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Injustice anywhere is a threat to justice everywhere.
(Martin Luther King Jr)

I. INTRODUCTION

On 29 January 2007 the Pre-Trial Chamber I of the International Criminal Court (ICC) committed Thomas Lubanga Dyilo for trial to the Court on three charges of war crimes committed in the Democratic Republic of the Congo.[1] On 27 February 2002 the Chief Prosecutor of the ICC Luis Moreno-Ocampo presented evidence against Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of the Sudan, and Ali Kushayb, a leader of the Militia/Janjaweed showing jointly commission of crimes against the civilian population in Darfur.[2] In addition, the prosecution has issued five arrest warrants regarding the situation in Uganda[3] and is undertaking preliminary analyses of the situation in the Central African Republic in order to determine whether to start investigations.[4] The ICC, which began operations only three years ago[5] after overcoming much opposition and pessimism,[6] is now a fully operative court investigating four different situations.

The main reason for establishing a permanent international criminal court was to bring the offenders of mass human rights violations such as war crimes, crimes against humanity and genocide to justice and end their *de facto* impunity.[7] Often these atrocities are committed in connection with State policies and government activities so that national prosecutions of the main offenders are unlikely. However, the limited resources of the ICC[8] prevent investigation of a large number of situations altogether.[9] So far the Office of the Prosecutor of the ICC (OTP) has investigated exclusively African situations.[10] It could therefore be argued that the ICC is insufficient to narrow the impunity gap and rather needs to be complimented by regional actions. When discussing the validity of regional responses to international crimes, one proposal which was discussed at the conference “Regionalising International Criminal Law” held in Christchurch, New Zealand in August 2006, was the establishment of international regional criminal courts. A regional court - so it is argued - could fill the gap between national criminal prosecutions and the ICC. Furthermore, a permanent regional criminal court could avoid the set-up problems of *ad hoc* tribunals[11] and at the same time avoid the short-comings of the central court in The Hague.[12]

This paper focuses on the question of what effect the establishment of permanent regional courts would have on the ICC and moreover, on international criminal law in general. Without considering the practical difficulties in establishing such courts,[13] the author claims that such regionalisation would hinder the development of international criminal law as a body of law in its own right. She argues rather that every endeavour should be made to ensure that the ICC itself develops more awareness of regional particulars and methods to adjust to regional needs. The first part of this paper explains the importance of the ICC for the development of international criminal law and why it is necessary not to divert cases from the Court. The second part explains the need for a universal coherent body of international criminal law. The third part identifies the difficulties of a central international criminal court in coping with the diversity of the special circumstances of different parts of the world and weighs them against the difficulties of regional international criminal courts.

The final part concludes that rather than establishing regional international criminal courts, the ICC needs to be more regional itself.

II. THE DOGMATIC DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

International criminal law has three very distinct characteristics: first, with the exception of some law on piracy and slave trade,[14] this area of law has mainly been developed after WWII.[15] Accordingly it can

be described as a comparatively new part of international law which has just begun to grow out of its infancy.

Second, international criminal law is a combination of different legal disciplines, principally public international law which defines the elements of crimes, and domestic criminal law which regulates general principles of mode of commission and procedural law.[16] This mixed character is reflected in the Rome Statute's nomination procedure for judges[17] which requires candidates to have expertise alternatively in criminal or in international law rather than in international criminal law.[18] The duality of international criminal law causes its own difficulties. Both legal disciplines are characterised quite distinctly, not only in their different sources of law, but moreover in the very nature of their development. Public international law is based on treaties, developed through negotiation between sovereign national States and therefore dependent on *realpolitik*. Criminal law on the other hand, is based on domestic legislation and case law allowing for very different legal, historical, political and religious contexts in each municipal criminal justice system. Whereas public international law is centred on political compromise and the resulting vagueness of provisions, domestic criminal law is of *nulla crimen sine lege* which requires each provision to be precise and specific.[19] However, the harmonisation of procedural and substantive law is indispensable for creating an international criminal justice system. For example, the principle of legality[20] needs to be realised through very precise definitions of crimes.[21]

Finally, to the extent that international criminal law is based on the Rome Statute,[22] it is shaped by the difficult negotiations during the short Rome Conference[23] in the summer of 1998[24] when 160 delegations were faced with the enormous task of squaring the circle between protecting national sovereignty of the States parties while creating a court with sufficient independence, integrity and credibility to earn the respect of the international community.[25] As a result, the Statute suffers some shortcomings such as inconsistencies and undeveloped provisions.[26] At the same time procedures to amend the Rome Statute are complicated and lengthy[27] and it is not feasible to adapt the Statute to developments other than the most important changes. The Review Conferences provided for in article 123 of the Rome Statute can be expected to suffer the same weaknesses as the Rome Conference, that is, too many delegates will have to discuss too many highly sensitive issues in too little time.[28] In the absence of an international legislator the development through changes of the Statute will be cumbersome and guided more by political than legal considerations.

