

**THE CRIME OF AGGRESSION AND THE
RELATIONSHIP BETWEEN THE ICC AND THE
SECURITY COUNCIL**

BY

LINET ATIENO OPIYO
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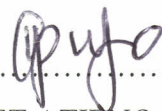
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DECLARATION

I, LINET ATIENO OPIYO, do hereby declare that this is my original work and that the same has not been submitted nor is currently being submitted for a degree in any other University.

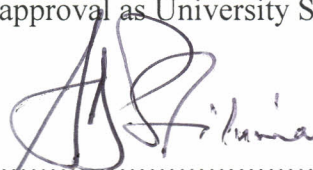
Signed



.....
LINET ATIENO OPIYO

This thesis is submitted for examination with my approval as University Supervisor

Signed



.....
PROF. E.D.P. SITUMA

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I am beholden to my supervisor, Prof F.D.P.Situma for his able guidance and incisive remarks in shaping this work.

With gratitude, I appreciate the assistance of various other people whose contribution was instrumental in various ways during my study: to my family, especially my mum who across the distance quietly urged me on; to Dr Kindiki for his help and insightful comments.

To all the above named persons and others whom I could not mention due to the strictures of space, I am truly grateful.

DEDICATION

To all those on the continent and across the distance; to whose pain, aspiration to dignity and injustice unrelenting global effort is allocated; and to posterity, for the record.

In honouring the victim's right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and the future of human generations, and affirms the international legal principles of accountability, justice and the rule of law.

Preamble, Bassiouni Report (E/CN.4/2000/62)

LIST OF ABBREVIATIONS

GA.	General Assembly
GC	The four Geneva Conventions of 1949.
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
IMT	International Military Tribunal for Nuremberg
IMTFE	International Military Tribunal for the Far East
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
PCIJ	Permanent Court of International Justice
SC	Security Council
ICRC	International Committee of the Red Cross
UN	United Nations

CHAPTER ONE

INTRODUCTION

1.1. Background to the study

On 17th July 2002 in Rome, 160 states signed the Rome Statute establishing a permanent International Criminal Court (ICC) to try individuals for the most serious offences of global concern, such as genocide, aggression, war crimes and crimes against humanity. Many felt that the agreement was no less important than the adoption of the UN Charter itself. The adoption of the Rome Statute and the eventual inauguration of the Court have been celebrated by commentators as the most important development in international criminal law.¹ Hailing the event as ‘historic’ and the Court as ‘a powerful tool for prosecuting and preventing atrocities’, Kofi Annan stated that the entry into force of the Rome statute ‘reaffirms the centrality of the rule of law in international relations’ and that the court ‘holds the promise of a world in which the perpetrators of genocide, crimes against humanity and war crimes will be prosecuted when individual states are unable or unwilling to bring them to justice.’²

The period immediately following the First World War is notable for numerous attempts to establish a variety of international criminal institutions, all of which ended in failure. For instance, in 1919 the victors agreed upon a few provisions of the peace treaty with Germany, signed at Versailles, which provided for the punishment of the leading figures responsible for war crimes committed during the war and went further to lay down in article 227 the responsibility of the German Emperor for the supreme offence against international morality and sanctity of treaties.³ The same provision envisaged the establishment of a ‘special tribunal’, composed of five judges charged with the duty of trying the Emperor. The Allies were motivated by their outrage at the atrocities perpetrated by the vanquished powers, more so Germany.

The ICC is no sudden invention; it is a culmination of a series of ideas and initiatives aimed at combating impunity by holding international criminals before judicial representatives of the

¹ L. S. Sadat, and S. R. Carden, “The New International Criminal Court: An Uneasy Revolution.” 88 *Georgetown international law journal* 386 (2000).

² See statement of the United Nations Secretary General at <http://www.globalsecurity.org/military/library/news/2002/07/mil/-020701-un01.htm> (Retrieved on 8 July 2006)

³ A. Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2002), p.321

world community.⁴ In the middle of the last century several initiatives were taken but it appeared that time was not yet ripe for the establishment of a permanent court. A 1937 draft statute of the League of Nations for an international criminal court to try international terrorists never entered into force due to lack of sufficient ratifications. A 1944 proposal of the UN War Crimes Commission for creation of a United Nations War Crimes Court to try Nazis was ultimately rejected in favour of ad hoc military tribunals of Nuremberg and Tokyo.⁵ A 1954 draft statute for a permanent international criminal court produced by the ILC got frozen in the political conflicts of the cold war. Indeed, it is the fall of the Berlin wall and subsequent vanishing of the East-West conflict that created the proper political climate for international criminal law enforcement. The eventual inauguration of the Court is traceable to the International Military Charter, which established the Nuremberg Tribunal. Thereafter, at its first session in 1946 the UN General Assembly adopted a resolution, which affirmed the principles of international law recognized by the Charter of Nuremberg and the judgments of the tribunal.⁶

The relationship between the Security Council and the ICC and their respective roles are important issues that arose during the preparatory stages as well as at the Rome Conference. The draft statute prepared by the International Law Commission envisaged in its draft Article 23 three specific roles for the Security Council in the Court's regime,⁷ namely, (i) the Court would not be able to deal with complaints of or directly related to acts of aggression unless there had been a prior determination by the Council that the state in question had committed the act of aggression which was the subject matter of complaint. (ii) the Council could refer matters to the Court pursuant to Chapter VII of the UN Charter and (iii) the Court could not, in the absence of approval by the Council, commence a prosecution if it arose out of a situation, which was being dealt with by the Council under Chapter VII of the Charter.

Apart from the relationship with the Security Council, there are other factors that affect the performance of international court like the ICC. These include state cooperation and operational issues like status of witnesses at their places of residence, movement to and from the seat of the

⁴ A. P. Van de Mei, "The International Criminal Court: Establishment, Jurisdiction and Composition."

¹ The Africa legal aid quarterly, 22 (18 Jan-March 2003).

⁵ Ibid.

⁶ United Nations General Assembly Resolution 177 (II); UN Doc. A/519 (1947).

⁷ L. Yee, "The International Criminal Court and the Security Council, in R. S. Lee (ed) The Making of the Rome Statute: Issues, Negotiations, Results. (Kluwer Law International. The Hague, 1999), p. 143

court, travel documents for witnesses who do not have valid documents or who may be living illegally in the country of residence.

1.2. Statement of the Problem

International treaties and customs have produced a plethora of rules, laws and norms prohibiting atrocities such as genocide, war crimes and crimes against humanity or forbidding the use of poison gas and biological and chemical weapons. But the record of the application and enforcement of these laws has not been impressive. While states are competent and often obligated under international law to investigate, prosecute and punish violations, states have often been either unable or unwilling to apply the law.⁸ It is against the foregoing that the International Criminal Court (ICC) was established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.⁹ In its functioning, the Court has a close link with the Security Council on matters that touch on the jurisdiction of the Court. Article 39 of the United Nations Charter provides that the Security Council shall determine the existence of any act of aggression. The mandatory language of this article indicates that a primary role must be given to the Council to determine the existence of aggression as a precondition to the institution of criminal proceedings against individuals by the Court.¹⁰ Consequently, the Court cannot exercise jurisdiction with regard to the crime of aggression until the Security Council has made a determination of existence of the same. This, then, presupposes that the Council will be making a legal determination, a duty that should be left to the Court. In article 36(3) of the Charter, the Council is exhorted to encourage states to refer legal disputes to the International Court of Justice, from the foregoing; the clear implication is that legal disputes are not the business of the Council. It is also against

⁸ R. S. Lee, (ed.) The International Criminal Court. The Making of the Rome Statute. Issues. Negotiations. Results (Kluwer Law International, The Hague, 1999), p.1.

⁹ See the website of the International Criminal Court. About the court. Retrieved from <http://www.icc-cpi.int/about.html> (Visited on 14th April 2006)

¹⁰ L.Yee, “ The International Criminal Court and the Security Council: Article 13(b) and 16”, in R. S .Lee(ed.) The International Criminal Court, The Making of the Rome Statute: Issues. Negotiations. Results (Kluwer Law International, The Hague, 1999), pp 143-152

this provision that the Council is empowered to seek advisory opinion from the International Court of Justice. The Council has only evoked this provision once in its 50 years of existence.¹¹ Even more disturbing, the Council frequently fails to indicate the constitutional basis, i.e., the Charter provision on which it acts. This provision amounts to politicization of the judicial regime. Additionally, prosecutions for aggression may never be undertaken against the permanent members of the Council because of their power of veto over non-procedural decisions.¹² Article 16 of the Rome Statute provides that no investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after Security Council, in resolution adopted under Chapter VII of the Charter of the United Nations has requested the Court to that effect; that request may be renewed by the Council under the same conditions. This provision amounts to interference in the independent functioning of the Court by the Council, which is a political organ. More importantly, the Court can in effect be deprived of jurisdiction by the mere placement of a situation on the agenda of the Council, where it could remain under consideration for an indefinite period of time.¹³ The problem that arises under these circumstances is that the function of the court will be prejudiced by the political inertia of the Security Council thereby, defeating the object and purpose of the Court's establishment. As a judicial organ, the Court should have the independence to determine legal issues without deference to a political organ, the Security Council, whose decisions are based on the political dictates of the members, especially the permanent members.

1.3. Hypothesis

This study proceeds on the basis of the hypothesis that the Rome Statute, as a constitutive instrument of the ICC, does not give the Court the autonomy it requires to discharge its mandate under the Statute.

¹¹ D. Bowett. "The Impact of Security Council Decisions on Dispute Settlement and Procedures," 5 European Journal of International Law. 1 (1994). See also Advisory opinion on the Legal Consequences for states of the continued presence of South Africa in Namibia. (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971) 12

¹² Ibid.

¹³ Ibid.

1.4. Objectives of the study

The objectives of carrying out this study are: -

- i. To investigate and analyze the institutional weaknesses of the ICC and find out the effects of the same on the mandate the Court.
- ii. To highlight the problems that the ICC is likely to face as a result of its close links with the Security Council.
- iii. To recommend legal reforms as a solution to the problems facing the ICC.

1.5. Justification of the study

It is a known fact that the object of the establishment of the International Criminal Court was to bring an end to impunity and hold perpetrators of heinous crimes like genocide, war crimes and crimes against humanity accountable. To achieve this goal, the need for independence of the Court cannot be overemphasized. However in light of the close link between the ICC and the UN Security Council it is quite unpredictable whether this goal will be achieved. This study will be significant in demonstrating that linking a judicial body with a political body impacts negatively on the mandate of the judicial tribunal.

1.6. Limitation of the study

No study can address all the aspects of the ICC and the Security Council, as the two are highly complex international institutions. Confronted with this reality, this study focuses its attention on the jurisdiction, enforceability and the right of the victims in the new international criminal process on one hand and the role of the Security Council in maintenance of international peace and security under Chapter VII of the UN Charter. Lack of adequate resources was also a limiting factor.

1.7. Theoretical framework

This research is based on the positivist legal theory, which is informed by philosophers like Austin, Bentham, Kelsen and H. L. Hart particularly the separability thesis. The Separability Thesis holds that there are no moral constraints on the content of law. As John Austin put it:

“The existence of law is one thing: its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry”

H. L. A. Hart stated that “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.”¹⁴ As contemporary positivists understand it, the separability thesis asserts a very modest claim about the law: it is possible for a legal system to have criteria of legality that do not include any moral norms. Since there might be legal systems with no moral criteria of legality, there is no contradiction in thinking that there could be laws that are unjust or legal systems that are morally illegitimate. In other words, it is not part of positivists’ concept of law that laws are just or that legal systems are morally legitimate. Legality and legitimacy are different issues.¹⁵ While the creation of the ICC does mark an important development in international criminal law, this thesis is premised on fact that the ICC has institutional problems that will negatively impact on its mandate their by defeating the aspirations of its founders. In this regard the ICC’s mandate does not reflect the morals of the society.

1.8. Research Methodology

The research for this work was mainly library based, with documented facts on this subject being explored. Reference to secondary data like journal, textbooks, Conventions, law reports, and the Internet was made.

1.9. Literature Review

The subject of International Criminal Court (ICC) has evoked a considerable amount of literature. A number of books and articles have been written on this broad subject adopting various approaches-historical, descriptive or analytical. In spite of this, there is not as yet a comprehensive work that addresses the questions proposed and the precise issues raised by this thesis. Most of the books have tended to trace the historical origin o f the ICC after the Nuremberg trial.

¹⁴ H. L. A. Hart, The Concept of law. (Oxford University Press, Oxford, 1996), pp 185-186

¹⁵ K.E.Himma, “Legal Positivism” IVR Encyclopedia of Jurisprudence, Legal Theory and Philosophy of law. Retrieved from www.ivr-enc.info/en/article (visited on 8 August 2006)

S. Dinah, in *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*¹⁶ merely traces the origin of the ICC from Nuremberg with specific reference to international crimes and evaluates the role of the Court with regard to human rights.

In *The Rome Statute of the International Criminal Court: A Commentary*¹⁷ Antonio Cassese looks at the historical evolution of the Court and various provisions of the Rome Statute while giving a detailed commentary on the issues that arose with regard to those provisions. The book looks at the reaction of the international community to atrocities, the crimes of genocide, war crimes, crimes against humanity and international criminal trials generally from abortive early attempts between 1919 to 1945, the establishment of mixed criminal courts or tribunals to the ICC, generally

Lee's book,¹⁸ on the hand, evaluates the issues that arose at the negotiations of the Rome Statute. He looks at the historical evolution of the Court and crimes within the jurisdiction of the court. These issues are evaluated in light of the Draft Statute for the International Criminal Court that was deliberated at Rome. It also gives the various positions taken by governments at the close of the conference

Bassiouni, in *Legislative History of the International Criminal Court*¹⁹ also traces the historical evolution of the court but more particularly with reference to the period between 1994 and 2000 after the ILC had produced the draft Statute for the International Criminal Court

¹⁶ S. Dinah, (ed.) International Crimes, Peace and Human Rights: The Role of the International Criminal Court (Transnational Publishers, New York, 2000).

¹⁷ A. Cassese, The Rome statute of the International Criminal Court: A Commentary. (Oxford University Press, Oxford, 2002).

¹⁸ R.S.Lee, (ed) The making of the Rome statute: Issues, Negotiations and Results. (Kluwer law international, The Hague, 1999).

¹⁹ M. C Bassiouni, Legislative history of the International Criminal Court: Legislative history (International and comparative criminal law series, 1998). See also M.C.Bassiouni, Crimes against humanity in international criminal law. (Kluwer Law International. New York, 1999).

Schabas in *Introduction to the International Criminal Court*,²⁰ explains article by article how the Court is likely to function by focusing on salient aspects of the Rome Statute. As suggested by the title of the work, not much effort is invested in critically analyzing any of the issues at hand.

An International Criminal Court: A Step Towards World Peace,²¹ equally gives a historical rendition of the journey that it took, since early efforts, to establish a permanent international criminal tribunal until the dawn of Rome.

Sunga, in *The Emerging System of International Criminal Law: Developments in Codification and Implementation*,²² discusses developments in the codification and implementation of international criminal law. In sum, it is an inquiry into the prospect of the emergence of a unified system of international criminal law, characterized by broad and coherent material coverage as well as fair and effective institutional implementation which departs from the position that norms of international criminal law form neither a coherent nor an integrated system and that currently established mechanisms do not provide a panacea to correct this situation. Cassese, in *International law*,²³ looks at the jurisdiction of the International Criminal Court under repression of international crimes. Wallace, in *International law* also looks at the International Criminal Court under jurisdiction with emphasize on issues like extradition.²⁴

Other texts and case book of general international law such as Dugard's *International Law: A South African Perspective*,²⁵ Shaw's *Principles of International Law*²⁶ and

²⁰ W. A . Schabas Introduction to the International Criminal Court. (Cambridge University Press, Cambridge, 2003).

²¹ B. Ferencz, An International Criminal Court: A Step Towards World Peace-A Documentary History and Analysis (Oceana Publishers, New York, 1980).

²² L. S. Sunga. The Emerging System of International Criminal law. Developments in Codification and Implementation (Brill Academic Publishers, The Hague, 1997)

²³ A. Cassese, International Law, 5th ed, (Oxford University Press, New York, 2005)

²⁴ R. M. M. Wallace, International Law. 2nd ed (Sweet and Maxwell, London, 2005)

²⁵ J. Dugard, International Law: A South African Perspective 2nd ed (Ndabeni So Africa: Juta 1994) pp.133 –151

Brownlie's Principles of Public International law²⁷ proffer only within the text of public international law, a very broad and general outline of the framework of international criminal law by their focus on historical developments of the tribunals up to the adoption of the Rome Statute.

²⁶ M. Shaw, Principles of International law 5th Ed. (Oxford University Press, Oxford, 1988)

²⁷ I. Brownlie, Principles of Public International Law 6th ed. (Oxford University Press, Oxford, 2003)

CHAPTER TWO

THE INTERNATIONAL CRIMINAL COURT: A HISTORICAL PERSPECTIVE

"Impunity cannot be tolerated, and will not be. In an interdependent world, the Rule of the Law must prevail." UN Secretary General Kofi Annan (1997)

2.1. Introduction

The twentieth century has witnessed the development of many norms in the field of international humanitarian and human rights law. The well being of the individual has become a central issue in international law and has influenced many other parts of the law. States have become liable for the treatment of individuals, be it foreigners or own nationals, and concepts like state sovereignty and non-intervention have undergone a considerable adaptation. At the same time, the twentieth century has been one of the most violent and brutal in human history. Not only did the First and Second World Wars witness the death of millions of people, but also did this century witness innumerable internal armed conflicts, which were as barbaric as international conflicts. The recent conflicts in Rwanda, Burundi, Democratic Republic Congo, Sierra Leone, Bosnia and Kosovo are but few examples here. In addition in many countries, without the existence of conflicts, there has been systematic policies of discrimination and denial of fundamental norms needed for survival, causing the death of millions of people, Cambodia under Khmer Rouge is the most obvious example here.¹ Armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people through out the world. As a result, more than 86 million civilians have died, been disabled or been stripped of their rights, property and dignity since the end of World War II. The world community has done very little for them or their families. Most victims have been forgotten and few perpetrators have been brought to justice. A

¹ H. V. Hebel, "An International Criminal Court-A Historical Perspective" in R.S.Lee (ed) The International Criminal Court: The making of the Rome statute. Issues.Negotiations.Results (TMC Asser Press, The Hague, 1999), p. 13.

culture of impunity seems to have prevailed.² Today's conflicts are often rooted in the failure to repair yesterday's injuries. The fight against impunity is not only a matter of justice, but is also inextricably bound up with the search for lasting peace in post-conflict situations. Unless the injuries suffered by the victims and their families are redressed, wounds will fester and conflict will erupt again in the future. Accountability is therefore a fundamental component of peace keeping.

