THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:

A COMMENTARY

VOLUME I

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OXFORD
UNIVERSITY PRESS

12

JURISDICTION *RATIONE PERSONAE*

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I. Nuremberg and Tokyo: The Reasons for Punishing the Vanquished and for Declaring the Criminality of Nazi Organizations

The two Military Tribunals established at Nuremberg and Tokyo in the aftermath of World War II were a clear expression of the Allied Power's victory.[1] The personal jurisdiction of the two Courts—and of the Military Tribunals established in their

[1] There have been some very critical studies casting doubts on the validity of the Nuremberg and Tokyo Trials as expressing only Victors' power, see R. Minear, *Victors' Justice: The Tokyo War Crimes Tribunal* (1972). For an interesting and articulated perspective on this and other issues in particular related to the Tokyo Trial, see Röling interviewed by Cassese in *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (1993) esp. 85–91.

wake[2]—obviously bore an important consequence: they came into existence only to punish the vanquished.[3] The Nuremberg Tribunal had the power to punish persons acting 'in the interest of the European Axis countries', while the Tokyo Tribunal had jurisdiction over 'Far Eastern Criminals'. The punishment of crimes committed by the Allied armies during the hostilities was never considered.

As a consequence, *nationality became a key element to select accused persons.*

There was of course a strong political necessity to punish those who plunged the world into World War II: a need that had to be reconciled—as agreed by the Allies—with a judicial solution. Undoubtedly, the necessity was also felt to punish not only the leaders, bearing the greatest responsibility for waging an aggressive war and for the atrocious crimes committed, but also the large number of people who took part in the overall plan, without simply condemning German and Japanese peoples *tout court.*[4] That is why the Allies introduced the crime of conspiracy in the Military Tribunals' jurisdiction[5] and attributed liability for membership in Nazi criminal groups.[6]

[2] In Germany, aside from the major Trial, held against 22 Nazi leaders, several trials were conducted on the basis of Control Council Law No. 10. In Japan, as well, besides the Trial against 28 Japanese leaders, there was another Military Tribunal established to deal with 'lesser' crimes: the Yokohama Tribunal.

[3] The Moscow Declaration (issued by the Allies on 1 November 1943) already established: 'Those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein . . . without prejudice to the case of major war criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Government of the Allies.'

[4] As for Germany, it was said: 'The atmosphere, naturally, was charged with vindictiveness towards those guilty of causing unspeakable suffering and devastation. Therefore it was important to set up a legal mechanism that would adequately respond to these feelings, and thereby satisfy a popular sense of justice as well as prevent an outbreak of uncontrollable, anarchic violence. Also, it was important to bring home to the defeated Germans that responsibility for war crimes could not and should not be easily shifted to a few top Nazi leaders, that organized criminality represented a deep current in the life of the German nation between 1933 and 1945 with millions of willing participants. At the same time, however, it was also important to steer away from the easy formula of a blank condemnation of the German people as a whole', S. Pomorski, 'Conspiracy and Criminal Organizations', in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990) 214.

[5] The crime of conspiracy explicitly appeared only under crimes against peace, whereas it was not mentioned under war crimes and crimes against humanity. In addition, the last sentence of Art. 6 read: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all the acts performed by any persons in execution of such plan.' In the Tokyo Charter it appeared in the same terms, that is to say under count 1, crimes against peace, and in the last sentence of Art. 5. In the Nuremberg verdict, the Tribunal was more cautious than the Prosecution would wish. It did trace the existence of a general plan (or conspiracy) to perpetrate crimes against peace that is to say to prepare, initiate, and wage an aggressive war. But it took a rather limited approach to the crime of conspiracy as such. It strictly limited the applicability of conspiratorial liability to the top war

[*note 6 opposite*

At Nuremberg, the criminalization of Nazi organizations was intended to play a highly symbolic role and to acquire a great moral and ideological significance: the condemnation of Nazism as an ideological movement was one of the most important objectives at stake.[7]

Article 9 of the Nuremberg Charter established that the Tribunal could declare, in connection with any act for which an individual was convicted, that groups or organizations of which the accused was a member were criminal organizations.[8] In addition, Article 10 provided that, in case a group was declared criminal, the competent national authority of any signatory state could bring individuals before national, military, or occupation courts.[9] The IMT was thus given the power to assess the criminal nature of Nazi organizations and, consequently, to prepare the ground for attributing individual criminal responsibility for mere membership in secondary proceedings.[10]

