the ad hoc Tribunals. It may be further defined as evidence of crimes not alleged in the indictment, but nevertheless used to establish guilt for the acts with which the accused is charged.[292] Such type of evidence, also known as character evidence, is generally inadmissible where it goes to show the accused's propensity or disposition to do the type of acts charged and is therefore guilty of the crime in the indictment.[293] Moreover, in relation to international crimes, evidence relating to the accused's character is considered to have very little probative value: the nature of international crimes which take place during a national or international emergency is such that they are often committed by persons with no prior convictions or history of violence.[294]

Pattern evidence can be quite prejudicial to the defense, and it potentially erodes the presumption of innocence.[295] Under certain circumstances it may be admissible, though.

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289 See *supra* Section 3.3.1.

290 Art. 7(2)(a) ICC Statute: '"Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.'

291 X. Agirre Aranburu, 'Sexual Violence: Using Pattern Evidence and Analysis for International Cases', 23 *Leiden Journal of International Law* 609 (2010), 610.

292 W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 790.

293 *Prosecutor v. Kupreškić et al.*, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, IT-95-16, TC, 17 February 1999, § 4; *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY, ICTR-98-41-T, TC I, 18 September 2003, para. 12 (Sept. 18, 2003).

294 *Kupreškić* Tu Quoque Decision, *supra* note 293, § 4. See also A. Smeulers, B. Holá and T. van den Berg, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures', in D.L. Rothe, J. Meernik, and J. Ingadóttir (eds), *The Realities of International Criminal Justice* (Martinus Nijhoff 2013) 34.

295 Schabas Commentary, *supra* note 292, at 791.

The RPEs of the ICTY, ICTR and SCSL share the same Rule 93 dealing with this type of evidence, providing that it may be admissible in the interests of justice.[296] The ICTY AC has endorsed using this evidentiary method pointing out that:

> […] under the so-called principle of "similar fact evidence", courts in England and Wales, Australia and the United States admit evidence of crimes or wrongful acts committed by the defendant other than those charged in the indictment, if the other crimes are introduced to demonstrate a special knowledge, opportunity, or identification of the defendant that would make it more likely that he committed the instant crime as well.[297]

The admission of such evidence always requires respecting and balancing the rights of the accused. Although comprised of professional judges and in the absence of juries, Chambers ought not be distracted by hearing endless testimony on irrelevant and prejudicial evidence, as this may cause the trial to lose focus and be unduly lengthened.[298]

There are a number of international cases in which similar fact evidence was used. For example, in the *Galić* case, similar fact evidence with respect to an additional (not-charged) sniping incident was admitted, as it corroborated the accused's consistent pattern of conduct in relation to the charged sniping incidents.[299] In the *Kvočka et al.* case, similar fact evidence was admitted against two accused. One woman's testimony relating to Mlado Radić, who encouraged a guard to have sex with the witness in exchange for a meeting with her husband, was admitted into evidence under Rule 93(A) ICTY RPE,[300] as well as a second testimony relating to a witness's actual rape by Radić.[301] The other accused in this case, Zoran Žigić, also had similar fact evidence admitted against him in relation to a number of assaults of which the victims were not listed on the Amended Indictment or Schedules.[302] Also, in *Popović et al.*, evidence relating to the Bišina execution site, which did not form part of the indictment, was admitted into evidence, because it was nevertheless 'still relevant and highly probative as to [Popović's] knowledge, intent and "pattern of conduct" during the

296 Rule 93(A) ICTY/R RPEs and SCSL RPE; R. May and M. Wierda, *International Criminal Evidence* (Martinus Nijhoff 2002) 105-106; *Prosecutor v. Ngeze and Nahimana*, Décision sur les appels interlocutoires, ICTR-99-52-A, AC, 5 September 2000, para. 20 (Separate Opinion Judge Shahabuddeen).

297 *Kupreškić* Appeal Judgment, *supra* note 182, para. 321.

298 *Bagosora* DBY Decision, *supra* note 293, para. 28. See also *Prosecutor v. Milutinović et al.*, Decision on Evidence Tendered Through Witness K82, IT-05-87-T, TC, 3 October 2006, para. 19.

299 *Prosecutor v. Galić*, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galić, IT-98-29-T, TC, 3 October 2002, para. 3 n1; *Prosecutor v. Galić*, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should Be Considered as the Amended Indictment, IT-98-29-PT, TC, 19 October 2001, para. 23.

300 *Prosecutor v. Kvočka et al.*, Judgment, IT-98-30/1-T, TC, 2 November 2001, para. 547.

301 Ibid para. 556.

302 Ibid paras 652, 663, 664.

relevant time period, particularly in relation to the alleged joint criminal enterprise to murder the able bodied Bosnian Muslim men.'[303]

In *Bagosora et al.*, the leading decision in this respect, the ICTR TC discussed a number of ways in which similar fact evidence may be used, relying mostly on the often-cited separate opinion of Judge Shahabuddeen to a decision from the *Ngeze and Nahimana* case. The context of the former decision was dealing with extra-temporal evidence in light of the Tribunal's jurisdiction. Such extra-temporal evidence from before 1994, the year from which the Tribunal's mandate allows it to exercise jurisdiction, is generally inadmissible at the ICTR bar three exceptions: (i) evidence relevant to an offense continuing into 1994; (ii) evidence providing a context or background; and (iii) similar fact evidence.[304] With respect to similar fact evidence, the *Bagosora* TC held that the rule must be understood from the perspective of the general principle that evidence regarding the character of the accused is not admissible if that evidence is only introduced to blacken the accused's reputation by showing that he or she committed the same crime before, is inclined to commit the crime or is capable of committing the crime.[305] Similar fact evidence is admissible, however, when it serves 'to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense.'[306] Thus, for similar fact evidence to be admissible it must show more than a mere propensity to commit the crime; it must be 'probative of some peculiar feature of the case which substantially enhances its probative value in relation to the charge.'[307] Judges will need to assess whether the evidence serves such a specific goal on a case-by-case basis keeping in mind the evidence should not be unfairly prejudicial towards the accused.[308]

The ICC has thus far remained silent with respect to the phrase 'similar fact evidence' and there is no mention of pattern evidence in the Rome Statute or RPE. In fact, Rule 93 of the ad hoc Tribunals' RPEs is the only original evidentiary rule that was not included in the ICC's equivalent.[309] However, there have been cases where patterns played a prominent role. One commentator noted the connection with pattern evidence when he discussed the use of evidence of other (not charged) attacks in the *Katanga and Ngudjolo* case with respect to context.[310] Indeed, in that case, under the heading *Theory of similar*

303 *Prosecutor v. Popović et al.*, Decision on Motion to Reopen the Prosecution Case, IT-05-88-T, TC II, 9 May 2008, paras 33, 39.

304 See *Bagosora* DBY Decision, *supra* note 293, paras 9-14; *Prosecutor v. Simba*, Decision on Defence Motion to Preclude Prosecution Evidence, ICTR-01-76-I, TC I, 31 August 2004, para. 3; *Prosecutor v. Ndindiliyimana et al.*, Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony, ICTR-00-56-T, TC II, 30 March 2006, para. 22.

305 *Bagosora* DBY Decision, *supra* note 293, para. 12.

306 Ibid para. 13.

307 Ibid para. 14.

308 Ibid.

309 C. Gosnell, 'Admissibility of Evidence,' in Khan et al., *supra* note 96, 431.

310 Ibid.

events: mode of proof by analogy, the Pre-Trial Chamber allowed evidence regarding other attacks than the charged attack (which had taken place in the town Bogoro in the DRC) in order to establish the overall context of the conflict. Referring to the *Lubanga* Confirmation of Charges Decision, the PTC held that 'providing evidence which may assist [the Chamber] in establishing the overall context in which the crimes are alleged to have occurred is not only helpful to its understanding of the evidence supporting the charges but is also highly relevant and probative in respect of the contextual elements of the crimes under articles 7 and 8 of the Statute.'[311] It must be assumed from the wording of the Chamber that the only type of context the evidence was used for were the contextual elements in the crime definitions, which are every bit a part of the material facts as the other legal elements of the crimes.[312] However, once again, this was not exactly what the prosecution had had in mind. They had submitted that evidence of other attacks was also probative regarding the suspects' intent and knowledge.[313] In a later submission, the prosecution linked this evidence to the doctrine of 'similar fact evidence' referring to the ICTY and ICTR case law discussed above,[314] but unfortunately, ICC Chambers have never clarified matters as they never used this terminology themselves nor devoted any substantial consideration to the notion.

With respect to the use of patterns at the ICC, the dissenting opinion of Judge Anita Ušacka to the *Lubanga* Appeal Judgment is also worth noting. She observed that the charges – the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities – were divided into a 'pattern' section and an 'individual cases' section, causing confusion as to the relationship between the two. Also, the evidence relating to the individual cases was, unforeseeably, rejected by the Trial Chamber only at the end of trial, leaving the 'vague formulations' of the pattern charges as the basis for the conviction.[315] In Judge Ušacka's view, the pattern charges merely provided contextual or background information, incapable of adequately informing the accused of the charges. Moreover, by having to rely on the pattern charges after the evidence regarding the individual cases was thrown out, the Prosecutor effectively was forced to

311 *Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, ICC-01/04-01/07-717, PTC I, 30 September 2008, para. 228.

312 See *supra* Section 3.3.1.

313 *Katanga and Ngudjolo* CoC Decision, *supra* note 311, para. 226.

314 *Prosecutor v. Katanga and Ngudjolo*, Prosecution's Consolidated Response to "Defence Objections to Admissibility in Principal and in Substance" (ICC-01/04-01-07-1558) and <Requête de la Défense en vue d'obtenir une décision d'irrecevabilité des documents liés aux témoins décédés référencés sous les numéros T-167 et T-258> (ICC-01/04-01/07-1556), ICC-01/04-01/07-1645, PTC II, 16 November 2009, paras 65-66 n68.

315 *Lubanga* Appeal Judgment, *supra* note 232, para. 12 (Dissenting Opinion Judge Ušacka).

reclassify the individual cases from 'core factual allegations underlying the charges' to evidence, or in the words of the Prosecutor, as 'sample episodes chosen as evidence.'[316]

While sampling of data – meaning, in general terms, the process of (i) selecting units such as people, organizations or events from a population or pool of interest, (ii) studying the sample in order to (iii) generalize the results back to the population or pool from which they were chosen – as method of investigating crime patterns is beyond the scope of this dissertation, sampling of incidents is a common technique for building a case in the legal sense at the international courts and tribunals. As one senior analyst pointed out, '[i]ncidents are chosen in a way like "case studies" as representative of the overall pattern.'[317] Especially in international crime cases, patterns often play a role since most cases involve a large number of incidents. Key in this respect is making a clear distinction between (material and subsidiary/evidentiary) facts and (pattern of conduct) evidence, or in other words, determining where the existence of a pattern forms part of the material facts charges and where the demonstrated pattern serves an evidentiary purpose. While the former (i.e. facts) are found in the charging instrument when deemed material or, if one follows ICTY case law, when used as evidentiary facts to establish *mens rea*, the latter (i.e. evidence) are matters of proof and should therefore not be in the indictment. If parties are clear on how they intend to use different facts and evidence at their disposal, the types of evidence discussed in this section do not influence case demarcation in the strict sense, that is, when we take the charging instrument as the foundation of demarcation. Nonetheless, it does have an effect on the scope of the case in a broader sense, as quantity and quality are related.[318] Additional incidents, although not charged, factually widen the amount of issues dealt with at trial, and therefore inevitably affect the interests of the accused with respect to the length of trial and the disclosure of evidence. However, as will be elaborated upon next, this is usually a different matter than the right of the accused to be given notice of the nature and cause of the charge against him or her, which strictly speaking relates to the charging instrument.

3.4 The Specificity of Charges and the Right to Be Put on Notice

As mentioned previously, the purpose of the charging instrument or indictment is to fix the factual and legal parameters of the case at trial and to inform the accused about the charges.[319] Vague charges and conflation of subsidiary and material facts, and facts and

316 Ibid para. 18 (Dissenting Opinion Judge Ušacka); *Prosecutor v. Lubanga*, Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, Prosecution, 18 February 2013, para. 104.

317 Agirre Aranburu, 'Sexual Violence', *supra* note 291, 620.

318 See *supra* Chapter 2, Section 2.3.

319 See also Friman et al., *supra* note 8, 383.

evidence corrode these fundamental goals and have a dire effect on the rights of the defense. Both parts of the charging instrument's dual function express a number of essential fair trial rights. This includes the fundamental principle to be presumed innocent when charged with a criminal offense and granting adequate opportunity to prepare a defense,[320] as well as safeguarding the *ne bis in idem* principle (protection from repeated charges of the same offense, also known as the double jeopardy protection). The fair trial rights at play here comprise the normative boundaries in light of this Chapter's main query: lack of specific case demarcation finds its limits in the rights of the accused to be given fair notice of the charges against him or her, discussed in Section 3.4.1, and to be protected against subsequent charges of the same crime, discussed in Section 3.4.2.

3.4.1 Notice: preparing a defense

Defense complaints relating to the vagueness of charges are commonly heard at the contemporary international criminal courts and tribunals. Such objections are based on the right of the accused to be informed of the case against him or her. The ICTY, ICTR, SCSL and STL statutes all follow the major international human rights instruments – the ICC and ECCC do as well, but use slightly different language – in guaranteeing that an accused will 'be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.'[321] The nature of the charge translates as the legal qualification and the cause of the charge as the underlying material facts,[322] both of which the accused must be made aware of.[323] It has been observed by the European Court of Human Rights that '[…] in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.'[324] The accused's right to be informed, or in other words, to be put on notice enables preparing an effective defense, which is the touchstone criterion in relation to sufficient specificity of charges.[325] Moreover, it relates closely to the right to have adequate time and facilities for the preparation of the defense, and already encompasses the right to have information translated into a language the accused understands. Obviously,

320 See e.g. Jordash and Martin, *supra* note 218, at 588; Friman et al., *supra* note 8, 454.
321 Art. 21(4)(a) ICTY Statute; Art. 20(4)(a) ICTR Statute; Art. 17(4)(a) SCSL Statute; Art. 16(4)(a) STL Statute. See also Art. 67(1)(a) ICC Statute; Rule 21(1)(d) ECCC Internal Rules.
322 *Ntagerura* Trial Judgment, *supra* note 183, para. 29.
323 *Pélissier and Sassi v. France*, App. No. 25444/94, ECtHR (1999), para. 52.
324 Ibid.
325 *Blaškić* Defects Decision, *supra* note 179, para. 32. See also Jordash and Coughlan, *supra* note 9, 289.

an effective defense starts with knowing in detail what one is being accused of, and consequently, these rights also apply to any amendments to charges.[326]

Since the ultimate objective of these fair trial provisions is allowing an effective defense, which is a notoriously subjective notion, the assessment whether an accused has received sufficient notice is inherently one that must be conducted on a case-by-case basis. Allowing special features to be taken into consideration in this respect does not deviate from international human rights standards per se.[327] As previously noted, the *Kupreškić* AC held that the massive scale of international crimes might justify a lower degree of specificity, which in and of itself is not unreasonable. However, especially in the early days of the ad hoc Tribunals, it opened the door to using this claim of 'uniqueness' as an excuse for 'loose drafting, less particularization, and less rigorous scrutiny of indictments.'[328] Fortunately, this tendency has changed, and more recent case law at the ICTY and ICTR shows adequate charging standards consistent with international human rights law.[329] At the ICC, the practice of the ICTY and ICTR is largely followed, too.[330] The SCSL's practice remained problematic though. Commentators have noted that the concise charging instrument supplemented with a case summary fell short of international standards.[331]

The idea that the nature of international crimes leaves prosecutors with unparalleled challenges has at times inspired a search for creative solutions outside of indictment requirements. For instance, in the *Ntakirutimana* case at the ICTR, the Trial Chamber allowed indictment defects to be cured through disclosure of evidence, holding that it depends on the circumstances of the case and as long as the disclosure is done before the commencement of trial. To be more specific, one of the indictments was found to lack specificity, but the pre-trial brief included 80 witness statements of the witnesses who would be called to testify at trial. This additional information was submitted one month before trial, and the Chamber held that this was most indicative of the material facts of the case.[332] Thus, where there had been sufficient notice to the accused through pre-trial disclosure of evidence, charges were not dismissed. This is controversial. In another case, a different ICTR Trial Chamber refused to allow other submitted information to so easily

326 See e.g. *Mattoccia v. Italy*, App. No. 23969/94, ECtHR (2000), paras 59-61.

327 See e.g. *Fox, Campbell and Hartley v. United Kingdom*, App. No. 12244/86; 12245/86; 12383/86, ECtHR (1990), para. 40, observing that '[w]hether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.'

328 Jordash and Coughlan, *supra* note 9, 289.

329 See Friman et al., *supra* note 8, 456.

330 See *supra* 3.2.3.

331 See e.g. Jordash and Martin, *supra* note 218; Friman et al., *supra* note 8, 456.

332 *Prosecutor v. Ntakirutimana and Ntakirutimana*, Judgment and Sentence, ICTR-96-10 & ICTR-96-17-T, TC I, 21 February 2003, para. 63. The judgment and sentence were upheld on appeal. However, some factual findings by the Trial Chamber were quashed because they were not in the indictment, making it defective, and this was not remedied, for the facts were not specified in the Pre-Trial brief or witness statements. See *Ntakirutimana* Appeal Judgment, *supra* note 186, paras 86, 99, 289, 555.

cure defects in the indictment: it held that all material facts must be properly pleaded in the indictment and pre-trial submissions and disclosure are not adequate substitutes.[333] If a paragraph in the indictment is indeed defective, the Chamber continued, it could be disregarded. This does not mean, however, that the Chamber cannot take the evidence supporting said paragraph into consideration.[334] Moreover, referring to *Kupreškić*, the Chamber noted it 'might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused.'[335] In other words, in exceptional instances solutions may indeed be found through other avenues as long as a balance is struck. Underscoring the case-by-case nature of the assessment, it held that '[i]f strong evidence of guilt is found to exist, the Chamber will take into consideration to what extent the lack of notice and the ambiguity influenced the evidence and will adjust its findings if necessary.'[336]

The right to be put on notice and its attached rights relate primarily to the charging instrument, which should contain all the material facts. However, at the ad hoc Tribunals, a narrow exception exists that allows disclosed evidence or other information (such as a pre-trial brief) to have a curing effect on an otherwise defective indictment, i.e. one that lacks specificity. This exception can only be allowed when the accused is given 'timely, clear and consistent information detailing the factual basis underpinning the charges.'[337] This exception is far from ideal and should be avoided whenever possible. It is highly problematic to require from the defense that it sift through large amounts of disclosures in order to ascertain which facts may underpin the charges, especially when such information is not made available until the eve of trial.[338] Moreover, 'in light of the factual and legal complexities normally associated with [international] crimes' the number of cases in which indictment defects may be cured through such means is extremely limited.[339]

Until recently, it was not clear whether the ICC allowed a curing effect by other documents in the same way as at the ad hoc Tribunals.[340] Commentators even thought the ICC's approach might turn out to be stricter.[341] As a general rule, the DCC must be read in conjunction with the prosecution's list of evidence.[342] This means that when items on this list

333 *Ntagerura* Trial Judgment, *supra* note 183, para. 66.
334 Ibid para. 67.
335 Ibid para. 68, citing *Kupreškić* Appeal Judgment, *supra* note 182, para. 125.
336 *Ntagerura* Trial Judgment, *supra* note 183, para. 68.
337 *Kupreškić* Appeal Judgment, *supra* note 182, para. 114. See also *Blaškić* Appeal Judgment, *supra* note 193, para. 77; *Prosecutor v. Fofana and Kondewa*, Judgment, SCSL-04-14-A, AC, 28 May 2008, para. 443; *Ntakirutimana* Appeal Judgment, *supra* note 186, para. 125.
338 *Ntagerura* Trial Judgment, *supra* note 183, para. 66.
339 *Kupreškić* Appeal Judgment, *supra* note 182, para. 114.
340 Cf. *Bemba* CoC Decision, *supra* note 240, para. 207. See also Friman et al., *supra* note 8, 423.
341 See Friman et al., *supra* note 8, 423.
342 *Lubanga* CoC Decision, *supra* note 74, para. 150.

can remedy a certain amount of ambiguity in the DCC, a defense's claim that the DCC is too vague has no merit.[343] Both documents are provided simultaneously, which arguably makes it rather unproblematic if the list can remedy a certain degree of vagueness. However, in the *Lubanga* Appeal Judgment, the Appeals Chamber seemed to have opened the door to a worrisome practice. It reiterated the importance of the prosecution's list of evidence in remedying vagueness of charges, but added 'other auxiliary documents' to the list of possible curing items.[344] It found that 'all documents that were designed to provide information about the charges, including auxiliary documents, must be considered to determine whether an accused was informed in sufficient detail of the charges.'[345] The Appeals Chamber then continued by adding a couple of conditions, namely: (i) this relates only to information made available before the start of the trial hearings,[346] and (ii) 'where submissions by the Prosecutor made in advance of the trial hearings related to the factual allegations provide additional detail, this can be taken into account when determining whether the accused's right to be informed in detail of the charges has been violated.'[347] In the case at hand, the Appeals Chamber referred, in addition to the DCC, to the Amended DCC and the Summary of Evidence,[348] but this second prerequisite theoretically adds a very wide range of documents capable of curing defective indictments.

3.4.2 Ne bis in idem

An often-neglected yet related issue in relation to the importance of indictment specificity is the protection against double jeopardy. In common law, preventing multiple jeopardy for the same crime, also known as the *ne bis in idem* principle, is a function of indictments given substantial attention. In *Hagner*, the U.S. Supreme Court observed that:

> [t]he true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'[349]

343 *Katanga and Ngudjolo* Decision on Defences' Motions, *supra* note 231, para. 25.
344 *Lubanga* Appeal Judgment, *supra* note 232, para. 124.
345 Ibid para. 128.
346 Ibid para. 129.
347 Ibid para. 130.
348 Ibid para. 132.
349 *Hagner et al. v. United States*, 285 US 427 at 431.

Protection against double jeopardy may be regarded as the basis of the prerequisite that the pleading sets forth the essential elements of the crime, and that it provide sufficient specificity as to the underlying facts.[350] It is a principle found in nearly every legal system – national, regional and international – in the world.[351] *Ne bis in idem* literally means 'not twice for the same.' The principle's details vary per system, but in most national systems "the same" entails a factual approach (the historical facts and conduct) as opposed to a legal approach (a particular criminal offense, which offers narrower protection).[352]

Due to the relationship international criminal courts and tribunals have with states, double jeopardy plays a role in different ways that are 'trans-jurisdictional' or 'transnational,'[353] and which may be characterized as downward and upward vertical *ne bis in idem* – i.e. externally between national and international systems, as opposed to horizontal, i.e. internally within one national or international system. As Article 10 of the ICTY Statute and Article 9 of the ICTR Statute say: 'no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.'[354] Such downward vertical double jeopardy protection is absolute. While some commentators have suggested it is not clear whether it entails a factual or a legal approach, most seem to agree that *idem* is to be understood as 'same offense,' making it a legal approach.[355] Upward vertical double jeopardy protection is not absolute. The ICTY, ICTR and SCSL may try a person already tried by a national court (1) in case the person was tried for an act characterized as an ordinary crime, or (2) when the national proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[356] Only the second exception applies to the STL.[357] The ordinary crime exception with upward *ne bis in idem* underscores that the conduct's legal qualification is indeed relevant, making it a legal approach. The statutes of the ad hoc

350 See W.R. LaFave et al., *Criminal Procedure* (5th edn, West 2009) 915-916.

351 See Friman et al., *supra* note 8, 471-477, 482.

352 Ibid 475-476. See generally G. Conway, 'Ne Bis In Idem in International Law', 3 *International Criminal Law Review* 217 (2003); W.F. van Hattum, *Non bis in idem : de ontwikkeling van een beginsel* (Wolf Legal Publisher 2012).

353 Friman et al., *supra* note 8, 482.

354 The statutes of the SCSL and STL only prohibit Sierra Leonean and Lebanese courts from trying persons already tried by these international tribunals, because their founding agreements do not bind other states than Sierra Leone and Lebanon. See Art. 9(1) SCSL Statute, Art. 5(1) STL Statute. See also S.M.H. Nouwen and D.A. Lewis, 'Jurisdictional Arrangements and International Criminal Procedure,' in Sluiter et al. (eds), *supra* note 8, 121.

355 See Friman et al., *supra* note 8, 440.

356 Art. 10(2)(a)-(b) ICTY Statute; Art. 9(2)(a)-(b) ICTR Statute; Art. 9(2)(a)-(b) SCSL Statute. See also Rule 13 ICTY/R RPEs.

357 Art. 5(2) STL Statute.

Tribunals do not include horizontal *ne bis in idem* provisions, probably because the drafters found the occurrence of a retrial at the same tribunal very unlikely.[358]

At the ICC, the *ne bis in idem* provision in Article 20 of the Statute must be read in light of the principle of complementarity. Pursuant to Article 20(3), which mirrors Article 17 of the ICC Statute that deals with admissibility of cases and provides the division of labor between the ICC and national jurisdictions, no person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the ICC with respect to the same conduct unless the proceedings in the other court were (i) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (ii) otherwise not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. This upward vertical *ne bis in idem* entails a factual approach, which means that it does not matter whether the national court qualified the conduct as an ordinary crime or not. In other words, the ICC Statute, like the STL Statute, does not contain the 'ordinary crime' exception like the statutes of the other Tribunals do.[359] The downward vertical *ne bis in idem* specified in Article 20(2) entails a legal approach, though, which means that national courts are free to try crimes outside the jurisdiction of the ICC. Another difference with the ad hoc Tribunals is that the ICC includes an internal, horizontal *ne bis in idem* provision in Article 20(1), which employs a factual approach.[360]

The *ne bis in idem* principle expresses 'the uniqueness of the criminal trial.'[361] The principle's inclusion here is necessary, because – similar to the right to prepare an effective defense – it is a tool that helps determine how specific a case must be delineated. This is especially so when a factual approach to double jeopardy is applicable. While offering more protection than the legal approach, the factual approach 'typically encounters significant problems in determining the precise limits of the object of a trial.'[362] This provides all the more reason to be as specific as possible from the beginning. When drafting indictments, a useful hypothetical question would be how it would stand the *ne bis in idem* principle test. If repeated charges are easily conceivable, the indictment is too vague under the specificity of charges principle.

358 See Friman et al., *supra* note 8, 439.
359 Cf. Art. 20(3) ICC Statute ('with respect to the same conduct'). See also *Al-Islam Gaddafi and Al-Senussi* Decision on Admissibility, *supra* note 22, para. 86.
360 See generally Friman et al., *supra* note 8, 442-445.
361 Ibid 436.
362 Ibid 476.

3.5 Conclusion

Throughout the history of international criminal courts and (military) tribunals, the complex nature of international crimes has been stated as reason to forgive lowering standards of specificity of charges. From the Control Council Law No. 10 *Justice* judgment to contemporary ICTY, ICTR, SCSL, and ICC decisions, judges have expressed the idea that with crimes of 'cataclysmic dimensions' the prosecution 'cannot be obliged to perform the impossible,' and requiring a high degree of indictment specificity is 'impracticable.' Indeed, the factual parameters of international crime cases are not easily set, and a prosecutor's perspective in this is easily sympathized with. The challenges are undoubtedly tremendous. In practice, however, this has led to vague indictments. This is not only due to a lack of factual specificity. It is also caused by evidentiary imprecision – conflating material facts and subsidiary/evidentiary facts on the one hand, and facts and (pattern) evidence on the other.

