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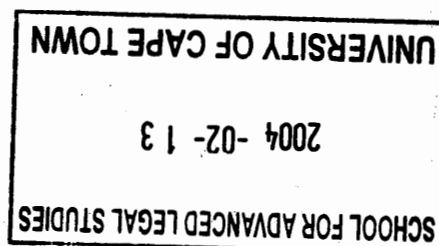
The German Code of Crimes against International Law in context of  
International Criminal Law:

Can its penalty system serve as model for the International Criminal  
Court?

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the Master of Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Cape Town, 15 February 2004



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**THE GERMAN CODE OF CRIMES AGAINST INTERNATIONAL LAW IN**  
**CONTEXT OF INTERNATIONAL CRIMINAL LAW:**  
**CAN ITS PENALTY SYSTEM SERVE AS MODEL FOR THE INTERNATIONAL**  
**CRIMINAL COURT?**

**1. Introduction**

A new millennium has recently begun and with it a new era in International Criminal Law. Since 1 July 2002, an International Criminal Court (ICC) in The Hague has been able to hold individuals responsible for human rights violations. In the era of globalisation the world acts more and more on an international level and globalisation has also adopted a high significance in international crime. Never has the international crime rate been as high as nowadays and there is anything but an end in sight. Thus, the need for international criminal prosecution increases. The establishment of *ad hoc* tribunals as an answer to the committed atrocities of the most terrible wars in the last century has shown that it is possible to prosecute the responsible individuals. Intervention is more than necessary. But while these *ad hoc* tribunals had to be established under certain circumstances, the ICC now offers a new and stable way to try international crimes before a global acknowledged court.

The final establishment of an ICC is the first step towards the prosecution of international crimes, but as new as the Rome Statute is, it is already clear that it has some shortcomings as an instrument for a comprehensive fight against international crime. The passing of the Rome Statute of 17 July 1998 and the establishment of the Court almost four years later is just the beginning. Further changes may be required to improve and complete the international criminal law system. In any case, the ICC has now the jurisdiction over crimes such as genocide, crimes against humanity, war crimes and grave breaches of the Geneva Convention. Thus, the Rome Statute covers the principal shortcomings of the former international criminal law. By stipulating that the Rome Statute should only come into force if 60 states ratified the statute, the Rome Conference ensured that the ICC would have enough support of the world community for its work.

The Rome Statute is the result of many years of political and legal struggle. Even now the discussion about a correct procedural order for the ICC is not yet complete. The wide gap between the Anglo-American and the Continental traditions of criminal procedure

makes it difficult to find a compromise in the issue of criminal procedure in an international context<sup>1</sup>.

As one could also see in the work for the establishment of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and afterwards for Rwanda (ICTR) in 1994, it is one of the greatest challenges to combine the civil law and common law rules as well as international human right standards into an international body of procedural and substantive criminal law<sup>2</sup>. The aim must be a standard international criminal procedure, which stands solidly on the columns of various traditions of criminal procedure.

At the moment the Rome Statute presents a framework for the procedure of the ICC. Considering the penalties in article 77 (1) of the Rome Statute, the State Parties of the Rome Conference consented after long controversial debates not to introduce the death penalty, but life imprisonment. Moreover, the penalty of life imprisonment has to be reviewed after duration of 25 years and may only be imposed by an extreme gravity of the crime and the individual circumstances of the convicted person (article 77 (1) (a) and (b) of the Rome Statute)<sup>3</sup>. Thus, sentences of up to 46 years<sup>4</sup> as imposed by the ICTY will no longer be possible. But is this improvement sufficient for the future work of the International Criminal Tribunal?

It cannot be denied that the Rome Statute has at least the potential to provide the necessary framework, in which a penal regime can be developed that meets the standards of international human rights law. But for purposes of structuring the process of imposing and implementing sentences the question arises, if it had been desirable for the Rome Statute itself to have included explicit penal objectives<sup>5</sup>.

Although there is no obligation for the states to implement the listed crimes of the Rome Statute into domestic law, the Rome Statute obviously assumes in section VI of its preamble that there is an obligation resulting from international customary law to prosecute

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<sup>1</sup> C Safferling, *Towards an International Criminal Procedure* (2001) 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> F Jarasch, C Kreß in: C Kreß, F Lattanzi (eds) *The Rome Statute and Domestic Legal Orders*, Volume 1 (2000) 110.

<sup>4</sup> For examples see: *Prosecutor v Jelesic*, IT-95-10-A, Appeals Chamber, 5 July 2001; *Prosecutor v Kristic*, IT-98-33-T, Trial Chamber, 2 August 2001.

<sup>5</sup> R Henham 'Some Issues for Sentencing in the International Criminal Court' 52 *International and Comparative Law Quarterly* (2003) 102.

international crimes<sup>6</sup>. However, many states have taken the ratification as an opportunity to modify their domestic criminal law and to harmonise it with the Rome Statute<sup>7</sup>.

Germany is one of those states. On 30 June 2002, the government brought the German Code of Crimes against International Law (CCIL)<sup>8</sup> into force, only one day before the Rome Statute. The CCIL transferred the substantive criminal law prescriptions of the Rome Statute into German law<sup>9</sup>. Moreover, it extended the articles of the Rome Statute and provided it with more accuracy regarding the penalties. One of the reasons for this slight change of the Rome Statute slightly for this was the requirement of the principle of legality, determined in Art. 103 II of the German Basic Law<sup>10</sup>, to provide the listed crimes with specific penalties.

Thus, the German CCIL presents a kind of new draft of the Rome Statute. For reasons of domestic basic law, the German state was forced to refine the articles of the Rome Statute. The CCIL having been established, the question is now, whether it presents a general improvement to the Rome Statute of 1998 also in regard to International Criminal Law and furthermore, whether it could be sensible to apply the CCIL also in International Criminal Law.

The following thesis will have a closer look at the ICC and its penalty system, the development of the current International Criminal Law as well as the German CCIL.

From this point of view, it will deal with the question, whether the penalty system of the German CCIL could serve as a model for the ICC.

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<sup>6</sup> Satzger 'German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law' *International Criminal Law Review* 2 (2002) 263.

<sup>7</sup> G Werle, F Jessberger 'International Criminal Justice is coming home: The new German Code of Crimes against International Law' *Criminal Law Forum* 13 (2002) 191.

<sup>8</sup> Voelkerstrafgesetzbuch.

<sup>9</sup> Werle, Jessberger op cit (n7) 102.

<sup>10</sup> Grundgesetz.

## **2. The penalty system of the German Code of Crimes against International Law as model for the International Criminal Court**

*'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'*<sup>11</sup>

The German CCIL was introduced on 30 June 2002. With its introduction the German State ensured that Germany would always be in the position to persecute crimes against International Law under the jurisdiction of the ICC<sup>12</sup>. Thus, the German Criminal Law adapted to the provisions of the Rome Statute. For constitutional reasons, however, the German State was not able to implement the Rome Statute word by word, but modified it by adding penalty provisions to the single crimes.

The following part will deal with the development of the International Criminal Law up to the establishment of the ICC, the possible deficit of the punishment provisions of the Rome Statute as well as the punishment system of the German CCIL. In conclusion it will consider whether the punishment system of the German CCIL could serve as a model for the ICC.

### **a) Punishment in International Law**

The punishment of natural persons has not been a concern of international law for a long time. Sanctions like trade embargoes, travel restrictions and seizure of foreign assets are routinely placed upon the nationals of states which perpetrate or otherwise support the commission of violations of international humanitarian law. When they are imposed as a custodial sentence there is the additional element of condemnation of the offender for the crimes he had committed<sup>13</sup>.

The post-World War II Tribunals of Nuremberg and Tokyo have confirmed the liability of individuals for international crimes and have imposed punishments on those convicted of committing them. The influence of these Tribunals was consolidated by the

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<sup>11</sup> A Cassese, P Gaeta, J Jones, *The Rome Statute of the international Criminal Court: A Commentary* Volume 2 (2002) 1085.

<sup>12</sup> Satzger op cit (n6) 263.

<sup>13</sup> S Beresford 'Unshackling the paper tiger – the sentencing practices of the ad hoc international tribunals for the former Yugoslavia and Rwanda' (2001) 1 *International Law Review* 46.

adoption of the Genocide Convention in 1948 and the formalisation of the Nuremberg Principles in 1950<sup>14</sup>.

In respect to the personal and direct social effects the imposing of sentences can have, it is appropriate to examine the classic rationales for punishment in order to determine whether they are applicable in the international context<sup>15</sup>.

### **i) Principles for Punishment**

Even although neither the statutes of the International Criminal Tribunals nor the Statute of the ICC specifically mention the reason for the imposition of punishment, it seems to be obvious that retribution and deterrence are the essential functions of punishment<sup>16</sup>. In this context, the ICTY-judgment stated in the *Furundzija*-Case:

‘ It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatization, and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence<sup>17</sup>.’

Deterrence can be defined as being what happens when one or more persons refrain from some censured activity on one or more occasions because of fear of the consequences<sup>18</sup>. Both legislators and sentencers entertain the belief that certain penalties may discourage persons with like intent<sup>19</sup>.

The *ad hoc* Tribunals are to dissuade everyone, who may be tempted to commit such crimes in the future, by showing them that the international community will not tolerate these serious violations of human rights and international humanitarian law<sup>20</sup>. In the Delalić-decision the judgment stated that the principle of deterrence

‘is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law. Apart from the fact that the accused

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<sup>14</sup> D van Zyl Smit, ‘Aspekte der Strafzumessung in der internationalen Strafjustiz’ (2004) 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* 167, forthcoming.

<sup>15</sup> Beresford op cit (n13) 39.

<sup>16</sup> S Zappalá *Human Rights in International Criminal Proceedings* (2003) 205-206.

<sup>17</sup> *Prosecutor v Furundzija* Case No. IT-95-17/1-T, Judgement, 10 December 1998, paragraph 290.

<sup>18</sup> A Skeen ‘Effective judicial thundering from up on high or a mere brutum fulmen? Deterrent sentences in criminal cases’ *South African Journal of Criminal Justice* 11 (2003) 244.

<sup>19</sup> N Walker, N Padfield *Sentencing: Theory, Law and Practice* (1996) 96.

<sup>20</sup> Beresford op cit (n13) 42.

should be sufficiently deterred by appropriate sentence from ever completing taking part in such crimes again, persons in similar situations in the future should similarly be deterred from resorting to such crimes.<sup>21</sup>

The theory of retribution or 'just deserts' places the requirements of justice at the foundation of the general justification for criminal sanctions. Due to this theory, punishment is the morally appropriate answer to crimes and restores the moral balance upset by the perpetrator's wrongdoing<sup>22</sup>. As a moral position, the need to re-assert the fundamental virtues of humanity, as represented by the international community and democratic principles of justice, justify the desire of retribution<sup>23</sup>.

However, there is a necessity for an objective fair punishment. This is the case, if the punishment is proportional to the crime committed. In this connection, cardinal proportionality is concerned with the magnitude of the penalty and requires a proportionality to the gravity of the conduct. On the other hand, ordinal proportionality can be reached by the ranking of the relative seriousness of different crimes<sup>24</sup>.

In the decision *Prosecutor v Aleksovski* the Court stated that 'a sentence of the Tribunal should make plain the condemnation of the international community was not ready to tolerate serious violations of international humanitarian law and human rights'<sup>25</sup>.

Moreover, it is acknowledged that apart from the above mentioned theories also the principles of rehabilitation and incapacitation contribute to the system of punishment.

The theory of rehabilitation emphasizes the treatment, rather than the punishment of the offenders, who are especially young, ill-trained or poorly educated. In cases like that, it should be tried to ensure that the sentences are imposed carefully in regard to the need to reintegrate convicted persons into society in such a manner that they can lead a normal life upon their release from imprisonment<sup>26</sup>.

Incapacitation as last principle of punishment plays the less important role in international law. In the *Kunarac*-Decision the Trial Chamber held that

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<sup>21</sup> *Prosecutor v Delalić and others* Case No. IT-96-21-T, Trial Chamber II, 16 November 1998.

<sup>22</sup> Beresford op cit (n13) 40.

<sup>23</sup> Henham op cit (n5) 86.

<sup>24</sup> Beresford op cit (n13) 42.

<sup>25</sup> *Prosecutor v Aleksovski*, Judgement, Case No. IT-95-14/1-A Appeal Chamber, 24 March 2000, paragraph 185.

<sup>26</sup> Beresford op cit (n13) 44.

‘unless it can be shown that a particular convicted person has the propensity to commit violations of international humanitarian law, or possibly, crimes relevant to such violations, such as ‘hate’ crimes or discriminatory crimes, it may not be fair and reasonable to use protection of society, or preventive detention, as a general sentencing factor’<sup>27</sup>.