The whole issue generated a sharp contrast between the prosecution and the defence and it proved very difficult to handle for the Judges.[11] The controversy over collective liability generated a lot of problems, some of which are reflected in the judgment. Only three organizations, out of the six indicted, were declared criminal: the Leadership Corps of the Nazi Party (NSDAP), the Secret Police (Gestapo), and the Guards Units of the Nazi Party (SS), including the Security

planners, so that only eight of the defendants were convicted under count 1. In the Tokyo Trial instead it played a major role in the final verdict, which established the existence of a criminal conspiracy and held all the defendants but two guilty for participating in that plan. See Minear, *supra* note 1, at 42.

[6] This would also facilitate the prosecution of lesser criminals bound to be tried under Military Tribunals about to be established under Control Council Law No. 10. No such provision was inserted in the Tokyo Charter.

[7] 'If one perceives a deterrent and preventive function of criminal law in a broad sense, if one views it as a consciousness-building factor, the idea of organizational prosecution fulfilled its task very well' (Pomorski, *supra* note 4, at 225).

[8] Art. 9. At the Trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individuals was a member was a criminal organization.

[9] Art. 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupations courts. In any such case the criminal nature of the group or organization is considered proven and shall be not questioned.

[10] Art. 2(2) of Control Council Law No. 10 established that an individual could be held responsible for membership in any organizations or group connected with the commission of the crimes under the law itself.

[11] The issue was left for the IMT to resolve, as 'the Charter did not explain how close the association had to be between the defendant and the particular organization, nor did it specify whether the acts in question had to have been performed in his official capacity. Obviously, the serious difficulties and dangers inherent in prosecuting organizations and especially the effort to link defendants with organizations, had not been smoothly resolved by Article IX. Many of these problems had surfaced in the London discussion but had generally been evaded by cloudy language' (B. F. Smith, *Reaching Judgment at Nuremberg* (1977) 61).

Service of the Reichs Führer (SD).[12] Also the question of membership in criminal groups was addressed with great caution and a set of limitations and qualifications was established. The declaration of an organization as criminal could have grave consequences; it was thus decided that such a declaration should be made in a manner as to ensure 'that innocent people will not be punished'. More precisely, it was expressly stated that 'Membership alone is not enough to come within the scope of these declarations'. On the contrary, the declaration of criminality ought to be effective only with regard to those who were members of the group concerned with knowledge that it was used for the commission of the crimes proscribed by the Charter.[13]

In conclusion, the design behind Articles 9 and 10 was almost nullified from a legal perspective and the condemnation of the Nazi groups maintained primarily a political significance.

II. The International Criminal Tribunals for the Former Yugoslavia and Rwanda: In Search of Universal Jurisdiction over Natural Persons

The two *ad hoc* Tribunals established for former Yugoslavia and Rwanda both have jurisdiction only over natural persons.[14] As shown above, the issue of collective liability had been rather controversial at Nuremberg[15] and it is still disputed

[12] The other three indicted organizations were the Reich Cabinet, the Storm Trooper Units of the NSDAP (SA), and the General Staff and High Command of the German Armed Forces.

[13] The judgment established that 'A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations' (*Nuremberg Judgement*, reprinted in G. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. II, part 2 (2000) 685).

[14] Art. 6 (ICTY) and Art. 5 (ICTR) read: 'The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.'

[15] As far as conspiracy is concerned, the term 'conspiracy' appears both in the Statutes of ICTY and ICTR, under the articles on genocide: individuals can be punished also for participation in a conspiracy to commit genocide. This crime has been especially relevant for the ICTR, since each person indicted by the Tribunal was involved with genocide and most of the high level officials were accused of conspiracy to commit genocide. The former Prime Minister of Rwanda, Jean Kambanda, was accused and found guilty—among other counts—of conspiracy to commit genocide, see ICTR, *Prosecutor v. Kambanda*, 4 September 1998.

today, given also the fact that different criminal systems have a very different approach to this issue.