The Rome Statute for the International Criminal Court entered into force on 1 July 2002. The election of the judges and prosecutor took place in April 2003. What was considered not so long ago merely a dream of a few visionaries has become a reality. The challenge is now for the court to concretely establish its authority as an indispensable institution to fight impunity and contribute to justice and peace in today's world society. The idea of setting up an international criminal court to bring to justice individuals, including leading state officials, allegedly responsible for serious international crimes goes back to the aftermath of the First World War. The attainment of that goal has been slow and painstaking. The process towards the eventual adoption of the statute for a Permanent International Criminal Court can be conceptualized in terms of various distinct phases, namely, (i) the abortive early attempts (1991-1945); (ii) criminal prosecutions in the aftermath of the second world war: the Nuremberg and Tokyo tribunals (1945-1947); (iii) elaboration by the ILC of the statute of a Permanent Court; (iv) the post cold war "new world order": the development of two ad hoc tribunals (1993-1994); (v) the drafting of the ICC statute (1994-1998)³

After the Nuremberg, Tokyo, Yugoslavia and Rwanda tribunals, the establishment of the ICC marks the important step on the road to international peace and criminal justice. The significance of the creation of the permanent criminal world court before which tyrants, torturers, mass killers and perpetrators of crimes can be held criminally accountable, even when they have acted in an official capacity or upon the command of superiors, cannot be

² R. S. Lee, "Rome conference and its contributions to international law", R. S. Lee (ed) The making of the Rome Statute. Issues. Negotiations. Results. (TMC Asser Press, The Hague, 1999), p. 2.

³ A. Cassese, International Criminal Law, (Oxford University Press, Oxford, 2002), p. 27.

denied. It is the realization of a long-held dream of all those opposing impunity and supporting human rights.⁴

2.2. Attempts to establish an international tribunal after the First World War (1919-1945)

During the 1920s, dozens of scholars of international renown, supported by numerous associations of international law, campaigned to have an international criminal court accepted. The voices in support of an international criminal court were raised all around the world, but the decision-makers were hard of hearing and the foreign ministers had their minds on matters which they regarded as more pressing than new legal innovations. Instead, they turned again to treaties and alliances. It took an outrageous act of terror to shock the nations into the realization that law might be a necessary tool to suppress international crimes.⁵

The aftermath of the First World War saw several failed attempts to create an international judicial body to try suspects for major crimes against humanity. The French and British moves to try Kaiser Wilhelm II were successfully opposed by the US, fearing a breach of head of states immunity. The Versailles Conference of 1919 and the Covenant of the League of Nation did not mention the concept of human rights, despite the 8.5 million lives lost in the World War 1.

Several initiatives were taken but it appeared the time was not yet ripe for the establishment a permanent court. When King Alexander and Louis Barthou were murdered in 1934, France, who had long favored international controls, demanded that the League takes actions on terrorists. The legal experts appointed by the league, led by Professor Pella of Roumania, drafted a convention establishing an international criminal court to repress terrorism. According to the terms of the convention, any nation that captured a terrorist would be obliged to try the offender, extradite him to the country where the crime was committed, or deliver the suspect to the international criminal court.

⁴ Supra, note 1, at p 7.

⁵ B. Ferencz, An International Criminal Court . A Step Towards World Peace. A Documentary History Analysis. (Oceana Publications, New York, 1980), p. 86.

The plan was clear and simple, and might have been effective-but it was not accepted. The terrorism convention went through several drafts, getting weaker every step along the way.⁶

This 1937 draft statute of the League of Nations for an international criminal court to try international terrorists never entered into force due to lack of sufficient ratifications. A 1944 proposal of the War Crimes Commission for the creation of a United Nations war crimes court to try Nazis was also rejected in favour of the ad hoc military tribunals of Nuremberg and Tokyo. Additionally, a 1954 draft statute for a permanent international criminal court produced by the ILC was frozen due to the political conflicts of the cold war. In deed, it is the fall of the Berlin wall, and subsequent vanishing of the East –West conflict that created the proper political climate for an international law criminal enforcement mechanism.⁷

It was not until 1922 that the Permanent Court of International Justice, sometimes called the World Court, was established by the League of Nations. Between 1922 and 1940 the court dealt with 29 cases between states and delivered 27 advisory opinions. The International Court of Justice replaced it in 1946 when the United Nations was founded. The world court however only handled disputes between states. Individuals or non-governmental groups could not bring cases nor could individuals or groups be tried.⁸

2.3. The International Military Tribunal for Nuremberg

On 5th January 1919, two months after the conclusion of the Armistice, which ended the First World War, and six months before the signing of the Peace Treaty at Versailles, there came into being in Germany a small political party called the German Labour Party. On the 12th September 1919, Adolf Hitler became a member of this party, and at the first public meeting held in Munich, on 24th February 1920, he announced the party's

⁶ Ibid.

⁷ A. P. Van der Mei, "The International Criminal Court: Establishment, Jurisdiction and Composition" 6 *Africa Legal Aid* (2003).

⁸See "justice unfettered? International justice in the human rights era" Retrieved at <http://www.irinnews.org/webspecials/RightsAndReconciliation/default.asp>. (Visited on 2nd July 2006).

programme. That programme, which remained unaltered until the party was dissolved in 1945, consisted of twenty-five points, of which the following five are of particular interest on account of the light they throw on the matters with which the Nuremberg Tribunal was concerned; that is (1) to demand the unification of all Germans in the greater Germany on the basis of the right of self-determination; (ii) to demand equality of rights for the German people in respect to other nations abrogation of the Peace treaty of Versailles and Saint Germain; (iii) to demand land and territory for the sustenance of the German people and the colonization of their surplus population; (iv) that only a member of the German race could be a citizen. A member of the race could only be one of German blood, without consideration of creed. Consequently, no Jew could be a member of the race; and (v) to demand abolition of mercenaries troops and formation of a national army.⁹

Of these aims, the one which seems to have been regarded as the most important, and which featured in almost every public speech, was the removal of the “disgrace” of the Armistice, and the restrictions of the Peace Treaties of Versailles and Saint Germain. In a typical speech at Munich on the 13th April 1923, for example, Hitler said the following with regard to the Treaty of Versailles:

The treaty was made in order to bring twenty million Germans to their deaths, and to ruin the German nation...at its foundation our movement formulated three demands, namely:

1. Setting aside of the peace treaty;
2. Unification of all Germans; and
3. Land and soil to feed our nation.¹⁰

Pursuant to the above policies, Germany embarked on aggression against various states despite signing non-aggression pacts with some of them. Fifty-seven nations were belligerents in World War II. The extent of misery they endured can never be

⁹ See “Origins and aims of Nazi party.” at www.yale.edu/lawweb/avalon/imt/proc/judnazi.htm Retrieved on 8th August 2006.

¹⁰ Ibid.

calculated. At least fifteen million combatants were killed. The loss of civilian lives was even greater. Nations which sought power and glory ended in ruins. The rules and customs of war, The Hague and Geneva Conventions, the treaties and pacts renouncing war, were little more than scraps of paper. Three million Soviet prisoners died in captivity. The murder of six million Jews, who were either worked to death or sent helplessly to gas chambers for extermination and the slaying of millions of other civilians solely because of race, religion or ideology were offences against all mankind. "Military necessity" provided the excuse for "total war," which was met with "total war." After German dive-bombers and uncontrollable rockets reigned death on English cities the allies retaliated with saturation firebombing of Germany. The war against America started with the treacherous attack of Pearl Harbor. It ended when United States bombers immolated the Japanese cities of Hiroshima and Nagasaki, and all their human, animal and plant inhabitants with atomic bombs, which polluted the atmosphere and damaged the gene of future generations.¹¹

Following the above atrocities, the victors were at loss on what to do with the Germans over the atrocities committed during this war. The Nuremberg process had its genesis during a series of conferences among the Allies held during the Second World War. The first important step occurred in London with the articulation of the "St James Declaration" of January 13, 1942, in which states occupied by Nazi Germany resolved, *inter alia*, to work together to bring to justice the perpetrators of crimes committed in Europe.¹² The establishment of the United Nations War Crimes Commission in October 1943 was the second major step, though it has been described as "weak evidence – collecting body that left investigation to its member states, many of which were under German occupation". In any case, by the time Nuremberg was in the works, the United Nations War Crimes Commission was unceremoniously killed.¹³ The International Military Tribunal at Nuremberg was unique for both its aims and the legal basis of

¹¹ B. Ferencz, An International Criminal Court. A Step Towards World Peace-A Documentary History and Analysis, (Oceana Publications, New York, 1998), p. 66.

¹² D. A. Mundis. "Completing the Mandates of the Ad hoc International Criminal Tribunals: Lessons from the Nuremberg Process?", 28 Fordham International Law Journal 593(2005).

¹³ *Ibid.* p 594.

proceedings. The period between the two world wars had produced international peacekeeping agreements without either the will to implement them or the mechanisms to enforce them. Several European signatories of the 1928 Kellogg-Briand, which promised to renounce war as an instrument of foreign policy, broke their word within a few years. It was only after intensive talks in London on 8 August 1945 that France, the Soviet Union, the United States and Great Britain signed the charter creating the IMT for the prosecution and punishment of major war criminals.¹⁴ Earlier, Winston Churchill had proposed that the leaders of the German regime be simply taken out and executed, and his Foreign Secretary, Anthony Eden believed that the guilt of individuals was “so black that they fall outside the scope of any judicial process”. Joseph Stalin also wanted to keep proceedings in the political realm, agreeing in principle to a tribunal only as a Soviet-style “show trial” which would dispense preordained capital punishment.¹⁵

From the beginning, the United States took the lead in creating the post-war world, particularly concerning the issue of war crimes. American involvement in the Nuremberg process was critical throughout, and the trial would never have materialized if not for American efforts. America’s role in the Nuremberg trials set the tone for America’s involvement in the post-war world, one of total involvement and leadership. As early as 1942, a broad consensus developed among the Allied nations concerning the possibility of action against the German political and military leaders should the Allies prove victorious. The Inter-Allied Commission, consisting of Czechoslovakia, Poland, Norway, Belgium, the Netherlands, Luxembourg, France, Greece, and Yugoslavia issued the St. James Declaration in London in January, 1942, which committed the signatories to “...the punishment, through the channel of organized justice, of those guilty of or responsible for crimes committed against them.” Later, in 1942 the United States, the United Kingdom, and the Soviet Union all made separate declarations of their intent to

¹⁴ R. Cawston, “Nuremberg and the Legacy of Law.” Retrieved at http://www.opendemocracy.net/democracy-institutions_government/nuremberg (Visited on 7th August 2006).

¹⁵ Ibid.

punish war criminals. Both these statements, however, were extremely vague, and lead to no real formulation of policy.¹⁶

The Moscow Declaration of November 1943, although similarly vague and noncommittal, did introduce the possibility of a separate tribunal for "...major criminals whose offenses have no particular geographical location." Up until the Tehran Conference, later that November, Allied opinion was still split on the nature of the action to be taken. British opinion favored "expedient political action," or summary executions of leading Nazi offenders, while Soviet opinion leaned towards a trial or international tribunal. Likewise, American policy was still in its formative stages, and would not be resolved until the middle of 1945.

In early September of 1944 the Secretary of the Treasury, Henry Morgenthau Jr., proposed a plan of action, later referred to as the Morgenthau Plan, calling for harsh post-war treatment of Germany and German leaders. The Joint Chiefs of Staff (JCS) had already begun debate on post-war war crimes policy in August of 1944, but Morgenthau's proposal to the President and Henry Stimson's alternate occupation plan submitted four days later created significant administrative debate and prevented the JCS from developing a coherent war crimes policy until the middle of 1945. Nevertheless, in October of 1944 the Joint Chiefs of Staff created the War Crimes Office as a division of the Office of the Judge Advocate General (JAG) Army, to act as a coordinating and head agency for all State, War, and Navy Departments in the area of war crimes. By January of 1945, the President had accepted Henry Stimson's proposal for a large international tribunal, and the Joint Chiefs of Staff created the Office of Chief of Counsel for the Prosecution of Axis Criminality (OCCPAC), on May 2, 1945. Supreme Court Justice Robert H. Jackson was appointed Chief of Counsel on the same day. At the founding of the United Nations in San Francisco on May 3, 1945, the American representatives submitted a draft trial proposal to the representatives from France, the Soviet Union, and

¹⁶ J. Brunner, "American Involvement in the Nuremberg war crime trial process" at http://www.umich.edu/~historyj/pages_folder/articles/American_Involvement_in_the_Nuremberg_War_Crimes_Trial_Process.pdf Retrieved on 8th August 2006.

the United Kingdom, who agreed to the proposal. Justice Jackson's interim report to the President in June of 1945, which outlined the charges of conspiracy, crimes against peace, war crimes, and crimes against humanity, further clarified and publicized American policy. This position became the basis of the formal declaration of an International tribunal at the London Conference in late June and early August of 1945.¹⁷

Negotiations on the statute for the International Military Tribunal (IMT), which would sit in Nuremberg, took place in London between 26th June and 8th August 1945. France, the Soviet Union, the United Kingdom, and the United States participated in these negotiations. The statute was subsequently adhered to by 19 other states. According to Article 1, the IMT was established "for the just and prompt trial and punishment of the major war criminals of the European axis". The tribunal would consist of four judges, one from each of the four victor states. Twenty-four persons were indicted; finally twenty-two were tried. In addition 6 organizations were indicted, with a view of having them declared as illegal. Members of such organizations could subsequently be held criminally responsible for their membership.

2.3.1. Jurisdiction of the Nuremberg Tribunal

According to the charter of the international Military tribunal for Nuremberg the tribunal had jurisdiction over the following offences:-¹⁸

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder

¹⁷ Ibid.

¹⁸ Article 6 of the Charter of the International Military Tribunal for the Nuremberg. The Charter of the IMT is available at <http://www.yale.edu/lawweb/avalon/imt/proc/judsov.htm>. Visited on 7 August 2006.

of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.¹⁹

2.3.2. Criticism of the Nuremberg Tribunal

There are four main criticisms that have been labeled against Nuremberg. First, that it was a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law. Second, that the defendants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war. Third that the Nuremberg Tribunal functioned on the basis of limited procedural rules that inadequately protected the rights of the accused. Finally, that it was a tribunal of first and last resort, because it had no appellate chamber.²⁰

2.3.2.1. Victor's justice

It must be remembered that the Tribunal was charged with enforcing the London charter, which had been created by victors fifteen months earlier. The victor's had to make a decision on what to do with Germany. Allied crimes were made exempt from prosecution, which led some observers to label the trial as "victor's justice. Secondly, the Nuremberg judges came from the same four countries as the prosecutor: the United States, the United Kingdom, Soviet Union and France, which together had formed the International Military Tribunal. The defense attorneys, in contrast, were all Germans.

¹⁹ Ibid.

²⁰ M. P. Scharf, "Have We Really Learned the Lessons of Nuremberg?" at http://justicescholars.org/pegc/archive/DoD/docs/Lessons_of_Nuremberg.doc (visited on 8th August 2006).

2.3.2.2. Application of Ex Post Facto Laws

Perhaps the greatest criticism of Nuremberg was its perceived application of ex post facto laws. The defendants were accused of committing crimes that were not legally defined as crimes at the time they were committed, such as waging aggressive wars. This was against the principle of *nulum crimen sine lege, nulla poena sine lege* and the prohibition against *ex post facto* criminalization.

2.3.2.3. Violations of the Defendant's Due Process

The Nuremberg Tribunal has been severely criticized for allowing the prosecutors to introduce ex parte affidavits against the accused over the objections of their attorneys. Such affidavits, it has been argued, seriously undermined the defendant's right to confront witnesses against them. The United States Supreme Court has expressed the importance of this right as follows: "Face-to-face confrontation generally serves to enhance the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person."²¹

2.3.2.4. Right of Appeal

A final criticism of Nuremberg was that it did not provide for the right of appeal. The Charter of the tribunal did not provide for the right of appeal, which is a fundamental right in any criminal trial.

2.3.6. Achievements of Nuremberg

The International Military Tribunals were important in many respects; first they broke the monopoly over criminal jurisdiction concerning international crimes like war crimes, which until then was firmly held by states. For the first time non-national, or multi national institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope. Secondly, new offences were envisaged in the London Agreement and made punishable; crimes against humanity and crimes against peace. Whether or not this was done in breach of the principle of *nullum crimen sine*

²¹ Ibid.

lege, it is a fact that since 1945 those crimes gradually became the subject of customary international law prohibitions. Thirdly the statutes and case law of the IMT, the International Military Tribunal For the Far East and the various tribunals set by the allies in the aftermath of Second World War contributed to the development of legal norms and standards of responsibility which advanced the international rule of law, for example, the elimination of the defence of 'obedience to superior orders,' and the accountability of heads of state. Finally, a symbolic significance emerged from these experiences in terms of their moral legacy, which was drawn on by those seeking a permanent, effective and politically uncompromised system of international criminal justice.²² One of the many legacies of the Nuremberg trials has been the establishment of the International Criminal Court, a permanent war-crimes court, in the Netherlands. The IMT resuscitated human rights and led to the adoption of various human rights instruments like the Genocide Convention and the Geneva Conventions of 1949.

2.4 The Tokyo Tribunal for the Far East.

While Nuremberg proceedings were underway, at the other side of the world, General Douglas Mac Arthur proclaimed the establishment of the International Military Tribunal for the Far East (IMTFE). A charter, similar to that of the IMT, authorized the international court to arraign Far Eastern war criminals on charges of conspiracy, crimes against peace, conventional war crimes and crimes against humanity.²³ The charter was largely based on that of the Nuremberg tribunal. It should however be noted that unlike the IMT charter, the Charter for the IMTFE was not negotiated between Allies but was drafted by the Americans, chiefly by J.B. Keenan, subsequently the US Chief prosecutor at the trial. It was then issued as an executive decree of the U.S General D. Mac Arthur. In essence the Charter reproduced the substance of the statute of the IMT. The procedure was similar to that which unfolded at Nuremberg.²⁴ The tribunal, consisting of not less than six and

²² *Supra*, note 3, at p. 323.

²³ B. Ferencz. An International Criminal Court. A step towards world peace. A Documentary history. (Oceana Publications. New York. 1980) p. 78.