However, even though the Trial Chamber sitting in the Delalić-Case found that the protection of society from convicted persons was a prominent factor in the determination of appropriate sentence, finally the rationale of incapacitate sentencing did not play a crucial role in their decision<sup>28</sup>.

## **ii) Appropriate Punishment for Crimes Against International Law**

The International Criminal Tribunals revealed little about appropriate punishments. Neither the charters of the post-World War II Tribunals nor the Statutes of the *ad hoc* Tribunals contain explicit rules regarding appropriate punishments.

The 1950 Nuremberg Principles, which consolidate the Nuremberg-Charter, are equally silent on this issue. They confirm that a person who commits a crime under international law is liable to punishment, but there are no rules defining what punishments are appropriate or how such punishments should be imposed or implemented<sup>29</sup>.

However, the Universal Declaration of Human Rights of 1948 provided that no one should be subjected to torture or to cruel, inhuman and degrading forms of punishment<sup>30</sup>. Also, the regional human rights standards such as the European Convention on Human Rights and Fundamental Freedoms<sup>31</sup>, the American Convention on Human Rights<sup>32</sup> and the African Charter on Human and Peoples’ Rights<sup>33</sup> stated this principle.

With the adoption of the UN Standard Minimum Rules for the Treatment of Prisoners in 1955 the principle was confirmed, representing ‘as a whole the minimum conditions, which are accepted as suitable by the United Nations’ (paragraph 2). Since the adoption, several successive UN resolutions have requested on states to implement the UN Standard

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<sup>27</sup> *Prosecutor v Kunarac and others* Case-No. IT-96-23-T and IT-96-23/1-T, Trial Chamber II, 22 February 2001.

<sup>28</sup> Beresford op cit (n13) 45.

<sup>29</sup> van Zyl Smit op cit (n14) 3.

<sup>30</sup> Article 5 of the Universal Declaration of Human Rights.

<sup>31</sup> Article 3 of the European Convention on Human Rights.

<sup>32</sup> Article 5 of the American Convention on Human Rights.

<sup>33</sup> Article 5 of the African Charter on Human and Peoples’ Rights.

Minimum Rules for the Treatment of Prisoners<sup>34</sup>. Also the International Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment established a basis for the international condemnation of misappropriated penalties.

Rights to human dignity and to due process are key elements of international human rights law and were implemented in penal law and practice. The prohibition of cruel, inhuman and degrading punishments has long been interpreted as comprising two complementary elements: a prohibition on punishments that are naturally incompatible with this standard and a prohibition against all punishments that are disproportionate to the seriousness of the offence in length or severity<sup>35</sup>.

The question, whether the death penalty is to be seen as a cruel, inhuman and degrading punishment, is not answered yet. Although there are no universally recognized international instruments, which outlaw the death penalty as such, its use is subject to restriction, most prominently by article 6 of the International Covenant on Civil and Political Rights<sup>36</sup>. However, in the present time there are too many states still supporting the death penalty in their domestic laws. In this respect, it is unlikely that the prohibition of the death penalty will in the nearer future become a mandatory rule in international criminal law.

From the 1990s onwards, the International Law Commission turned its attention to the penal provisions of the draft Code of Crimes against Peace and Security of Mankind. In the debates not only the imposition of the death penalty was discussed<sup>37</sup>, but also for the first time in an international debate the question, whether life imprisonment as an alternative ultimate penalty would satisfy human rights norms<sup>38</sup>.

However, this concern could not assert itself. Therefore, both the Statutes of the *ad hoc* Tribunals and the Rome-Statute provide life imprisonment as a possible punishment, but there is no provision for imposing the death penalty.

## **b) History and Development of the International Criminal Law**

Neither the Rome Statute nor the German CCAIL came into existence from one moment to the other. They both are the product of a long process, which lasted for several centuries and is still forming.

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<sup>34</sup> Amnesty International 'Combating torture – a manual for action' [www.amnesty.org/resources/pdf/cambating\\_torture/chapter5.pdf](http://www.amnesty.org/resources/pdf/cambating_torture/chapter5.pdf) 115-116, accessed on 25 September 2003.

<sup>35</sup> van Zyl Smit op cit (n14) 4-5.

<sup>36</sup> van Zyl Smit op cit (n14) 5.

<sup>37</sup> W Schabas 'Life, death and the crime of crimes' 2 *Punishment and Society* (2000) 265.

<sup>38</sup> van Zyl Smit op cit (n14) 6.

### **i) Nuremberg and Tokyo Tribunal**

Though the roots of International Criminal Law can be traced back to the 15<sup>th</sup> century to the von Hagenbach trial<sup>39</sup> and maybe even earlier, its real development began only in the last century. After World War I the first tribunal should have been established for a trial against the German *Kaiser* Wilhelm II. However, the Netherlands, where he lived in exile refused his extradition until his death. Therefore, a trial to charge the Germans for the atrocities of World War I never came into existence<sup>40</sup>.

Therefore, the Nuremberg and Tokyo Tribunals have been the first international criminal tribunals.

#### **aa) Nuremberg**

In October 1945, the four prosecuting nations, the United States, Russia, Great Britain and France, issued an accusation against 24 men and six organizations before the International Military Tribunal. They were charged not only with the murder of millions of people, but also with planning and carrying out World War II<sup>41</sup>.

The trial took place under the terms of a Charter drafted in London between June and August 1945 by representatives of the Allies ('Nuremberg Charter' or 'London Charter')<sup>42</sup>. The Charter was named to avoid using words such as 'law' or 'code' in an effort to circumvent the delicate question of whether the trial would be *ex post facto*<sup>43</sup>. The International Military Tribunal combined elements of Anglo-American and Continental Law.

The Nuremberg Trial was originally intended to be the first of a series of trials, but a combination of inertia, the Cold War and a desire to get on with the peace, even at the price of impunity for some criminals, resulted in no more trials being scheduled by the International Military Tribunal<sup>44</sup>.

In the Nuremberg Charter were listed three categories of offences: crimes against peace, war crimes and crimes against humanity (article 6 Nuremberg Charter).

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<sup>39</sup> C Bassiouni *International Criminal Law* Vol. 3, 2<sup>nd</sup> ed (1999) 171.

<sup>40</sup> Werle, Jessberger op cit (n7) 196.

<sup>41</sup> [www.courttv.com/archive/casefiles/nuremberg/indictments.html](http://www.courttv.com/archive/casefiles/nuremberg/indictments.html) of 28 August 2003.

<sup>42</sup> Clark in: T McCormack, G Simpson, *The Law of War Crimes*, 1997, p. 171.

<sup>43</sup> [www.courttv.com/archive/casefiles/nuremberg/law.html](http://www.courttv.com/archive/casefiles/nuremberg/law.html) of 28 August 2003.

<sup>44</sup> Clark in: McCormack, Simpson op cit (n42) 172.

### **(1) War Crimes**

Least controversial of these categories were war crimes. They were intended to deal with acts that violated traditional concepts of the law of war like the use of slave labour, bombing civilian populations, The Reprisal Order or the Commando Order, both of them issued by one of the defendants Wilhelm Keitel<sup>45</sup>.

Essentially alleged were on the one hand violations of the Hague Convention<sup>46</sup>, which dealt with the conduct of war by outlawing certain types of weapons and the treatment of prisoners of war and civilians. On the other hand violations were alleged of the Geneva Convention<sup>47</sup>, in which it was dealt with the sick and wounded. It was fairly well established that such breaches gave rise to individual criminal responsibility. Though not all belligerents were parties of the Hague Convention, the Tribunal held that 'by 1939 the rules laid down in the Convention were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter'<sup>48</sup>. Therefore it could be applied for individuals' processes.

### **(2) Crimes Against Peace**

The category of the crime against peace raised more difficulties. Although Adolf Hitler had clearly waged an aggressive war, the crime against peace was based on allegations that the Germans had violated international agreements like the Kellog-Briand-Pact of 1928<sup>49</sup>. However, this Pact concerned State responsibility and did not regard to the liability of the individuals responsible for carrying out State policy<sup>50</sup>. Individuals, in fact, could be brought to justice only under the laws of their own countries, not on the basis of a new order established after war<sup>51</sup>. Furthermore, the Soviet Union had equally broken the Kellog-Briand Pact by invading Finland, Poland and the Baltics, and had schemed with Hitler to sign the Nazi-Soviet Non-Aggression Pact in 1939, which secretly divided Poland<sup>52</sup>. Finally only Rudolf Hess was charged for crime against peace, and also for the future the Tribunal derived the liability for individuals.

<sup>45</sup> [www.courtstv.com/archive/casfiles/nuremberg/indictments.html](http://www.courtstv.com/archive/casfiles/nuremberg/indictments.html) of 28 August 2003.

<sup>46</sup> 'The Hague Convention (No. IV) Respecting the Laws and Customs of War on Land' of 18 October 1907.

<sup>47</sup> 'Geneva Convention Relative to the Treatment of Prisoners of War' of 27 July 1929.

<sup>48</sup> Clark in: McCormack, Simpson op cit (n42) 174.

<sup>49</sup> Kellog-Briand Pact; treaty providing for the Renunciation of War as an Instrument of National Policy, 94 L.N.T.S. 57 (1928).

<sup>50</sup> Clark in: McCormack, Simpson op cit (n42) 174.

<sup>51</sup> [www.courtstv.com/archive/casfiles/nuremberg/legacy.html](http://www.courtstv.com/archive/casfiles/nuremberg/legacy.html) of 28 August 2003.

<sup>52</sup> [www.courtstv.com/archive/casfiles/nuremberg/indictments.html](http://www.courtstv.com/archive/casfiles/nuremberg/indictments.html) of 28 August 2003.

The derivation came from the discussions of the legality of war in many international forums throughout the 1920s, the existing rules on individual responsibility for war crimes and espionage, as well as a functional approach to the matter<sup>53</sup>. The Tribunal held that

‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. ... To initiate a war of aggression...is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.’<sup>54</sup>.

### **(3) Crimes Against Humanity**

This category should be applied to defendants responsible for death camps and concentration camps<sup>55</sup>. However, initially the category of crimes against humanity was understood as crimes committed by a government against its own people<sup>56</sup>. Therefore the question arose whether the concept could be applied internationally<sup>57</sup>. The Trial was not a court of unlimited jurisdiction, but had only the power that its treaty parties gave it. Thus, it did not have jurisdiction over crimes against humanity unless they were connected with a war of aggression<sup>58</sup>. For this reason, the court could not apply crimes against humanity to the defendants responsible for the pre-war death- and concentration camps. Moreover, the Tribunal did not take the opportunity to make a substantial intellectual contribution to the development of emerging norms on crimes against humanity<sup>59</sup>.

### **(4) Penalties**

Article 27 of the Nuremberg Charter laid down the penalty provision: ‘The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just’. There were no analogous debates in the judgments of the International Military Tribunal in Nuremberg; the only discussion about the punishments themselves was whether those sentenced to death should be executed by firing squad or – what finally was the case- be hanged<sup>60</sup>.

<sup>53</sup> Clark in: McCormack, Simpson op cit (n42) 174.

<sup>54</sup> Clark in: McCormack, Simpson op cit (n42) 175.

<sup>55</sup> [www.courttv.com/archive/casefiles/nuremberg/indictments.html](http://www.courttv.com/archive/casefiles/nuremberg/indictments.html) of 28 August 2003.

<sup>56</sup> Clark in: McCormack, Simpson op cit (n42) 175.

<sup>57</sup> [www.courttv.com/archive/casefiles/nuremberg/indictments.html](http://www.courttv.com/archive/casefiles/nuremberg/indictments.html) of 28 August 2003.

<sup>58</sup> Clark in: McCormack, Simpson op cit (n42) 177.

<sup>59</sup> Ibid.

<sup>60</sup> van Zyl Smit, *Aspects of Punishment in International Criminal Justice*, 2

**bb) Tokyo**

The Charter of the International Military Tribunal for the Far East was set out in proclamation in Tokyo on 19 January 1946 by the Supreme Commander of the Allied Powers, General MacArthur. The Tribunal was established by the eleven Allied nations, which had been involved in the war in Asia. At the trial 28 men were accused.

As in Nuremberg, the jurisdiction of the Tokyo Tribunal encompassed the three offences crimes against peace, war crimes (described as conventional war crimes) and crimes against humanity<sup>61</sup>. All of them were essentially defined as in the Nuremberg Charter<sup>62</sup>. Also, the penalty provisions, laid down in Article 16 of the Tokyo Charter, were identical with Article 27 of the Nuremberg Charter.

The International Military Tribunal for the Far East adopted the essential articles of the Nuremberg Charter and hardly differed from its provisions.

While in Germany trials have continued since the late 1940s under German domestic law, primarily for what would have been regarded at Nuremberg as crimes against humanity, no such trials have taken place in Japan aside from a few cases in early 1946<sup>63</sup>.

