INTERNATIONAL CRIMINAL JUSTICE CASCADE: FROM THE INTERNATIONAL CRIMINAL COURT TO THE NATIONAL COURTS AND BACK

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This is a compilation of thesis of participants' lectures of the conference "International Criminal Justice Cascade: from the International Criminal Court to the National Courts and Back" which includes relevant issues of interaction of national and international jurisdiction, principle of complementarity in the International Criminal Court activity, documenting and analyzing of the war crimes evidences, ICC real cases description and analyses.

It is developed for scientists, teachers, graduate and law students of higher education institutions who are interested in international justice, as well as law enforcement officers of Ukraine who deal with war crimes, representatives of human rights organizations and media.

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ESTONIAN LESSONS LEARNED FROM TRANSPOSITION OF NORMS OF INTERNATIONAL CRIMINAL LAW INTO DOMESTIC PENAL LAW

1. General remarks on transposition of international criminal law into national legal order

Estonia, along with the bulk of European countries is a state that has chosen in favour of autonomous transposition of norms of international criminal law into domestic legal order. Based on Estonian example I would outline some issues that have come up with such approach.

Generally speaking, it could bring to following problems. It might bring to domestic norms that are not in full conformity with corresponding original international norms. The domestic norm might turn out to be both narrower or wider in scope than respective international norm. This of course can happen because of deliberate policy considerations; but it can also happen involuntarily, because of faulty translation, use of improper terminology, as a result of structuring norms differently from international law etc. Application of international law is always an uneasy task for a domestic judge. It will become even more problematic, if the transposition of respective norms into domestic law is imprecise or contradictory to the original norms.

2. Concrete examples from Estonian legislation

2.1. Genocide

In Art 90 of Estonian Penal Code the circle of protected groups in crime of genocide has been defined as “national, ethnical, racial or religious group, a group resisting occupation or any other social group […].” Hence the list of protected groups is different from the widely accepted international standard. It includes one more specific group and the list is left open.

The road chosen by Estonia and several other states, where domestic regulation of genocide is wider than provided in international treaties or customary international law, certainly raises problems in the application of the domestic norm.

If it would come to prosecuting somebody for genocide on the basis of universal jurisdiction, a question arises whether Art 90 of Estonian PC can be fully applied. To answer that: at first, if in the State where genocide was committed the targeted group was identified on some other feature than their nationality, ethnicity, religion or race, but objectively the victims are also determinable

on one of those grounds; there are no restrictions for prosecution according to universal jurisdiction.

Such a situation might in fact occur in a civil war that is regarded by central government merely as an anti-terrorist operation and where the opponents are not regarded as a group entitled protection under Genocide Convention, but as plain criminals, terrorists or a political group. For instance, Soviet Union punished – according to official rhetoric – political criminals, bandits and enemies of the working class in the occupied Baltic States. In reality, however, the attempt was made to destroy Estonian, Latvian and Lithuanian nations as groups with distinct identity by selectively eliminating persons that carried the biggest importance from the aspect of self-consciousness of these nations, and to melt these groups into the amorphous mass of Soviet people.²

A more complex situation will develop if according to the universal jurisdiction principle it is sought to prosecute for genocide a person, the victims of whose conduct can indeed not be included under any protected group in the sense of the internationally accepted concept of the crime of genocide. Is the prosecution of such persons according to a wider domestic norm legitimate? Apparently not. The obligation to base the prosecution of the crime of genocide, according to universal jurisdiction principle, on the internationally accepted definition of this crime derives actually already from the *nullum crimen sine lege* postulate, since a person can only be accountable for a conduct that was explicitly criminal in the time and place of its perpetration. Therefore, e.g Belarus criminal law has to be criticised, as Section 6 (3) of its Criminal Code provides exclusive universal jurisdiction in the case of the crime of genocide notwithstanding the fact that the crime is defined in a more extensive way in Belarus than accepted on international level.²

What was said above does not necessarily mean that in a situation like this the application of domestic jurisdiction would be entirely precluded. Let us once more refer to Estonian Penal Code: the surrogate adjudication jurisdictional principle established in Article 7, which enables to prosecute an alien offender who has been detained in Estonia and is not extradited. The referred provision has been constructed on the identical norm principle and thus only a person, whose conduct was punishable at the place of commission of the act, or if no penal power is applicable at the place of commission of the act, can be prosecuted under that norm.

### 2.2. Crime of Aggression

Article 91 of Estonian Penal Code – defining the Crime of Aggression is a good example of what can unintentionally happen, if one would want to keep the original meaning of the international norm, but at the same time would also want to use an original vocabulary to express this meaning.

The punishable individual conduct in Article 91 of the Estonian Penal Code is defined as ‘participation in the leading, execution or preparation of an act of aggression’. The reason for choosing such formulation remains unclear. In the explanatory memorandum to the draft law it is only stated that the ‘formulation of the definition stems from the amendments to the Rome Statute’.³ The new wording is likely to produce problems in interpretation. Namely, how to delineate between leading and execution of an act of aggression is open to question given that the responsibility for the crime of aggression is already by its very nature confined to persons who are in effect running the aggressive campaign of a State against another State. It is by definition leadership crime.