²⁴ *Supra* note 3 at p. 383.

not more than eleven members, was to be appointed by the Supreme Commander for the Allied Powers, who would also designate the president of the court. Neither the official position of the accused nor the fact that he acted according to government or superior orders would excuse a crime. This could only be considered in mitigation.²⁵ The tribunal was given power to impose sentences of “death or such other punishment as shall be determined by it to be just.” The tribunal consisted of eleven judges, one from each of the countries with which Japan had been at war. There was only one chief prosecutor who was assisted by ten associate prosecutors. The tribunal tried a total of 28 persons.²⁶ The Japanese Emperor did not belong to the group of persons indicted before the tribunal. The trial lasted from April 29, 1946 to November 12, 1948. The official records of the session covered almost 50,000 pages. Over 400 witnesses were heard and over 4000 documents were received in evidence. It was the “biggest trial in record of history.” Seven were sentenced to death by hanging and most of the others to imprisonment for life.²⁷

2.4.1. Jurisdiction of the Tokyo Tribunal

The trial of Japanese leaders at the Tokyo trials of 1946-1948 presented a perfect opportunity to apply and build on the Nuremberg precedents. According to the statute of the court, the tribunal had jurisdiction over the following offences:

- (a) Crimes against Peace; namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) Conventional War Crimes; namely, violations of the laws or customs of war;
- (c) Crimes against Humanity; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution

²⁵ Article 6 of the Charter of the IMTFE.

²⁶ *Supra*, note 2, at p. 21.

²⁷ *Supra*, note 23, at p. 78.

of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.²⁸

2.4.2 Criticism of Tokyo Tribunal

It is important to note that the Charter for the Tokyo Tribunal was produced by way of executive decree by the United States. However, it was modeled along the provisions of the Nuremberg Charter, thereby subjecting the tribunal to the same criticism as Nuremberg. The Tokyo trials were the source of much controversy both during and after the event. Some have claimed that the trial was either a vehicle for America's revenge for the treacherous attack on the Pearl Harbour, or a means of assuaging American national guilt over the use of atomic weapons in Japan.²⁹

2.5 The International Criminal Tribunal for the Former Yugoslavia

In 1908, the Austro-Hungarian Empire formally annexed Bosnia. The move provoked neighboring Serbia, which coveted Bosnia because of its large Serbian population. When a young Bosnian Serb assassinated Austrian Crown Prince Ferdinand in Sarajevo in the name of Serbian national unity, World War I began. In 1918, Bosnia was incorporated into the newly formed Kingdom of Serbs, Croats, and Slovenes (later renamed Yugoslavia). During World War II, the Nazi puppet state in Croatia annexed all of Bosnia. This period saw mass murder of Serbs by the ruling Croatian fascists, as well as massacres of Muslims and Croats by Serb nationalists. The communist Partisans, led by Josip Broz, popularly known as "Tito," led the resistance. After the war, Bosnia-Herzegovina became one of six republics in the reconstituted Federal Republic of Yugoslavia. Tito ruled from 1945 until his death in 1980.³⁰ In the 1980s, Bosnia, like the

²⁸ Supra, note 19, Article 5.

²⁹ A Cassese, *International Criminal law* (Oxford University Press, Oxford, 2002), p 322.

³⁰ Y Aksar, *Implementing International Humanitarian Law* (Taylor & Francis Group, Ohio, 2004), p. 67. See also Nations Encyclopedia Bosnia-Herzegovina at <http://www.nationsencyclopedia.com/World-Leaders-2003/Bosnia-Herzegovina-POLITICAL-BACKGROUND.html> Retrieved on 1st July 2006.

other republics, experienced rising anticommunist and nationalist sentiment. In 1990, a number of independent political parties were formed, including nationalist Muslim, Serb, and Croat parties. Multiparty elections were held in November 1990, based on a system of proportional representation by nationality.³¹ The nationalist parties ran on a platform of defense of their cultures, but none of them called for dismembering Bosnia. The election resulted in a Parliament divided along ethnic lines. The presidency of the republic included two members from each of the three ethnic groups, plus one ethnically mixed member. Alija Izetbegovic, head of the Democratic Action Party (SDA), was chosen to lead the presidency. The three nationalist parties formed a coalition government. The Bosnian government at first did not seek independence but rather promoted remaining in a new Yugoslav federation. In March 1991, however, the presidents of Serbia and Croatia secretly agreed to partition Bosnia between them. By fall 1991, working closely with Belgrade, the Bosnian Serb Democratic Party (SDS) had established numerous "Serbian autonomous regions" throughout Bosnia and began forming its own militias.³² The SDS declared a "Serbian Republic of Bosnia and Herzegovina," uniting these regions. In January 1992, an independent Serb republic in Bosnia was created, claiming over 60% of the Republic's territory. Meanwhile, the European Union (EU) backed the idea of holding a referendum on independence as a preliminary move to international recognition. The Bosnian Muslim and Croat communities voted overwhelmingly in favor of independence, but the Bosnian Serb leadership called for a boycott of the vote. In April 1992, Bosnia-Herzegovina gained recognition from the EU and the United States as an independent state. About the same time, Serbian irregular forces, backed by the Yugoslav Army, launched attacks throughout the republic. They quickly seized more than two-thirds of the Bosnian territory, carrying out policies of "ethnic cleansing" to drive non-Serb populations out of their territory. More than two million people were driven from their homes, creating the greatest flow of refugees in Europe since World War II. An estimated 200,000 persons were killed. Fighting between ethnic Croats and Muslims between 1993 to 1994 also resulted in

³¹ D. Shrager and R. Zacklin, "The International Criminal Tribunal for the Former Yugoslavia" 5 European Journal of International Law 360(1994).

³² M. C. Bassiouni and P. Manikas. The Law of Criminal Tribunal for the Former Yugoslavia (Transnational Publishers, New York, 1996), p 12.

"ethnic cleansing" by both sides. In response to U.S. and European pressure, Bosnian Croat and Muslim leaders agreed to a ceasefire between their communities and to the formation of a Muslim-Croat federation in Bosnia-Herzegovina. In this way, the Croat and Muslim communities were officially allied against their common Serb enemy.³³

Numerous international attempts to negotiate a peaceful settlement failed. United Nations (UN) peacekeepers on the ground, with a mandate to provide humanitarian aid to the victims of the war, were unable to keep the peace. In August 1995, a North Atlantic Treaty Organization (NATO) bombing campaign, coupled with a series of successful Muslim-Croat counteroffensives against the Bosnian Serb forces, brought the parties to the negotiating table. Serbian president Slobodan Milosevic accepted responsibility for the Bosnian Serb leadership. After three weeks of negotiations at Wright-Patterson Air Force Base in Dayton, Ohio, the presidents of Bosnia, Croatia, and Serbia agreed to a wide reaching peace accord (known as the "Dayton Accords") in November 1995.

Recognizing that the situation in the former Yugoslavia constituted a threat to international peace and security, the Security Council by Resolution 827³⁴ established the International Criminal Tribunal for the former Yugoslavia (ICTY) under Chapter VII of the Charter. This resolution was passed on 25 May 1993 in the face of serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.³⁵ The Statute adopted by the Security Council set forth the framework for the tribunal's operation. The court has three organs: the chamber, the prosecutor and the registry. The chambers initially comprised of two trial chambers of three judges each. Unlike Nuremberg and Tokyo tribunals, it has an appeal chamber. It consists of five judges. The appeal's chamber also hears appeals from the Rwanda tribunal. The tribunal is ad hoc and trials are conducted without a jury.³⁶ When the ICTY was established by the Security Council in May 1993, it held the promise of being

³³ Ibid.

³⁴ UN Doc. S/Res/827 (1993).

³⁵ See the website of the International Criminal Tribunal for the former Yugoslavia at www.un.org/icty/glance/index.htm (Visited on 1st July 2006).

³⁶ G. K. Mc Donald, "Reflections on the contributions of the International Criminal Tribunal for the Former Yugoslavia," 24 *Hastings International and Comparative Law Review* 157(2001).

the first international tribunal to prosecute the crime of genocide. Prior to the establishment of the ICTY an application was made to the International Court of Justice by Bosnia and Herzegovina in early 1993. They relied on article XI of the 1948 Convention and focused more attention on the claim that genocide was being committed in the territory of the former Yugoslavia. The provisional measures ordered by the court, on April 8, 1993, seemed to confirm the credibility of the charge.³⁷ A few days later, in a resolution referring to the ICJ order, the Security Council used the word “genocide” for the first time in its history.³⁸

2.5. Jurisdiction of the International Criminal Court for the former Yugoslavia

2.5.1 Jurisdiction Rationae personae

According to the statute of the court the tribunal shall have power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.³⁹ The tribunal shall have power to prosecute persons violating law and customs of war in the territory of the former Yugoslavia.⁴⁰

2.5.2. Jurisdiction Rationae Materiae

The tribunal shall have power to try the offence of genocide, grave breaches of the Geneva Conventions of 1949, crimes against humanity and violations of the law and customs of war.

2.5.3. Jurisdiction Rationae Temporis

³⁷Bosnia & Herzegovina V. Yugoslavia (Serbia & Montenegro) Requests for the indication of provisional measures, 1993. I.C.J. 3, 16 (1993).

³⁸ UN.Doc. S/RES/819(1993). See also W. A. Schabas, “Was Genocide Committed in Bosnia and Herzegovina?: First Judgments of the International Criminal Tribunal for the Former Yugoslavia,” 25 *Fordham International Law Journal* 89(2002).

³⁹ Article 1 of The Statute of the International Tribunal for the Former Yugoslavia; UN Doc. S/RES/827 (1993).

⁴⁰ Ibid ,article 3

The tribunal is responsible for the prosecution of the above offences committed since 1991 in the territory of the former Yugoslavia

2.5.4. Jurisdiction Rationae Loci

The jurisdiction of the tribunal is limited to the offences committed in the territory of the former Yugoslavia since 1991

2.6. The International Criminal Tribunal for Rwanda

Rwanda lies in the heart of Africa, bordered by the Democratic Republic of Congo, Burundi, Tanzania and Uganda. It is densely populated, with 7.3 million inhabitants, who are still recovering from the human, economic and environmental destruction caused by decades of ethnic conflict, culminating in the genocide and civil war of 1994. Officially, the people fall into three ethnic divisions – 84 per cent Hutu, 15 percent Tutsi and 1 per cent Twa – but in reality, years of intermarriage and shared customs have integrated the people. In pre-colonial times distinctions were generally class-based – Tutsis were usually landowners, Hutus mainly agricultural laborers. Belgian colonial rule (1916-1962) brought with it more rigid distinctions, as Tutsis were favored in terms of education and employment, and identity cards were introduced to distinguish their ethnicity. This led to tensions between the groups.⁴¹ In 1959, civil war led to the overthrow of the Tutsi king, and independence three years later resulted in a Hutu-led government. Over the next several years, thousands of Tutsis were killed, and an estimated 150,000 were driven into exile in neighbouring countries. The children of these exiles later formed the rebel group Rwandan Patriotic Front (RPF) and began a civil war in 1990. Ethnic tensions continued to rise in Rwanda and also in its neighbouring countries.⁴²

These regional tensions finally came to a head. In April 1994, when a plane carrying Rwandan President Habyarimana and the new President of Burundi was shot down. This gave fresh impetus to the fighting, resulting in genocide in Rwanda, as Hutu extremists

⁴¹ V Morris and M. P. Scharf, The International Criminal Tribunal for Rwanda, (Transnational Publishers, New York, 1989), p.40.

⁴² J.R. W.D. Jones. The practice of the International Criminal Tribunal for the Former Yugoslavia and Rwanda (Transnational Publishers New York, 2000),p18.

tried to exterminate all Tutsis, and also moderate Hutus. The fighting claimed at least 900,000 Rwandan lives. A further 2 million Hutu refugees, many fearing Tutsi retribution, fled to the Democratic Republic of Congo (formerly known as Zaire), Tanzania and Burundi. In 1996, after peace had returned to Rwanda, instability in the DRC caused around 700,000 Rwandan refugees to return home, followed by over 500,000 returnees from Tanzania and 60,000 from Burundi. By the end of 1997 over one million people had returned to their homeland.⁴³

Recognizing that serious violations of humanitarian law were committed in Rwanda, and acting under Chapter VII of the United Nations Charter, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994.⁴⁴ The purpose of this measure was to contribute to the process of national reconciliation in Rwanda and the maintenance of peace in the region. The International Criminal Tribunal for Rwanda was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period.⁴⁵

2.6. Jurisdiction of the International Criminal Tribunal for Rwanda

2.6.1. Jurisdiction Rationae Personae

According to the Statute of the International criminal Tribunal for Rwanda, the Tribunal has power to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan

⁴³ See background to the Rwandan Genocide at <http://www.christian-aid.org.uk/world/where/eagl/rwanda2.htm> (Visited on 7th August 2006) See also J.B.Fink, "Deontological, Retributivism and the Legal Practice and International Jurisprudence: The case of the International Tribunal for Rwanda." *2 Journal of African Law*.101 (2005).

⁴⁴ UN Doc S/Res/955 (1994).

⁴⁵ See International Criminal Tribunal for Rwanda website "General information about the court." at www.icttr.org (Visited on 1 July 2006).

citizens responsible for genocide and other violations committed in the territory of neighboring states between 1 January 1994 and 31st December 1994.⁴⁶

2.6.2. Jurisdiction Rationae Materiae

The international tribunal has power to try the offence of genocide, crimes against humanity and violations of common Article 3 of the Geneva Conventions and Additional Protocol II. The Statute details the elements of what constitute these crimes.⁴⁷

2.6.3. Jurisdiction Rationae Temporis

The temporal jurisdiction of the court is limited to the period between 1st January 1994 to 31st December 1994.⁴⁸

2.6.4. Jurisdiction Rationae Loci

The territorial jurisdiction of the court extends to the territory of Rwanda including its land, surface and airspace as well as the territory of neighboring states in respect of serious violations of international humanitarian law committed by Rwandan citizens.⁴⁹

2.7. Jurisprudential Contributions of the ICTY and the ICTR

Although far from perfect, the ICTY and its sister the ICTR have addressed the greatest gaps in international humanitarian law. The ICTY has expanded the jurisprudence of international humanitarian law. These two courts are the very first ones in international law to define rape and interpret the Genocide Convention of 1948. Secondly, they have demonstrated that the rule of law is an integral part of the peace process.⁵⁰ Finally the courts decisions on individual criminal responsibility have ensured that those who aid in commission of crimes are held accountable as well as the primary perpetrators.⁵¹ In the

⁴⁶ Article 1 of the Statute of the International Criminal Tribunal for Rwanda. UN Doc S/RES/955 (1994).

⁴⁷ Ibid..

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Supra, note 3, at 580.

⁵¹ Ibid.

Prosecutor vs Jean Paul Akeyesu⁵²The ICTR was the first court to define rape in international law and to find that rape if committed with genocidal intent, amount to an act of genocide. It is also the first time that an international criminal tribunal tried and convicted an individual for genocide and international crimes of a sexual nature. The *Akeyesu* judgment was also groundbreaking for its affirmation of rape as an international crime. Apart from elucidating the elements the offence, this judgment and its successors are notable for their finding that rape may form part of the *actus reus* of genocide. The ICTR is also the first court to apply the Genocide Convention. The court emphasized that the crime of Genocide required *dolus specialis* (specific intent to destroy in whole or in part a national, religion, ethnic or racial group) and further defined what a protected group is within the Genocide Convention of 1948.⁵³ In Prosecutor vs Jean Kabanda⁵⁴the Prime Minister of Rwanda was held liable for genocide, war crimes and crimes against humanity because he exercised *de jure* and *de facto* authority over members of his government as well as senior civil servants and military officers. In Prosecutor vs Alfred Musema⁵⁵ the trial chamber emphasized that an accused person may incur individual criminal responsibility for inchoate offences under the Statute of the ICTR.⁵⁶

2.7.6 Accountability of leaders

From the outset, the Prosecutor of the ICTR concentrated on those individuals who were alleged to have been in positions of leadership in Rwanda in 1994 and bore the gravest responsibility for the crimes committed. The Tribunal's focus on leadership is illustrated by the fact that the 25 persons who have received judgments so far include one prime minister, four government ministers, two prefects, five bourgmestres, as well as media and military leaders. The 25 persons currently on trial include seven ministers, one parliamentarian, two prefects, two bourgmestres, and 10 military leaders. There are also members of the clergy on the ICTR list of convicts and indictees. Most of the more than 60 accused persons, who fled Rwanda in 1994, would probably not have been brought to

⁵² ICTR-96-4.

⁵³ The UN Convention on the Prevention and Punishment of the Crime of Genocide was adopted by General Assembly Resolution 261 (III) on 9 December 1948 .

⁵⁴ ICTR- 97-23.

⁵⁵ ICTR-96-13.

⁵⁶ *Supra* note 49. See also K.Kindiki. "The Jurisprudential Contributions of the ICTR to International Humanitarian Law," Zambian Law Journal 35(1999).

justice had it not been for the Tribunal's investigations, insistence upon their arrest and subsequent requests for transfer to Arusha. Many states are reluctant to initiate investigations and institute criminal proceedings at their own expense against individuals who may have committed crimes in other countries. Extradition to other countries is also a cumbersome process, assuming that a request is made at all.⁵⁷

2.7.7. Fair trial by an impartial tribunal

The right of the accused to a fair trial and an impartial Tribunal is guaranteed in Article 20 ICTR Statute. The ICTY statute has similar provisions. The Tribunals have carried out all trials in accordance with international standards of justice. One of the reasons why some cases may be time-consuming is to dispel any doubt as to whether all international standards of justice are complied with. By conducting proceedings, which are beyond reproach, the Tribunal has set an important precedent and has contributed to the development of the international rule of law. Besides efficiently prosecuting a person for having allegedly committed a given crime, another aim of the trial may be to contribute to establishing a historical record. This may require more time and effort than would be necessary simply to complete the case.⁵⁸

2.8. Conclusion

The development of international criminal law generally, and the International Criminal Court borrows heavily from the Nuremburg tribunal, the International Military Tribunal for the Far East, the International Tribunal for the Former Yugoslavia and the International Criminal tribunal for Rwanda. From the criticism labeled against the above tribunals, the ICC Statute has endeavored to improve on issues such as ex post facto criminalization. Emerging jurisprudence from the ICTR and the ICTY such the definition of rape in international law have been codified in the Rome Statute as crimes against humanity. The lack of an appeal tribunal in Nuremburg and the IMFTE has also been gradually dealt with through an appeal chamber for the ICTR and the ICTY. This development has been maintained in the ICC Statute. The ICC Statute has also improved

⁵⁷ E. Mose. "Appraisal of the Role of the ICTR." 3 Journal of International Criminal Justice 920 (2005).

⁵⁸ Ibid.

the trial process through the creation of a pretrial chamber. In the next chapter, We discuss the statute of the International Criminal Court, the Rome Conference and the structures of the Court.

