

COMMENT

OTTO TRIFFTERER

I. INTRODUCTION

Human Rights have experienced a tremendous extension by number and 'quality' not only since the French Revolution, but even more in various differentiations since the period of decolonisation and self-determination, in particular after the Second World War. They now embrace all kinds of rights and duties of individuals and groups and are developed as well as promoted, but equally violated by individuals or different national and international institutions and organisations.¹

To put them in a nexus to the International Criminal Court makes both of these issues not more transparent and understandable. This connection rather demonstrates that several legal institutions approach each of these two matters from different angles and may serve different purposes. Both as well as their interdependency therefore justify an introduction.

With regard to genocide this complexity becomes at least a little, though not much more transparent; because this crime under international law, acknowledged and defined since 1948 in detail in a Convention, is one of the most complicated violations of Human Rights. It triggers for instance individual criminal responsibility for the completed crime, even if the intent of the perpetrator; to destroy the group the victim belongs to, is not (yet), and perhaps will never be realized, notwithstanding serious (additional) endeavours of the perpetrator.² This third subject matter to be discussed in this session therefore also needs an introduction.

¹ For the development and for violations of Human Rights all over the world see the Reports of Human Rights Watch, visible under <http://www.hrw.org/> (13 Oct. 2009).

² See for instance O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as expressed in Article 28 Rome Statute?', in: 15 *Leiden Journal of International Law* (2002) 179-205.

The task ahead

My task as a commentator has to be orientated on two aspects: the 'Program' of the Conference and the contribution of Prof. Skubiszewski. The XV Plenary Session of the Pontifical Academy of Social Sciences is dedicated to 'Catholic Social Doctrine and Human Rights'. While the first and the third Session of the 'Program' emphasize the relation of Human Rights to the Catholic Church respectively the Christian vision of men and international justice, the others take a more neutral approach to Human Rights. So does for instance our Section Four, 'Surveying and Enforcing Human Rights'; it addresses the issue without approaching or limiting it by a relation to the Christian vision or the Church.

Against this background my task is to analyze the three issues just mentioned and I have to comment within this context on what Prof. Skubiszewski has contributed to 'Human Rights and the International Criminal Court'. My obligation thus makes it necessary to consider scope and notion of both issues as mentioned in this heading, to find out whether the Court protects in particular the Christian and Catholic Church-achievements or what other interdependences may exist between Human Rights and the Court.

The contribution of Prof. Skubiszewski is convincing and I agree in principle and in detail with all what he has presented. To comment on this would thus be a repetition. Therefore, my comment will concentrate on the theoretical structures and the practical handling of what Prof. Skubiszewski presented to us with regard to the subject matters, including the crime of genocide.

For this orientation, we do not have to recall the Human Rights recognized and promoted by the Church and the Catholic Social Doctrine. They are analyzed and evaluated in other parts of this Plenary Session.³ Here we merely have to survey scope and notion of the International Criminal Court to find out, whether and to what extent the Rome Statute acknowledges, guarantees or merely enforces already existing Human Rights, when exercising its specific role and function, to contribute to the prevention of the crimes listed in Article 5 Rome Statute and defined in the following Articles 6 to 8 there.

A similar attention has to be given to the 'crime of genocide', which according to the organizers of this Plenary Session, shall serve in my comments as an example. The definitions for its various alternatives correspond almost verbally, wherever they are included into one of the several different

³ See for instance the presentation of Prof. Herbert Schambeck to this Plenary Session, *Die Menschenrechte in der Lehre der katholischen Kirche*.

international documents. This perpetuation of defining genocide since more than 50 years with identical formulations makes this crime a particular suitable example for a demonstration of the practical importance of crimes under international law for protecting Human Rights over the years. In addition, genocide demonstrates more than other core crimes, falling within the jurisdiction of the Court, the relationship and interdependence between Human Rights emphasized by the Catholic Social Doctrine (CSD) like life, freedom of religion and the right to have, as well as to grow up in a family on the one side, and most serious crimes of concern to the international community as a whole on the other; because it endangers collective and individual Human Rights alike through various threats.

In this context it plays also a role that genocide can be committed by one person on a single member of a protected group.⁴ Because characterizing for all alternatives is that they are punishable only when committed with the (additional) intent, to destroy more, namely that 'group as such, in whole or in part', just by that act or omission of the perpetrator against one or several of its members. This (additional) intent goes beyond the ordinary *mens rea* required for all material elements, as already mentioned above. It therefore does not need its realisation to have a completed crime, as long as such an intent exists: *Vice versa*, without it, therefore, no crime of genocide, not even an attempt, is committed.⁵

Though acting in or out of a position of power is not required, it is rather typical for the commission of genocide; because in principle only such a position enables the perpetrator to continue with and achieve a result for his 'line of intent'; he or she thus may finally and more easily reach what they have been 'going at': a broader achievement of criminal harm as on first sight visible: an additional consequence of his or her genocidal act.

Further, genocide is an especially suitable example not only for my task, but also for many new international criminological appearances; because the tendencies and endeavours for an economical, political and social globalization are quite often accompanied by an intent, to destroy a specific group or at least endanger their identity to cut out resistance; only strong

⁴ See for instance W.A. Schabas, 'Article 6 – Genocide', in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd ed., 2008), at 148 *et seq.*

⁵ See for command responsibility without genocidal intent O. Triffterer, "Command Responsibility" – *crimen sui generis* or participation as "otherwise provided"?, in: O. Lagodny *et al.* (eds.), *Festschrift für Albin Eser* (2005) 901-924.

minority groups, namely, may be capable to effectively oppose activities to achieve globalization in whatever direction, endangering ethnical structures, the natural environment or even future life in the field. It therefore can not only be helpful, but is indispensable, to refer to the Introduction into our Program as well as to the latest encyclical letter on *Caritas in veritate* where these guarantees are dealt with.⁶

Finally, genocide, in particular in the context with globalization, is further not only dangerous for individuals and groups; it may also threaten 'peace, security and the well-being of the world', when natural resources are exploited or political power is strived at to reach a domination on a political or economic situation, two aspects which can not be left aside for our coming considerations.

I therefore will proceed in my analysis according to the following lines:

What is the Court and the present situation in which it is operating?

How can its approach to Human Rights be enforced?

Are there Human Rights established or shaped by the Catholic Social Doctrine which are or need in particular to be protected by the Court?

Shape Court decisions Human Rights and/or shape the Catholic Social Doctrine some alternatives of the core crimes?

As provided already in our Program, and due to the space available, these aspects can however only be 'surveyed' as can their 'enforcement'.

The Court and the ius puniendi of the community of nations in the international legal and political framework

While the nexus between Human Rights and the Catholic Social Doctrine, as well as the endeavours of the Church to guarantee and enforce universal divine law, for instance to abolish slavery, are easily to be found, such a context with the International Criminal Court is rather difficult to be made visible in the same way.⁷ However in the legal history of an inter-

⁶ See the Introduction into the Program of the XV Plenary Session of the Pontifical Academy of Social Sciences and also *Encyclical Letter Caritas in Veritate of the Supreme Pontiff Benedict XVI to the Bishops, Priests and Deacons, Men and Women religious the lay faithful and all People of Good Will on Integral Human Development in Charity and Truth*, 29 June 2009, visible under http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html (29 Sept. 2009).

⁷ For Human Rights in the Catholic Church in general see for instance W. Wolbert, *Was sollten wir tun? Biblische Weisung und ethische Reflexion* (2006) and id., 'Menschen-

national criminal jurisdiction the *ius puniendi* of the Pope in the Medievals has been referred to as the beginning of such an institution. The Holy Seat was, at that time, the only impartial supranational institution, which by its position of power on international Church – and non-Church matters was able to interfere for protecting the legal order between states with criminal measures.⁸

However, this starting position may remain open. More important than to have a look at the very beginning of the *ius puniendi* of the community of nations is the aspect that more legal and political institutions were and still are claiming competence to access grave violations of Human Rights and account them to states or their organs, though mainly not under penal aspects. The International Criminal Court therefore has to be separated for instance from the International Court of Justice; the later has jurisdiction not over individuals, but exclusively over states and has no *ius puniendi*. However, both Courts are partly overlapping. The ICJ claims jurisdiction over situations, for instance to assess whether during the belligerent struggles on the territory of former Yugoslavia the involved states were obliged to prevent and repress certain core crimes, like the massacre of Srebrenica as the commission of genocide.⁹

The Security Council also has jurisdiction with regard to situations endangering peace and security of the world, even with a sanctioning power under Chapter VII of the UN-Charter. This quasi-criminal-jurisdiction includes the assessment of belligerent struggles inside one state or between states and the power to react by political sanctions or even military interventions, if necessary to achieve peace and security or to protect civilians attacked.

In addition, several international, regional or universal commissions, tribunals and courts deal with Human Rights violations. They are not exercising a *ius puniendi*. But their jurisdiction may be called quasi-criminal because putting the moral blame on states and judging on the questions of compensations or on changing the starting position, for instance the legal basis, which formally has made it possible to violate individual rights in a

würde, Menschenrechte und die Theologie', in: 7 *SaThZ* (2003) 161-179. For slavery in particular see id., 'Der Proportionalismus und die in sich schlechten Handlungen', in: 45 *Studia Moralia* (2007) 377-399.

⁸ For details see H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (1952), at 19 *et seq.* with further references.

⁹ See the case *Bosnia and Herzegovina vs. Serbia and Montenegro*, ICJ, case 91, 26 Feb. 2007.

specific state, like in cases of legally permissible but unproportional too long pre-trial detention.¹⁰

All these institutions, like the European Court on Human Rights, have had already been called by Felix Ermacorea jurisdictions 'ohne Biss' (without any bite). They therefore are calling for the establishing of a better enforcement of Human Rights to prevent these violations and protect more effectively the most valuable Human Rights against the most severe violations,¹¹ in particular against dangers through those in power. The need for improvement became more and more urgent, though after Nuremberg the General Declaration on Human Rights 1948 and the 1966 two Covenants for civil and political respectively social and cultural Human Rights can be seen as a certain success.

Individual criminal responsibility under international law, ultima ratio protection for Human Rights

This underlying situation continued till the end of the last century. It therefore does not surprise that more and more ideas of the enlightening movement (Aufklärung) with its humanitarian endeavours were re-vitalized. The major political leaders called for more engagement of the international community as a whole to increase the effectivity of protecting Human Rights.¹² Consequently, the Major Powers intervened more frequently by using diplomatic and military means when in (other) states Human Rights were ignored or violated in an unbearable manner.¹³ Such

¹⁰ The European Court of Human Rights has placed particular emphasis on the obligation of authorities to show 'special diligence' when the accused is in pre-trial detention; see for instance the decisions *Punzelt v. Czech Republic*, ECHR, case Number 31315/96, 25 Apr. 2000, 169; *P.B. v. France*, ECHR, case number 38781/97, 1 Aug. 2000, 406; *Assenov and others v. Bulgaria*, ECHR, case number 24760/84, 28 Oct. 1998, 98; and *W. v. Switzerland*, ECHR, case number 14379/88, 26 Jan. 1993, 1.

¹¹ See F. Ermacora, 'Rechtspluralismus und universelle Menschenrechte', and O. Triffterer, 'Universeller Menschenrechtsschutz auch durch das Völkerstrafrecht?', both in: Hanns Seidel Stiftung (ed.), *Die universale Geltung der Menschenrechte, Politische Studien, Zweimonatszeitschrift für Politik und Zeitgeschehen, Sonderheft 1* (1995) 14-19 and 32-55.

¹² See for instance H. Jescheck, *Verantwortlichkeit*, supra note 8, at 39 and O. Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg* (1966), at 8.

¹³ See H. Jescheck, *Verantwortlichkeit*, supra note 8, at 40 and O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 8.

interventions however concentrated on the prevention or on the determination of violations.¹⁴ They had no penal character with regard to those in power who may have been responsible for these atrocities. For developing a new independent penal approach, the state sovereignty was still too strong and absolute. In addition, the principles, the States can do no wrong and *par inter parem non habet jurisdictionem*, had granted impunity to state organs, acting in official capacity. Therefore, the theoretical basis was not yet suitable at that time to promote the punishability of crimes committed by abuse of state power under national or international law.¹⁵

However, the pressure increased by the observation, that it was more or less at the disposal of those in power, not only to formally guarantee Human Rights on their territory, but also to ensure their practical enforcement worldwide. The result of the First International Investing Committee after the Balkan wars 1912/1913 was, that 'it would have needed only one word of those in power and all belligerent struggles and atrocities committed with them would have stopped immediately'.¹⁶

This statement raised new hope and called for common activities.¹⁷ Violations by abuse of state power became the main focus of interest for international penal regulations. Because those in power could in the majority of cases not be brought to court in their respective state and therefore an independent responsibility was needed at the international level. Its practical importance however, was limited to an *ultima ratio* protection in cases, where national laws and practice were not sufficiently effective, because the suspects are still in power or have good friends, protégés in the domestic legal system.¹⁸ After such a responsibility of the German Emperor, provid-

¹⁴ See H. Jescheck, *Verantwortlichkeit*, supra note 8, at 41 and O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 8.