While allowing exceptions to specificity based on international crimes' uniqueness is most certainly not without merit, it finds its limit in the 10 general pleading principles and related fair trial rights discussed in this Chapter. Accordingly, the effect of international crimes' massive scale on their prosecution should be left to a minimum. This corresponds with how case law developed over the past two decades. While the early post-World War II judgments showed much more leniency in respect of scale-related prosecutorial challenges, the contemporary cases have been faced with much higher demands. The argument that the nature of international crimes pardons a lower degree of specificity of charges has slowly been losing ground, and the 'unique nature' argument therefore no longer carries as far as it once did.

The rights of the accused comprise the normative boundaries of how unspecific charges are allowed to be and how much confusion of facts and evidence is remediable fairly. They form a two-prong test in this respect: (i) is the accused in a position to prepare an effective defense, and (ii) can a double jeopardy assessment be made? These two questions are to be kept in mind when applying the 10 pleading principles as well as when making a distinction between different types of facts and evidence, for tolerating erosion of the rights of the accused in deference of perceived challenges is not the way to go. If something needs to give due to the challenging nature of the crime, it should not be the rights of the accused. Rather, answers should be sought in prosecutorial methods of framing the case, which goes back to the investigation stage of the proceedings.

Admittedly, international crimes' complexities and associated evidentiary challenges, as noted in the Introduction to this dissertation and in Chapter 2, lead to unparalleled fact-finding impediments. There is indeed a certain amount of uniqueness to proving international crimes, but where fact-finding becomes so challenging that it lacks adequate precision, this will be reflected in the indictment and throughout the presentation of evi-

dence during trial. This in turn affects the rights of the accused to be sufficiently informed of the charges. In other words, a well-defined indictment must be preceded by precise fact-finding; if the latter lacks accuracy, the charging document will inevitably be vague, too. The link between available evidence through adequate fact-finding and indictment specificity was already illustrated very early on by the *Einsatzgruppen* case. The *Einsatzgruppen* indictment had reached its high level of specificity because most of the evidence came from elaborate previous testimony by defendant Otto Ohlendorf in the IMT trial where he had testified as a witness.

International crime cases still too often suffer from vague charges and imprecise categorization of facts and evidence, resulting in ambiguous case demarcation to the detriment of the accused. This unwanted result is usually approached from the perspective of specificity of charges, which indeed sets the factual and legal boundaries of a case at trial and puts the accused on notice. An understudied topic thus far, however, has been the use of facts and evidence in this respect. This Chapter has shown that all parties, but most importantly prosecutors and judges, need to be much clearer and explicit in how they use and characterize different types of facts, pattern evidence and evidence of similar conduct. While seemingly simple in theory, such distinctions are notoriously complicated to make in practice. This kind of confusion not only hurts the prosecution, but also violates the rights of the accused as it leaves the question of what it is that we are trying to prove without a straightforward answer.

4 Legal Recharacterization and the Materiality of Facts at the ICC

Which Changes Are Permissible?[*]

4.1 Introduction

In November 2014, oral closing statements were heard in the *Bemba* trial at the International Criminal Court. After *Lubanga*, *Ngudjolo Chui* and *Katanga*, this will be the fourth case in which a judgment by a Trial Chamber will be issued. In all these cases, as well as in a significant number of other cases before the Court,[363] Regulation 55 of the Regulations of the Court, adopted by the Court's judges, has played a significant role.

This Chapter continues the demarcation theme on case level by focusing on the specific delineation issues caused by the ICC's Regulation 55. Regulation 55 allows the Chamber to modify the legal characterization of facts in its final judgment as long as the new legal label does not exceed the facts and circumstances described in the charges. If the Chamber anticipates that it might recharacterize the facts, it must notify the parties and allow them to make submissions. Moreover, the Chamber must ensure that the accused is given adequate time and facilities for the effective preparation of his or her defense, and if necessary, allow the accused to (re-)examine witnesses or present other evidence. In *Bemba*, for instance, while the outcome will not become clear until the final judgment, parties and participants have been informed that the knowledge requirement for Bemba, who is allegedly responsible as military commander for two counts of crimes against humanity and two counts of war crimes, may change from 'knew' to 'should have known.'[364]

Commentaries scrutinizing Regulation 55 have thus far focused on the legitimacy of the provision itself and its problematic application in the ICC's cases to date.[365] But one

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* A shorter version of this Chapter has been accepted for publication by the *Leiden Journal of International Law* as: E. Fry, 'Legal Recharacterisation and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?' (forthcoming 2016).

363 These other cases are *Prosecutor v. Abdallah Banda Abakaer Nourain*, *Prosecutor v. Uhuru Muigai Kenyatta*, and *Prosecutor v. William Samoei Ruto*. All cases in which Regulation 55 is/was an issue or in which it has been applied are discussed in Section 4.3.2, *infra*.

364 *Prosecutor v. Bemba*, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2324, TC III, 21 September 2012, para. 5.

365 See e.g. K.J. Heller, ''A Stick To Hit the Accused With': The Legal Recharacterization of Facts Under Regulation 55', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015); D. Jacobs, 'A Shifting Scale of Power: Who is in Charge of the Charges at the International

particular question has not yet been explored in a systematic fashion. As noted by the Appeals Chamber when it endorsed the Regulation's existence in its *Lubanga* Regulation 55 Judgment: 'the text of Regulation 55 does not stipulate […] what changes in the legal characterization may be permissible.'[366] The Appeals Chamber's statement implies that not all changes are permissible, and that Chambers must make case-by-case assessments. Which changes are permissible? This Chapter makes this question concrete, and answers it not only by scrutinizing the ICC's relevant case law to date, but also by exploring additional feasible types of recharacterization, i.e. with respect to changes regarding the contextual elements, the underlying (sub)categories of crimes or the form of participation. It then assesses for each type of alteration whether it (hypothetically) exceeds the facts and circumstances described in the charges of a case.

This query requires going back to the basic principles of pleading before international criminal tribunals, as outlined in the previous Chapter. Matters such as the content of indictments, the ingredients comprising a charge, and the difference between subsidiary facts and material facts are the starting point for assessing whether a recharacterization exceeds the facts and circumstances described in the charges. The key question in this respect is whether the application of Regulation 55 leads to altering the *materiality* of facts. The importance of this question is found in the rationale behind pleading principles: the accused has the right to know what he or she is accused of, and therefore, the charges must be as specific as possible. Moreover, only material facts need to be proven beyond a reasonable doubt to provide the basis for a conviction, and awareness of those facts enables preparing an effective defense. Not knowing which facts are material leaves the defense in the awkward position of having to devise and put forth two or more mutually exclusive or counterfactual lines of defense, which is prejudicial.

This Chapter will take a closer look at how Regulation 55 can and cannot be applied by first exploring and dissecting all relevant elements of a charge: the legal characterization, the facts and circumstances (i.e. the material facts), and other (subsidiary) facts (Section 4.2). It will then take a closer look at Regulation 55's adoption and application in cases to date, discussing the *Lubanga*, *Bemba*, *Katanga*, *Banda*, and *Ruto and Sang* cases, as well as a related development regarding alternative charging, which has emerged as an apparent substitute for the Regulation 55 avenue in the 2014 confirmation of charges decisions in the *Ntaganda*, *Gbagbo*, and *Blé Goudé* cases (Section 4.3). Finally, it will explore different types of recharacterizations, seeking to answer the main question (Section 4.4): what determines whether a change is permissible? It will become clear that some recharacterizations are rather harmless, while others cannot but change the materiality of facts to the

Criminal Court', in W.A. Schabas, Y. McDermott and N. Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (2013).

366 *Lubanga* Regulation 55 Judgment, *supra* note 77, para. 100.

detriment of the accused, which is prohibited by Regulation 55. The provision has its merits, and this Chapter is not a straight-out plea for abolition of the provision altogether, but experience so far shows that Regulation 55 has been utilized too often and too carelessly, while it should in fact be reserved for extraordinary instances only, with the utmost sensitivity to the rights of the accused.

4.2 Back to Basics: Charges, Facts, and Evidence

The indictment, also known as the Document Containing the Charges (DCC) at the ICC, is the official accusatory instrument setting out the criminal charges against an accused. At the ad hoc Tribunals, the indictment is required to 'set forth the name and particulars of the suspect and a concise statement of the facts of the case and the crime with which the suspect is charged.'[367] The ICC framework regulates the DCC's content only in the Regulations of the Court. Similar to the ad hoc Tribunals, it requires that the charging document contain the full name of the person and any other relevant identifying information, a statement of facts, and a legal characterization of those facts.[368]

As noted in Chapter 3, the indictment's unique and fundamental purpose is twofold: (1) to inform the accused about the charge(s), and (2) to settle the factual scope of the trial.[369] Enabling the accused to know the case against him or her is crucial from a fair trial perspective, and the indictment is the core document on which that knowledge hinges. In other words, the accused must be put on notice as to the charges in order to be able to prepare a defense. Moreover, by providing this clarity the indictment also sets the case's factual parameters for trial, and to that end, keeps centre stage for the entire course of criminal proceedings.

It is the Prosecutor's responsibility to formulate and bring charges. At the ad hoc Tribunals, a single judge was competent to confirm the indictment.[370] At the ICC, the Pre-Trial Chamber confirms the charges.[371] If, by means of its decision, the Pre-Trial Chamber makes amendments to the charges, the Prosecutor is required to file an updated DCC post confirmation.[372] In case of a disparity between the Prosecutor's (updated) DCC and the Pre-Trial Chamber's Decision on the Confirmation of Charges, the latter takes precedence.[373] After the charges have been confirmed, the Prosecutor, with the permission of

367 Rule 47(C) ICTY RPE; Rule 47(C) ICTR RPE.
368 Reg. 52 ICC Regulations of the Court.
369 Friman et al., *supra* note 8, 383.
370 Art. 18(4) and Art. 19(1) ICTY Statute; Art. 17(4) and Art. 18(1) ICTR Statute; Rule 47 SCSL RPE.
371 Art. 61 ICC Statute.
372 *Prosecutor v. Lubanga*, Order for the prosecution to file an amended document containing the charges, ICC-01/04-01/06-1548, TC I, 9 December 2008, paras 13.
373 *Prosecutor v. Bemba*, Decision on the Defence Application to Obtain a Ruling to Correct the Revised Second Amended Document Containing the Charges, ICC-01/05-01/06-935, TC III, 8 October 2010, para. 12.

the Pre-Trial Chamber and after notice to the accused, may amend the charges, but only as long as the trial has not yet begun.[374] This applies irrespective of when the request for permission was made, i.e. even when the amendment request was made before the trial commenced. The *entire* amendment process must be concluded before the start of trial.[375] After the trial has begun, the ICC Prosecutor may only withdraw charges.[376] In contrast with the ad hoc Tribunals, where the Prosecutor may file a motion to amend the charges after the trial has started,[377] the ICC Statute and Rules of Procedure and Evidence (RPE) do not provide any possibilities for amending the charges after the trial has begun.[378]

The following subsections address a couple of preliminary questions: (i) what comprises a charge, and (ii) what are the 'facts and circumstances' (or in other words, how are material facts distinguished from other facts or evidence)?

4.2.1 What is a charge?

The provisions dealing with the content of the indictment, as briefly touched upon above, do not set out a definition of a charge per se. Although the ICC's and ad hoc Tribunals' legal frameworks do not provide any such definition, at least not directly, it can be found by inference from the right of the accused to be put on notice of the charges, which is an imperative purpose of the charging instrument or indictment. The statutes of international criminal courts and tribunals all follow the interpretation of a charge consisting of two elements – facts and their legal characterization – and mirror international human rights instruments in guaranteeing that an accused will be informed promptly and in detail in a language which he or she understands of the nature *and* cause of the charge against him or her.[379] The nature of the charge translates as the legal qualification and the cause as the underlying material facts.[380] The European Court of Human Rights, for instance, also considers the right to be put on notice to attach to both the facts and the legal qualification of those facts. In *Pélissier and Sassi v. France*, it held that: 'Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that

374 Art. 61(9) ICC Statute.

375 *Prosecutor v. Ruto and Sang*, Decision on the Prosecutor's appeal against the "Decision on the Prosecution's request to amend the updated document containing the charges pursuant to article 61(9) of the Statute", ICC-01/09-01/11-1123, ICC, AC, 13 December 2012, para. 31.

376 Art. 61(9) ICC Statute.

377 Rule 50(A)(i)(b) and (c) ICTY RPE; Rule 50(A)(i) ICTR RPE.

378 *Lubanga* Appeal Judgment, *supra* note 232, para. 129.

379 Art. 21(4)(a) ICTY Statute; Art. 20(4)(a) ICTR Statute; Art. 17(4)(a) SCSL Statute; Art. 16(4)(a) STL Statute; Art. 67(1)(a) ICC Statute; Rule 21(1)(d) ECCC Internal Rules.

380 *I.H. v. Austria*, Judgment of 20 April 2006, ECtHR, Application No. 42780/98, at 30. See also Jordash and Martin, *supra* note 218, 588; Schabas Commentary, *supra* note 292, 803.

is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts.'[381]

The ICC Statute appears to add an extra component to a charge, stating that the accused has the right '[t]o be informed promptly and in detail of the nature, cause *and content* of the charge […].'[382] However, commentators have noted that it is unlikely that this third element has any independent meaning, because it is difficult to imagine a distinction between 'cause' and 'content.'[383] They state the drafters probably added the word to convey comprehensiveness.[384] It is indeed safe to assume 'content' should not be interpreted as a third element of a charge: there is no ICC case law even hinting at any independent meaning of 'content', nor can anything be found on the matter in the official records of the Rome Conference.

4.2.2 Facts and circumstances: what is material?

It is worth briefly recalling what constitutes a material fact with an eye to this Chapter's purpose of scrutinizing Regulation 55. The facts that should be included in the indictment are those that are essential to the outcome of the case, also known as the material facts. Those are the facts that must be proven to the requisite standard of proof – beyond a reasonable doubt. In other words, material facts are those on which the charges are premised and upon which the verdict is critically dependent. The conclusion of law is eventually drawn from the material facts, and therefore, the accused must be put on notice regarding these facts. (Appendix 1 provides an overview of this.) They include all the facts that satisfy the legal elements of the individual crimes charged, the accused's criminal responsibility (including *mens rea*), and the contextual elements.[385]

At the ICC, terminology is not always consistent. The *Gbagbo* Pre-Trial Chamber has stated that the 'facts and circumstances described in the charges' as it is phrased in Article 74 of the Statute indeed refer to the material facts of the case.[386] However, the Appeals Chamber has declined to define the phrase, stating it would not in the abstract address 'how narrowly or how broadly the term "facts and circumstances described in the charges" as a whole should be understood.'[387] Judge Van den Wyngaert has pointed to this unsettled

381 *Pélissier and Sassi v. France*, *supra* note 323, 51.
382 Art. 67(1)(a) ICC Statute [emphasis added].
383 Schabas Commentary, *supra* note 292, 803; O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, C.H. Beck, Hart and Nomos 2008), 1257; Amnesty International, *Making the right choices – Part V: Recommendations to the diplomatic conference*, AI Index: IOR 40/10/98, 60.
384 Ibid.
385 *Gbagbo* Adjournment Decision, *supra* note 19, para. 19.
386 *Gbagbo* Decision on Date CoC, *supra* note 279, para. 27.
387 *Katanga* Regulation 55 Judgment, *supra* note 77, para. 50.

terminology – opting for the phrase 'material facts' herself – and the many different phrases used at the Court.[388] It may seem a trivial issue, but consistency in terminology would have aided distinguishing material facts from subsidiary facts and (other types of) evidence, so a more unified usage of these terms should be encouraged.

Subsidiary facts (also known as evidentiary facts at the ICTY and ICTR)[389] are facts that are used as indirect proof, and therefore, do not need to be judicially established.[390] At the ICC, subsidiary facts have been defined as facts providing background information or indirect proof of material facts.[391] While no Chamber has been particularly clear on it, as noted before this may be understood as creating the following chain: *direct* evidence going to subsidiary (evidentiary) facts constitutes *indirect* evidence going to material facts. In other words, material facts can be proven by inference from subsidiary facts. In numerous confirmation of charges decisions, Pre-Trial Chambers have reiterated that the facts and circumstances underlying the charges must be distinguished from other facts not mentioned in the charges but otherwise subsidiary or related to them.[392] This accords with pleading rules as developed in the case law of the ad hoc Tribunals: all material facts must be in the indictment, but not the evidence tendered to prove them.[393] Naturally, only material facts are subject to confirmation as they are part of the charges.[394] While subsidiary facts help create the narrative of a case, they do not need to be individually established to the applicable standard of proof since they act as evidence. This is not to say that judges will not need to make a finding regarding subsidiary facts at some level of probability in order for those facts to plausibly act as evidence.

While this distinction is imperative, it is not always an easy one to make in practice. Whether or not a fact may be regarded as material depends on the nature of the prosecu-

388 Judge Van den Wyngaert mentions 'factual allegations which support each of the legal elements of the crime charged', 'facts underlying the charges', 'material facts', and 'constitutive facts'. See n18 in *Prosecutor v. Germain Katanga and Ngudjolo*, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319, TC II, 21 November 2012, para. 14 (Dissenting Opinion Judge Van den Wyngaert).

389 See e.g. *Blaškić* Appeal Judgment, *supra* note 193, at para. 219; *Simba* Appeal Judgment, *supra* note 254, para. 264.

390 See *supra* note 256 (in common law, evidentiary facts have been defined as those subsidiary facts introduced to prove material facts).

391 *Banda and Jerbo* CoC Decision, *supra* note 74, para. 37.

392 E.g. *Banda and Jerbo* CoC Decision, *supra* note 74, para. 36; *Ruto and Sang* CoC Decision, *supra* note 234, para. 47.

393 *Naletilić and Martinović* Appeal Judgment, *supra* note 194, para. 23; *Blaškić* Appeal Judgment, *supra* note 193, para. 210; *Stakić* Appeal Judgment, *supra* note 193, para. 116; *Furundžija* Appeal Judgment, *supra* note 193, paras 61, 147, 153; *Ntagerura* Appeal Judgment, *supra* note 194, para. 21; *Simić* Appeal Judgment, *supra* note 194, para. 20; *Kupreškić* Appeal Judgment, *supra* note 182, para. 88.

394 *Gbagbo* Decision on Date CoC, *supra* note 279, para. 27.

tion's case.[395] Decisive in this respect is the nature of the alleged criminal conduct, which mainly comes down to the proximity of the accused – both geographically and in terms of mode of liability – to the events alleged in the indictment.[396] For instance, if the accused is alleged to have personally committed the acts giving rise to the charges against him, the material facts would include such details as the identity of the victim, the place and the approximate date of the events in question, and the means by which the crime was committed. As the proximity of the accused to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused himself upon which the prosecution relies to establish his responsibility as an accessory to or as a superior of the persons who personally committed the acts giving rise to the charges against him.[397] These are all pleading principles developed at the ad hoc Tribunals in relation to determining the degree of specificity required in the indictment, as more elaborately discussed in Chapter 3, and the ICC has followed these principles, too.[398]

Judge Van den Wyngaert has argued that the DCC should only contain material facts,[399] but generally, DCCs contain both, albeit in different parts. A DCC has a separate section dealing with the charges, which should not include background information or evidence.[400] As long as the material facts are clearly distinguished from other facts and background information, Chambers have allowed other sections of the DCC to contain such additional information.[401]

However, ICC case law continuously shows that keeping material facts clearly distinguished from other facts and evidence is not easy in cases involving international crimes, even when only looking at the charges section of a DCC. For example, on 1 December 2014, the ICC Appeals Chamber issued its first judgment on a verdict, namely in the *Lubanga* case where the accused was found guilty of the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.[402] Nine individual cases of child soldiers initially comprised the core factual allegations central to the prosecution's case – the DCC's 'charges' segment contained a 'pattern' section and

395 *Halilović* Appeal Judgment, *supra* note 195, para. 86; *Naletilić and Martinović* Appeal Judgment, *supra* note 194, para. 24; *Kupreškić* Appeal Judgment, *supra* note 182, para. 89; *Blaškić* Appeal Judgment, *supra* note 193, para. 210.

396 *Halilović* Appeal Judgment, *supra* note 195, para. 86; *Ntagerura* Appeal Judgment, *supra* note 194, para. 121; *Krnojelac* Appeal Judgment, *supra* note 198, para. 132; *Kupreškić* Appeal Judgment, *supra* note 182, para. 89; *Blaškić* Appeal Judgment, *supra* note 193, para. 210.

397 *Galić* Decision, supra note 185 para. 15; *Kupreškić* Appeal Judgment, *supra* note 182, paras 88-90.

398 *Banda and Jerbo* CoC Decision, *supra* note 74, para. 134; *Bemba* CoC Decision, *supra* note 240, para. 134.

399 *Muthaura and Kenyatta*, Decision on the Updated DCC, *supra* note 280, para. 3 (Separate Opinion of Judge Van den Wyngaert).

400 *Muthaura and Kenyatta* Order regarding Charges, *supra* note 77, para. 14.

401 *Muthaura and Kenyatta*, Decision on the Updated DCC, *supra* note 280, paras 13, 23.

402 *Lubanga* Appeal Judgment, *supra* note 232.

an 'individual cases' part. However, these nine individuals were deemed unreliable by the Trial Chamber, and the trial judges therefore reached the conclusion that it had not been proven beyond a reasonable doubt that these particular individuals had been conscripted or enlisted when under the age of 15, or that they had been used to participate actively in hostilities during the relevant time period of the indictment.[403] On appeal, the Prosecutor then had to change her narrative, and in her Response to the Document in Support of the Appeal, she demoted the nine cases to 'sample episodes chosen as evidence' while the pattern section in the charges became the material focus of the case.[404] In her dissenting opinion to the Appeal Judgment, Judge Ušacka pointed to this re-categorisation from material facts to evidence and the promotion of the pattern section to the main material facts underlying the charges, noting that because of it, Lubanga was convicted 'on the basis of vaguely formulated allegations that had previously played a peripheral and subsidiary role in the case.'[405] Without the nine cases, there were indeed no details provided in the indictment as to the identities of any of the child soldiers, creating a discussion of whether sufficient notice as to the charges had been provided to the accused. Judge Ušacka opined that as a result of this shift in focus, Lubanga's right to be informed in detail of the nature and cause of the charges had been violated and that the Trial Chamber should have acquitted the accused after having found that the factual allegations underlying the individual cases in the indictment had not been established beyond a reasonable doubt.[406] The Majority, however, found that Lubanga had not substantiated his argument that the charges were insufficiently detailed regarding the particulars of the instances of enlistment, conscription and participation in hostilities.[407] The Majority pointed at the Summary of Evidence as providing more details but refused to conduct a *proprio motu* review of this and other related documents.[408] Most worrisome, the Appeals Chamber found in general that such detail could have been derived from 'other auxiliary documents' or any submission made by the Prosecutor before the start of trial.[409]

Since both material facts and subsidiary facts may be found in the DCC as a whole, a very peculiar statement made by the ICC's Appeals Chamber in its Regulation 55 Judgment in the *Katanga* case is worth noting. As stipulated above, only material facts are subject to confirmation, but perhaps we must conclude that the AC does not agree, or at least is confused, as it stated it was not persuaded by the argument that:

403 Ibid paras 478-484.
404 Ibid para. 18 (Dissenting Opinion Judge Ušacka).
405 Ibid para. 17 (Dissenting Opinion Judge Ušacka).
406 Ibid. para. 20 (Dissenting Opinion Judge Ušacka).
407 *Lubanga* Appeal Judgment, *supra* note 232, para. 136.
408 Ibid paras 132, 134.
409 Ibid paras 124, 130, 132.

> necessarily, only "material facts", but not "subsidiary or collateral facts" may be the subject of a change in the legal characterisation. There is no indication of any such limitation in the text of article 74 (2) of the Statute or regulation 55 (1) of the Regulations of the Court. Rather, those provisions stipulate that any change cannot exceed the "facts and circumstances".[410]

This seems a nonsensical assertion. Indeed, Article 74(2) and Regulation 55(1) do not explicitly exclude the obvious. While other facts may be found in the DCC in introductory sections, the 'facts and circumstances described in the charges' do not – or should not, at least – include subsidiary facts. In the words of Judge Van den Wyngaert, '[s]ubsidiary facts, by definition, are not part of the "facts and circumstances described in the charges", are not confirmed by the Pre-Trial Chamber, and therefore do not form part of the factual matrix that can be recharacterized.'[411] One can only remain at a loss as to what the Appeals Chamber meant to convey with the above statement. It does, however, demonstrate that the issue of which facts are subject to recharacterization has been, and remains, confused at the ICC.

4.3 Deciding on Charges: the Role of Regulation 55

Article 74(2) of the Rome Statute sets out the requirements for a decision on the charges (verdict), noting that the 'decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.' Referring to Article 74, this language is duplicated in Regulation 55(1). But the scheme, intended to correct potential legal flaws in the Prosecution's charging, is not without its own faults and flaws, many of which have been criticised heavily throughout the Regulation's existence. Shaky foundations, unfulfilled promises, and dubious application to the detriment of the accused have all been pointed out in relation to the power judges have granted themselves through Regulation 55. In order to form an idea of how the Regulation should be applied in the future, a few matters from its past must be reviewed: Regulation 55's adoption and its application in cases to date.

410 *Katanga* Regulation 55 Judgment, *supra* note 77, para. 50.

411 *Katanga and Ngudjolo* Regulation 55 and Severance Decision, *supra* note 388, para. 15 (Dissenting Opinion of Judge Christine van den Wyngaert).

4.3.1 Adoption: taking issue

4.3.1.1 'Routine functioning'

Article 52(1) of the Rome Statute states that '[t]he judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.' In the first case before the Court, the meaning of 'routine functioning' immediately became an issue in relation to Regulation 55. In the *Lubanga* case, the defense argued that Regulation 55 was illegal because it directly affects the substance of the trial and the rights of the accused, and therefore, exceeds what may be understood as the Court's routine functioning. The Appeals Chamber dismissed these arguments, stating that while neither the Statute nor the RPE define the term 'routine functioning,' it has been described as a broad concept also covering practice and procedure. It then pointed to other Regulations that also affect the rights of the accused, namely those regarding detention and legal assistance.[412]

While one may argue that a power that has such a direct impact on individual cases cannot be regarded as 'routine' (especially compared to issues regarding detention and legal assistance, which do not touch upon the substance of a case), it is not surprising that the Appeals Chamber judges, who were amongst those who adopted the Regulations, saw no problem here. Moreover, legitimacy may be derived from the Appeals Chamber's observation that a provision on powers of the Trial Chambers to modify the legal characterization of facts was deliberately left for determination by the judges of the Court.[413] In other words, it was a form of 'constructive ambiguity' expressing the intention of leaving it up to the judges either through case law or through the adoption of the Regulations. It must be noted in this respect that pursuant to Article 52(3) States Parties have the possibility of objecting to regulations, which keeps them from remaining in force if such objections are raised within six months. Since such objections were not raised in relation to Regulation 55, one may argue that States Parties acquiesced to the existence of Regulation 55.[414]

4.3.1.2 The *iura novit curia* principle

The reason the matter was left undecided during the negotiations leading up to the Rome Statute was a clash of legal cultures surrounding the *iura novit curia* principle. Regulation 55 is an expression of this principle, which means 'the court knows the law.' In systems adhering to this principle, the facts' legal qualification chosen by the Prosecutor is merely a recommendation, while judges are expected and required to administer the law. This

412 *Lubanga* Regulation 55 Judgment, *supra* note 77, para. 69.
413 Ibid para. 70. See also Friman et al., *supra* note 8, 431.
414 Art. 45 Vienna Convention on the Law of Treaties.

principle can be found in many domestic civil law systems in one form or another.[415] In these systems, the charged conduct is regarded as decisive, not its legal characterization.