CHAPTER THREE

THE INTERNATIONAL CRIMINAL COURT

3.1. Introduction

A historical survey of efforts to create an International Criminal Court started with the First World War, 1914 to 1918. This interest was later rekindled after the Second World War, when the Nuremberg and Tokyo tribunals were created.¹ In the years following the Nuremberg and Tokyo proceedings, there was unmistakable desire to generalize the experience gained from the ad hoc jurisdictions of the international military tribunals, as evidenced by the UN General Assembly's statement confirming "the principles of international law recognized by the Nuremberg tribunal and the judgments of the tribunal."² One hundred and sixty states participated in the United Nations Diplomatic Conference of the Plenipotentiaries on the establishment of an International Criminal Court held from 15 June to July 1998 to draft the statute of an International Criminal Court, the establishment of which had been a challenge for the United Nations for more than 50 years. Those states made a last minute decision to confer upon the court the jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. They agreed to that compromise in order to secure the conclusion of the Statute after they had reached a deadlock over the crime aggression. The compromise led to inclusion of aggression as one of the four crimes within the jurisdiction of the court. That was not without a price, it resulted in a main defect in the statute. The statute does not contain a readily applicable provision on aggression which according to the whole international community, represented by the General Assembly, is the gravest of all crimes against peace and security throughout the world.³

¹ M. C. Bassiouni, *International Criminal Law* (Transnational Publishers, New York, 1986) p. 3.

² General Assembly Resolution 177 (II) of 21 November 1947; UN Doc. A/519 (1947).

³ M. M. Goma, "The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime" in M. Politi & G. Nesi (eds) *The International Criminal Court and the Crime of Aggression*. (Ashgate Publishing Company, Oxford, 2001), p. 55.

It had been 50 years since the United Nations first recognized the need to establish an International Criminal Court, to prosecute crimes such as genocide. In resolution 260 of 9 December 1948,⁴ the General Assembly, "recognizing that at all periods of history genocide had inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required" adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that Convention characterizes genocide as "a crime under international law", and Article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory in which the act is committed or by such international penal tribunal as may have jurisdiction . . ." In the same resolution, the General Assembly also invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . ." ⁵Following the Commission's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised draft statute in 1953. The General Assembly, however, decided to postpone consideration of the draft statute pending the adoption of a definition of aggression.

Since that time, the question of the establishment of an international criminal court was considered periodically. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide -- in the guise of "ethnic cleansing" -- once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council established the ad hoc international criminal tribunal for the

⁴ UN Doc. A/CN.4/15 (1949).

⁵ UN Doc .A/231 (1946).

Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future.⁶

Shortly thereafter, the International Law Commission successfully completed its work on the draft statute for an international criminal court and in 1994 submitted the draft statute to the General Assembly. To consider major substantive issues arising from that draft statute, the General Assembly established the ad hoc committee on the establishment of an international criminal court, which met twice in 1995. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the establishment of an international criminal court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee, which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text.⁷

3.2. The International Law Commission work on the ICC

The Nuremberg and Tokyo trials as symbols of a new, fairer world order had aroused great hope through out the world. It was now believed that the world had gained an effective instrument both for punishing violations of the law and deterring such acts. Accordingly, the UN General Assembly welcomed the Nuremberg judgments in its resolution 95(1) of 11 December 1946,⁸ and affirmed the principles on which it was based.

The UN General Assembly directed the UN Committee on codification of international law to treat the formulation of the Nuremberg principles, either in the form of a general codification of offences against peace and security of mankind or in the form of an international criminal court, as an urgent task.⁹ At the same time, the ILC was directed to

⁶ UN Doc. S/RES/827 (1993).

⁷ See Background work of the international Criminal Court at www.un.org/law/icc/general/overview.htm. Visited on 20th July 2006.

⁸ UN Doc. A/64 (1946.)

⁹ B. Graefrath. "Universal Criminal Jurisdiction and the International Criminal Court," 1 European Journal of International Law 67(1990).

formulate the principles of Nuremberg and, additionally, to draw up an international code that would encompass all “crimes against the peace and security of mankind”.¹⁰

At its very first meeting, the ILC appointed two rapporteurs to study these questions, R. J. Alfaro and A. E. F Sandstrom. Alfaro regarded creation of an international criminal court as desirable and possible. Sandstrom, however, was of the opinion that this sort of court could not be effective in the given international circumstances and therefore was undesirable. Following exhaustive discussions the ILC, by a large majority, came to the finding that creation of such an organ was desirable and possible.¹¹ The task of formulating a draft statute for the establishment of an international criminal court was assigned to another special rapporteur who submitted his first report to the ILC in March 1950.

The General Assembly, in the meantime, decided to sever the direct link between discussions surrounding the potential establishment of an international criminal court and discussions on the proposed code and set up a committee on international criminal jurisdiction to study the question regarding the court. Both tasks were accomplished rapidly. As core elements of its codification of the Nuremberg law finished in 1950, the ILC, in conformity with the Tribunal’s Charter acknowledged that criminal responsibility under international law is independent of the provisions of a national legal order. The ILC produced the following principles from that exercise:-¹²

Principle I.

Any person who commits an act which constitutes a crime under international law is responsible therefore liable to punishment.

Principle II.

The fact that internal law does not impose a penalty for an act, which constitutes a crime under international law, does not relieve the person who committed the act from responsibility under international law.

Principle III.

¹⁰ United Nations General Assembly Resolution 177/(II), 21 November 1947; UN Doc A/519 (1947).

¹¹ Vol. II. ILC Year Book (1950), p.15.

¹² UN Doc A/1316.

The fact that a person who committed an act, which constitutes a crime under international law, acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle IV.

The fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.

Principle V.

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI.

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(I) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War Crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation of slave-labor or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII.

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

In addition, the ILC fell in line with the concept on which the Nuremberg trials were based, namely, that there are three main groups of crimes against peace and security of mankind: crimes against peace, war crimes, and crimes against humanity. It is on this

basis that the first draft code of offences against peace and security of mankind was adopted in 1954. However, both the codification of the Nuremberg principles and the first version of the code of offences were only taken note of by the UN General Assembly, and not discussed further. At the same time, a special committee of the General Assembly was entrusted with the task of drawing up the charter of an international criminal court. In a surprising short period of time, the committee succeeded in preparing this charter. The text was further revised in 1953, but all work on the project ground to a halt after that.¹³

The ostensible reason for postponing the debate about the substance and procedural aspects of the subject matter was that a definition of aggression had first to be agreed upon before further progress could be made, since the crime of aggression was the core of the crimes against peace and security of mankind. However the truth of the matter was that tensions between East and West had led to a stalemate, for each of the super powers was afraid that the international norms of criminal law to be formulated might one day also be used against it. In this way, they might not only be morally and legally discredited, but also politically affected, if an action undertaken by them was one day to fall foul of world opinion. To date, the industrially strong Western powers have decisively opposed universal criminal jurisdiction in the context of a code of offences against the peace and security of mankind fearing that they might thereby lose rights of diplomatic protection for their citizens or be forced to recognize criminal judgments of states whose legal systems they do not wish to respect as being of equivalent right. Fundamentally, the Western powers base their opposition on the principle of sovereignty, that is, sovereignty *vis-à-vis* the criminal jurisdiction of other states. They cite the principle to justify their non-recognition of foreign criminal judgments, their refusal to extradite their own citizens, and their attempts to claim immunity for persons who are acting as state agents when they commit international crimes. The Western powers did not wish national courts to be empowered to judge the conduct of foreign governments.¹⁴

¹³ C. Tomusha, "From Nuremberg to The Hague",. 53 Law and State 113-130(1996).

¹⁴ *Ibid.*

This essentially meant the removal of recognition of the international nature of the crimes defined in the code of offences against security of mankind.¹⁵

In addition, states used the sovereignty principle to justify their objections to the competence of an international criminal court. The underlying fear here was that criminal jurisdiction over crimes committed on one's own territory, where the victim is a citizen or where national interests are at stake, will be at the mercy of an international system of criminal justice controlled by others. Thus, although the Soviet Union and other socialist countries emphatically supported international cooperation of states to coordinate criminal prosecution of crimes against peace and humanity, from the outset they had repeatedly rejected the creation of an international criminal court as a supra-national institution.¹⁶

In relation to the committee work, only few states responded to the committee's report, which in its annex included a draft statute for an international criminal court. Nevertheless the report was exhaustively discussed at the seventh General Assembly session. After considering whether or not to defer the matter, the General Assembly set up a committee to study the circumstances and consequences of creating an international criminal court and to examine the proposed court's potential relationship to the United Nations.¹⁷ This committee report, which contained thoroughly reworked draft statutes, was submitted to the General Assembly in 1954 to be considered along with two other documents. (The ILC's second draft code of offences against peace and Security of mankind and the report of the committee dealing with aggression which had come to no result.)¹⁸

The issue of an international criminal court also arose during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide. Unfortunately, the discussion was from the beginning confined to the question of whether the

¹⁵ B. Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court: Sovereignty and criminal jurisdiction." 1European Journal of International law20(1995)

¹⁶ Ibid.

¹⁷ UN.Doc. A/1540.

¹⁸ UN Doc . A/1316.

prosecution of the crimes encompassed by the Convention should fall under the national jurisdiction of the state in which the offence has been committed or under the competence of an international criminal court. The compromise finally reached is embodied in Article VI of the Genocide Convention, which provides that the competent courts are those of the state on whose territory the offence is committed or an international criminal court which can dispense justice for those states party to the Convention that have recognized its jurisdiction.¹⁹ The debate on the Genocide Convention clearly showed that the majority of states did not favor an international criminal court. It is in light of this debate, that the General Assembly concluded that “the development of the international community will lead to the growing need for an international judicial body competent to judge certain crimes under international law,” and called on the ILC to study the desirability and possibility of establishing an international judicial organ for trial of persons charged with genocide or other crimes over which jurisdiction would be conferred upon that organ by an international convention.²⁰

In 1974, the General Assembly succeeded in adopting the long -feared definition of aggression in Resolution 3314(XXIX). The definition is generally considered far from ideal and is often referred to as non-definition. In Article 3 of this definition, a number of acts are enumerated. This list is not exhaustive and the Security Council is not bound by it.²¹ However, since Chapter VII of the UN Charter states that the Security Council has the last word on issues of international peace and security, both the USA and the Soviet Union could lean back and relax. For the rest, little interest was at first shown in resuming the interrupted work on the international code of offences and the charter of an international criminal court. For most countries, it seemed far too utopian to continue with the project that, in view of the persisting global political antagonism between East and West, had no chance whatsoever of being realized.

¹⁹ M. C. Bassiouni, The Statute of the International Criminal Court. A Documentary History. (Transnational Publishers, New York, 1998), pp. 30-36. See also M .C. Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal. (Transnational Publishers, New York, 1987).

²⁰ United Nations General Assembly Resolution 260 B (III) December 1948.

²¹ H. V. Hebel, “The International Criminal Court: A Historical Perspective” in H. A. M. Hebel, J. G. Lammers and J. Schukking (eds), Reflections on the International Criminal Court (T.M.CAsser Press.,The Hague ,1999) p 26.

In 1973, the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid.²² Like the Genocide Convention, and in largely similar wording, this Convention provided in Article V for the possibility of trial by an international penal tribunal. On 26 February 1980, the UN Commission on Human Rights requested by Resolution 12 (XXXVI) that an Ad Hoc Working Group do undertake a study into the question of establishing an international criminal jurisdiction. Such a study was indeed undertaken, but the political will to carry the issue forward appeared to be lacking.²³ In spite of that, the ILC was in 1981 asked (more as matter of routine) to continue its work on the international code of offences.²⁴ For the time being, there was no more talk of an international criminal court. It was outside events that suddenly gave the law making process a dynamism and topicality that had previously been missing. In 1998, a bomb caused an American passenger jet to crash near the Scottish town of Lockerbie. At first sight, it seemed that members of the Libyan secret service were involved in the crime. In spite of the efforts on the part of the USA and Great Britain, Libya refused to extradite the suspects, even after the Security Council had imposed heavy sanctions on the country as a result of this refusal.²⁵

As the Libyan government explained, it would only have been prepared to consent to hand the suspects over to an international court. (This no more existed then than it does now). A similar problem arose after the end of the Gulf war. If Iraqi dictator Saddam Hussein had been captured, and if there had then been a plan to indict him for his aggression against Kuwait, then one would have been faced with a vacuum. Shortly afterward reports began to come in of the horrors committed in Bosnia, strongly suggesting that criminal proceedings against those responsible should be initiated. Already in 1989, Trinidad and Tobago had made a proposal at the General Assembly from a completely different direction. Pressured and threatened by international drug trafficking, the country had to admit that its judicial system had become incapable of

²² General Assembly Resolution 3068 (XXVIII). UN Doc A/9030 (1973).

²³ M. C. Bassiouni, The International Criminal Court-Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference, No peace without justice (Rome 1998), pp743-821

²⁴ United Nations General Assembly Resolution 37/106, 10 December 1981; UN Doc. A/ 9/97.

²⁵ United Nations Security Council Resolution 748, 31 March 1992; UN Doc. S/RES/748(1992).

proceeding affectively against drug-related crimes. They therefore hoped that an international criminal court might lighten their burden and remove prosecution from the closely-knit web of relationships within a country's society. With this appeal, a climate was suddenly created in which Nuremberg no longer seemed to be the expression of a unique, never to be repeated situation.²⁶

In 1991, in the spirit of this altered mood after ten years of preparatory work, the ILC approved a new version of the international code of crimes against peace and security of mankind. The emphasis had shifted in the meanwhile. Representatives of the third world attached great importance to the elements of offences that had not played any role in Nuremberg. For the Africans in particular, the apartheid system practiced in South Africa represented the worst of international crimes. They also succeeded in having colonialism retrospectively included in the list of crimes.²⁷ Indeed, the rapporteur even wished to ostracize "neo-colonialism" by creating a new criminal offence. This meant that a regulatory scheme was created, with more than twelve criminal offences, as opposed to the Nuremberg Charter's classical three, was too far extensive to be able to meet the approval of the international community.²⁸

The ILC had a happier hand with the Charter of the International Criminal Court. In 1992 after it had been formally requested by the General Assembly, it set up a working group, which was given the mandate to prepare a preliminary study on the possibility of establishing such a criminal jurisdiction. In the following year, this preliminary study was transformed into the draft of the statute of a permanent international criminal court, and in 1994 there followed the final second reading of this statute, which was then pending before the General Assembly. During this period events took a dramatic turn in the former Yugoslavia and Rwanda. In Resolution 808(1993) of February 1993, the Security Council decided in principle to establish an international criminal tribunal to try persons involved in war crimes in the territory of the former Yugoslavia.²⁹ With only few alterations the example of the tribunal for Yugoslavia was followed by the

²⁶ Supra, note 9, at p.126.

²⁷ Article 18 of the International Code of Crimes Against Peace and Security of Mankind; UN Doc. A/49/10 (1997).

²⁸ Supra, note 5.

²⁹ UN Doc. S/RES/808 (1993).

International Criminal Tribunal for Rwanda, whose legal basis is Security Council Resolution 955(1994) of 8 November 1994.³⁰ In 1993, a month after the Security Council had established the ICTY, the ILC met again. The creation and work of the ICTY and the ICTR contributed significantly to the consideration of a permanent institution and also influenced the ILC's work. After all, not only did this decision clearly show that an international criminal court was desirable, if not necessary, but also that the apparent lack of political will which had frustrated the discussions on the international criminal court for decades, had now made room for a determination to punish perpetrators of serious violations of fundamental humanitarian norms. The Commission reconvened its working group, which elaborated a comprehensive set of draft articles, including short commentaries. Sometimes several options were represented or questions formulated for further consideration. Although the ILC did not examine the draft text in detail during that session, it nonetheless considered that the draft provided a basis for examination by the General Assembly and for written comments by governments. The General Assembly fully supported the efforts of the ILC and requested it by resolution 48/31 of 9 December 1993 to continue its work as a matter of priority with a view to finalizing the draft statute by 1994.³¹

The ILC prepared a draft-statute for a permanent international criminal court in 1994 and began reworking its "draft Code of Crimes against the Peace and Security of Mankind" whose preliminary version was approved in 1991 and the final version in 1996. In 1994 the ILC finalized its work on the draft statute and recommended to the General Assembly "that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an International Criminal Court". The draft was well received in the sixth committee of the General Assembly in 1994.³² In view of many delegations, it "reconciled the need an international criminal court and respect for state sovereignty". Still, however a number of states continued to express reservations on an international criminal court. Although a majority of states supported

³⁰ UN Doc. S/RES/955 (1994).

³¹ H.V.Hebel, "An International Criminal Court: A Historical Perspective," in H.A.M.Hebel et al (eds), Reflections on the International Criminal Court (T.MC.Asser Press, The Hague, 1999), p. .30.

³² UN Doc. A/49/10.

the ILC proposal to convene a diplomatic conference with a view to adopting a statute for an international criminal court in principle, only a number of states favored such a conference taking place already in 1995. Most others agreed that some preparatory work was needed first. A substantial group of states, however, considered it too early to take a decision about a diplomatic conference. As the elaboration of such an important project as a statute of an international criminal court needed the broadest support possible, the more careful approach was taken. By resolution 49/53 of 9 December 1994, the General Assembly created an ad hoc committee on the establishment of an international criminal court, which would merely study the relevant issues involved. A decision on a Diplomatic Conference was not taken.³³

Regarding the ILC-Draft Statute, the General Assembly, at its 49th session in 1994, decided to establish the ad hoc committee on the establishment of an international criminal court, which held two sessions in 1994.³⁴ At its 50th session in 1995 the GA decided on the basis of the ad hoc committee's report to establish the Preparatory Committee on the establishment of an international criminal court, which had to prepare a consolidated text of a convention to be considered by a conference of plenipotentiaries. At its first session, held in March/April 1996, the preparatory committee considered substantive, procedural and administrative issues; at its 2nd session in August 1996 it took into account the Draft Code of 1996 and dealt with further procedural and organizational questions regarding the establishment of an international criminal court.³⁵

This preparatory committee was charged with drafting a governing statute that would define the structure of such an organization and its jurisdictional reach. Using the 1949 Geneva Conventions and their Protocols,³⁶ the Genocide Convention of 1948, and the

³³ Ibid.

³⁴ Report of the International Law Commission on its forty sixth session, 1994; UN Doc A/49/10. (1994)

³⁵ K. Ambos. "Establishing an International Criminal Court and an International Criminal Code: Observations from an International criminal law viewpoint." 17 European Journal of International Law 5(2002).