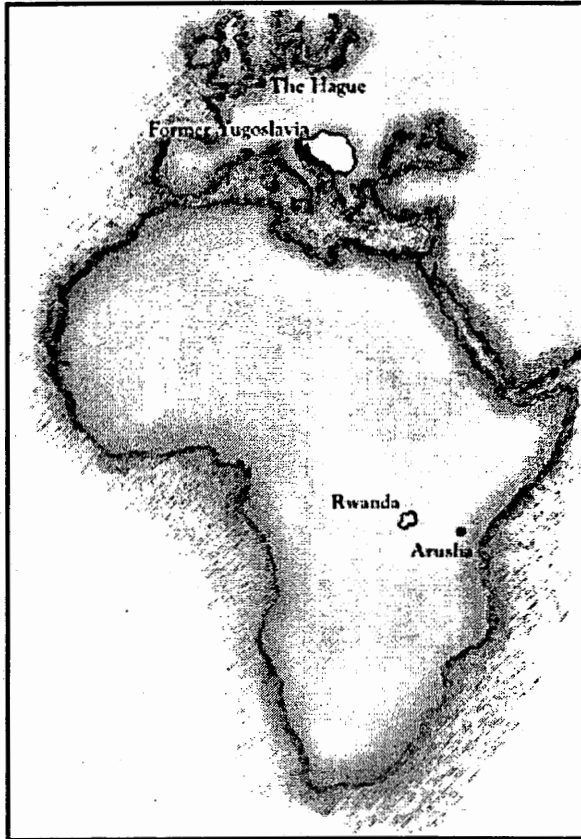
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<sup>61</sup> Article 5.

<sup>62</sup> Clark in : McCormack, Simpson op cit (n42) 180.

<sup>63</sup> Clark in: McCormack, Simpson op cit (n42) 184.

## **ii) The *ad hoc* Tribunals**



Since the post World War II Tribunals of Nuremberg and Tokyo, no other prosecutions before international criminal Tribunals took place until the 1990s, when the United Nations Security Council established the Yugoslavia and the Rwanda Tribunals.

International lawyers had envisaged the establishment of an International Criminal Tribunal as a means of enforcing human rights and suppressing international crimes as a means of enforcing human rights and suppressing international crimes long before. However, it was not before the end of the Cold War that all members of the Security Council agreed to establish the first *ad hoc* Tribunal for the former Yugoslavia<sup>64</sup>.

Map<sup>65</sup>

### **(aa) The International Criminal Tribunal for the former Yugoslavia (ICTY)**

The process before the ICTY began in 1991 with several Security Council resolutions that declared the concern over violations of international law in the region and affirmed individual responsibility for such violations<sup>66</sup>. Resolution 827 determined that the horrible and widespread violations of international humanitarian law in the territory of the former Yugoslavia constituted a threat to international peace and security<sup>67</sup>.

The ICTY derives its binding force for the articles of its statute from the provisions of article 25 and chapter VII of the Charter of the United Nations. With the authority of the

<sup>64</sup> R Goldstone *For humanity: Reflections of a war crimes investigator* 79.

<sup>65</sup> Map: Bulletin 09 *ICTY/ICTR Twin Tribunals* <http://www.un.org/icty/BL/09art1e.htm> accessed on 13 November 2003.

<sup>66</sup> S Ratner, J Abrams *Accountability for Human Rights Atrocities in International Law* 2 ed (2001) 191.

<sup>67</sup> C Warbrick, D McGoldrick 'Co-operation with the International Criminal Tribunal for Yugoslavia' 45 *International and Comparative Law Quarterly* (1996) 947.

UN Security Council behind it and on account of the practice developed by judges, it incarnates the coercive 'supra-state' model<sup>68</sup>.

### **(1) Jurisdiction and Applicable Law**

The jurisdiction of the ICTY is limited to serious violations of international humanitarian law committed in the former Yugoslavia since 1 January 1991. Article 2 to 5 of the ICTY-Statute states over which crimes the Tribunal has jurisdiction: war crimes (article 2-3 of the ICTY-Statute), genocide (article 4 of the ICTY-Statute) and other crimes against humanity (article 5 of the ICTY-Statute).

The Tribunal's jurisdiction is concurrent with that of national courts. However, it enjoys primacy and may request a national court to defer to its jurisdiction over a case (article 9 of the ICTY-Statute). Moreover, the rules concerning the individual responsibility and defenses are generally consistent with the Nuremberg principles and the 1949 Geneva Conventions as well as the additional Protocol I<sup>69</sup>.

Judgments of the Tribunal can be passed only by a majority of the judges in the chamber and must be delivered in public. Moreover, the judgment must be accompanied by a written reasoned opinion, to which separate or dissenting opinions may be appended<sup>70</sup>.

Generally the Tribunal may only try a person, who has been tried by a national court, if the national court characterized the relevant act as an ordinary crime. However, double jeopardy is possible, where the national court proceedings were either not impartial or independent, or designed to protect the person from international criminal responsibility, or were not diligently prosecuted<sup>71</sup>.

Contrary to the Nuremberg Tribunal the ICTY is not allowed to try persons *in absentia*. In the case that the Tribunal is not able to obtain custody of the accused person, according to Rule 61 of the Rules of Procedure and Evidence of the ICTY (ICTY-RPE) the prosecution may nevertheless present its case to the trial chamber. The trial chamber then decides on the basis of the evidence so presented if reasonable grounds exist for believing that the accused committed any of the offences in the indictment and may then issue an international arrest warrant directed to all states. This corresponds to a quasi-*in absentia* trial

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<sup>68</sup> A Cassese *International Criminal Law* (2003) 357.

<sup>69</sup> Ratner, Abrams op cit (n66) 193.

<sup>70</sup> Report of the Secretary General Containing the Statute of the International Tribunal in: V Morris, M Scharf *In Insider's Guide to The International Criminal Tribunal for The Former Yugoslavia* Volume 2 (1995) 24.

<sup>71</sup> Ratner, Abrams op cit (n66) 193.

and the refusal of any presentation of the accused resulting from the accused's absence raises questions of fairness<sup>72</sup>.

## **(2) Penalties**

Article 24 of the ICTY-Statute deals with the penalties:

- '1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.'

In addition to the provision in the ICTY-Statute, the judges have incorporated a number of provisions on sentencing into the ICTY-RPE. The most important rule is Rule 101, which provides:

- '(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
  - (i) any aggravating circumstances;
  - (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
  - (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
  - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
- (C) Credit shall be given to the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.'

Moreover, the Tribunal has discretion to impose multiple sentences consecutively or concurrently and may also take into account time served in pre-trial detention or national prisons<sup>73</sup>.

One of the most important distinctions between the post-World War II Tribunals of Nuremberg and Tokyo and the *ad hoc* Tribunals is the exclusion of the death penalty as an

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<sup>72</sup> Ratner, Abrams op cit (n38) 196.

<sup>73</sup> Schabas in: Cassese, Gaeta Jones op cit (n11) 1500.

available sanction<sup>74</sup>. This issue was a theme of both criminal and human rights law since the end of World War II. For the Statute it was argued that the death penalty has to be excluded in line with a principle that is by now part of the legal heritage, as shown by the Additional Protocol No. 6 to the European Convention on Human Rights<sup>75</sup>.

The ICTY-Statute determines that sanctions shall be limited to imprisonment, which includes the prohibition of corporal punishment as well as imprisonment with hard labour and fines. Moreover, the sanctions are to be established having 'recourse to the general practice regarding prison sentences' in the former Yugoslavia<sup>76</sup>. This requirement seems to be in accordance with the requirement of the prohibition of a retroactive sentence, a principle derived from the legal maxim *nullum crimen sine lege*. The maxim requires that punishments for legal acts must be determined when the crime was committed in order that the court may mete out the punishment<sup>77</sup>.

However, the criminal law of the former Yugoslavia allowed the courts to sentence convicted persons to death. In respect to imprisonment the law stated that incarceration must not be shorter than fifteen days and not longer than fifteen years. The court, however, could impose an imprisonment sentence for 20 years, when the person was convicted for a crime, for which the capital punishment was prescribed. Life imprisonment was not authorized under the penal code as it was seen as a fate worse than death<sup>78</sup>.

Faced with the restrictive nature of the sentencing provisions of the penal code for the former Yugoslavia, the Tribunal held the position that the general practice must be considered, however it was not determinative. The Tribunal stated in the Erdemović-decision<sup>79</sup> that whilst the relevant provisions of the law of the former Yugoslavia in effect at the time of the events covered genocide and war crimes perpetrated against the civilian population, crimes against humanity were not provided for<sup>80</sup>.

The Trial Chamber stated that

'reference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognized by the community of nations whereby the most severe penalties may be imposed for crimes against humanity. In practice, the reference

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<sup>74</sup> Beresford op cit (n13) 46.

<sup>75</sup> Bassiouni op cit (n39) 193.

<sup>76</sup> Schabas in: Cassese, Gaeta Jones op cit (n11) 1500.

<sup>77</sup> W Schabas 'Sentencing by the International Tribunals: For a Human Rights Approach' 7 Duke Journal Comparative and International Law 461 (1997).

<sup>78</sup> Beresford op cit (n13) 47-48.

<sup>79</sup> *Prosecutor v Dražen Erdemović* Case-No IT-96-22-T, Trial Chamber I, 29 November 1996.

<sup>80</sup> Beresford op cit (n13) 48.

means that all the accused who committed their crimes in the territory of the former Yugoslavia could expect to be held criminally responsible. No accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them.<sup>81</sup>

However, in the Delalić-Case<sup>82</sup> the Tribunal showed the inconsistency between the sentencing practices of the former Yugoslavia and the ICTY Rules. The Chamber did not impose the maximum sentence upon the three defendants, because otherwise the sentence would have been greater than the sentence they could have received from the courts of the former Yugoslavia<sup>83</sup>.

According to rule 101 of the ICTY-RPE the Tribunal shall take into account mitigating and aggravating circumstances on imposing the sentence. Therefore it is necessary for the Trial Chambers to 'identify the specific material circumstances directly related to the offence in order to evaluate the gravity thereof' as well as the individual circumstances of the defendant 'in order to adapt the sentence imposed to (their) character and potential for rehabilitation'<sup>84</sup>.

In this respect, rule 85 (A) (vi) of the ICTY-RPE states that the parties are permitted to produce 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment'.

### **(3) Enforcement of Sentences**

The Tribunal designates a state, in which a convicted person shall serve his sentence. All willing states inform the Security Council from their willingness to incarcerate the convicted person<sup>85</sup>, though the Secretary-General has indicated that convicted persons should be incarcerated outside the former Yugoslavia<sup>86</sup>. States are not under any obligation to assist the Tribunal in this field. According to article 27 of the ICTY-Statute and rule 103 of the ICTY-RPE the enforcement of sentences depends on the willingness of the states<sup>87</sup>.

For the enforcement of imprisonment the Tribunal adopted the system that states should carry out the enforcement of prison sentences in accordance with their national laws

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<sup>81</sup> *Prosecutor v Dražen Erdemović*, supra (n79) paragraph 40.

<sup>82</sup> *Prosecutor v Delalić and others* supra (n19).

<sup>83</sup> Beresford op cit (n13) 49.

<sup>84</sup> *Prosecutor v Blaškić* Case No. IT-95-14-T, Trial Chamber I, 3 March 2000, paragraph 765.

<sup>85</sup> Article 27 ICTY-Statute.

<sup>86</sup> Ratner, Abrams op cit (n66) 196-197.

<sup>87</sup> C Kress, G Sluiter in: Cassese, Gaeta, Jones op cit (n11) 1771.

and procedures, but under international supervision<sup>88</sup>. However, the Tribunal negotiate with the states for an enforcement agreement. In this respect the model agreement embodies the two principles: respect for the duration of the penalty as imposed by the Tribunal and respect for international rules governing the conditions of imprisonment<sup>89</sup>. However, a conformity with the model agreement does not exclude a possibility for certain reasonable conditions. For example, a state can determine that it will only consider the enforcement of sentences pronounced by the Tribunal where the duration of the sentence does not exceed the highest maximum sentence for any crime under domestic law<sup>90</sup>.

Early release touches upon the duration of the sentence and is therefore a sensitive issue. According to article 28 of the ICTY-Statute, the initiative for pardon or commutation of the sentence lies with the enforcing state. However, the President of the Tribunal shall decide the matter in consultation with the judges on the basis of the interests of justice and general principles of law<sup>91</sup>. The Tribunal demands full respect for the duration of the penalty and states that no measure a state might take can have the effect of terminating a penalty or subverting it by reducing its length<sup>92</sup>. Rule 125 of the ICTY-RPE determines the general standards for granting pardon or commutation of the sentence, like the gravity of the crime committed, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation and cooperation of the prisoner with the Prosecutor<sup>93</sup>.