Although there are numerous means of dealing with mass human rights violations it is uncontested that international criminal law, if not a panacea, still has a decisive role to play by reducing impunity for perpetrators of the worst atrocities.[29] However, the ICC is designed to prosecute and try only the most important offenders of the most severe crimes.[30] Only to this very limited extent will the Court be able to close the impunity gap with its own prosecutions. Additionally, it is expected to diminish the impunity gap by encouraging national courts to fulfil their "duty to prosecute"[31] and provide for a developed, coherent and recognised body of international criminal law. As the first permanent international criminal court the ICC will without question become the decisive vehicle for the development of international criminal law, be it in domestic criminal courts or in internationalised so-called hybrid courts.[32]

Seeing the difficulties of developing international criminal law through international treaties, the role of the ICC in the development of international criminal law cannot be overestimated. Essential questions have not been clarified in the Statute and will need to be decided by the jurisdiction of the judges. For example, jurisprudence will be needed to develop the whole area of admissibility and the standards of genuine prosecution.[33] Likewise judges will need to decide the applicability of article 8 with regards to the development of methods of warfare and especially technical innovation and invention of new weapons. In addition, the development of human rights law and humanitarian law will have an influence on both substantive and procedural international criminal law.[34] It is case law that will advance the necessary development in both the dogmatic as well as specific questions of law.

In order for the ICC to fulfil this function of developing international criminal law through case law, it evidently needs to adjudicate a sufficient number of cases. Unfortunately there is no shortage of situations which would qualify to be considered as international core crimes, but for the development of international criminal law these situations need to be heard as cases before the ICC. Prosecutor Luis Moreno-Ocampo

has pointed out that “the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”.^[35] However, until this somewhat utopian scenario has come true the ICC needs cases to develop international criminal law. Each case decided by a regional international criminal court, on the other hand, takes away an opportunity for the ICC to develop case law.

One could argue that any court hearing international crimes, be it domestic criminal courts or regional international criminal courts, would develop international criminal law through their jurisdiction. For instance the *ad hoc* tribunals for the former Yugoslavia (ICTY)^[36] and Rwanda (ICTR)^[37] have played an essential role in developing international criminal law.^[38] However, the development of case law in a number of different courts carries the risk of causing a diffuse incoherent cluster of different international criminal law standards. For example, the diverse development of law in the two *ad hoc* tribunals, despite having similar statutes and sharing the same Appeal Chamber,^[39] shows the likelihood of diverse law development.^[40] If there were one or several regional courts (and even if their statutes were based on the Rome Statute) they might hinder a uniform development of international criminal law. Being a permanent court, representing the majority of States and having a growing number of ratifications, the ICC is in a much better position to foster consistency. Hearing cases of different situations from different regions the ICC will gain the necessary oversight to develop continuity in the long run. Regional courts on the other hand are unlikely to have a great influence on national courts of other regions.

Although each court that is hearing international criminal cases, whether on the national or regional level, may play a role in the development of international criminal law, one central permanent international court is needed to streamline the development. One step in the regionalisation of the ICC would be to create a system with branches of the ICC seated in different regions and a central Appeal Chamber in The Hague which ensures uniform development and consistency. The necessary requirements are already provided for in the Rome Statute: according to article 3(3) of the Rome Statute, the Court can sit elsewhere than in The Hague in the Netherlands. Article 36(2)(a) allows the Presidency to propose an increase of judges to the Assembly of States parties.

III. UNIVERSALITY OF INTERNATIONAL CRIMINAL LAW

The previous part is based on the assumption that it is desirable to have a uniform body of international criminal law. Conversely, one could argue that as long as offenders are prosecuted it does not matter whether this is accomplished under national, regional or international criminal law. Inequality between different systems does not necessarily mean injustice and the primary goal for establishing the ICC was to end impunity for the most severe atrocities, not to uniform international criminal law. This paper argues, however, that there are a number of reasons for the desirability of an international criminal law which is, if not uniform, at least harmonised to a certain degree.