³⁶ The Geneva Convention on Amelioration of the Condition of the Wounded and Sick Members of the Armed Forces on Land, The Geneva Convention on the Amelioration of the Condition of the Sick, Wounded and Shipwrecked Members of the Armed Forces at Sea, Geneva Convention on Treatment of Prisoners of War and the Geneva Convention on the Treatment of Civilians During War. UN Doc. A/RES/49/36

case law developed in and experiences gained from the ad hoc tribunals in Nuremberg, Tokyo, and the ICTY/ICTR as starting points, the preparatory committee met six times between 1996 and 1998. Over the course of these meetings, the committee drafted a statute for an international criminal court. This draft statute was presented to delegations from UN member states in Rome in the summer of 1998 at a full diplomatic conference. The goal of the Rome Conference was to finalize and adopt a statute that would establish a permanent international criminal court. At the end, the participating member states adopted a statute by a vote, rather than a statement of consensus. Commonly referred to as the Rome Statute, it established the court's jurisdiction, its organizational structure, its operating rules, and the applicable law, including the law of command responsibility and other principles of humanitarian and criminal law. As the Preamble of the Statute states, its purpose is "to put an end to impunity for the perpetrators of the most serious crimes of international concern and thus prevent the commission of such crimes."³⁷

Building on the ILC's draft statute and referencing the two *ad hoc* tribunals as prototypes, the U.N general Assembly issued resolutions that led to the diplomatic conference of the plenipotentiaries on the establishment of an international criminal court, which met in Rome beginning on June 15, 1998. On July 1998, the Rome Statute of the International Criminal Court was signed by 120 states, with twenty-one abstentions and seven objections, including that of the United States. The ICC was created upon the ratification of the Rome Statute by sixty states and entered into force on 17 July 2002. Four crimes may be prosecuted before the ICC: genocide, crime against humanity, war crimes and aggression. These crimes are understood to possess an intrinsic international dimension as a result of their scope of extraordinary inhumanity, which raise a concern for all nations.

Finally, the ICC contains explicit provisions that preclude the legal and theoretical challenges raised concerning the legitimacy of Nuremberg. By specific, separate articles, the ICC incorporates the principles of *nullum crimen sine lege*,³⁸ *nulla poena sine lege*

³⁷See the Paragraph 5 and 9 of the preamble to the Rome Statute; UN Doc. A/CONF183/9.

³⁸ Ibid.

³⁹and a prohibition against *ex post facto* criminalization.⁴⁰ The ICC is most sharply distinguished from its predecessor tribunal by its jurisdictional mandate. Unlike the Nuremberg tribunal and the Yugoslav and Rwandan ad hoc tribunals, the ICC's jurisdiction is consensual and complementary to that of national courts.

The Court has since commenced its operations. The office of the prosecutor, following three referrals pursuant to Article 14, from Uganda, the Democratic Republic of Congo began its investigations into the situation in DRC on June 23, 2004, and on July 29 of that year announced the institution of official investigations into the situation in northern Uganda.⁴¹ On January 25 2002, the International Commission of Inquiry on Darfur⁴² issued its report to the Secretary General of the United Nations.⁴³ In it, the Commission recommended that the situation in Darfur be referred to the ICC by the Security Council because "the Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring accountability for the crimes committed in Darfur." After lengthy discussions, the Security Council acting under Chapter VII of the Charter, decided in Resolution 1593⁴⁴ "to refer the situation in Dafur since July 2002 to the prosecutor of the International Criminal Court."⁴⁵ The referral by resolution 1593 is the first case in which the Security Council has used the trigger mechanism provided by Article 13 (b) of the Rome Statute.

3.3. The Rome Conference

On the 15th of June 1998, the Secretary-General of the United Nations, Mr. Kofi Annan, opened the diplomatic conference on the International Criminal Court in Rome. In the conference, 160 states participated. The most important organ of the conference was the

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ H. P .Kaul "Developments at the International Criminal Court. Construction site for more justice: The International Criminal Court after two years" 99 American Journal of International law.368(2005).

⁴² The Commission was established under the report requested by the UN Security Council Resolution 1564 of September 18, 2004. See also M. H. Arsanjani and W. M. Reisman, " Law in Action at the International Criminal Court," 99 American Journal of International Law 385-403(2005)

⁴³ Report of the UN Commission of Inquiry on Darfur; UN Doc. S/2000/60 (2005)

⁴⁴ UN Doc S/RES/1593 (2002)

⁴⁵ Supra, note 41, at p.378.

committee of the whole, chaired by Philippe Kirsch of Canada.. It is here that the substantive discussions took place. The chairman was assisted by a bureau, consisting of the chairman himself, three vice chairmen and a rapporteur.

At the Rome Conference there was consensus with respect to the crimes falling under the jurisdiction of the ICC: genocide, war crimes, crimes against humanity, and the crime of aggression. The Rome Statute's definition of crimes against humanity and war crimes includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other crimes of sexual violence. The inclusion of these crimes, not included in the 1949 Geneva Conventions or their Protocols, provides a clear example of how international humanitarian law has evolved as a result of the cases brought before the ICTR and ICTY. In particular, the ICTY's prosecution of Serbian military forces for their crimes of sexual violence against Muslim women in eastern Bosnia was influential in the ICC's criminal definitions. The Statute does not, however, define the crime of aggression, as member states determined that reaching an acceptable definition would have to come later, "no sooner than seven years after the Statute's entry into force."⁴⁶

On the other hand, there was no consensus on the ICC's jurisdiction over individuals, particularly those whose states are not parties to the Statute. At the conclusion of the Rome Conference, the Statute was adopted by a vote of 120 to 7, with 21 countries abstaining. The seven countries voting against it were the United States, Israel, China, Libya, Iraq, Qatar, and Yemen. Since July 1998, Israel has announced that it will sign the Rome Statute, leaving the United States in fairly undesirable company, as far as the human rights records of the other nonsignators are concerned.

As to the crime of aggression, some delegations expressed the view that aggression is one of the most serious crimes of concern to the entire international community. They wished to see it included in the draft statute in order to deter the commission of such crimes and to avoid the impunity of the responsible individuals by providing a forum for their prosecution. Others felt that aggression should not be included because there was no

⁴⁶ See A. E. Mahle. "The International Criminal Court" Retrieved from www.pbs.org/wnet/justice/world_issues_int.html (visited on 20th September 2006).

generally accepted definition of the crime for the purpose of determining individual responsibility and there was no precedent for individual criminal responsibility for acts of aggression as opposed to wars of aggression. Moreover, it was estimated by these delegations that considerations of acts of aggression fell within the competence of the Security Council according to the UN Charter, and that some kind of linkage would be necessary. Other delegations pointed out the need to avoid a situation in which the use of the veto might impede the prosecution by the Court of persons responsible for acts of aggression.⁴⁷

On the role of the Security Council, it was proposed that the Court should not deal with a situation being dealt with by the Security Council under Chapter VII of the Charter, which relates to the maintenance of international peace and security. Some delegations were concerned that such a role for the Council might interfere with the independent functioning of the Court. It was also suggested that the Court should proceed with the consideration of any situation. Should the Council, however, feel that consideration of a situation would interfere with its primary role of maintenance of international peace and security, the Council would communicate its concern to the Court not to deal with that situation.⁴⁸

The role of the prosecutor was dealt with at Article 12 of the draft statute. According to Article 12 of the draft statute, the Prosecutor could initiate an investigation in two situations, that is, (a) when the Security Council refers a matter to the Court, and (b) when a state party that has accepted the jurisdiction of the Court files a complaint with the court. Some delegations were of the opinion that the trigger mechanism should be expanded to allow the Prosecutor to be more independent. He/she should be able to initiate an investigation based on his/her findings or on information obtained from any source, independently of a Security Council referral or a State complaint.

⁴⁷ See United Nations Conference on the Establishment of an International Criminal Court. An analysis of issues in the draft Statute, at www.un.org/icc/index.htm. (Visited on 23 September 2006).

⁴⁸ Ibid.

The United States continues to have strong reservations about the jurisdictional reach of the ICC. As the only remaining superpower, the United States has legitimate concerns about politically motivated prosecutions and the ICC supplanting the United States' use of its own well-functioning domestic and military court system. Despite its vote against the Statute at the Conference, the United States has remained engaged in the development of the ICC. President Clinton signed the Statute before leaving office in December 2000, just before the signing deadline. Consequently, ratification was in the control of the U.S. Senate. With or without the participation of the United States, the Rome Statute has entered into force. The creation of the ICC will alter the legal landscape forever by creating a new and permanent mechanism to hold accountable the perpetrators of the most repugnant international crimes.

3.4. The Structure and Organization of the Court

The Court is an independent institution. The Court is *not* part of the United Nations, but it maintains a cooperative relationship with the U.N. The Court is based in The Hague, the Netherlands, although it may also sit elsewhere. The Court is composed of four organs. These are the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry.⁴⁹

3.4.1 Presidency

The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute. The Presidency is composed of three judges of the Court, elected to the Presidency by their fellow judges, for a term of three years.⁵⁰

3.4.2. Judicial Divisions

The judicial functions of the Court are carried out in each division by Chambers:

1. The Appeals Chamber;
2. The Trial Chamber; and
3. The Pre-Trial Chamber.

⁴⁹ Article 34 of the Rome Statute of the International Criminal Court. UN Doc A/CONF/183/9.

⁵⁰ Article 38 of the Rome Statute.

The Judicial Division consists of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court at different stages. Assignment of judges to Divisions is made on the basis of the nature of the functions each Division performs and the qualifications and experience of the judge.⁵¹ This is done in a manner ensuring that each Division benefits from an appropriate combination of expertise in criminal law and international law.

3.4.3. Office of the Prosecutor

The Office of the Prosecutor acts independently as a separate organ of the Court. The Prosecutor has full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor is assisted by one or more Deputy Prosecutors, who are entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors have to be of different nationalities. They serve on a full-time basis.⁵²

3.4.4. Registry

The Registry has two main tasks. In the first place, it is responsible for supporting and servicing the judges and the parties during the proceedings. The Registry is headed by the Registrar, who is the principal administrative officer of the Court. The Registrar exercises his or her functions under the authority of the President of the Court.⁵³ The registry is also the Court's administrative platform: it provides services and resources to the entire Court, including the secretariat of the Assembly of state parties⁵⁴.

3.4.5. Other Offices

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Supra, note 41.

The Court also includes a number of semi-autonomous offices, such as the Office of Public Counsel for victims and the Office of Public Counsel for Defence. These Offices fall under the Registry for administrative purposes, but otherwise function as wholly independent offices. The Assembly of States Parties has also established a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court and the families of these victims.⁵⁵ In general, the Registry is similar in structure to that of the ICTR and the ICTY, but there are some distinguishing elements, most notably, the victims participation and reparation Section, and the office of Public Counsel and Defense and for victims.⁵⁶

3.5. Conclusion

It is undeniable that something was achieved in 1998 that had proved elusive in 1919 at the Versailles Conference, throughout the existence of the League of Nations, and even after the Second World War, that is, agreement by the international community on the establishment of an international criminal court.⁵⁷

It is clear that the ICC that emerged from Rome is a two-track system. Track one is the Security Council-initiated track, in which the Court would have jurisdiction over situations referred to it by the Security Council. Any of the permanent members of the Security Council could veto the Court's jurisdiction. Once a situation is referred to the ICC by the Security Council, the ICC Prosecutor has full authority to decide who to investigate and who to charge. Under this track, compliance with the Court's requests for evidence and surrender of indicted persons is mandatory for all countries of the world under Chapter VII of the UN Charter. This track will be enforced by Security Council-imposed sanctions, such as economic embargoes and freezing of assets.

Track two is the independent Court track, in which the Court's jurisdiction is triggered by complaints from member States as well as by the Court's Prosecutor. Only the parties to

⁵⁵ See organs of the court at the official website of the International Criminal Court at <http://www.icc-cpi.int/organs.html> (visited on 20th September 2006).

⁵⁶ Established by Regulation 77 and 81 of the Regulations of the Court; Doc.ICC-BD/01-01-04 (May 26 2004).

⁵⁷ A. Bos, "The International Criminal Court: Recent Developments", in H. A. M. Hebel et al (ed), Reflections on the International Criminal Court (T.M.C.Asser Press, The Hague, 1999), p. 40.

the ICC Statute will be bound to cooperate with the Court under the second track, and there is no in built means of ensuring compliance. Under the concept of complementarity, the second track would be utilized only as a last resort where no country is willing and able to prosecute a particular case.⁵⁸

National courts will continue to play an important and primary role in the prosecution of alleged war criminals. Moreover, the establishment of the ICC does not, in any way, prejudice the work undertaken by the aforesaid ad hoc tribunals, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The establishment of the International Criminal Court is a further step towards the effective punishment of persons responsible for having committed the world's gravest crimes.⁵⁹ In the next chapter, we look at the jurisdiction conferred on the International Criminal Court by the Rome Statute.

⁵⁸ M .P .Scharf. " The Rome Diplomatic Conference for an International Criminal Court". 4 The American Society of International law 67(1998)

⁵⁹See Advisory Service on International Humanitarian Law. Statute of the International Criminal Court Retrieved from www.icrc.org/web/eng/siteeng0nsf/htm/57JPK9/%24FILE/ICC.pdf. Visited on 23 September 2006

CHAPTER FOUR

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

4.1 Introduction

The group of Articles governing the exercise of jurisdiction of the International Criminal Court gave rise to some of the most difficult negotiations at the Rome Conference. This was to be expected, since these Articles were complex in nature and touched political nerves, dealing with matters affecting state sovereignty and the Security Council. These Article cover referral of cases to the Court; the role of the prosecutor; and preconditions to the exercise of the Court's jurisdiction, which include the role of the Security Council.¹ The ILC draft Statute recognized two categories of crimes over which the court might exercise jurisdiction. The first category consisted of the crimes of genocide, aggression, serious violations of law and customs applicable to armed conflict, and crimes against humanity. The second category consisted of a list of crimes established under relevant treaty regimes and included grave breaches of the 1949 Geneva Conventions² and the 1977 Additional Protocols thereto, apartheid, torture, and certain acts of terrorism and illicit traffic in narcotic drugs. From the beginning of the preparatory negotiations, a clear trend emerged in favour of limiting the jurisdiction of the court to the core crimes. It was considered that this would promote the broadest acceptance of the court and would enhance the credibility and moral authority of the court.³

When the Rome Conference started, the crimes under discussion were grouped into three conceptual categories. The first category comprised those crimes in the Statute that were undisputed, namely, genocide, crimes against humanity and war crimes. The second

¹ E.Wilmshurst, "Jurisdiction of the Court," in R. S .Lee (ed) The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results (Kluwer Law International, The Hague, 1999), p.127.

² The Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick Members of the Armed Forces in the Field, The Geneva Convention for the Amelioration of the Condition of the Wounded, the Sick and Shipwrecked Members of the Armed Forces in the Sea, the Geneva Convention on the Treatment of Prisoners of War and the Geneva Convention on Treatment of Civilians in Armed Conflict. UN Doc. A/RES/49/36.

³ *Supra*, note 1.

category consisted only of the crime of aggression, for which doubts existed as to the desirability and feasibility of its inclusion in the Statute. The third category of the crimes consisted of the treaty crimes, namely, the crime of terrorism, drug trafficking and violations of the Convention on the safety of the United Nations and Associated Personnel.⁴ A clear majority of states consistently opposed inclusion of these treaty crimes, particularly the first two, as they were widely regarded as crimes of a different character, for which effective systems of international cooperation were already in place.⁵

4.2. Jurisdiction under International law

Jurisdiction is an attribute of state sovereignty. A state's jurisdiction refers to the competence of the state to govern persons and property by its municipal law (civil or criminal). This competence embraces the jurisdiction to prescribe, to adjudicate and to enforce the law. Jurisdiction is primarily exercised on a territorial basis, but there are exceptions, for example there may be a person within a state's territory who is immune from the state's jurisdiction, while there are also occasions when the state may exercise jurisdiction beyond its territory. In international law, jurisdiction relating to the allocation of competence between states is an ill-defined concept.⁶ International law confines itself to criminal rather than civil jurisdiction. The civil law is the concern of private international law. International law concerns itself principally with the propriety of the exercise of state jurisdiction. The exercise of jurisdiction remains for the most part, a discretionary matter for the state concerned. What international law demands today is the existence of a tangible link between the alleged offender and or the forum of the alleged offender.⁷ The following are the bases on which jurisdiction may be exercised under international law.

- I. Territorial Principle;
- II. Nationality Principle;

⁴ Supra, note 1, at p.128.

⁵ H. V. Hebel and D. Robinson, "Crimes Within the Jurisdiction of the Court", in R. S. Lee. (ed) The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results (Kluwer Law International, The Hague, 1999), p.79.

⁶ R. M. M. Wallace. International Law, 2nd ed (Sweet and Maxwell, London, 2005), p.116.

⁷ S. Johnson, Peace Without Justice: Hegemonic Instability or International Criminal Law (Ashgate Publishing Company, New Castle, 2003), p.75.

- III. Protective (or security) principle;
- IV. Universality Principle; and
- V. Passive Personality Principle

4.3. The Nature of Jurisdiction Conferred on the ICC by the Rome Statute.

Part 2 of the Rome Statute gives a description of the court's specific system of jurisdiction.⁸ Its main points include the following provisions, namely.⁹

- 1) The jurisdiction of the Court shall be limited to the most serious international crimes of concern to the international community as a whole, that is, the crime of genocide, crimes against humanity, war crimes and the crime of aggression.¹⁰
- 2) A state which becomes party to the Statute thereby accepts the jurisdiction of the Court with respect to the said crimes; a state not party may accept by declaration the exercise of jurisdiction by the Court with respect to the crimes concerned.¹¹
- 3) The Court may exercise jurisdiction as long as the state on the territory of which the crime occurred, the state of which the person accused of the crime is a national, is party to the Rome Statute or is a state not party thereto that has accepted the Court's jurisdiction. The Court has jurisdiction, however, over all cases referred to it by the Security Council.¹²
- 4) There are three trigger mechanisms for the Court's jurisdiction, namely (i) a state party refers a case to the prosecutor; (ii) the UN Security Council refers a case to the Court under Chapter VII of the UN Charter; or (iii) the prosecutor himself or herself initiates an investigation on the basis of the relevant material.¹³

⁸ See the Rome Statute; UN Doc. A/CONF/183/9 (1998).

⁹ Z. Wengi. "On Co-operation by States Not Party to the International Criminal Court", 88 International Review of the Red Cross, 90 (2006).

¹⁰ Article 13 of the Rome Statute; UN Doc. A/CONF/183/9.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

- 5) The ICC also determines the admissibility of a case where the case is being investigated or prosecuted by a state, which has jurisdiction over it, or where the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted under its Statute.¹⁴

Thus, for the ICC to exercise its jurisdiction, not only can the Court prosecutor trigger the investigation and prosecution mechanism, but state parties and the UN Security Council can also do so by referring situations to the ICC

The controversy concerning Article 12 of the Rome Statute involves the ICC's application of adjudicatory jurisdiction to nationals of non-party states.¹⁵ Most commentators focus on the territorial basis of the ICC as legitimizing its jurisdiction over the nationals of non-party states under Article 12 of the Rome Treaty. Given the unique nature of the core crimes within the ICC's subject matter jurisdiction, however, the universal basis is also relevant. This is not to imply that the ICC may exercise universal jurisdiction in the sense that it is empowered to prosecute non-party nationals without a referral by the Security Council or the consent of the state in which the crime was committed. The delegates in Rome decided against so broad a jurisdictional reach. But where the territorial state gives its consent (as expressed by ratifying or acceding to the Rome Treaty or by special consent on a case-by-case basis), in addition to the principle of territoriality, the ICC has a legitimate interest on the basis of the universal nature of the crimes to prosecute the nationals of non-party states. In this limited context, the jurisdiction of the ICC can be deemed to be based concurrently on the universal and territorial bases of jurisdiction.¹⁶ Universal jurisdiction provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim. While other bases of jurisdiction require connections between the prosecuting state and the offense, the perpetrator, or the victim, the

¹⁴ Ibid.