#### **bb) The International Criminal Tribunal for Rwanda (ICTR)**

On 8 November 1994 the UN Security Council passed Resolution 955, which incorporated the decision to establish an International Criminal Tribunal for Rwanda. The Tribunal should prosecute persons responsible for genocide and other violations of international humanitarian law committed in Rwanda and Rwandese citizens responsible for such acts committed in neighboring states between 1 January and 31 December 1994<sup>94</sup>.

Like the ICTY also the ICTR derives its binding force for the articles of its statute from the provisions of article 25 and chapter VII of the Charter of the United Nations. With

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<sup>88</sup> Ibid.

<sup>89</sup> *Prosecutor v Dražen Erdemović*, supra (n79) paragraph 34.

<sup>90</sup> Kress, Sluiter in: Cassese, Gaeta, Jones op cit (n11) 1774

<sup>91</sup> Kress, Sluiter in: Cassese, Gaeta, Jones op cit (n11) 1776.

<sup>92</sup> *Prosecutor v Dražen Erdemović*, paragraph 73.

<sup>93</sup> Kress, Sluiter in: Cassese, Gaeta, Jones op cit (n11) 1778.

<sup>94</sup> C Scheltema, W van der Wolf (eds) *The International Tribunal for Rwanda* (1999) 240.

the authority of the UN Security Council behind it and on account of the practice developed by judges, it also incarnates the coercive 'supra-state' model<sup>95</sup>.

### **(1) Jurisdiction and Applicable Law**

In the ICTR-Statute the UN Security Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which can be committed in both international and internal conflicts, like genocide (article 2 of the ICTR-Statute) and crimes against humanity (article 3 of the ICTR-Statute). Moreover, given the nature of the conflict as non-international in character, the Tribunal has the jurisdiction over crimes which may only be committed in internal conflicts, like the violation of article 3 common to the four Geneva Conventions, as are more fully elaborated in article 4 of the Additional Protocol (article 4 of the ICTY-Statute)<sup>96</sup>.

Like the jurisdiction of the ICTY, the jurisdiction of the ICTR is limited to natural persons and is concurrent with national courts, with the ICTR enjoying primacy. Furthermore the provisions of the statutes on individual responsibility, defenses, immunities and double jeopardy are identical<sup>97</sup>.

Article 14 of the ICTR-Statute states that the same Rules of Procedure and Evidence applicable before the ICTY shall also be adopted by the ICTR. Moreover, the Prosecutor of the ICTY shall also serve as prosecutor of the ICTR (article 15 paragraph 3 of the ICTR-Statute). Even though there are separated trial chambers (article 12 paragraph 2 of the ICTR-Statute), the both *ad hoc* Tribunals share the members of the Appeals Chamber<sup>98</sup>.

### **(2) Penalties**

While the resolution establishing the ICTY passed unanimously, resolution 955 passed with Rwanda voting against and China abstaining. Although Rwanda itself initially applied before the UN Security Council for an International Criminal Tribunal, it finally objected to the ICTR principally because of its inability to order the death penalty<sup>99</sup>.

The provisions for the penalties of the ICTR-Statute are the same like of the ICTY-Statute. Instead of article 24 of the ICTY-Statute, article 23 of the ICTR-Statute states that

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<sup>95</sup> Cassese op cit (n68) 357.

<sup>96</sup> J Tebbs (ed) *Rwanda, War and Peace?! (1999)* 255-256.

<sup>97</sup> Ratner, Abrams op cit (n66) 203.

<sup>98</sup> Tebbs op cit (n96) 259-260.

<sup>99</sup> Ratner, Abrams op cit (n66) 202.

the 'penalty imposed by the Tribunal shall be limited to imprisonment'. Hereby the following issue arises:

Like the Tribunals in Nuremberg, Tokyo and Yugoslavia, the ICTR focuses on those perpetrators in leadership positions, particularly those who conspired to commit genocide. The Rwandan courts, however, which are allowed to impose the death penalty, have concentrated on lower-ranking defendants. The anomaly of this arrangement is that lower-ranking offenders tried by Rwandan courts have received heavier sentences like the death penalty than the higher-ranking offenders tried before the ICTR<sup>100</sup>.

Identical to the procedure of the ICTY for the enforcement of sentences, the ICTR Tribunal designates a state from a list, in which a convicted person shall serve his sentence. Also in this context states are not under any obligation to assist the Tribunal in this field: According to article 26 of the ICTR-Statute and rule 103 of the ICTY-RPE the enforcement of sentences depends on the willingness of the state itself<sup>101</sup>.

### **c) The International Criminal Court (ICC)**

During the ninth meeting of the UN Preparatory Commission of the ICC, the 57<sup>th</sup> to 66<sup>th</sup> ratifications of the Rome Statute were deposited with the consequence that on 1 July 2002 the ICC could start with its work to try international crimes worldwide before a permanent court.

The last roots of the Rome Statute can be drawn back directly to the post-War Tribunals and the ICTY and ICTR, as well as draft statute prepared in 1994 by the International Law Commission (ILC). Compared to the *ad hoc* Tribunals, the ICC forms a judicial body, the jurisdiction of which is not limited to a specific time or area.

The process of drafting the Statute of the ICC was constructed on the work of the ILC from the 1940s onwards. But only in 1989, after the end of the Cold War, the question of an international criminal court came back onto the United Nation agenda, when Trinidad and Tobago suggested to found a court to deal with the problem of drug trafficking. The ILC responded on this request with a report in 1990, which was not limited to the drug issue.

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<sup>100</sup> Ratner, Abrams op cit (n66) 205.

<sup>101</sup> Kress, Sluiter in: Cassese, Gaeta, Jones op cit (n11) 1771.

Encouraged by the UN General Assembly, the ILC continued its work and produced a comprehensive text in 1993, which was modified in 1994<sup>102</sup>.

An *ad hoc* committee (referred to as the *Ad Hoc* Committee for the Establishment of an International Criminal Court) was founded which produced finally a basis for the UN General Assembly to establish the 1996 Preparatory Committee on the Establishment of an International Criminal Court (PrepCom). In the same time, an independent committee worked on an alternative draft to the ILC-draft. Many of these proposals were later adopted by the PrepCom and have influenced the Draft Code 1996<sup>103</sup>.

Finally, the Draft Statute and Draft Final Act were submitted to the Diplomatic Conference at Rome of 15-17 July 1998. It consisted of 116 articles and was a tribute to the Drafting Committee and the Diplomatic Conference to have translated this complex draft into a text acceptable to a large number of states<sup>104</sup>.

On 17 July 1998 the ICC Statute was adopted as a treaty, which includes 13 chapters and 128 articles. It defines the crimes, which the court is to judge: they are the most serious crimes of concern to the international community as a whole, like genocide, crimes against humanity and war crimes. By adopting this Statute, participants in the Conference had to overcome many legal and political problems.

Today, 139 states have signed the Statute, while 92 have already ratified or acceded to it<sup>105</sup>. According the requirement that 60 states had to have ratified it before it could come into force, the ICC could start with its work from the 1 July 2002 on.

### **i) Jurisdiction**

The issue of the jurisdiction for the ICC was one of the most controversial during the Rome Conference and was negotiated to the last day<sup>106</sup>. All the International Criminal Tribunals before were limited to a certain period or to certain persons: The Nuremberg Tribunal had exercised a personal jurisdiction, trying persons, who were acting in the interest of the European Axis countries and had committed one of the crimes within the court's subject

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<sup>102</sup> A Cassese in: A Cassese, P Gaeta, J Jones, *The Rome Statute of the International Criminal Court: A Commentary* Volume 1 (2002) 16.

<sup>103</sup> K Ambos, 'Establishing an International Criminal Court and an International Criminal Code - Observations from an International Criminal Law viewpoint' <http://www.ejil.org/journal/Vol7/No4/art4.html> accessed on 08 December 2003.

<sup>104</sup> Cassese in: Cassese, Gaeta, Jones o cit (n102) 17.

<sup>105</sup> Amnesty International 'The International Criminal Court Table of signatures and ratifications of the Rome Statute' [web.amnesty.org/web/web.nsf/print/icc-signatures\\_ratifications-eng](http://web.amnesty.org/web/web.nsf/print/icc-signatures_ratifications-eng) accessed on 08 December 2003.

<sup>106</sup> M Arsanjani in: M Politi, G Nesi (eds) *The Rome Statute of the International Criminal Court* (2001) 50.

matter jurisdiction. The ICTY, however, has territorial jurisdiction over all crimes committed on the territory of the former Yugoslavia, subsequent to 1991, while the jurisdiction of the ICTR is limited to crimes committed in Rwanda during 1994 and over crimes committed by Rwandan nationals in neighbouring countries in the same period. Thus, the jurisdiction is both personal and territorial<sup>107</sup>.

Basically, the jurisdiction of the ICC distinguishes from the jurisdiction of the *ad hoc* Tribunals in the fact that the ICC was created as a multilateral treaty, binding every state, which is a member party, to be subject to the ICC's jurisdiction. By this, the international community has accepted a jurisdiction for its new court, which is narrower than the jurisdiction that individual states are allowed to exercise with respect to the same crimes<sup>108</sup>.

Moreover, a main feature of the ICC is the complementarity of its jurisdiction to national criminal jurisdictions. This implies the idea that the primary responsibility for repressing serious international crimes should still lay in the concern of the national criminal tribunals<sup>109</sup>.

## **ii) Applicable Law**

While the statutes of the ICTY and ICTR are silent as to the applicable law, already the ILC provided in article 33 of the 1994 Draft Statute a provision named 'Applicable Law' indicating the sources to which the Court should refer in making its decisions. This idea was referred to in article 21 of the Rome Statute. The system of sources to which the provision refers is extremely complex and sometimes even uncertain, as well as the order of precedence between the different provisions is equally ambiguous<sup>110</sup>.

Article 21 of the Rome Statute lists the four sources of applicable law of the ICC: the Rome Statute itself, the Elements of Crimes, the Rules of Procedure and Evidence (ICC-RPE) and the case law of the Court itself, which still have to be developed.

The Rome Statute as a treaty of particular type is a constitutive instrument, being an agreement between the state parties and the constitution of the organisation. The provisions concerning this constitutive element are the establishment of the Court (part 1 of the Rome Statute), the structure of the institution and its mode of operation (parts 4, 11 and 12 of the Rome Statute) and the final clauses (part 13 of the Rome Statute). Moreover, the Statute is a

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<sup>107</sup> W Schabas *An introduction to the International Criminal Court* (2001) 54.

<sup>108</sup> *Ibid.*

<sup>109</sup> P Benvenuti 'Complementarity of the International Criminal Court to National Criminal Jurisdictions' in F Lattanzi, W Schabas (eds) *Essays on the Rome Statute* (1999) 21.

code of criminal procedure determining the jurisdiction of the ICC (part 2 of the Rome Statute) and setting out the system of investigation and prosecution (part 5 of the Rome Statute), trial procedure (part 6 of the Rome Statute), the penalties and their enforcement (parts 7 and 10 of the Rome Statute), appeal against the decisions of the Court and their revision (part 8 of the Rome Statute) as well as the obligations of states concerning cooperation and judicial assistance (part 9 of the Rome Statute). Furthermore, the Rome Statute provides a veritable criminal code defining three of the crimes within the jurisdiction of the ICC (articles 6-8 of the Rome Statute) and reiterates the general principles of criminal law (part 3 of the Rome Statute)<sup>111</sup>.

The elements of crimes are stated in article 9 of the Rome Statute. The judges can take inspirations from this provision designed to assist the Court. According to their promoters the elements of crimes are of a nature to 'give teeth to the concept of *nullum crimen sine lege*'<sup>112</sup>. Its amendment procedure is less unrealistic than that of the Rome Statute itself, because the initiative is more liberal and the adoption by two-thirds of the members of the Assembly of State Parties is sufficient.

The ICC-RPE should be less rigidly immutable than the Rome Statute itself and more adaptable to the needs of the Court. However, compared to the precedents of Nuremberg or the *ad hoc* Tribunals the Rome Statute encroaches largely on the sort of provisions, which should be of a regulatory nature. While the RPE of the *ad hoc* Tribunals contain 34 (ICTY) and 32 (ICTR) provisions, the ICC-RPE contain 128 rules. This results from the 'grey zone' between Statute and Rules as the 'basic' and 'subsidiary', because the 'basic' has gradually taken on a disproportionate importance compared to the 'subsidiary'<sup>113</sup>.

Besides the case law, which still has to be developed, article 21 of the Rome Statute allows the Court to apply 'applicable treaties', 'the principles and rules of international law, including the established principles of the international law of armed conflicts' as well as 'failing that, general principles of law derived by the Court from national laws of legal systems of the world, including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'.

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<sup>110</sup> A Pellet in: Cassese, Gaeta, Jones op cit (n11) 1052-3.

<sup>111</sup> Pellet in: Cassese, Gaeta Jones op cit (n11) 1054-5.

<sup>112</sup> Pellet in: Cassese, Gaeta Jones op cit (n11) 1060.