¹⁵ See O. Triffterer, 'Article 27 – Irrelevance of Official Capacity', in: O. Triffterer, *Commentary*, supra note 4, at 780 *et seq.* and see for instance O. Triffterer, 'Irrelevance of Official Capacity, Article 27 Rome Statute undermined by obligations under international law or by agreements, Article 98?', in: I. Buffard *et al.* (eds.), *International Law Between Universalism and Fragmentation: Festschrift in honour of Gerhard Hafner* (2008) 571-662.

¹⁶ See L. Tindemans, *Unfinished Peace: Report of the International Commission on the Balkans – Carnegie Endowment for International Peace* (1996); the report of the International Commission on the Balkans is available online at <http://www.promacedonia.org/en/carnegie/index.html> (8 Oct. 2009).

¹⁷ See for instance O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 8.

¹⁸ See for instance O. Triffterer, 'Ursprung, Entwicklung, Gegenwärtiger Stand und Zukunftsperspektive für das Völkerstrafrecht und dessen Durchsetzung – Eine hohe

ed for in the Versailles Peace Treaty 1919, could not be enforced, and Nuremberg was criticised under several aspects of legality,¹⁹ the endeavours were interrupted by the 'Cold War' till at the end of the century the two ad-hoc Tribunals 1993 and 1994 and finally 2002 the ICC were established.

II. HUMAN RIGHTS, PROTECTED AND GUARANTEED BY THE COURT

It may be presupposed that everybody is (to a certain degree) familiar with the rights and duties of individuals. But as far as scope and notion of the International Criminal Court is concerned, the situation is different. The average person may know, that criminal law tries to prevent and punish grave violations of individual Human Rights and those of the community. But what the International Criminal Court has to do with state guarantees for Human Rights is not so obvious. In addition, we have to be aware, that the different organs of this Court have to guarantee procedural Human Rights when investigating and prosecuting. They therefore have to take due care not to violate such rights of suspects, witnesses and victims by any official activities of the Court. Since this obligation put the Court into relation to Human Rights, we have to find out about a possible interdependence of both categories of Human Rights. The following contribution shall help to better understand this subject matter.

1. *Theoretical foundation and structuring elements*

For developing a more effective policy of interventions to protect Human Rights against violations of the state, which ought to guarantee and

Rechtskultur, vornehmlich zur Bekämpfung krasser Formen von Macht- und Rechtsmissbrauch?', in: G. Fornasari/R. Wenin, *Aktuelle Probleme der Internationalen Strafrechtswissenschaft – Akten des XXVII. Internationalen Seminars deutsch-italienischer Studien, Meran 26.-27. Oktober 2007* (2009) 7-55, at 13 *et seq.*

¹⁹ See for instance G. Hankel, *Die Leipziger Prozesse – Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (2003) and M. P. Scharf, *Have we really learned the lessons of Nuremberg?*, Address presented 17 November 1995 during the conference 'Nuremberg and the Rule of Law: A Fifty-Year Verdict' held in the Decker Auditorium, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, November 17-18, 1995; the report is visible under http://www.pegc.us/archive/DoD/docs/Lessons_of_Nuremburg.doc (3 Oct. 2009): 'There were four main criticisms levied on Nuremberg. First, that it was a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law. Second, that the defen-

enforce these rights, quite a few changes in international law were necessary. Legal theory had to slowly create the basis for a 'real' international approach within a penal system, which ought to be 'supra-national' in the sense of 'above' the states and therefore possibly in conflict with the traditional law of nations and its absolute sovereignty of states.²⁰ For a long time therefore an independent 'world-Court' was not in sight. Most of the former proposals tried to overcome the difficulties by providing with regard to cases of relevant violations of Human Rights an *ad hoc* 'transfer' of part of their sovereignty respectively of the national jurisdictions to such an international court, for instance the Anti Terror Convention of the League of Nations.²¹

With regard to these endeavours it was right from the beginning agreed upon, that states could be the addresses of penal norms to implement them into their national legal systems; but that they could not be held criminally responsible themselves, as indirectly expressed by Article 25 para. 4. They were obliged to contribute to the prevention of such crimes, but the criminal responsibility rested with or was supposed to rest exclusively with human beings, who acted, and not with abstract entities.²²

a. *Individual criminal responsibility of natural persons under the law of states*

However, it was not so easy to hold natural persons accountable directly under the law of nations. They first had to be accepted as subject within this legal system. The acknowledgement of universal rights and duties of men therefore was the first step to open the development in the direction

dants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war. Third, that the Nuremberg Tribunal functioned on the basis of limited procedural rules that inadequately protected the rights of the accused. And finally, that it was a tribunal of first and last resort, because it had no appellate chamber'.

²⁰ See for instance the paper of Prof. L. Sabourin to this Plenary Session, *State Sovereignty and Humanitarian Intervention: the Duty to Protect*.

²¹ In 1934 the League of Nations took the first major step regarding terrorism by discussing a draft convention for the prevention and punishment of terrorism. Although the Convention was eventually adopted in 1937, it never came into force. Since 1963, the international community has elaborated 13 universal legal instruments and three amendments to prevent terrorist acts. See for instance *UN Action to Counter Terrorism*, visible under <http://www.un.org/terrorism/instruments.shtml> (21 Oct. 2009).

²² See for instance K. Ambos, 'Special Part: Art. 25 – Individual criminal responsibility', in O. Triffterer (ed.), *Commentary*, supra note 4, at 768 *et seq.* and O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 158 *et seq.*

of individual criminal responsibility 'outside' their own domestic systems or those of other states.

One of the starting points that has to be recalled on this occasion was, that every legal system carries the possibility in itself, to create and enforce penal law in order to prevent grave violations of its basic values, at least as *ultima ratio*.²³ To accept this also with regard to the law of independent states was viewed as an interference with their sovereignty, one of the basic pillars of their independence. It therefore would have been easier to accept for the states to build the international criminal law and its enforcement on a transfer of domestic jurisdictions to organs of the international community as a whole, as provided by the Anti-Terror Convention 1934.

But the historical development was more favourable for a direct international criminal responsibility as an inherent part of the legal system of this international community as a whole. The agreement of the states to this tendency was finally supported by the fact that states play anyhow an important role for the creation of the law of nations and its enforcement and therefore could influence the future development more than any other institution.²⁴

Before this background it was not surprising, that first humanitarian conventions, obliging the states to care for individual criminal responsibility of their citizens, sporadically made individuals directly responsible, for instance for breaking an armistice in the The Hague Law Article 41.²⁵

Consequently, the Peace Treaty of Versailles 1919 called the former German emperor to responsibility for breaking the law of wars and the holiness (sanctity) of treaties. This document demonstrates the abolishing of the 'Act of States Doctrine' and thus of the absolute sovereignty of the state, as already mentioned above: Organs of states acting in official capacity could no longer enjoy impunity and thus not be exempted from punishment.²⁶

²³ See for instance O. Triffterer, 'The Court in Danger? Future Perspectives for International Criminal Law and its enforcement mechanisms', in: C. Burchard *et al.* (eds.), *The Review Conference and the Future of the International Criminal Court – Proceedings of the First AIDP Young Penalists Symposium in Tuebingen, Germany* (forthcoming), under 1.A. therein.

²⁴ See for instance Art. 38 ICJ-Statute, where treaties are mentioned as the main source of international law.

²⁵ See Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 Oct. 1907, Art. 41: 'A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained'.

²⁶ See for instance O. Triffterer, 'Irrelevance of Official Capacity', *supra* note 15, 571-662.

To be effective, the new type of law should no longer favour a structure which provided only the responsibility of states for taking the necessary activities that their citizens and other inhabitants respect the law of nations and protect the values of this international community as a whole. They respectively their organs should be held directly responsible also for acts committed in official capacity: this was the final break with the Act of State Doctrine.²⁷ And once the law was applicable to everybody including state organs, the demand for an international court to apply and enforce this law, could no longer be suppressed.²⁸ Because the failures to enforce the provided penal responsibility after the First World War, demonstrated already in between and in particular when faced with the cruelties of the Second World War²⁹ that an international individual criminal responsibility of states organs was indispensable.³⁰

b. *Legal values and interests, inherent to the international community as a whole*

Criminal law deals in principle and by its nature with the *ultima ratio* protection of the highest values of the legal system it belongs to. Including the new international criminal law into the legal system of the law of nations, the international community as a whole had to reflect what are the most precious values inherent to this system. It could not merely refer to the cooperation of states in criminal matters; because mutual legal assistance to make the national protection more effective was not the issue of the day. Such regulations protected only national values and the prosecution of violations is coordinated in order to make the prevention more successful. But the values protected remain those of national legal systems involved.³¹

²⁷ See for instance O. Triffterer, 'The Court in Danger?', supra note 23, under 2.A. therein.

²⁸ See for instance Beling, *Die strafrechtliche Bedeutung der Exterritorialität* (1896). For the development of the work of the United Nations see O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 65 *et seq.*

²⁹ See for instance G. Hankel, *Die Leipziger Prozesse*, supra note 19, and G. Hankel/G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen – Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (1995).

³⁰ *Ibid.*

³¹ See O. Triffterer, 'Present Situation, Vision and Future Perspectives', in: A. Eser/O. Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law, Documentation of an International Workshop 1991, Freiburg im Breisgau* (1992) 369-386.

*'Peace, security and well-being of the world'*³²

The difference of this national approach of value protection in comparison to 'Völkerstrafrecht' can be demonstrated by two examples: Slavery for instance is committed in various stages on one or the other territory of states. The transport of the 'kidnapped' victims through or to another country with different jurisdictions, made cooperation necessary to ensure prosecution and thus contribute to the prevention of these violations of Human Rights. The application of the Universality Principle was required to protect the victim in as many states as possible, in the interest of abolishing the crime against legal values protected in many states, though not in all. Only when the question of the admissibility of slavery led to a civil war between the northern and the southern states of America, values of the international community as a whole, namely peace and security were endangered.³³

With regard to piracy, the situation was and still is different. Not primarily human beings needed to be protected against violations of their individual rights, but the open sea as a common good for all was the predominant value which belonged to all states and their citizens; and therefore it could and had to be protected everywhere, where pirates appeared. This value, peace, security and liberty on the high sea, was the prevailing issue to justify international regulations. The interests of the owners of the attacked ships as well as the rights and liberties of the crews, were as individual Human Rights indirectly protected in the same way.³⁴ It was no longer merely the common interest of states to protect national values of each of them; it rather appeared more and more indispensable to protect values which could not be assigned to any of them alone, but only to the community to which all states belong. Just this structure made it not only desirable but even necessary, to apply also for such violations the Universality Principle.

Having for instance this development and the comprehensive laws and customs of war in mind, it was only a small step to demand and establish

³² See Preamble of the Rome Statute, Section 3.

³³ For more information about the American Civil War see http://en.wikipedia.org/wiki/American_Civil_War (13 Oct. 2009) and J. Keegan, *The American Civil War* (2009).

³⁴ See for instance O. Triffterer, 'The Court in Danger?', supra note 23, at 47 *et seq.* For the present military situation to fight piracy see D. Wiefelspütz, 'Die Beteiligung der Bundeswehr am Kampf gegen Piraterie – Völkerrecht und Verfassungsrecht', in 4 *Neue Zeitschrift für Wehrrecht* (2009) 133-150, at 135.

'Peace and security of the world' as the basic values inherent to the international community as a whole. Correspondingly these two values were already right from the beginning anchored approximately thirty times in the Statute of the UN. In addition, it was clarified that protecting these values was at the same time protecting individual rights and liberties, directly or indirectly endangered through war, armed conflicts and other belligerent or insecure situations.³⁵

Grave violations of individual Human Rights, endangering collective values

The just mentioned interdependence between international criminal law, its enforcement and Human Rights does not only work in the described 'one way'. On the opposite, it can be characterized as a 'two way' relation. Based on the interventionalist politics of the major powers in the Medieval it became namely more and more obvious, that grave violations of individual Human Rights by the state itself, in particular when committed through abuse of power and on a large scale, were endangering also collective values and thus, as a reaction or a countermeasure, called for humanitarian, diplomatic or even military interventions.

It was this mutual interdependence between violations of collective values inherent to the international community as a whole and violations of rights and liberties of individuals, attacked as members of the community, which called for common action to supply these two groups of rights with an *ultima ratio* protection by international law. This structure is mirrored more or less in all groups of core crimes under the jurisdiction of the Court, as will be explained in detail below under III.1.b. But it becomes in particular obvious with regard to genocide as summarized under IV. below.

2. Substantive law, an indispensable protection against arbitrary arrest and discriminatory judgements

To fight and thus prevent violations of individual or collective rights by penal law seemed right from the beginning and up till now not satisfying. Violating or limiting Human Rights of suspects or even convicted persons as reactions to their violations, therefore needed to be based on

³⁵ See for instance O. Triffterer, 'Preamble', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 8 *et seq.*

legal restrictions to guarantee, that innocent persons are not punished. Since holding individuals criminally responsible was not new, it was more and more recognized that every legal system needed a substantive criminal law, to limit the power of its judiciary and make its decisions subject to control.