The principle does not form part of common law systems, which place the emphasis on the charged offense as chosen by the Prosecutor. This means that the legal characterization accompanying a charge is generally binding. To avoid acquittals because an offense is not charged, even though the facts are deemed proven, common law indictments often contain many offenses charged alternatively. Common law systems generally do provide, however, for a system of 'lesser included offenses' and 'alternative verdicts.' These systems set out which offenses must be separately charged in the indictment and which may be regarded as automatically included as a lesser offense. For example, manslaughter is considered to be included in murder and theft to be included in robbery.[416]

In *Kupreškić et al.*, the ICTY Trial Chamber held that the *iura novit curia* principle does not apply in that court. It followed the common law approach of allowing convictions based on lesser included offenses, holding that in all other instances – when the elements of the offenses are different or when a more serious offense is under scrutiny – the indictment must be amended by the Prosecutor.[417] Pointing at the unique nature of a criminal trial, it stated that:

> [w]ere the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge. The task of the defence would become exceedingly onerous […]. Hence, even though the *iura novit curia* principle is normally applied in international judicial proceedings [between states], under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an individual accused are at stake.[418]

The complex nature and large scale of international crimes could easily serve as arguments against the application of the *iura novit curia* principle in light of the accused's right to be

415 Art. 373 Criminal Procedural Code (Albania); Section 262 Code of Criminal Procedure (Austria); §265 Code of Criminal Procedure (Germany); Art. 521(1) Code of Criminal Procedure (Italy); Art. 312 Code of Criminal Procedure (Japan); Art. 350 Code of Criminal Procedure (the Netherlands). See also *Prosecutor v. Kupreškić et al.*, Judgment, IT-95-16-T, TC, 14 January 2000, paras 733-737; Friman et al., *supra* note 8, 467-469; C. Stahn, 'Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55', 16 *Criminal Law Forum* 1 (2005), 5-6.

416 See e.g. Rule 31(c) Federal Rules of Criminal Procedure (U.S.); *Schmuck v. United States*, 489 U.S. 750 (1989); Section 6(3) Criminal Law Act 1967 (UK); *R. v. Mandair* [1994] 2 WLR 700, (H.L.); Section 662 Criminal Code 1985 (Canada). See also *Kupreškić* Trial Judgment, *supra* note 415, paras 729-732.

417 *Kupreškić* Trial Judgment, *supra* note 415, paras 740-748.

418 *Kupreškić* Trial Judgment, *supra* note 415, para. 740 [footnote omitted].

able to prepare his defense. The ICC, however, is not the only international crimes court that applies this principle. At the ECCC, we find an expression of it in Rule 98 (2) of the Internal Rules, which provides that judges are allowed to change the legal characterization of the crime as set out in the indictment, as long as no new constitutive elements are introduced. The *Duch* Trial Chamber reiterated that the *iura novit curia* principle applies fully at the ECCC, stating that 'it is not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Amended Closing Order.'[419] This regards both crimes and modes of liability. In the Court's second case, a prosecution motion to request a recharacterization was declared admissible and fair to the accused, as it was filed before the commencement of trial.[420] In its final judgment in the same case, the Trial Chamber reiterated it is only bound by the facts in the Closing Order, not the legal characterizations given to those facts.[421]

4.3.1.3 Recharacterizing or amending: whose power is it?

It has been argued that regulation 55 is *ultra vires* for two reasons: the Regulation does not involve the 'routine functioning' of the court, and furthermore, it is inconsistent with Article 61(9) of the Rome Statute.[422] As previously discussed in Section 4.2, Article 61(9) provides that after the charges have been confirmed, the ICC Prosecutor may only amend the charges as long as the trial has not yet begun. After the trial has begun, the Prosecutor can only withdraw charges. The ICC Statute and RPE do not provide any possibilities for amending the charges after the trial has begun, and prohibits it for the prosecution. The Statute, however, remains silent on whether a *Trial Chamber* may make any changes in the way as provided by Regulation 55, rendering the *ultra vires* argument in relation to the prohibition for the prosecution in Article 61(9) less convincing than it may seem at first glance.

The discussion often revolves around whether the modification of the legal characterization of facts can be regarded as an amendment. If one accepts that a charge is made up of two components (facts and legal qualification), it is logical to conclude that changing one of the parts will automatically lead to altering the whole. But opinions are divided on this. It has been argued that a legal recharacterization of facts does not entail an amendment of the charges, as long as the recharacterization is based on the facts set out in the charges.[423] Others have argued it does entail an amendment, not only based on a common sense

419 *Prosecutor v. KAING Guek Eav (alias 'Duch')*, Judgment, 001/18-07-2007/ECCC/TC, TC, 26 July 2010, para. 492.

420 *Prosecutor v. NUON Chea et al.*, Decision on the Applicability of Joint Criminal Enterprise, 002/19-09-2007/ECCC/TC, TC, 12 September 2011, paras 24-25.

421 *Prosecutor v. NUON Chea et al.*, Case 002/01 Judgment, 002/19-09-2007/ECCC/TC, TC, 7 August 2014, paras 688, 813.

422 Article 52(1) requires that all Regulations must be in accordance with the ICC Statute.

423 Stahn, *supra* note 415, at 17.

reading of the meaning of 'change' or 'modification,' but also because a different interpretation does not correspond to ICC case law where Chambers have held that a change to the legal characterization before the start of trial requires the Prosecutor to formally amend the charges.[424]

The discussion of whether or not recharacterization may be regarded as an amendment may be beside the point, though, and not as important for the Regulation's overall legitimacy. The Appeals Chamber, in its *Lubanga* Regulation 55 decision, defended Regulation 55's compatibility with the Statute from an angle of division of powers. It held that Article 61(9) and Regulation 55 'address different powers of different entities at different stages of the procedure, and the two provisions are therefore not inherently incompatible.' Article 61(9), the Appeals Camber reminded, 'addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial.' According to the Appeals Chamber, this does not exclude the power of judges to change the legal characterization of facts pursuant to Regulation 55 in the final judgment.[425]

In sum, Regulation 55 entails a type of amendment of a charge, but that does not make it inherently incompatible with the Statute. The application of the *iura novit curia* principle indeed influences the relationship between the Prosecutor and Chambers and the division of labour between the two entities when it comes to charging. The idea that Regulation 55 can only be valid if deemed not entailing an amendment fails to see that the question actually hinges on the discussion of the Prosecutor's powers versus the Chamber's powers. In this respect it must be noted that just because the Statute does not mention the possibility (of Trial Chambers altering charges) does not mean it *prohibits* it. Amendments after the start of trial are explicitly prohibited for the prosecutor; there is no similar provision with respect to Trial Chambers.

4.3.1.4 Purpose (fulfilled?)

Regulation 55 is said to have two purposes: to avoid impunity gaps and to allow more focused trials on clearly delineated charges aiding judicial economy.[426] Allowing the risk of acquittals that are merely the result of incorrect legal qualifications confirmed in the pre-trial phase would be contrary to the Statute's aim to end impunity. According to the Appeals Chamber, Regulation 55 is intended to 'close accountability gaps,' which, the Chamber argues, is consistent with the Rome Statute's general aim to end impunity – as stated in the fifth paragraph of the Preamble. In other words, Regulation 55 is meant to

424 Jacobs, *supra* note 365, 14 [ssrn], citing *Bemba*, Decision Adjourning the Hearing, *supra* note 266. See also Heller, Regulation 55, *supra* note 365, 9-11 [ssrn].

425 *Lubanga* Regulation 55 Judgment, *supra* note 77, para. 77.

426 Ibid para. 77. See also H.P. Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years', 99 *American Journal of International Law* 370 (2005), 377.

avoid situations where an accused is acquitted even though there is proof beyond a reasonable doubt that he or she has committed a crime within the jurisdiction of the Court. Not allowing Chambers to modify the legal characterization of facts would be contrary to the ICC's primary goal of ending impunity, so the argument goes.

The other rationale behind Regulation 55 is that it supposedly promotes judicial efficiency. The idea is that without Regulation 55 prosecutors would overburden judges with indictments containing many cumulative or alternative charges in order to avoid acquittals due to not having charged the correct crime or mode of liability. This would create legal uncertainty and also extend the length of trial, potentially violating the rights of the accused to be tried without undue delay.[427] Regulation 55 purportedly encourages the Prosecution to have 'a precise charging practice from the very beginning of the proceedings.'[428] While it is impossible to gauge – or empirically establish – whether the impunity rationale is valid, this second rationale is partially refutable. The possibility that facts may be recharacterized creates an equal amount of uncertainty, both from the prosecution's perspective as well as the defense's perspective, since neither party can rest assured that the charges will not change along the way. The Prosecutor might resort to formulating the facts of the case in as general a manner as possible, leaving all options open for legal recharacterization and securing a conviction.[429] Moreover, as shown by the application of Regulation 55 in cases to date discussed below, the rights of the accused have suffered violations of considerable proportions, most notably in the *Katanga* case.

4.3.2 Application: modifications and notifications in ICC cases to date

While the legal recharacterization of facts pursuant to Regulation 55 is supposed to leave the factual parameters of the case untouched, ICC case law shows that whether or not this limitation is respected is often at the centre of litigation. Moreover, while Regulation 55(2) and (3) theoretically provide strong safeguards for the rights of the accused, in practice these rights have been undermined in numerous ways.

4.3.2.1 Lubanga: the Court's first litigation on Regulation 55

In the Court's first case, Regulation 55 played a role on more than one occasion. First, the Pre-Trial Chamber tacitly made use of Regulation 55's power when it confirmed the charges against Lubanga. The Prosecutor had initially charged Lubanga with three counts of war crimes under Article 8(2)(e)(vii), which is the crime of 'conscripting or enlisting children

427 Stahn, *supra* note 415, 3. See also ICC-OTP, *Informal Expert Paper: Measures available to the International Criminal Court to reduce the length of proceedings* (2003), paras 41-46, *available at* www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/length_of_proceedings.pdf.

428 Stahn, *supra* note 415, 30.

429 Heller, Regulation 55, *supra* note 365, 29-30 [ssrn].

under the age of 15 years into armed forces or groups or using them to participate actively in hostilities' in an armed conflict not of an international character. The Pre-Trial Chamber found that part of the conflict in Ituri, namely from July 2002 till June 2003, could be qualified as international.[430] It reasoned that the war crimes of using child soldiers duplicated in Article 8(2)(e)(vii) (not international) and Article 8(2)(b)(xxvi) (international) criminalise the same conduct regardless of the nature of the armed conflict, and it was therefore not necessary to adjourn the hearing on the confirmation of charges and request the Prosecutor to amend the charges.[431] The Trial Chamber allowed parties to present evidence on both classifications,[432] and later used Regulation 55 (explicitly this time) to change the nature of the armed conflict back from international to non-international for the relevant time period.[433]

While it is within the competencies of the Trial Chamber to change it back, the Pre-Trial Chamber's move is technically not allowed by the Statute. Article 61(7) sets out very clearly the options available to the Pre-Trial Chamber at the confirmation of charges phase: confirm the charges, decline to confirm the charges, or adjourn the hearing on the confirmation of charges and request the Prosecutor to consider (1) providing further evidence or conducting further investigation with respect to a particular charge; or (2) amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court. Also, Regulation 55 must be read in conjunction with Article 74 of the Statute, i.e. the final decision made by Trial Chamber, and it is therefore not a competency of Pre-Trial Chambers. This remains, however, the only instance in which a Pre-Trial Chamber appeared to have made use of a Regulation 55 type power. Other Chambers have banned the application of Regulation 55 in the confirmation of charges process.[434]

The second way in which Regulation 55 played a role in the *Lubanga* case caused a lot more controversy. Upon the request of the victims' legal representatives (to recharacterize the facts to include charges of inhuman treatment, cruel treatment and sexual slavery as war crimes and sexual slavery as a crime against humanity),[435] the Trial Chamber's majority issued a decision notifying the parties it would possibly change the legal charac-

430 *Lubanga* CoC Decision, supra note 74, para. 220.

431 Ibid para. 204.

432 *Prosecutor v. Lubanga*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, TC I, 13 December 2007, paras 49-50.

433 *Lubanga* Trial Judgment, supra note 43, para. 566.

434 See e.g. *Prosecutor v. Ruto et al.*, Decision on the "Request by the Victims' Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact", ICC-01/09-01/11-274, PTC II, 19 August 2011, paras 7-8.

435 *Prosecutor v. Lubanga*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891-tENG, 22 May 2009, paras 17 *et seq*.

terization of facts pursuant to Regulation 55(2). It interpreted Regulation 55 as having two distinct phases: one articulated in Regulation 55(1) applicable at the deliberation and delivery of the judgment stage, and one articulated in Regulation 55(2) applicable during trial stage. The former would be delimited by the 'facts and circumstances described in the charges and any amendments to the charges,' while the latter would not.[436] In the Trial Chamber's interpretation of this trial phase type of notification, it would have been allowed to 'change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial.'[437] The Trial Chamber effectively added the proposed extra charges.

The Appeals Chamber overturned the Trial Chamber's decision concluding that this is not a correct interpretation of Regulation 55; the provision should be viewed as a whole. The Trial Chamber's interpretation would have allowed additional facts to be introduced at trial in violation of Article 74(2), the purpose of which is to bind the Chamber to the factual allegations in the charges.[438] New facts may only be added under the procedure provided in Article 61(9) of the Rome Statute. Incorporating 'new facts and circumstances into the subject matter of the trial would alter the fundamental scope of the trial.'[439] The Trial Chamber adhered to the Appeals Chamber decision, and concluded it could not implement the proposed changes.[440]

4.3.2.2 Bemba: should have known

In *Bemba*, the Trial Chamber notified the parties it considered changing the knowledge requirement for command responsibility from 'knew' to 'should have known,'[441] and invited observations from the parties on the procedural impact of the notification.[442] The Prosecution did not object to the proposed recharacterization, arguing it did not drastically depart

436 *Prosecutor v. Lubanga*, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, TC I, 14 July 2009, paras 27-28.

437 *Prosecutor v. Lubanga*, Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2107, TC I, 3 September 2009, para. 41.

438 *Lubanga* Regulation 55 Judgment, *supra* note 77, paras 88-91.

439 Ibid para. 94.

440 *Prosecutor v. Lubanga*, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-2223, TC I, 8 January 2010, para. 37.

441 *Bemba* Regulation 55, supra note 364.

442 Ibid para. 6.

from the findings in the confirmation decision, and furthermore, the evidence tendered to prove Bemba's knowledge would also prove that he should have known of the crimes.[443]

The defense, understandably, objected. It argued that the proposed change would be 'of monumental significance' as '[a]ctual knowledge requires proof of knowledge of the crimes alleged, whereas constructive knowledge can be based on a mere objective assessment of the available information about such matters.'[444] Consequently, this new theory of liability would be based on 'entirely different material elements.'[445] The defense continued by providing detailed examples of such new material elements, and argued that in the absence of notice of these material facts it could not properly conduct a defense. It concluded that the accused's right to be promptly informed of the case against him under Article 67(1)(a) would be adversely affected by changing the knowledge requirement from such a high standard to such a low standard.[446]

Clearly, the objective mental state of 'should have known' (as opposed to the subjective mental state of actual knowledge) is much easier to prove, creating no problems for the Prosecution. But it confronts the defense with a new theory, i.e. the negligence version of the originally charged mode of participation, which requires a completely new defense strategy. Moreover, this notification was given rather late in the proceedings, almost two years after the start of trial, when the defense had already begun presenting its case. The final outcome will not be certain until the decision under Article 74 is issued, but the notification stands – and the defense's grievances were eventually dismissed.[447] Considering the circumstances and the history before the Pre-Trial Chamber in this case, this is dubious to say the least. The element 'should have known' had previously been struck from the Amended Document Containing the Charges upon the defense's request, after it had somehow made its way back into the case unnoticed.[448] The Prosecution had to file a second Amended DCC in which the knowledge requirement had been changed back to 'knew.' Now, effectively, the Trial Chamber's Regulation 55 notification – if the change materializes – has made it considerably easier for the Prosecution to obtain a conviction against Bemba.

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443 *Prosecutor v. Bemba*, Prosecution's Submissions on the Procedural Impact of Trial Chamber's Notification pursuant to Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2334, Prosecution, 8 October 2012, para. 3.

444 *Prosecutor v. Bemba*, Defence Submission on the Trial Chamber's Notification under Regulation 55(2) of the Regulations of the Court, ICC-01/05-01/08-2365-Red, Defense, 18 October 2012, para. 17.

445 Ibid para. 18.

446 Ibid paras 18-20.

447 *Prosecutor v. Bemba*, Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/0802497, ICC-01/05- 01/08-2500, TC III, 6 February 2013.

448 *Prosecutor v. Bemba*, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, ICC-01/05-01/08-836, TC III, 20 July 2010. See also War Crimes Research Office (American University Washington College of Law), *Regulation 55 and the Rights of the Accused at the International Criminal Court* (October 2013), 14-17.

4.3.2.3 Katanga: changing the narrative

Katanga, initially on trial together with Ngudjolo Chui until the charges against the two were severed, has experienced the effects of Regulation 55 most extremely. The two accused were charged as indirect co-perpetrators pursuant to Article 25(3)(a), meaning they 'jointly committed' the alleged crimes 'through other persons.'[449] Well after the trial against the two was concluded, six months into deliberation, the Trial Chamber issued its severance decision and notified the parties that the mode of liability under which Katanga was charged would be subject to legal recharacterization on the basis of Article 25(3)(d)(ii), i.e. common purpose liability.[450] Predictions that this move meant an acquittal for Ngudjolo Chui and a conviction for Katanga turned out to be true. About a month later, the Trial Chamber acquitted Ngudjolo Chui,[451] and about 16 months after the severance and notice decision, Katanga was convicted on the basis of this new mode of liability.[452]

There are many aspects to what unfolded next that deserve scrutiny, but are beyond the scope of this chapter.[453] This section focuses on matters related to the scope of the facts and circumstances of the case. Judge Van den Wyngaert's dissent provides invaluable insights in this respect. She dissented from the Trial Chamber's Regulation 55 decision, stating it 'goes well beyond any reasonable application of the provision and fundamentally encroaches upon the accused's right to a fair trial.'[454] First, she pointed out that the Majority had not made clear on which factual allegations from the Confirmation Decision it intended to base the proposed recharacterization. This not only creates a serious problem in relation to the accused's right to be put on notice, it also potentially opens the door to recharacterizing subsidiary facts since no clear distinction was made between material facts and subsidiary facts in this case.[455] As noted before, subsequently in *Lubanga* the Appeals Chamber found no fault in that, but one can only hope the Court will ignore that Appeals Chamber's incomprehensible holding. Recharacterizing subsidiary facts is simply nonsense, because subsidiary facts fulfil an evidentiary purpose and do not form part of the material facts of the case.

Second, Judge Van den Wyngaert argued that the recharacterization would change the narrative of the charges so drastically that it would exceed the facts and circumstances

449 *Katanga and Ngudjolo* CoC Decision, *supra* note 311, para. 487.
450 *Katanga and Ngudjolo* Regulation 55 and Severance Decision, *supra* note 388.
451 *Ngudjolo* Judgment, *supra* note 15.
452 *Prosecutor v. Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, TC II, 7 March 2014.
453 For example, the fact that notice was given well into deliberations is arguably in violation of Regulation 55, because the deliberation phase cannot be regarded as falling within the 'trial' phase meant in Regulation 55(2).
454 *Katanga and Ngudjolo* Regulation 55 and Severance Decision, *supra* note 388, para. 1 (Dissenting Opinion of Judge Christine van den Wyngaert).
455 Ibid paras 14-17.

described in the charges.[456] I fully agree with her reasoning, which relates to how the ad hoc Tribunals have always held that the materiality of facts depends on the nature of the prosecution's case:

> Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to and were influenced by a particular context. Charges therefore constitute a narrative in which each material fact has a particular place. *Indeed, the reason why facts are material is precisely because of how they are relevant to the narrative*. Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a "change in the statement of facts", something the Appeals Chamber has found to be clearly prohibited by Regulation 55(1).[457]

A closer look at the different material elements of the two modes of liability in question gives a better idea of what Judge Van den Wyngaert meant. In the Confirmation of Charges decision, the Pre-Trial Chamber had identified the material elements for joint commission as being: (i) the existence of an agreement or common plan between two or more persons;[458] and (ii) a coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime.[459] The objective elements for commission of a crime 'through another person' were identified as: (i) the principal has control over the organization;[460] (ii) the organization must be based on hierarchical relations between superior and subordinates;[461] and (iii) the execution of the crimes is secured by almost automatic compliance.[462] With respect to the subjective elements (*mens rea*), indirect co-perpetration requires that the accused intended to commit the charged crimes, or at least was aware that the realisation of the objective elements would be a consequence of their acts in the ordinary course of events.[463] Applied to the case at hand, this meant that Katanga as the superior commander exercised authoritative control over a hierarchical group of executants, whose personal intentions or criminal responsibility were irrelevant, and who automatically complied with Katanga's orders, who acted intentionally.

456 Ibid paras 18-22.
457 Ibid para. 20 [emphasis added].
458 *Katanga and Ngudjolo* CoC Decision, *supra* note 311, para. 522.
459 Ibid para. 524.
460 Ibid para. 500.
461 Ibid para. 511.
462 Ibid para. 515.
463 Ibid para. 533.

With the proposed recharacterization, a completely different story would emerge. Pursuant to Article 25(3)(d), Katanga's role as leader with almost absolute control over his subordinates – whose *mens rea* is irrelevant – and over the charged crimes, would transform into the role of an accomplice contributing to the charged crimes, who supported the criminal common purpose of an unidentified portion of his former subordinates, and who would now gain considerable independent significance in the narrative.[464] The subjective element changed drastically, too: common purpose liability requires that the accused *knew* that the group intended to commit the charged crimes rather than *mens rea* being irrelevant.

As Van den Wyngaert reiterated and elaborated upon in her dissent to the final judgment convicting Katanga based on this common purpose liability, the change in narrative was so fundamental that it exceeded the facts and circumstances of the charges in more than one way: (i) the Majority had relied on parts of the Confirmation Decision (i.e. introductory sections, footnotes, etc.) that did not form part of the material facts of the case, still circumventing the crucial legal question what constitutes 'the facts and circumstances' of the charges;[465] (ii) the Majority had added new factual elements to the charges that are nowhere to be found as such in the Confirmation of Charges decision or the DCC (for example, the allegation that members of the relevant group were filled with a desire for revenge towards the Hema population and had been motivated by a so-called 'anti-Hema ideology');[466] and (iii) even if the facts and circumstances were not exceeded formally, the fundamental change was still impermissible for two reasons: first, the accused had to significantly change his line of defense to address the new narrative, and second, certain factual elements in the original narrative were taken out of context and now played a completely different role in the new narrative.[467]

All this is not to say that any change in the narrative of a case is impermissible (provided it remains within the facts and circumstances of the charges): as Judge Fulford stated in an earlier dissent to the *Lubanga* Regulation 55 decision, it is a matter of fact and degree.[468] A test could be this: would a reasonably diligent accused have conducted substantially the

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464 *Katanga and Ngudjolo* Regulation 55 and Severance Decision, *supra* note 388, para. 22 (Dissenting Opinion of Judge Christine van den Wyngaert).

465 *Katanga* Judgment, *supra* note 452, para. 19 (Dissenting Opinion Judge Van den Wyngaert).

466 Ibid paras 19-24. Note that Van den Wyngaert argues this added element is based on the Majority's erroneous interpretation of common purpose liability: 'it confuses a finding that a number of *individuals* acted with intent and knowledge with finding that a *group* had a common plan to commit crimes, which is a requirement under the newly charged mode of criminal responsibility (article 25(3)(d).' She does concede that the latter may be inferred from the former (para. 23).

467 Ibid para. 28 *et seq*.

468 *Prosecutor v. Lubanga*, Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 5(2) of the Regulations of the Court, ICC-01/04-01/06-2054, TC I, 17 July 2009, para. 19 (Dissenting Opinion Judge Fulford).

same line of defense against both the old and the new charge?[469] With respect to the chain of events in *Katanga*, the rights of the accused to be put on notice of the (newly constructed) charges and to build a defense were seriously impaired. Particularly worrisome in this respect is that due to the change in *mens rea*, the accused's own testimony could be used to show he knew the crimes had been committed, something he could admit without consequences under the initially charged mode of liability. As Heller rightly noted: 'no rational accused will ever testify on his own behalf if the mere existence of Regulation 55 puts him on notice that anything he says can be used – even long after trial has ended – to convict him of any charge that might be supported by the "facts and circumstances" in the Confirmation Decision.'[470]

Exceeding the facts and circumstances of the case by relying on background information, subsidiary facts and other types of evidence, or by adding new facts is clearly prohibited by Regulation 55. One is left with the creeping suspicion that the case against Katanga was artificially moulded to reach a conviction. The Majority, however, found support from the Appeals Chamber with respect to its notice decision, and the final judgment, unfortunately, was not appealed. The *Katanga* debacle does seem to have had its effect though, as a new trend regarding Regulation 55 and charging may be discerned from the cases that followed.

4.3.2.4 Ruto, Banda, and Ntaganda: alternative charging in disguise?

In the Kenya case against Ruto and Sang, the Trial Chamber gave notice that it would consider recharacterizing the facts against Ruto to also include the modes of liability under Article 25(3)(b), (c) or (d) of the Statute in addition to Article 25(3)(a) already charged.[471] This only applies to Ruto, not to Sang, who stands accused within the meaning of Article 25(3)(d). The Prosecution in the *Kenyatta* case had made a similar request,[472] but the Trial Chamber never issued a decision on the matter. The case against Kenyatta collapsed in December 2014,[473] and as noted in the Introduction to Chapter 2, the Trial Chamber officially terminated the proceedings in March 2015.[474]

In the case against Banda, who is allegedly criminally responsible as co-perpetrator for three war crimes under Article 25(3)(a) of the Statute, the Prosecution has also requested the Trial Chamber to provide notice to the parties pursuant to Regulation 55 that there is

469 *Katanga* Judgment, *supra* note 452, para. 35 (Dissenting Opinion Judge Van den Wyngaert).

470 Heller, Regulation 55, *supra* note 365, 31 [ssrn].

471 *Prosecutor v. Ruto and Sang*, Decision on Applications for Notice of Possibility of Variation of Legal Characterisation, ICC-01/09-01/11-1122, TC V(A), 12 December 2013, para. 44.

472 *Prosecutor v. Muthaura and Kenyatta*, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accuseds' individual criminal responsibility, ICC-01/09-02/11-444, Prosecution, 3 July 2012.

473 *Prosecutor v. Kenyatta*, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983, Prosecution, 5 December 2014.