When it comes to the collective act, it might seem, at least at first glance, that Estonia has adhered to the definition of the crime

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³ See Explanatory Memorandum to the draft law amending the Penal Code and other related legal acts (SE 554), at 3.2.2., available (only in Estonian) at www.riigikogu. ee/tegevus/eelnoud/eelnou/78433b29-8b2f-4281-a582-0efb9631e2ad/, last accessed 3 October 2015.
of aggression agreed in Kampala. Estonian legislator has set a similar objective threshold for the punishable act as in Art 8bis of the Rome Statute. Still, the meaning of ‘the use of armed force by one state, in violation of international law, against another state’ in Article 91(3) of the Estonian Penal Code needs some further clarification. The first version of the new definition of the crime of aggression proposed by the Ministry of Justice still followed the formula agreed in Kampala and stipulated that for the purposes of Article 91 of the Penal Code only ‘an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’ is relevant. However, in the course of the consultation process with the Ministry of Foreign Affairs, the draft law was amended into its current version. The justification for changing the text was curiously the will to bring it into accordance with Article 8bis of the Rome Statute! It appears that the drafters have overlooked the logic behind Article 8bis of the Rome Statute and came therefore to wrong conclusions. As the crime of aggression actually has two origins in international law, that are both binding to Estonia – the customary law definition of the crime and Article 8bis of the Rome Statute, it could have made sense at least to try to combine the requirements of both of these sources. In the light of the above, this departure from the Kampala description of the minimum standard for the collective act must be criticised.

The issue is not merely of theoretical significance. The above-discussed construction rather causes practical problems for the application of the definition of the crime of aggression under Article 91 of the Penal Code. The Estonian judge will find it difficult to find guidance in setting the minimum standard of an act of aggression punishable as a criminal offence. Different sets of rules of international law pose different standards as to what should be deemed an illegal use of force. According to the definition of aggression in Article 1 of GA Resolution 3314, aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. At the same time, Article 8bis(1) of the Rome Statute speaks of ‘an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. Besides that, any unjustified use of armed force by one State against another State (e.g. shooting a single bullet over the border) is contrary to Article 2(4) of the UN Charter. This begs the question what standard binds the Estonian judge. The task of determining which aggressive acts are in violation of international law is not just uneasy for a domestic judge, but in most cases probably an unrealizable task.

### 2.3. War Crimes

As a third example, where the domestic legislator has transposed international crimes in a considerably narrower fashion than respective international norms, the definitions of war crimes in the Estonian Penal Code have to be pointed out. Unlike its predecessor Estonian Penal Code that was adopted in 2001, was supposed to entail comprehensive definitions of war crimes. Although Estonia had signed the Rome Statute for the ICC

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4 See Karistusseadustiku ja sellega seonduvalt teiste seaduste muutmise seadus [Draft law for amending the Penal Code and related acts], as presented for consultation process to other government bodies, article 1 (46). The file of the draft law is downloadable (only in Estonian) at http://eelnoud.valitsus.ee/main/mount/docList/2c861e08-9718-4cece-83f5-a88a63e8c6d6?activity=1#pnNZcise, last accessed 3 October 2015.

5 See Karistusseadustiku ja sellega seonduvalt teiste seaduste muutmise seadus [Draft law for amending the Penal Code and related acts], as presented to the session of the Government, article 1 (46). The file of the draft law is downloadable (only in Estonian) at http://eelnoud.valitsus.ee/main/mount/docList/2c861e08-9718-4cece-83f5-a88a63e8c6d6?activity=1#pnNZcise, last accessed 3 October 2015.

6 See Kooskõlastuste tabel [overview of the consultation process]. The file of the overview is downloadable (only in Estonian) at http://eelnoud.valitsus.ee/main/mount/docList/2c861e08-9718-4cece-83f5-a88a63e8c6d6?activity=1#pnNZcise, last accessed 3 October 2015.

7 1974 GA Resolution 3314, supra note 4.

8 The original text of 2001 Estonian Penal Code (in Estonian) is available: https://www.riigiteataja.ee/akt/73045.
already in the end of 1999, the cumbersome system of defining war crimes in the Statute was not followed by Estonian legislator. First, no difference has been drawn in Estonian Penal Code between war crimes punishable during an international and a non-international armed conflict. The offences were grouped based on the legal values protected through definitions of respective offences. The trouble however is that the legislator was not meticulous enough to think through, whether all internationally recognised definitions of war crimes were covered by articles in Chapter VIII Section 4 prescribing war crimes in Estonian Penal Code. The result was that in the original version of the Code, several acts that are punishable as war crimes in international law were completely forgotten, whereas in case of several other offences the elements of the crime were defined more narrowly than in corresponding international law.

E.g. Estonian Penal Code did not provide for definitions of war crimes of conscripting minors (Article 8 paragraph 2 (b) (xxvi) of the ICC Statute); treacherous attack (Article 8 paragraph 2 (b) (xi) of the ICC Statute); human shields (Article 8 paragraph 2 (b) (xxiii) of the ICC Statute) and attacking a combatant hors de combat. The war crime of declaring no quarter will be given was only punishable as an ordinary crime of threat. Most of the internationally recognised war crimes against property were only partly covered by respective articles of Estonian Penal Code, leaving big areas violations only punishable as ordinary property offences. The war crime of illegally restricting the judicial rights of the nationals of the hostile party was only punishable as an ordinary crime of violation of equality according to Article 152 of Estonian Penal Code.⁹

None of these errors, referred to above, was based on any policy considerations, but merely miscalculations or results of poor analysis. Although all these errors have been amended by today, it shows how easily it could happen that an autonomous domestic definition of an international norm goes awry. One of the reasons for that is obviously the big number of different war crimes definitions in international law that are partly overlapping and that apply in some instance only for international armed conflicts, but in other instance to non-international armed conflicts as well. The cumbersome and long list of war crimes presented in Article 8 of the Rome Statute is not helpful in that sense either.

2.4. General Part

A further example of problematic deviation from international norms can be brought regarding the general principles of responsibility – the concept of superior’s responsibility.