Notwithstanding some proposals to give to the ICTY the power to declare organizations or groups as criminal,[16] the final choice was to prosecute only individuals and the simple rationale beyond this option is well explained by the Secretary-General of the United Nations in his Report on the establishment of the ICTY:

> The question arises, however, whether a juridical person, such as an association or organization may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard of the International Tribunal. The *criminal acts set out in this Statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.*[17]

Although both in the former Yugoslavia and in Rwanda there were various organizations, especially paramilitary groups (like the Arkan's Tigers or Hutu Interahamwe), allegedly involved in the commission of the atrocities, it was decided that the Tribunals should not pronounce themselves on the nature of these groups and that individuals should not be charged on the basis of their membership therein. Of course, this does not hinder that individuals may be jointly charged and tried for the same crime or set of crimes.[18]

As to the nationality of the accused, there is a relevant difference between the two Tribunals. The ICTY has unlimited jurisdiction with respect to nationality, whereas the ICTR bears some limitations as to the prosecution of persons for crimes related to the 1994 genocide, but committed outside the territory of Rwanda.

The Statute establishes that the ICTR has the power to prosecute persons, irrespective of their nationality, for the crimes committed in the territory of Rwanda.[19] The *Ruggiu* case clearly shows that there is no limitation on nationality

[16] France, who strongly opposed any form of collective liability at Nuremberg, proposed to prosecute membership in groups declared as criminal: 'membership in a *de jure* or *de facto* group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the Tribunal would constitute a specific offence', UN doc. S/25266, paras. 92–94.

[17] UN doc. S/25704, 3 May 1993, para. 51. The language used here echoes one of the most often quoted excerpts from the Nuremberg Judgment: '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.'

[18] According to the *Rules of Procedure and Evidence*: 'Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried' (Rule 48). See the ICTY *Decision on Motions for Separate Trial filed by the Accused Zejnil Delalić and the Accused Zdravko Musić*, 25 September 1996, rejecting a defence motion based on the argument that a joint trial would run counter to the principle of individual criminal responsibility.

[19] Art. 1. See Chs. 13 and 14, below.

in this respect: Georges Ruggiu is a Belgian citizen who has been tried and found guilty of direct and public incitement to genocide and persecution.[20]

On the contrary, only Rwandan citizens may be brought to trial for crimes committed on the territory of neighbouring States of Rwanda. This restriction was introduced, consistently with the *ad hoc* nature of the Court, to avoid the ICTR dealing with crimes only peripherally unrelated to the Rwandan genocide.

III. The ICC Personal Jurisdiction: The Need for a Compromise Solution

The ICC also has jurisdiction only over natural persons. Several articles of the Rome Statute play a role in the definition of the personal jurisdiction of the Court and need to be taken into account in order comprehensively to assess the issue.

A. Jurisdiction over Natural Persons

Article 1 establishes the Court and attributes to it jurisdiction *over persons* for the most serious crimes of international concern; there is no explicit reason for omitting the word natural before persons in Article 1. Other articles directly or indirectly confirm that the *ratione personae* jurisdiction covers exclusively natural persons: Article 25, devoted to individual criminal responsibility, reintroduces the adjective 'natural' to define persons subject to the Court's jurisdiction;[21] Article 26 establishes that the ICC will not exercise its jurisdiction over persons under eighteen, thus implying that the Court deals only with natural persons.[22]

The possibility of giving the Court jurisdiction over juridical persons was supported by some States. France, in particular, stressed the importance of including legal persons, but it was eventually agreed to exclude this possibility since its inclusion would have caused major problems to the Court. There is no uniformity whatsoever among the different national systems on the issue of criminal liability of juridical persons[23] and this lack of a common approach could affect the full

[20] He was arrested by Kenyan authorities at the request of the ICTR, he then pleaded guilty to both charges and was sentenced to twelve years' imprisonment, see *Prosecutor v. Ruggiu*, 1 June 2000.

[21] See Ch. 20, below.

[22] See O. Triffterer, 'Article 1', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999) 58.