474 *Kenyatta* Decision on Withdrawal of Charges, *supra* note 18.

a possibility that the facts contained in the charges will be recharacterized to accord with Articles 25(3)(b), (c), (d), or 28(a) of the Statute.[475] It suggests the Trial Chamber do so on the first day of trial.[476] Also, in the case against Bosco Ntaganda, where all modes of liability are already charged alternatively except for direct co-perpetration, the Prosecution has requested the Trial Chamber to provide notice that the missing mode of perpetration will be included, too.[477]

The Prosecution's requests, both in *Banda* and in *Ntaganda* still to be decided upon, show the continuing of this novel trend of trying to make nearly every form of liability applicable. In its submission in *Banda*, the Prosecution argues that such notification is necessary because 'it is clear from the record now before the Chamber that there are multiple ways to characterise the Accused's alleged criminal responsibility under the Statute.'[478]

Regulation 55 is a provision of an exceptional nature and as such should be interpreted narrowly.[479] The practice of requesting the Chamber to provide notice for a multitude of modes of liability is at odds with Regulation 55's purpose of correcting possible legal flaws in the Prosecution's charging by ways of narrow exception. It raises the question whether this new trend of requesting notice to be given for every mode of liability on the menu is not just another way of charging alternatively. Considering the rationale behind Regulation 55, alternative charging would make more sense.

Judge Van den Wyngaert noted in November 2012 in her dissent to the *Katanga* Regulation 55 decision: 'it has not generally been the pre-trial chambers' practice to confirm charges or issue arrest warrants on alternative modes of liability, which makes a significant difference with the ad hoc tribunals, where cases usually proceed on alternative charges.'[480] But this has definitely changed. In all three cases in which the charges were confirmed in 2014, the accused are charged with different modes of liability alternatively,[481] seemingly

475 *Prosecutor v. Banda*, Prosecution request for notice to be given of a possible recharacterisation under Regulation 55, ICC-02/05-03/09-549, Prosecution, 28 March 2014.

476 Ibid para. 1.

477 *Prosecutor v. Ntaganda*, Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2), ICC-01/04-02/06-501, Prosecution, 9 March 2015.

478 Ibid para. 2.

479 *Katanga* Regulation 55 Judgment, *supra* note 77 (Dissenting Opinion Judge Tarfusser).

480 *Katanga and Ngudjolo* Regulation 55 and Severance Decision, *supra* note 388, para. 5 (Dissenting Opinion Judge Van den Wyngaert).

481 Charging alternatively is not the same as charging cumulatively. While having the same practical effect of keeping more than one door open potentially delaying proceedings and overburdening the defense, charging cumulatively refers to the situation in which more than one crime is charged and may be convicted upon based on the same underlying facts – instead of choosing one of the alternatives, which the judges must do when deciding upon alternative charges. The practice at the ICC is still evolving regarding this matter: the *Bemba* Pre-Trial Chamber showed a general disinclination towards cumulative charging pointing at the negative effect on the rights of the defense and the availability of Regulation 55, while the Pre-Trial Chamber in *Al-Bashir* allowed it when issuing the arrest warrant. See Bemba CoC Decision, *supra* note 240, paras 200-203; *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, 4 March 2009, paras 95-96 (accepting both extermination and murder as

avoiding the application of Regulation 55 later during trial. First, on 9 June 2014 the charges were confirmed against Bosco Ntaganda, covering 18 counts and 7 modes of liability. He is charged with indirect co-perpetration (including the acts of attempted murder in conformity with Article 25(3)(f)) and direct perpetration pursuant to Article 25(3)(a), ordering and inducing pursuant to Article 25(3)(b), common purpose liability pursuant to Article 25(3)(d), and as a military commander for crimes committed by his subordinates pursuant to Article 28(a). Not all, but most of these are charged alternatively spread out over the 18 counts.[482]

Second, on 12 June 2014 the charges were confirmed against Laurent Gbagbo. He is allegedly criminally responsible for the crimes against humanity of murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution. He is charged under Article 25(3)(a) of the Statute for committing these crimes, jointly with members of his inner circle and through members of the pro-Gbagbo forces, or, in the alternative, under Article 25(3)(b) of the Statute or, again alternatively, under Article 25(3)(d) of the Statute for contributing in any other way to the commission of these crimes.[483]

Third and finally, on 11 December 2014 the charges were confirmed against Charles Blé Goudé. He is allegedly criminally responsible for the crimes against humanity of murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution, and for all four counts, he has been charged alternatively under Article 25(3)(a) (indirect co-perpetration), 25(3)(b) (ordering, soliciting or inducing), 25(3)(c) (aiding, abetting or otherwise assisting) or 25(3)(d) of the Statute.[484]

One of the rationales behind Regulation 55 is that it supposedly promotes judicial efficiency, the idea being that without the provision prosecutors would overburden judges with indictments containing many cumulative or alternative charges in order to avoid acquittals for mainly technical reasons.[485] It was also thought to encourage precise charging from the beginning, but ironically, it seems Regulation 55's time-consuming and dubious application has only encouraged exactly what the provision once was meant to prevent: a practice of alternative charging, most notably with respect to modes of liability. Interestingly, exactly the same argument previously used to defend Regulation 55 was made by the Prosecutor and endorsed by the Pre-Trial Chamber in the *Ntaganda* case in defense of charging alternatively: '[c]onfirming charges for alternative modes of liability promotes judicial efficiency and reduces the potential disruptive effect at the trial stage of notification

crimes against humanity based on the same underlying conduct). See also Friman et al., *supra* note 8, 392-393.

482 *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, PTC II, 9 June 2014, para. 97.

483 *Gbagbo* CoC Decision, *supra* note 285, para. 266.

484 *Prosecutor v. Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, ICC-02/11-02/11-186, PTC I, 11 December 2014, para. 194.

485 See *supra*, Section 3.1.4.

that the legal characterisation of the facts may change.'[486] If this is where the ICC is heading, one may wonder if it does not create the same type of problems that also surround Regulation 55. A practice of alternative charging that leaves all options of criminal responsibility open to the prosecution, which can then play it by ear depending on how the evidence turns out at trial, makes it very hard to prepare an effective defense. The narrative is all over the place in such cases. While the array of modes of liability may be pleaded with sufficient specificity if regarded individually, the sheer plurality of case theories makes it challenging to construct an effective defense strategy.[487] As shown by the recharacterization in *Katanga*, different modes of liability can create contradicting storylines: what role did the accused actually play if simultaneously he may have been the mastermind in full control as well as his subordinates' equal in carrying out the crimes?

Moreover, a practice of alternative charging is at odds with Regulation 52(c), which requires that the DCC contain 'the *precise* form of participation under articles 25 and 28.' This Regulation appears to bar a practice of alternative charging, and therefore, it would need to be amended in light of this new practice at the ICC.[488] Unfortunately, the Single Judge of Pre-Trial Chamber I did not engage with the defense's argument that Regulation 52(c) and charging alternatively are incompatible as shown by her decision in the *Blé Goudé* case ignoring the defense's submissions to that end,[489] and no other Chamber has ever stated anything substantively on the matter.

4.4 Which Recharacterizations Are Permissible?

The practice of alternative charging is making headway at the ICC in avoidance of Regulation 55, and one day a middle ground will undoubtedly be struck between employing Regulation 55 and charging alternatively. But an in-depth analysis of the latter, although an important topic for future research, is beyond the scope of this dissertation. This section will therefore only look at which changes pursuant to Regulation 55 stand the test of remaining within the facts and circumstances of the case and do not violate the safeguards that flow from general pleading principles.

The legal framework of pleading principles that have developed in international crimes case law across the board should be the starting point for Regulation 55's future. Only the

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486 *Ntaganda* CoC Decision, *supra* note 482, paras 99-100.

487 K. Ambos, 'Critical Issues in the *Bemba* Confirmation Decision', 22 *Leiden Journal of International Law* 715 (2009), 724.

488 A. Whiting, 'Guest Post: The ICC's End Days? Not So Fast', *Spreading the Jam*, 20 March 2014, *available at* http://dovjacobs.com/2014/03/20/guest-post-the-iccs-end-days-not-so-fast/ (accessed 26 April 2015).

489 *Prosecutor v. Blé Goudé*, Decision on the "Defence request to amend the document containing the charges for lack of specificity", ICC-02/11-02/11-143, PTC I, 1 September 2014, paras 8-9. See also *Prosecutor v. Blé Goudé*, Defence request to amend the document containing the charges for lack of specificity, ICC-02/11-02/11-126, Defense, 25 Augustus 2014.

facts and circumstances described in the charges – i.e. the material facts – can be subject to legal recharacterization, and modifying charges ought not to violate the accused's right to be put on notice of the charges. The Appeals Chamber's statement that also subsidiary facts can be the subject of legal recharacterization should be dismissed as a onetime blunder, hopefully to be corrected in a subsequent decision. Even then, given that the materiality of facts is determined by the nature of the prosecution's case, i.e. the legal characterization of the facts, and given that the two are dialectically connected, a paradox is created that should be kept in mind with every possible change.[490]

The material facts include the contextual elements, the individual crimes charged, and the mode of liability. It is in that order that recharacterizations become more and more problematic, predominantly because the materiality of facts depends to a large extent on the proximity of the accused to the underlying crimes, and a change in mode of liability directly affects the narrative the accused is to refute.

4.4.1 Recharacterizing the crime

The recharacterization of a contextual element without changing the underlying individual crime as such, as was the case in *Lubanga* at the confirmation stage, can only occur within the crime category of war crimes – changing the contextual elements for crimes against humanity turns it into a different crime. Changing the contextual elements in the war crimes category from an international to an internal armed conflict or the other way around has little to no effect on the role of the accused with respect to the underlying crimes, which are the same in both subcategories. If both can be based on material facts pleaded in the DCC, there is little harm done. But with respect to changing the context from internal to international this will probably not be the case, even though it also likely does not affect the role of the accused. A change from internal to international will increase the material facts, as the scenario will then include the additional involvement of a third State in an otherwise internal armed conflict. Perhaps the distinction should not have been imported from international humanitarian law at all. There is little need for a distinction between 'internal' and 'international' where the same crime exists in both subcategories, rendering the difference essentially irrelevant.[491] This is therefore probably the least problematic recharacterization thinkable, because the distinction as such has little added value as it is, but it still harbours the risk of adding new material facts if the change is one from internal to international.

This is different where another (sub)category of crimes is charged through recharacterization. The lack of examples in case law to date shows that this type of recharacterization

490 See *supra*, Section 4.2.2.
491 Jacobs, *supra* note 365, 8 [ssrn].

is far less probable than a recharacterization of the mode of liability or the nature of the armed conflict.

War crimes and crimes against humanity often overlap, but there are still very significant differences between them. War crimes take place within the context of an armed conflict (whether internal or international), while crimes against humanity do not require the nexus with an armed conflict but demand the context of a widespread or systematic attack. If only war crimes are charged, they can probably not be recharacterized as crimes against humanity, because the contextual elements differ too much – the same goes for the other way around. For instance, a mass killing of civilians during an armed conflict can be qualified as both crimes,[492] but the material facts relating to the context of one of the crimes will not have been pleaded if only the other crime was charged. However, if both war crimes and crimes against humanity were charged (i.e. multiple counts) the material factual elements would be present in the original pleading document(s). In sum, it makes sense that the material facts of the case be viewed holistically – taken as a whole – and not per count.

The same may be concluded, for instance, when genocide is recharacterized as a crime against humanity. The main element that distinguishes genocide from a crime against humanity is that the alleged perpetrator must have 'genocidal intent.' If such intent cannot be proven, the crime may still appear to fall within the category of crimes against humanity. However, the contextual elements of a crime against humanity, while possibly inferred from evidence of the initial genocide charge, will not have been part of the material facts in the original indictment and will therefore not have been pleaded with sufficient detail, violating the principle of specificity of charges. To illustrate: for crimes against humanity the ICC Elements of Crimes clarifies that the attack against a civilian population, which must be widespread and systematic, is to be understood to mean 'a course of conduct involving the multiple commission of acts […] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.'[493] Regarding genocide, the requirement is only that the 'conduct took place in the context of a manifest pattern of similar conduct.'[494] Once again, if the charges contain numerous counts they may be viewed holistically, solving the problem, but evidence or a subsidiary fact can never be promoted to material fact.

Obviously, if the facts are recharacterized in such a way that the initially charged offense contains all the material elements that the crime after recharacterization also contains, the facts and circumstances of the case are not exceeded – i.e. 'cases where the *lex specialis* invoked by the Prosecutor is found not to be applicable, whereas the *lex generalis* is still applicable.'[495] This is reminiscent of the system of 'lesser included offenses.' However, the

492 Compare Article 7(1)(a) and (b) with Article 8(2)(a)(i), (b)(i), (c)(i), and (e)(i) of the ICC Statute.
493 Article 7 (Introduction) para. 3 ICC Elements of Crimes.
494 Ibid Article 6.
495 *Kupreškić* Trial Judgment, *supra* note 415, para. 742(c).

common law notion of 'lesser included offenses' does not unequivocally apply at all the international criminal courts and tribunals. The ICTY has accepted the system, although only for limited instances, and only if sufficient notice is given to the defense.[496] Conversely, the ICTR has held that genocide, crimes against humanity and war crimes are not 'lesser included offenses' of each other, because (i) they have different constituent elements, and (ii) they are intended to protect different interests.[497] The system of 'lesser included offenses' is intended to dictate which crimes must be charged cumulatively and which may be regarded as implicitly charged – absorbed in the more serious offense – due to qualifying as a lesser included offense. Thus, the ICTR Trial Chamber concluded that 'multiple convictions for these offenses in relation to the same set of facts [are] permissible.'[498] However, as Cassese once noted in line with ICTY practice, perhaps this does not apply to some crimes within the same category of crimes, for example, different war crimes may be regarded as lesser included offense of one another.[499]

At the ICC, there is seemingly no need for the common law counterpart of the *iura novit curia* principle: Regulation 55 has taken the civil law road. Nevertheless, the system of 'lesser included offenses' may provide some guidance in determining the validity of recharacterizing the underlying crime. In the *Lubanga* case, the Pre-Trial Chamber stated regarding the nature of the armed conflict that it might entertain the system of 'lesser included offenses' – or in the words of the Chamber do so 'on the basis of the well-established principle of *majori continet in se minus*, that the greater includes the lesser in relation to the nature of the armed conflict.'[500] Judge Fulford once suggested that the debate surrounding Regulation 55 would eventually revolve around whether or not its application would be restricted by lesser included offenses.[501] The idea that Regulation 55 is limited to situations of lesser included offenses was left unresolved by the Appeals Chamber though.[502] But it seems unlikely that it could play a prominent role, given the provision's explicit *iura novit curia* foundation.

496 *Kupreškić* Trial Judgment, *supra* note 415, paras 742-743.

497 *Akayesu* Judgment, *supra* note 43, para. 469.

498 Ibid para. 470.

499 A. Cassese et al, *Cassese's International Criminal Law* (2013) 169.

500 *Prosecutor v. Lubanga*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, TC I, 13 December 2007, para. 49.

501 *Prosecutor v. Lubanga*, Corrigendum to 'Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009', ICC-01/04-01/06-2061-Anx, TC I, 21 July 2009, para. 20 (Minority Opinion Judge Fulford).

502 *Lubanga* Regulation 55 Judgment, *supra* note 77, paras 99-100. See also *Lubanga* Decision on the Legal Representatives' Joint Submissions, *supra* note 440, para. 12.

4.4.2 Recharacterizing the mode of liability: less is worse

Significant problems arise if the form of participation is recharacterized. The notion of 'lesser included offenses' cannot provide much guidance here. Applying a seemingly lesser form of liability, or a lesser degree of knowledge as happened in *Bemba* and *Katanga*, has the opposite effect to the detriment of the accused, seriously compromising or erasing his previously built defense. The system of 'lesser included offenses' generally leads to the accused being convicted of a less serious crime potentially carrying a lower penalty. Charging 'less' with respect to the objective and/or subjective elements of the form of participation, practically speaking enhances the provability of the accused's involvement. For instance, 'should have known' is much easier to prove than 'knew.' This does not create any problems from a prosecutorial perspective, but from a defense's perspective it is injurious.

Most significantly, a change in mode of liability may alter which of the underlying facts must be regarded as material, given that the pleading principles dictate that the required degree of specificity of charges is the proximity of the accused to the crime – pertaining not only to geographical vicinity but also to the mode of liability. In *Bemba*, the defense argued along these lines regarding the change from 'knew' to 'should have known' showing the dialectical link between the facts and the legal characterization of those facts: '[i]n the instant case, the proposed re-characterisation would result, not in a modification of the legal characterisation of facts, but rather in the modification of the factual allegations themselves.'[503] It explained that 'the factual (or material) elements relevant to establishing one category of *mens rea* ("knew") is not identical, sufficient or comparable to fulfil the factual elements relevant to proving the other ("should have known").'[504] In other words, by changing the case's theory regarding the proximity of the accused vis-à-vis the crimes, other facts than initially charged became material and had to be pleaded with sufficient specificity.

The *Katanga* saga is also illustrative in this respect. In that case, other facts relating to Katanga's subordinates came to the forefront when Regulation 55 was applied. Under the initially charged form of liability (indirect co-perpetration), the *mens rea* of the physical perpetrators was entirely irrelevant. After recharacterization, the Majority argued that the Pre-Trial Chamber had implicitly confirmed the physical perpetrators' intent,[505] supposedly staying within the facts and circumstances of the charges. However, such a shift in case theory, completely altering the position of the accused vis-à-vis the crimes, leads to different facts being regarded as material. It is practically impossible to not exceed the material facts

503 *Bemba* Defense Regulation 55 Submission, *supra* note 444, para. 21.
504 Ibid para. 26.
505 *Katanga* Judgment, *supra* note 452, para. 1462.

contained in the charges when radically changing the form of participation, because the materiality of facts is determined by the accused's position.

4.4.3 Filling gaps: a slippery slope

As shown by these examples, a treacherous temptation arises: the temptation to use subsidiary facts, patterns or other information from various sources – pre-trial briefs, lists of evidence, or other submissions – to fill the gaps in the newly chosen narrative. Information that had previously been used as evidence, to demonstrate a pattern or to provide context and background, all of a sudden is promoted to the status of material fact. However, there is no certain way of telling from the initial charges which of those other pieces of information may be promoted one day. The only way an accused can defend himself against such changes is by assuming every type of crime or mode of liability may be charged further down the line based on all information made available to him, rendering the distinction between material facts on the one hand, and subsidiary facts, background information and evidence on the other, completely moot. This is a slippery slope, because that distinction dictates which facts must meet the requisite standard of proof and to which facts the rights attach to be put on notice and be enabled to adequately prepare a defense.

In *Muvunyi*, the ICTR Appeals Chamber reminded that '[i]t is to be assumed that an Accused will prepare his defense on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges.'[506] While it has been held – by analogy – that small defects relating to specificity in the indictment may be cured through these other documents if provided in a timely fashion,[507] applying Regulation 55 in any other way than with the most rigorous attention to which facts are material reeks of 'moulding the case against the accused.'[508]

4.5 Conclusion

Material facts and their legal qualification are like communicating vessels. Changing the latter affects the former (and *vice versa*). In its application of Regulation 55 to date, the ICC has underappreciated this, treating international crimes cases as having blurry factual boundaries where material facts can be swapped, neglected, or created at will. Regulation 55 has also been overused; even to the extent it has now appears to have instigated the

506 *Prosecutor v. Muvunyi*, Judgment, ICTR-2000-55A-A, AC, 29 August 2008, para. 166.
507 *Kupreškić* Appeal Judgment, *supra* note 182, para. 114. See also *Lubanga* Appeal Judgment, *supra* note 232, paras 124, 128-130, 132.
508 *Prosecutor v. Simić et al*, Judgment, IT-95-9-T, TC II, 17 October 2003, para. 110.

exact practice it was once designed to prevent, namely a system of charging alternatively. Perhaps alternative charging is the way forward, leaving only the very exceptional situations to be dealt with by Regulation 55. After all, this is how the provision was intended to function. At least a system of alternative charging would provide the accused with more certainty as to the case against him or her from a much earlier point in time, provided the alternatives are built upon clear factual foundations and are not radically contradictory. It would, however, entail having to amend Regulation 52(c), which demands including the *precise* form of participation in the indictment.

Pursuant to Regulation 55, only changes that remain within the facts and circumstances of the charges are allowed. In other words, the material facts dictated by the initial charges cannot be modified. The closer the changes come to the alleged acts of the accused, the more likely they will change the narrative of the case to such an extent that the materiality of the initially charged facts is affected. While the case's narrative is not the starting point for establishing whether a change is permissible, it certainly helps to compare narratives pre- and post-recharacterization in order to determine which are the material facts of the case, and whether they have changed impermissibly. As shown through case law, (i) changes on the periphery of the charges are not very problematic (i.e. contextual elements of the crimes, most notably when kept in the same crime category); (ii) modifying the underlying crime may be possible in some instances, especially where the change goes from sub-crime to sub-crime (i.e. a war crime is altered into another war crime) or one crime may be regarded as a lesser included offense of the other; but (iii) modifying the charges as they relate most directly to the acts of the accused – the objective and subjective elements of the form of participation – drastically affects the nature of the prosecution's case, or narrative, and the material facts of the case. While not categorically impermissible, such changes must be approached with the greatest caution. In sum, the more added value an element has with respect to the narrative of the case, the more likely this is a solid clue that the facts and circumstances of the case will be surpassed in case of recharacterization.

In any event, retroactively labelling subsidiary information as material facts undermines a series of fundamental principles and rights. Qualifying a fact as a material fact has certain profound legal consequences. It influences the standard of proof and a number of rights of the defense, i.e. the right to be put on notice and related rights of enabling an effective defense. The greatest ill the ICC suffers from is a lack of appreciation of the difference between material facts and other facts and evidence. The distinction exists for very good reasons though. In addition to making polite note of it, as most Chambers do by default, the fundamental difference between the two ought to be respected.

Part III
Jurisdictional Reach of the International Criminal Court

5 Between Show Trials and Sham Prosecutions

The Rome Statute's Potential Effect on Domestic Due Process Protections[*]

5.1 Introduction

Tunisian fruit vendor Mohamed Bouazizi set himself on fire in December 2010, triggering the extraordinary chain of events known as the Arab Spring. Many of the violent responses to uprisings in various regions of the Arab world remain beyond the ICC's reach, and matters in the region have become considerably more complicated with the rise of the Islamic State since 2013. But in a relatively rare move, the UN Security Council referred the situation in Libya to the Court in February 2011.[509] An eight-month civil war and a NATO intervention followed, and the regime finally collapsed with the capture and questionable death of its leader Muammar Gaddafi in November 2011. The ICC Prosecutor had moved forward swiftly after the Security Council referral, and opened an investigation in Libya in March 2011. On 27 June 2011, PTC I issued three warrants of arrest, respectively for Muammar Gaddafi (the case against whom was terminated on 22 November 2011 following his death), his son Saif al-Islam Gaddafi, and Libya's former intelligence chief Abdullah al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya from 15 February 2011 onwards.

From day one, Libya has been adamant about trying Saif al-Islam and al-Senussi domestically. For each suspect, Libya filed Article 19 applications challenging the cases' admissibility – successfully regarding al-Senussi,[510] unsuccessfully regarding Saif al-Islam[511] –

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509 UNSC Res. 1970, *supra* note 38, para. 4.

510 *Prosecutor v. Al-Islam Gaddafi and Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, PTC I, 11 October 2013, confirmed on appeal: *Prosecutor v. Al-Islam Gaddafi and Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC-01/11-01/11-565, AC, 24 July 2014.

511 The Pre-Trial Chamber found Libya to be unable in the sense of Article 17(3) due to the fact that the authorities in Tripoli had not been able to obtain the accused from Zintan, where at the time of writing, Saif al-Islam is still being held by local militias. See *Al-Islam Gaddafi and Al-Senussi* Decision on Admissibility, *supra* note 22, para. 215, confirmed on appeal: *Prosecutor v. Al-Islam Gaddafi and Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-547-Red, AC, 21 May 2014.

and in both cases, the state of domestic due process protections played a role in the tug of war for putting these men on trial. Neither of the remaining suspects has made it to the ICC, even though Libya is still under an obligation to hand Saif al-Islam over to the Court.[512] Libya put the two men on trial in early 2014 together with other Gaddafi-era officials, and on 28 July 2015, the Tripoli Court of Appeal sentenced both suspects to death after a controversial mass trial heavily criticized for its lack of fair trial rights.[513]

This Chapter opens Part III, which explores the jurisdictional reach of the ICC in terms of influence and scope. It briefly breaks away from the factual demarcation theme, which will be continued in Chapter 6, by trying to determine the limits of the ICC in the sense of influence it may exert on domestic systems due to its unique jurisdictional principle of complementarity. The complementarity principle in the ICC Statute regulates the theoretical and practical division of labor between the Court and domestic jurisdictions. While the UN ad hoc Tribunals have precedence over national jurisdictions, the ICC will only exercise jurisdiction when a state is inactive or 'unwilling or unable genuinely to carry out the investigation or prosecution' of alleged perpetrators of core international crimes such as war crimes, crimes against humanity and genocide.[514] The ICC is complementary to its domestic counterparts, creating a relationship of vertical influence and guidance with respect to national criminal law systems.

The situation in Libya and the admissibility decisions relating to Saif al-Islam and Abdullah al-Senussi raise an interesting procedural question that goes beyond the confines of those particular cases:[515] does the ICC's complementarity regime influence domestic

512 ICC OTP, *Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to the UNSCR 1970 (2011)*, 11 November 2014, para. 17.

513 C. Stephen, 'Gaddafi's son Saif al-Islam sentenced to death by court in Libya', *The Guardian*, 28 July 2015. See also Human Rights Watch, Libya: Flawed Trial of Gaddafi Officials, 28 July 2015, *available at* https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials (accessed 29 July 2015). At the time of writing it is unclear when (or whether) these sentences will be carried out since they are given the right to appeal.

514 Art. 17 ICC Statute.

515 For earlier discussions among legal scholars on a number of concerns raised by Saif al-Islam Gaddafi's case (including the relationship between the ICC, Libya and the United Nations Security Council, the status and effect of the ICC arrest warrant, and the consequences of an Article 19 admissibility challenge in light of Article 95 of the Rome Statute), see the following postings of J.D. Ohlin to his blog *LieberCode*: 'Libya & Positive Complementarity' (21 November 2011) www.liebercode.org/2011/11/libya-positive-complementarity.html; 'Libya's Duty to Cooperate with the ICC' (23 November 2011) www.liebercode.org/2011/11/libyas-duty-to-cooperate-with-icc.html; 'Libya & The Death Penalty: Can the ICC Complain About Too Much Punishment?' (28 November 2011) www.liebercode.org/2011/11/libya-death-penalty-can-icc-complain.html (all accessed 20 January 2012). See also the following postings of K.J. Heller to the blog *Opinio Juris*: 'Does Libya Have to Surrender Saif to the ICC? (Answer: Yes)' (23 November 2011) http://opiniojuris.org/2011/11/23/does-libya-have-to-surrender-saif-to-theicc-answer-yes/; 'Four Quick Thoughts on Justice in Libya' (3 January 2012) http://opiniojuris.org/2012/01/03/four-quick-thoughts-on-justice-in-libya/; 'ICC Ducks the Article 95 Issue Regarding Gaddafi' (5 April 2012) http://opiniojuris.org/2012/04/05/icc-ducks-the-article-95-issue-regarding-gaddafi/ (all accessed 11 April 2012). And see the following postings of D. Akande to the blog *EJIL:Talk!*: 'Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC?

due process issues? Although many states have adopted new substantive criminal laws under the influence of the ICC's complementarity regime, the scope of the Court's authoritative guidance is disputed with respect to procedural matters, most notably due process protections. On the one hand, many scholars believe that the ICC's effect on this area of domestic criminal procedure is positive. The complementarity principle dictates regard to principles and norms of due process as recognized by international law when the Court makes an admissibility assessment under either Article 17 or Article 20(3) of the Rome Statute. Kevin Jon Heller calls this the 'due process thesis.'[516] On the other hand, it has been argued that such an effect is beyond the Rome Statute's text, as well as beyond the drafters' intentions, and while the Appeals Chamber has not closed the door on the due process thesis completely,[517] the Court's first Article 19 Application decisions by Pre-Trial Chambers appear to point in that direction as well.