Responsibility of the superior is prescribed in Article 88 (1) of Estonian Penal Code, which stipulates that for a criminal offence provided for in Chapter 8, the representative of state powers or the military commander who issued the order to commit the criminal offence, consented to the commission of the criminal offence or failed to prevent the commission of the criminal offence although it was in his or her power to do so or who failed to submit a report of a criminal offence while being aware of the commission of the criminal offence by his or her subordinates shall also be punished in addition to the principal offender. Comparing international law on superior’s responsibility with the respective Estonian domestic norms it appears that in several important aspects Estonian law either directly contradicts international law or at least remains very unclear and ambiguous. In merely one sentence the legislator has been able to create considerable mess.

First, it appears that Article 88 (1) of the PC deviates considerably from ICL by not covering properly the responsibility of non-military superiors exempting non-military superiors, who are not representatives of the state powers. Estonian legislator has seriously mixed up different forms of responsibility, when embracing the

ordering of criminal offence with the concept of superior responsibility. Another aspect, which calls for criticism about Estonian regulation of the superior responsibility, is the inadequate formulation of the effective command (authority) and control requirement in Article 88 (1). Merely the notions of military commander or representative of state powers are not enough to determine, whether the respective superior had actual power over his or her subordinates. It is likewise inexplicable, why according to Estonian law not preventing an offence has to be in the power of the superior, but not reporting does not have to. The element of “failure to exercise control properly over subordinates” missing and “failure to take necessary and reasonable measures” dubious. Also wrongfully, Estonian legislator has covered non-suppression and non-reporting of subordinates’ crimes, but has forgotten the duty to prevention such crimes. This lacuna in the text of Article 88 (1) of the PC means that both disorderly behaviour of superiors as well as deliberate ignorance or even indifference of predicted offences of the subordinates is currently awarded by Estonian legislator, as it falls out of ambit of the superior responsibility doctrine. The non-punishability of reckless and negligent dereliction of superior duties gives another opt out from responsibility to a superior who has arranged his or her relations with subordinates in a disorderly manner and who just does not care, what is going on under his or her command.

The decision to deviate from the international standard – either the extension or restriction of the responsibility should at least be a consciously made one. As far as the many deviations from international law in regard of superior responsibility are concerned, it seems, however, that this is more a result of a misinterpretation of international law.

3. Instead of a conclusion

The above is not in any way meant to discourage domestic legislators from choosing the method of autonomous norm-making when transposing international law into domestic law. Nor should it be taken as a warning to avoid at all cost a result, where domestic statutes would differ from corresponding international norms. It is quite the contrary. Taking into account the rigidity of law-making in substantive international criminal law, advancing domestic legislation is perhaps one of the most realistic ways to come to a point one day, where a real evolution of one or the other international norm would become possible. So far, it would be possible to test advanced norms in domestic proceedings, to create case-law, but also enhance academic discussion.

Also autonomously defined norms might better suit into domestic legal system. They are easier to comprehend for the participants in the legal proceedings, clearer in their application (at least from the domestic point of view). On the other hand, it is vital to create a clear understanding in what respects do domestic norms deviate from corresponding international norm, so that prosecutors, defence counsels and judges would have some guidance in the otherwise strange and unexplored territory.

However, when creating autonomous norms when transposing international law into domestic legal order, one has to take into account the nullum crimen principle and the ways, how would it be actually possible to apply the transposed norms. Would it, in the context of the state’s participation in the ICC, contribute to the exercise of the complementarity principle or not. Do the transposed norms meet the requirements that stem to the state from international law?
PROTECTION OF THE NATIONAL SECURITY INFORMATION IN THE ICC REGIME

There is no one definition of national security or national security information among states. Each state itself determines the meaning and framework of its national security. This is a fundamental attribute of the state sovereignty and has minimum international standards: determined in law, judicial review is ensured. International tribunals and courts, including the ICC have jurisdiction to investigate and prosecute for international crimes, in particular, genocide, crimes against humanity, war crimes, aggression. These are types of crimes the elements of which include the determination of state policy, elaborating on military and defense information such as military unit sites, weapons and battalions, strategic and tactical planning etc. Moreover, in order to define the individual criminal responsibility the court has to assess information that concerns military and political (or administrative) structures, roles of the individuals in those structures. This applies especially, but is not limited, to the determination of command responsibility. The context can be even broader depending on what exact meaning and framework is given to the national security of a state. Thus, the very nature of the international crimes under the ICC jurisdiction makes the court deal in one way or another with information, documents or evidence that touches upon the national security of a state.

The question arises on how the Rome Statute reconciles the tension between different, sometimes opposing values, protected under the statute, and international law in general. More specifically, such tensions may arise between the rights of the defense to a fair trial, to disclosure of the information for the preparation of defense on the one hand and the state’s sovereignty when such information concerns its national security. Another illustration of such tension may arise between the truth seeking function of the court (or the Prosecutor) when the state invokes national security considerations in order to prevent the use of such information in court. Under the Rome Statute a separate lengthy article (Article 72) is devoted to the protection of the national security information which applies [as it reads] “in any case where the disclosure of the information or documents of a State would, in the opinion of that state, prejudice its national security interests” at any stage of the proceedings. There are three possible situations:

1. The state is in the possession of the information and the Court requests the information. (cooperation context)

2. Individual possesses and refuses to provide on the national security prejudice ground. The claim is valid only if confirmed by a state.

3. The information in the hands of the OTP or defense.

Let us look closely to the each mentioned above.