[23] The Italian Constitution (Art. 27(1)) declares that criminal responsibility is individual. The Italian Penal Code, *a contrario*, confirms what just said (*societas delinquere non potest*), as it imposes non-criminal sanctions to punish corporate liability (Art. 197(1)). See F. Mantovani, *Diritto Penale* (1998) 148–149. On the other hand, the new French Penal Code (entered into force in 1993) establishes that corporate entities, other than the State, can be held criminally liable (Art. 121(2)).

functioning of the principle of complementarity, one of the cornerstones of the ICC. In addition, collective liability is very difficult to prove even in the case of crimes committed on a massive scale, as the Nuremberg trial clearly showed, and the Court could be confronted with a 'serious and ultimately overwhelming problem of evidence'.[24] The choice of excluding collective liability seems appropriate because it definitely stresses the Court's primary objective: the punishment of individuals responsible for committing the most serious international crimes.

B. The Relationship between Individual and State Responsibility

Some comments ought to be made on the link between individual and State responsibility.[25] It may happen—and it is very likely in some situations—that individuals brought to trial before the ICC are organs of a State, or de facto agents of State or acted 'in the name of the State', even if not endowed with any legal power. In these cases, the ICC has no direct power to ascertain States' responsibility, yet the powers it exercises with regard to individual criminal responsibility shall not prejudice any question as to States' responsibility: this can be drawn from Article 25(4).[26]

A 'without prejudice' clause is inserted also in Article 4 of the 1996 International Law Commission Draft Code on Crimes against the Peace and Security of Mankind, according to which the fact that the Code provides for the responsibility of individuals for certain crimes is without prejudice to any question of the responsibility of States, for the same crimes, under international law. The commission emphasized on several occasions—including the adoption of the Draft Articles on State Responsibility—that prosecuting individuals who acted as States' agents, 'certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs'.[27] In other words, a State cannot invoke the individual punishment of its organs to be exonerated from its responsibility for a crime.

C. The Exclusion of Jurisdiction over Persons below the Age of 18

Article 26 bars prosecution of persons under the age of 18. Hence, for the first time an age limit was introduced in the Statute of an international tribunal. Neither the Nuremberg and Tokyo Charters, nor the ICTY and ICTR Statutes contain any indication as to the age at which criminal responsibility begins. The

[24] K. Ambos, 'Article 25', in Triffterer (ed.), *supra* note 22, at 478.

[25] See Ch. 26, below.

[26] Art. 25(4): 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'

[27] Excerpt from the Nuremberg Judgment quoted by the ILC in the commentary to Art. 4 of the 1996 Draft Code, available at http://www.un.org/law/ilc/texts/dcodefra.htm.

case law of international tribunals shows however that the age of eighteen was considered a tacit threshold, for no individual under that age was ever brought to trial.

The age limit was extensively discussed[28] since it is not the same in different penal systems. The Statute, in any case, does not exclude jurisdiction over minors: they can be prosecuted—for the crimes under the Court's jurisdiction—by national courts whose criminal laws provide for criminal liability of juveniles. Prosecution at the domestic level should in many cases fill the gap left open by the fact that persons over the age of 15 are considered lawful combatants, including under the Rome Statute, and may commit crimes without being tried by the ICC.[29] On the other hand though, it may cause other problems, since it may happen that national systems do not incorporate international standards of juvenile justice and do not provide adequate guarantees for the treatment of youngsters. Some scholars have argued instead that it seems preferable to leave persons below the age of 18 to the national courts, for they are much better equipped 'to take care of the specific situation in which children have been committing crimes under international criminal law'.[30] It is submitted that, while national courts may cater for these specific situations, this does not mean that they are capable or willing to take adequate care of child defendants. On the contrary, it is well known that many judicial systems—over and above those of war-torn societies—do not always function in the best possible way and they seldom endorse international recognized standards of juvenile justice. Therefore, Article 26 may give rise to this kind of contradiction: it may happen that adults are brought to trial before the ICC in full respect of their rights whereas youngsters are tried by national courts without their rights being respected.

In this respect, one can mention the solution adopted for the Special Court of Sierra Leone[31] which fixes at 15 the age at which individuals may be prosecuted,

[28] For the historical development of this norm, see R. Clark and O. Triffterer, 'Article 26', in Triffterer (ed.), *supra* note 22, at 493.

[29] As it has been rightly pointed out: 'A person between 15 and 17 is regarded as a lawful combatant and may commit a crime without being brought to court and punished. A commander could therefore recruit minors into his army expressly for the purpose of forming terrorist units whose members would be immune from prosecution. Moreover, in modern warfare, particularly in developing countries, young persons are more and more involved in armed hostilities and thus increasingly placed to commit war crimes and crimes against humanity', A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 153.