This Chapter scrutinizes critiques of the due process thesis by assessing whether there is a legal basis for the Court's influence through an analysis of the admissibility grounds of Article 17 and Article 20(3). It touches upon those aspects of the complementarity principle that seem to affect fair trial rights at the domestic level, such as two of the Rome Statute's due process clauses: Article 17's reference to 'principles of due process as recognized by international law' and Article 20(3)'s mention of 'the norms of due process recognized by international law.' The Chapter suggests there is room for a moderate form of the due process thesis in case of flagrant violations of core elements of internationally recognized fair trial rights. This stance finds support in the ICC Appeals Chamber holding that 'when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice' it may be argued 'a State is not genuinely investigating or prosecuting at all' rendering a case inadmissible.[518] The importance of rethinking the due process thesis is shown by the Libya situation, the fair trial concerns that have been raised with respect to the related case – even more so after death sentences were handed down in

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Part I (What Does the Rome Statute Say?)' (26 November 2011) www.ejiltalk.org/islibya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-therome-statute-say/; 'Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? (Part II) Has the UN Security Council Imposed Different Obligations of Cooperation from the Rome Statute?' (29 November 2011) www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-ii-has-theun-security-council-imposed-different-obligations-of-cooperation-from-the-romestatute/; 'Libya's Obligation to Surrender Saif Gaddafi to the ICC: A Follow Up' (20 February 2012) www.ejiltalk.org/libyas-obligation-to-surrender-saifgaddafi-to-the-icc-a-follow-up/ (all accessed 11 April 2012).

516 K.J. Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process', 17 *Criminal Law Forum* 255 (2006), 255. See also H.J. van der Merwe, 'The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions', 15 *International Criminal Law Review* 40 (2015).

517 See *Al-Senussi* AC Judgment on Admissibility, *supra* note 510, para. 230, discussed *infra* at 5.2.1.

518 *Al-Senussi* AC Judgment on Admissibility, *supra* note 510, para. 230.

Tripoli – and the compelling goal 'to prevent a post-conflict free fall into vengeance, vendetta, or victor's justice.'[519]

In order to test the potential effect of the moderate due process thesis, this Chapter next examines that area of law where fairness in procedure comes closest to fairness in outcome: evidentiary rules. The rationale for choosing this field of law as a test area is twofold. First, most evidentiary rules can be construed as a form of due process protection, making it a comprehensive area of law most suitable for the purpose of this Chapter. Second, evidentiary issues are currently under severe criticism in debates regarding international criminal fact-finding, rendering them among the most contentious topics in any due process discussion relating to the prosecution of international crimes. Moreover, fact-finding and evidentiary problems faced by the ICC may in turn affect the standards of quality that the Court can demand from domestic jurisdictions.

Thus, this Chapter does not profess to present an exhaustive list of all areas of domestic due process rights that the moderate due process thesis may influence, and it is mindful of the fact that such influence will be guided by the facts of the case warranting case-by-case assessments. Rather, the Chapter aims, first, at introducing the moderate due process thesis, and second, at placing it in a more tangible context by exploring an exemplary field of law that the suggested narrower interpretation of the classic due process thesis may affect in the future.

5.2 Complementarity and Principles of Due Process

Article 17 of the Rome Statute dictates that the ICC does not come into play unless a state is inactive or, where it is investigating and prosecuting the case, it is either 'unwilling' or 'unable' to genuinely prosecute and punish international crimes committed within its jurisdiction.[520] Consequently, if a state tries to shield the person(s) responsible for mass atrocities by undertaking sham prosecutions designed to acquit, the ICC may step in and take over the proceedings. Article 20(3) contains a similar ground for admissibility when national proceedings have already been concluded.[521] The provision's 'upward' principle

519 R. Teitel, 'The ICC and Saif: After International Intervention, Avoiding Victor's Justice', *Opinio Juris*, 2 January 2012), *available at* http://opiniojuris.org/2012/01/02/the-iccand-saif-after-international-intervention-avoiding-victor%E2%80%99s-justice/ (accessed 17 January 2012).

520 Art. 17(1)(a) ICC Statute, which reads: 'Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.'

521 See Art. 20(3) ICC Statute, which reads: 'No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independ-

of *ne bis in idem* vis-à-vis the ICC does not apply when proceedings in a national court were intended to shield the person concerned from criminal responsibility or were otherwise conducted improperly.[522]

Both provisions form exceptions to the general rule that the ICC is barred from exercising jurisdiction where national justice systems are engaged. However, the question remains to what extent this exception results in the Rome Statute demanding procedural reform at the national level, and whether *not* providing a defendant with basic due process rights constitutes inability or unwillingness to prosecute offenders, or alternatively, makes a case admissible under Article 20(3).[523] The due process thesis answers the latter question in the affirmative, but in its current form, the thesis has not gone without criticism.

5.2.1 The due process thesis: the treaty and critiques

The ICC may be viewed as a role model of due process, as it gives defendants all the procedural rights enumerated in the International Covenant on Civil and Political Rights (ICCPR).[524] Moreover, Article 17 of the Rome Statute, most clearly giving effect to the complementarity principle, refers to 'the principles of due process recognized by international law' in its second paragraph. This seems to underline the assumption that the ICC has a positive effect on national due process rights. As noted by scholars in Triffterer's Commentary to the Rome Statute, Article 17 may even require 'an assessment of the quality of justice from the standpoint of procedural and perhaps even substantive fairness.'[525] Arguably, a state's failure to guarantee a defendant due process rights, most notably basic fair trial rights as recognized in international human rights law, makes a case admissible under Article 17.

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ently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

522 Ibid. See also C. Van den Wyngaert and T. Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, vol 1* (Oxford University Press 2002) 724–725.

523 See e.g. G.S. McNeal, 'ICC Inability Determinations in Light of the Dujail Case', 39 *Case Western Reserve Journal of International Law* 325 (2006), 325; J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008) 130.

524 Heller, Shadow Side, *supra* note 516, 256.

525 S.A. Williams and W.A. Schabas, 'Article 17: Issues of Admissibility', in Triffterer, *supra* note 383, 623.

Heller refers to this interpretation of the complementarity principle, observing that it is widely supported,[526] as the 'due process thesis.'[527] However, he counters the thesis, phrasing the most fundamental objection, by stating that '[p]roperly understood, article 17 permits the Court to find a State "unwilling or unable" only if its legal proceedings are designed to make a defendant *more difficult* to convict. If its legal proceedings are designed to make the defendant *easier* to convict, the provision requires the Court to defer to the State no matter how unfair those proceedings may be.'[528]

Article 17's admissibility assessment consists of a number of elements that are necessarily scrutinized in the due process thesis debate. For instance, with respect to 'inability', Heller notes that scholars generally argue that a state is 'unable' in the sense of Article 17 if it does not guarantee a fair trial for the defendant.[529] The Informal Expert Paper on complementarity issued by the ICC's OTP supports this stance.[530] However, Heller argues that this is an unrealistic interpretation of 'inability.' The third paragraph of Article 17 elaborates on what constitutes an inability to investigate or prosecute, stating that the Court should consider whether 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'[531] On the one hand, '[i]t is difficult to argue that we would ordinarily describe a functioning national judicial system that lacks certain due process protections as one that has "collapsed" or become "unavailable."'[532] One may argue that such an expansion of the ICC's jurisdiction goes beyond the intentions of the Rome Statute's drafters.[533] On the other hand, demanding complete compliance with international due process standards is not necessary. It would be realistic to regard the lack of *basic* due process rights for an accused as an inability in the sense of Article 17. Such a moderate way of assessing 'inability' is in line with the treaty's text as it targets not any lack of due process rights but a lack of even the most basic due

526 Heller, Shadow Side, *supra* note 516, at 256. See also M.S. Ellis, 'The International Criminal Court and Its Implication for Domestic Law', 15 *Florida Journal of International Law* 215 (2002), 221–222; J. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* 86 (2003), 105-106; C. Stahn, 'Complementarity, Amnesties, and Alternative Forms of Justice; Some Interpretative Guidelines for the International Criminal Court', 3 *Journal of International Criminal Justice* 695 (2005), 713; C. Stahn, 'Complementarity: A Tale of Two Notions' 19 *Criminal Law Forum* 87 (2008), 97; C. Stahn, 'Libya, the International Criminal Court and Complementarity', 10 *Journal of International Criminal Justice* 325 (2012), 344–345.

527 Heller, Shadow Side, *supra* note 516, at 257.

528 Ibid.

529 Ibid 259.

530 See ICC OTP, *An Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, 28, *available at* www.icc-cpi.int/iccdocs/doc/doc654724.pdf (accessed 19 December 2011).

531 Art. 17(3) ICC Statute.

532 Heller, Shadow Side, *supra* note 516, 264.

533 Ibid. See also McNeal, *supra* note 523, at 333.

process protections. Moreover, the Appeals Chamber left the door to this interpretation open when it confirmed the admissibility decision regarding al-Senussi. It stated that:

> At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all. Whether a case will ultimately be admissible in such circumstances will necessarily depend upon its precise facts.[534]

The next element, part of the willingness assessment in Article 17(2)(c), provides a good argument in support of the due process thesis as it lists the requirement that national proceedings must be conducted independently and impartially.[535] However, basing the due process thesis on this element has also been criticized.[536] The subparagraph continues with a conjunctive requirement ('and' as opposed to 'or'), namely that a national proceeding is also 'being conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person concerned to justice.' One may conclude that this is reason enough to assume that an unfair trial designed to convict, but still with the intent to bring the person to justice, does not constitute unwillingness on the part of a state.

However, Article 17(2)(c) leaves room for different interpretations. First, biased proceedings against a person other than the actual perpetrator, so-called scapegoat trials meant to convict, which are different from sham prosecutions designed to shield and acquit, are neither conducted impartially nor are they consistent with the intent to bring the person concerned to justice.[537] In comparing the historical *Justice* case, in which judges, prosecutors

534 *Al-Senussi* AC Judgment on Admissibility, *supra* note 510, para. 230 [footnotes omitted].

535 See Art. 17(2) ICC Statute, which reads: 'In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.

536 Heller, Shadow Side, *supra* note 516, at 260–261; Kleffner, Complementarity, *supra* note 523, at 130.

537 See Kleffner, Substantive, *supra* note 526, 105-106 (n93); see also F. Gioia, 'Comments on Chapter 3', in J. Kleffner and G. Kor (eds), *Complementarity Views on Complementarity: Proceedings of the International*

and officials of the Reich Ministry of Justice were found guilty of crimes against humanity for abusing the judicial process to further the persecution and extermination of minorities and political opponents of the Nazi regime, one can see the ultimate consequence of the strategy of systematically denying fair trial rights.[538] Such a denial may lead to an assessment of unwillingness under today's ICC regime. When the 'person concerned' turns out to be the real perpetrator but the trial was unfair, one could still argue that such proceedings are inconsistent with the intent to bring the individual to justice.[539] Second, it must be a difficult task for the Court to determine whether a violation of due process rights took place to the benefit or the detriment of the accused.[540]

The most promising element of Article 17 in light of the due process thesis is the subordinate clause in the chapeau of the second paragraph, to which this Chapter refers as Article 17's due process clause: 'In order to determine unwillingness in a particular case, the Court shall consider, *having regard to the principles of due process recognized by international law*, whether one or more of the following exist […].'[541] However, this paragraph could suffer a similar (grammatical) fate, since the Article's chapeau and subparagraphs are conjunctive as well.[542] The subordinate clause merely provides guidance as to how the Court should determine whether one of the subparagraphs applies. This is not necessarily fatal to the due process thesis, though. As noted above in relation to the willingness requirement, the intent to bring the person concerned to justice may be interpreted less rigidly, leaving room for the due process thesis.

In sum, the fundamental objection against the due process thesis is expressed in the conclusion that a case becomes admissible under the complementarity regime only when defendants receive *too many* due process rights, which serve as a cloak to shield the person concerned from justice. Consequently, if a defendant is deprived of sufficient due process rights, which amounts to an unfair trial *to the detriment* of the individual, the case is not admissible as long as a state has the intent to bring the person to justice.

5.2.2 Introducing a moderate form of the due process thesis

5.2.2.1 Article 17's due process clause

John T. Holmes's account of the negotiations on complementarity, which Holmes himself coordinated in Rome in 1998, is a useful tool for going beyond textual interpretation and

Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam 25/26 June 2004 (TMC Asser Press 2006) 112.

538 See *Justice* case, supra note 162, 1046-47. See also May and Wierda, *supra* note 296, 259.

539 Kleffner, Substantive, *supra* note 526, 105-106 (n93).

540 Gioia, *supra* note 537, 112.

541 Art. 17(2) ICC Statute [emphasis added].

542 Heller, Shadow Side, *supra* note 516, 262-263.

looking into the drafting history.[543] An examination of the preparatory work of the Rome Statute seems to suggest that it was not the drafters' intention to expand the scope of the ICC's jurisdiction in a way that is reconcilable with the classic due process thesis.[544] Although suggested by some delegations, many did not believe that the absence of national due process rights should be a ground for admissibility.[545] When interpreting the drafting history stringently, one may conclude together with opponents of the due process thesis that each element of the Rome Statute's complementarity principle was put in there for sound, but different reasons.

However, there is one aspect of Article 17 of which the underlying reason for inclusion is highly unsatisfactory. The subordinate clause in Article 17(2), which refers to the principles of due process as recognized by international law, was added at the last minute in Rome as an 'element of objectivity to all the criteria of unwillingness.'[546] Delegations worried that the ICC would be granted too much discretion in determining whether a state was 'unwilling' and repeatedly expressed the concern that the provision lacked objective criteria on which the Court would base its assessment, rendering it too subjective.[547]

Thus, it is clear that the drafters did not want the words 'due process' in Article 17(2) to mean complete compliance with international human rights standards. It is clear why the drafters of the Statute added them (to introduce an element of objectivity), but it is not clear what is left, if anything, of the clause's meaning in practice. Apparently, the drafters intentionally chose an ambiguous term in order to allow for an assessment on a case-by-case basis. However, it is problematic that 'objectivity,' a rather vague term in this context, is also stated as the underlying reason for including the word 'genuinely' in Article 17. The Informal Expert Paper states that the addition of 'genuinely' brings 'a certain basic level of objective quality.'[548] Both the word 'genuinely' and Article 17's due process clause were added to guarantee more objectivity. The word 'genuinely,' due to its placement as an adverb in Article 17(1)(a), pertains to both 'inability' and 'unwillingness.' Therefore, with respect to 'unwillingness,' the objectivity requirement is added twice: once in the form of requiring genuineness, and once in the form of requiring a regard to the principles of due process as recognized by international law. In essence, if every form of the due process thesis is denied, and it is assumed that the reference to international due process principles is absolutely limited to meaning an added element of objectivity, then the subordinate clause in Article 17(2) is redundant. Article 17(1)(a) already demands objectivity. It is problematic that the Rome Statute includes such grand words merely to have them

543 J.T. Holmes, 'The Principle of Complementarity', in R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999) 41.
544 Ibid 50. See also Heller, Shadow Side, *supra* note 516, 271-273.
545 Holmes, *supra* note 543, 50. See also Heller, Shadow Side, *supra* note 516, 272.
546 Holmes, *supra* note 543, 54.
547 Ibid 53; see also Kleffner, Complementarity, *supra* note 523, 90.
548 Informal Expert Paper on Complementarity, *supra* note 530, 8.

serve as an unnecessary safeguard. Moreover, as will be discussed below, such an interpretation of the Statute's due process clauses is not in keeping with the general objective and meaning of due process rights.

5.2.2.2 Due process rights: objective and scope

The conclusion that Article 17(2) has only been written for situations in which criminal processes are abused to the benefit of the suspect or accused reveals a dichotomy. As Jann Kleffner states: '[t]his [conclusion] is diametrically opposed to the general assumption and objective of fair trial guarantees, which are designed to protect individuals against abuses *to their disadvantage*.'[549] Although not subscribing to the due process thesis, Kleffner hits the nail on the head, since the concept 'due process of law' emerged as regulating legal proceedings in accordance with rules and principles which safeguard the position of the individual charged.[550] It is a universally accepted principle of international law that trials must be fair.[551] Therefore, interpreting Article 17's due process clause as only intended to prevent abuse of the criminal process to the advantage of the accused is a contradiction in terms. It is diametrically opposed to the general assumption and objective of fair trial guarantees, which are designed to protect individuals against abuses to their disadvantage, namely arbitrariness.

Due process and fair trial rights do not have a fixed meaning in any legal system, but they generally refer to the idea that citizens have fundamental rights vis-à-vis the state or the government to delimit the latter's power.[552] In other words, these types of rights are designed to (a) protect the individual from a greater power, namely the government or the state, and more specifically, (b) prevent arbitrary abuse of that power. As noted above, the Informal Expert Paper states that the word 'genuinely' brings a certain basic level of objective quality.[553] The Paper continues that although human rights standards may still be relevant for assessing whether national proceedings are carried out genuinely, the ICC is not a human rights court, nor is its role to demand perfect compliance with international human rights standards.[554] According to the authors of the Informal Expert Paper, this does not mean that human rights standards play no role at all, since '[…] human rights

549 Kleffner, Complementarity, *supra* note 523, 130.
550 Ibid 129.
551 A. Cassese, *International Criminal Law* (3rd edn, Oxford University Press 2013) 356.
552 A. Duff et al., 'Introduction: Towards a Normative Theory of the Criminal Trial', in A. Duff et al. (eds), *The Trial on Trial: Truth and Due Process, vol 1* (Hart Publishing 2004) 24; See also *Taxquet v. Belgium* App no 926/05, ECtHR, 31 January 2009; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) 162-163.
553 Informal Expert Paper on Complementarity, *supra* note 530, 8.
554 Ibid 8-9.

standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely.'[555]

Taking internationally recognized fair trial principles into account does not mean that the ICC would turn into a human rights court – an often stated counterargument. The drafters did not intend the Court to be the type of human rights body we know from international human rights law, but this does not mean human rights will not play a role. The conformity of the domestic process with the international standards of fair trial is a valid concern, as the cases in the Libyan situation show, and said counterargument should not paralyze the complementarity debate. Furthermore, a certain role for human rights within the complementarity framework is in line with the Rome Statute's Article 21, which states that the application and interpretation of law by the Court must be consistent with internationally recognized human rights.

5.2.2.3 A process-oriented approach

Interpreting Article 17 to make cases admissible only where the criminal process is being abused to the benefit of the accused, suggests that the Court's unwillingness assessment focuses on result, not process. The inclusion of the phrase 'with an intent to bring the person concerned to justice' makes this suggestion reasonable, as it seems to imply that a *result* that shields the person concerned from justice would be impermissible.[556] However, as stipulated before, biased proceedings against persons other than the actual perpetrator are not consistent, either, with the intent to bring the person concerned to justice.[557]

Moreover, although the language of the Rome Statute is slightly ambiguous on this matter, Article 17 clearly refers to 'proceedings' as opposed to any type of result, such as a final verdict or sentence. The authors of the Informal Expert Paper confirm that the assessment required by Article 17 'should be based on *procedural* and *institutional* factors, not the substantive outcome,'[558] which suggests a more objective assessment consistent with the due process thesis.

In this context, 'the intent to bring to justice' may be defined as striving to assure that the actual perpetrator is arrested and tried in court.[559] Heller regards 'justice' synonymous with conviction, but reads into the word, as it is used in Article 17, the successful conclusion

555 Ibid.

556 L. Waldorf, '"A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal', 33 *Fordham International Law Journal* 1221 (2010), 1266.

557 *Supra* Section 5.2.1.

558 Informal Expert Paper on Complementarity, *supra* note 530, at 14.

559 Oxford English Dictionary (2nd edn, Oxford University Press 1989; online version June 2011); see also Kleffner, Complementarity, *supra* note 523, at 151–152; M. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* 507 (1999), 525; cf. Heller, Shadow Side, *supra* note 516, 261-262, assuming that the intent to bring to justice is synonymous with the intent to obtain a conviction, instead of defining justice as submitting a person to the administration of law or a judicial proceeding.

of criminal proceedings against the actual perpetrator. 'Justice' per se can mean conviction in some instances. For example, the Oxford English Dictionary defines justice alternatively as infliction of punishment, legal vengeance on an offender, capital punishment or execution.[560] But a different and broader definition applies here.[561] Indeed, defining the intent to bring to justice as 'to do someone justice' stretches beyond the limits of Article 17.[562] However, jumping ahead and defining it as synonymous with conviction incorrectly labels the unwillingness assessment as one of result. In Article 17, the focus is on the proceedings. Therefore, the meaning of justice ought to be understood as prosecuting a person by arresting him and trying him in court.

A criminal process designed to acquit, where an abundance of due process rights serves as a cloak that shields the person concerned from justice, may be difficult to prove.[563] But so may a scapegoat trial designed to convict. The Informal Expert Paper addresses these difficulties by providing a list of factors that may be indicative of a non-genuine use of proceedings, which includes a regard for fair trial rights.[564] For instance, one of the items mentioned by the Informal Expert Paper is the '[l]egal regime of due process standards, rights of the accused, [and] procedures.'[565] If the admissibility assessment were one of result, it would entail the Court making a (preliminary) guilt-innocence assessment beyond the scope of the complementarity principle.[566] One scholar rightly notes in this respect that the Court's Prosecutor, who is the first on the ground to make an initial assessment of local regimes in light of the complementarity principle, has an obligation pursuant to Article 54(1)(a) of the Rome Statute '[i]n 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 this Statute, and, in doing so, [to] investigate incriminating and exonerating circumstances equally.'[567]

Objectifying the unwillingness assessment by making it one of procedure makes sense for a more practical reason as well. As stipulated above when discussing the meaning of 'the person concerned,'[568] it would be very difficult for the Court acting under Article 17 'to determine *ex ante* whether a violation of the principles of due process occurred to the detriment or to the benefit of the accused.'[569]

560 Oxford English Dictionary, *supra* note 559.
561 Scharf, *supra* note 559, 525.
562 Kleffner, Complementarity, *supra* note 523, 152.
563 Waldorf, *supra* note 556, 1266.
564 Informal Expert Paper on Complementarity, *supra* note 530, 28-31.
565 Ibid 28.
566 Gioia, *supra* note 537, 112.
567 Ibid.
568 *Supra* Section 5.2.1.
569 Gioia, *supra* note 537, 112.

One may argue that the rejection of the due process thesis results in an assumption of guilt. Will the ICC not step in unless a country is suspected of providing a suspect with an abundance of due process protections that prevent a genuine prosecution and conviction? Regardless of the unattractive message this would send to the world, in this scenario the suspect would (already) be assumed a guilty person benefitting from a sham prosecution. However, the main reason for including the due process clause and the word 'genuinely' in Article 17 of the Rome Statute was to add a certain amount of objectivity to the admissibility assessment. In essence, the presumption of innocence is the right that most objectifies the criminal process, and therefore, it comes to mind as one of the due process rights recognized by international law that the Court must take into account. Given that Article 17 requires a process-oriented approach, as opposed to a result-oriented approach, the presumption of innocence seems to play a role here as an additional confirmation that the Court's assessment must be objective. If the person concerned is not presumed innocent, or even assumed guilty, an internationally recognized principle of due process is not being taken into account. Such a system moves closer to Herbert Packer's well-known Crime Control Model, in which the presumption of guilt 'is basically a prediction of outcome.'[570]

It has been rightly suggested that 'a trial falling short of international standards of fairness [is] contrary to the very purpose of holding international trials.'[571] More appropriate for a model court as ambitious as the ICC is a system resembling Packer's Due Process Model, even in preliminary assessments like the one that Article 17 demands. Such a model is supported not only by the very objectives pursued in creating the ICC but also, as the analysis of Article 17 and its due process clause shows, by the text of the Rome Statute itself.

5.2.2.4 Article 20's due process clause

After the due process clause had been accepted relatively easily regarding Article 17(2), the drafters believed it should also be included in Article 20(3) in order to secure the same type of objectivity when the Court considers deviation from the *ne bis in idem* principle.[572] However, oddly enough, the words were not precisely duplicated. The due process clause in Article 20(3) reads, 'in accordance with the *norms* of due process recognized by international law' as opposed to the *principles* of due process as it is phrased in Article 17. Nevertheless, there is no indication that the due process clause in Article 20(3) should be read or interpreted differently than the clause as found in Article 17(2). Delegations were satisfied to borrow strongly from the compromise already achieved on Article 17, since *ne bis in idem* is part of the complementarity principle. A reference to it is in fact incorporated in

570 H.L. Packer, 'Two Models of the Criminal Process', 113 *University of Pennsylvania Law Review* 1 (1964), 12.
571 May and Wierda, *supra* note 296, 260.
572 Holmes, *supra* note 543, 59.

Article 17(1)(c).[573] Moreover, the rest of the provision's language is almost identical to Article 17's wording, which made it widely acceptable for inclusion in Article 20(3).[574] It is, therefore, reasonable to assume that the rationale behind both due process clauses is the same, despite fairly careless drafting.

Still, the inclusion of (approximately) the same phrase in Article 20(3) may seem slightly puzzling to some. Commentators noted the striking difference from the *ne bis in idem* principle as incorporated in the Statute of the Yugoslavia Tribunal.[575] The latter only refers to national proceedings that were not independent and impartial and were intended to shield the accused from justice, while the Rome Statute's *ne bis in idem* principle also refers to the norms of due process as recognized by international law. Given the drafters' intentions in including a due process clause in Article 17 and the wide consensus among them to copy the phrase into Article 20, we must assume that the deviation from the Yugoslavia Tribunal's Statute was an intentional one. Therefore, the ICC's assessment under Article 20(3) can go in both directions: against or in favor of the accused.[576] From the point of view of chronological continuity this makes sense. Once domestic proceedings have come to an end, Article 17 is no longer applicable. However, the Rome Statute's drafters wished for the same safeguards to apply at this later stage.[577]

Article 20(3) also clearly refers to 'proceedings.' Although the Informal Expert Paper on complementarity does not cover Article 20, it is reasonable to assume that, in light of the similarities between Article 17 and Article 20(3), the provision demands a similarly objective assessment focused on the process, not the substantive outcome. At first blush, this may seem less logical in relation to the *ne bis in idem* principle. However, if the Court could only look at the substantive outcome, and not the proceedings as a whole, states would essentially be more likely to be in the clear once proceedings are concluded. They would have too much freedom in setting up sham and show proceedings, as long as they speed things along, if the Court lacks the actual competence to adequately step in at all stages of national proceedings.[578]

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573 Ibid 58.