ICC cooperation context: What happens if the state is in the opinion that the disclosure of the requested information would prejudice its national security? Thus, refuses to provide such information or denies the request for assistance in part or in whole (Article 93(4)). State parties to the ICC have a general duty to cooperate with the court, including in the production of documents and other assistance in ensuring the testimony and obtaining other evidence. However, the Statute explicitly provides an exception when the national security prejudice is invoked. Thus, in accordance with Article 72, the State may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence that relates its national security (Article 93(4)). Article 72 of the ICC was drafted at the time when the ICTY Appeals Chamber issued its judgment in Blaskic case¹, which concerned this issue.
[Blaskic case: The Court had ordered Croatia to produce documents and its defense minister to appear in court so that he Court was able to review (in camera, ex parte) the information, which was claimed to be withheld on national security grounds. Croatia argued that the international tribunal does not have a power to judge or determine Croatia’s national security claims because the national security needs are a fundamental attribute of the state sovereignty. All after all, The ICTY recognized the protection of a state’s national security interests as a valid reason to refuse assistance and cooperation to the ICTY].

The Appeals Chamber entertained the question, whether the international tribunal is barred from examining documents raising national security concerns. Blaskic Appeals Chamber found that States are not allowed, on the claim of national security interests, to withhold documents and other evidentiary materials requested by the international tribunal. However, practical arrangements may be adopted by a trial chamber to make allowance for legitimate and bona fide concerns of States. With this judgment in mind, the States drafted Article 72 with extreme cautiousness and with complicated and rather confusing procedure of handling claims of information that may prejudice the national security of the state.

Coming back to the question, what are the consequences in the ICC, when a state invokes a national security prejudice claim. First, it is worth mentioning that Article 72 applies to any state whether party or non-party to the Rome Statute. Thus, while the cooperation regime applies only to the state parties, states that made Article 12(3) declaration and non-party states when a situation was referred by the UN Security Council, national security prejudice exception applies to all states. Second, it is the state that determines not only their national security interests, but also, whether the disclosure of the requested information would prejudice its national security interests. Third, when the national security prejudice is invoked by the state, a cooperative and consultative process takes place between the state and the court, defense and Prosecutor.

Thus, the Rome Statute entails that the requested state does not simply deny the compliance with the request. But rather, this detailed procedure follows before the state would deny the request. The cooperative means may include modification or clarification of the request, obtaining information from other sources, agreement on conditions under which the information could be provided (summaries, redactions, ex parte proceedings, other protective measures). After this cooperative steps are taken, and if the state still considers that the disclosure would prejudice its national security, the state has to give reasons of non-disclosure, unless such reasons (the description) themselves may prejudice its national security. After that, if the Court determines that the evidence is relevant and necessary for the determination of guilt or innocence of the accused, as well as concludes that the state does not act in accordance of its cooperation obligations, can make a finding on non-compliance (not in good faith cooperation) and refer the matter to the Assembly of State Parties (ASP) or UN Security Council (SC referrals). The court can also draw inferences as may be appropriate in the circumstances.

To sum up, in the context of the cooperation and invoking by the state of national security prejudice, it is the state that decides the prejudice, and the procedures under Article 72 allow the court to assess the denial of assistance, provide judicial remedy in the form of non-compliance decision, to refer it to the ASP if the court finds non-compliance. In this case, it will be up to the ASP, a political organ to take measures against the state (only member state). In addition, Article 72 provides another judicial remedy, that is, the court can draw inferences as to the existence or non-existence of a certain fact that is relevant to the guilt or innocence of the accused, as may be in the circumstances.

When the information is in the hands of the third party. In this context one should remember that Article 72 applies any state, in any case, at any stage of the proceedings, namely, Article
72(4) gives the state a procedural right to intervene and have a standing at court when the disclosure of the information may prejudice its national security.

[Ugandan government intervention in Ongwen case (trial). The case is on the OTP disclosure obligations towards the defense. Rome Statute explicitly subordinated the defense right to disclosure to national security prejudice.

The key details about the case are as follows:
- national security prejudice claim substantiated (state decides)
- national security prejudice claim as "new facts" to modify the request (Court modified its previous request not requiring disclosure)
- cooperative process
- Chamber decided the most appropriate way to proceed
- Court determined the relevance of the identity of the informant to the preparation of the defense of duress. (found not relevant)
- another cooperative step was taken. OTP admitted as proven the fact that Joseph Kony had killed Otti. So, it was inferred from this fact that Kony had implicit threats of death to his subordinates.
- Court assessed the relevance without having access to the information. It said that there is no information that the informant identity would be relevant to the defence of duress. Moreover, that there was no information that the informant would be a witness.
- Court modified its order and did not require the prosecutor to disclose the informant’s identity.

Conclusions.

The right to disclosure is not absolute, can be limited, e.g. based on national security grounds, but it should be counterbalances by procedures followed by judicial authorities. In this way the rights of the parties to the proceedings can be ensured (ECHR standard). Especially in the ICC, that clearly this right of the defence was subordinated to the national security prejudice claim. Judicial review in the context of search for truth is needed, so that the power is not abused and that the search for truth is not obstructed. The most effective option empowering the Court is the power of the court to draw inferences from the refusal to disclose. The court could regard something as proven even though no evidence has been produced. The existence or non-existence of a fact can be inferred. Although, this can create many problems with regard to the rights of the defence depending on the incriminating or exonerating nature of the fact.
DOCUMENTING INTERNATIONAL CRIMES AS A GUARANTEE OF ENFORCEMENT OF THE RIGHT TO TRUTH

Transitional justice and criminal processes, whether at the national or international level, are primarily about meeting out justice for alleged wrongs committed by individuals. It is not unusual that the criminal process is not so much about finding the objective truth as it is offering evidence that proves guilt or innocence — evidence that is contested, put into question or interpreted in different ways — to win a case. The case is won or lost by convincing or failing to convince a judge of guilt or innocence. The “truth” is merely a by-product.