¹⁵ M. P. Scharf. The ICC's jurisdiction over the nationals of non-party states: A critique of the U.S. Position. Retrieved from www.law.duke.edu/journals/lcp64dWinter2001p67.htm. (Visited on 5th October 2006).

¹⁶ Ibid.

universality principle assumes that every state has a sufficient interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.

4.4. Complementary Jurisdiction of the ICC

A fundamental question facing the drafters of the Statute of the ICC was the role the institution would play in relation to national courts. The general view was that the ICC should complement national jurisdictions; hence, the term complementarity was used to describe the relationship between these two institutions. Defining the precise nature of this relationship was both politically sensitive and legally complex. Some states, while supporting the establishment of an international criminal court, were reluctant to create a body that could impinge national sovereignty. Under existing international law, states have obligations to prosecute many crimes contemplated for inclusion in the court's statute. In their view these obligations were paramount and should not be pre-empted or challenged by court, acting, for example, as an international court of appeal. Rather the court should only assume jurisdiction where national judicial systems are unable to investigate or prosecute the transgressors. A different view shared by some states and many non-governmental organizations, held that the court should have the potential for a greater role. Fearing the possibility of sham investigations or trials aimed at protecting perpetrators, these states argued that the court should intervene where the proceedings under the national jurisdictions were ineffective and where a national judicial system was unavailable.¹⁷

Preambular paragraph 10 of the Statute as well as Articles 1, 17 and 18 lay down the principle that jurisdiction of the ICC is complementary to national courts. Article 17 of the Rome Statute provides as follows:

Having regard to paragraph 10 of the preamble and Article 1, the Court shall determine that a case is inadmissible where:

- a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the states is unwilling or unable to genuinely carry out the investigations;

¹⁷ T. T. Holmes, "The Principle of Complementarity," in R. S. Lee (ed) The international Criminal Court: The Making of the Rome Statute. Issues. Negotiations. Results. (Kluwer Law International, The Hague, 1999), p. 41.

- b) The case has been investigated by a state which has jurisdiction over it and the states has decided not to prosecute the person concerned; unless the decision resulted from the unwillingness or inability of a state to genuinely prosecute.

These provisions create a presumption in favour of action at the national level by states. In other words, the ICC does not enjoy primacy over national courts, but should only step in when the domestic prosecutors or courts fail, or are unwilling or unable to act. The Rome Statute makes it clear that states' judicial authorities have the primary responsibility of prosecuting and punishing international crimes. Complementarity means that the court may assume jurisdiction only when national jurisdiction are unable or unwilling to exercise it.¹⁸ Some scholars¹⁹ have seen this as a positive step. This is due to the fact that national institutions are in a best position to do justice, for they normally constitute the *forum conveniens*, where both the evidence and the alleged culprit are to be found. Secondly, under international law, national or territorial states have the right to prosecute and try international crimes, and often even a duty to do so. Thirdly, national jurisdiction over those crimes is normally very broad, and embraces even lesser international crimes, such as sporadic and isolated crimes, which do not make up, nor are part of, a pattern of criminal behavior. Were the ICC also to deal with all sorts of international crimes, including those of lesser gravity, it would soon be flooded with cases and become ineffective as a result of an excessive and disproportionate workload. To a certain extent this has already occurred at the ICTY and has necessitated the withdrawal of indictments of minor individuals in the political-military hierarchy. However, complementarity might lend itself to abuse. Complementarity might amount to a shield used by states to thwart international justice.²⁰ This might happen with regard to those crimes (genocide and crimes against humanity) which are normally perpetrated with the help and assistance, or the connivance or acquiescence, of national authorities.

¹⁸ M. H. Arsanjani, "Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court" in H. A.M. Hebel et al (eds.) Reflections on the International Criminal Court (T.M.C.Asser, The Hague, 1999), p. 67.

¹⁹ A. Cassese, International Criminal Law (Oxford University Press, Oxford. 2002), p.489.

²⁰ M.Delmas-Marty, "The ICC and the Interaction of National and International Legal Systems", in A Cassese, P. Gaeta and J. R. Jones (eds.) The Rome Statute of the International Criminal Court. (Oxford University press, Oxford, 2002)pp1915-1931.

In these cases state authorities may pretend to investigate and try crimes, and may even conduct proceedings, but only for the purpose of actually protecting the allegedly responsible persons. This danger is more serious because the principle of complementarity also applies to third states, i.e., states that are not parties to the statute. Under article 18(1) all state parties as well as ‘those states which, taking into account the information available, would normally exercise jurisdiction over crimes concerned’, must be notified by the prosecutor that he intends to initiate an investigation upon referral of a state or intends to proceed with an investigation initiated *proprio motu*.²¹

4.4.1. Unwillingness

In a September 2003 policy paper, the Office of The prosecutor gave several examples of unwillingness, such as ‘national proceedings ...undertaken for the purpose of shielding the person concerned from criminal responsibility; ...unjustified delay inconsistent with bringing the person concerned to justice; or proceedings were not or are not being conducted independently or impartially.’²²

4.4.2. Inability

The policy paper cited above addresses primarily the case in which a state is insufficiently organized to gather evidence or is ‘otherwise unable to carry out its proceedings’. This provision refers primarily to situations in which there is a lack of central government or a state of chaos due to conflicts or crisis.²³ The Report on the Commission of Inquiry on Darfur²⁴ illustrates this point.

The Commission concluded that genocide had not been committed but that war crimes and crimes against humanity seemed to have been committed on a large scale, thousands of murders, rapes, destroyed villages and houses, and close to 2,000,000 persons displaced. The report specified that international crimes were imputable to both

²¹ A. Cassese, “The Statute of the International Criminal Court, Some Preliminary Reflections” 10 *European Journal of international law* 144 (1996).

²² ICC, Office of the Prosecutor, Paper on some policy issues 4. Available at the ICC official website i.e www.icc.cpi.org. (Visited on 7, July 2006).

²³ M.Delmas-Marty, “Interactions Between National and International Criminal Law in the Preliminary Phase of the Trial at the ICC”, 4 *Journal of International Criminal Justice*.5 (2005).

²⁴ Report of the United Nations Commission of Inquiry on Darfur (25 January 2005); UN Doc.S/2005/60 (1 February 2005).

government officials and rebels. It is remarkable that the Security Council, despite the well-known reservations of the United States, finally referred the situation to the ICC—a success that can be attributed to the legal arguments set out in the Report.²⁵ With respect to complementarity, the report in fact considered that Sudan was ‘unable and unwilling to prosecute and try alleged offenders’. In explaining its recommendations, the Report explains the legal meaning of complementarity.²⁶ With regard to Article 17, there were at least six reasons to refer the situation to the ICC, that is, (1) the existence of crimes threatening international peace and security; (2) the difficulty in investigating and prosecuting, in Sudan, persons ‘enjoying authority and prestige in the country and wielding control over the state apparatus’ and the need to adjudicate the facts in a neutral environment; (3) the need for the authority of the ICC to convince both government leaders and rebel chiefs to submit to investigation and possibly criminal prosecution; (4) the fair trial guarantees offered by the international composition of the Court and by its rules of procedure and evidence; (5) the ability to intervene immediately; and finally (6) the lack of ‘significant financial burden’ to the international community. It should be noted that the last two reasons preclude the creation of an ad hoc tribunal as too slow and expensive to set up.

Nonetheless, the Commission’s analysis of the principle of complementarity led to suggestion of possible measures by other bodies’ as a complement to, not as a substitute for ICC referral. In particular it suggests adjudication in a third party state exercising universal jurisdiction.²⁷ The complementarity regime is one of the cornerstones on which the ICC is built. During the negotiation process, states made it clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one that must be based on national procedures complemented by an international court. Such a system will reinforce the primary obligations of states to prevent and prosecute genocide, crimes against humanity and war crimes—obligations, which existed for all states under conventional and customary international.

²⁵ Supra note 23

²⁶ Paragraph 606 to 609 of the Report; UN Doc. S/R/2005/60.

²⁷ Paragraph 613

4.5. The subject matter jurisdiction of the ICC (Jurisdiction Rationae Materiae)

4.5.1 The Crime of Aggression

Several attempts have been made to arrive at a definition of the crime of aggression. Some definitions have been adopted in transient treaties to which a restricted number of states are or were parties. It should be noted however that states, international organs, and distinguished scholars have maintained that a definition of aggression is not possible. Thus the League of Nations Permanent Advisory Commission held in 1923 that under the conditions of modern warfare, it would seem impossible to decide, even in theory, what constitutes a case of aggression.²⁸

From the foregoing, it is not surprising that the discussion on the crime of aggression differed from the other discussions on the other core crimes, as it remained controversial until the end of the conference whether the crime should even be included in the statute.²⁹ Part of the debate centered on finding an acceptable definition of the crime of aggression. While arguments to include aggression centered on its extreme gravity and international repercussions, arguments against its inclusion was based on the lack of a sufficiently precise definition. Another part of the debate focused on the role of the Security Council in this regard. Pursuant to Article 39 of the UN Charter, the Security Council "shall determine" the existence of an "act of aggression". Consequently, the issue is inseparably linked to the role of the Security Council in the maintenance of international peace and security. It has been a difficult task to find an acceptable way to reflect in a balanced manner the responsibility of the Security Council, on the one hand, and the judicial independence of the Court, on the other.³⁰

At the end of the Rome Conference, after extensive discussions, proponents and opponents of the inclusion of the crime of aggression within the jurisdiction of the Rome

²⁸ S. M. Schwebel. Justice in International Law (Grotius Publications, Cambridge University Press, Cambridge, 1999), p.521

²⁹ *Supra*, note 5, at p.81.

³⁰ See Background work on the Rome Conference at www.un.org/icc/crimes.htm/ (Visited on 28th August 2006).

Statute of the International Criminal Court had to admit that negotiations had ended in a tie and accepted a “codified impasse.” Aggression was included in the crimes within the jurisdiction of the International Criminal Court but without immediate effect due to a provision stipulating that:

The Court shall exercise jurisdiction over the crime of aggression once, a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of charter of the United Nations.³¹

As part of a compromise, the mandate of the Preparatory Commission (PrepCom) was enlarged to make sure that efforts on the subject would continue immediately after the end of the Conference. To that end, Resolution F adopted at the Conference on July 17, 1998 stated that:

The Commission shall prepare proposals for provision on aggression, including the definition and elements of the crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The commission shall put forward such proposals to the assembly of state parties at a Review Conference, with a view of arriving at an acceptable provision on the crime of aggression for inclusion in this statute. The provisions relating to the crime of aggression shall enter into force for the state parties in accordance with the relevant provisions of this statute.³²

4.5.1.1. Definition of Aggression

The definition of aggression has always been an extremely difficult issue to settle to settle. The history of the search for such a definition shows that it is not purely technical; rather it is overshadowed by political undertones. It has challenged the professionalism and patience of international negotiators for more than a century. The ILC included aggression in its draft statute for the international criminal court but, as was the case for other crimes, did not provide a definition. In the commentary to the draft, the ILC acknowledged the special problem that was raised by this crime in that there was no

³¹ Rome Statute of the International Criminal Court; UN Doc. A/CONF.183/9 (1998).

³² Final Act of the United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court. Resolution F. Para 7; UN Doc. A/CONF.183/10.

treaty definition comparable to genocide. Further more, the General Assembly Resolution 3314 of December 14, 1974 dealt with aggression by states, not with the crimes of individuals, and was designed as a guide for the Security Council not as a definition for judicial use.³³

During the negotiations of the Rome Statute many delegations quoted these ILC statements and shared the historical assessment of the Commission; that it would be retrogressive to exclude individual criminal responsibility for aggression fifty years after Nuremberg. The crime was finally included at the end of the Diplomatic Conference. Unfortunately, however, the international community was not in a better position to define the crime as all efforts to that effect failed in Rome.

4.5.1.2. Precedents

Proposals introduced by the delegations drew inspiration from existing precedents, namely, the Charter of the International Military Tribunal and General Assembly Resolution 3314. Article 6(a) of the Charter provided for the individual criminal responsibility for crimes against peace, “namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”³⁴ It is on the basis of this provision that the Tribunal found twelve defendants guilty of having committed crimes against peace and famously proclaimed:

The charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity ...To initiate a war of aggression; therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.³⁵

Efforts to sanction the crime of aggression increased with the International Military Tribunal for the Far East (IMTFE), which focused predominantly on the prosecution of

³³ J. Harzard, “Why Try Again To Define Aggression? ,” 62 American Journal of International Law 708 (1947).

³⁴ Charter of the IMT is available at www.yale.edu/lawweb/Avalon/imt/proc/imtconst.htm

³⁵ Judicial decisions of the International Military Tribunal (Nuremberg), Judgments and Sentences. Oct 1, 1946,41 American Journal of International Law 172-186 (1947)

perpetrators of the crime against peace.³⁶ On this crime the IMTFE concluded that there had been a conspiracy to wage aggressive wars and that the conspiracy had led to aggressive wars against a number of countries.³⁷ Like the Nuremberg tribunal, the IMTFE relied heavily on the Pact of Paris of 1928 as the legal basis of the crime against peace. Among the separate and dissenting opinions, Judges Roling of the Netherlands and Pal from India objected that aggression had not been defined yet as a crime under international law for the purpose of ensuring individual criminal responsibility.³⁸ Both made a call to the international community to take the necessary legal measures in the future, in light of the horrors of the Second World War. The effort towards this end started immediately after the war in 1946. On December 11, 1946, the General Assembly of the United Nations adopted three resolutions. By the first one, the General Assembly established the Committee on the Progressive Development of International Law and its Codification.³⁹ By the second one it directed the Committee:

To treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against peace and security of mankind or of an international criminal code of the principles recognized in the charter of the Nuremberg tribunal and in the judgement of the tribunal.⁴⁰

The third resolution affirmed that genocide was a crime under international law and asked the Economic and Social Council to “undertake necessary studies, with a view to drawing up a draft convention on the crime of genocide.”⁴¹ Regarding the first two resolutions, the ILC met for the first time in 1949. On the basis of the reports of the Special Rapporteur, the Commission at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of Nuremberg Tribunal

³⁶ B. Ferencz, “Defining Aggression: Where it Stands and Where it is Going”, 66 American Journal of International Law 507(1972).

³⁷ B. Ferencz, An international Criminal Court. A Step Towards world Peace: A Documentary History and Analysis. (Oceana Publications, New York, 1989), p.79.

³⁸ See Tokyo Judgments, Volume 11, Extracts of Opinion of Mr. Justice Roling and Mr. Justice Pal, reprinted in Ferencz above at pp. 507-38 and pp.80-83.

³⁹ General Assembly Resolution 94 (I). A year later this Committee was transformed into the International Law Commission, pursuant to General Assembly resolution 174 (II) of November 21, 1947.

⁴⁰ Affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal. General Assembly Resolution 95(1) 1946.

⁴¹ The Crime of Genocide. General Assembly Resolution 96(1). UN Doc A/4684 (1961).

and in the judgement of the tribunal and submitted these principles to the General Assembly. In 1954, it submitted a draft code of offences against the peace and security of mankind to the General Assembly. The General Assembly, considering, that the draft code of offences against peace and security of mankind as formulated by the Commission, raised problems closely related to those of the definition of aggression and also considering that the General Assembly had entrusted a special committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft code until the special committee had submitted its report.⁴²

Discussions of the definition of aggression lingered on at successive special committees for twenty years. Finally by Resolution 3314 (XXIX) of December 14, 1974, the General Assembly managed to adopt by consensus a definition of aggression. These provisions do not affect article 39 of the UN Charter or the Security Council's responsibility. These provisions do not affect Article 39 of the UN Charter. Article 1 contains a generic provision, partially drawn from Article 2(4) of the Charter, which stipulates that:⁴³

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, as set out in this definition.

Article 2 stipulates that “the first use of armed force by a state in contravention of the charter shall constitute prima facie evidence of an act of aggression although the Security Council...may conclude that a determination that an act of aggression has been committed would not be justified in light of other relevant circumstances.”⁴⁴ In article 3 of the definition, a number of acts that constitute aggression were enumerated as follows:

- a) The invasion or attack by the armed forces of a state of a territory of another;
- b) Bombardment by the armed forces of a state against the territory of another state;
- c) The blockade of the ports or coasts of a state by the armed forces of another state;

⁴² For a history of the Draft code of crimes, see Report of the ILC on the work of its Forty-sixth session, Draft Statute for an International Criminal Court, UN. GAOR, 49TH Sess., Supp No 10 at 23; UN Doc. A/49/10 (1997).

⁴³ S. A Fernandez de Gurmendi. “The Working Group on Aggression at the Preparatory Commission for the International Criminal Court”, 25 Fordham International Law Journal 589-605 (2002).

⁴⁴ General Assembly Resolution 3314 (XXIX)-Annex article 1; UN Doc A/8028/1970.

- d) An attack by the armed forces of a state on the land, sea or air forces of another state;
- e) The use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement;
- f) The action of a state in allowing in its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression;
- g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state.⁴⁵

It has been suggested that one ought to beware of the tendency of the Security Council to be treated as the “mouth of oracle” for determination of whether aggression has taken place, with the consequence that none of the permanent members has been accused by the United Nations of aggression. On the other hand, it may be argued that only a political organ such as the Security Council can ascertain whether aggression has occurred and that it would be difficult for a judicial body to do so, more so because the evidence may prove difficult to obtain. In fact, it is fair to say that such evidence is likely to obtain only or primarily when aggression state has been defeated, militarily and politically.⁴⁶

Another factor is that aggression is a crime for which a definition has not yet been achieved, despite UN discussions lasting many decades and culminating in the disappointing General Assembly Resolution 3314 (XXIX) adopted by consensus on 14 Dec 1974. As is well known, the definition laid down in this resolution is not exhaustive; as stated in Article 4 of the resolution, which adds that the Security Council may determine that other acts (than those listed in Article 2 and 3 as amounting to aggression) constitute aggression under the Charter. The fact that this definition was deliberately left incomplete is quite understandable. To define aggression also means among other things, to decide whether pre-emptive self-defense is lawful under the Charter or must instead be regarded as a form of aggression.⁴⁷

⁴⁵ General Assembly Resolution 3314 (XXIX)–Annex Article 3; UN Doc. A/8028/1970.

⁴⁶ A. Cassese, “The Statute of the International Criminal Court: Some Preliminary Reflections”, 10 *European Journal of International Law* 147 (1999).

⁴⁷ Ibid.