<sup>113</sup> Pellet in: Cassese, Gaeta Jones op cit (n11) 1063.

### **iii) The Crimes Prosecuted by the Court**

The ICC has jurisdiction over the following categories of crimes: genocide (article 6 of the Rome Statute), crimes against humanity (article 7 of the Rome Statute) and war crimes (article 8 of the Rome Statute). The crimes are 'international' not so much because international cooperation is necessary for their repression and prosecution, but because their heinous nature elevates them to crimes concerning the international community. These categories of crimes require prosecution, because the humanity as a whole is the victim. This is the reason, why the international community is entitled and required to prosecute these crimes<sup>114</sup>.

All the four categories were already prosecuted in the Nuremberg and Tokyo Tribunal, but they were called crimes against peace, war crimes and crimes against humanity. The term crimes against peace is now replaced by the category aggression, which covers most of the old definitions<sup>115</sup>. Genocide was also prosecuted by the post-World War II Tribunals, even it was applied as a sub-category of crimes against humanity.

#### **aa) Genocide**

The term 'genocide' was invented in 1944 by Raphael Lemkin and is nowadays commonly understood as the intentional killing, destruction or extermination of entire groups or members of a group<sup>116</sup>. In 1946, when genocide was declared an international crime by the UN General Assembly, it was considered as important to separate the both categories. Crimes against humanity refers to a rather wide range of atrocities. However, in a narrower aspect it was also considered that crimes against humanity could only be committed in association with an international armed conflict<sup>117</sup>. Nowadays the distinction between the both is less significant, because it is recognized today that crimes against humanity can be applied in wartime as well as in peacetime. In this respect, genocide forms the most aggravated form of crimes against humanity and therefore deserves an own category. Genocide is stated as the first crime in the list of crimes of the Rome Statute and is essentially copied from article II of the 1948 Genocide Convention. The decision of the Rome Conference to maintain a 50-year-old text proved that article 6 of the Rome Statute constitutes a codification of a customary

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<sup>114</sup> Schabas op cit (n107) 21-2.

<sup>115</sup> Schabas op cit (n107) 22.

<sup>116</sup> Cassese in: Cassese, Gaeta, Jones op cit (n102) 335.

<sup>117</sup> Schabas op cit (n107) 30.

international norm<sup>118</sup>. The definition of article II of the Genocide Convention and article 6 of the Rome Statute has numerous merits. First of all it sets out a careful definition of genocide and punishes also other acts, which are connected with genocide like conspiracy and complicity. Moreover, the definition prohibits genocide regardless of whether it is perpetrated in wartime or peacetime. Finally, the definition regards genocide both as a crime involving the criminal responsibility of the perpetrator and consequently punishable by national criminal courts or by any future international criminal court, and as an international delinquency entailing the international responsibility of the state, the authorities of which have been engaged in the commission of genocide<sup>119</sup>.

Genocide differs from the other crimes stated in the Rome Statute by requiring a special intent or *dolus specialis*. While all three crimes defined in the Rome Statute provide for prosecution for killing or murder, genocide must be committed with the specific intent to destroy in whole or in part a national, ethnical, racial or religious group.

### **bb) Crimes against Humanity**

For the first time the international prohibition of crimes against humanity was stated in the Charter of the IMT of Nuremberg. Since 1945 several variants on the definition of crimes against humanity came into existence, some of them eliminating the *nexus* with armed conflicts to a definition. Nowadays customary international law bans the crimes to cover atrocities committed in wartime as well as in peacetime<sup>120</sup>. The Rome Statute adapted the evolved definition in article 7. Like the genocide definition in article 6 of the Rome Statute, there is nothing mentioned that the crime can only be committed in the absence of international armed conflict, but it is undoubtedly meant<sup>121</sup>.

Article 7 of the Rome Statute consists of three paragraphs, of which paragraphs 2 and 3 define the terms appearing in paragraph 1. The chapeau of paragraph 1 states that for the purposes of the Statute, crimes against humanity means any of the eleven mentioned 'acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

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<sup>118</sup> Schabas op cit (n107) 31.

<sup>119</sup> Cassese in: Cassese, Gaeta, Jones op cit (n102) 336.

<sup>120</sup> Cassese in: Cassese, Gaeta, Jones op cit (n102) 356.

<sup>121</sup> Schabas op cit (n107) 35.

The usage of 'acts' goes back to the Nuremberg formulation and includes both physical and mental aspects<sup>122</sup>. The requirement of an 'attack' has been slowly incorporated into the concept of crimes against humanity, although neither in the Nuremberg Charter nor in the statutes of the *ad hoc* Tribunals the requirement was mentioned<sup>123</sup>.

### **cc) War Crimes**

One of the oldest subjects of international law is the *ius in bello*. The modern origin of war crimes goes back to the last part of the 19<sup>th</sup> century, when the so-called Law of the Hague came into existence. This series of treaties dealt with the conduct of war, such as permissible weaponry and targets on land, sea, and air, as well as neutrality. So the Hague Law prohibited attacks of undefended towns, use of arms designed to cause harm in a unnecessary cruelty or poisonous weapons, pillage or collective penalties<sup>124</sup>. In 1929 this law was supplemented by the Geneva Conventions on the Wounded and Sick in Armies in the Field and on the Treatment of Prisoners of War, which, however, had only a few penalty provisions<sup>125</sup>.

In article 8 the Rome Statute lists four categories of war crimes, two of them addressing international armed conflict and two of them non-international armed conflict<sup>126</sup>.

For the international conflicts article 8 of the Rome Statute lists the different possible violations of the laws and customs of war. These 26 detailed violations include numerous war crimes under Protocol I and the Hague Conventions, as well as acts prohibited, but not necessary criminalized under specific treaties, like conscription of children or attacks on UN peacekeepers<sup>127</sup>. For internal conflicts, article 8 of the Rome Statute offers the most detailed list of war crimes, however it is still less extensive than the list for the international armed conflicts. The war crimes in internal conflicts are split up in two categories of civil wars: four 'serious violations' of Common article 3 and twelve 'other serious violations' of the laws and customs of wars applicable to civil conflicts<sup>128</sup>.

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<sup>122</sup> R Clark in: Politi, Nesi op cit (n106) 80-1.

<sup>123</sup> Clark in: Politi, Nesi op cit (n106) 90.

<sup>124</sup> Ratner, Abrams op cit (n66) 80-1.

<sup>125</sup> Geneva Convention for the Amelioration of Conditions of the Wounded and Sick in Armies in the Field, 27 July 1929, 118 LNTS 303; Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343; Ratner, Abrams op cit (n66) 81.

<sup>126</sup> Schabas op cit (n107) 42-3.

<sup>127</sup> Ratner, Abrams op cit (n66) 93.

<sup>128</sup> Ratner, Abrams op cit (n66) 102.

#### **dd) Other Offences**

Besides the three mentioned categories of crimes, the ICC also has jurisdiction over 'offences against the administration of justice', when these relate to proceedings before the Court. Article 70 of the Rome Statute and in rules 162 – 169 and 172 ICC-RPE it is specified that such offences must be committed intentionally, like perjury or the presentation of evidence known to be false or forged, influencing or interfering with witnesses, corrupting or bribing officials of the ICC or retaliating against them, and, for the officials of the ICC, soliciting or accepting bribes<sup>129</sup>.

#### **iv) Penalties**

The fundamental norm for the *nulla poena sine lege*-principle is implemented in article 23 of the Rome Statute: 'A person convicted by the Court may be punished only in accordance with this Statute'. However, different to the most national criminal systems, there is not a specific range of sanctions for the different crimes, but a general sanctions scheme applicable to the crimes that come within the subject-matter jurisdiction of the Court.<sup>130</sup>

The member states of the Rome Conference finally established in article 77 of the Rome Statute three possible penalties: imprisonment, fines and forfeiture of proceeds of crimes. In this respect, article 77 as first article of part 7 of the Rome Statute states that:

'1. ...the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

- (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.'

Although it is not mentioned explicitly, according to article 77 of the Rome Statute, the death penalty and other forms of corporal punishment are excluded.

Article 78 of the Rome Statute deals with the determination of the sentence:

'1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

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<sup>129</sup> Schabas op cit (n107) 52.

<sup>130</sup> Schabas in: Cassese, Gaeta, Jones op cit (n11) 1497.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time ootherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentencce of life imprisonment in conformity with article 77, paragraph 1 (b).'

The member of the Rome Conference did not discuss the reasons for criminal punishment. They took them for granted. However, the debate took place to the extent that philosophies of sentencing raised such questions like life imprisonment, mandatory review and capital punishment<sup>131</sup>. Also the death penalty was discussed, even though a vast majority of delegations were opposed to including the death penalty in the Rome Statute. A group of Arab and Islamic States, as well as English-speaking Carribean States and some others like Singapore, Rwanda, Ethiopia and Nigeria, threatened to block consensus on the subject. However, they got only some concessions: Finally, article 80 of the Rome Statute was introduced stating that 'nothing in this part [7 of the Rome Statute] affects the application by States of penalties described by their national law, nor the law of States which do not provide for penalties described in this Part.' Moreover, at the final meeting of the Rome Conference the president stated that the sensitivity of the mentioned states on the issue was recognized<sup>132</sup>.

#### **aa) Ranking of the Crimes**

Sentences are stated according to their grade of seriousness. However, there are no guidelines in respect of any hierarchy of offences. Article 5 of the Rome Statute states that the jurisdiction of the Court is limited to 'the most serious crimes of concern to the international community as a whole'. This could be taken to imply that the three categories of crimes in the Rome Statute, namely genocide, crimes against humanity and war crimes, are of equal gravity in respect of setting sentences<sup>133</sup>. However, there are some indications for the assumption that genocide is the most serious crime of the three categories.

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<sup>131</sup> Schabas in: Cassese, Gaeta, Jones op cit (n11) 1520.

<sup>132</sup> Schabas op cit (n37) 272.

<sup>133</sup> Schabas in: Cassese, Gaeta, Jones op cit (n11) 1506.

The *ad hoc* Tribunals regarded genocide as ‘the crime of the crimes’<sup>134</sup>. The ICTR stated that ‘the heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating’<sup>135</sup>, but the *ad hoc* Tribunals both avoided to rank genocide compared to the other crimes. Moreover, genocide is placed in the Rome Statute as the first of the crimes, which can be prosecuted by the Court. This confirms the assumption that genocide presents the most serious international crime in regard to the Rome Statute.

In this context, the war crimes present the ‘less serious crime of the three. Besides the fact that war crimes are stated in article 8 of the Rome Statute as the last of the three, there are also other indications for this assumption. The ICTR has stated in the decision *Prosecutor v Kambanda* that the war crimes are to be considered ‘lesser crimes’ compared to genocide or crimes against humanity<sup>136</sup>. Moreover, article 124 of the Rome Statute states that war crimes are to be excepted from the jurisdiction of the Court and according to article 33 of the Rome Statute the defence of the superior order is also excluded in the case of genocide and crimes against humanity, but permitted in the case of war crimes. Furthermore, according to article 31 (1) (c) of the Rome Statute the defence of property is admitted only in regard to war crimes<sup>137</sup>.

### **bb) Determination of a Sentence**

Different from many national penalty systems, the Rome Statute contains only general provisions on sentencing and sanctions. To ensure that nevertheless there will be no justification for severe violations of human rights, a just and consistent sentencing practice has to be developed. This issue relates to problems concerned with balancing elements of proportionality and culpability<sup>138</sup>.

In this context, this limited form of retributism was also adopted by the *ad hoc* Tribunals. They required the adherence of the two basic principles: both ‘that consistency demands similar crimes be dealt with by similar punishments, and that the severity of any sentence should be related to the amount of harm caused by the offending behaviour’<sup>139</sup>.

However, article 78 of the Rome Statute, emphasising the importance of offence gravity and sentence individualisation by implication, does not state, which factors should

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<sup>134</sup> W Schabas ‘The *Jelisić* Case and the *Mens Rea* of the Crime of Genocide’ (2001) 14 *LJIL* 125.

<sup>135</sup> *Prosecutor v Seruchago*, ICTR-98-39-S, Sentence, 2 February 1999, paragraph 15.

<sup>136</sup> *Prosecutor v Kambanda*, ICTR-97-23-S, 4 September 1998, paragraph 43.

<sup>137</sup> Schabas in: Cassese, Gaeta, Jones op cit (n11) 1506.

<sup>138</sup> Henham op cit (n5) 92.

<sup>139</sup> Henham op cit (n5) 93.

determine the relative weight to be accorded to these principles. Moreover, also rule 145 (c) of the ICC-RPE recognizes the culpability of the offender as relevant only in so far as it relates to issues regarding the totality of sentence<sup>140</sup>.