First of all, one of the arguments for the notion of international criminal law compared with national criminal law is the underlying notion expressed in the preamble of the Rome Statute that some of the most serious crimes are “of concern to the international community as a whole”.^[41] The victims of genocides, war crimes and crimes against humanity are not only the individuals attacked or their community but also humanity as such.^[42] A regional court bears the risk that this understanding could be replaced by the notion that certain atrocities are mainly the concern of the relevant region rather than that of the whole international community. An additional issue is the question of the audience of the trial. Deferring these cases away from the ICC to regional courts could mean that the international community loses interest in these cases while concentrating on cases of the allegedly more important ICC. The West, which still today provides considerable technical support, could disengage. Furthermore, perceiving the international community as a whole as a victim requires a uniform international standard both for the definition of crimes as well as the standard of protection of the defendant through the rule of law. There is no reason why human rights protection of criminal law should be better in one region of the world than in another. The same holds for the procedural safeguards for the accused.^[43] Therefore the definitions of crimes and individual criminal responsibility, the mechanisms of establishing the truth, as well as the standards of the right to fair trial, all need to be standardised.

However, since criminal justice (both in its substantive and its procedural aspects) is so deeply rooted in moral, political, religious and historical features of a society and the core of national sovereignty,[44] one could argue that it should be left to the national States to decide the standard at which they prosecute and try their criminals. Yet, there comes a point where the gravity of the crime is so severe that the concern of the international community overrides the State's interest in its sovereignty. As Wald puts it:

International law broke from its sovereign boundaries to recognize the universality of repugnance for widespread crimes committed by governments against civilian populations. The focus of international law shifted from the sovereign rights of nations to the human rights of individuals, regardless of citizenship or nationality.[45]

This is reflected in article 19 of the Rome Statute[46] which allows the ICC to insist that a case be adjudicated in its own jurisdiction under certain circumstances. Although case admissibility to the ICC, unlike the ICTY and the ICTR, is governed by the principle of complementarity,[47] the ICC (through its Pre-trial Chamber) has the power to overrule a State's explicit request for primacy.[48]

Another reason for developing a universal international criminal law is to give trials more legitimacy and prevent defendants from claiming that they were tried under rules of victor's justice which were violating the principles of non-retrospectivity.[49] Most of the atrocities envisaged by the Rome Statute will take place in a legal vacuum. Often the government will have lost partial or total control of the country and the criminal justice system will have collapsed or be unreliable because of severe corruption. As soon as there is an independent international criminal law in place, the defendant cannot rely on the lawless situation in existence when the crime was committed. Furthermore, with a well established and acknowledged body of international criminal law, the defendant cannot claim that their action does not fall under the current definition of a certain offence or mode of participation.

One could argue that creating regional criminal courts simply means inserting an additional layer of jurisdiction into the complementarity scheme of the Rome Statute. If the ICC allows national courts to divert cases away from the ICC why shouldn't it allow regional courts to do so? The main difference is that regional courts would be an intermediate level between the ICC and national criminal courts. Whereas the ICC will take into consideration the jurisdiction of the regional court in a certain region, this will function as an intermediary between the ICC and the national courts and therefore diminish the direct influence that a national court of this region could have on the development of international criminal law. Letting a case be decided at a regional level means that the national court loses the opportunity to make its own contribution to international criminal case law. On the other hand, countries with a regional court might develop their own regional international law looking primarily to their regional international criminal courts for interpretation and definition of substantive and procedural law, which will mean that the ICC loses its influence in the development of international criminal law in this region.

The risk is the development of a very diverse rather than universal international criminal law or even different international criminal law families.

This problem is increased if a certain legal family is predominant in one region (for example, Sharia Law[50]) which then will be underrepresented in the development of the ICC which may not have jurisdiction over cases from this region. Obviously, certain legal families might be underrepresented simply because serious core crimes do not occur in the relevant countries or do not fall under the jurisdiction or admissibility of the ICC. However, this is to be distinguished from the situation where cases under this legal family do arise but are heard in a different court and thus foster diverse development.

An additional problem is that if all regions do not establish their own permanent international court (and it is unlikely that they would) the ICC inevitably will develop around the remaining un-represented regions. This means that regions with a regional court would not only lose influence in the development of the ICC, but also that different standards between different regions might develop. Moreover, in practice the ICC would be degraded to a regional court itself for the un-represented regions.[51]

Drawing the parallel with international human rights law, one could argue that the establishment of regional human rights conventions[52] and human rights courts[53] have promoted rather than hindered the enforcement of the United Nations' Universal Declaration of Human Rights. However, regional human rights declarations usually offer higher standards of human rights than the universal declaration[54] so that

regional divergence strengthens human rights protection rather than hampers it. Furthermore, there is no international court for the protection of human rights from which cases could be diverted. The principal difference, however, is that human rights instruments are generally directed at States to promote protection of individuals. Although different human rights protect different interests and therefore must be balanced with each other, the primary balance of human rights instruments needs to be struck between the individual and the State. If regional instruments go further than the UN declaration in offering protection to individuals, this means strengthening rather than weakening international human rights law.