It is quite clear by now that there will be no quick solution to the issues involved in the definition of aggression. This is a political issue that has been transformed into a legal obligation by Article 5, which requires a provision on aggression to be adopted in accordance with Articles 121 and 123. These Articles provide for a cumbersome amendment process. An amendment would have to be voted in favor by a two third majority of state parties at a review conference to be held in 2009. This amendment will enter into force only if it is ratified by seven-eighths of them, but, even then, it will only enter into force in respect of those who have accepted the amendment. The conditions for exercise of jurisdiction over the crime of aggression raise not only thorny political difficulties, but also technical problems that need to be addressed. From the latter perspective it is important to recognize that a predetermination of an act of aggression – by whatever organ – could have a tremendous impact on criminal proceedings. It seems most probable that the definition of this crime to be adopted under Article 5(2) of the Statute in accordance with Article 121 and 123 will not be agreed upon, at least in the near future.

4.5.2. Genocide

The ILC Draft Statute of 1994 recognized the crime of genocide as one of the crimes over which the Court could have jurisdiction. Since the beginning of the preparatory discussions in the Ad Hoc Committee in 1995, there had been general support for inclusion of this crime in this Statute. The ILC did not articulate a definition of the crime, but observed in its commentary that this crime is “clearly and authoritatively” defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Genocide is recognized under the convention as a crime under international law, which can be committed either in peace or in time of war. By 1951, it had already been generally acknowledged that this definition reflected customary international law.⁴⁸ For this reason, there was a strong reluctance among states to tamper with the definition of the crime. It was argued that a modified definition would have questionable status under customary international law and might produce conflicting obligations for state parties to the Statute when incorporating the crime in their national legislation. At the Rome

⁴⁸ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of the International Court of Justice (1951) ICJ Rep 15

conference, the definition of the crime of genocide was not discussed in substance, but referred directly to the drafting committee. Article 6 of the Statute is identical to Article VII of the Genocide Convention. Only the words, “for purposes of this Statute” were added, in order to bring the structure of this article in line with the other articles containing definition of crimes.⁴⁹

There is broad agreement to use the wording of the Genocide Convention in the draft statute for the Court. Article 5 of the draft statute has been taken directly from the Convention:

“. . . Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

Consequently, Article 6 repeats verbatim Article II of the Convention on the Prevention and Punishment of the Crime of Genocide as adopted by the UN General Assembly on 9 December 1948.⁵⁰ Of the crimes defined in the Rome Statute, genocide is the least controversial, for it precisely tracks the definition of genocide contained in article II of the Genocide Convention. Indeed, genocide was one of the crimes which the United States delegation at Rome was willing to accept universal jurisdiction. The International Court of Justice, the UN Commission of Experts on the Rwanda situation, and a number of U.S Courts have all determined that the crime of genocide has achieved the status of *jus cogens* and binds all members of the international community.

4.5.3. Crimes Against Humanity

⁴⁹ *Supra*, note 2, at 89.

⁵⁰ T. Meron, “The International Criminal Court” in H. V. Hebel (ed) Reflections on the International Criminal Court. (T.M.C Asser Press, The Hague, 1999).

Defining crimes against humanity posed a challenge for the drafters at Rome since no definitive definition existed, either as a matter of treaty or customary international law. The concept of crimes against humanity was first codified in Article 6(c) of the Nuremberg Charter and subsequently in the Statutes of the ad hoc tribunals for the former Yugoslavia and for Rwanda. The definition of crimes against humanity in article 5 of the draft statute is based on the Nuremberg Charter and takes into account subsequent developments of international law, particularly relating to the recent ad hoc international criminal tribunals. Proposals for the definition of crimes against humanity include acts, which would constitute such a crime when committed in a widespread and/or systematic manner, and/or on a massive scale, and/or on specified grounds.⁵¹

According to the draft statute, the definition of this crime would include the following prohibited acts, that is,

- (a). murder;
- (b). extermination;
- (c). enslavement;
- (d). deportation or forcible transfer of population;
- (e). torture;
- (f). rape or other sexual abuse of comparable gravity, or enforced prostitution;
- (g). persecution against a group on political, racial, national, ethnic, cultural or religious (and possibly gender) grounds;
- (h). enforced disappearance; and
- (i). other inhumane acts causing serious injury to body or to mental or physical health

In the draft statute, *extermination* is defined as including the infliction of conditions of life calculated to bring about the destruction of part of a population.

⁵¹H. D. T.Gutierrez Posse, "The Relationship Between International Humanitarian Law and the International Criminal Tribunals, 88 International Review of the Red Cross.73 (2006).

The definition of crimes against humanity contained in the Nuremberg Charter included the requirement that the prohibited acts be committed in connection with crimes against peace or war crimes. A decision is yet to be made as to whether the definition of crimes against humanity contained in the Statute will also include such acts when committed in peacetime. In this regard, the Yugoslavia Tribunal stated, that it is a “settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.”⁵²

Rather than strictly follow the formula of the Charters of the Nuremberg and Tokyo Tribunals and the Statutes of the Yugoslavia and Rwanda Tribunals, the Rome Statute adopts an approach which does not require any nexus between crimes against humanity and armed conflicts. Yet the choice of the wording for this provision was not haphazard. It was consistent with the authoritative report on the development of laws of war at the conclusion of the Nuremberg trials, in which the UN War Crimes Commission concluded that international law may now sanction individuals for crimes against humanity committed not only during war but also peace time. This was confirmed by the decision of the Appeal Chamber of the Yugoslavia Tribunal in the Tadic case, which pointed out that it was “settled” that “crimes against humanity do not require a connection to international armed conflict. Indeed...customary international law may not require a connection between crimes against humanity and any conflict at all.”⁵³ Additionally, the Rome Statute expands upon the list of offences considered crimes against humanity that are enumerated in the Statute of the International Tribunal for the former Yugoslavia and Rwanda by adding two new listed offences: apartheid, and enforced disappearance of persons; by expanding the offence of deportation to include “forcible transfer of population”; by expanding the offence imprisonment to include “severe deprivation of physical liberty in violation of fundamental rules of international law”; and by expanding the offence of rape to include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. It is significant to note that the articles on crimes against humanity in the Nuremberg Charter

⁵² *Supra*, note 31.

⁵³ *Supra*, note 15.

and the Statutes of the Yugoslavia and Rwanda Tribunals each contain a non-exhaustive list followed by the phrase “and other inhuman acts”⁵⁴.

4.7.4. War crimes

War crimes are defined very broadly as “violations of law of war”. While traditionally war crimes were held to embrace only breaches of international rules regulating international armed conflict and not civil wars, since the ICTY decision in Tadic,⁵⁵ it is now widely accepted that serious infringement of customary or applicable law on internal armed conflict must also be regarded as amounting to war crimes. As evidence of this new trend, Article 8 of the ICC Statute embraces as war crimes serious violation of both the law regulating international armed conflict and rules covering internal armed conflicts.⁵⁶

There was general agreement at the Rome conference that war crimes should fall within the mandate of the ICC, and only minor differences on definitions for such offenses, since much of this law is embodied in the Geneva Conventions and well-established customary international law. Nonetheless, there was some serious disagreement among the delegates as to whether this category of crimes should include violations committed in internal as well as international conflict. Some used the statute of the Rwanda tribunal, as well as the decision of the Yugoslavia Tribunal Appeals Chamber in the Tadic case,⁵⁷ to justify such inclusion, noting that national criminal justice systems are ill equipped to deal with such issues. It is likely that the offenses punishable under these provisions will include torture of prisoners of war, taking civilian hostages, subjecting detainees to medical and scientific experiments, and other such offenses.⁵⁸

⁵⁴ Supra note 15

⁵⁵ ICTY-94-1 (Interlocutory Appeal on jurisdiction) at Paragraph 95-137.

⁵⁶ A. Cassese, International law, 2nd ed (Oxford University Press, New York, 2005), p 438.

⁵⁷ ICTY-94-1 (26 January 2000).

⁵⁸ R. J. Wilson, “A Permanent International Criminal Court: Impunity Loses Another Round.” Available at www.derechos.org/kaoga/iii/3/wilson/-eng.htm. (Visited on 5 October 2006).

In the ILC Draft Statute, the war crimes provisions appeared in two places. Article 20(c) referred to “serious violations of the laws and customs applicable to armed conflict conflicts”, and the Annex, referred to in Article 20(e), included grave breaches of the 1949 Geneva Conventions and of Additional Protocol 1 thereto. As with other crimes, the ILC refrained from elaborating definitions and instead made references to relevant precedents. The draft statute enumerated four different categories of war crimes. The first two categories apply to international armed conflicts and are largely based on well-established principles of international law. There was broad support for their inclusion:

(a) Grave breaches of the four Geneva Conventions of 12 August 1949;⁵⁹

(b) Other serious violations of the laws and customs applicable in international armed conflicts (largely derived from the Hague law, limiting the methods of waging war). The third and fourth categories of war crimes apply to armed conflicts not of an international character. These categories are drawn from Common Article 3 of the 1949 Geneva Conventions and the Second Additional Protocol to the four Geneva Conventions, respectively. The inclusion of these two provisions is still being debated.;

(c) In case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 (which bars specified acts committed against persons taking no active part in the hostilities);

(d) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. (Based largely on the Second Additional Protocol to the four Geneva Conventions).’

In 1995, the Ad Hoc Committee concluded that the different concepts used in the ILC Draft, such as ‘serious violations of laws and customs of war’ ‘grave breaches,’ and ‘exceptionally serious violations’, were to a considerable extent overlapping and could lead to confusion. The Ad Hoc Committee preferred to use a single concept ‘war

⁵⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Members of the Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of the Sick, Wounded and Shipwrecked Members of the Armed Forces at Sea, Geneva Convention on prisoners of war and the Geneva Convention on Treatment of Civilians during an Armed Conflict..UN Doc A/RES/49/36.

crimes', which would cover the whole field of norms applicable to armed conflicts. The principle of legality required that these war crimes be defined in detail.

Article 8 on war crimes begins by a provision stating that the Court shall have jurisdiction in respect of war crimes, in particular, when committed as a part of a plan or policy or as part of large-scale commission of such crimes. Article 8 contains, paragraph 2(a) tracking grave breaches of the Geneva Conventions, i.e., acts against persons or property protected by those conventions.⁶⁰ The war crimes enumerated in Article 8 of the Rome Statute are derived from the 1949 Geneva Convention, the two additional protocols of 1977, and the Hague Regulations of 1907. The ICC's jurisdiction over war crimes can be challenged on three grounds: First, that only grave breaches of the Geneva Conventions of 1949 entail individual criminal responsibility under customary international law, and consequently that violations of the Hague Regulations and non-grave breach provisions of the Geneva Conventions cannot provide the basis for universal jurisdiction. Second, Additional Protocol I of 1977 does not constitute customary international law. Third, war crimes in internal armed conflicts, including violations of Additional Protocol II and Common Article 3 of the Geneva Conventions, are not yet universally recognized as part of customary international law.

The exercise of jurisdiction by the ICC over war crimes may be limited under Article 124 of the Statute. This provision allows States on becoming parties to Rome Statute, to declare that they do not accept the jurisdiction of the Court for a period of seven years with respect to war crimes that have allegedly been committed by their own nationals or on their territories.

4.6. The Court's Jurisdiction and Bilateral Immunity Agreements (Article 98 agreements)

If an alleged offender is in a territory other than that of the States seeking to exercise jurisdiction, the lawful method of securing his return to stand trial is to request his extradition. Extradition is the handing over of an alleged offender by one State to

⁶⁰ *Supra*, note 56, at p.54.

another. Extradition as a rule is effected by bipartite agreements. There is no duty to extradite in the absence of a treaty. Extradition treaties normally relate to serious crimes and impose the same obligations on the parties concerned. A country's own nationals may be protected from extradition, as may be persons who have committed offences of a "political" or "religious" character.⁶¹ Extradition relies upon the existence of a complex network of treaties and reciprocal agreements between states, and so there is a potential of gaps and hard cases within its rules. As it is, in essence a surrender of sovereignty by one state in favour of another state asserting jurisdiction, the process may be protracted and involve much negotiation. In order for a suspect to be extradited, a series of rules must be followed:

- a. There must be an identified person whose surrender is sought.
- b. The offence for which the accused is suspected must be within the terms of an existing treaty or reciprocal agreements between the two states in question.
- c. Some offences or type of offences are routinely excluded from the category of extraditable crimes (e.g. political and religious offences).
- d. The act or activity of which the suspect is accused should be a criminal offence in both the relevant jurisdictions, regardless of whether different labels are used.⁶²

The formula "extradite or prosecute" (in Latin: "*aut dedere aut judicare*") is commonly used to designate the alternative obligation concerning the treatment of an alleged offender. It is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct.⁶³ As it is stressed in the doctrine, "the expression '*aut dedere aut judicare*' is a modern adaptation of a phrase used by Grotius: '*aut dedere aut punire*' (either extradite or punish)". It seems, however, that applying it now, a more permissive formula of the alternative obligation to extradition ("prosecute" [*judicare*] instead of "punish" [*punire*]) is suitable, having additionally in mind that Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is injured.⁶⁴

In particular, the obligation to extradite or prosecute during the last decades has been included into all, so-called sectoral conventions against terrorism, starting with the

⁶¹ *Supra*, note 6, at p.129.

⁶² C. de Than and E. Shorts. International Criminal Law and Human Rights. (Sweet & Maxwell, London, 2003), p.46.

⁶³ M. C. Bassiouni and E.M.Wise, Aut dedere Aut Judicare: The Duty to Extradite or Prosecute Under International Law (Martinus Nijhoff Publisher, Dordrecht, 1995), p.3

⁶⁴ *Ibid.*

Convention for the Suppression of Unlawful Seizure of Aircraft, signed in the Hague on 16 December 1970, which at Article 7 stated:

The Contracting State in the territory of which the alleged offender is found, shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

Many countries, mostly under civil law tradition, generally do not extradite their own nationals. While the status of the nationality exception is still unsettled under customary international law, most extradition treaties at least permit states to refuse handing over their own nationals. However the relevant provisions seldom specify the material moment for the determination of nationality, and the issue is not regulated with sufficient clarity under international law. Whereas nearly all extradition treaties published in the United Nations Treaty Series provide for a right or obligation to refuse delivering up one's national to a foreign state, positions vary widely with regard to the moment for the determination of nationality. Some agreements have attempted to regulate this question by stating that the nationality of the accused shall be considered to be the one that he or she possessed on the date of commission of the alleged offence. Others specify the material moment as the day of the charges, the date of the reception of the request, the date on the decision on extradition, or the date of the extradition, or specify that the status of nationality shall be determined by the laws of the requested party. In addition, a few treaties directly address the possibility of fraud in the acquisition of nationality.⁶⁵ Even though states tend to follow a certain pattern in their extradition practices, as indicated by the treaties that they have concluded, in the absence of strict domestic laws on the subject, they sometimes deviate from that pattern to accommodate the conditions of the other party. In this sense extradition practices are flexible.⁶⁶ The provisions of the ICC Statute attribute a central role to the nationality of the accused while failing to

⁶⁵ R. Deen-Racsmany, "A New Passport to Impunity? Non-extradition of Naturalized Citizens Versus Criminal Justice" 2 *Journal of International Criminal Justice* 765(2004)

⁶⁶ Ibid.

clarify the meaning of the terms ‘national’ and ‘state of nationality’.⁶⁷As the Court cannot prosecute suspects in absentia, state cooperation in obtaining custody over the accused is of crucial importance for the operation of the ICC.⁶⁸ Pertinently, the issues of extradition attracted a considerable amount of controversy during the preparatory work. The majority of drafters believed that, due to its international character, the ICC should obtain custody over the accused through the *sui generis* approach (surrender) applied in the context of the Yugoslavia and the Rwandan tribunals,⁶⁹ rather than the procedures and rules commonly relied on in state-to-state extradition. They proposed to remove any ambiguity related to the applicability of domestic obstacles to extradition by using the term ‘surrender’ rather than ‘extradition’, suggesting the applicability of a distinct legal regime to such transfer, hence the irrelevance of nationality exception. This solution was eventually adopted in spite of the objections of some delegations that feared that ratifying the Statute would thus impose obligation (i.e. to hand over their nationals to the ICC) on them which are inconsistent with their domestic rules, often of a constitutional rank. At any rate Article 102 clearly distinguishes surrender from extradition.⁷⁰

The Rome Statute includes article 98, which states as follows at Article 98(2) on Cooperation with respect to waiver of immunity and consent to surrender:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The international agreements mentioned in Article 98(2) of the Rome Statute are referred to by several terms, including Article 98 agreements, bilateral immunity agreements (BIAs), impunity agreements, and bilateral non-surrender agreements. Starting in 2002, the United States began negotiating these agreements with individual countries, and has concluded at least one hundred such agreements. Countries that sign these agreements

⁶⁷ Article 12(2) of the Statute of the International Criminal Court; UN Doc. A/CONF/183/9

⁶⁸ *Ibid.*, Article 63 (1)

⁶⁹ B. Swart, “Arrest and Surrender,” in A. Cassese, P. Gaeta and J .R. W.D Jones (eds.) The Rome Statute of the International Criminal Court (Oxford university Press, Oxford, 2002), pp.1664-1668

⁷⁰ *Supra*, note 22, at p.777

with the United States agree not to surrender Americans to the jurisdiction of the International Criminal Court.⁷¹ The ICC state parties are obligated under international law not to defeat the object and purpose of the Rome Statute, under which according to the preamble, ‘the most serious crimes of concern to the international community as whole must not go unpunished’. States Parties are obliged to cooperate fully with the Court, in accordance with article 96 of the Rome Statute, thus preventing them from entering immunity agreements which remove certain citizens from the states’ or ICC’s jurisdiction, thereby undermining the full effectiveness of the ICC and jeopardizing its role as complementary jurisdiction and a building block in collective global security.⁷² The avoidance of impunity as the object and purpose of the ICC Statute is consistent with obligations arising under general international law and specific treaties. The obligation to investigate and, if warranted, to prosecute crimes which are within the jurisdiction of the Court arises also under general international law and specific treaties. The preamble to the Rome Statute affirms that it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes. From the foregoing, it is clear that the object and purpose of the ICC Statute are subject to limitations, which states have accepted. Article 98 identifies two sets of obligations which may lawfully prevent a state party from acceding to a request to surrender a person to the Court, namely, state and diplomatic immunity (under Article 98(1), and a certain class of international agreements. On its own terms, therefore, the ICC Statute limits the possibility of the complete realization of the policy of avoiding impunity by ensuring investigation or prosecution of persons within the territory of a state party. The general purpose of the Rome Statute (to remove impunity) is therefore limited by Article 98.⁷³

Status of Forces Agreements are frequently cited as relevant to this provision, as they commonly provide for exclusive or primary jurisdiction by the sending state over its forces at least with regard to certain crimes. It is widely acknowledged that, under such

⁷¹ See Bilateral Immunity Agreements at www.ll.georgetown.edu/intl/guides/articles_98.cfm (Visited on 5 October 2006).