In trials dealing with international crimes, however, the significance of this by-product is taking on a new dimension, owing no doubt to the unique objectives that international criminal law is supposed to fulfill and that go way above and beyond merely finding guilt or innocence of particular individuals. They range from contributing to “the restoration and maintenance of peace” and “the process of national reconciliation” to others, such as fighting against impunity, preventing future violations and satisfying victims’ needs among which is the right to know the truth.

1. Right to the truth

The right to the truth has been the result of a long process of evolution in international human rights case law, and norms and standards in international law. The right is rooted in international humanitarian law and has evolved from the right of the relatives to know the fate of their loved ones who disappeared during armed conflicts, to the right to know the fate and whereabouts of missing loved ones who were disappeared, executed in secret or secretly buried. The corpus juris on the right to the truth has evolved and has been systematized mostly by human rights bodies that constantly confirm that victims and their relatives have the right to know the truth about past violations.

The following instruments have marked milestones in the recognition of the right to the truth:

- Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Principles against Impunity) from 2005,
- Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles on Reparation) from 2005,
- International Convention for the Protection of All Persons from Enforced Disappearance from 2006. Thanks to the last document, the right to the truth has obtained a treaty law nature.
Put in brief, the scope of the right to the truth depends on a type of violation and is closely related to the State’s obligation to:
- investigate the violations,
- prosecute and punish those responsible for these violations;
- provide reparation to the victims and/or to the relatives of the victims.

According to the documents mentioned above, victims and their families should be entitled to receive the truth of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten their safety and interests. This means that the States are obliged to seek, collect and preserve the evidence of the violations and to allow the victims and their relatives access to these information, and to use collected evidence in order to bring the perpetrators to justice.

2. Documenting international crimes as a guarantee of enforcement of the right to the truth

Now let’s focus on documenting process. It must be stressed out that documentation initiatives can play a critical role after committing the international crimes and during the transitional justice period. It is because they allow to:
- preserve evidence of the violations,
- spur political will to see justice done,
- help people remember their history
- provide tools for reconciliation.

Documentation projects and mechanisms therefore play a crucial role in enforcement of the right to the truth, and it may constitute an essential component of future prosecution. Unfortunately sometimes the reality seems to be different. It is worth to mention the genocide in Srebrenica and the work of the ICTY Procesutor Office. While collecting the evidence of Srebrenica genocide, it was decided that determining the overall number of victims and the general scheme of the crimes would be sufficient for formulating the indictments. It means that for the Prosecutor it was not necessary to find and identify all victims and to clarify all uncertain events. What’s more, in Kupreskic case the Tribunal expressed that creating historical memory of past atrocities is not the task for Tribunal. Of course, it did not meet the victims’ needs and hopes.

Deficiencies in collecting evidence and documenting crimes cause that victims and their families search for the truth in different ways. They may apply for special judicial bodies (eg. Selimovic and Others v. Republika Srpska before Human Rights Chamber in BiH) or they may search for the truth before non-judicial bodies, such as truth commissions. Below I would like to focus only on the mechanism of a truth commission and its documenting role.

Why to talk about the truth commissions? According to Priscilla B. Hayner truth commission is one of the major mechanism for transitional justice which play a crucial role not only in preserving victims and their relatives’ rights, but also in collecting evidence of past atrocities. The truth commission may be given wide-ranging responsibilities. In many contexts, they have become the most prominent government initiative to respond to past abuses, and the starting point from which other measures for accountability, reparations, and reforms may be developed. The first and most straightforward objective of a truth commission is sanctioned fact-finding: to establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history. As such the truth commission can be the most powerful tool to collect the evidence of past violations and to enforce the victims and their families right to the truth.

For example, National Commission on the Disappearance of Persons in Argentina presented in 1984 its final report “Nunca mas” in which it submitted more than 7000 testimonies and
evidences on 8960 cases of enforced disappearances. The truth commission established that more than 62% of violations were committed at houses of the victims in the presence of their relatives. Another example can be Chilean National Commission on Truth and Reconciliation, which examined more than 3400 testimonies and evidences. Significant is that the Chilean truth commission had almost unlimited access to official and unofficial documents and archives and therefore it could efficiently collect all the evidence.

It must be expressed that the truth commissions do not only collect the evidence and reconstruct the facts, but also evaluate the motivations that stand behind the perpetrator (which is also the component of the right to truth). Worth mentioning are conclusions made by the Truth and Reconciliation Commission in South Africa. Just to give a hint, the African commission paid the attention to, so called, magnitude gap, which refers to the consistent differences in recall between victims and perpetrators. In case of the Commission in South Africa this conclusion has particular importance as the commission carried out two main tasks: discovering the truth about the violations and deciding on the amnesties for perpetrators.

As proved above the existence of the truth commission is very valuable for collecting evidence and enforcing the right to the truth about past violations. But yet, it must be remembered that any truth commission cannot substitute the criminal proceeding regarding individual responsibility. And that is why the truth commission should cooperate with national and international judicial bodies. Chilean Truth Commission has shared the collected evidence with national judicial bodies which used the material in formulating indictments against the perpetrators. A cooperation, although difficult, existed also between the Truth and Reconciliation Commission in Sierra Leone and the Special Court for Sierra Leone.

Cooperation between national and international judicial bodies and the truth commission (or any other institution that collects evidence) is without any doubts essential. Especially that criminal courts not always have a power or interest in discovering the historical truth, they focus mostly on judicial truth. Antonio Cassese, the president of the ICTY, said that international criminal courts cannot evaluate all evidence and testimonies and therefore are not able to enforce fully the right to the truth. But yet the cooperation between judicial bodies and truth commissions might be difficult due to many factors. The truth commission at its work is usually not limited as the criminal court is. Another problem is using immunity for testimony. But this is already the question for another research.