[30] Clark and Triffterer, *supra* note 28, at 497.

[31] The United Nations and the government of Sierra Leone signed on 16 January 2002 a bilateral agreement establishing a mixed tribunal exercising jurisdiction over the most serious crimes under international law. The text of the agreement and the Special Court Statute are available at http://www.specialcourt.org. For some comments on the draft version of the Statute see M. Scharf, 'The Special Court for Sierra Leone', *ASIL Insights* (http://www.asil.org/insights/insigh53.htm); M. Frulli, 'The Special Court for Sierra Leone. Some Preliminary Comments', 11 *EJIL* (2000), 857–869.

but at the same time establishes a special regime for juvenile offenders granting them a whole set of protective measures and guarantees, including the fact that they may not be sentenced to imprisonment.[32] The underlying purpose is to protect children, often victimized in the context of bloody and prolonged conflicts and transformed into criminal offenders, who need to be assisted and rehabilitated rather than being punished and additionally traumatized through a criminal trial.[33] Unfortunately, the ICC cannot directly influence national systems. States must nonetheless be strongly encouraged to adjust to internationally recognized standards of juvenile justice.

D. The Jurisdictional Links: Nationality of the Accused

The ICC Statute *failed to endorse the principle of universality of jurisdiction*,[34] the Court will thus have some restrictions as to the nationality of the accused persons.

Article 12(2)(b) establishes that the nationality of the accused is one of two bases upon which the ICC can exercise its jurisdiction. The other possible criteria is the territorial link, that is to say that the Court may exercise its jurisdiction over crimes committed in the territory of State Parties to its Statute irrespective of the nationality of the perpetrator.

The following limitation of the personal jurisdiction of the Court results: only individuals who are nationals of State Parties or of States who have accepted the jurisdiction of the Court, may be tried irrespective of the circumstances in which the crime was allegedly committed, whereas nationals of States who did not accept it can be prosecuted only if charged with the commission of crimes in the territory of a State who accepts the ICC jurisdiction or in a situation which has been deferred to the Court by the Security Council under Article 13. In this way, as many observers already underlined, a very serious gap has been introduced in the Statute.[35]

[32] The establishment of a lower threshold for criminal liability has attracted strong criticism especially among international human rights groups and organizations responsible for child care and rehabilitation programmes. However, it must be stressed that the treatment of juvenile offenders under the Special Court's Statute is carefully addressed in a manner to protect their dignity and to ensure their rehabilitation, and reintegration in society. Consistently, their release must always be considered as a priority.

[33] As a matter of fact, it was considered that 'prosecuting minors, which would inevitably involve trying to provide a special regime for them, was not a good way to use the Court's probably limited resources', Clark and Triffterer, *supra* note 28, at 497.

[34] See Ch. 16, below.

[35] 'It is a serious gap that the acceptance of the Statute by the custodial State does not act as a precondition for the exercise of jurisdiction by the ICC. It is this provision that would have ensured that atrocities will not go unpunished if the territorial State or State of nationality are not parties or do not consent *ad hoc* and there is no UN Security Council referral', S. Williams, 'Article 12', in Triffterer (ed.), *supra* note 22, at 341.

The restrictions placed on nationality may also cause problems, for instance, in cases where the nationality of the accused is uncertain or in cases where the indicted person has more than one nationality.

IV. The Question of 'Incidental or Ancillary' Jurisdiction over States and/or Persons: The *Blaškić* Case and Its Legacy

In January 1997 Judge McDonald issued a *subpoenae duces tecum* to the Republic of Croatia and its Defence Minister, Šušak. Croatia challenged the ICTY legal authority to issue a subpoena and subsequently requested a review of Trial Chamber II *Decision on the Objection of the Republic of Croatia to the issuance of subpoenae duces tecum* (18 July 1997)—upholding the validity of the subpoena and ordering compliance with it within 30 days.

The ICTY Appeals Chamber pronounced itself on this matter in the *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997.*

The Appeals Chamber clarified the scope of incidental or ancillary jurisdiction over States—thus also specifying the extent of the obligation to cooperate under Article 29—and individuals. The conclusions reached are highly significant and shed some light on a possible failure to cooperate, a problem that the ICC will very likely encounter in the future. There are three main problems identified by the ICTY and the very same hypothesis could confront the ICC.