574 Art. 20(3) ICC Statute, which reads: 'No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

575 Van den Wyngaert and Ongena, *supra* note 522, at 725.

576 I. Tallgren and A.R. Coracini, 'Article 20: Ne bis in idem', in Triffterer, *supra* note 383, 694-695.

577 Holmes, *supra* note 543, 59.

578 Van den Wyngaert and Ongena, *supra* note 522, at 724–725.

5.2.2.5 The moderate due process thesis: which rights?

It has already been mentioned that while demanding complete compliance with all fair trial rights recognized by international law is unrealistic, it is viable to demand adherence to basic due process rights.[579] This is where the moderate due process thesis deviates from the classic due process thesis. The Rome Statute's principle of complementarity allows for such a reduced form of the due process thesis, but the Statute naturally does not identify which due process rights Article 17 and 20(3) refer to. In the admissibility decision in Libya's al-Senussi case, Pre-Trial Chamber I has suggested that Article 17's due process clause must be assessed in light of the substantive and procedural law applicable *in Libya*.[580] However, since in respect of unwillingness the Statute dictates that the norms and principles of due process need to be recognized by international law, the most logical place to find these rights is in international human rights treaties, not in domestic law.

In order to establish which of these internationally-found rights are basic fair trial rights, we may look at the underlying idea of a fair trial or due process, which is captured in the belief that not only does a citizen need protection from the state, but also that there is some kind of 'inner morality' to criminal proceedings.[581] There are six core elements to this idea of a fair trial, which have been usefully summarized by Mireille Hildebrandt using international documents such as the European Convention on Human Rights:[582] (1) the judge is impartial and independent; (2) the trial is public; (3) the defendant will not be punished without a legal finding of guilt (the presumption of innocence); (4) there is an equality of arms between prosecution and defense; (5) the judgment will be based on evidence presented in court (a principle of immediacy, connected with a normative preference for oral testimony); and (6) the proceedings are based on a right of confrontation.[583] Jens David Ohlin provides a similar inventory containing 'a basic level of due process [rights] universally recognized among civilized nations,'[584] codified in the International Covenant on Civil and Political Rights.[585]

The idea of a fair trial has been further internationalized with the realization of the international criminal tribunals and the permanent ICC. At these courts, 'the dominant idea is perhaps less that of the individual protection than that the international community should be seen to be acting according to demonstrable principles of fairness.'[586] This

579 *Supra* Section 5.2.1.

580 Al-Senussi PTC Decision on Admissibility, *supra* note 510, para. 203.

581 A. Duff et al., *The Trial on Trial: Towards a Normative Theory of a Criminal Trial, vol 3* (Hart Publishing 2007) 51.

582 M. Hildebrandt, 'Trial and 'Fair Trial': From Peer to Subject to Citizen', in A. Duff et al. (eds), *The Trial on Trial: Judgment and Calling to Account, vol 2* (Hart Publishing, 2006) 25; see also Duff et al., *supra* note 581, at 51.

583 Art. 6 ECHR.

584 Ohlin, A Meta-Theory, *supra* note 13, 93 n75.

585 Art. 14 ICCPR.

586 Duff et al., *supra* note 581, at 51.

underscores that the ICC, as a role model of due process,[587] should extend its influence to national due process rights where the abovementioned basic rights are not granted.

Whether domestic authorities grant basic due process rights will need to be assessed on a case-by-case basis, and 'will necessarily depend upon [the case's] precise facts.'[588] The six core elements as summarized by Hildebrandt provide an excellent starting point for assessing whether national justice is failing or has failed dramatically. Based on a realistic execution of the moderate due process thesis, only gross violations of the six core elements of basic due process rights would make a case admissible under the ICC's complementarity regime. Section 5.3 will address such assessments in more detail.

5.2.2.6 Practice: moving towards the moderate due process thesis

Despite skepticism of the due process thesis and concerns for its impracticality, neither the ICC nor the individual states seem to express adherence to some form of due process thesis as a burden; they are generally willing to subscribe to it.[589]

In relation to the ICC, Gregory McNeal notes that the Court's migration towards the due process thesis is illustrated by the Report of the Commission of Inquiry on Darfur.[590] The Commission investigated whether Sudan was unwilling and/or unable to prosecute the alleged perpetrators of the atrocities committed in Darfur. The Report lists six reasons for referring the situation in Darfur to the ICC, including 'the fair trial guarantees offered by the international composition of the Court and by its rules of procedure and evidence.'[591]

Not only the ICC, but also states are moving towards a due process thesis approach. As shown by Kenya's application, the first of its kind, to the ICC's Pre-Trial Chamber II under Article 19 of the Rome Statute in March 2011, states assume that strengthening fair trial rights and procedural guarantees are indeed amongst their obligations under the Rome Statute.[592] In the application's second paragraph, the government of Kenya starts its list of reforms by pointing out that '[t]he new Constitution incorporates a Bill of Rights which significantly strengthens fair trial rights and procedural guarantees within the Kenyan criminal justice system.'[593] The Libyan authorities seem to move in this direction

587 Heller, Shadow Side, *supra* note 516, 256.

588 Al-Senussi Appeals Chamber Judgment on Admissibility, *supra* note 510, para. 230.

589 McNeal, *supra* note 523, 332. See also M. Delmas-Marty, 'Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC', 4 *Journal of International Criminal Justice* 2 (2006), 5-6, citing ICC OTP, *Paper on some Policy Issues before the Office of the Prosecutor*, 4 September 2003, *available at* www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (accessed 22 April 2015).

590 McNeal *supra* note 523, 332; Delmas-Marty, *supra* note 589, 5-6, citing *Report of the International Commission of Inquiry on Darfur to the United Nations*, UN Doc. S/2005/60, 25 January 2005, para. 648.

591 Report of the International Commission of Inquiry on Darfur, *supra* note 590, para. 648.

592 *Prosecutor v. Ruto et al.* and *Prosecutor v. Muthaura et al.*, Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC-01/09-01/11-19, 31 March 2011, para. 2.

593 Ibid.

as well, at least on paper. Not only have they repeatedly made similar statements in relation to Saif al-Islam's fate, assuring that Gaddafi's son would receive a fair trial,[594] their Article 19 application devotes over 10 paragraphs to defending the quantity and the quality of due process protections in Libya's criminal proceedings.[595] The Libyan government naturally does not confirm the due process thesis while it understandably does not make the uncongenial argument of denying the thesis either. But it (perhaps unintentionally) articulates a moderate form of the due process thesis: '[i]t is not the function of the ICC to hold Libya's national legal system against an exacting and elaborate standard *beyond* that basically required for a fair trial.'[596]

5.3 The Moderate Due Process Thesis in Context: Evidentiary Rules

The moderate due process thesis entails the ICC approaching situations objectively (refraining from any preliminary guilt/innocence-assessments), focusing on the proceedings, and determining whether core fair trial elements have been so grossly violated that it warrants a case's admissibility. The following type of questions may be asked: has the accused already been brought before an impartial and independent judge? Does he have access to counsel and other recourses, and has he been informed of the charges against him to allow an equal opportunity to prepare his defense? Will his trial be public, and will he get the opportunity to examine witnesses against him?

These questions show that the moderate due process thesis might have an effect on certain aspects of domestic evidence law, as evidentiary rules comprise a fair amount of the six core elements of a fair trial discussed above.[597] This section explores how due process rights are related to evidentiary rules, placing the moderate due process thesis in a more concrete context. Certain practical issues cannot be ignored here. The search for the truth, which is intimately connected to both due process rights and evidentiary rules, is an area currently heavily under debate in relation to international crime prosecutions. Today's international criminal tribunals experience many evidentiary difficulties in the form of fact-finding impediments. These challenges may be relevant as a correctional factor to the Court's admissibility assessment in cases of substandard due process protections.

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594 See e.g. 'Libya pledges 'fair trial' for Saif al-Islam', *Al Jazeera*, 20 November 2011, *available at* www.aljazeera.com/news/africa/2011/11/201111205291584598 6.html (accessed 3 March 2012); 'Libya: Gaddafi son Saif al-Islam "will get fair trial"" BBC, 20 November 2011, *available at* www.bbc.co.uk/news/world-africa-15810142 (accessed 3 March 2012).

595 See *Prosecutor v. Al-Islam Gaddafi and Al-Senussi*, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 1 May 2012, paras 56–67.

596 Ibid 99 [emphasis added].

597 *Supra* Section 5.2.2.5.

5.3.1 Evidentiary rules as due process protections

Evidence may be defined as relevant, i.e. material and probative, information put before a court to establish a fact in question.[598] Evidentiary rules identify and govern how this information is used at trial.[599] Obviously, a judgment must be fact-based to be fair. As a tool for accurate fact-finding, evidentiary rules guarantee procedural fairness through identifying and governing the information presented at trial. In other words, '[e]vidence is that area of criminal justice which comes closest to linking fairness in procedure with fairness in outcome.'[600]

Fair trial rights prevent miscarriages of justice and set boundaries on truth-finding.[601] These boundaries do not necessarily stand in the way of the search for the truth: '[…] while effective prosecutions without too many barriers caused by principles of due process may lead to more convictions […] they may not lead to accurate results.'[602] One may argue that respecting individual rights contributes to truth-finding. Due process rights comprise the structural protection that is designed to produce the correct outcomes and to make the correct culpability determinations.[603] Accordingly, due process rights have a direct effect on the search for the truth, as they are designed to ensure that the prosecution does not have an unfair advantage and taint the outcome of the trial, potentially causing the innocent to be convicted.[604]

The rules created to ensure procedural fairness directly affect criminal proceedings with respect to the admission and consideration of evidence.[605] Evidence and due process are intimately connected in two ways. First, evidentiary rules are intended to regulate the use of information in court, while due process protections act as the checks and balances for this use. Consequently, due process rights can be seen as the main rationale behind evidentiary rules. Second, evidentiary rules may be viewed as the most obvious remedy for the infringement of due process rights, for instance the exclusion of any evidence obtained as a result of a due process violation.[606] Either way, the main goal of both sets of rules, evidence and due process, is finding the truth and generating the correct outcomes.

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598 May and Wierda, *supra* note 296, at 2; see also M.C. Bassiouni, 'Issues Pertaining to the Evidentiary Part of International Criminal Law', in M.C. Bassiouni (ed), *International Criminal Law: International Enforcement, vol 3* (3rd edn, Martinus Nijhoff 2008) 581.

599 Ibid.

600 M. Stevens, 'Due Process of Law: Procedural and Substantive Issues', *available at* http://faculty.ncwc.edu/mstevens/410/410lect06.htm (accessed 21 December 2011).

601 See C. Buisman, M. Bouazdi and M. Costi, 'Principles of Civil Law', in Khan et al, *supra* note 96, 16.

602 Ibid 14.

603 Ohlin, A Meta-Theory, *supra* note 13, 94, 109.

604 Ibid.

605 Bassiouni, *supra* note 598, 593; see also Jackson and Summers, *supra* note 13, 5.

606 Bassiouni, *supra* note 598, 597; see also May and Wierda, *supra* note 296, 295.

Because of the close connection between evidentiary rules and due process rights, the moderate due process thesis may affect domestic evidence law through those types of evidentiary rules that can be construed as a form of due process protection. The presumption of innocence, one of the six core elements of procedural fairness as enumerated by Hildebrandt, as well as one of the key principles governing the application of the burden of proof,[607] may be viewed as the main link between due process rights and evidentiary rules. Additionally, the following fair trial notions and rights consist of evidentiary rules, possibly causing the ICC to influence domestic evidence law through the principle of complementarity: (1) the equality of arms principle, consisting of rights such as access to evidence, equality in resources and means, including the right to counsel, the right to be present at trial, the right to be informed promptly of the charges, which includes the right to adequate time and facilities to prepare for trial and the right to disclosure, and related to the right to translated documents;[608] (2) the right to an expeditious trial and to be tried without undue delay, allowing for judicial powers such as setting the number of witnesses, determining the time available to the parties for presenting evidence, and exercising control over the questioning of witnesses;[609] (3) the right to a public trial, ensuring that justice is also seen to be done, but also related to dilemmas of witness protection, anonymous witnesses, and other protective measures for witnesses;[610] (4) the right to remain silent or the 'right to lie' – in a common law system the accused has a right to remain silent but may choose to testify under oath, while in a civil law system the accused has no right to remain silent and may be questioned, but is not under oath, and therefore, has a 'right to lie';[611] and (5) the right to examine or have examined witnesses against him.[612]

If one or more of these evidentiary rules are too flawed or absent from a national criminal justice system, this could result in a gross violation of one of the core fair trial elements. However, the mere determination that a certain rule is absent or unsound should not suffice. As Gideon Boas notes, '[t]he nature of war crimes and their prosecution makes measures otherwise frowned upon in domestic criminal justice systems less egregious: retrospective extension of criminal provisions, extended jurisdiction, more relaxed eviden-

607 May and Wierda, *supra* note 296, 289.
608 Ibid 266-277.
609 Ibid 280.
610 Ibid 281-284.
611 Ibid 289
612 Ibid 284-288.

tiary provisions may be considered appropriate and necessary […].'[613] Different standards may apply when dealing with international crimes.[614]

5.3.2 Correction factor: international crimes and fact-finding

There exists a caveat in relation to international crime prosecutions due to some practical difficulties that have been touched upon throughout the various chapters in this dissertation. Naturally, the primary goal of any criminal trial is to determine whether a particular accused is guilty of the charges brought against him.[615] However, the unique features of international criminal trials create numerous evidentiary challenges.[616] Criminal evidentiary rules have 'had to synthesize the rules to be found in these [domestic] laws and adapt them to the particular circumstances of the international criminal trial.'[617]

The first challenge these trials face is caused by the fact that evidence gathering is extremely difficult when dealing with mass atrocities due to the violent nature as well as the great magnitude of the situation under investigation. The scope of trials dealing with international crimes is much greater than those dealing with domestic crimes, causing a need for the rules to be adapted to fit the size of these trials.[618] Secondly, in some instances the temporal and geographical distance from the scene of the crime may cause problems in addition to those of evidence gathering. Gathered evidence may be less reliable. And finally, other elements of the crimes – the intent of the perpetrator, the context of a widespread attack, the context of an international armed conflict, etc., – give rise to evidentiary challenges, for these aspects are often difficult to establish in court.[619]

Most if not all of these features are typical of trials where international crimes are prosecuted, whether in a domestic court or at an international tribunal, whereas they will be much less common in, or even completely absent from, trials prosecuting a 'regular'

613 G. Boas, 'War Crimes Prosecutions in Australia and other Common Law Countries: Some Observations', 21 *Criminal Law Forum* 313 (2010), 327; see also May and Wierda, *supra* note 296, at 267, noting that '[i]n domestic common law courts, a question has arisen whether there should, in principle, be a relaxation of the technical rules of evidence in favor of the defense in war crimes trials, in order to ensure maximum protection against unjust conviction.'

614 Cf. *Al-Islam and Al-Senussi* Application on behalf of Libya, *supra* note 595, para. 94 ('Even this Court with its considerable resources has required several years to bring accused persons to justice in less complex cases. Libya is meeting the requirements of due process in accordance with international standards, and cannot be held to a requirement of achieving swift justice in circumstances that neither other States nor the ICC itself are required to meet.').

615 Bassiouni, *supra* note 598, 581, 589; see also Ohlin, *supra* note 13584, 93.

616 Bassiouni, *supra* note 598, 581.

617 May and Wierda, *supra* note 296, 2.

618 Bassiouni, *supra* note 598, 581.

619 See e.g. N.A. Combs, 'Evidence', in W. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2010) 323; D. Vandermeersch, 'Prosecuting International Crimes in Belgium', 3 *Journal of International Criminal Justice* 400 (2005), 411.

domestic crime. Libya, for instance, is slowly coming to grips with the violence that took place in large parts of the country in 2011,[620] and the situation has recently been deteriorating again with the rise of the Islamic State.[621] Local prosecutors and investigators (have) face(d) considerable challenges, as undoubtedly the ICC would (have) as well, in gathering evidence. The crime scene encompasses most of the country, which has not yet recovered from Gaddafi's decades-long reign or the recent fighting and is now confronted with the rise of the Islamic State, while the scope of the suspected crimes is tremendous compared to a simple domestic crime.

It is important to reiterate that the assumption that international criminal trials are at least capable of determining who did what to whom during mass atrocities has been severely challenged in recent years.[622] Combs, for instance, has shown that international fact-finding is like gluing together grains of sand. Observing that prosecutors at today's international tribunals rely almost exclusively on eyewitness testimony,[623] she describes the numerous problems haunting the reliability of witnesses.[624] International criminal proceedings suffer from inaccurate fact-finding not only due to educational, linguistic, and cultural impediments but also because of witnesses' perjury and errors in translation and investigation. Although domestic criminal jurisdictions are in a better position to tackle some of these problems (for instance, a Libyan prosecution of Saif al-Islam Gaddafi, such as the one that was concluded in first instance in Tripoli in July 2015, is most likely not thwarted by linguistic or cultural impediments), domestic courts are bound to face some of the same challenges. Moreover, political factors can distort fact-finding in domestic jurisdictions, especially when trials are conducted in the same jurisdiction where the mass atrocities took place. This could be an issue of concern in Saif al-Islam's case, in addition to the challenges of trying a case in a post-conflict – and Islamic State threatened – Libya, because tensions between the interim government and supporters of the late Muammar Gaddafi have not yet subsided.[625] For instance, despite the fact that Saif al-Islam was officially on trial in Tripoli and sentenced to death by the Tripoli Court of Appeal, he is still being held by local militias in Zintan at the time of writing, and followed only some of his controversial trial via video link.[626]

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620 In early 2012, there were still reports of violence breaking out in parts of Libya. See for example L. Stack, 'Pro-Government Libyan Militia Routed From a Qaddafi Bastion', *NY Times*, 24 January 2012.

621 ICC OTP Eighth Report to the UNSC, *supra* note 512, para. 13.

622 See for example Combs, *supra* note 6; Zahar, *supra* note 6.

623 Combs, *supra* note 6, 6.

624 Ibid 21 *et seq*. See also L. van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime; Mpambara before the Dutch Courts', 7 *Journal of International Criminal Justice* 1117 (2009), 1130–1131.

625 Stack, *supra* note 620.

626 Amnesty International, 'Libya: Trial of former al-Gaddafi officials by video link a farce', 14 April 2014, *available at* www.amnestyusa.org/news/news-item/libya-trial-of-former-al-gaddafi-officials-by-video-link-a-farce; 'Trial of Gaddafi-era figures adjourned until March 22', *Anadolu Agency*, 8 March 2015, *available*

When prosecuting core international crimes, domestic courts will inevitably apply their own evidentiary rules. These can differ considerably from one jurisdiction to another. The Anglo-American common law system and the Roman-Germanic civil law system are rather unalike in this respect; evidentiary rules play a significant role in a common law trial mostly because of the presence of a jury, while a civil law trial is generally much less constrained by evidentiary rules. Consequently, rules differ from legal system to legal system, from country to country, and even from state to state within one legal system.[627] Nevertheless, certain evidentiary rules, as they relate to basic due process protections, can be found in most legal systems in one form or another. For instance, the right of an accused to examine or have examined witnesses against him is one of the core elements of a fair trial and it can be found, albeit in varying forms, in the evidentiary rules of most legal systems of the world.[628] Moreover, the ICC is not the only international institution that has to deal with such (domestic) differences. All the major international human rights treaties and their judicial bodies have had to deal with similar national divergences. In this Chapter was established that the moderate due process thesis has a real and significant role to play when it comes to domestic proceedings. As shown by Section 5.3, the next step would be to ensure that the fact-finding and evidence debates within the context of domestic proceedings are conducted in compliance with the complementarity regime of the Rome Statute.

5.4 Conclusion

The due process thesis discussion is still an important one. Fair trial concerns have been raised in relation to the cases of the Libyan situation, with the debate reaching a new peak in July 2015 when the controversial Libyan trial concluded with death sentences for both Saif al-Islam and al-Senussi – presumably to be appealed. While local authorities have been eager to take action from day one, Saif al-Islam is still at the center of a tug of war between the ICC and Libya at the time of writing, as Libya remains under the obligation to hand him over to the Court. Regardless of the fact that the first Article 19 decisions are now on the table, litigation on the matter is still scant and arguably unsettled. Comparable cases may rise in the future, and due to the Appeals Chamber's reasoning that left the

at www.aa.com.tr/en/news/475682--trial-of-gaddafi-era-figures-adjourned-until-march-22 (both accessed 10 April 2015). See also Human Rights Watch, Libya, *supra* note 513.

627 See May and Wierda, *supra* note 296, 2. See also Bassiouni, *supra* note 598, 581.

628 May and Wierda, *supra* note 296, 284–285. See also R.D. Friedman, 'The Confrontation Right Across the Systematic Divide', in J. Jackson et al. (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Hart Publishing 2008) 262; C.M. Rohan, 'Rules Governing the Presentation of Testimonial Evidence', in Khan et al., *supra* note 96; Jackson and Summers, *supra* note 13, 24.

possibility of a form of the due process thesis viable, all is not set in stone. However, the due process thesis as it stands in legal scholarship is too broad. It is not in line with the Rome Statute's text or its drafters' intentions. Moreover, a liberal application of the classic due process thesis in admissibility determinations is unrealistic. It would swamp the ICC with cases the Court was never meant to deal with. None of this means that the due process thesis discussion has no relevance to cases brought before the ICC.

Although the mere lack of certain domestic fair trial rights should not be sufficient for making cases admissible under Article 17 or Article 20(3), there is a limit to what the Court can ignore. Instead of targeting every possible flaw in national due process protections, the moderate due process thesis focuses on core fair trial elements. These fundamental elements translate more universally to national jurisdictions without turning the ICC into a traditional human rights body. This would allow the Court, which at the point of an Article 17 determination is already engaged with the case anyway, to send an important message to the world: there is no justice without basic protection of the rights of the accused.

How strict should the ICC's assessment be with respect to evidentiary due process protections? Questions like these are food for future discussion with respect to the practical execution of the moderate due process thesis. National jurisdictions cannot be expected to meet higher standards than those asked of an international court or tribunal. When scrutinizing prosecutions and trials involving international crimes, evidentiary challenges as well as other fact-finding impediments must be included in the equation for a fair admissibility assessment under the Rome Statute's complementarity regime.

This Chapter has not suggested a radical change in the Court's admissibility determinations. It has shown the Court's potential reach through the principle of complementarity, and it has proposed a process-oriented approach that is realistic in practice and cautious in its implementation. Perfect compliance with all international human rights standards is a utopian goal even for countries not torn up by violence. Yet, no defendant should be left to a Kafkaesque fate.

6 On the Verge of Engagement

The ICC's Jurisdictional Limits[*]

6.1 Introduction

Within the general theme of this dissertation, one last question has not yet been addressed: how are the outer limits of an international prosecution set at the earliest point of engagement, i.e. before the contours of a case are visible? This question is of particular interest in relation to the ICC, for its jurisdictional scheme is unique. Moreover, the role of the ICC in today's international criminal justice is a limited one. This final Chapter explores just how limited, measured at the verge of the Court's involvement: when jurisdiction is determined.

As elaborated upon in the previous Chapter, the Court's jurisdiction is complementary to national jurisdictions. In other words, the ICC does not have universal jurisdiction (like domestic courts may have in some instances) or primary jurisdiction (like the UN ad hoc Tribunals have) over international crimes. Moreover, the otherwise dormant jurisdiction of the ICC must be 'triggered' for the Court to be able to exercise it.[629] Once jurisdiction is triggered, the Court's attention focuses on criminal events that fall within the jurisdictional parameters of the Court.[630] The ICC makes a strict distinction between situations and cases in this respect; the latter arise from the former. Hence, jurisdiction cannot be triggered with respect to a specific case (i.e. a particular suspect), only with respect to a situation.

While far from identical to the issues regarding case demarcation described in Chapters 3 and 4, and of a different nature than the complementarity issue discussed in Chapter 5, situational demarcation presents challenges, too, especially in light of the preconditions for exercising jurisdiction: (1) subject-matter, (2) temporal, and (3) either personal or territorial.[631] These three preconditions operate independently – and are regulated separately

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* Part of this Chapter has appeared online as: E. Fry, 'The ICC's Problematic Jurisdiction over Foreign Islamic State Fighters', JURIST - Academic Commentary, Dec. 24, 2014, *available* at http://jurist.org/academic/2014/12/elinor-fry-islamic-state.php (accessed 20 April 2015).

629 Arts 13, 14, and 15 ICC Statute. See generally H. Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff, 2005).

630 UN Security Council referrals potentially expand (or, theoretically, may completely remove) jurisdictional boundaries in terms of territoriality and nationality (and to a more limited extent, *ratione temporis* – not beyond 1 July 2002, the entry into force of the Statute). The other triggering mechanisms are constrained by the preconditions for the exercise of jurisdiction. See *infra* Section 6.2.

631 Arts 5, 11, and 12 ICC Statute.

in the Rome Statute – from the triggering mechanisms, but the preconditions for exercising jurisdiction and triggering mechanisms are at times intertwined to such an extent that it causes unique demarcation problems. Moreover, Article 12(3) of the Rome Statute also provides for the possibility of signing a declaration accepting the ad hoc jurisdiction of the Court, an avenue closely related to the preconditions for exercising jurisdiction and the triggering mechanisms but still distinct from them.

For the purpose of exploring the ICC's jurisdictional boundaries, this Chapter, first, briefly looks at the difference between the triggering mechanisms and the preconditions for exercising jurisdiction, and second, uses two case studies to highlight the most likely problematic scenarios: (i) the issue of foreign Islamic State fighters in relation to which jurisdiction is based on the active nationality principle, and (ii) the situation in Palestine regarding to which jurisdiction is based on an ad hoc Article 12(3) declaration by a (non-)member state. These demarcation issues pertain to the factual reach of the ICC as institution, as opposed to the institutional influence discussed in the previous Chapter.

6.2 The Difference between Triggering Jurisdiction and the Preconditions for Exercising Jurisdiction

Pursuant to Article 13 of the Rome Statute, the ICC's jurisdiction can be triggered in three ways: (1) the Security Council refers the situation to the court, (2) a State Party refers the situation to the court pursuant to Article 14, or (3) the ICC Prosecutor initiates an investigation *proprio motu* pursuant to Article 15. In case of a Security Council referral, some preconditions for the exercise of jurisdiction are bypassed, meaning the crimes must of course still fall within the subject-matter jurisdiction of the Court, but it does not matter whether or not the territorial state or the state of active nationality is a State Party to the Rome Statute.[632] The other two triggering options leave these last two preconditions intact: pursuant to Article 12(2) the court may exercise jurisdiction over conduct that occurred on the territory of a State Party or over persons who are nationals of a State Party. Article 12(3) provides states not party to the statute with the possibility of signing a declaration accepting ad hoc jurisdiction of the ICC with respect to a particular crime, which for jurisdictional purposes then equates them with States Parties.