To sum up, the right to the truth is one of the pillars of the mechanisms of transitional justice. The right translates into the possibility of knowing the circumstances of when, how and where any violations occurred, and the motives that drove the perpetrators. Enforcement of the right to the truth requires therefore proper and efficient process of collecting evidence, verifying testimonies of victims and witnesses and analyzing motivation of perpetrators. It must be although remembered that the right to truth also obliged the State to bring the perpetrators to justice and to restore the sense of dignity to the victims and their families.
DOMESTIC PROSECUTIONS FROM THE GENOCIDE AGAINST YAZIDIS – ACCOUNTABILITY FOR ISIS?

1. The phenomenon of foreign fighters.

The first reports emerged of so-called “foreign fighters” (FF) leaving their country for Syria in Summer 2012. In the following years, thousands of Europeans travelled to Syria to join Jihadist groups, esp. ISIS. Exact numbers are obviously impossible to provide, though, UN estimated up to 50,000 persons in total (2017), Europol estimates that around 5,000 to 7,000 FF came from European Union member states. Official figures from 2017 claim that more than 910 Islamists have left Germany to join IS. In Belgium around 470 foreign fighters departed for Syria. Belgium is the largest contributor in proportion to its population. With ISIS losing territory, more and more FF have been captured. So far, Germany is not willing to take them back (like most other countries).

2. Genocide of the Yazidis people by ISIS.

ISIS has pointedly attacked any other group that it considers to be in apostasy, including Shia Muslims, Yazidis, and Christians. The Yazidis are a religious minority living in Syria and Northern Iraq. The overall strategy of ISIS, with public beheadings, kidnappings, required conversions and jizya payments, sex slave markets for fighters, etc., all provide evidence of an intent to create conditions of life calculated to bring about physical destruction.

Political Reactions were as follows:
- United Nations High Commissioner for Human Rights
- Independent International Commission of Inquiry
- European Parliament
- Many States (USA, UK, etc.)

Legal Reactions were as follows:
BGH: In December 2016, the Supreme Court of Germany issued an arrest warrant against a high-ranking IS commander allegedly responsible for genocide and war crimes, including abduction and sexual enslavement of Yazidi women in Syria and Iraq.

3. The Sinjar Massacre.

The acts were preceded by the withdrawal of Kurdish peshmerga from the region around the Jabal Sinjar. When the Peshmerga had fled the civilian population, leaving the Yazidis defenceless. On 3 August 2014, the Islamic State terrorist militia attacked the main settlement area of the Yazidis in Sinjar and allegedly committed a genocide on the population. As a result, around 5,000 men...
and boys were murdered, 7,000 women and children abducted and more than 400,000 expelled from their homes. In addition, IS committed sexual and gender-specific violence against Yezidi women.

4. The Federal Prosecutor and the ZBKV.

The competence for criminal investigations and prosecutions of international crimes rests with the German Federal Prosecutor. At the moment, two departments are working on international crimes with eleven prosecutors. The German Federal Criminal Police has a “Central Unit for the Fight against War Crimes and further Offences pursuant to the Code of Crimes against International Law” (ZBKV). It employs 17 police officers. Two of them work exclusively on crimes of ISIS, three on crimes committed by the Assad regime. Most suspects are either Foreign Fighters or asylum seekers. The Syrian Civil War is the main source of criminal investigations. In 2018 there are 80 investigations, around half of them are concerning the Syrian Civil War. On the one hand, the Federal Prosecutor and the ZBKV conduct “normal” investigation techniques (house searches, wire trapping etc.)

5. Structural investigations.

Prosecutorial strategies employing a wider and more flexible approach do exist. One legal mechanism to enforce the ‘complementary preparedness’ approach are so-called ‘structural investigations’. No legal basis in the German procedural law but not explicitly excluded. Structural investigations are broad preliminary investigations without specific suspects, designed to gather evidence related to potential crimes that can be used in future proceedings either before a court in the investigating state itself or before another domestic or international criminal court. It entails investigations with full investigatory powers that are not (yet) directed against specific persons but that exist for the purpose of investigating (and collecting evidence on) specific structures, within which international crimes have been allegedly committed. Testimonies from Syrian refugees, either victims or witnesses, have been gathered and data collected. In 300 of these cases, witnesses were able to name perpetrators. Up till May 2017 more than 200 witnesses have testified in the two structural investigations. Currently six structural investigations are ongoing in Germany. Two of these relate to Syria. One concerning all conflict parties of the Civil War, esp. the Assad Regime. The second structural investigation is concerned with crimes committed by non-state actors, such as ISIS and all other armed opposition groups and militia in Syria and Iraq and is ongoing since 1 August 2014. In particular, the investigation is focused on crimes perpetrated against the Yazidi community in Sinjar. These investigations gained momentum with the admittance of 1100 Yazidi women and children by a quota of the German states as refugees since 2014. The ZBKV has heard hundreds of them as witnesses. It is not only concentrated on Syria but on the complete terror network of ISIS.

6. Pro et Contras.

Contra:

▶ Expensive, extremely complex, not always successful

Pro:

▶ They are the first step toward more focused investigations of specific suspects. In case sufficient evidence has been secured, the investigation can be individualized and an arrest warrant against a specific suspect may be issued.

▶ These investigations thus take into consideration that international crimes are normally committed within (or by) a certain structure and in a specific context and that knowledge and evidence about both is helpful or even necessary in order to conduct investigations against
individuals that are alleged to have committed these crimes.