International criminal law on the other hand enforces human rights on two levels. On the one hand the development of substantive criminal law, that is the parameters of individual criminal responsibility, is hoped to mark a decisive improvement in human rights protection of possible victims via the deterrence of gross human rights violations.[55] On the other hand, international procedural law protects mainly the rights of the defendant.[56] Thus, it is not sufficient to proclaim a minimum standard and leave it to States or regions to endeavour to exceed this minimum. Rather the fundamental rights of victims and defendants must be balanced against each other.[57] Following, one cannot compare the development of international criminal law to human rights law where, roughly speaking, the higher the standard the better.

An additional problem is the question of admissibility of cases. The principle of complementarity poses a number of problems when the ICC must determine the appropriate jurisdiction between that of the ICC and those of the national States. For example, article 19 of the Rome Statute requires a lengthy and complicated procedure to determine admissibility which could mean a considerable diversion of resources of the Office of Prosecution from the crime investigation to the question of whether a “State is unwilling or unable genuinely to carry out the investigation or prosecution”.[58] Another problem is that the terms ‘unwilling’, ‘unable’ and ‘genuinely’ are very vague and will need to be defined by case law. If there were an intermediate level of regional courts, questions regarding the correct balance between the impartiality of the different courts and national sovereignty would increase.

IV. PROBLEMS OF A CENTRAL COURT

It could be argued that the adjudication of international criminal law should be left to the regions because criminal law is deeply rooted in a society’s history and its political, cultural and religious background and therefore not suitable for one central court. The experience with international *ad hoc* tribunals[59] and internationalised courts[60] demonstrate the manifold difficulties of applying international criminal justices to the different circumstances of different countries.[61]

One of the most serious problems is the language difficulties. Even if a country has only one official language it is pivotal that defendants and witnesses are heard in their mother tongue and all relevant statements are translated into their mother tongue. Many countries, however, not only have very diverse local dialects and languages but even several official languages. In an international tribunal there is the additional layer of the working languages of the judges, usually the official language of their home country, English or French. For example, the Special Tribunal in East Timor had two official languages: Portuguese, which is spoken only by a minority of citizens who have been educated during the Portuguese administration;[62] and Tetum, a standardisation of Timorese local languages.[63] Questions by counsel or members of the bench had to be translated from English (the language spoken by the court) to Portuguese (as the interpreters speaking Tetum would not speak sufficient English) to Tetum before the reply had to be interpreted back to English. Thus, between question and response one could have up to four intermittent translations. It is clear how difficult it was under these circumstances to achieve precise communication.[64]

An additional problem is that some languages are not compatible with the complex legal criminal concepts of international courts which are mostly based on Western criminal law.[65] The ICTR, for example, faced the difficulty that the local language does not have a word for rape.[66] To cite another example from East Timor: Tetum is a comparatively simple language which does not have a conditional tense. When the judges asked a conditional question (“what would have happened if ...”) the witness was not able to perceive this question (“but it did not happen!”).[67]

Related to this difficulty is that the procedures rely on the assumption that all involved parties have a certain knowledge of the proceedings. There is a range of information available on the internet that clearly explains the organisation, procedure and jurisdiction of the ICC. However, in many societies the majority cannot read and write and only the elite have access to computers let alone the internet. In East Timor one illiterate witness was not able to translate the scene of the crime from three-dimensional into two-dimensions and thus was unable to show the court what had happened on a sketch or on a map.[68] It is doubtful whether illiterate people can follow all the complicated formalities of the court.