But the sanctioning only of the defeated enemy by the victor, according to the national laws or peace treaties, appeared in the overwhelming majority of cases not sufficiently impartial to be accepted by the enemy and in the majority of cases equally not by third states. It thus was not a solid basis for reconciliation and peace.

a. *Definitions of crimes to be 'strictly construed'*³⁶

One way to guarantee objectivity and impartiality was to define which behaviour should be criminal and punishable. To achieve this goal, it was more and more requested to create unified law with detailed regulations about the behaviour and its result (material elements) and the mental elements to be required for punishability. This decisive law should not be left at the discretion of the victor. The Hague and Geneva Conventions document corresponding endeavours in the years since the second half of the 19th century.

For avoiding arbitrary and discriminatory judgements was not only demanded to accept the law, but that states transferred their international obligations 'one to one' into their national law. This proceeding could be to apply the international law directly and enforce it within the domestic legal systems, or to accept it by a formal legislative act by the competent state organ. Only such a correspondence of the national laws with international requirements for infringements into Human Rights of suspects or convicted persons appeared as a certain guarantee against partial jurisdictions of the victors on the defeated enemies.

But though the laws and customs of war were more and more detailed since the beginning of the last century, the Nuremberg crimes were rather vaguely 'described' in Article 6 of the International Military Statute for this Tribunal and therefore not well accepted. It was more and more requested, that criminal appearances which should be condemned and sanctioned had to be defined according to the principle *nullum crimen, nulla poena sine*

³⁶ Art. 22 para. 2 Rome Statute.

lege. They thus would guarantee international standards, which were already anchored in many national legal systems of the world.³⁷

After Nuremberg, the increasing number of non international and international belligerent struggles called for more guarantees to at least ensure future progress. The codification movement started very soon with regard to the crime of genocide; however, no more than this minimum consensus could be achieved at that time. But even then for instance no agreement about what groups should be protected and what should be excluded from the list given in the Convention for the Prevention and Punishment of the crime of Genocide 1948, was obtainable.³⁸

In addition, at least the International Red Cross made the next step to improve clarity and acknowledgment of what was generally accepted, by drafting and adopting the Four Geneva Conventions of 1949. They define grave breaches of the laws and customs of war as crimes to be prosecuted in all states in order to protect Human Rights in situations of international and non-international armed conflicts. Within the organizational framework of the United Nations not more could be reached as a Genocide Convention. But for years the Draft Code of Crimes against the Peace and Security of Mankind and the Draft Statute for an International Criminal Court were discussed. However, due to the 'Cold War' and other political inconsistencies the development stopped at the end of the fifties for decades.³⁹

b. 'General principles of criminal law'

In this context it has to be kept in mind, that as important as these basic definitions of the crimes are for the present situation, almost the same ranking have the 'general principles of criminal law', as described in Part III of the Rome Statute. Compared with others general parts of domestic legal systems, these regulations are rather meagre. But with regard to participation it is rather broadly sufficient, not withstanding that there are discussions going on, for instance with regard to the concept and notion of

³⁷ See for instance O. Triffterer, *Dogmatische Untersuchungen*, supra note 12, at 92 *et seq.*

³⁸ See for instance W.A. Schabas, *Genocide in International Law – The Crime of Crimes* (2nd ed., 2009).

³⁹ See *Revised Draft Statute for an International Criminal Court* (Annex to the Report of the Committee on International Criminal Jurisdiction), U.N. Doc. A/2645 (1954) and *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. Doc. A/2693 (1954).

responsibility for joint criminal enterprise or concerning command responsibility as defined in Article 28.⁴⁰

Anyhow, according to Article 21 Rome Statute the applicable law can be amended, for instance by generally accepted national principles or the law of the state where the crime had been committed.

The definitions of crimes have to clearly describe, what behaviour consequences and circumstances, *actus reus*, as described in Article 30 Rome Statute, as well as the harm resulting should be punishable. But in such definitions it is not always anchored in which way a participation in the crime may trigger that a person will be held, together with others, accountable. General principles appeared therefore necessary to be precisely in their wording for narrowing or extending responsibility and thus to limit scope and notion of a crime.

In general, inspiring others to commit crimes is punishable as well as aiding and abetting in the commission. For genocide however, the punishability is 'vorverlegt' (anticipated): Who in public and directly incites others to commit genocide, though nobody in fact was thus inspired to commit genocide, is also punishable. The reason is that with regard to this crime the inciting, though without success, is dangerous for the protection of the individual and group, values underlying the crime of genocide.

The importance of these general rules becomes further obvious also by Article 31, according to which certain situations constitute 'grounds for excluding criminal responsibility',⁴¹ even though all elements contained in the definition of the crime are fulfilled. As an example may serve 'self-defence'. In this context also Article 25 is relevant; because its definitions decide that besides the principle perpetrator, fulfilling all elements, aiding and abetting for instance will be sufficient to hold other persons responsible.

The most complicated regulations with regard to extending or narrowing responsibility by interpreting the modalities for responsibility is Article 28. It is an excellent example for the structure of crimes, even though not for a short and nevertheless clear and understandable definition. Extensive analyse comes to the conclusion that the responsibility of a military commander for genocide committed by his subordinates does not require his genocidal intent,

⁴⁰ See V. Haan, *Joint Criminal Enterprise – Die Entwicklung einer mittäterschaftlichen Zurechnungsfigur im Völkerstrafrecht* (2008) and R. Arnold/O. Triffterer, 'Article 28 – Responsibility of commanders and other superiors', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 795 *et seq.*

⁴¹ See for instance A. Eser, 'Article 31 – Grounds for excluding criminal responsibility', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 863 *et seq.*

as generally demanded. It is sufficient that the principal perpetrator has such an intent and the commander or the superior knows or assumes that the subordinate acts with such a genocidal intent, and that he or she supports, though by omission, such activities. The same is true with regard to subordinates, who do not need to act with a particular genocidal intent as long as they aid or abet as mercenaries for instance corresponding activities.⁴²

c. Extending the jurisdiction of the Court?

After the Second World War the questions arouse, whether it was sufficient to have international criminal responsibility directly under the law of nations for the 'core crimes' prosecuted at Nuremberg. At that time there were only three groups: crimes against humanity, war crimes and crimes against the peace; out of the first group genocide was later separated. However the numerous drafts proposals within the UN, International Scientific Organisation and by Individuals, always considered a (partly considerable) extension of this number.⁴³ This discussion about other crimes included the protection of under-sea telephone cables, diplomats, international mail and of course international terrorism and organised drug trafficking.⁴⁴

Against such an extension was however argued that it would not be easy to achieve an agreement and that not all of these definitions fulfilled the requirements of international criminal law, namely to endanger the highest legal values inherent to the international community as a whole. Therefore, it was feared that including so called 'soft crimes' would diminish the reputation of and respect for the Court.⁴⁵

⁴² See for instance O. Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as expressed in Article 28 Rome Statute?', in: 15 *Leiden Journal of International Law* (2002) 179-205.

⁴³ See for instance *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/10, 17 July 1998, Annex I, lit. E., para. 6: 'Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court'.

⁴⁴ See for instance M.Ch. Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) and id., *The Legislative History of the International Criminal Court: an Article-by-Article Evolution of the Statute* (2005).

⁴⁵ See O. Triffterer, 'International Crimes and Domestic Criminal Law, Efforts to Recognize and Codify International Crimes, General Report', in: *Revue Internationale de Droit Pénal* (1989), at 29 *et seq.*

In order to risk no breakdown of the Rome Conference, this question was left open, in particular with regard to state terrorism and organized drug trafficking. But now, more than in the first decades after the Nuremberg, and ten years after Rome, the question arises, whether the globalization leads to appearances of misbehaviour which might be of sufficient gravity and structured in a way to fulfil the demands of international criminal law in the narrow sense.⁴⁶ Since continuously people are starving on this earth – with all due respect for the achievements made –, the uneven distribution of wealth and poverty and the criminal appearances coming with globalization tendencies lead to proposals to include more and more the protection of social human rights in the schedule of the core crimes and within the jurisdiction of the Court.⁴⁷

However, it nevertheless cannot be expected, that at the First Review Conference in Kampala 2010 an extension will be agreed upon. The definition of aggression is not such an extension. It does not create the punishability but only defines strictly construed the different alternatives for what is already accepted as a crime against the peace.⁴⁸

3. *Enforcement mechanisms*

However, as can be seen by the development of Human Rights, the best substantive law alone is not sufficient to prevent violations. When it cannot be made visible or otherwise proved that the law will be applied and violations prosecuted, the effectivity of the law is highly questioned.

⁴⁶ For the differentiation between narrow and broad sense see *ibid.* and for Human Rights and Globalization see the paper of Prof. J. Stiglitz to this Plenary Session, *Human Rights and Globalization: The Responsibility of States and of Private Actors*. See also the proposals of the World Future Council regarding 'Crimes against Future Generations', visible under <http://www.worldfuturecouncil.org/startseite.html>; for the expression 'in the narrow sense' see O. Triffterer, 'International Crimes and Domestic Criminal Law', *supra* note 45, at 29 *et seq.*

⁴⁷ See O. Triffterer, 'Die Dritte Welt vor der Türe Europas – Katastrophe oder Chance?', in: H. Schmidinger (ed.), *Die Eine Welt und Europa, Salzburger Hochschulwochen 1995* (1995) 119-164 and *id.*, 'Preliminary Remarks', in: O. Triffterer, *Commentary*, *supra* note 4, at 46 *et seq.*

⁴⁸ See O. Triffterer, 'The object of review mechanisms', in: R. Bellelli (ed.), *Turin Conference on International Criminal Justice* (forthcoming), under 4.B. therein; for a summary of this text see R. Bellelli (ed.), *Conference on International Criminal Justice* (2008), at 40 and 41.

a. *General requirements*

To expect obedience to the law, its precise wording and notion has to be made familiar to the citizens. They must know and be aware of what they have to expect whenever they violate the law. The enforcement also serves the purpose, to demonstrate to those who do not violate the law, that it is worthwhile to remain inside the legal boundaries, because otherwise punishment has to be expected. Therefore clarity and awareness of the law, acceptance and general obedience, are equally indispensable as an inherent enforcement.

b. *Available modalities*

For an enforcement at the domestic level the judiciary has several 'state agencies' at its disposal; help can be requested for instance by the police and all other states authorities, which have to assist the local judiciary by 'Rechts- und Amtshilfe'.

In some states are in addition to these 'inherent' organs on the local or regional level 'private security forces' entrusted with the task to prevent crimes and trace suspects as well as arrest them to transfer them immediately to the official state authorities. In a similar way are also for the enforcement of international law different modalities available which may influence scope and notion of the international jurisdiction in this field.

Organs of the community of nations

Predominant as on the domestic level is also for international criminal law to enforce its substantive law by organs, inherent to the legal system it belongs to, the law of nations. Such an enforcement mechanism promises at first sight the best results. This has always been expected, correspondingly demanded since more than one century and, meanwhile, been proven by practical experiences of the ICTY and the ICTR.

However, special organs of the community of nations to directly apply the substantive law can be created through different procedures (direct enforcement models).

One of the possibilities was used in 1993 and again in 1994 for creating the International ad-hoc Tribunals for the Former Yugoslavia (ICTY) respectively the ICTR. Both had been established by the Security Council

as its Sub-organs.⁴⁹ They had been assigned the task of the international community as a whole, to directly apply what was and still is beyond a reasonable doubt the substantive law of this community and to guarantee the enforcement of their decisions.⁵⁰ This modality is limited by time and to a certain territory. It can be called back or be prolonged when requested by whom ever, through a decision of the Security Council.⁵¹

Both Tribunals were the first organs of the international community as a whole, exercising the *ius puniendi* of this body. They are partly overlapping by having one Prosecutor and a common Appeals Division. The ICC, created by a treaty, the Rome Statute, exercises the same *ius puniendi*, but permanent and since its entry into force on 1 July 2002 without any temporal or territorial limitation as provided for the first two Statutes.

All these organs have no inherent executive agencies at their disposal. Arrest, surrender and execution of sentences therefore have to be made with the help of national criminal justice systems, or other international, for instance peace-keeping UN-forces, for which however the competence of such legal aid is disputed.

Already these aspects, but mainly the historical development supported therefore the idea, to use the national enforcement agencies to supply 'Rechts- und Amtshilfe' for special organs of the international community as a whole.

Execution through national justice systems

Instead of enforcing the international law by international organs within their international legal system, but anyhow with some help of domestic agencies, as explained above, another possibility is to transfer the complete execution of the *ius puniendi* to national criminal justice systems. This is called the indirect enforcement model, because not organs of the interna-

⁴⁹ See for instance O. Triffterer, 'Grundlagen, Möglichkeiten und Grenzen des Internationalen Tribunals zur Verfolgung der Humanitätsverbrechen im ehemaligen Jugoslawien', in: *ÖJZ* (1994) 825-843.

⁵⁰ See Report of the Secretary General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), 3 May 1993; with regard to the question of reasonable doubt see para. 34. therein.

⁵¹ See Article 1, ICTY-Statute; see for instance O. Triffterer, 'Grundlagen, Möglichkeiten und Grenzen', supra note 49. For the end of its competence in 2013 see for instance <http://www.icty.org/sections/AbouttheICTY> (22 Oct. 2009).

tional community, rather states or member states which 'build up' this community, enforce the international law, which is anyhow comparable and has to be made compatible or consistent with their own legal systems, though it is higher ranking under the aspect of a 'world order'.