The possibility of an unjust and disproportionate sentence is only addressed in part 8 of the Rome Statute (Appeal and Revision): 'A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence'<sup>141</sup>. Since the Rome Statute does not provide an explicit hierarchy of the different categories of crimes, which might be developed into meaningful sentencing principles by the ICC, it will be difficult to prove the disproportion between offence and sentence. Moreover, only article 110 (4) of the Rome Statute refers to the individual circumstances as relevant to the ICC on a review in regard to the reduction of the sentence. In this context, the Court may reduce the sentence, if the person presents an early and continuing willingness to cooperate with the Court in its investigations and prosecutions (article 110 (4) (a) of the Rome Statute) and assists voluntarily 'in enabling the enforcement of the judgements and orders of the Court in other cases and in particular provides assistance in locating assets subject to orders of fines, forfeiture or reparation which may be used for the benefits of victims' (article 110 (4) (b) of the Rome Statute)<sup>142</sup>.

Similar to the *ad hoc* Tribunals, the ICC does not provide any techniques for securing consistency. Article 76 (1) of the Rome Statute states that the Trial Chamber should consider the appropriate sentence, however without considering any primary rationales of purposes in sentencing. Moreover, in the Rome Statute there are neither relations stated between offence seriousness and sentence severity nor some linkages between the principles of cardinal and ordinal proportionality<sup>143</sup>.

The possibility of an obfuscation of the purposes and normative principles, which will in future govern the sentencing of those convicted of the most serious crimes of international concern will increase as the ICC relates to the national courts on a horizontal level<sup>144</sup>. In this respect, the question arises whether it would be rather advisable to adopt a national penalty system which is applicable on the Rome Statute.

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<sup>140</sup> Ibid.

<sup>141</sup> Article 81 (2) (a) of the Rome Statute.

<sup>142</sup> Henham op cit (n5) 94-5.

<sup>143</sup> Henham op cit (n5) 98.

### v) The Rome Statute and National Criminal Justice Systems

Article 1 of the Rome Statute states that the ICC ‘shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions’. Therefore, domestic prosecutions of international crimes as the heart of a decentralised administration justice are vital to the international system of criminal justice. In this respect, the ICC will complement the efforts of national systems to bring to justice those responsible for the most serious crimes of international concern, but will not replace them<sup>145</sup>. The ICC will, in fact, exercise its jurisdiction only on unwillingness of states to prosecute or on the inability in case of a collapse of the judicial systems, or in case of a lack of effective means at a national level. If a state has not implemented the Statute itself or other applicable international standards in domestic legal orders, the Court could decide as a consequence of the incapability of national jurisdictions to provide justice in the case that the case is admissible before the ICC. In case that a person is already tried before the ICC, national jurisdictions will be barred to retry the individual by the principle of *ne bis in idem* (article 20 of the Rome Statute)<sup>146</sup>.

However, different from the most international treaties, the states do not have any obligation to implement the substantive criminal law of the Rome Statute into the domestic legislation. In this respect, states retain their autonomy in regard to their criminal law provisions even as state party of the Rome Statute<sup>147</sup>.

On the other hand, the ICC is also able to act without the consent of the state of nationality or the territorial state, if its jurisdiction will be triggered by the referral of a situation by the UN Security Council according to chapter VII of the UN Charter<sup>148</sup>. In this case, whether or not the states have implemented the Rome Statute in their own legislation, the Court will be empowered to complement and replace domestic jurisdictions also of states, which have still not ratified or do not want to ratify the Rome Statute or have not accepted *ad hoc* the jurisdiction of the ICC according to article 12 (3) of the Rome Statute<sup>149</sup>.

The implementation process of the states differs from state to state. While some states started the implementation process immediately, others postponed the process of

<sup>144</sup> Henham op cit (n5) 100.

<sup>145</sup> Werle, Jessberger op cit (n7) 193.

<sup>146</sup> F Lattanzi in: Politi, Nesi op cit (n106) 180.

<sup>147</sup> Werle, Jessberger op cit (n7) 194.

<sup>148</sup> Article 13 (b) of the Rome Statute.

<sup>149</sup> Lattanzi in: Politi, Nesi op cit (n106) 181.

further specific implementation of its prescriptions after incorporating the Rome Statute first of all with a constitutional norm. Others postponed the ratification of the Rome Statute to the process of its implementation. Moreover, some states used the occasion of the ratification of the Rome Statute to implement general principles of international criminal law and international humanitarian law<sup>150</sup>.

That the ICC does not oblige the states to implement the Rome Statute, does not mean that it does not encourage them to do so. The main purpose of the Rome Statute is not to try international crimes as far as possible before an international court, but to provide a basis of norms and legal standards that states themselves have the opportunity to investigate and prosecute the most serious crimes against international law<sup>151</sup>.

While Article 22 (1) of the Rome Statute contains the principle *nullum crimen sine lege*, paragraph 3 of the article relates to the principle of legality. This confirms the fact that international law upholds this principle and that its affirmation is not limited to national regulatory frameworks. In this context, the language of article 6, 7 and 8 of the Rome Statute as well as the decision to subordinate the attribution of the Court's competence on the crime of aggression to its definition according to article 5 of the Rome Statute, confirms the assumption 'that the drafters of the Rome Statute had a strong sensitivity towards legal precision and predictability in defining the contours of criminal offences'<sup>152</sup>. According to a 'nationalistic' interpretation of the principle of legality it would be necessary for the states to implement the international norm into the domestic legislation independently from an international instrument, through a referral to the relevant provision of an international convention or custom. Instead of hearing cases on these crimes, before a detailed implementing legislation states could be deemed as not providing the definition of the crimes as stated by international law and would be barred<sup>153</sup>.

However, since the introduction of the Rome Statute, it is not acceptable to argue that in the case, that a conduct is not expressly criminalized under domestic law, it is illegitimate to make findings as of their binding nature to the case directly under international criminal law. The crimes of international concern, which can be tried before domestic courts are now

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<sup>150</sup> Lattanzi in: Politi, Nesi op cit (n106) 182.

<sup>151</sup> Werle, Jessberger op cit (n7) 195.

<sup>152</sup> Lattanzi in: Politi, Nesi op cit (n106) 185.

<sup>153</sup> Lattanzi in: Politi, Nesi op cit (n106) 186.

no longer only those explicitly stated in national legal orders, but all these disciplined in the Rome Statute<sup>154</sup>.

#### **d) The German Code of Crimes against International Law**

With the introduction of the *Völkerstrafgesetzbuch*, the German Code of Crimes against International Law (CCIL), the German legislation realized the international task to cooperate with the world community in the fight against the international crime and founded, under the principle of complementary, a new 'German International Criminal Law'. The CCIL is the basis for Germany's expected contribution to the investigation and prosecution of the most serious crimes of international concern. However, the significance of the CCIL does not only lie in the translation and implementation of the Rome Statute into German law. The CCIL rather fulfills important international tasks: on the one hand, it contributes directly to the concretisation and consolidation of the current international criminal law<sup>155</sup>. On the other hand, it serves as a possible model for other states to implement the Rome Statute in their domestic legislation<sup>156</sup>.

However, the CCIL does not present a direct translation of the Rome Statute, as constitutional reasons made slight changes necessary. As it will be presented in the following text, the penalty provisions had to be improved and present now a more detailed system. In this respect, the question arises, if the penalty system of the German CCIL could serve as an international model.

#### **i) International Criminal Justice in Germany**

It is not possible to think about the development of international criminal law without an association with Germany. This sad conclusion has to be drawn, because in the last century no other country in the world has been responsible for the commission of so many international crimes, thus making the development of the international criminal law necessary and inevitable.

The Treaty of Versailles in 1919 related to the 'acts in violation of the laws and customs of war' and 'supreme offences against international morality and the sanctity of treaties' of World War I by the never realized decision to establish a 'special tribunal' to try

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<sup>154</sup> Lattanzi in: Politi, Nesi op cit (n106) 187.

<sup>155</sup> S R Lüder, T Vormbaum *Materialien zum VSStGB – Dokumentation eines Gesetzgebungsverfahrens* (2002) 23.

<sup>156</sup> G Werle, F Jessberger, 'Das Völkerstrafgesetzbuch' JZ 2002, 725.

the German *Kaiser* Wilhelm II. Moreover, the Treaty of Versailles stated that other perpetrators should be tried by Allied Military Tribunals. However, these tribunals were never established and the prosecution of German World War I criminals before the *Reichsgericht* was not taken serious<sup>157</sup>.

After World War II, under the name 'Nuremberg process' a war tribunal was finally established against German offenders against International Law. The law of Nuremberg as the basis of the modern international criminal law only presented a response to the international crimes, which had been committed on behalf of the German Nazi-regime<sup>158</sup>. From this time on, a neutral to aloof relation of Germany to the international criminal law was no longer possible. At least in the later West-Germany the law of Nuremberg was rejected. In the case of a prosecution of a war criminal in Germany, the person was not charged for the violation of international law, but for the violation of the *Reichsstrafgesetzbuch*, which was valid during the Second World War<sup>159</sup>.

In the next decades, the rejection influenced by scepticism and resistance changed into approval and acceptance<sup>160</sup>. Nowadays, Germany supports the international criminal justice system completely and was one of the most enthusiastic supporter of the idea to establish a permanent, worldwide and independent international criminal court. In this context, it voted at the Rome Conference in favour of the Rome Statute and signed it on 9 December 1998. Two years later, it ratified the Statute on 11 December 2000, after the International Criminal Court (ratification) Act had created the prerequisites for the Rome Statute to take effect in Germany. Moreover, article 16 (2) of the German Constitution (*Grundgesetz*, in the following referred to as 'Basic Law') had to be altered in order to make it possible to extradite German citizens to the ICC<sup>161</sup>. In the end, Germany was among the first 60 states, having ratified the Statute. The Rome Statute was adapted and is now implemented in the German Code of Crimes against International Law, which entered into force on 30 June 2002, one day before the Rome Statute.

## **ii) The Code of Crimes against International Law**

The CCIL was designed to fulfil the obligations which directly result from the Rome Statute. It has now the potential to play an important and powerful role in the prosecution of

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<sup>157</sup> Werle, Jessberger op cit (n7) 196.

<sup>158</sup> Lüder, Vormbaum opcit (n155) 22.

<sup>159</sup> Werle, Jessberger op cit (n156) 726.

<sup>160</sup> Werle, Jessberger op cit (n7) 197.

international crimes. First of all, following the principle of universal jurisdiction, it allows worldwide prosecutions<sup>162</sup>. On the other hand, the German principle of mandatory prosecution, can also be applied for prosecutions on the basis of the CCIL. In this respect, for example, a prosecutor has the obligation to prosecute if there is sufficient evidence and has no discretion to decide otherwise<sup>163</sup>.

#### **aa) Lacks of the Prior Legal Order**

The CCIL had to be introduced for some constitutional reasons. First of all, the crimes listed in the Rome Statute as crimes of international customary law cannot be applied immediately within the legal order. According to article 25 of the Basic Law, international customary law is placed in the rank above ordinary law, but beyond the constitutional level<sup>164</sup>. Therefore, according to article 103 (2) of the Basic Law, all crimes originating from international customary law must correspond to the principle of legality. The principle of *nullum crimen sine lege scripta* as one of the most essential principles regulates that a prosecution based on international criminal law is not allowed<sup>165</sup>. Also a transposition by reference to the norms of the Rome Statute does not fulfil the requirements of the principle of legal certainty. Moreover, all definitions stated in the Rome Statute had to comply with this strict principle so that also a bare translation and implementation of the Rome Statue would not have been sufficient<sup>166</sup>.

First of all, the Rome Statute does not fulfil the requirements of the German Basic Law: despite providing specific penalties for the individual crimes, it simply enumerates a list of applicable penalties in article 77. Also, article 78 of the Rome Statute refers to the determination of sentences in general, however without any explicit relation to the individual crimes, which would be necessary to fulfil the German Basic Law's principle of legal certainty<sup>167</sup>.

Moreover, article 5 of the Rome Statute refers to the jurisdiction of the Court. In this respect, the following definitions in articles 6, 7 and 8 of the Rome Statute are not aimed at

<sup>161</sup> Satzger op cit (n6) 262.

<sup>162</sup> C Stahn 'Die Umsetzung des Rom-Statuts in nationales Recht – Ein erster rechtsvergleichender Überblick' (2000) *Humanitäres Völkerrecht – Informationsschriften* 200

<sup>163</sup> S Wirth 'Germany's New International Crime Code: Bringing a Case to Court' *Journal of International Criminal Justice* 1 (2003) 151.

<sup>164</sup> Satzger op cit (n6) 264.

<sup>165</sup> Stahn op cit (162) 203.

<sup>166</sup> Werle, Jessberger op cit (n7) 200.

<sup>167</sup> Satzger op cit (n6) 264.

the perpetrators, like the German Basic Law requires, but at the ICC itself. Thus, the Rome Statute had to be transformed into national law according to article 59 (2) Basic Law<sup>168</sup>.