A further difficulty is the clash of different cultures in an international court. For example, in East Timor a witness was asked about the passengers of an attacked bus and gave very evasive answers until finally the court realised that one of the passengers had since died and therefore could not be mentioned.[69] Another problem is the different underlying legal concepts. One example of this is the question of evidence. Although international courts admit hearsay evidence, it is generally given less weight than eyewitness statements.[70] In some Rwandan communities, on the other hand, hearsay information given by an elder is deemed to be as good as having been at the crime scene oneself. Thus a witness might express positive knowledge of a fact which he has “only” heard from hearsay.[71] Another difficulty is the culture of cross examination which is accepted and expected before common law courts and hence the international criminal courts. In Arusha victims were offended by being cross examined in a way that U.S. lawyers would consider a careful and considerate witness examination.[72]

The whole concept of a court, be it a more inquisitorial or a more adversarial procedure, is foreign to many cultures who focus on conflict solution and restorative justice. The formality can be overwhelming. Being called to court alone (not to mention an international one) is an extraordinarily intimidating event that implies to many local witnesses that they are accused of having done something wrong. In East Timor the court was very confused about a witness’s tendency to contradict his own testimony depending on whether he was questioned by defence counsel, prosecutor or the judge. The reason was that he replied in a way that he thought was expected by each of the examiners. The perceived need to respond appropriately to an authority replaced any notion of “objective” truth.

So far the procedures and general principles in the Rome Statute are mainly based on civil and common law criminal justice systems.[73] This cultural bias does not do justice to the claim of being a criminal court for the international community. If the ICC is to serve the international community and not develop into a Western super court it must recognise that this international community consists of very different cultures and recognise, incorporate and accommodate for these differences. However, losing cases to regional criminal courts would mean losing the opportunity to establish regional expertise in this part of the world. Outsourcing cases to regional courts means preventing the Court from adopting more encompassing procedures and adjustment to cultural and legal diversity. Although all international tribunals engage in some outreach work, these difficulties reach into the trial procedures and must be considered beforehand. In the long run the ICC will need to make use of more cultural experts[74] who will prepare the judges for cultural differences.[75] Pre-trial procedures will then not only consist of investigation, witness protection and preparation for trial but also cultural adjustment of the court to the case.

A further consideration is the political difficulties of setting up a regional court which may affect the court’s judicial quality. A region might only consider the need for a permanent regional criminal court if it is affected by a number of situations of gross violations of human rights. Under these circumstances both victims and defendants might lack the trust of regional authorities and officials who might be nationals from former opponents in an armed conflict.

However, being closer to the place of atrocities, member States of a regional court might show more eagerness to secure thorough investigations and prosecutions than member states of an international court which may demonstrate less political interest in a remote situation. On the other hand, a regional court might be more vulnerable to political needs and interests of neighbouring States in the region. This might lead to a lack of necessary co-operation of member States, for example, regarding the question of extradition.[76]

Whereas regional criminal courts will probably share the same weaknesses as the ICC, that is, they do not have their own enforcement power, the mutual dependencies of the member States might be stronger

and thus more hindering than in the ICC.

Providing for highly qualified judges, prosecutors, counsels and court staff, witness protection programmes, custody facilities as well as libraries, interpreters and administration in general means a burden on any States which have to fund such a court and the duplication of such expenses where a State is already member to the ICC should be seriously contemplated. A shortage of funding inevitably affects the quality of investigation and pre-trial, trial and appeal procedures of any court.[77] Moreover, a region might be better advised to use resources for rebuilding the affected societies rather than duplicating the institutions of the ICC.

V. CONCLUSION: CLAIM FOR REGIONALISATION OF THE ICC

The strongest argument for permanent regional criminal courts is that they might narrow the impunity gap between national and international investigations and prosecutions. At the same time, however, the establishment of regional criminal courts would undermine the development of a fully fledged body of international criminal law by diverting cases from the ICC, developing different families of multinational law and furthermore fragmentising case development in this area of law. Moreover, the relationship between the ICC and national systems is a two way relationship.[78] Not only does the ICC encourage and influence national legislation,[79] national criminal justice systems will influence the jurisprudence of the ICC.[80] This mutual enrichment would be thwarted with a regional court as middle ground between domestic courts and the ICC.

The major risk the author sees in the installation of regional courts for the ICC is that it relieves the ICC from the need to develop more regional awareness and, most of all, expertise itself. Inevitably, considering the history of the development of the ICC, the Court is mainly a Western institute with definitions and procedures mainly rooted in Western legal tradition. Now that the ICC has been established against many predictions and has gained wide respect and recognition, it needs to develop into a much more truly international institution. This might be very difficult to achieve. A range of problems relating to the multiplicity of cultures, legal traditions, historical backgrounds and last but not least languages of the international community will be needed to be addressed by the ICC. However, as long as there is the recognition that the ICC needs to become more regional and adapt to the diversity of the different regions of this world it will be able to do so. Obviously, this development has to be set into motion and pressed on by the regions themselves. Therefore the regions should focus their resources and influence[81] on pushing the ICC to accommodate the needs of regions rather than weakening the young court through regional courts and thereby weakening international criminal law in general.