For the operation of this model it is not relevant, whether the respective state can apply the law of nations directly or whether it needs to implement the international law before, for formal or substantial reasons, into its national legal system by the competent national organ.

New alternatives and reconciliation

After the Second World War criminological research came more and more to the result that serving (long term) imprisonment was not so much preventing further crimes by reconciliation, but rather promoting recidivism.⁵² As an effective counter measure long term imprisonment was as much as possible avoided, for instance by probation or parole. In addition, new regulations, for instance 'außergerichtlicher Tatausgleich' or 'Schuldausspruch ohne Strafe' or 'mit Strafvorbehalt' were created and operated effectively in praxis.⁵³ Social therapy seemed for a long time to be the best method to prevent future crimes.⁵⁴ In addition, assistance to crime prevention through alternative 'security forces', private agencies entrusted for instance with police functions, were growing. All these measures had in common, that they changed the attention, when criminal acts appeared, from traditional formalized procedures to consulting negotiations with the main persons concerned, namely the perpetrators and the victims.

All these alternatives have been and partly still are in comparison to inherent traditional organs and institutions of the judiciary disputed on the national level. But on the international level comparable 'soft solutions' were considered more and more to be helpful for the prevention of core crimes. Because these crimes are typically committed by persons abusing their power or at least silently tolerating or assisting in such an abuse. They

⁵² See for instance J. Grünberger, *Humaner Strafvollzug: Am Beispiel Sonderanstalt Mittersteig* (2007) as well as the literature to Social Therapeutic Institutions. See for instance Schüler Springorum, *Subkultur in den Gefängnissen* (1957).

⁵³ See H. Hinterhofer, *Diversion statt Strafe – Untersuchungen zur Strafprozessnovelle 1999* (2000).

⁵⁴ See for instance R. Ortmann, 'The Effectiveness of Social Therapy in Prison – A Randomized Experiment', in: 46/2 *Crime and Delinquency* (2000) 214-232.

therefore in general also have the power, to stop the violations of Human Rights, as already reported with regard to the Balkan wars 1912/1913 by the Carnegie Endowment for Peace.⁵⁵

This involvement of strong political or military leaders makes it in general indispensable to negotiate with them about ending the situation which caused such crimes and the most severe violations of Human Rights.⁵⁶ Such persons therefore often have to be included and addressed in almost every negotiation for peace. Against this background they quite often demand and partly have been promised impunity in order to inspire and guarantee their help for stopping the situation as soon as possible and permanently.

In addition, the slow process of creating the ICC and the tension in different aspects on judging core crimes or other violations of Human Rights called for more emphasis on reconciliation. I mention in this context that for instance the massacre on the Armenians in 1919 came not to a reconciliation till finally on 10 October 2009, which means ninety years later, the states involved signed a treaty concerning peaceful settlement of the main issues concerned. It was a strong desire to find better ways to overcome the past as criminal responsibility of the individual actors had to offer.⁵⁷

The slow process of creating a permanent ICC and the tremendous difficulties called again and again for more emphasis on reconciliation. In this context it must be referred to some of the first states making use of new possibilities to overcome the past. It were Peru and South Africa creating 'Truth and Reconciliation Commissions' at the end of the Eighties and the 'transitional justice' after the two Germanies were united. The last solution was practically unique, notwithstanding the situation in Korea still waiting for coming also to reconciliation.

The first Truth Commissions however have meanwhile been copied several times.⁵⁸ Such a solution provides that a state organised and estab-

⁵⁵ See L. Tindemans, *Unfinished Peace*, supra note 16.

⁵⁶ See *ibid.*

⁵⁷ See for instance <http://news.bbc.co.uk/2/hi/8299712.stm>.

⁵⁸ For a list of all Truth and Reconciliation Commissions see http://en.wikipedia.org/wiki/Truth_and_reconciliation_commission (20 Oct. 2009). For the Truth and Reconciliation Commission South Africa (TRC) see <http://www.doj.gov.za/trc/> (20 Oct. 2009); for the Truth and Reconciliation Commission in Sierra Leone see <http://www.trcsierraleone.org/drwebsite/publish/index.shtml> (20 Oct. 2009); for the Commission for Reception, Truth and Reconciliation in East Timor see <http://www.cavr-timorleste.org/> (20 Oct. 2009); for the Truth and Reconciliation Commission in South Korea see <http://jinsil.go.kr/english/> (20 Oct. 2009); for the Peruvian Truth and Reconciliation Commission see <http://www.cverdad.org.pe/ingles/pagina01.php> (20 Oct. 2009).

lished neutral commission takes care of former crimes in order to achieve reconciliation by friendly means without traditional penal procedures and perhaps by granting amnesty or other modalities to achieve impunity.⁵⁹

All these endeavours convince against the just mentioned background that the struggle between Turkey and Armenia about the massacre on the Armenians in 1919 will perhaps find a solution by a treaty almost hundred years later.

In general, the conditions for such a success are mainly collected and almost accepted: a clear confession, admission of violations of the law and an apologize to the victims as well as financial compensation. As alternative, in cases these conditions are not fulfilled, remains criminal responsibility before national courts. Whether then the Rome Statute is applicable or national law with sanctioning according to international criminal law standards, has to be decided on a case to case basis.

Helpful for the development of new alternatives was also the experience all over the world that neither national law nor international institutions were offering by traditional means and methods satisfying solutions with regard to reconciliation. 'Internationalized' and comparable 'hybrid' courts or tribunals on the opposite seemed to offer a compromise between the two alternatives which already by the first agreements on how to proceed based hope to finally achieve a peaceful solution.

While truth and reconciliation commissions only investigate and not prosecute according to traditional national lines, the 'hybrid' courts do. They are 'internationalized' because in particular the judges, but also other organs of such institutions, are elected and appointed with the cooperation of the UN; in principle 50 per cent are national and 50 per cent international judges and other organs, in particular the Prosecutor. Sometimes, however, there is a small majority of one of the two groups or the possibility to use a veto by the representatives of the international community as a whole. In accordance with the UN, the General Secretary of the General Assembly or the Security Council, some countries like Sierra Leone, had both, a Truth and Reconciliation Commission as well as a Special Court;⁶⁰

⁵⁹ See for instance M. Freeman, *Truth commissions and procedural fairness* (2006).

⁶⁰ The Report of the Sierra Leone Truth and Reconciliation Commission is available unter <http://www.africa.focus.org/docs04/sl0410.php>; for the Special Court of Sierra Leone see <http://www.sc-sl.org/>.

and Charles Taylor, for example, has to stand trial before the Special Court for Sierra Leone sitting in The Hague.⁶¹

After meanwhile more or less satisfying experience with such new compromising institutions, a systematisation of these additional possibilities was elaborated and put on discussion by Cherif M. Bassiouni with the 'Chicago Principles on Post Conflict Resolution'.⁶² These principles as a whole are meant to substitute traditional penal proceedings; and their aim is to solve the conflict by agreement and by, if necessary, using even an amnesty to achieve a peaceful permanent new society. The Chicago Principles as well as the similar Nuremberg Declaration on Peace and Security⁶³ mention amnesty expressly as one of the possibilities to achieve peace and reconciliation. However, in both documents is emphasized that this may not be the right solution for 'main' or major perpetrators, as they were held responsible for instance in Nuremberg. Methods and means of the traditional criminal justice system are therefore kept 'in reserve' if so called 'soft solutions' do not lead to the result required, namely reconciliation with (under) conditions promoting permanent peaceful living together.⁶⁴

III. PRESENT SITUATION

On the above considered theoretical foundation and structuring elements including the endeavours to find new solutions, the present situation has to be evaluated. Of course, the substantive law can only be surveyed as well as the enforcement mechanisms shaping right now the situation. The *status quo* therefore will not be exhaustingly analysed and reported. Instead of giving too many details I will concentrate on what are the prevailing issues in this field at the beginning of the twenty first century.

⁶¹ See also for the tendency in Africa, to find a regional solution T. Goodman, *Staging solidarity – truth and reconciliation in a new South Africa* (2009). See also G. Werle, 'Without truth, no reconciliation. The South African Rechtsstaat and the Apartheid Past', 29 *Verfassung und Recht in Übersee* (1996) 58–72.

⁶² See for instance International Human Rights Law Institute, Chicago Council on Global Affairs, *The Chicago Principles on Post-Conflict Justice* (2008).

⁶³ Annex to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General – Nuremberg Declaration on Peace and Justice, UN Doc. A/62/885, 19 Jun. 2008.

⁶⁴ See for instance the Court of Bosnia and Herzegovina, which is a domestic court of the state of Bosnia and Herzegovina but also includes international judges and prosecutors. For jurisdiction, organization and structure of this court see <http://www.sudbih.gov.ba/?jezik=e> (07 Oct. 2009).

1. *The first permanent International Criminal Court and the law to be applied*

The outstanding and most important legal and political achievements for theory and practice of this new field are the Rome Statute and its meanwhile established and operating International Criminal Court. Both represent the first and only institutions of such high quality. The law to be applied is in principle international law according to which the Court is established; and relevant national laws concerning specific situations and cases may also be taken into consideration and thus be decisive as far as mentioned in Article 21 Rome Statute and as their application is in the interest of justice or at least not against it.⁶⁵

a. *The Rome Statute and the Rules of Procedure and Evidence*

The Court is a 'treaty based' solution established by the Rome Statute, after 60 states became members of this Treaty. The Treaty and the Rules of Procedure and Evidence, the latter given to the Court not by its judges, as in Nuremberg and for the ICTY and the ICTR, but by the Assembly of States Parties (ASP), did not create the *ius puniendi* of the international community as a whole. They create only the executive organs for this enforcement model and the general outlines for the proceedings to investigate and prosecute crimes within the jurisdiction of the Court. This *ius puniendi* is inherent to the international community as a whole, not to the Court; the Court rather has merely to exercise this right. But the Court may leave this execution to another reliable institution, in principle to a domestic criminal justice system, if the state concerned is not suspicious of abuse of power as already mentioned above, or otherwise unable or unwilling to genuinely proceed in the sense of Article 17.

This modality to create the Court by a Treaty and not within the UN, as the ad-hoc Tribunals, was preferable, compared with other possibilities to establish a court or tribunal. Because it makes the Court (more) independent from political influence on its organs and agencies as the other just mentioned modalities for creating an international criminal court.⁶⁶

⁶⁵ See for instance M. McAuliffe deGuzman, 'Article 21 – Applicable law', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 708, margin No. 14.

⁶⁶ For the position of the defence counsel in international criminal justice see for instance J. Temminck Tuinstra, *Defence Counsel in international criminal law* (2009) and O. Triffterer, 'Preface', therein at V. See also O. Triffterer, 'The Court in danger?', supra note 23, at 54 *et seq.*

b. *Acknowledging and defining the crimes 'beyond reasonable doubt'*⁶⁷

Treaties and conventions are the main sources of the Law of Nations as referred to in Article 38 ICJ Statute. By a treaty, the community of states may for instance decide what behaviour should be prevented and repressed by penal sanctions. The question therefore arises whether the Rome Statute when listing the four groups of crimes in Article 5 lit a-d and defining three of them in Articles 6, 7 and 8, has created new crimes or (merely) decided about the jurisdiction of the Court with regard to already existing crimes with responsibility of individuals directly under international law.

*'Collecting' the 'most serious crimes of concern to the international community as a whole'*⁶⁸

The Rome Statute refers several times to the Court and its jurisdiction over 'most serious crimes of concern to the international community as a whole'. The context of these references clearly indicates that there are other 'most serious crimes' not within the jurisdiction of the Court and also 'serious crimes' under international law.⁶⁹ Examples for the first category are perhaps state terrorism and organised drug trafficking. Almost equally questioned is whether also grave violations of Human Rights like the right to life, to food and to survive is or should be a most serious crime. Into the second categorie may also be listed non grave breaches of the Four Geneva Conventions of 1949. However, all these crimes are by now excluded from the jurisdiction of the Court by being not mentioned in the Rome Statute.

The Rome Statute is the 'Statute of the International Criminal Court' and not the penal code of crimes against the peace and security of mankind. Though it defines substantial and procedural law, both have to be accessed differently. The Rome Statute did not create the law establishing international criminal responsibility for various appearances of crimes. The situation at the Rome Conference was similar to the one referred to in the Report of the General Secretary of the UN when proposing to the Security Council the Statutes for the ICTY and one year later for the ICTR. He,

⁶⁷ See supra note 70.

⁶⁸ Preamble to the Rome Statute, Section 4.

⁶⁹ See for instance O. Triffterer, 'Preliminary Remarks', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 36 *et seq.*, margin No. 61.

in May 1993, expressed the opinion that the judges would have 'to find' the law, respectively to find out what is a criminal behaviour directly under international law, exactly 'beyond a reasonable doubt'.⁷⁰ A similar though much more limited reference is contained in the Letter dating 9 December 1994 of the General Secretary to the President of the Security Council. In paragraph 145 with regard to the precise notion of certain crimes

[t]he Commission of Experts recommends that the Prosecutor explore fully the relation between the policy of systematic rape under a responsible command as a crime against humanity on the one hand, and such a policy as a crime of genocide, on the other.