A. Whether International Tribunals are Empowered to Issue Binding Orders to States and to Sanction them for Non-Compliance

In *Prosecutor v. Blaskić,* Croatia challenged ICTY competence to issue binding orders to States arguing that it lacks any jurisdiction over States.[36] The Prosecutor responded instead that Article 29 grants the ICTY 'ancillary-jurisdiction' over States.[37]

The Appeals Chamber stressed the equivocal nature of this expression and clarified the question. The ICTY has jurisdiction only over natural persons. However—since it does not possess enforcement powers and it must rely on States' cooperation to bring individuals to trial—it has incidental mandatory powers complementing States' duty to cooperate enshrined in Article 29. It is

[36] *Brief on appeal of the Republic of Croatia in opposition to* subpoena duces tecum, 18 August 1997, 5–14.

[37] *Prosecutor's Brief in response to the Brief of the Republic of Croatia in opposition to* subpoena duces tecum, 8 September 1997, 3–4.

therefore misleading to use the term jurisdiction to define these powers, including that of issuing binding orders.[38] The Appeals Chamber also affirmed that the Tribunal has the inherent power to make a judicial finding concerning a State's failure to comply with a binding order or request and to report its finding to the Security Council. Such a judicial finding formally establishes whether or not a certain State has committed an international wrongful act violating the obligation to cooperate with the Tribunal.

Similarly, the ICC will exercise the same mandatory powers with regard to States Parties. Failure to comply with the Court's requests amounts to a violation of the treaty obligations governing international cooperation and judicial assistance.[39] The ICC will also have the power to make a formal finding assessing a breach of the obligation to cooperate and transmit it to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.[40]

B. Whether International Tribunals are Empowered to Issue Binding Orders to State Officials

After discussing the Prosecutor's arguments, the ICTY Appeals Chamber concluded that the Tribunal cannot issue binding orders to State officials. State officials may well be requested to cooperate with the Tribunal, but they are not obliged to do so: the obligation to cooperate only binds States.

This finding not only corresponds to the rules enshrined in the ICC Statute, but also to general international law. Accordingly, the relevant request or order must be addressed to the State concerned, which solely can identify its internal organs competent to comply.

[38] 'The prosecutor has submitted that Article 29 expressly grants the International Tribunal "ancillary jurisdiction" over States. However, care must be taken when using the term "jurisdiction" for two different sets of actions by the International Tribunal. As stated above, the primary jurisdiction of the International Tribunal, namely its power to exercise judicial functions, relates to natural persons only. The International Tribunal can prosecute and try those persons who are allegedly responsible for the crimes defined in Articles 2 to 5 of the Statute. With regard to States affected by Article 29 the International Tribunal does not, of course, exercise the same judicial functions: it only possesses the power to issue binding orders or requests. To avoid any confusion in terminology that would also result in a conceptual confusion, when considering Article 29 is probably more accurate simply to speak of the International Tribunal's ancillary (or incidental) mandatory powers vis-à-vis States.', Ap. Ch., Judgment of 29 October 1997, *Prosecutor v. Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997,* para. 28.

[39] See Part IX of the Statute, International Cooperation and Judicial Assistance.

[40] Art. 87(7): Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

The same reasoning is applicable to the ICC. States are responsible for the functions carried out by their organs and it is their duty to ensure that their officials provide the requested assistance to the Court, if necessary by compelling them. Any refusal to cooperate by a State official will be attributed to the State itself, which will thus incur international responsibility for breaching the ICC Statute.

C. *Whether International Tribunals are Empowered to Issue Binding Orders to Individuals Acting in their Private Capacity*

Albeit neither Croatia nor the Prosecutor denied that the Tribunal could issue *subpoena duces tecum* or binding orders to private individuals, the Appeals Chamber considered this matter, in particular the question whether State officials can be compelled to cooperate in their private capacity.

The judges argued that, consistent with the spirit and purpose of the Statute, the ICTY has ancillary or incidental jurisdiction over individuals other than those who can be brought to trial. Furthermore, some articles expressly give to the Prosecutor the power to question suspects, victims, and witnesses (Art. 18(2)) and to the judges the power to issue, upon confirmation of an indictment and at the request of the Prosecutor, any order that may be necessary for the conduct of the trial (Art. 19(2)).