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[1] International Criminal Court Latest Press Releases, 'Pre-Trial Chamber I commits Thomas Lubanga Dyilo for trial', online: <<http://www.icc-cpi.int/press/pressreleases/220.html>> (last accessed on 28 February 2007).

[2] International Criminal Court Latest Press Releases, 'Pre-Trial Chamber I receives documents containing list of evidence in the situation of Darfur', online: <<http://www.icc-cpi.int/press/pressreleases/233.html>> (last accessed on 28 February 2007).

[3] See "Decision on the Prosecutor's Application for Warrants of Arrest under Article 58," ICC-02/04-01/05-1, 8 July 2005; "Warrant of Arrest for Joseph Kony," ICC-02/04-01/05-2-US-Exp, 8 July 2005; "Warrant of Arrest for Vincent Otti," ICC-02/04-01/05-4-US-Exp, 8 July 2005; "Warrant of Arrest for Raska Lukwiya," ICC-02/04-01/05-6-US-Exp, 8 July 2005; "Warrant of Arrest for Okot Odhiambo," ICC-02/04-01/05-8-US-Exp, 8 July 2005; "Warrant of Arrest for Dominic Ongwen," ICC-02/04-01/05-10-US-Exp, 8 July 2005. Also on 8 July 2005, the Chamber issued corresponding Requests for Arrest and Surrender addressed solely to Uganda. See ICC-02/04-01/05-12-US-Exp to ICC-02/04-01/05-16-US-Exp, 8 July 2005.

[4] International Criminal Court, 'Pre-Trial Chamber III: Situation in Central African Republic' (15 December 2006), online: <http://www.icc-cpi.int/library/cases/ICC-01-05-7_English.pdf> (last accessed on 28 February 2007).

- [5] The Rome Statute of the International Criminal Court, opened for signature 17 July 1998 UN Doc A/CONF.183/9 (entered into force 1 July 2002) (“*Rome Statute*”). The Court began operations on 11 March 2003.
- [6] Michael P Scharf, ‘The Jury Is Still Out On The Need For An International Criminal Court’ (1991) *Duke Journal of Comparative and International Law* 135.
- [7] Office of the Prosecutor (“OTP”), International Criminal Court, *Paper on Some Policy Issues before the Office of the Prosecutor* (2003) 3.
- [8] *Ibid* 7.
- [9] See the OTP responses on requests to investigate the situations in Iraq and Venezuela: The Office of the Prosecutor, letter concerning the situation in Iraq, online: <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> (last accessed on 28 February 2007) and letter concerning the situation in Venezuela, online: <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf> (last accessed on 28 February 2007); Annie Wartanian, ‘The ICC Prosecutor’s Battlefield: Combating Atrocities While Fighting for States’ Cooperation Lessons from the UN Tribunals Applied to the Case of Uganda’ (2005) 36 *Georgetown Journal of International Law* 1289, 1314.
- [10] As at January 2007 the OTP has received 1732 communications from 103 different countries. However investigations have only been conducted regarding the situations in Uganda, Darfur, Republic of Congo and Republic of Central Africa.
- [11] Adam Day, ‘No Exit Without Judiciary: Learning a Lesson From UNMIK’S Transitional Administration in Kosovo’ (2005) 23 *Wisconsin International Law Journal* 183; J Peter Pham, ‘A Viable Model for International Criminal Justice: the Special Court for Sierra Leone’ (2006) 19 *New York International Law Review* 37; Sarah Williams, ‘The Cambodian Extraordinary Chambers – a Dangerous Precedent for International Justice?’ (2004) 53 *International and Comparative Law Quarterly* 227; Suzannah Linton, ‘Rising From the Ashes: The Creation of a Viable Criminal Justice System in East Timor’ (2001) 25 *Melbourne University Law Review* 122.
- [12] For the disadvantages of one central court, refer to “III. Universality of International Criminal Law” in this paper.
- [13] The member States will not only need to agree on substantive and procedural law but also on provisions regarding obligations of co-operation of member States. Besides, “judges, a prosecutor, a registrar, investigative and support staff, an interpretation and translation system, a legal aid structure, buildings, equipment, courtrooms, detention facilities, and necessary funding needed to be found or created”: Talitha Gray, ‘To Keep You Is No Gain, To Kill You Is No Loss – Securing Justice Through the International Criminal Court’ (2003) 20 *Arizona Journal of International and Comparative Law* 645, 661.
- [14] Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, 2003) 149.
- [15] The tribunals in Nuremberg and Tokyo prompted the UN General Assembly to request the International Law Commission to formulate the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the tribunal: GA Res 177(II), *Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, UN GAOR, 2nd sess, 123rd plen mtg, UN Doc A/Res/177(II) (1947).
- [16] For more details on the different components of International Criminal Law see Bassiouni, above n 15, chapter 1.
- [17] *Rome Statute*, art 36(3)(b).
- [18] Even candidates who are experts in both areas need to choose on which list they wish to appear: *Rome Statute*, art 36(5).
- [19] UN General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, Fiftieth Session Supplement No 22, UN Doc A/50/22, 10ff.
- [20] *Rome Statute*, art 22(1).
- [21] Another example is the high threshold of *mens rea* which needs to be reflected in the rules of evidence.
- [22] Werle calls the Rome Statute the “crystallization of international criminal law” which “represents the first comprehensive codification of international criminal law” and which “affirms and clarifies customary international criminal law”: Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, 2005) 3.
- [23] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998.
- [24] On the process of the Rome Conference negotiations see Philippe Kirsch and Darryl Robinson, ‘Reaching Agreement at the Rome Conference’ in Antonio Cassese, Paula Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2003) 67.
- [25] Although the Preparatory Committee was supposed to filter out disagreements, their Draft Statute contained over 1400 provisions in square brackets.
- [26] For example, the absence of definitions for ‘omission’ and ‘recklessness’.
- [27] *Rome Statute*, arts 121 and 122.
- [28] For example, the definition of the ‘crime of aggression’.
- [29] As of 1st January 2007 there are 104 States Parties and 139 Signatories to the *Rome Statute*.
- [30] *Rome Statute*, arts 17(d) and 53(1)(c).
- [31] *Rome Statute Preamble*, para 6; Thomas S Warrick, ‘Organization of the International Criminal Court: Administrative and Financial Issues’ (1997) 25 *Denver Journal of International Law and Policy*, para 202.
- [32] Like in East Timor, Kosovo, Sierra Leone and planned for Cambodia.
- [33] Equally the standard of evidence which the prosecutor will need to provide to prove unwillingness and inability under article 17(1)(a) of the *Rome Statute* needs to be clarified: D Stoelting, ‘ICC Pre-Trial Proceedings: Avoiding Gridlock’ (2002) 9 *ILSA Journal of International and Comparative Law* 413, 421.
- [34] Regarding the protection of victims as well as the human rights of the accused before the ICC.
- [35] International Criminal Court, ‘Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal

Court' (16 June 2003), online: <http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf> (last accessed on 28 February 2007).

[36] *The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY)*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, [1], UN Doc S/Res/827 (1993).

[37] *The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda (ICTR)*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, [1], UN Doc S/Res/955 (1994).

[38] For example, the Court's declaration that rape can amount to an act of genocide: *The Prosecutor v Jean-Paul Akayesu* (Case No ICTR-96-4-T) 2 September 1998.

[39] *ICTR Statute of the Tribunal*, art 12(2), annexed to SC Res 955 UN SCOR, 49th sess, 3453rd mtg, [1], UN Doc S/Res/955 (1994), online: <<http://www.un.org/icttr/statute.html>> (last accessed on 4 April 2007).

[40] Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law' in Antonio Cassese, Paula Gaeta, and John RWD Jones (eds), above n 25, 746.

[41] *Rome Statute Preamble*, para 4. In addition, the *Rome Statute* acknowledges that these most serious crimes affect the international community as a whole not only because of "all peoples are united by common bonds" but also because "such grave crimes threaten the peace, security and well-being of the world".

[42] *Rome Statute Preamble*, para 1.

[43] There would be no justification, for example, to raise the threshold for genocide to specific intent in some regions and simple intent or even recklessness in others or to include different protected groups in different regions.

[44] James Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *American Journal of International Law* 404, 406.

[45] Patricia M Wald, 'Why I Support the International Criminal Court' (2003) 21 *Wisconsin International Law Journal* 513.

[46] *Rome Statute*, art 17 (1)(a)-(c).

[47] *Rome Statute*, art 17 and preamble para 10.

[48] *Rome Statute*, art 19(3).

[49] For example Slobodan Milosevic's rejection of the legitimacy of the ICTY, MILOSEVIC (IT-02-54), 'Kosovo, Croatia and Bosnia-Herzegovina', Defence Opening Statement (31 August 2004), 32174ff.

[50] Steven C Roach, 'Arab States and the Role of Islam in the International Criminal Court' (2005) 53 *Political Studies* 143.