Comparing the situations in 1993 and 1998 at Rome, there is a relevant though not too big difference. Except with regard to genocide for which a Convention defines the different alternatives since 1948 'strictly construed', war crimes and crimes against humanity are in the Statutes of the Tribunals less precisely defined. Articles 3 respectively 5 ICTY and ICTR Statutes contain for instance with regard to 'the power to prosecute' that it 'shall include but not be limited to' the following crimes listed; and this list ends in Article 5 respectively 3 with the vaguely described 'catch-clause': 'other inhuman acts'. The partly rather summarizing description of core crimes therefore had to be in detail analysed and interpreted as punishable behaviour under international law before the Tribunals applied them. With regard to war crimes, this task was relatively easy. Because the Hague and Geneva laws, in particular the four Geneva Conventions of 1949 and their Additional Protocols of 1977, were of great help, precisising the laws and customs of war.⁷¹

The failure to describe exactly 'strictly construed' all criminal behaviour falling within the jurisdiction of the two Tribunals had of course meanwhile been compensated by the jurisprudence of these two Tribunals. Already the Rome Conference therefore had to take due consideration of possible changes or amendments. To keep in line with Nuremberg, the Rome Statute therefore limits the jurisdiction of the Court to the four core crimes, the classical Nuremberg crimes. Genocide was the first crime under international law since long time precisely defined by positive international law.

⁷⁰ See Report of the Secretary General pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), 3 May 1993; with regard to the question of reasonable doubt see para. 34. therein.

⁷¹ See for instance E. van Sliedregt, *Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) and Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 4 *et seq.*

With regard to crimes against humanity there was more need for precision, than for the war crimes; because for the latter the just mentioned Geneva Conventions and their 1977 Additional Protocols were helpful; and the 'catch clause' of the Statutes of the Tribunals had for instance been replaced in Article 7 para. 1 lit. k Rome Statute by: 'Other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

Notwithstanding these difficulties an agreement existed worldwide ever since Nuremberg that genocide, originally merely an alternative of the crimes against humanity, was at that time not yet precisely enough defined and therefore needed detailed elements to fulfil the demands of *nullum crimen, nulla poena sine lege* in its Convention 1948. The same is true, but though not in the same extent for war crimes, because there the laws and customs of war had already for centuries tried to define more and more precisely what should be prohibited and what punishable because of its gravity in violating legally protected values. This step of development becomes evident when we look at the 1949 Geneva Conventions, where these laws and customs of war have been grouped and summarized under various aspects. Now the even greater precision in the Rome Statute is almost satisfying, though always open for improvement as the jurisdiction of the Tribunals and the decisions of the Court demonstrate.

One of the reasons for this improvement by clearly defined provisions was besides the various aspects of a fair trial, to avoid that alleged and obviously unjustified charges, complains and accusations or just submissions by whom ever were raised against other states, state organs, parliamentarians, military commanders, etc. By transparency and an easy control should be prevented, that for instance political opponents would be falsely charged with violating Human Rights or other values of the international community as a whole (by committing crimes under international law). It was feared that otherwise by rather vague, inconsistent charges it could be too easy to throw the moral or political blame on states or persons acting in official capacity for something which does finally not constitute a core crime. For political or other purposes it should be impossible to deliberately and by false charges trigger investigations of the Court and thus raise the impression, there was reasonable ground to believe, a crime within the jurisdiction of the Court could have been committed.

The best examples for the endeavours to exclude such an abuse of the Court was the demand for 'strictly constructed' definitions of crimes against the peace, before the Court could insofar execute its jurisdiction.

The situation was similar as for crimes against humanity. However, the Rome Conference could not agree on what exactly should be the punishable alternatives of relevant crimes against the peace within the jurisdiction of the Court. The minimum consent was that at least such crimes exist. This made it possible to put aggression into the four groups of crimes listed in Article 5. But since the Conference could not even agree on a summarizing definition for at least one single alternative, to punish aggression within the jurisdiction of the Court, a political compromise had to be accepted at Rome: aggression was included into the list of crimes within the jurisdiction of the Court, Article 5 para. 1 lit. d; but at the same time it was ruled in Article 5 para. 2, that though competence for these crimes already existed, it could not be exercised by the Court before the Assembly of States Parties had defined at least one alternative of crimes against the peace; and, in addition, conditions should be fixed by the ASP under which this *ius puniendi* then should be exercised.

Discussed are for instance to require an opinion of the Security Council before the Court could start investigating or prosecuting a situation or case with regard to being an aggression.⁷² The right to peace, security and well-being of the world was thus confirmed as well as the individual Human Rights which are always endangered in belligerent struggles or armed conflicts. Though the violations of civilian objects and persons are manifold comprehended by the definitions of crimes against humanity, with regard to collateral damage on these protected targets, for instance, the corresponding war crime is not satisfyingly defined in Article 8 para. 2 lit. b (iv).⁷³

Referring to traditional appearances of crimes

As already mentioned above under II. 2. a., not only the various definitions of crimes have to be 'strictly construed', but also their different appearances, like commissions by a single person, as principle perpetrator, aider or abetter or in any other form of participation. Correspondingly 'individual criminal responsibility' under the Statute can only be established 'if that per-

⁷² See for instance A. Zimmermann, 'Article 5 – Crimes within the jurisdiction of the Court', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 135 *et seq.*

⁷³ For collateral damage see for instance O. Triffterer, 'Ius in bello: Eskalation durch "Kollateralschäden" wie durch Kriegsverbrechen – Beweisbarkeit und Vermeidbarkeit?', in: R. Moos *et al.* (eds.), *Strafprozessrecht im Wandel – Festschrift für Roland Miklau zum 65. Geburtstag* (2006) 559-584.

son fulfils one of the alternatives' listed in Article 25 para. 3 lit a-f. Article 28, however, extends this list by ruling that 'in addition to other grounds of criminal responsibility', meaning those in Article 25, commanders and other superiors can be held responsible when fulfilling the elements strictly construed in Article 28.

c. Creating specific investigation and prosecution proceedings

My considerations on the Court in operation would be incomplete without a few surveying remarks on the proceedings. They will demonstrate how far compromises can go and where some weak-points remain.

Looking at the historical examples and experiences judging war crimes under national legal systems, in particular before military courts, with limiting the rights of suspects, for instance for free choosing a counsel,⁷⁴ a strong engagement for a new approach became dominant. It was unanimously agreed and decided that it was not satisfying to proceed according to any mentioned standard. To avoid the danger of arbitrariness or partiality, because of the implications involved on the national level in many cases, it was rather agreed, that it was indispensable to create an inherent at least partly revised international criminal procedure. The aim was to prevent all disadvantages of national law and establish as many advantages as possible from there. In particular abuses of power in such proceedings had to be avoided, for instance by excluding a trial *in absentia*. Rather, a fair trial with its various components like the rule of law, due process of law and equality of arms had to be guaranteed. The standards summarising by this key-word are meanwhile well accepted by customary international criminal law.⁷⁵

Compromising between common and civil law

An own high standard was however difficult to achieve; because two major legal systems had already clashed at Nuremberg and again were concurring when the ICTY and the ICTR investigated and prosecuted. However, an institution assigned with the task to watch out for the protection of

⁷⁴ See for instance J. Temminck Tuinstra, *Defence Counsel*, supra note 66.

⁷⁵ See for instance P.L. Robinson (President of the ICTY), *The Right to Fair Trial in Customary International Law and the Jurisprudence of International Tribunals*, lecture on 16th October 2009 at Rome III (forthcoming).

Human Rights and against most serious violations, needs a very good reputation to be accepted. The acceptance does not only depend on the quality of the substantive law, but at least equally on the proceedings. Therefore the members of the Rome Conference tried to find a compromise between common and civil law, claiming to have the best of both systems written down in the Rome Statute. It does therefore not surprise that the right to be heard is extremely developed in the Rome Statute and includes the right of everybody at any time of proceedings to initiate by writing or orally a (re)consideration of situations or cases.

Nuremberg for instance has strived to avoid former disadvantages of partial and unfair national criminal proceedings, in particular of victors prosecuting former enemies. Though it achieved an acceptable, rather fair criminal post-war justice, it nevertheless has raised sceptical opposition, missing for instance an equality of arms, right from the beginning and till the end.

In addition it was criticised that Nuremberg was established almost exclusively by common law states, where judges decide about 'their rules', thus dominating their procedure. After Nuremberg the various endeavours to create direct international enforcement mechanisms therefore demanded to establish proceedings which clearly and beyond reasonable doubt were conducted impartial, fair and in accordance with the rule of law, guaranteeing sufficient rights to the defence.⁷⁶

The creation of the two ad-hoc Tribunals, for the Former Yugoslavia and for Rwanda, was done too much in a hurry to take due consideration to the Draft Code and the Draft Statute already existing at that time. Agreement on a symbiosis between the two systems could therefore not be found so quickly. This was the reason why the Statutes continued to grant mainly the procedural rights of Nuremberg. Consequently, because of the dominance of common law, for each case had to be assigned a common law lawyer as one of the defence counsel.⁷⁷

⁷⁶ For more details see O. Triffterer, 'Zum Beachtungsanspruch des Völkerstrafrechts in staatlichen Rechtssystemen', in: Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft (AIDP) (ed.), *Internationale Strafgerichtshöfe und Menschenrechte* (2006) 69-117, at 106 *et seq.*

⁷⁷ For details on these questions see *ibid.* and, for instance, C. Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in: A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 143-159, at 150 *et seq.*

This factual and legal situation, which some of the presiding judges of the ICTY compensated *ad hoc*, was the basis for the preparatory work facing the Rome Conference. The desire to come up with a symbiosis between the different procedural laws and structures nevertheless could not be achieved. How difficult this is can be seen in the framework of the European Union, where merely a unification of arrest warrants could be achieved. But no further 'rapprochement' is in sight for the near future.

However, in a few parts of the Rome Statute, satisfying deviations from the procedures of the *ad-hoc* Tribunals can be found. The Rome Statute provides for instance expressly that the Prosecutor can initiate a proceeding '*proprio motu*'. He then has to notice not only the States Parties but also the Pre-Trial Chamber delivering the evidence to this Chamber and ask for authorisation to start official investigations, Article 15 Rome Statute. In addition provides Article 19, that the jurisdiction of the ICC or the admissibility of a case can be separately appealed.⁷⁸

Striving for the highest standard for a fair trial

This is the background against which at the Rome Conference many Delegations strived to elaborate and adopt the highest standards for Human Rights achievable in criminal proceedings. This aim appeared further desirable, because such standard on the international part of the Complementarity Regime of the Rome Statute could and should serve at the same time as a model for domestic criminal jurisdictions. To give an example was, in addition, advisable, since national jurisdictions have in principle a certain priority. It therefore may be argued that with regard to crimes falling within the jurisdiction of the Court, states as the constituent parts though but individually substituting are in a certain way representing the international community as a whole respectively its jurisdiction. It therefore is understandable that relevant regulations of the Rome Statute go beyond those contained in the rather quickly adopted Statutes for the ICTY and the ICTR.

It was this aim to make clear that only the highest standards of Human Rights for all participants should govern the proceedings before the Court. Disputed rights or limitations should not spoil the reputation of the Court.

⁷⁸ For these and the following considerations see O. Triffterer, 'Beachtungsanspruch', supra note 76, at 110-112 and C. Kreß, 'The International Criminal Court', supra note 77, at 149 *et seq.*

It was this aim and intent to keep high standards for procedural guarantees. For instance, with regard to genocide by denying sufficient food, the alternatives (a) *killing* or (b) *causing serious bodily harm* could be fulfilled. The same is true if conditions are 'inflicted' on the group, which were 'calculated' to bring about its physical destruction.

Progressive stages under the control of the Pre-Trial Chamber

When regulating the specific proceedings before the Court, one of the main aims was to prevent abuses of the organs and possibilities of the Court to discredit another state or its organs. Right from the beginning a neutral institution therefore was suggested to pre-decide whether a case was stringent when brought before the Court or whether it was suspicious of raising alleged accusations for political purposes.⁷⁹

Instead of creating such a separate organ to control the start of official proceedings, the Rome Conference preferred to have a continuous supervision of investigations and prosecutions and established particular proceedings for this purpose. At different stages different rights and duties exist to be obeyed by the organs of the Court. This system of 'checks and balances' with controlling powers is entrusted to the Pre-Trial Chamber, for instance with regard to the final confirmation of charges in Article 61.

But this is not all. Right from the beginning, whenever situations or cases were presented to the Prosecutor, he or she is obliged to refer to the Pre-Trial Chamber requesting its permission or better the confirmation that the Prosecutor is 'doing right' and therefore may start or continue investigations concerning situations or cases. Of course not only the official start of investigations and collecting evidence is depending on the agreement of the Pre-Trial Chamber. As in all states in particular the arrest and pre-trial detention depend on the decision of judges. These checks and balances serve the purpose to protect the rights of the suspect against unjustified interferences of the judiciary within his or her rights and liberties.