- It can enable the prosecutor to react swiftly when a suspect enters Germany in the future triggering the duty to investigate.
- Such evidence can also facilitate substantially future proceedings in a third state or before an international court, if a specific case falls under the latter court’s jurisdiction, because it can be shared by way of judicial cooperation.
- The knowledge and evidence gathered by structural investigations can lead to the opening of an investigation against a specific person even if that person is not in Germany, if there is an ‘initial suspicion’ that he or she has committed an international crime. If there is strong suspicion in this regard, the Federal Prosecutor can request the issuance of an arrest warrant against a suspect at the Federal Supreme Court.

7. Conclusions

It is safe to say that the structural investigations demonstrate that a more nuanced approach offers an avenue to fill the gaps in (the incomplete and imperfect) system of international criminal law. Additionally, they allow for strategic investigations into atrocity crimes for which there are no other judicial forum. This prosecutorial technique further enables the authorities to investigate powerful actors at least in the beginning, without directly being exposed to political pressure since they are not focused on specific incidents or suspects, thus avoiding strong political reactions and interference by states whose elite might be under investigation. The ongoing structural investigations can ultimately yield tangible results in the form of arrest warrants issued against persons most responsible for heinous crimes if individual investigations against them are opened. They allow the German Federal Prosecutor to balance the rationale of ‘no-safe haven’ approach.

However, the Federal Prosecutor should not exaggerate it. ISIS is only one side. Numerous international crimes have been committed by the other side, esp. Assad regime. ISIS investigations are particularly necessary against:

- Every ISIS member who lives on German soil
- Germans who left to fight as Foreign Fighters but however have not returned.
- The most responsible ISIS members, even if they are not Germans or do not live in Germany.
COLLECTING AND ANALYISING EVIDENCE OF INTERNATIONAL CRIMES IN ONGWEN CASE

I will address the collection and analysis of evidence of international crimes on the example of the Ongwen case. Benjamin Gumpert and I have been prosecuting it since 2015.

Back in 2005, pre-trial judges issued arrest warrants against Dominic Ongwen and four other rebel commanders of the Lord’s Resistance Army from northern Uganda for war crimes and crimes against humanity. Ten years later, in 2015, Mr Ongwen was finally arrested and transferred to the ICC. Trials in absentia are not permitted under the Rome Statute. In practice, this meant that active investigations in the case were largely suspended sometime between 2006 and 2015.

After the transfer of Mr Ongwen in 2015, one of the first steps that the Prosecution undertook was to examine what we already had in our evidential collection. The evidence preserved in 2004-2006 became a springboard for refining the original case against Mr Ongwen (it concerned just one attack in May 2004), as well as bringing additional charges related to three other attacks and three thematic charges covering a period of three and a half years. It turned into a much bigger case. This allowed the Prosecution to bring a more representative case of Mr Ongwen’s alleged crimes. This also put pressure on us to present a well-defined case within a rather short time we were given to conduct additional investigations.

Per ICC jurisprudence, to be admissible at trial, evidential material must be relevant to the issues in the case, have probative value, and not be unduly prejudicial to the accused. This test ultimately guided us in our collection and review of evidence.

When we reactivated the case in 2015, we carried out evidential gap analysis for the crimes from the original arrest warrant against Mr Ongwen to identify areas or elements of crimes that needed to be strengthened for trial. At the ICC, different procedural stages require different quantity and quality of evidence to pass them, where the Prosecution must meet the requisite standard of proof. Essentially, what is good enough at the arrest warrant stage might not be good enough to sustain a case at trial to prove it beyond a reasonable doubt.

Next, we looked at evidence of other crimes. Once we identified potential additional charges, we conducted a similar gap analysis. We selected additional charges when we were satisfied that we had reliable and credible evidence from at least three independent sources:

1. Crime base witnesses, meaning persons who witnessed the crimes;
2. Insider witnesses, meaning persons with knowledge that would connect the crimes to the accused; and
3. Objective evidence, for example intercepted radio communications between rebel commanders or DNA evidence related to direct victims of sexual violence.

We also visited crime scenes for each of the four charged attack sites, although the on-site investigation had to be limited to mostly observing and recording the area by means of photographs, 3D laser image scanner and drone videos. By then, little was left of the original crime scene, structures, and biological material.

For one of the four attacks, we had collected contemporaneous documentary and visual evidence: a video recording of the victims and the crime scene soon after the attack, photographs of the same, autopsy reports, police statements, and other domestic investigation files.

At the moment, we have almost 40 000 items in our Uganda evidence collection, but only selected items have been used at trial as evidence in the Ongwen case.

In conclusion, I want to emphasize the following points:

- **Legal framework**: The Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence provide principal legal guidance as to the collection and analysis of evidence, together with other sources listed in article 21 of the Rome Statute.
- **Investigation**: The Prosecution has a duty to extend investigations to cover exonerating and incriminating circumstances equally under article 54(1)(a) of the Rome Statute.
- **Methodology**: Investigation of international crimes is a circular process without a clear-cut end point, where existing information leads to discovery of additional information and so on. The Ongwen case is a good example of it.
- **Prosecution**: Corroboration from independent sources is important in cases with a large number of potential crimes, perpetrators and victims, especially when there is a significant time elapse.
- **Standard of proof**: Requirements concerning evidential standard in the ICC proceedings depend on their stage. What is sufficient at the arrest warrant or confirmation of charges stage might not pass the trial stage, when guilt must be proved beyond a reasonable doubt.