[51] On the other hand, further complications can arise if a State is party to the *Rome Statute* but not to the regional court in its own region.

[52] *African [Banjul] Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5 (entered into force 21 October 1986); *American Convention On Human Rights*, opened for signature 22 November 1969 (entered into force 18 July 1978); *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September, 1953).

[53] European Court of Human Rights, The African Court on Human and Peoples' Rights, The Inter-American Court of Human Rights.

[54] Twenty-eighth Report of the Commission to Study the Organization of Peace (1980) 15, cited in Henry J Steiner and Philip Alston, *International Human Rights in Context* (Oxford University Press, 2nd ed, 2000) 784.

[55] For example, substantive law developments in the recognition of gender crimes and the detailed list of prohibited acts of war. Sari Moshan, 'Women, War, and Words: the Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity' (1998) 22 *Fordham International Law Journal* 154.

[56] It is generally acknowledged that the rights of the defendants before the IMT and the IMTFE were not adequate: Christoph JM Safferling, *Towards an International Criminal Procedure* (Oxford University Press, 2001) 33.

[57] For example, the right to fair trial includes the right of cross-examination which at the same time might violate victims' interests.

[58] *Rome Statute*, art 17(1)(a).

[59] William A Schabas, *The UN International Criminal Tribunals – The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006).

[60] Cesare PR Romano et al (eds), *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, 2004).

[61] Safferling, above n 58.

[62] United Nations, 'Report from the Asia Foundation, East Timor National Survey of Voter Knowledge (Preliminary Findings)' (6 May 2001), online: <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN017815.pdf>> (last accessed on 28 February 2007) 72.

[63] English and Indonesian are recognised as working languages in East Timor.

[64] Herbert D Bowman, 'Letting the Big Fish get Away: The United Nations Justice Effort in East Timor' (2004) 18 *Emory International Law Review* 371, fn 97.

[65] Every researcher in comparative legal studies is aware of the manifold problems of translations between common law and civil law systems as a number of legal concepts cannot be directly translated: Harold Cooke Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge University Press, 2nd ed, 1949) 117. Obviously, this problem is incomparably more complicated between Western and non-Western legal systems.

[66] *Judgment, Prosecutor v Akayesu*, Case No ICTR-96-4-T, 2 Sept 1998, para 152.

[67] Nancy Combs, in conversation with the author (June 2006).

[68] *Ibid.*

[69] *Ibid.*

[70] Hearsay evidence is more accepted in civil law than in common law systems where the judge conducts the fact-finding process without a jury. See also Kellye L Fabian, 'Proof and Consequences: An Analysis of the Tadic & Akayesu Trials' (2000) 49 *DePaul Law Review* 981.

[71] Another example is the unfamiliarity of defendants and defence counsels before the ICTY with the practice of plea bargaining: Julian A Cook, 'Plea Bargaining at The Hague' (2005) 30 *Yale Journal of International Law* 473, 499.

[72] Shana Eaton, 'Sierra Leone: The Proving Ground For Prosecuting Rape As A War Crime' (2004) 35 *Georgetown Journal of International Law* 873, 900.

[73] For the relationship between Sharia Law and the ICC, see Roach, above n 52.

[74] There will also be a need for experts of comparative legal studies: Mireille Delmas-Marty, 'Interactions Between National And International Criminal Law In The Preliminary Phase Of Trial At The ICC' (2006) 4 *Journal of International Criminal Justice* 2, 3.

[75] For example, informing the Court about certain taboos or notions of certain offences in the relevant community.

[76] Member States need to consider their future relationship with the neighbour State whose nationals they are asked to surrender. However, the ICC faces the same problem.

[77] David Cohen, 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?' (2002) 61 *Asia Pacific Issues* 7; online: <<http://www.eastwestcenter.org/stored/pdfs/api061.pdf>> (last accessed on 28 February 2007).

[78] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 15.

[79] For example, in his decision of 10 February 2005 not to open investigation against Donald Rumsfeld, the German Federal Prosecutor referred to article 17 of the Rome Statute: file-no 3 ARB 207/04-2, relevant section online: <<http://www.generalbundesanwalt.de/de/showpress.php?newsid=163>> (last accessed on 28 February 2007).

[80] *Rome Statute*, art 21(1)(c). For the harmonisation of international criminal law, see Delmas-Marty, above n 75.

[81] For example, by encouraging States of the region to sign and ratify the Rome Statute so that they can influence the development of the ICC as Members to the Assembly of States Parties.