They also indicated that State officials can be subpoenaed *qua* private individuals each time their role in the proceedings is not related to their present function as State official or does not directly interfere with the exercise of their functions.

However, there are very few cases in which the ICTY may enter into direct contact with individuals. The Appeals Chamber considered several hypotheses. For certain acts (for instance execution of arrest warrants) the cooperation of organs of the State where the individual is located is required and the ICTY must address itself to the competent national authorities. The Tribunal must generally contact private individuals through national authorities also for acts they can carry out by themselves or together with an investigator designated by the Prosecution or the Defence Counsel. There are two exceptions: the ICTY may directly address individuals when so authorized by the legislation of the State concerned, and when State authorities hinder one of their State officials to cooperate even if their collaboration is required in a private capacity.

The same reasoning can apply to the ICC only as far as officials of State Parties are concerned, since the Statute only binds those States.

This is most evident if one turns to the legal remedies for non-compliance. The Appeals Chamber held that the ICTY should normally turn to State authorities to

seek remedies for non-compliance by an individual. When it is not possible, the Tribunal may use its contempt powers: in these cases the Tribunal may also contemplate *in absentia* proceedings, since these cases fall within the ancillary jurisdiction of the Court.

In the case of the ICC, States who are not willing to cooperate most likely will not become parties to the Statute thus *a priori* preventing the Court from using the above-mentioned remedies.

As for members of international forces, according to the ICTY Appeals Chamber, they should always be treated, under this perspective, in their private capacity, since they do not perform their functions as officials of their own countries. Their mandate derives from the same source of the International Tribunal, i.e. a Security Council resolution, and they must cooperate with the Tribunal, at least as far as the rendering of testimony is concerned. The ICTY has not taken into account the fact that, in the case of a peacekeeping force for instance, the international organization whose officials refuse to cooperate with the Court may incur international responsibility.

A different reasoning must be followed for the Rome Statute. The ICC is established by multilateral agreement and not by a Security Council resolution and it is put on the same footing as intergovernmental organizations. The latter are not bound by the Statute and the same can be said of the forces they constitute or authorize. It follows that their cooperation is voluntary. Nonetheless, as already noted, international organizations may undertake by treaty to be obliged to cooperate and, consequently, incur international responsibility in case of failure to cooperate. The Court should then have the power to make a legal finding assessing the Organization's non-compliance.[41]

V. Final Remarks

Looking ahead, it is convenient to conclude by assessing the merits and flaws of the ICC Statute.

The choice to limit ICC jurisdiction to natural persons seems appropriate: the principal purpose of the Rome Statute is to prosecute persons responsible for grave crimes in their individual capacity. Not only prosecuting criminal groups could overburden the functioning of the Court, but historical examples—the Nuremberg trial in particular—clearly demonstrated that the condemnation of criminal organizations is essentially a political objective and is better pursued through non-judicial means.

[41] C. Kress and K. Prost, 'Article 87', in Triffterer (ed.), *supra*, note 22 , at 1063–1064.

As to the exclusion of ICC jurisdiction over minors, there are both positive and negative elements. Given the complementarity principle, national judicial systems should be able to fill the gap left open by the fact that persons over the age of 15 are considered lawful combatants (also according to the Rome Statute) and may commit crimes without being prosecuted by the ICC. It may happen, though, that national systems do not incorporate international standards of juvenile justice, do not provide enough guarantees for the prosecution of youngsters or they are simply not equipped to take adequate care of minors. Paradoxically, adults may be brought to trial before the ICC in full respect of their rights whereas minors may end by being tried by national courts without their rights being respected.

On the negative side, a very serious gap is introduced in the Statute through the jurisdictional links: the limitations they entail to the personal jurisdiction of the Court clearly undermine the principle of universality of jurisdiction and create means for impairing the work of the ICC.

In conclusion, the question of 'incidental or ancillary jurisdiction' over States and/or persons emphasizes the importance of States' cooperation with the ICC. Unfortunately, the only legal remedy in case of States' parties failure to comply with binding orders or requests by the Court amount to a formal finding of a breach of the Statute.

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