One of the first things the ICC Prosecutor must do when deciding whether or not to initiate an investigation in accordance with Article 53, is determine whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed. This entails an assessment of the following requirements: (i) the crimes must fall within the subject matter jurisdiction of the Court, i.e. the crimes listed in Article 5 of

632 Temporal jurisdiction may not be expanded beyond the entry into force of the ICC Statute. See Article 13 in conjunction with Article 11(1).

the Statute (war crimes, crimes against humanity, genocide, and one day, aggression); (ii) the crimes must fall within the temporal jurisdiction of the Court as stated in Article 11, i.e. the date of entry into force of the Statute, namely 1 July 2002 onwards, the date of entry into force for an acceding State, the date specified in a Security Council referral, or in a declaration lodged pursuant to Article 12(3); (iii) in accordance with Article 12(2), the crimes must have been committed on the territory of a State Party, or in case the crimes occurred on board a vessel or aircraft, the State of registration, or the crimes must have been committed by the nationals of a State Party.

The relationship between the triggering mechanisms and the preconditions is such that the preconditions for exercising jurisdiction must be met regardless of the triggering mechanism, with the sole exception of when the Security Council refers the situation. In that case, the Security Council resolution referring the situation contains geographical and temporal boundaries (which still must fall at least after 1 July 2002, the entry into force of the Statute), and it does not matter that the country in question is not a State Party to the Rome Statute, or that in theory, the conduct under investigation may have been committed by nationals of non States Parties.[633] This means that once the jurisdiction of the Court is triggered by means of a State referral or a *proprio motu* investigation, the ICC Prosecutor is not relieved of her duty to consider the subject-matter, temporal, and personal or territorial jurisdiction requirements.

6.3 The ICC's Jurisdiction Preconditions and Situational Demarcation

The two preconditions that create the most severe situational demarcation problems are the active nationality principle and temporal jurisdiction when expanded by an Article 12(3) declaration. Such declarations may equate a non State Party with a State Party or expand the temporal jurisdiction regarding a State Party to a date going further back than the date of entry into force of the Statute for that state. These two preconditions are the most capable of corrupting the jurisdictional scheme of the ICC; they cause conflation between, on the one hand, the trigger mechanisms of the otherwise dormant jurisdiction of the ICC, and on the other hand, the actual preconditions for *exercising* jurisdiction. This section uses two case studies to highlight the demarcation difficulties arising this way: (i) the ICC's problematic jurisdiction over foreign fighters that have made the journey to Syria and Iraq to fight for the Islamic State, and (ii), the ICC's preliminary investigation into the situation related to the Israel-Palestine conflict. These two are chosen because they are contemporary issues testing the Court's reach in today's international criminal justice, and because the conflicts they pertain to will not likely be resolved any time soon

633 Article 13(b) ICC Statute.

– the still-growing Islamic State is nowhere near defeat, and the Israel-Palestine conflict is probably the most perpetual one in modern history.

6.3.1 *The active nationality principle and the ICC's problematic jurisdiction over foreign Islamic State fighters*

In an interview with the German newspaper *Süddeutsche Zeitung* published on November 20 2014, the Chief Prosecutor of the ICC, Fatou Bensouda, said her office is considering the possibility of investigating acts that could be qualified as war crimes or crimes against humanity committed by foreign Islamic State (IS) fighters.[634] Bensouda's statement pertained to the earliest stage of possible ICC involvement: an initial assessment meant to identify those crimes that appear to fall within the court's jurisdiction (phase one of the preliminary examination process, not to be confused with the formal initiation of an investigation pursuant to Article 53(1) of the ICC's Rome Statute).[635] While the crimes committed by IS are likely to fall within the court's subject-matter jurisdiction,[636] and jurisdiction can be exercised over nationals of States Parties based on the statute's active nationality principle, this jurisdictional scheme presents some serious challenges, raising the question whether the issue of foreign IS fighters is really one for the ICC Prosecutor to take on without the UN Security Council or Syria and Iraq taking action by accepting the ICC jurisdiction under Article 12(3) or by acceding to the Statute and referring their situation in their respective territories to the ICC.

IS is not just a terrorist group but a military and political organization seeking to impose its radical understanding of Islam on all who cross its path. It has focused on building its "state" ever since it joined the Syrian civil war in 2013.[637] Governed from Raqqa in Syria, IS holds large sections of Syrian and Iraqi territory at the time of writing.[638] Reports of beheadings, mass killings, rape, slavery, and other atrocities have been making headlines

634 R. Steinke, 'Den Haag erwägt Ermittlungen gegen ausländische IS-Kämpfer', *Süddeutsche Zeitung*, 20 November 2014, *available at* www.sueddeutsche.de/politik/internationaler-strafgerichtshof-den-haag-erwaegt-ermittlungen-gegen-auslaendische-is-kaempfer-1.2228977 (accessed 20 April 2015).

635 ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 78, *available at* www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (accessed 22 April 2015).

636 C. Stahn, 'Why the ICC Should Be Cautious to Use the Islamic State to Get Out of Africa: Part 2', *EJIL: Talk!*, 4 December 2014, *available at* www.ejiltalk.org/why-the-icc-should-be-cautious-to-use-the-islamic-state-to-get-out-of-africa-part-2/ (accessed 20 April 2015).

637 E. Friedland, *Special Report: The Islamic State*, November 2014, 5, *available at* www.clarionproject.org/sites/default/files/islamic-state-isis-isil-factsheet-1.pdf (accessed 20 April 2015).

638 Daily Chart: State of Terror, *The Economist*, 16 June 2014, *available at* www.economist.com/blogs/graphicdetail/2014/06/daily-chart-9 (accessed 20 April 2015).

worldwide throughout 2014 and 2015, while more and more foreign fighters are making their way to the self-declared Islamic caliphate.[639]

After the Security Council adopted Resolution 2170 in the summer of 2014, calling on all UN Members States to take measures to 'suppress the flow of foreign terrorist fighters,' bring them to justice and discourage people to travel to Syria and Iraq for the purpose of joining terrorist groups,[640] international attention shifted to the unprecedented number of citizens of states other than Iraq and Syria joining the ranks of IS. According to a SC report obtained by the British daily *The Guardian* in October 2014, over 15,000 people from more than 80 countries have joined IS and similar extremist groups.[641] The European Union's anti-terrorism chief Gilles de Kerchove told the BBC in September 2014 that more than 3,000 Europeans have joined IS.[642] The largest groups of foreign fighters are not European though; they appear to be from Tunisia, Saudi Arabia, and Jordan.[643]

There is no doubt that the flow of foreigners to IS is considerable and that many of the fighters' countries of origin – European states, Tunisia, Jordan, and Australia, to name a few – are States Parties to the Rome Statute of the ICC.[644] Since neither Syria nor Iraq – the states on whose territory the crimes are taking place – is a State Party to the statute, and assuming they will not accede to the statute anytime soon or make a declaration under Article 12(3), there remain two possible avenues by which the crimes of foreign IS fighters could come within the court's reach.

First, the SC could refer the situation to the court. However, a Security Council referral is extremely unlikely given current geopolitics. To name one factor in this respect, a US-led operation is active in the conflict and the US, a permanent member of the SC, would probably not want the ICC to get involved and potentially scrutinize this military effort.[645] Moreover, it is hard to imagine how the 'situation' would be defined in terms of subject matter. The crimes committed by IS are closely linked to the Syrian civil war – in relation

639 UN Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic, 'Rule of Terror: Living under ISIS in Syria', 14 November 2014. See also K. Yourish, 'The Fates of 23 ISIS Hostages in Syria', *NY Times*, 10 February 2015.

640 UN Security Council, Resolution 2170, S/RES/2170 (2014), 15 August 2014.

641 S. Ackerman, 'Foreign jihadists flocking to Iraq and Syria on 'unprecedented scale' – UN', *The Guardian*, 30 October 2014.

642 'Islamic State crisis: '3,000 European jihadists join fight'', *BBC*, 26 September 2014, *available at* www.bbc.com/news/world-middle-east-29372494 (accessed 20 April 2015).

643 M. Hashim, 'Iraq and Syria: Who are the foreign fighters?', *BBC*, 3 September 2014, *available at* www.bbc.com/news/world-middle-east-29043331 (accessed 20 April 2015).

644 For an up-to-date overview of the States Parties to the Rome Statute see the ICC's website at www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

645 H. Cooper, 'Obama Enlists 9 Allies to Help in the Battle Against ISIS', *NY Times*, 5 September 2014. See also G. Sargent, 'Obama's war authorization request is way too broad. And the damage has already been done', *The Washington Post*, 11 February 2015.

to which a Security Council referral failed earlier in 2014.[646] Moreover, states not party to the statute would probably push for an explicit exclusion of jurisdiction over their nationals in the referral – a widely criticized standard clause that has been added to previous Security Council referrals (see Darfur[647] and Libya[648]).[649]

Second, in the absence of a Security Council referral, the ICC prosecutor can use her *proprio motu* power to investigate. The court would then only have jurisdiction over the nationals of states that are parties to the Rome Statute. This would provide a way for the foreign IS fighters to be prosecuted despite Syria and Iraq not being States Parties. However, an even greater challenge with situational demarcation arises here. As noted above, the statute makes a distinction between situations and cases. A preliminary examination or the initiation of an official investigation pursuant to Article 53(1) concerns a given situation, not a case. As the Pre-Trial Chamber reminded in the decision authorizing the Prosecutor's *proprio motu* investigation in the Kenya situation, a case starts after the issuance of an arrest warrant or a summons to appear pursuant to Article 58 of the Rome Statute.[650] Cases *arise from* situations. To prevent prejudiced or one-sided investigations, the SC or States Parties cannot refer cases, only situations. When the court's jurisdiction is triggered by the *proprio motu* power of the Prosecutor and is based on the nationalities of alleged perpetrators, demarcation of the situation is not based on territorial jurisdiction but on personal jurisdiction. The situation under investigation is then technically demarcated exclusively by future events: the cases that may arise from it. This effectively puts the cart before the horse and renders the investigation of the situation highly biased and fragmented, because it already focuses on possible perpetrators when it should be looking into events more objectively at the situation stage.

While demarcation of a situation exclusively based on the active nationality principle is unusual, it is not unprecedented. The (recently re-opened) preliminary examination into the situation in Iraq concerns alleged responsibility of British troops for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.[651] This situation is less difficult to demarcate than a possible ICC inquiry into IS foreign fighters. The crimes

646 UN SC Press Release, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', SC/11407, 22 May 2014.

647 UN Security Council, Resolution 1593, S/RES/1593 (2005), 31 March 2005.

648 UNSC Res. 1970, *supra* note 38.

649 M. Kersten, 'The ICC in Syria: Three Red Lines', *Justice in Conflict*, 9 May 2014, *available at* http://justiceinconflict.org/2014/05/09/the-icc-in-syria-three-red-lines/ (accessed 20 April 2015).

650 *Situation in the Republic of Kenya*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09-19, PTC II, 31 March 2010, para. 44.

651 ICC OTP Statement, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', 13 May 2014, *available at* www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx (accessed 20 April 2015).

allegedly occurred at 14 military detention facilities and other locations under the control of UK Services personnel in southern Iraq. The examination focuses on UK nationals alone, not an array of different nationalities, leaving open the possibility of investigating the higher end of the hierarchy structure allegedly responsible. With IS, this is trickier. While the IS leadership structure appears to be 'largely dominated by foreign fighters,'[652] those at the top end of the IS hierarchy are not from countries falling under ICC jurisdiction.[653] In fact, the highest ranks are reportedly filled with Iraqi former Saddam loyalists,[654] most of whom met a decade earlier when being held in the Camp Bucca prison in southern Iraq.[655] This matters, because the ICC Prosecutor's policy is only to pursue those leaders bearing the greatest responsibility.[656] This is not to say that foreign fighters, even mid-ranking, could not still bear 'greatest responsibility' for a given crime, but when forced to focus on foreign IS fighters alone, it is possible that the most responsible amongst that so-defined group are not the most responsible for the crimes as such. The most responsible at the top of the IS hierarchy could remain untouched, which is – theoretically at least – not the case in relation to the situation in Iraq dealing with UK officials of all ranks. This focus on the most responsible is a prosecutorial policy, not a legal requirement, but with an eye to this particular situation it raises the question whether the policy must be applied within the ambit of those falling under the court's jurisdiction or in the context of crimes committed by IS in general. The latter is most likely to be correct. This makes the court's role questionable in relation to IS violence when centered on a select group of alleged perpetrators of lower ranks who, arguably, bear less responsibility.

The matter of foreign IS fighters is not manifestly beyond the court's jurisdiction, so the Prosecutor could conceivably have proceeded to phase two of a preliminary examination, which is its formal commencement.[657] Further analysis of the situation during this next phase would have entailed an assessment in relation to the statute's (situational) gravity threshold – where the same question arises: what are the parameters of the 'situation'? – as well as complementarity requirements, namely whether any potential cases arising from the situation would be admissible under Article 17. The latter would have included gathering information on relevant national proceedings in the countries of which the foreign fighters are nationals. In the spirit of the complementarity principle, this could have meant that the court would have been (partially, depending on the country) barred

652 Report CoI into Syria, *supra* note 639, para. 13.
653 N. Thompson and A. Shubert, 'The anatomy of ISIS: How the 'Islamic State' is run, from oil to beheadings', *CNN*, 14 January 2015, *available at* http://edition.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/ (accessed 20 April 2015).
654 B. Hubbard and E. Schmitt, 'Military Skill and Terrorist Technique Fuel Success of ISIS', *NY Times*, 27 August 2014.
655 M. Chulov, 'Isis: the inside story', *The Guardian*, 11 December 2014.
656 ICC OTP Paper on some Policy Issues, *supra* note 589, 3, 7.
657 ICC OTP Policy Paper Preliminary Examinations, *supra* note 635, para. 80.

from further action anyway. There are a number of national jurisdictions that appear to be dealing with the issue of their nationals going abroad to fight for IS. For instance, prosecutions have been initiated and/or completed in the Netherlands,[658] the UK,[659] Jordan,[660] and Australia.[661] However, on 8 April 2015, Bensouda issued a statement much in line with the arguments advanced in this section, and explained why the Court would not proceed: considering that the Court's jurisdictional scheme would most likely result in leaving those most responsible within IS leadership untouched, she concluded that 'the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage.'[662]

6.3.2 *Article 12(3) declarations and temporal jurisdiction: the situation in Palestine*

The 2014-2015 developments relating to Palestine and the ICC have raised an interesting question of temporal demarcation of a situation in case of an Article 12(3) declaration. Effective 2 January 2015, Palestine acceded to the Rome Statute of the ICC.[663] In accordance with Article 126(2), the Statute entered into force for Palestine on the first day of the month after the 60th day following the date of the deposit of the instrument of accession, i.e. approximately 3 months later on 1 April 2015.[664] The day prior to accession, on 1 January 2015, Palestine lodged a declaration with the Court under Article 12(3) accepting the ICC's jurisdiction since 13 June 2014.[665] On 16 January 2015, the OTP started a preliminary investigation into the situation in the occupied Palestinian territory, including East

658 See e.g. District Court The Hague Press Release, 'Syriëganger krijgt drie jaar gevangenisstraf', 1 December 2014, *available at* www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Pages/Syri%C3%ABganger-krijgt-drie-jaar-gevangenisstraf.aspx (accessed 20 April 2015).

659 See e.g. J. Edgar, 'UK man who fought in Syria is first to be convicted of terror offences related with the conflict', *The Guardian*, 20 May 2014.

660 See e.g. 'Jordan both hosting and prosecuting Islamist fighters trained to fight in Syria', *World Tribune*, 2 May 2014, *available at* www.worldtribune.com/2014/05/02/jordan-hosting-prosecuting-islamist-fighters-trained-fight-syria/ (accessed 20 April 2015).

661 See e.g. S. Pillai, 'Foreign fighter passports and prosecutions in government's sights', *The Conversation*, 6 August 2014, *available at* http://theconversation.com/foreign-fighter-passports-and-prosecutions-in-governments-sights-30197 (accessed 20 April 2015).

662 ICC OTP Press Release, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS', 8 April 2015.

663 Secretary-General of the United Nations, State of Palestine: Accession, Reference C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification), 6 January 2015. This was communicated to the President of the Assembly of States Parties to the Rome Statute on 7 January 2015: ICC Press Release, 'The State of Palestine accedes to the Rome Statute', ICC-ASP-20150107-PR1082.

664 ICC Press Release, 'ICC welcomes Palestine as a new State Party', ICC-CPI-20150401-PR1103, 1 April 2015.

665 ICC Press Release, 'Palestine declares acceptance of ICC jurisdiction since 13 June 2014', ICC-CPI-20150105-PR1080, 5 January 2015.

Jerusalem, from 13 June 2014, which pertains to the 50-day war in Gaza in the summer of 2014.[666]

The Gaza Strip became the center of international media attention in the summer 2014 as fighting between Israeli forces and Hamas quickly escalated. The hostilities were sparked by the abduction of three Israeli students from the West Bank on 12 June 2014, after which Israel launched Operation Brother's Keeper in search of the three teenagers.[667] The teenagers were found dead on 30 June 2014.[668] On 8 July 2014, Israel launched a military operation that it designated Operation Protective Edge, which started with airstrikes and continued with a ground invasion of Gaza in order to, among other things, destroy Hamas's tunnel system.[669] On 26 August 2014, an open-ended ceasefire came into effect bringing an end to the latest fighting in and around Gaza.[670] Both Israel and Hamas reportedly committed serious violations of the laws of war during the Gaza Strip hostilities in July and August 2014,[671] which events are being investigated by the UN Commission of Inquiry on the 2014 Gaza Conflict at the time of writing.[672]

This is not the first time that the ICC looks into matters related to the Palestine-Israel conflict. The OTP had previously received an Article 12(3) declaration from the Palestinian National Authority (PNA), on 22 January 2009, which attempted to grant the ICC jurisdiction over 'acts committed on the territory of Palestine since 1 July 2002.'[673] On that occasion, however, the ICC Prosecutor concluded that the declaration was not valid, because the PNA could not be regarded as a 'state' for the purpose of the Statute. At the time, the PNA was only granted the status of 'observer entity' by the UN, and the ICC Prosecutor adhered to that determination.[674] On 29 November 2012, the UN General Assembly adopted Resolution 67/19, granting Palestine 'non-member observer State' status.[675] This did not retroactively change anything with respect to the earlier (invalid) Article 12(3) declaration, but Palestine would from then on be able to accept the jurisdiction of the court either by

666 ICC OTP Press Release, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', ICC-OTP-20150116-PR1083, 16 January 2015.

667 J. Rudoren, 'Fate of 3 Kidnapped Israelis Raises Tensions on Many Fronts', *NY Times*, 22 June 2014.

668 P. Beaumont and O. Crowcroft, 'Bodies of three missing Israeli teenagers found in West Bank', *The Guardian*, 30 June 2014.

669 International Institute for Counter-Terrorism, 'Operation 'Protective Edge': A Detailed Summary of Events', 7 December 2014, *available at* www.ict.org.il/Article/1262/Operation-Protective-Edge-A-Detailed-Summary-of-Events (accessed 20 April 2015).

670 H. Sherwood and H. Balousha, 'Gaza ceasefire: Israel and Palestinians agree to halt weeks of fighting', *The Guardian*, 27 August 2014.

671 Human Rights Watch, World Report 2015: Israel/Palestine, January 2015, 308-318, *available at* www.hrw.org/sites/default/files/wr2015_web.pdf (accessed 20 April 2015).

672 UN Human Rights Council, Resolution S-21/1, A/HRC/RES/S-21/1, 23 July 2014.

673 ICC OTP Report, *Update on Situation in Palestine*, 3 April 2015, para. 1, *available at* www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf (accessed 20 April 2015).

674 Ibid paras 5-7.

675 UN General Assembly, Resolution 67/19, A/RES/67/19 (2012), 29 November 2012.

acceding to the Rome Statute or by means of an Article 12(3) ad hoc declaration to that effect.

After the events in the summer of 2014, Palestine did both. As noted, it made a declaration under Article 12(3) on 1 January granting the Court (retroactive) jurisdiction over the events in the summer of 2014, and it acceded to the Rome Statute the next day. The chosen order of these acts may be regarded as a bit strange, but it appears to be based on a particular, and in the author's view erroneous, reading of Article 11(2) of the Rome Statute. The provision dealing with temporal jurisdiction reads as follows: 'If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State *has made* a declaration under article 12, paragraph 3.'[676] The Palestinians may have thought that if they had first joined the ICC they could then not retroactively accept jurisdiction over crimes committed before they acceded to the Statute. In other words, Palestine may have thought that states parties cannot utilize Article 12(3) to endow the Court with retroactive jurisdiction. If indeed not intended for states parties, then a state must do what Palestine did: make a declaration first and then accede to the Statute – the latter move is technically not necessary for the purpose in question then. However, if states parties can use Article 12(3), then Palestine could have proceeded the other way around or have made both moves. This would have made more sense, because otherwise the Statute would seem to afford more options to non-member states than to states parties. The Statute appears to make prospective jurisdiction the norm, and affords an exception to that norm by means of the declaration option provided in Article 11(2). Moreover, the ICC's Appeals Chamber has stipulated that both prospective and retroactive jurisdiction are possible in case of an Article 12(3) declaration, namely when it addressed the issue in the *Gbagbo* case where the defense tried to argue the crimes that occurred after the declaration could not fall within the Court's jurisdiction.[677]

One of the questions that springs to mind in relation to Palestine is how this all relates to its status as a state. Only states can accede to the Rome Statute, as is reiterated in Article 125. While mostly outside the scope of this Chapter, it is nevertheless interesting to note that the ICC Prosecutor follows the UN when it comes to determining whether or not an entity may be regarded as a state. The discussion of how far this can go back in time – also to the time when the UN General Assembly did not regard Palestine as a state? – has become moot, now that the Article 12(3) declaration only goes back to 13 June 2014. Moreover, the ICC Prosecutor has made it clear she played it safe when she determined

676 [emphasis added].

677 *Prosecutor v. Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, ICC-02/11-01/11-321, AC, 12 December 2012, paras 83-84. See also generally A. Wills, 'Old Crimes, New States and Temporal Jurisdiction of the International Criminal Court', 12(3) *Journal of International Criminal Justice* 407 (2014).

that the previous Article 12(3) declaration was invalid due to the PNA's lack of statehood. This means that for Palestine retroactive jurisdiction cannot go back all the way to the entry into force of the Rome Statute (1 July 2002), but only to the moment Palestine became a state in accordance with the UN's determination of granting Palestine observer state status in November 2012.[678]

As noted above, the ICC Prosecutor commenced a preliminary examination based on the 12(3) declaration on 16 January 2015, and she did so as a matter of policy. The ICC Prosecutor will always open a preliminary examination in case of a 12(3) declaration, unless the situation is 'manifestly outside the jurisdiction of the Court.'[679] Palestine's declaration has been called a '12(3) referral,'[680] but that phrase causes confusion. Is an Article 12(3) declaration a (non-)state referral (a fourth type of triggering mechanism) or a precondition for exercising jurisdiction over non-member states? The OTP's Policy Paper on Preliminary Examinations is quite clear on this where it states: 'It should be noted that article 12(3) is a jurisdictional provision, not a trigger mechanism. As such, declarations of the sort should not be equated with referrals, but will require a separate triggering by the Prosecutor proprio motu or by a State Party.'[681] It is important to keep these things separated, because its qualification matters in light of Article 53(3). The Pre-Trial Chamber may review a decision by the Prosecutor not to proceed with an investigation in relation to a referral by a State Party or the Security Council in accordance with article 53(3). An Article 12(3) declaration therefore only leads to a precondition for the exercise of jurisdiction being fulfilled. Regarding Palestine, we must assume that if the Prosecutor decides to open an investigation pursuant to Article 53(3), jurisdiction has been triggered by the *proprio motu* option provided in Article 15, unless Palestine (or another State Party) explicitly refers the situation to the Court pursuant to Article 14.[682]

678 For a different view see Wills, *supra* note 677.

679 ICC OTP Policy Paper Preliminary Examinations, *supra* note 635, para. 76.

680 A. Whiting, 'The ICC Opening of a Palestine Preliminary Examination: A Non-Event', *Lawfare*, 16 January 2015, *available at* www.lawfareblog.com/2015/01/the-icc-opening-of-a-palestine-preliminary-examination-a-non-event/ (accessed 20 April 2015).

681 ICC OTP Policy Paper Preliminary Examinations, *supra* note 635, para. 40 n25.

682 There is still the possibility that Palestine will officially refer the situation to the ICC pursuant to Article 14, and it has indicated its intention to do so if the Prosecutor appears to be moving too slowly. See T. Escritt, 'Palestinians prepared to trigger case as they join ICC', *Reuters*, 1 April 2015, *available at* www.reuters.com/article/2015/04/01/us-israel-palestinians-icc-idUSKBN0MS41B20150401 (accessed 20 April 2015); A. Whiting, 'On Palestine's Decision to "Hold Off" on Referring the Situation in Palestine to the ICC', *Lawfare*, 2 April 2015, *available at* www.lawfareblog.com/2015/04/on-palestines-decision-to-hold-off-on-referring-the-situation-in-palestine-to-the-icc/ (accessed 20 April 2015).

6.4 Conclusion

Expectations are often too high with respect to the ICC – a court of last resort with limited means and a restricted jurisdictional reach. In relation to prosecuting foreign Islamic State fighters, the fact that the Statute theoretically allows an ICC probe does not mean it is justified or realistic to proceed. Not only do the jurisdiction requirements create problems, the practical concerns are immense, too, bearing in mind the difficulties and danger involved with investigating in IS-controlled areas. Having said that, a mere possibility of a preliminary examination, or even a press release by the Prosecutor as was issued in April 2015 stating the reasons for *not* commencing one at this stage,[683] can serve as catalyst for national prosecutions and definitely puts accountability for IS crimes on the international agenda. The truth remains that the only way IS atrocities can be dealt with comprehensively is if, in addition to national jurisdictions, the SC, Syria, or Iraq take action to that end – the SC by referring the situation to the ICC and Syria or Iraq by acceding to the statute or accepting the court's ad hoc jurisdiction.

It is difficult to gauge whether the same can be said of the situation in Palestine, where the Prosecutor as a matter of policy did in fact take the next step in a preliminary examination, namely by proceeding to phase 2, which is a preliminary examination's official commencement. While legitimate questions have been raised regarding whether the ICC Prosecutor is truly equipped to deal with such a politically fraught situation as the Israel-Palestine conflict,[684] the political ramifications of the ICC's probe into the situation are beyond the scope of this Chapter's discussion of the Court's legal framework and jurisdictional scheme. Putting the debate on the situation's temporal boundaries to rest for now, as there is a clear and legitimate starting point of the situation on 13 June 2014, at least the ICC has jurisdiction to deal with the events in the Occupied Palestinian Territories within clear parameters and there are no jurisdictional restraints regarding who to eventually investigate, as opposed to IS-related endeavors.

The triggering mechanisms and the preconditions for exercising jurisdiction are two separate matters and they should be carefully distinguished from one another in order to allow for exact situational demarcation of an examination or investigation. The two case studies in this Chapter show, however, that the jurisdictional scheme of the Rome Statute, which is in fact the first step of demarcation, is complex and at times inevitably restricted, especially if active nationality is the basis for jurisdiction. What this Chapter has also shown is that demarcation at its earliest stage – the ICC's (triggering and) situation phase – is inevitable entangled with questions of public international law such as those regarding

683 ICC OTP Press Release regarding IS, *supra* note 662.

684 N. Karin, 'The Establishment of the International Criminal Tribunal for Palestine (Part II)', *Just Security*, 22 January 2015, *available at* http://justsecurity.org/19301/establishment-international-criminal-tribunal-palestine-part-ii/ (accessed 15 March 2015).

statehood, and even larger questions of how the Court operates in the world today. Particularly the rise of the Islamic State and the perpetual crisis in the Middle East demonstrate that demarcating the jurisdictional reach of the ICC, while technically a strictly legal matter, is an endeavor fraught with global politics – a realm in which the Court is merely one of many pawns.