Witness protection, victims participation and compensation in the context with other rights and duties of the Prosecutor

In Article 66 Rome Statute the presumption of innocence is, for instance, expressly mentioned. But, Article 68 regulates for the first time direct in a

⁷⁹ See for instance A. Cassese, *International Criminal Law* (2nd ed., 2008), at 395 *et seq.*

Statute the 'protection of the victims and witnesses and their participation in proceedings', amended by Article 75, 'reparations to victims'.

New in this context are also the more detailed regulations of rights for the accused in Article 67 combined with the protection of victims and their participation in proceedings. These rights clearly set limits in paragraph 1 and paragraph 2 by emphasizing, that all measures taken or positions granted to victims during the proceedings 'shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.

How the Prosecutor has to proceed and what his or her rights and duties are, is in detail regulated in Articles 53 and 54. For the first time it is expressly confirmed as one of his duties, to establish the truth. Article 54 para. 1 lit. a) obliges the Prosecutor to '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, investigate incriminating and exonerating circumstances equally'.

In a similar way the rights of the suspect are fixed in Articles 55 and 66 as well as 67; there the immediate defence and its presence when witnesses are questioned, are ruled. Evidence may be formally withheld in a reduced way, even though the ICC Pre-Trial Chamber controls this issue to keep it within certain limits.

Though such requirements and the Rule of Law are mentioned further a few more times in the Rome Statute, it is up till now disputed what exactly is necessary to meet these standards and which infringements of civil rights and liberties can be tolerated in the interest of justice.⁸⁰ For instance the question of undue delay has been disputed not only in the case of *Prosecutor v. Lubanga* but also in the case of *Prosecutor v. Al-Bashir*.⁸¹

⁸⁰ For general remarks on the principle of a fair and expeditious trial see A. Cassese, *International Criminal Law* (2003), at 395 *et seq.* For a more detailed explanation see J. Pejic, V. Lesnie, *What is a Fair Trial? – A Basic Guide to Legal Standards and Practice* (2000), available online at http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf (15 Oct. 2009); copies of this report are also available from comm@lchr.org.

⁸¹ See *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, case No. ICC-02/05-01/09, available online at <http://www.icc-cpi.int/Menu/ICC/Press+and+Media/Press+Releases/> and at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (25 Sep. 2009) and *Prosecutor v. Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06, available online at <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases/> (11 Oct. 2009). See also R. Heinsch, 'How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge-dominated approach?', in: C. Stahn/G. Sluiter, *The emerging practice of the International Criminal Court* (2009) 479-500.

In the last case this may be due to political questions, because the suspect is supposed to have acted in official capacity as head of state. But in particular in such situations of alleged abuses of power, legal guarantees of Human Rights have to prove their validity and practical importance for protecting suspects. These considerations I have on another occasion dealt with by a few admittedly sophisticated questions in order to see, whether the high standard strived at has been reached in the Rome Statute. The result was that with regard to the qualification of defence counsel, for instance, the Rome Statute offers no satisfying regulation. Concerning judges there is no clear provision regulating the situation, where election or re-election depends on a state official, who has or may become a suspect. Should the judge concerned then be obliged to ask to be excused before this can be made an issue by any other person involved?

Since there may be more of such hidden issues, it is the task of the young generation to keep the role of the defendant and his client as well as the rights for both in international law under permanent critical observation; because perhaps there is a better solution available as in the Rome Statute?⁸²

2. *The task of the Court*

The context between Human Rights and the Court, addressed in the heading for this discussion, raises the question what does the Court can, should or can not contribute to the protection of Human Rights and does its` approach work in practice?

a. *To protect Human Rights by 'contributing to the prevention of core crimes'*

We have already seen above that creating and shaping awareness of justice presupposes that justice will be done and that it can be seen to be done. Therefore, the Court has to make everything transparent and in particular the results at the end of the proceedings, the decision: acquitted or sentenced.

But of equal importance is the procedure in between, for instance the reasoning for a warrant of arrest and its execution. It can, as the case of Milosevic demonstrates, be a condition for reconciliation even though finally because of the absence of the suspect, there may be no acquittal or sentence of the Court.

⁸² See for instance O. Triffterer, 'The Court in danger', supra note 23, under 2.B.4.b.

In addition, though this comparison limps, the Court may be seen as a 'watch dog'. The difference is that such dogs have to directly protect legal values and thus directly prevent violations; and the Court mainly becomes active, investigating and prosecuting, when a crime has been at least attempted, occurred or allegedly occurred. To be in addition preventive for the future, the Court therefore has also to concentrate on spreading the news on what is going on in The Hague as often as such an information is in the interest of justice and in so far, as, it appears admissible, to all the population in the world.

The news should not only reach the potential perpetrators, but equally the citizens as voters in political elections of state organs and also the states in their judiciary power; because in this function they have to take care of it, in principle, primarily to enforce the Rome Statute by preventing crimes by educating everybody about what is prohibited. The churches also play an important role in this task. Such a communication by all organs of the Court therefore is integrated in the general crime prevention Program of the United Nations but also of states and all individuals, military and civilians, obliged to defend and thus promote peace, security and well-being of the world.

b. First situations and cases pending, focusing on violations of individual Human Rights

According to the huge number of information on crimes within the jurisdiction of the Court which has been received as 'communications' from individuals or organizations, a few of major issues pending deserve some additional attention. All express the acceptance of the exercise of jurisdiction, referring a situation to the Prosecutor through a State Party or the Security Council and the Prosecutor initiating an investigation *proprio motu* in accordance with Article 15.⁸³

With regard to the Democratic Republic of the Congo, one of the indicted persons is charged with 'enlisting and conspiring of children under the age

⁸³ See for instance L. Moreno Ocampo, 'Lessons from the First Cases', in: The Austrian Federal Ministry for Foreign Affairs and Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law (eds.), *Salzburg Retreat, May 2006: The Future of the International Criminal Court* (2006), at 4 *et seq.*; see also the situation in Sudan: three cases are being heard before Pre-Trial Chamber I: *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*; *Prosecutor v. Omar Hassan Ahmad Al Bashir* and *Prosecutor v. Bahr Idriss Abu Garda*.

of 15 years into the forces'. This using children to participate in activities and hostilities in the context of an armed conflict of an international character is punishable under Article 8 para. 2 lit. e (vii) Rome Statute. In this case the charges are rather limited on recruiting too young 'soldiers', but nevertheless indirectly focusing also on the protection of those minors directly concerned.

With regard to *Prosecutor v. Germain Katanga*, these charges are amended by claiming that the accused has jointly with and through other persons directed an attack against civilian populations, namely wilful killing, destruction of property, pillaging and sexual slavery respectively rape.⁸⁴

Though in these cases individual Human Rights are emphasized and protected against violations of law and customs of warfare, peace and security are underlying legal values also for these definitions of crimes. Because every violation of international humanitarian law carries the danger of causing an escalation in an armed conflict and thus may lead to further violations of Human Rights. This is in particular true also when, like in this case, in addition, from the crimes against humanity, murder, rape and sexual slavery are charged.⁸⁵

As far as president Al-Bashir is concerned, the warrant of arrest lists seven counts with responsibility 'as an indirect (co)perpetrator'. Allegedly committed in this modality are murder, torture and rape as well as extermination and forcible transfer of population. While the first three crimes protect individual Human Rights the last two concentrate more on collective rights, even though individuals are victimized necessarily also by the commission of these crimes.⁸⁶ The two additional war crimes charged are of a similar structure, namely intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities.⁸⁷ Here however the difference between civilian population and individual civilians show very clearly that one definition may put in front individual Human Rights while another emphasizes more collective rights, as being primarily the (protected) object of an attack.

Another specificity is also contained in *Prosecutor vs. Jean-Pierre Bemba Gombo*, who as a military commander is charged with murder and rape as overlapping war crimes and crimes against humanity.⁸⁸

⁸⁴ See Article 25 para. 3 lit a, Article 8 para. 2 lit a (i), lit b (i), (xiii), (xvi), (xxii).

⁸⁵ See Article 7 para. 1 lit a, g.

⁸⁶ See Article 7 para. 1 lit a, d, f, g.

⁸⁷ See Article 8 para. 2 lit e (i), (v).

⁸⁸ For similar charges see *Prosecutor vs. Bahr Idriss Abu Garda*. However with the intentionally directing attack against installation, material, units or vehicles involved in a peacekeeping mission, Article 8 para. 2 lit e (iii).

Looking at these and comparable cases, charging crimes within the jurisdiction of the Court, it becomes obvious that though all regulations mainly stay in context with the protection of peace and security, they all equally aim to protect, though with different emphasis, individuals attacked and thus defend their personal Human Rights involved.

3. Investigating and prosecuting in a per se incomplete criminal justice system

As already mentioned above, international criminal justice can properly be exercised by investigating, prosecuting and of course sentencing through its organs, which at the moment are the ICTY, the ICTR and the ICC. But all three can fulfil their task only with the help of national criminal justice systems. Whether there will be one day a 'task force' or something similar to make the Court (more) independent from 'legal state aid' and thus make it more inherently equipped, is not predictable.

a. Direct enforcement of the Rome Statute, though partly with the help of domestic criminal justice agencies

Even the direct enforcement of the Rome Statute by the Court needs such help. Except for cases where suspects voluntarily appear in front of the Court or even more, for instance transmit to the Court a reliable written confession or present other convincing evidence for their crimes, the Court depends on the help of state agencies. When it has received communications hinting at certain places for hidden dead bodies or for other evidence, the team of the Prosecutor has to ask the respective state for the permission, not only to work at these places but also for the necessary elementary equipment, for instance for digging in mass graves to exhume the victims, and even more for arresting suspects and for their surrender to the Court.

The same is true with regard to questioning witnesses. They either have to be heard on the spot or asked to come to the Seat of the Court, but cannot be forced by the Court to appear. In the latter case they, in addition, quite often may need the permission to leave their country and to enter the Netherlands in order to be able to testify in front of the Court.⁸⁹

⁸⁹ With regard to the difficult situation of victims to be questioned at home and to be convinced to come to The Hague see for instance D.D. Cattin, 'Article 68 – Protection of the victims and witnesses and their participation in the proceedings', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 1275 *et seq.*

b. *Delegating the ius puniendi of the international community generally to states or leaving merely its execution to them?*

With regard to the indirect enforcement the task is easier to be managed. The states use their ordinary 'tools' of their domestic criminal justice systems. But since the guidelines and the law to be applied come from the international level, the question about the nature of this indirect enforcement is of some relevance.

Article 12 confirms that 'the Court with respect to the crimes referred to in Article 5' has jurisdiction; because otherwise the State Party would not by its ratification 'accept the jurisdiction of the Court'. According to Article 12 the states on the territory of which the crimes within the jurisdiction of the Court are committed and those states, of which the perpetrator is a national, have, in principle, even prior competence to investigate and prosecute the respective situation or case. The question therefore arises, whether they exercise their own *ius puniendi*, helping to enforce the overall *ius puniendi* of the international community as a whole, or substituting the community but, as already mentioned above, only exercising its *ius puniendi*.

However, Article 12 sets merely preconditions for the exercise of the jurisdiction, namely that 'the State on the territory of which the conduct in question occurred' or 'of which a person accused of the crime is a national' is a State Party or has accepted the jurisdiction of the Court. The only exception from this limitation is a referral by the Security Council according to Article 13 lit b; because Article 12 para. 2 does not mention this alternative.

The ductus 'accepting the jurisdiction of the Court' even though the state has according to the territoriality principle for instance also jurisdiction, justifies the interpretation, that the formulations in Articles 12 and 15, in particular 'within the jurisdiction of the Court', presuppose that the Court exclusively is entrusted with the administration of *ius puniendi* of the international community as whole. Since no opposite has to be deduced from the Statute or the Rules, the states and thereby their national courts when accepting the jurisdiction are not substituting the community but only exercising its powers according to the Statute. The domestic level therefore, merely executing this *ius puniendi* on behalf of the community, is bound by the framework which this community has decided to be the necessary prerequisites: namely, 'genuinely' to proceed in the sense of Article 17.

In such cases the state may even have a double function: exercising its own *ius puniendi* for crimes created by its national law, and at the same time helping to enforce the over all *ius puniendi* of the international community as a whole. The situation may be comparable with states in a con-

federation, union or Republic of states where the *ius puniendi* is with the supra national institution but executed by the members. However, at least for the decisive part this execution it is under the supervision, control and appeal to the highest courts in the higher organization.

This question of the theoretical structure between national jurisdiction and the complementarity jurisdiction of the ICC, however, is not decisive. More important is that the enforcement on the domestic level by States Parties and non-Parties equally apply the relevant international criminal law to hold persons responsible for crimes listed in Articles 5 to 8 Rome Statute. Therefore, when international criminal law has to be enforced by states, it is the scope and notion of this law that decides the assessment of specific situations or cases dealt with by domestic agencies or state organs.