## THE PRINCIPLE OF COMPLEMENTARITY AS THE BASIS OF THE ICC

### Admissibility of the Saif Al-Islam Gaddafi case before the ICC

In my presentation about the admissibility of the *Saif Gaddafi* case before the ICC, I will address four issues:

1. The principle of complementarity as the cornerstone of the ICC system;
2. Background on the Libya situation, with a focus on the *Saif Gaddafi* case;
3. Previous admissibility challenge in the *Saif Gaddafi* case (2012-2014); and

### 1. The principle of complementarity as a cornerstone of the ICC

What does it mean? The principle of complementarity is based on the idea that, whenever possible, states should prosecute international crimes domestically because they have the primary duty to do so.
It is stipulated in the preamble to the Rome Statute, which states that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.” It also states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

More specifically, the preamble emphasises that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Likewise, article 1 of the Rome Statute dictates that “[the ICC] shall be complementary to national criminal jurisdictions.”

2. Background on the Libya situation and the Gaddafi case


The warrant of arrest for Saif Al-Islam Gaddafi was issued on 27 June 2011. In issuing the arrest warrant, Pre-Trial Chamber I found that there are reasonable grounds to believe that:

- Following the events in Tunisia and Egypt in the early months of 2011, a State policy was designed at the highest level of the Libyan State machinery and aimed at deterring and quelling, by any means, including by the use of lethal force, the demonstrations of civilians against the regime of Muammar Gaddafi which started in February 2011; and
- In furtherance of the above-mentioned State policy, from 15 February 2011 until at least 28 February 2011 the Libyan Security Forces, which encompass units of the security and military systems, carried out throughout Libya – and in particular in Tripoli, Misrata and Benghazi as well as in cities near Benghazi such as Al-Bayda, Derna, Tobruk and Ajdabiya – an attack against the civilian population taking part in demonstrations against Gaddafi’s regime or those perceived to be dissidents, killing and injuring as well as arresting and imprisoning hundreds of civilians.

Pre-Trial Chamber I also found that there are reasonable grounds to believe that:

- Although not having an official position, Saif Al-Islam Gaddafi is Muammar Gaddafi’s unspoken successor and the most influential person within his inner circle and, as such, he exercised control over crucial parts of the State apparatus, including finances and logistics and had the powers of a de facto Prime Minister;
- Muammar Gaddafi, in coordination with his inner circle, including his son Saif Al-Islam Gaddafi, conceived a plan to deter and quell, by all means, the civilian demonstrations against the regime, and that both of them made an essential contribution to implement that plan.

Saif Gaddafi was detained in the city of Zintan at the behest of the Government of Libya between 20 November 2011 and 12 April 2016.

No suspect in the Libya situation has been arrested and transferred to the ICC for trial so far, including Saif Gaddafi.

3. Previous admissibility challenge

On 1 May 2012, the Government of Libya filed its admissibility application under article 19.

On 31 May 2013, the Pre-Trial Chamber I rejected Libya’s admissibility challenge and determined that the Saif Al-Islam Gaddafi case was admissible before the ICC.

On 21 May 2014, the Appeals Chamber upheld the PTC I decision.
4. Most recent admissibility challenge

On 6 June 2018, Defence for Saif Gaddafi filed admissibility challenge on the following grounds:

- On 28 July 2015, Saif Gaddafi was convicted by the Tripoli Criminal Court for substantially the same conduct as in the ICC proceedings;
- About 12 April 2016, he was released from prison pursuant to Law No. 6 (2015);
- On that basis, the case against him is inadmissible.

The Prosecution disagreed with the Defence.

On 5 April 2019, the Pre-Trial Chamber I issued its Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute” rejecting the admissibility challenge and declaring the case admissible (“Decision 662”).

The Defence appealed Decision 662 in April 2019.

What are the main takeaway points related to Decision 662? I would like to emphasize two procedural and three substantive points:

- A suspect has procedural standing (locus standi) to lodge the admissibility challenge pursuant to article 19(2)(a) of the Rome Statute;
- The burden of proof lies on the challenging party;
- The case is inadmissible where the person has been the subject of a completed trial with a final conviction or acquittal – a judgment which acquired a res judicata effect;
- Trial in absentia can render a case prosecuted domestically admissible at the ICC;
- There are no amnesties for international crimes.

Let me elaborate some of these points.

**Gaddafi has procedural standing (locus standi) to lodge the admissibility challenge pursuant to article 19(2)(a)**

The Pre-Trial Chamber found that “[i]t is not a condition of making an admissibility challenge that [the suspect] must surrender himself to the Court” and that “[n]o such requirement is expressly or impliedly contained in Article 19” (Decision 662, para 23).

**The case is inadmissible where the person has been the subject of a completed trial with a final conviction or acquittal – a judgment which acquired a res judicata effect**

Article 21(3) of the Rome Statute states that the “application and interpretation of law […] must be consistent with internationally recognized human rights […]”. As such, article 20(3) must be applied and interpreted “in light of internationally recognized human rights”.

The international human rights standards prohibit second trial when there is a final decision or judgment of acquittal or conviction (Decision 662, para 45).

**There are no amnesties for international crimes**

Decision 662 gives no definition of amnesties. Collins Dictionary defines it as follows:

1. a general pardon, especially for offences against a government
2. a period during which a law is suspended to allow offenders to admit their crime without fear of prosecution
According to Pre-Trial Chamber I, “there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law” (Decision 662, para 61).

To demonstrate this point, the Chamber cited the jurisprudence of the principal international courts and human rights bodies:
- Inter-American Court of Human Rights;
- European Court of Human Rights;
- African Commission of Human and People’s Rights;
- Human Rights Council;
- International Criminal Tribunal for the former Yugoslavia;
- Special Court of Sierra Leone; and
- Extraordinary Chambers in the Courts of Cambodia.

The Chamber concluded that “granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognised human rights. Amnesties and pardons intervene with States’ positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate” (Decision 662, para 77).
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