7 Overall Conclusion and Outlook

Law *is* demarcation. The endeavor of establishing, applying, and interpreting rules isolates the relevant from the irrelevant, separates the included from the excluded, and marks the boundaries of what lies within and what goes beyond the law's sphere of influence. Setting parameters serves purposes of particular weight in criminal law, as stakes are generally regarded as being higher, or at least more profound, than in other litigation. Lives have been damaged or lost, and the prosecuting entity is prepared to exert its most intrusive power upon those subjected to the criminal process: impose the temporary or indefinite restriction of freedom, and in some countries still, enforce the penalty of death. Determining what is, and what is not, part of a criminal prosecution is the crucial yet often inexplicit undertaking that this dissertation has sought to make explicit with regard to international crimes.

Departing from the typical nature of international crimes (Part I), this dissertation has explored the outer boundaries of international criminal prosecutions on two levels: (i) the micro level of a case (Part II), and (ii) the macro level of the jurisdictional system of one specific international institution: the permanent International Criminal Court (Part III). What became apparent in this study is that the problems regarding the indistinct parameters of international crime prosecutions – caused by the challenges mentioned in the Introduction and Chapter 2: fact-finding impediments, the complexity of facts, the quantity of evidence, the magnitude of the crime, and the pursuance of idealistic goals – attach to one particular aspect of the prosecutorial effort most frequently, especially where the factual boundaries on the micro level are being examined: unearthing the connection between the accused and the crime(s). This connection is often the subject of legal dispute and scholarly debate in the international criminal justice field, and rightly so. Especially from a substantive law point of view, it has been observed many times before that there is an inherent 'linkage' challenge in terms of modes of liability in international crime cases.[685] Also, the many studies into fact-finding impediments have shown the practical difficulties of establishing the position of the accused vis-à-vis the crime(s), and finding reliable linkage evidence to that end.[686] However, the demarcation approach taken in this research shed new light on the linkage dilemma. As such, it did not illuminate the modes of participation debate or the practical fact-finding concerns, but centered on that which lies in between and is often overlooked: the legal ramifications of how facts and evidence are used and the

685 See *supra* note 83.
686 See *supra* note 6.

jurisdictional schemes that influence the overall parameters of international criminal prosecutions.

As the main vessel of demarcation in a criminal trial, indictments are a crucial starting point in this respect. In the early days of the history of international criminal justice, indictments' lack of specificity was the norm rather than the exception. At the International Military Tribunal in Nuremberg, the indictment did not mention the accused individually, but merely referred to those on trial as 'all the defendants.' Their names and roles were listed in one of the indictment's appendices, which dedicated one short paragraph to each defendant stating their occupation and activities during the Second World War as well as a very minimal explanation of their involvement in each count. Similar to the Nuremberg indictment, at the IMTFE, the defendants' names and occupations were listed in one of the appendices, yet hardly any specifics were provided regarding the defendants' individual conduct. Australian Judge and President of the IMTFE Sir William Webb even explicitly stated in an order dismissing a defense's motion for a bill of particulars that the actual role played by the accused in a conspiracy does not need to be specified.[687] The majority of the 12 indictments of the post-WWII military prosecutions under Control Council Law No. 10 was not much different, suffering from a lack of detail, too. They simply asserted that the defendants were charged with 'special responsibility,' which was further left undefined, regarding the crimes they had committed in connection to the Second World War.[688]

From an early point on, the absence of the specifics of the link between the accused and the crimes in the indictment has been attributed, directly and indirectly, to the nature of international crimes as collective, systematic violence on a large scale. It was first noted, claiming that drafting indictments in general terms was not only necessary but also proper, in the judgment of the Control Council Law No. 10 *Justice* case: '[n]o indictment couched in specific terms […] could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.'[689] This sentiment would remain prevalent for well over half a century. The early decisions of the ad hoc Tribunals also pointed at the magnitude and complexity of international crimes in defense of lowering standards of specificity of charges. However, modern day international criminal justice can no longer afford the luxury of avoiding linking the accused to the crime, and more importantly, it no longer regards vagueness of charges as being 'proper' by default. The field has indeed come a long way with respect to individualizing and particularizing guilt, but as is demonstrated by the abundant litigation regarding the principle of specificity of charges at the contemporary international and hybrid criminal courts and tribunals as discussed in this dissertation, the endeavor remains a taxing one.

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687 See *supra* Chapter 3, Section 3.2.1, accompanying text at n150.
688 See *supra* Chapter 3, Section 3.2.1, accompanying text at n152.
689 See *supra* Chapter 3, Section 3.2.1, accompanying text at n162.

With respect to the micro level and the initially asked sub-question of how the factual parameters in an international crime case are set in the face of demarcation challenges, the following concluding observations may be made. First, the earliest international crime prosecutions already showed that the quality and accuracy of fact-finding greatly influences how the charges against an accused are eventually framed – the most detailed Control Council Law No. 10 indictments were the ones in the *Einsatzgruppen* and *Hostage* cases that both benefited from detailed testimony and evidence presented earlier at the IMT trial in Nuremberg.[690] In other words, a correct use of facts and evidence, and indictments in which material facts are clearly distinguished from subsidiary facts and (other) evidence, must be preceded by accurate fact-finding. But there is more to it than that in prosecutions involving international crimes. The differentiating factors identified in this dissertation, i.e. those typical features that set international crimes apart from ordinary domestic crimes, such as the (didactic) goals generally associated with international criminal justice, the contextual elements found in crime definitions, but also the use of contextual or pattern evidence, contribute to the lack of individualization and obscure the link between the accused and the crime.

For instance, in relation to the *Eichmann* trial in Israel in 1961, Arendt has noted there is no place for history-telling in a criminal trial, as it breaches due process rights and results in a bad sense of history. She dismissed Attorney-General Gideon Hausner's attempt at reaching such higher didactic goals as 'cheap rhetoric.'[691] The goal of history-telling, which indeed widens the scope of a criminal trial considerably due to the additional information that may then be considered legally relevant to a particular case, is generally no longer considered a legitimate pursuit in international criminal prosecutions. However, the political and historical context in which international crimes take place cannot be ignored categorically, as it is, first, part of the crime definition to varying degrees depending on the particular crime prosecuted, and second, potentially sheds valuable light on the role the accused played within that context. The political and historical context colors the link between the accused and the crimes on the ground, for which purpose evidence and subsidiary facts may be introduced. At the same time, however, this exposes the criminal trial to the risk that assumptions are made and conclusions are drawn based on the accused's occupation or position within that context (i.e. background information), and not the accused's specific actions. As was the case with the post-WWII indictments, the accused's precise link to the crimes could remain couched in generalities if a proper use of facts and evidence, i.e. sufficiently identifying the material facts of a case, it not employed.

Second, and flowing from the first observation above, the use of background information and context has continued to cause demarcation problems in the sense of insufficient

690 Most notably by the testimony of Otto Ohlendorf at the IMT. See *supra* Chapter 3, Section 3.2.1, n159.
691 See *supra* Chapter 2, Section 2.2.1.3, accompanying text at n49.

identification of the material facts for the purpose of framing the indictment (and setting the factual scope of the trial). A strict distinction must be made between where the political and historical context is indeed part of the crime definition, and therefore part of the case's material facts that must be proven beyond a reasonable doubt, and where such context serves other purposes, such as to provide background information or establish an evidentiary pattern. In the absence of a meticulous distinction, the factual boundaries of a case are at risk of being stuck in a perpetual state of fluctuation to the detriment of the accused, especially at the ICC in light of the possibility provided for in Regulation 55.

This brings us to the third observation. The trials and tribulations surrounding Regulation 55 at the ICC, pursuant to which the legal qualification of the facts may be modified in the final judgment, is one of the many expressions of this inherent 'linkage' challenge in terms of establishing the materials facts of a case. Of the three feasible types of recharacterization, i.e. with respect to the contextual elements, the underlying (sub-)categories of crimes, and the mode of participation, it is the connection between the accused and the crimes that is most often, and at times with very worrisome consequences,[692] subjected to recharacterization. It is also the type of recharacterization regarding which other methods are surfacing in practice. Alternative charging with respect to modes of liability is making headway at the ICC, as demonstrated by the most recent Confirmation of Charges decisions issued in 2014, making the subject a recommendable topic for future research.

With respect to the macro level, a few additional concluding observations may be made. The initial sub-question was whether there are similar demarcation problems discernible at the situation stage of investigations at the ICC in relation to jurisdictional matters. On the one hand, the answer is yes, but only to a certain extent. In determining the scope of an international criminal prosecution in terms of jurisdiction, which regulates situational demarcation, tension arises, or perhaps more accurately, a disconnect occurs as to the link between the most responsible and the crimes that appear on the ICC's radar: how to get to the most responsible alleged perpetrators within the limited jurisdictional bounds of the Court? Jurisdictional limitations will more often than not entirely break the link between the crimes on the ground and those allegedly most responsible. For example, regarding the Islamic State, the connection simply cannot be established with respect to the ICC, because those probably most responsible do not fall within the territorial or active nationality jurisdiction of the Court as it stands today. Any type of individualization of responsibility will have to be achieved through different avenues, i.e. national prosecutions of international crimes or following a Security Council referral, or perhaps cannot be achieved at all at the moment. On the other hand, the answer to this sub-question is no: demarcation at the macro level encounters its own unique challenges. As shown by the

692 See *supra* Chapter 4, Section 4.3.2.3 for the most telling example in this respect, namely the recharacterization of the mode of liability in the *Katanga* case.

due process thesis debate in light of complementarity, and by temporal jurisdiction in light of 12(3) declarations, the ICC Statute leaves a few demarcation issues in the sense of institutional reach and influence unresolved or at least ambiguous and up for debate.

In general, though, the 'linkage' challenges on different levels show that international criminal justice struggles the most with the one thing it set out to do: realizing individual criminal responsibility for collective, systematic violence. In relation to the fact that international crimes are crimes of context, Koskenniemi boldly stated individualization is impossible altogether.[693] Others have been less pessimistic, stating in relation to the collective nature of international crimes that it does not preclude holding alleged perpetrators individually responsible.[694] While their trials have certainly not been flawless, one cannot deny that international and hybrid criminal courts and tribunals have indeed been able to hold perpetrators individually responsible. Even if individualization is not impossible per se, should we still not get rid of modes of liability and opt for a unitary approach, i.e. "a unitary theory of perpetration that collapses all modes of liability into a single standard,"[695] in order to make the overall endeavor more realistic and easier to demarcate? Getting rid of the modes of liability has been suggested with respect to international criminal justice.[696] While seemingly an extreme measure, the suggestion provides invaluable food for thought, and perhaps represents the logical next step after alternative charging practices that deserves additional research. Preserving the individualization of guilt while abandoning the prerequisite of providing only one (circumvented by alternative charging) or any (circumvented by getting rid of modes of liability altogether) legal particulars of the link between the accused and the specific crimes might result in more honest charges. However, it does not translate well to national courts which deal with international crimes themselves and have their own substantive laws governing individual criminal responsibility. Furthermore, it leaves evidentiary problems mostly untouched: it will not make these crimes necessarily easier to prove, and moreover, less particularity in the charges may enhance the problem of insufficient identification of material facts.

This study did not allege to solve the most difficult puzzle in international criminal justice – linking the accused to the crime will undoubtedly remain the subject of much (practical and scholarly) debate for many years to come. However, it did find there is more to solving the puzzle than scrutinizing modes of liability and practical fact-finding issues, as it focused on the often-neglected rules of facts, charging, and jurisdiction governing demarcation most directly. Thus, this dissertation advocates a more meticulous stance

693 See *supra* Chapter 2, Section 2.2.2.2, accompanying text at n81

694 See *supra* Chapter 2, Section 2.3.1, n102.

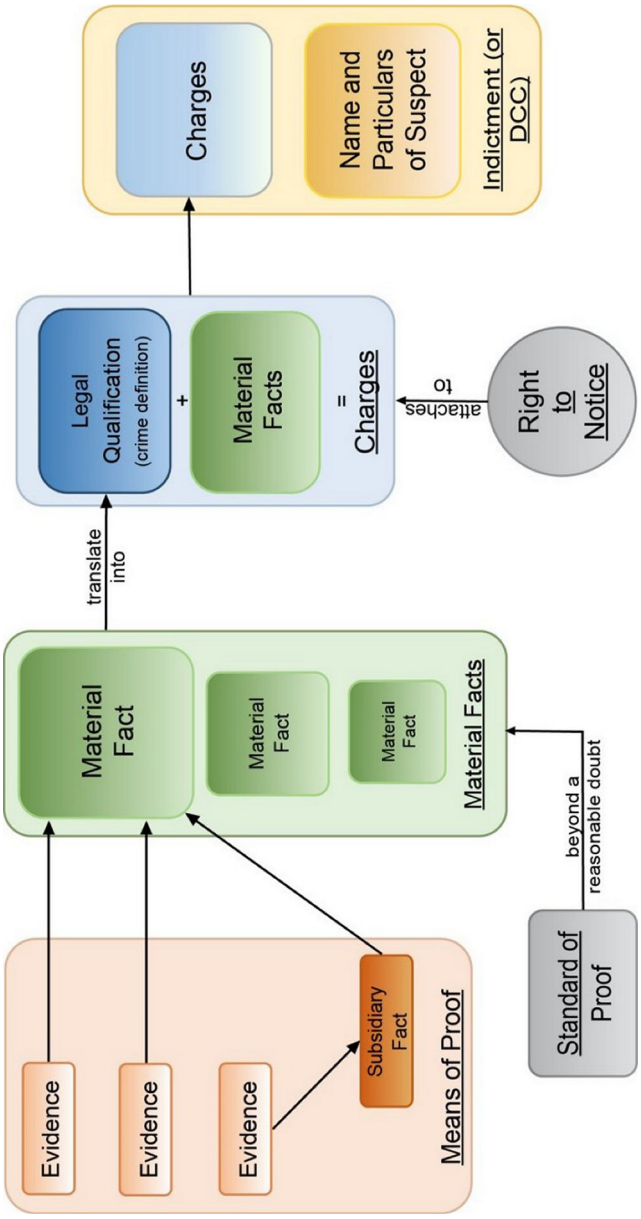
695 J.G. Stewart, 'The End of 'Modes of Liability' for International Crimes', 25(1) *Leiden Journal of International Law* 165 (2012), 172 ('On this account of blame attribution, only a causal contribution and the mental element required for the offence would be necessary; all those who contribute to international crimes would be deemed perpetrators, dispensing with all other forms of legal classification.').

696 Ibid.

towards and respect for the basic building blocks that are the essentials of a criminal prosecution: (material) facts, evidence tendered to prove those facts, charges, indictments, and the jurisdictional schemes by which the entire prosecutorial endeavor is delimited in advance. Accordingly, the main research question that was asked from the outset – what are the outer limits of an international criminal prosecution? – is to be answered by using the tools identified in this research, and which are appended to this dissertation for practical use. The crime being the element that glues the pluralistic legal order in the field of international criminal justice together, national systems dealing with international crimes may benefit from those tools as well. After all, prosecuting international crimes globally is not a task for one court or tribunal to take on alone; large-scale, collective violence demands a comprehensive, collective response.

Appendix 1

Evidence, Facts, and Charges



Appendix 2
The 10 Pleading Principles

Indictment

1. The indictment must contain enough detail to inform the accused clearly of the nature and cause of the charges to allow him or her to prepare a defense.

2. An indictment must be considered as a whole, not as a series of paragraphs existing in isolation.

Material Facts

3. All material facts substantiating the charges must be pleaded, but it is not required to plead the evidence used to prove the material facts.

4. Each of the material facts must be pleaded expressly, however, in some circumstances it may suffice if they are expressed by necessary implication.

5. Whether a fact is material depends on the nature (i.e. legal qualification) of the prosecution's case.

Conduct of the Accused

6. Decisive in respect of materiality is the nature of the alleged criminal conduct charged against the accused, and more specifically, the proximity of the accused to the events alleged in the indictment.

7. If the accused person is alleged to have personally committed the acts giving rise to the charges against him, the material facts must include such details as the identity of the victim, the place and the approximate date of the events in question, as well as the means by which the offense was committed. As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the pros-

ecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.

8. The legal qualification of the accused's liability, including the particulars thereof, must be expressly pleaded in the indictment.

- Joint Criminal Enterprise: The prosecution must include in the indictment whether physical commission or participation in a Joint Criminal Enterprise (JCE) is charged. It is insufficient to merely make a broad reference to Article 7(1), which deals with individual criminal responsibility, of the ICTY Statute. Whether or not the type of JCE is to be pleaded expressly is unclear. Most chambers at the ad hoc Tribunals dictate that the type of JCE must be specified, but some state that this is only preferable. All chambers seem to agree though that when charging JCE the indictment must also include the nature, purpose, and time or period over which the joint criminal enterprise is said to have existed, the identity of its members insofar this is known, but at least by reference to their category as a group, and the nature of the accused's participation in that enterprise.
- Accomplice liability: the Prosecutor must plead clearly the acts – meaning the "particular acts" or "the particular course of conduct" – by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.
- Command or superior responsibility: the material facts that must be pleaded in the indictment include the accused's position as a superior of identified subordinates over whom he or she had effective control – in the sense of a material ability to prevent or punish criminal conduct – and the subordinates' acts for which he or she is allegedly responsible. The accused's knowledge – who must have known or had reason to know – of the crimes must be indicated. And finally, the conduct of the accused by which he or she may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them must be specified.

Mens Rea

9. If the state of mind (*mens rea*) of the accused is relevant to the charges, the indictment must either (i) contain the state of mind as a material fact, or (ii) set forth the evidentiary facts – i.e. facts that prove material facts – from which the state of mind is to be inferred.

Dates, Locations, and Other Particulars

10. A date – and by analogy other specifics such as location – may be considered to be a material fact if it is necessary to inform the accused clearly of the charges so that he or she may prepare his or her defense, but a reasonable range of dates may be pleaded where precise dates cannot be specified, and a broad range of dates does not of itself invalidate a paragraph in an indictment.

Summary

This dissertation explores the jurisdictional and factual boundaries of international prosecutions of core international crimes, i.e. war crimes, crimes against humanity, and genocide. By nature, such crimes have indistinct factual parameters. They generally occur on a massive scale, spread out over a large geographical area and a long time span, involving many perpetrators at various distances from the crime scene(s). These characteristics make international crimes difficult to demarcate from start (when determining the jurisdictional scope for the investigation in its earliest stage) to finish (pronouncing the final judgment on the charges as delineated in the indictment). Accurate jurisdictional and factual demarcation of international crimes prosecutions is important, though, for many reasons and from various perspectives: victims have an interest in knowing whether the particular harm they suffered is being dealt with in the criminal case addressing the events giving rise to international criminal charges; an accused must be notified of those charges and the exact events he or she personally stands accused of; moreover, if a particular international criminal court or tribunal does not have jurisdiction over (part of) the events, which domestic or international institution will deal with what happened on the ground, or in other words, how are impunity gaps addressed?

There are certain legal and factual characteristics of international crimes that differ from ordinary domestic crimes – i.e. a single murder or robbery committed in no discernible political or historical context. Characteristics such as the contextual element of an armed conflict, the massive scale upon which such crimes and victimization occur, and the wide range of perpetrators involved act as differentiating factors relevant for the parameters of the case. The premise here is that, despite institutional and legal diversity amongst national and international tiers of international criminal law (ICL) enforcement, the crimes and their typical features are the common factors that bind the ICL field. Instead of magnifying the differences between systems' substantive and procedural laws, this dissertation departs from this crime-based common ground.

The main research question addressed in this dissertation is: what are the outer limits of an international criminal prosecution? Exploring the outer limits of international criminal prosecutions entails researching those legal aspects that influence demarcation: jurisdiction, charges, and identifying material facts by adequately distinguishing them from background information and evidence for the purpose of the indictment. Thus, the chapters in this dissertation, which consists of articles previously published or accepted for publication as indicated per chapter, deal with demarcation issues on various levels, taking the nature of international crimes as point of departure.

The first part of this dissertation, titled The Nature of the Crime, deals with this point of departure in Chapter 2 by exploring the *sui generis* nature of international crimes and the goals usually associated with international criminal justice. This Chapter shows that certain typical features of international crimes set these crimes apart from ordinary crimes. Such features lead to an exponential increase of information that must be considered and managed at all stages of investigation, prosecution, and adjudication. The amount of information can help prove the relevant fact where, due to subpar quality of individual pieces of evidence, it serves the purpose of corroboration (and not merely repetition). But quantity also leads to time- and information-management problems that should not be underestimated, and that may contribute to difficulties discussed in Parts II and III of this dissertation. Chapter 2 does not come up with new evidentiary rules allowing to better deal with the tremendous amount of information relevant in the prosecutions of international crimes. Instead, it illustrates the point that the search for procedural solutions that may prove effective in international crimes cases both at the international and national level should proceed from the systematic review of the unique characteristics of international crimes. Such a review will also be indispensable for identifying the problems intrinsic in core crimes prosecutions, such as demarcation difficulties, and the extent to which the available solutions provide an adequate response to those problems.

The second part of this dissertation, titled Factual Demarcation at Case Level and consisting of Chapters 3 and 4, discusses demarcation at the micro level of individual cases. Chapter 3 explores the factual scope of an international criminal prosecution by seeking to ascertain the following: how specific should the charges in an international crimes case be, which circumstances play a role in answering this question, and what influences (lack of) specificity? The focus is therefore on case demarcation in light of an investigation or a case against an identified suspect or accused, and centers on the indictment phase of criminal proceedings. The Chapter identifies pleading principles (listed in Appendix 2) as developed at the international criminal courts and tribunals, and researches the difference between material facts, subsidiary facts, and evidence (outlined in Appendix 1). This Chapter also contains a review of all historical post-WWII indictments, both the international ones and the military ones. Since the indictment is the core document providing notice to the accused, it is of paramount importance to ensure charges are specific, and material facts, upon which the case's outcome depends critically, are distinguished from subsidiary facts and background information. This Chapter addresses these issues of vague charges and evidentiary imprecision from new angles, being mindful of the fact that the accused's right to know the case against him or her embodies the essence of a fair trial: the right to defend oneself.

Chapter 4 continues researching case demarcation at the micro level by taking a closer look at Regulation 55 of the ICC's Regulations of the Court. Pursuant to this provision, the Chamber may modify the legal characterization of facts in its final judgment as long

as the new legal label does not exceed the facts and circumstances described in the charges. Building upon the pleading principles as identified in the foregoing chapter, Chapter 4 addresses the question which changes are permissible. It not only scrutinizes the ICC's relevant case law to date, but also explores additional feasible types of recharacterization, i.e. with respect to changes regarding the contextual elements, the underlying (sub)categories of crimes or the form of participation. It then assesses for each type of alteration of a legal characterization of facts whether it (hypothetically) exceeds the facts and circumstances described in the charges of a case. Recharacterization must not exceed the facts and circumstances described in the charges, but material facts and their legal qualification are like communicating vessels. Changing the latter affects the former (and *vice versa*). In their application of Regulation 55 to date, ICC chambers have underappreciated this, treating cases as if they have blurry factual boundaries where material facts can be swapped, neglected, or created at will. This Chapter is not a plea for abolition of Regulation 55, though, but explores which modifications are permissible, and finds that when comparing a change regarding the contextual elements or (sub)categories of crimes to a change regarding the mode of participation the latter is most problematic and often detrimental to the rights of the accused.

Continuing the demarcation theme, the third part of this dissertation, titled Jurisdictional Reach of the International Criminal Court, consists of two chapters dealing with demarcation at the macro level, addressing jurisdictional delimitation of the ICC. Chapter 5 deals with admissibility in light of the due process thesis – the idea that, through the principle of complementarity, the ICC positively influences domestic due process protections. It scrutinizes critiques of the due process thesis by assessing whether there is a legal basis for the Court's influence through an analysis of two of the Rome Statute's safeguards against failing national justice systems, namely the admissibility criteria found in Article 17 and Article 20(3). It shows that the Court's influence may extend to domestic due process rights. The Rome Statute's complementarity principle leaves room for such an interpretation, *inter alia*, by demanding regard to due process as recognized by international law when the Court assesses admissibility – a liberal interpretation of which is known as the due process thesis. However, the Chapter suggests a narrower approach, only in cases of gross violations of core fair trial rights. Then, the Chapter examines how this moderate form of the due process thesis might affect evidence law. The reason for this is twofold. First, most evidentiary rules can be construed as a form of due process protection, rendering them a comprehensive area of law suitable for examination. Second, evidence law is inseparable from the practical problems of fact-finding impediments, which are currently widely discussed in the international criminal justice discourse.

Chapter 6 addresses the other side of the coin and makes demarcation at the macro level more concrete by researching situational demarcation in light of the ICC triggering and jurisdictional scheme. The Chapter explores the outer limits of the ICC's factual reach

by examining whether the jurisdictional scheme of the ICC Statute, which in fact regulates the first step of demarcation, at times leads to inherently unrealistic conditions or demarcation difficulties. It uses two case studies pertaining to the Middle East and North Africa region to do so: (1) the ICC's problematic jurisdiction over foreign fighters joining the ranks of the Islamic State (IS); and (2) Palestine's accession to the ICC Statute. The triggering mechanisms and the preconditions for exercising jurisdiction are two separate matters and they should be carefully distinguished from one another in order to allow for exact situational demarcation of an examination or investigation. The two case studies in this Chapter show, however, that the jurisdictional scheme of the Rome Statute is complex and at times inevitably restricted, especially if active nationality is the basis for jurisdiction. What this Chapter also shows is that demarcation at its earliest stage – the ICC's (triggering and) situation phase – is inevitable entangled with questions of public international law such as those regarding statehood, and even larger questions of how the Court operates in the world today. Particularly the rise of the Islamic State and the perpetual crisis in the Middle East demonstrate that demarcating the jurisdictional reach of the ICC, while technically a strictly legal matter, is an endeavor fraught with global politics – a realm in which the Court is merely one of many pawns.

What became apparent in this study is that the problems regarding the indistinct parameters of international crime prosecutions – caused by the challenges mentioned in the Introduction and Chapter 2: fact-finding impediments, the complexity of facts, the quantity of evidence, the magnitude of the crime, and the pursuance of idealistic goals – attach to one particular aspect of the prosecutorial effort most frequently, especially where the factual boundaries on the micro level are being examined: unearthing the connection between the accused and the crime(s). This connection is often the subject of legal dispute and scholarly debate in the international criminal justice field, and rightly so. Especially from a substantive law point of view, it has been observed many times before that there is an inherent 'linkage' challenge in terms of modes of liability in international crime cases. Also, the many studies into fact-finding impediments have shown the practical difficulties of establishing the position of the accused vis-à-vis the crime(s), and finding reliable linkage evidence to that end. However, the demarcation approach taken in this research sheds new light on the linkage dilemma. As such, this dissertation does not illuminate the modes of participation debate or the practical fact-finding concerns, but centers on that which lies in between and is often overlooked: the legal ramifications of how facts and evidence are used and the jurisdictional schemes that influence the overall parameters of international criminal prosecutions.

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