### **bb) The Content of the CCIL**

The CCIL is divided in 14 sections, which are separated in two parts: a general part (sections 1-5), which states the general provisions applicable to all crimes, and a special part (sections 6-14), which contains the definitions of crimes against international law. The special part is divided in three chapters: the first deals with genocide and crimes against humanity, the second with war crimes, and the third part with other crimes, namely violations of the duty of supervision and the omission to report a crime.

#### **(1) General Part**

Section 1 of the CCIL renders the universality principle and clarifies that Germany's jurisdiction applies to the prosecution of serious criminal offences (*Verbrechen*), like genocide, crimes against humanity and war crimes, even when they are committed abroad and do not have any relations to Germany. The principle of universality does not apply to the less serious crimes (*Vergehen*), which are stated in sections 13 and 14 of the CCIL. In these cases, the general provisions on extra-territorial jurisdiction of the German Criminal Code (*Strafgesetzbuch*) are applicable<sup>169</sup>.

Section 2 as key norm of the General Part reflects the basic decision of the German legislation to implement the provisions on crimes against international law into the dogmatic framework of German criminal law. Thus, the CCIL does not make special provisions to the general principles stated in articles 22 to 33 of the Rome Statute, but refers to the ordinary general criminal law<sup>170</sup>. Accordingly, the general provisions of the ordinary Criminal Code are also applicable, unless special provisions were introduced in the CCIL, because the norms of the Rome Statute differed significantly from the general German criminal law<sup>171</sup>. In this context, the mental element presents an important example. According to section 2 of the CCIL and due to the absence of a *lex specialis*, the fundamental principle of section 15 Criminal Code is to be applied, stating that *dolus eventualis* meets the requirement for the *mens rea*. However, as a compromise between continental and Anglo-American criminal

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<sup>168</sup> Satzger op cit (n6) 264-5.

<sup>169</sup> Werle, Jessberger op cit (n7) 201.

<sup>170</sup> Werle, Jessberger op cit (n7) 202.

<sup>171</sup> Lüder, Vormbaum op cit (155) 24.

law, the mental element of the Rome Statute is not identical to the German concept of intent. This difference can have consequences in cases, where a punishment on the basis of the CCIL is impossible due to a lack of the necessary intent, while the ICC could sentence the perpetrator on the basis of a more complex understanding of the mental element<sup>172</sup>.

One of the few classical matters of the General Part of international criminal law is regulated in section 3 of the CCIL, which deals with the 'acting upon orders'.

Section 4 in addition with section 13 and 14 of the CCIL relates to article 28 of the Rome Statute and regulates the 'responsibility of military commanders and other superiors'. In regard to article 28 of the Rome Statute, many member states had difficulties with the transformation of this provisions<sup>173</sup>. The German legislation tried to solve the problem by implementing only one section in the CCIL instead of three separate articles like provided in the Rome Statute: A superior who omits to prevent his subordinate from committing genocide, a crime against humanity or a war crime shall be punished like a perpetrator of the offence committed by the subordinate<sup>174</sup>. In this context, the CCIL falls behind the Rome Statute that equates the criminal liability of the commander and the subordinate, even though the commander is negligent as to the offence of the subordinate or as to his own offence<sup>175</sup>.

As last section of the General Part of the CCIL, section 5, relating to article 29 of the Rome Statute deals with the non-applicability of the statute of limitations. In this context statutory limitations are not applicable to 'serious criminal offences', which include the crimes in section 6 to 12 of the CCIL<sup>176</sup>. However, the general rules of prescription (sections 78 of the Criminal Code) apply to the extent that less serious crimes have been included in the CCIL<sup>177</sup>.

## **(2) Special Part**

The special part of the CCIL contains the definitions of the crimes. Most of them are closely modelled like the relevant provisions in the Rome Statute. Moreover, in order to implement the Rome Statute as far as possible as a whole, the drafters of the CCIL gave the Rome Statute due consideration, when they interpreted the crimes under the CCIL<sup>178</sup>.

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<sup>172</sup> Satzger op cit (n6) 269.

<sup>173</sup> Stahn op cit (n162) 205.

<sup>174</sup> Werle, Jessberger op cit (n7) 204.

<sup>175</sup> Satzger op cit (n6) 273.

<sup>176</sup> Wirth op cit (n163) 155.

<sup>177</sup> Werle, Jessberger op cit (n7) 204.

<sup>178</sup> Wirth op cit (n163) 156.

### Genocide

The special part starts with chapter 1 dealing with genocide and crimes against humanity. Like the members of the Rome Conference, the drafters began the list of crimes with the most serious crime, the genocide (article 6 of the CCIL). The definition of genocide has already been stated in the Criminal Code under section 220a after implementing the Genocide Convention in the 1950s. However, the definition in section 6 of the CCIL now clarifies that also a single genocidal act, like a single killing or a single infliction of grave bodily harm can constitute genocide, as far as the act was committed with a genocidal intent<sup>179</sup>. In this respect, the German legislature decided that according to customary international law, the genocidal act need not to be committed as part of a systematic practice<sup>180</sup>.

### Crimes against Humanity

Section 7 of the CCIL deals with the crimes against humanity, which were not yet included in the German Criminal Code. The section follows the article 7 of the Rome Statute not only in the direct inclusion of the legal definitions contained in article 7 (2) of the Rome Statute, but also in the overall structure of the corresponding norm. In this respect, section 7 of the CCIL distinguishes between the 'chapeau' (*Gesamttat*) and single inhumane acts (*Einzeltaten*): The general prerequisite of 'a widespread or systematic attack directed against any civilian population' forms the chapeau of the single inhumane act. Thus, the *Einzeltat* can only be punished in context of the *Gesamttat*<sup>181</sup>.

However, some elements are stated differently from the Rome Statute. Section 7 (1) no. 6 of the CCIL presents one example: a case of 'forced pregnancy' is regarded as case of crimes against humanity, if the perpetrator 'confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population'. In spite of this, article 7 of the Rome Statute provides for a broader mental element. In this respect, the Rome Statute states in article 7 (1) (g) 'forced pregnancy' as an 'unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population *or carrying out other grave violations of international law*' (article 7 (2) (f) of the Rome

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<sup>179</sup> C Kress § 220a/§6 VStGB in: W Joecks, K Miebach (eds) *Münchener Kommentar zum Strafgesetzbuch* volume 3 (2003) 642.

<sup>180</sup> Wirth op cit (n163) 156.

<sup>181</sup> F Dietmeier *Völkerstrafrecht und deutscher Gesetzgeber – Kritische Anmerkungen zum Projekt eines 'Deutschen Völkerstrafgesetzbuchs'* in: E Graul, G Wolf (eds) *Gedächtnisschrift für Dieter Meurer* (2002) 339.

Statute)<sup>182</sup>. Another example states section 7 (1) No. 8 of the CCIL, which defines that the perpetrator ‘causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code’ as part of a widespread or systematic attack directed against any civilian population. In contrast, the comparable crime under the Rome Statute, article 7 (1) (k), is less clear, being designed as a ‘catchall provision’: it includes all ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health’<sup>183</sup>. Moreover, the same structure can be found in the case of ‘apartheid’ stated in section 7 (5) of the CCIL, respectively in article 7 (1) (j) and (2) (h) of the Rome Statute. In these cases, the ‘quite unspecific rules of the Rome Statute are reduced to a more tangible nucleus’<sup>184</sup>.

Also more specifically as in the Rome Statute, the internal order within the inhumane acts are arranged in regard to their seriousness. Moreover, in subsections 3 and 5 were introduced aggravating circumstances (*Qualifikationstatbestände*) as well as mitigating circumstances in subsection 2 and 4, which lead to a classification of the crime as a less serious case (*minder schwere Fälle*)<sup>185</sup>.

Moreover, section 7 (1) No. 10 of the CCIL provides a more specific formulation of the crime of persecution. The Rome Statute with its comparable norm of article 7 (1) (h) falls behind customary international law by presupposing a link to another crime against humanity or to any other crime within the jurisdiction of the ICC, because customary international law recognizes persecution as an independent crime against humanity. In contrast, the CCIL follows customary international law by specifying the conduct to the effect that it criminalizes a person who persecutes an identifiable group or community for specific discriminatory reasons by a substantial denial or serious curtailing of fundamental rights<sup>186</sup>. On the other hand, broader than article 7 (1) (h) of the Rome Statute, the persecution need not be connected to another inhumane act or another crime<sup>187</sup>.

### War Crimes

War crimes present the second chapter within the general part of the CCIL. It is divided in five sections, which deal with different conducts: War crimes against persons (section 8 of

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<sup>182</sup> Satzger op cit (n6) 274.

<sup>183</sup> Satzger op cit (n6) 275.

<sup>184</sup> Ibid.

<sup>185</sup> Werle, Jessberger op cit (n7) 205.

<sup>186</sup> Werle, Jessberger op cit (n7) 206.

<sup>187</sup> Wirth op cit (n163) 157.

the CCIL), war crimes against property and other rights (section 9 of the CCIL), war crimes against humanitarian operations and emblems (section 10 of the CCIL), war crimes consisting in the use of prohibited methods of warfare (section 11 of the CCIL), and war crimes consisting in employment of prohibited means of warfare (section 12 of the CCIL).

Like genocide and crimes against humanity, the war crimes differ in some cases from the provisions of the Rome Statute, stated there in article 8. First of all, the war crimes are listed in the CCIL in a different order. While the war crimes in the Rome Statute are listed according to their applicability in international and non-international conflicts, the drafters of the CCIL held that in regard to criminal conduct the difference between international and non-international conflicts had become obsolete. Therefore, they structured the chapter according to the nature of the objects which are attacked<sup>188</sup>.

Section 8 (1) of the CCIL is valid for both international and non-international armed conflicts and covers individual acts, which are committed in the majority of the cases against 'a person who is to be protected under international humanitarian law'. The definition of a protected person in this sense is stated in section 8 (6) of the CCIL, basically referring to the protection granted by the Geneva Conventions<sup>189</sup>.

Like all the provisions of war crimes of the CCIL, section 8 of the CCIL has not included the so-called 'threshold clause', which is stated in article 8 (1) of the Rome Statute: 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. The German legislature did not believe that this clause presented a requirement under customary international law<sup>190</sup>.

Both sections, 9 and 10 of the CCIL derive from the definitions of the Geneva Conventions. In section 9 (1) of the CCIL numerous individual definitions are brought together into a compact penal provision which also is applicable in both international and non-international armed conflicts<sup>191</sup>.

Moreover, section 11 of the CCIL presents a substantial tightening of the provision stated in the Rome Statute. However, it falls behind the Rome Statute by encompassing crimes committed in non-international conflicts. On the other hand, this extension is

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<sup>188</sup> Ibid.

<sup>189</sup> Werle, Jessberger (n7) 207.

<sup>190</sup> Wirth op cit (n163) 157.

<sup>191</sup> Werle, Jessberger op cit (n7) 207.

consistent with the legal position under customary international law stated in the judgements of the ICTY and ICTR<sup>192</sup>.

Finally, the CCIL punishes the use of biological or chemical weapons under section 12 (1) No. 2. The Rome Statute, however, does not contain such a provision, because the matter was too contentious<sup>193</sup>.

#### Final Remark on the Special Part of the CCIL

Some formulations of the offences differ explicitly from the definitions stated in the Rome Statute in order to meet the German constitutional standard of the principle *nullum crimen sine lege certa*. In these cases, problems can arise. However, despite certain differences between the formulations of the CCIL and the Rome Statute, prosecutions under either system finally should have the same outcome<sup>194</sup>. Moreover, where the formulations of the Rome Statute are broader than the definitions of the CCIL, the future cases brought before the ICC might narrow to adopt a similar, more explicit German approach.

#### cc) Penalties

As mentioned above, the Rome Statute contains only general provisions regarding the penalties. This, however, contravenes with the German principle of legal certainty. Therefore, an attachment of minimum and maximum sentences to each crime was inevitable for the drafting of the CCIL.

In this respect, the CCIL provides for each crime a concrete sentence, which can also consist in a span of a minimum and a maximum sentence. As the death penalty is abolished in Germany according to article 102 of the Basic Law, the most serious sanction under German law is life imprisonment. While under the ordinary German Criminal Code the penalty of life imprisonment can only be sentenced for the crimes of murder and homicide in serious cases (sections 211 and 212 (2) of the Criminal Code), the sentence to life imprisonment is to apply frequently under the CCIL. The reason for this was the consideration that the offences of the CCIL require in principle more serious penalties as the corresponding norms of the Criminal Code<sup>195</sup>.

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<sup>192</sup> See *Prosecutor v Kupreskic* Case No. IT-95-16-T, Judgement 14 January 2000.

<sup>193</sup> Wirth op cit (n163) 157.

<sup>194</sup> Ibid.

<sup>195</sup> Werle, Jessberger op cit (n156) 741.