If at all, there is a small discretion on the domestic level with regard to analyzing and interpreting this international law. It remains the supreme law of the nations and what this is, will be decided in the last instance by the Court. Because finally the Court decides whether a state was able and willing to 'genuinely' proceed, Article 17, and whether there is need to apply Article 20, namely by lifting the *ne bis in idem* rule, when the national jurisdiction had shielded the suspect or did not conduct the proceeding 'independently and impartially' or in a way 'consistent with an intent to bring a person concerned to justice'.

c. *Tension between competing enforcement levels*

Already the just mentioned possibility to control, supervise and finally correct national proceedings according to Articles 17 and 20 Rome Statute, triggers a tension between the direct international and the indirect national enforcement model. The last, even if investigating and prosecuting *bona fide* has to be careful, to sufficiently demonstrate and express to the public and the Court that it is properly applying the law contained in the Statute and the Rules as well as in other relevant international documents; even if the national jurisdiction has given its best, the results may not correspond with what the International Criminal Court deems to be genuinely, independently, impartially or in any other way as 'consistent' with what is described in these Articles.

And if the domestic level was not *bona fide* it had to be all the time very careful not to be trapped by the 'superior' court. In both cases the situation is right from the beginning not without tension; because each level is observing the other with suspicion perhaps to find 'mistakes' or even proof for 'cheating'.

To avoid or at least to diminish such a tension between a domestic court in Bosnia Herzegovina and the ICTY, representatives of both, in particular judges met at the end of October 2009 in The Hague to discuss open questions. Such an exchange appears not only advisable when like according to Article 9 ICTY two institutions have 'concurrent' jurisdiction, though one, the ICTY 'shall have primacy over national courts at any stage of the procedure and correspondingly may formally request to defer to the competence of the ICTY'. Such an exchange of ideas and cooperation appear advisable also with regard to the ICC, where according to the Preamble para. 10 and Article 1 the International Criminal Court '...shall be complementary to national criminal jurisdictions'. And Complementarity in this sense means the competence may be triggered whenever the provided conditions are fulfilled.

d. *The 'Complementarity regime' of the Rome Statute: A political compromise in the interest of justice and Human Rights*

Such a predictable tension was the background before which the discussion at the Rome Conference about different proposals for assigning prior competence to the national or to the international level was negotiated. Dominating for shaping this relationship or competition of the two levels in the Rome Statute were, in particular, former Drafts out of which Articles 12, 13, 15, 17 and 20 emerged.⁹⁰ Recommended were in addition to the competence of the territorial or the national state, as described in Article 12, the primary competence of the custodial state and, in general a higher threshold for triggering the competence of the Court, only when the competent state being unable or unwilling to prosecute genuinely.⁹¹

The political compromise finally was, to limit the competence of the Court by Article 12 to the territorial and the nationality principle. But this rather small basis for starting an international criminal jurisdiction was mitigated by exceptions permitting to start immediately at the Court, listed in Articles 12 para. 3, 13 lit a-c and 15. In particular lit b opens the possi-

⁹⁰ See for instance C. Bassiouni, *An Article-by-Article Evolution*, supra note 44, at 97 et seq. See also S.A. Williams/W.A. Schabas, 'Article 12 – Preconditions to the exercise of jurisdiction'; id., 'Article 13 – Exercise of jurisdiction'; M. Bergsmo/J. Pejic, 'Article 15 – Prosecutor'; S.A. Williams/W.A. Schabas, 'Article 17 – Issues of admissibility'; I. Tallgren/A. Reisinger Coracini, 'Article 20 – Ne bis in idem', all in O. Triffterer (ed.), *Commentary*, supra note 4, at. 547 et seq., 563 et seq., 581 et seq., 605 et seq., 669 et seq.

⁹¹ See S.A. Williams/W.A. Schabas, 'Article 17', at 616.

bility for the Security Council to refer a situation directly to the Court. Such a referrals broadens the primary competence of the Court and thus of the international level to fight core crimes by reacting immediately and rather independent of domestic criminal justice systems. Because according to the wording of Article 12 para. 2, Article 13 lit b is not mentioned, with the consequence that the limitations of Article 12 are not applicable in cases of referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

As the referral concerning the situation in Darfur has demonstrated, the critical point is when in the context of such a referral persons are suspicious who have acted as state organs or in any other official position. Article 27 provides without any exception the 'irrelevance of official capacity' with regard to criminal responsibility and emphasizes in para. 2 that

immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

But this denial of impunity, though convincingly and without exceptions formulated, has to be seen in the context with Article 98 para. 2. This rule permits states for instance not to cooperate with the Court and to refuse a request for surrendering the suspect to the Court, if such an act would be inconsistent with other international obligations of that state. However, Article 98 para. 2 has a disputed validity and cannot change the basic rule, that the Court should not be barred to exercise its jurisdiction by any official position of the suspect.⁹²

This and similar historical and present examples mirror the ambivalent situation at Rome. It was shaped by the fear that ruling heads of states and organs of states would be easily without reasonable ground blamed or even prosecuted for allegedly having committed a crime. And on the other side granting them impunity and denying and not enforcing their international criminal responsibility might increase atrocities and abuse of power worldwide. When searching for a solution, almost everybody was extremely cautious. Nobody wanted to take the responsibility for favouring or even promoting one or the other of the two extreme possibilities.

⁹² See O. Triffterer, 'Irrelevance of Official Capacity, Article 27 Rome Statute', supra note 15, at 592 *et seq.* and C. Kreß/K. Prost, 'Article 98 – Cooperation with respect to waiver of immunity and consent to surrender', in: O. Triffterer (ed.), *Commentary*, supra note 4, at. 1601 *et seq.*

And on the other side, nobody wanted to be responsible for a break down of the Conference. Because blocking the adoption of the Statute would prevent the establishment of an International Criminal Court, perhaps forever. It appeared impossible to continue beyond the provided end of 17th of July 1998, or to postpone the Conference to a later date. Everybody was convinced that a Conference without the requested result would not lead in predictable time to a new Conference with the same aim. Notwithstanding that never again such an enthusiasm was expected as in Rome, a delay for years or even decades was feared might cause a failure of the whole project forever.

The situation appeared for just a few Delegates rather desperate till all of a sudden, unexpected the word 'complementary' was thrown into the discussion. It was till then no issue, neither in Rome nor in the history of the Statute for an international criminal court. The Delegates, however, were aware that Nuremberg did not need a special agreement on the issue, which level should have priority, the national or the international. Because the four major Allied and the 19 'co-opting' states trusted each other. They all wanted that the main perpetrators should be sentenced at Nuremberg, because their acts were transgressing national borders and it would not be easy to assign to them specific localities; and those who committed their atrocities in other countries should be brought back to the places where they had committed their crimes.

But at the beginning of 1991 the situation in Yugoslavia and Rwanda were different. Correspondingly, the Statutes for the ICTY and the ICTR used the word 'concurring jurisdiction'. It needed however immediately a limitation, so Article 9 para. 2 and Article 8 para. 2 respectively ruled that the Tribunals 'shall have primacy over the national courts of all states' and obliged 'at any stage of the procedure', if 'formally requested national courts to defer to its competence'.

The underlying situation was that nobody trusted anybody at that time on one of the relevant territories and even abroad. For instance without other reasons than that the ICTY did not have a suspect available at that time, the Prosecutor of the ICTY asked Germany to surrender Tadić, the first case then which became quite famous because it shaped several aspects to be observed and in particular the position of the defence.

With the word 'complementary' mentioned at the Rome Conference, immediately a certain calming effect appeared. Obviously there was a different meaning for the two words; concurring expresses more a competing situation, like running for the same aim; and complementary expresses an avail-

able cooperation as it is expressed in Article 86 *et seq.* of the Rome Statute: assisting if needed and only then the international level was challenged. This scope and notion made it superfluous to regulate priority expressly. Because the underlying structure presupposes that states carry the main load already for practical reasons; they are obliged primarily to deal with relevant situations and cases; since a huge amount of suspects like in Rwanda could not be managed by an international tribunal. Therefore, the underlying structure to deduce jurisdiction of the Court is decisive, in particular as expressed in Articles 12, 13 to 15, 17 and 20, as already mentioned above.

The Court is designed for standing aside, keeping 'contenance' as long as what could be observed or reported in a reliable way was in accordance with the aims and purpose of international criminal justice. The Court should have the power to investigate and to prosecute only when situations occurred, not consistent with the relevant parameters established in the Rome Statute. It was a compromise to accept a narrow concept in principle, but to provide exceptions in Articles 12 para. 3, 13 and 15.

This relation, rule and exception, was expected to dominate the situation after the Statute and the Court came into operation. But to the surprise of all, exceptions finally started the first activities of the Court. This is in particular true with regard to the referral of the situation in Darfur by the Security Council. It has shaped the first operating situations of the Court tremendously. It appeared not necessary to exhaust the provided procedures on the domestic level, as long as it became obvious and agreed between the national and the international level, in particular the Security Council, that the international level should start immediately as being the more reliable and suitable body for investigation and prosecution in this situation.

In addition, during the beginning of such proceedings, there are anyhow enough possibilities to challenge the admissibility and the jurisdiction of the Court, according to Articles 18 and 19.

But the first cases pending, as already mentioned above, have shown that there was sufficient trust into the Court worldwide though a few critical voices up till now can be heard, like from African states but also from the U.S., and they have to be heard. In particular a court just starting to enforce justice and Human Rights should be listening carefully to critical voices. The First Review Conference 2010 in Kampala opens for instance a suitable opportunity to control and if necessary amend the Statute, the Rules and other underlying laws.

The above comment on the complementarity regime of the Rome Statute demonstrates that though still disputed, the relevant regulations

are, in principle, satisfying. The 'preconditions' listed in Article 12 narrow the direct enforcement model, which however has been broadened by quite a few exceptions; and all these, in particular referrals according to Article 13 lit b, have demonstrated right at the beginning, when the Court started its activities, how important it is in praxis, for the protection of Human Rights, to start investigation and prosecution as soon as possible by a direct enforcement model, without first exhausting the perhaps or most properly time consuming activities to prevent further or stop crimes by prosecuting in domestic criminal justice systems, the indirect enforcement model.

IV. GENOCIDE AND ITS PARTICULAR FEATURES

At the end of my presentation I will survey why genocide is a particular satisfying example for the task of our session and what are the consequences, part of which have been discussed already when analyzing the theoretical background for our subject matter. A detailed analysis of relevant issues I have published on another occasion when commenting § 321 Austrian Penal Law. In order to avoid repetition I refer to this publication and emphasize here only a few aspects which are especially suitable to demonstrate the importance of Human Rights for the prosecution of crimes within the jurisdiction of the Court.⁹³

⁹³ See O. Triffterer, '§ 321', in O. Triffterer *et al.* (eds.), *Salzburger Kommentar zum StGB* (2004); the contents there, from which the important issues can be taken are the following:
Gliederung:

A. Allgemeines

1. Entstehungsgeschichte, internationale Vorgaben und Entwicklungstendenzen
2. Geschützte Rechtsgüter und Angriffsobjekte
3. Systematische Einordnung und gewählte Deliktstypen

B. Die Anwendungsvoraussetzungen im Einzelnen

I. Die Tatbestandsmerkmale

1. Objektiver Tatbestand

- a) Gemeinsames Merkmal für alle Varianten: Betroffenheit von einzelnen Mitgliedern und von einer der geschützten Gruppen
 - aa) Unmittelbare Betroffenheit
 - bb) Die geschützten Gruppen
 - (1) Das Ganze und dessen Teile
 - (2) Die benannten Gruppen

1. *General aspects relevant for Human Rights*

Article 6, genocide is the only group within the jurisdiction of the Court, which defines all alternatives by focusing each of them on more than one Human Right to be protected:

- in lit a and b, life and physical integrity of one or more individuals, are the directly protected targets;
- in lit c, ‘conditions of life calculated to bring about its physical destruction’, also protect individuals and, at the same time, all members of the attacked group against dangers for their physical integrity and life;
- ‘measures intended to prevent birth within the group’, lit d, violates the rights of every single member to plan and have a family, as well as the continuing existence of the group;
- and finally, according to lit e ‘forcible transferring children to another group’ violates the right of parents to bring up children and edu-

(a) ‘Kirche oder Religionsgesellschaft’

(b) ‘Rasse’

(c) ‘Volk’ und ‘Volksstamm’

(d) ‘Staat’

b) Die einzelnen Begehungsformen

aa) Tötung

bb) Zufügung schwerer körperlicher oder seelischer Schäden

cc) Aufoktroiyierung von zur Lebensgefährdung geeigneten Bedingungen

dd) Verhängung von Maßnahmen zur Geburtenverhinderung

ee) Zwangsweise Überführung von Kindern in eine andere Gruppe

c) Verknüpfung von Handlung und Erfolg

d) Größerer Sachzusammenhang?

2. Subjektiver Tatbestand

a) Tatvorsatz

b) Erweiterter Vorsatz

II. Rechtswidrigkeit

III. Schuld

C. Besonderheiten

1. Zusammenwirken mehrerer

a) Verabredung zur gemeinsamen Ausführung, Abs. 2

b) Verhetzung, § 283

c) Sonstige Formen

2. Konkurrenzen

a) Überschneidungen zwischen den Varianten

b) Zusammentreffen mit anderen Tatbeständen

3. Verfolgbarkeit

cate them as well as the right of children to grow up in a certain group with their parents or another group of their choice.⁹⁴

For a criminal responsibility, one of these objective appearances of harm has to be committed or at least attempted to be realized. While all alternatives presuppose an aggressive behaviour against one or more individuals though the act as such may be addressed to a group, like the last three alternatives, this chain of material elements are for no alternative the only requirement to establish the harm described in the definition. All alternatives presuppose, in addition, that whatever the specific behaviour of the perpetrator for his *actus reus* was, it has to be covered by an intent to destroy the group, the person addressed belongs to, 'as such in whole or in part'. Through this particular intent, collective values of protected minorities are approached and thus an additional harm has entered the definition. But the specificity is that the particular intent does not have to be realized, as already mentioned above. It is sufficient that the perpetrator at the beginning of his criminal behavior believes, his act against one or more members of the group could or would 'destroy the group as such in whole or in part' even if shortly after the act it becomes obvious, that this 'second result' would definitely not occur. Decisively is that the perpetrator believed it would or could and already then he has fulfilled the necessary prerequisites for an attempted or completed crime, even if the particular intent is finally prevented to lead to the intended consequences.