Apart from that, the minimum period of imprisonment depends on the seriousness of the committed offence, and is provided for three, five or ten years of imprisonment. There are only some exceptions, where the CCIL allows for sentences between one and ten years of imprisonment. However, 'less serious cases' are generously used, which allows for a more lenient punishment where necessary<sup>196</sup>.

According to section 38 (2) of the Criminal Code, the maximum sentence, which is no life sentence, is limited to 15 years imprisonment. However, in Germany even a life sentence is for constitutional reasons limited to a certain extent.

The penalty system of the CCIL is based on the fact that some offences are more serious than others. While the crimes stated in the Rome Statute lack an explicit hierarchy, the German legislature made sure that the seriousness of a certain crime is reflected by the sentence.

Finally, for the regulation of the sentences in the CCIL the provisions of the Criminal Code were equally taken into consideration and, where possible, adopted for the international crimes. In this context, the crimes against humanity present an example: While homicide as crime against humanity (section 7 (1) No. 1 of the CCIL) is punishable only with life imprisonment, bodily harm as crime against humanity (section 7 (1) No. 8 of the CCIL) can only be sentenced with imprisonment from three to fifteen years<sup>197</sup>.

Moreover, the German legislature did not regard it as necessary to lift the maximum sentence to 30 years, like it is stated in the Rome Statute. However, the differences between the jurisdiction of the ICC and the German Courts, which have to be expected, are neglectable in regard to the principle of complementarity<sup>198</sup>.

### **iii) International Significance of the CCIL**

Beyond the fact that the German legislature has brought an appropriate solution for the lacks in the German legal order in regard to international criminal law by drafting a modified implementation of the Rome Statute in an independent codification, the CCIL has also got some relevance in international criminal law.

First of all, the German national law should be brought into line with the requirements of the Rome Statute. The Rome Statute as one of the most important means of international criminal law reflects in most of the prescriptions, like the definitions of the

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<sup>196</sup> Werle, Jessberger op cit (n7) 212.

<sup>197</sup> Werle, Jessberger op cit (n156) 741-2.

crimes and the general principles, customary international law. The aim of implementing the Rome Statute into German Law could be achieved by a direct transposition of the definitions of crimes contained in the Rome Statute itself. However, as stated above, from a German point of view, in some issues the Rome Statute falls behind the requirements of customary international law. In particular in regard to the definitions of crimes, even the Rome Statute states in its article 10 that it shall not be interpreted as limiting or prejudicing existing or developing rules of international law<sup>199</sup>. In this context, the drafters of the CCIL tried to bridge the gap between the Rome Statute and customary international law and added the missing provisions codifying international law.

The Rome Statute combines the civil law and common law rules as well as international human right standards into an international body of procedural and substantive criminal law and forms a new form of an international code of criminal law<sup>200</sup>. In this respect, no national legislature could be able to implement the Rome Statute one by one, but had to adapt the corresponding parts, interpreting and transferring the other part into domestic law. Thus, the substance of the Rome Statute had to be transformed directly into German law, without violating the constitutional and domestic criminal requirements and standards. For the German lawmaker the major challenge was the strict interpretation and transposition of the principle of *nullum crimen sine lege*, which required several adjustments<sup>201</sup>. However, the German legislature found a finetuned way to unify the substantive law of the Rome Statute with the German standard of domestic constitutional and criminal law. Moreover, the German lawmaker tried to refine the provisions of the Rome Statute and codified customary international law, which was not part of the Rome Statute yet. In this context, the CCIL followed the trend of recent case law of the *ad hoc* tribunals and broadened the scope of civil war crimes by fusing them with war crimes in international armed conflicts<sup>202</sup>. Another achievement of the CCIL is the simplification of the structure of the war crimes in article 8 of the Rome Statute. The CCIL divides this article in 5 sections according to their protected legal values<sup>203</sup>.

Although most of the domestic legal orders have some certain requirements in order to implement international legal texts, most of the requirements will be the same for all

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<sup>198</sup> Werle, Jessberger op cit (n156) 742.

<sup>199</sup> Werle, Jessberger op cit (n7) 209.

<sup>200</sup> Safferling op cit (n1) 1.

<sup>201</sup> Werle, Jessberger op cit (n7) 109-10.

<sup>202</sup> Werle, Jessberger op cit (n7) 210-11.

<sup>203</sup> Wirth op cit (n163) 157.

civil law systems. In this respect, the CCIL can in several issues serve as model for other nations, which still have to implement the Rome Statute into domestic law.

Moreover, the principle of limited mandatory universal jurisdiction presents one of the most far-reaching innovations of the CCIL. As it has not been clear until now, to which extent international law permits and obliges the states to prosecute international crimes against 'the peace, security and well-being of the world'<sup>204</sup>, section 1 of the CCIL introduces the principle of universal jurisdiction for genocide, crimes against humanity and war crimes.

However, it would be impossible to investigate and prosecute all crimes of this kind committed in the world. So, with the introduction of section 153 (f) of the German Code of Criminal Procedure (*Strafprozessordnung*), the principle of universal jurisdiction was limited in the context that the general duty to prosecute is complemented by a complex set of narrow exceptions. These are to apply in cases, in which there is neither a need nor a realistic chance to bring a perpetrator to justice in Germany. Moreover, in the case that a crime prohibited under the CCIL has been committed abroad by a non-German national against a non-German national and that the perpetrator is neither in Germany nor expected to enter Germany, the prosecutor has the full discretion whether to prosecute or not<sup>205</sup>. So, the limited mandatory universal jurisdiction stated in the CCIL presents a practical compromise between the obligation to prosecute the most serious international crimes according to customary international law and the possibilities of a nation to fulfil this obligation. Also in this respect, it is possible that the provisions of the CCIL combined with the norms of the general German criminal law will serve as a model for other nations, which are implementing the provisions of the Rome Statute.

#### **iv) Application of the Penalty System of the CCIL in International Criminal Law**

The Rome Statute has set general provisions to impose sentences. With the articles 77 to 80 of the Rome Statute the most important issues are stated clearly. It becomes evident that the death penalty is abolished by determining life imprisonment as the highest penalty provided in the Rome Statute. Moreover, besides the penalty of life imprisonment the sentence of imprisonment is limited to 30 years. In this respect, sentences of 46 years of imprisonment like they still could be stated in the *ad hoc* tribunals are no longer possible<sup>206</sup>. Therefore, by

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<sup>204</sup> Preamble, paragraph 3 of the Rome Statute.

<sup>205</sup> Werle, Jessberger op cit (n7) 213.

<sup>206</sup> See supra (n4).

the penalty provisions in the Rome Statute it is at least achieved that the basis of the penalty system in international criminal law is codified.

#### **aa) Need for a Uniform Penalty System in International Criminal Law**

The Rome Statute is based on the principle of complementarity. In an ideal future case, consequently, the ICC will only have the jurisdiction over the minor cases, because individual nations will investigate and prosecute the perpetrators.

In this case, a lack of the Rome Statute becomes obvious: different states impose different penalties. Of course, some differences are inevitable: the conditions in the prisons of different states vary, and also in many countries 'life imprisonment' does not mean that a convicted person will stay in jail for the rest of his or her life. For example, in Germany a convicted person will normally be released after a certain time for constitutional reasons. In this respect, it will be impossible to provide all international crime prisoners with the same conditions, unless all convicted persons will be incarcerated at one place in the world.

However, besides this fact, it might occur that in the one state the perpetrator could be sentenced for life imprisonment, while he or she would have been sentenced for only fifteen years in prison in the other state. Moreover, the degree of punishment could likewise differ from one state's to the ICC's jurisdiction. Here the question arises whether it can be just, if a person convicted before a national tribunal will be imposed with a higher or lower sentence than if the person had been imposed for the same crime before a court of another state or before the ICC. It would be just a question of coincidence whether the home state of the perpetrator was able or willing to prosecute this crime or not.

For this reason, it would have, in my opinion, been advisable, to provide the Rome Statute for explicit penalties instead of the general clauses in the articles 77 to 80 of the Rome Statute. This would have excluded the risk for a person to be convicted with unequal high penalties, depending on which court is trying the perpetrator.

#### **bb) Application of the Penalty System of the CCIL in International Criminal Law**

The Rome Statute is a treaty between the member states and consists on the consent of all members. Although the Rome Statute only contains a general penalty system, it does not mean that it could not adopt a system of concrete penalties in the future. Of course, for the moment the issue is of a theoretical nature, as it was difficult enough for the member states to find a compromise between the civil law and the common law systems in regard to current

the penalty provisions. The future will show whether the ICC will develop a greater degree of specificity in its future case law. However, when the ICC tries the first individuals, the lack of hierarchy between the different offences within the Rome Statute will probably become an obstacle, if there are only general penalty provisions. Moreover, different from other Statutes or Codes within domestic law, the provisions of Rome Statute are to be made applicable in all member states. In this context, it would be clearer by far, if all member states had the same requirements in regard to the penalties. In this case, a fair trial would be granted as far as possible. Moreover, punishing individuals on an international level is no academic enterprise, but a very serious matter, as a convicted is tried as a 'world criminal'<sup>207</sup>. In this respect, even though the issue is nowadays of a theoretical nature, it can also get a practical nature in the future.

Thus, in my opinion, the German CCIL represents a considerable improvement to the Rome Statute in regard to its explicit minimum and maximum sentences to each of the crimes in sections 6 to 14 of the CCIL. To add a specific sentencing range to each offence, first of all, the seriousness of the crimes in relation to other international crimes as well as the ordinary offences under domestic law had to be determined<sup>208</sup>. In this respect, the penalties provisions of the CCIL do not only create more clarity for imposing the sentences, but also establish a hierarchy of the offences, which appears to be inevitably necessary.

Even though the German legislature had to alter the definitions of the crimes in the Rome Statute slightly to adopt the provisions in the light of the constitutional Basic Law, the nucleus of the Rome Statute remained the same. Thus, the degree of the sentence added on the definitions of crimes could also be adopted by the Rome Statute.

Therefore, the penalty system of the CCIL could be adopted. The question, however, is whether it would be sensible. A unique international criminal procedure should be developed as a legal order which takes into account the history and experience of criminal prosecution over the last centuries in different cultures and traditions. When difficulties arise with the one system, the drafters should look at the other system to solve the problem<sup>209</sup>. In regard to the penalty provisions, in my opinion the system of the German CCIL provides more clarity and simplifies the process of sentencing that it is sensible to adopt this system.

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<sup>207</sup> Safferling in: Safferling op cit (n1) 379.

<sup>208</sup> Werle, Jessberger op cit (n7) 212.

<sup>209</sup> Safferling in: Safferling op cit (n1) 378.

In this respect, it would be sensible to adopt the penalty system of the German CCIL at the ICC.

### **3. Conclusion**

The Rome Statute came into existence as a consequence of a long political and legal struggle about a permanent and world-wide acknowledged international criminal court. By the introduction of the Rome Statute, the drafters of the Statute for the ICC found a compromise between the different law systems in the world by orientating themselves at the post World War II tribunals of Nuremberg and Tokyo, as well as the *ad hoc* Tribunals of Yugoslavia and Rwanda established by the UN Security Council.

The German legislature has taken the date, on which the Rome Statute came into force, as opportunity to brush up its criminal law in regard to the international crimes. The implementation of the Rome Statute served as aim to introduce norms stating the prohibition of the most serious international crimes. While the legislature tried to stay as close to the norms of the Rome Statute as possible, it was inevitable for constitutional reasons to refine some provisions. In this context, the penalty system of the Rome Statute could not be adopted, but had to be developed by the German legislature. Thus, the penalty system of the CCIL developed itself to serve as an indicator for the ranking of the different crimes and, moreover, as a model for other states on their way to implement the Rome Statute themselves. The CCIL shows that Germany has changed its attitude towards international criminal justice. While Germany was sceptical and reluctant in former times, it now presents approval and commitment in regard to international criminal law<sup>210</sup>. By presenting a legal frame work, which could possibly serve in some parts as model for the ICC, it supported the international community to establish a world-wide acknowledged instrument to try serious international crimes like genocide, crimes against humanity or war crimes.

In my opinion, the German penalty system of the CCIL presents an improvement of the general penalty provisions of the Rome Statute and, therefore, should be adopted by the international community. In some other parts of the Rome Statute, other nations might have found or will find an ideal solution during their work to implement the Rome Statute. In these cases, it should be discussed to refine the Rome Statute with their solutions. Only by the cooperation of all member states and the acceptance of national refinements of the Rome Statute, an ideal way for the work of the International Criminal Court is guaranteed. Even

though the Rome Statute presents a well-balanced codification of customary international law and the different law systems, it remains the first Statute of its kind and therefore cannot be infallible, but lives of the proposals for improvements of the single nations.

In this respect, in my opinion the penalty provisions of the German Code of Crimes against International Law are able to serve as a model for the Rome Statute of the International Criminal Court.

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<sup>210</sup> Werle, Jessberger op cit (n7) 214.

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