This particular intent differentiates for instance the alternative killing and causing bodily or physical harm from the ordinary murder with the same consequences. It thus demonstrates how high the quality of this particular intent is for shaping one of 'the most serious crimes of concern to the international community as a whole'.

Further general aspects for all alternatives of genocide are the following, as partly already mentioned above:

- The crime may be completed even if the intent, to destroy the group in whole or in part, has not and cannot be anymore realized. This 'double' mental element has to be emphasized, because this is the

⁹⁴ All these are material elements directly interfering with Human Rights. The fact that one of them refers to a mental element by the wording 'deliberately inflicting' and another by referring to 'intended to prevent birth' is not decisive. For the protection of Human Rights this may be a deviation from dogmatic rules not mixing material and mental elements; but important is that all these material elements focus directly on Human Rights and their protection.

constitutive part of genocide. It makes this crime so dangerous for individual Human Rights as well as for peace, security and the well-being of the world.

- Another important issue are orders to commit genocide. They are in no case relevant for the responsibility of the subordinate. Since Article 33 para. 2 contains a *presumptio iuris et de iure*; the possibility to prove the opposite is thus excluded. The subordinate therefore cannot achieve impunity by referring to an error in law or in fact.
- Finally, it ought to be mentioned that according to Article 25 para. 3 lit e, a public and direct incitement triggers responsibility for genocide, even if nobody was ‘seduced’ or otherwise inspired to commit genocide.

2. *Specificities concerning material elements*

The three above mentioned general aspects have already demonstrated how high for the protection of Human Rights the punishability of genocide is accessed. This evaluation is confirmed by some of the specific definitions. In lit c, ‘deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part’, the consequence, that these conditions really are successful, is not required. An abstract danger by the condition as such is sufficient. The crime therefore is completed when those conditions are established independent of whether they are or will be successful.

A similar approach is contained in the alternative under lit d, ‘imposing measures intended to prevent birth’. Whether such measures like prohibiting sexual intercourse between members or to use preventive measures are successful or not is not decisive. The aim of this alternative is to avoid any limitation of the Human Rights of this particular group.

With regard to transferring children from one group to other the situation is similar. It does not count what is better for the child, because it is the right to be brought up in his or her own group and to be protected against influences by another groups, which have not been chosen by the victim. However, though this alternative defines a continuing crime (Dauerdelikt), the question, whether (a help to) self defence excludes criminal responsibility in the sense of Article 31 depends on a case to case basis.

The special structure of this alternative has to be observed, because it establishes criminal responsibility for a result without a visual harm: Perhaps the education in this group may be all around better, but this does not

count. It is an abstract potentially dangerous behaviour justifying the accountability, because every group has the right to bring up their children their own way. So even if the education in the receiving group will be all around better, the crime is nevertheless completed.

3. *The mental side*

Most of the relevant aspects have been addressed already above. It needs only to summarize that intent and knowledge shape all mental elements according to Article 30, 'unless otherwise provided'. This means no special high or low degree is required, where only 'intent' is mentioned. And this is with regard to genocide only once: 'deliberately inflicting conditions'; that means here is a higher degree for the intent required than for the genocidal intent to destroy the group as such in whole or in part.

The intellectual part and the voluntative part are more detailed described in Article 30, though not with the same clarity. Therefore, the request to demand for genocide a special intent, the highest quality in the sense of *dolus directus*, is not justified.⁹⁵

V. CONCLUSIONS AND FUTURE PERSPECTIVES – VISIONS BEYOND

At the end of my comments a few remarks on what we have to expect by the International Criminal Court and its substantive law basis. To anticipate part of the answer: the development of new Human Rights cannot be expected from criminal law and its enforcement, neither on the national nor on the international level.

In this context I have not to deal with procedural rights before the Court in detail. That they ought to be guaranteed on the highest level is, as already mentioned above, self evident. Only as far as withholding such rights on the domestic level, in particular to members of minority groups, when attacking civilian populations by crimes against humanity or military personal as well as protected targets through war crimes, these rights play a role in the context of responsibility under international law.⁹⁶

⁹⁵ See for instance O. Triffterer, 'Art. 27 – Irrelevance of Official Capacity', in: O. Triffterer (ed.), *Commentary*, supra note 4, at 779 *et seq.* and O. Triffterer, *Österreichisches Strafrecht, Allgemeiner Teil* (2nd ed., 1994), at 64 *et seq.*

⁹⁶ See S. Zappala, *Human Rights in International Criminal Proceedings* (2003) and O. Triffterer, 'Preface', in: J. Temminck Tuinstra, *Defense Counsel*, supra note 66.

1. *Other groups outside the definition of genocide to be protected*

There is no tendency visible to extend the definition of genocide to for instance, social, cultural or political groups. The reasons for limiting the present scope and notion of Article 6 are first the specificities of the groups mentioned in the definition of genocide. They are, according to the experience over centuries, in particular endangered by abuse of power. To include others could diminish the preventive effect of this definition. In addition, social, cultural or political groups are included in the scope and notion of crimes against humanity, Article 7 para 1 lit. h, persecution, including protection against large scale and wide spread attacks endangering their existence. An anticipated protection like for genocide is not needed, because Articles 7 and 8 contain sufficient possibilities to prosecute discrimination of these groups by severe infringements, for instance on prisoners of war.

And finally there is a theoretical problem and a hesitation for practical reasons. To define genocide on social, cultural or political groups in the sense of Article 22 para. 2 'strictly construed' is not only difficult but also needs an amendment to the Genocide Convention. And it is feared that any tendency to narrow or extent the scope and notion of the present concept of genocide may trigger a general debate on this Convention and endanger one of the highest achievements we had since Nuremberg, notwithstanding the Rome Statute, the ICTY, the ICTR and, of course, the four Geneva Conventions.

2. *Extending the jurisdiction of the Court to protect additional Human Rights*

There is no doubt that not all Human Rights are protected by crimes defined as constituting 'the most serious crimes of concern to the international community as a whole'. Quite a few of the political and civil as well as the social and cultural rights granted by the 1966 Covenants, are not to be found in all the alternatives of the four core crimes within the jurisdiction of the Court. This is the consequence of the task assigned to international criminal law, to establish direct responsibility and enforcement only for those crimes, where as *ultima ratio* an international engagement is required, because the shielding system on the domestic level appears, mainly because of abuse of power, not sufficient. I refer in so far to the right for asylum as well as the right to be born, to live, and to die in dignity, all of which are strongly supported by Catholic Social Theory and partly go back to the Christian Universal Declarations.

More and more, however, the right to live is expressly extended to include to live without hunger and fear to starve. The Preamble of the Rome Statute therefore includes as protective values of the international community as a whole besides peace and security also 'the well-being of the world'. This implies for every single human being to participate on the wealth of the world, in particular with regard to children. They and the coming generations have to be protected against destroying and exhausting the natural resources of the world.⁹⁷

The present situation is a shame for all of us, with all due respect for the achievements in the last decades. But it seems to be intolerable that daily millions of persons have not enough to eat or even starve while in other places of the world superfluous basic food is destroyed to stabilize the prices. Should the criminal law of the international community as a whole not 'help' to change the situation?⁹⁸

3. *Rights of future life?*

It has been on several occasions considered, what rights future generations should have, and how to protect now for instance natural sources, without which they cannot live at all or at least have to accept a severe reduction of their present chances to live. Even according to the Rome Statute, Article 8 para. 2 lit. b (iv), '[i]ntentionally launching an attack...that ...will cause...widespread, long-term and severe damage to the natural environment...' is one of the war crimes. A similar formulation is contained in Additional Protocol I (1977) to the Geneva Conventions.⁹⁹

A remarkable initiative has lately been started by the World Future Council.¹⁰⁰ It proposes 'Crimes against future generations of life' but not meaning only generations of human beings. For these crimes the starting point can be any 'act[s] or conduct, when committed with knowledge of

⁹⁷ See O. Triffiterer, *Umweltstrafrecht – Einführung und Stellungnahme zum Gesetz zur Bekämpfung der Umweltkriminalität* (1980).

⁹⁸ See O. Triffiterer, 'Die Dritte Welt', supra note 47, 119-164.

⁹⁹ See Additional Protocol I, Art. 55. See also O. Triffiterer, 'Recht als eines der Instrumente zur Bewältigung der Umweltkrise', in: D. M. Bauer/ G. Virt, *Für ein Lebensrecht der Schöpfung* (1987) 48-142; In the original German version it is argued that the created earth has an independent right to live.

¹⁰⁰ See for the current work of the World Future Council <http://www.worldfuturecouncil.org/startseite.html> (2 Nov. 2009).

their severe consequences on the health, safety, or means of survival of future generations of humans, or of their threat to the survival of entire species or ecosystems'. It is especially mentioned 'military, economic, cultural or scientific activities, or the regulatory approval or authorisation of such activities', when they cause one of the above mentioned consequences or a specific danger to protected values. It is as far as I see the first time that such a broad responsibility is demanded. Even though with regard to the International Criminal Court there is no chance that such an extension of its jurisdiction will within due time seriously be considered or voted upon. But it is already worthwhile to discuss or bring to the attention of the audience at the First Review Conference 2010 this new approach, which hopefully will change the attitude towards the environment already by its consideration in such a greimum.

The Churches with their big influence on millions of people have the task and the possibility to propose and to promote such a protection of the environment. They may as well by their basic organisations, like the Caritas, provide to diminish or perhaps even abolish to a great extent the causes for crimes.

I am not qualified to refer the bible. However, all of us should remember that the donation 'Fill the earth and subdue it'¹⁰¹ is followed by 'to take care of it'.¹⁰² We thus all have the responsibility for the 'well-being of the world' in the sense of Preamble, para 3, Rome Statute. This value is obviously not only the basis for our present existence but also the condition to survive in future generations in our 'Mitwelt'. Solidarity therefore is required not only for the environment and future generations, but also for those who carry the burden now under unfavorable conditions compared with other privileged parts of the world.¹⁰³

This will finally bring us to an old demand, now even more urgent than before: who dares to refuse endangered people to land on a safe shore ahead? Throwing them back into the open sea violates not only human dignity but may trigger in many countries criminal responsibility for the failure to help or perhaps also for causing danger to life or even death!

Of course, neither criminal proceedings nor penal sanctions are dominated by humanity. The enforcement of social rights is only to a very small part

¹⁰¹ Genesis, 1:28.

¹⁰² Genesis, 2:15.

¹⁰³ See for instance O. Triffterer, 'Die Dritte Welt', supra note 47.

the task of national criminal justice systems; for instance when parents deliberately refuse maintenance for their children; and 'bystanders' are at least obliged to be Samaritans, while persons with closer relations to the emergency situation or the victims may even have to face criminal responsibility for omitting to prevent harm and thus contribute to the commission of a crime.

With regard to international criminal law the situation is at least a little different. Its rules (commandments) call for instance quite often for a minimum humanity, even during armed conflicts. Since grave breaches of 'international humanitarian law' are punishable, it is not only prohibited to be inhuman, but required to exercise this virtue by omitting such violations. This interrelation between prohibition and commandment obliges in particular military personal and others acting in official capacity to actively 'practice' Human Rights when confronted with weak, endangered or handicapped human beings, unable to take an active part in armed conflicts.

State organs and other persons acting in official capacity, therefore, have to 'take care' and exercise this virtue whenever humanity is required to protect peace, security and well-being of the world. Prisoners of war for instance and minority groups listed in Article 6 shall not be denied sufficient basic food, as can be seen by the punishability of 'inflicting...conditions of life calculated to bring about its physical destruction in whole or in part'.

This requirement, to abstain from inhuman conduct is established to prevent crimes falling within the jurisdiction of the Court by putting an end to impunity. The punishability thus is a considerable contribution to this prevention.

But much more effective than criminal law would be, to diminish or even completely abolish the causes for such crimes. And violations of social rights, in particular when they amount to withhold basic conditions for living and appear in hunger, poverty and starvation, are one of the major factors causing crimes. Therefore, even though the chance that the community of nations as a whole will agree on criminalizing the destruction of food for the purpose to stabilize prices, while in other parts of the world people starve, is low, it is worthwhile to repeat continuously, that hunger, poverty and starvation have to be abolished not only in the interest of humanity, but also for the effective prevention of crimes; at least, as far as domestic law is not able or willing to fulfil this talk, international criminal law should be considered to 'take over', as *ultima ratio* the protection of Human Rights for everybody, to be protected against starvation.