⁷² See In the matter of the International Criminal Court. And in the matter bilateral agreements sought by the United States under article 98(2) of the Rome Statute. Joint Opinion. Retrieved from www.iccnw.org. (Visited on 5 October 2006.) p.6.

⁷³ Ibid.

provisions, the host state (i.e. the state on whose territory the force is stationed) is not only prevented from exercising jurisdiction itself, but also lacks authority, without the consent of the sending state.⁷⁴

4.7. The Reach of the ICC Jurisdiction over Non-signatory States' Nationals.

Under the Rome Statute, the ICC has jurisdiction over nationals of non-parties in three circumstances. First, the ICC may prosecute non-parties in situations referred to the Prosecutor by the UN Security Council. Secondly, non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a state that is party to the ICC Statute or has otherwise accepted the jurisdiction of the Court with respect to that crime. Thirdly, jurisdiction may be exercised over the nationals of a non-party where the non-party has consented to the exercise of jurisdiction with respect to a particular crime.⁷⁵ In either of the first two circumstances, the consent of the state of nationality is not a prerequisite to the exercise of jurisdiction.

The International Criminal Court has jurisdiction over crimes committed on the territory of a state that has ratified the Rome Treaty, or over the nationals of State Parties to the treaty. Thus crimes committed by a national of a non-State party on the territory of a state party are subject to the Court's jurisdiction. However, if the Security Council refers a situation to the Court, acting under Chapter VII, it has jurisdiction over non-State party nationals as well as non-State party territories.⁷⁶

The analysis of the historic precedent and principles of international law contained in this Article 12 has shown the ICC's jurisdiction over the national of non-party states to be well grounded in international law. The exercise of such jurisdiction can be based both on

⁷⁴ D. Fleck, "Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?" 1 Journal of International Criminal Justice 657(2003).

⁷⁵ D. Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-parties: Legal Basis and Limits", 1 Journal of International Criminal Justice 618 (2003). See also Article 12 of the Rome Statute; UN Doc. A/CONF/183/9.

⁷⁶ A. Dieng, "International Criminal Justice: From Paper to Practice-A Contribution from the International Criminal Tribunal for Rwanda to Establishment of the International Criminal Court." 25 Fordham Journal of International Law 693 (2002). A good example of a referral of a non state party to the ICC's jurisdiction is the Security Council referral of Sudan situation in Darfur.

the universality principle and the territoriality principle. The core crimes within the ICC's jurisdiction -- genocide, crimes against humanity, and war crimes -- are crimes of universal jurisdiction. The negotiating record of the Rome Treaty indicates that the consent regime was layered upon the ICC's universal Jurisdiction over these crimes, such that with the consent of the state in whose territory the offense was committed, the court has the authority to issue indictments over the nationals of non-party states. The Nuremberg tribunal and the ad hoc tribunal for the former Yugoslavia provide precedent for the collective delegation of universal jurisdiction to an international criminal court without the consent of the state of the nationality of the accused.⁷⁷

In addition, international law recognizes the authority of the state where a crime occurs to delegate its territorial-based jurisdiction to a third state or international tribunal. Careful analysis of the European Convention on the Transfer of Proceedings indicates that the consent of the state of the nationality of the accused is not a prerequisite for the delegation of territorial jurisdiction under the Convention. There are no compelling policy reasons why territorial jurisdiction cannot be delegated to an international court and the Nuremberg Tribunal provides the precedent for the collective exercise of territorial as well as universal jurisdiction.⁷⁸

Despite the fact that the ICC has jurisdiction over nationals of non-parties when those nationals are accused of committing crimes on the territory of consenting states, the ICC Statute limits the exercise of jurisdiction in specific circumstances. The following are some of the provisions of the Statute that limit the jurisdiction of the ICC over nationals of non-parties.

a) Article 98(2) agreements

Article 98(2), allows parties on whose territory a person wanted by the ICC is present, to fulfill their obligations under international agreements preventing the transfer of such persons to the ICC. Since the ICC does not have a right to require the non-party to transfer

⁷⁷ Ibid.

⁷⁸ Ibid.

the suspect to the ICC, agreements in keeping with article 92, will have some impact on the jurisdiction of the ICC over nationals of non-parties.

b) Security Council request for deferral

Under Article 16 of the ICC Statute the prosecutor may not commence or proceed with an investigation or prosecution, if the Security Council, acting under Chapter VII of the charter has requested a deferral. Such a deferral of investigation lasts 12 months and may be renewed by the Security Council. This provision was inserted as a means of providing limited political control over the work of the prosecutor. While it is not accepted that the Security Council should have general political control, it was conceded that there might be circumstances where the exercise of jurisdiction by the Court would interfere with resolution of an ongoing conflict by the Security Council. In those limited circumstances the ICC parties have accepted that the Security Council, acting under Chapter VII, may demand that the requirement of peace and security are to take precedence over the immediate demand of justice.⁷⁹ Given that the ICC parties have accepted obligations under the Statute and the non-state parties have not, it is more likely that the Security Council will exercise its article 16 powers over non-nationals thereby limiting the ICC's reach over nationals of non state parties. Indeed the Security Council has passed resolution 1422⁸⁰ and 1487⁸¹ requesting deferral of ICC's prosecution of personnel of non-parties taking part in operations authorized by the UN.

c) Complementarity

Under the complementarity provisions of the ICC Statute, the ICC may not exercise jurisdiction over nationals of non-parties in cases in which a state is willing to, or has genuinely and in good faith, investigated and prosecuted a person in relation to the same crime. The jurisdiction of the Court is therefore supplementary to national jurisdiction and is not to be exercised where those national jurisdictions are functioning properly as discussed above.

⁷⁹ D. Sarooshi, "Aspects of the Relationship Between the International Criminal Court and the United Nations," 32 *Netherlands Yearbook of International Law* 38-39 (2001).

⁸⁰ UN Doc S/RES/1422 (2002).

⁸¹ UN Doc S/RES/1487 (2003).

4.8. Conclusion

In elaborating the definitions, one of the major guiding principles was that definitions should be reflective of customary international law. It was understood that the Court should operate only for crimes that are of concern to the international community as a whole, which meant the inclusion only of crimes which are universally recognized. As regards the scope of the subject matter jurisdiction, the drafters of the Statute took a cautious but sound approach. Only the most serious crimes of international concern, namely, genocide, crimes against humanity and war crimes, are presently included. Crimes that are considered of a different character, such as drug trafficking and terrorism, have been deferred until a later stage. The crime of aggression remains in a distinct category. The Court's jurisdiction over the crime has been established in theory, but in practice jurisdiction will remain dormant until differences of view on the definition and appropriate preconditions (in particular, the appropriate role of the Security Council) are resolved. Given the intensity of these differences and the fairly high threshold required for amending the subject matter jurisdiction, it may be questioned whether the Court's jurisdiction over the crime will be activated in the foreseeable future. The discussion on the crime of genocide was fairly simple as delegations considered the definition of the 1948 Genocide Convention to be reflective of customary international law. Proposals to alter the text were all rejected on the ground that any change would detract from the customary status of existing definition. In the next chapter we look at the role of the Security Council under Chapter VII of the UN Charter and within the Rome Statute and how the same impacts on the jurisdiction of the Court. We also look at the performance of the UN during the cold war era to show how politics has played a major role in Security Council deliberations and decisions.

CHAPTER FIVE

THE SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT

5.1 Introduction

The basic weakness of the system of international organization represented by the United Nations consist in the fact that it contains an irreconcilable normative contradiction, namely between (a) the principle of the sovereign equality of member states and (b) the privileged position of the five permanent members of the Security Council, expressed in the veto right. Thus, a heavy price has been paid by the international community for the (partly) supranational authority vested in the Security Council. Incorporating the power balance as it prevailed at the end of the Second World War, the world organization has been unable to reform itself along democratic lines.¹

The United Nations Security Council has played an influential role in the world political and legal developments throughout the post-cold war era. By gradually expanding the scope of its activities, it has virtually reshaped its role and function, as well as the public discourse and perception of the UN itself. Suffice it to recall the Council's involvement in humanitarian crises, in restoring democracy, in state reconstruction; its decisive role in enforcing rules of international law, or consolidating emerging ones. In the name of a comprehensive, almost all-encompassing perception of peace and security, the Council has not shied away from addressing purely internal situations, non-state actors or thematic issues. At the same time, such unprecedented activism has been seen as being too selective and too much in line with the priorities of the big powers.² The Council has sometimes seemed to behave in a way that would merely make it more vulnerable to such criticism, a conspicuous case being Resolution 1422³ exempting certain personnel of UN and UN-authorized operation from the jurisdiction of the International Criminal Court. Hardly any of the above developments has remained legally unchallenged. Yet the Council has only rarely made an effort to justify the creative and novel interpretation of its powers. This task was left to international lawyers. Not surprisingly then,

¹ H. Kochler, "The United Nations Organization and Global Power Politics: The Antagonism Between Power and Law and the Future of World Order" 5 *Chinese Journal of International Law* 324 (2006).

² Ibid.

³ UN Doc.S/RES/1422 (2002).

considerable literature has developed on the council's powers and their limits, often and more properly-discussed with the question of judicial review.⁴ This Chapter takes a critical look at the Security Council from the cold war era to date with a view of showing the political considerations that are given primary importance in the Council's deliberations while the legal issues and implications are put on the periphery. The Chapter also looks at the role of the Security Council in the maintenance of international peace and Security under Chapter VII with a view of finding out under what circumstances the Security Council can invoke Articles 5, 13(b) and 16 of the Rome Statute.

5.2. The UN in the Cold War Era

The veto of the five permanent members of the Security Council under Article 27(3) was used 279 times between 1945 and 1985; from 1946 until 1970 it was almost exclusively the USSR, facing a western majority in the General Assembly that prevented the adoption of resolutions by the Security Council. In 1970 the USA made its first veto, and from then on came to replace the USSR as overwhelmingly the main user of the veto. It was not only the actual use of veto that prevented action by the Security Council; threats to use the veto also prevented the adoption of resolutions or secured their revisions to something more acceptable to the permanent member concerned.⁵ During the cold war the Security Council occasionally threatened to use Chapter VII; often it called for action without taking any binding decisions. Very rarely did it succeed in taking binding decisions under Chapter VII in response to threats to peace, breach of peace and acts of aggression. When it did act under Chapter VII its approach was generally flexible rather than formalistic; it did not usually specify the exact article of the Charter under which it was acting. Security Council Resolution 598, demanding a mandatory ceasefire in the 1980-88 Iran –Iraq conflict, was unusual in that it expressly stated that the Security Council was acting under Articles 39 and 40. This reluctance by the Security Council to identify the precise legal basis, if any, for its resolutions had led to protracted and not

⁴ E. De Wet. The Chapter VII Powers of the United Nations Security Council (Hart Publishing, Oxford, 2004), p. 2.

⁵ C. Gray, International Law and the Use of Force, 2nd ed.(Oxford University Press, New York, 2004), p.196.

always fruitful, speculation by some commentators as to the legal effect of Security Council operations. It is clear from the practice of the Council that no formal pronouncements with an express reference to Article 39 are required for action under Chapter VII; the use of the language of Article 39 is apparently sufficient.⁶

The Security Council has been extremely reluctant to find that there has been an act of aggression; it has done so only with regard to Israel, South Africa and Rhodesia. It is also generally reluctant to condemn states by name. It has been only slightly readier to find a breach of peace; it has done so with regard to Korea, Iraq/Kuwait, and Argentina's invasion of the Falklands, and the 1980-88 Iran Iraq conflict. However, it has passed many resolutions determining the existence of a threat to peace. The Security Council has consistently taken a wide view of the phrase "threat to international peace and security."⁷

5.3. The Role of the Security Council in Maintenance of International Peace and Security

It is widely accepted that the maintenance of international peace and security is the principal objective of the United Nations, and this objective assumes precedence over all other commitments of the organization. According to the scheme of the UN Charter, the Security Council is the primary organ entrusted with the responsibility of fulfilling this objective.⁸ The Council is thus required to act in situations that necessitate swift and urgent action on its part. It is, therefore, only natural that the Council should enjoy broad powers in the discharge of its functions with a view to maintaining international peace. The drafting history of the UN Charter indicates that unsuccessful attempts were made during the San Francisco Conference to qualify the words 'maintenance of international peace and security' in Article 1, with the words 'in conformity with the principles of justice and international law'. Such attempts failed due to apprehensions that such qualifications would unduly limit the powers of the Council and prejudice effective

⁶ Ibid.

⁷ Ibid, at p. 197.

⁸ Article 24 of the UN Charter.

action on its part.⁹ The wide measure of discretion thus accorded to the Council is particularly true of the enforcement measures taken by the Council acting under Chapter VII.¹⁰ Under Article 39, the Council's powers to decide which situations constitute a threat to international peace and security, as well as what kind of responsive measures that should be taken to quell the threat, are almost plenary. Decisions of the Council while acting under Chapter VII are essentially political decisions.¹¹ The Security Council has in the past, exercised a wide array of powers while acting under Chapter VII, including the establishment of international tribunals¹² and the settlement of border disputes between nations.¹³ The Chapter VII measures taken by the Security Council must be in response to a threat to international peace and security, once the Council has made a determination to that effect under Article 39. The Council has, in the past, determined what constitutes a threat to international peace and security in fairly broad terms. An example of the wide interpretation made by the Council is the determination that failure by the Libyan government to demonstrate its renunciation of terrorism and to respond to the Council's request in SC Resolution 731(1991) constituted a threat to international peace and security.¹⁴ Further, it is widely acknowledged that as decisions of the Council are political, it would be unwise to second-guess the validity of their determination.¹⁵

⁹ N. Jain, "A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court," 16 European Journal of International Law 239 (2005).

¹⁰ Case Concerning the Interpretation and Application of the Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K), Provisional Measures, 94 ILR 478 (dissenting opinion of Judge Weeramantry, at 549).

¹¹ Case Concerning Conditions of Admission of a State to Membership in the United Nations, ICJ Rep 57 (Dissenting opinion of Judges Basdevant, Winiarski, McNair, and Read at p.85)

¹² Security Council Resolution on the Establishment of the International Tribunal for the Former Yugoslavia, SC Res. 827(1993); UN Doc. S/Res/827 (1993); Security Council Resolution on the Establishment of the International Tribunal for Rwanda, SC Res.935, UN Doc.S/Res/935 (1994).

¹³ SC Res. 687 (1991) passed under Chapter VII enjoined Iraq and Kuwait to recognise the inviolability of the international boundary as set out in the minutes between the two countries. The Resolution also called upon the Secretary General to draw upon appropriate material to demarcate the boundary between Iraq and Kuwait; UN Doc .S/INF/47 (1991).

¹⁴ UN Doc . S/RES/748, (1992).

¹⁵ C. Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)," 14 European Journal of International Law 86(2003).

The maintenance of international peace and security is not the exclusive business of the Council. In 1950, the General Assembly concerned at the inaction of the Security Council and its failure to play its role provided in the Charter, adopted the Uniting for peace resolution.¹⁶ This resolution allowed it to call emergency meetings in the event of the Security Council failure because of lack of unanimity of the permanent members to exercise its primary responsibility for maintenance of international peace and security in any case where there appears to be a threat to peace, breach of peace, or act of aggression. The General Assembly may then recommend collective measures including, the use of armed force if necessary. Using this procedure, it proceeded to recommend the establishment of peace keeping forces in the Middle East. The legality of this was upheld by the ICJ in the Certain Expenses Case.¹⁷ The Court held in its interpretation of Article 11(2) of the Charter the Security Council has a primary but not exclusive role in maintenance of international peace and security.¹⁸

5.4. The Security Council and the International Court of Justice

The International Court of Justice is the principal judicial organ of the United Nations.¹⁹ Its seat is at the Peace Palace in The Hague (Netherlands). It began work in 1946, when it replaced the Permanent Court of International Justice, which had functioned in the Peace Palace since 1922. It operates under a Statute largely similar to that of its predecessor. The Court has a dual role, namely, to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. The Court is composed of 15 judges elected to nine-year terms of office by the United Nations General Assembly and Security Council sitting independently of each other. It may not include more than one judge of any nationality. Elections are held every three years for one-third of the seats, and retiring judges may be re-elected. The members of the Court do not represent their governments but are independent judges. The judges must possess the

¹⁶ UN Doc. A/C 6/SR 897.

¹⁷ 1962 ICJ Rep at 580.

¹⁸ Supra, note 4, at P.198.

¹⁹ See Article 92 of the UN Charter.

qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognized competence in international law. The composition of the Court has also to reflect the main forms of civilization and the principal legal systems of the world. When the Court does not include a judge possessing the nationality of a State party to a case that State may appoint a person to sit as a judge *ad hoc* for the purpose of the case.²⁰

5.4.1. Jurisdiction

The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:²¹

- (1) By the conclusion between them of a special agreement to submit the dispute to the Court;
- (2) By virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a disagreement over its interpretation or application, one of them may refer the dispute to the Court. Over three hundred treaties or conventions contain a clause to such effect;
- (3) Through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. In cases of doubt as to whether the Court has jurisdiction, it is the Court itself which decides.

5.4.2. Advisory Opinions

The advisory procedure of the Court is open solely to international organizations. The only bodies at present authorized to request advisory opinions of the Court are five organs of the United Nations and 16 specialized agencies of the United Nations family.²²

²⁰ See General Information about the composition and functioning of the Court at the International Court of Justice website at www.icj-cij.org/icjwww/generalinformation/notice.pdf. Visited on 4th September 2006.

²¹ M. S. Mohammed. The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations. (Bril Academia Publishers, Leiden, 2003), p.20.

²² See Article 65 of the Statute of the International Court of Justice.

On receiving a request, the Court decides which States and organizations might provide useful information and gives them an opportunity of presenting written or oral statements. The Court's advisory procedure is otherwise modeled on that of contentious proceedings, and the sources of applicable law are the same. In principle, the Court's advisory opinions are consultative in character and are therefore not binding as such on the requesting bodies. Certain instruments or regulations can, however, provide in advance that the advisory opinion shall be binding. Since 1946 the Court has given 25 Advisory Opinions concerning, *inter alia*, the legal consequences of the construction of a wall in the occupied Palestinian territory,²³ admission to United Nations membership, reparation for injuries suffered in the service of the United Nations,²⁴ territorial status of South-West Africa (Namibia) and Western Sahara, judgments rendered by international administrative tribunals, expenses of certain United Nations operations, applicability of the United Nations Headquarters Agreement,²⁵ the status of human rights rapporteurs²⁶, and the legality of the threat or use of nuclear weapons.

There have been many interesting facets to the relationship of the Court and the Security Council. Both are organs of the United Nations, hence a relationship of equality is natural. However, the Court should give consideration only to legal factors when exercising its jurisdiction, notwithstanding the important political role of the Security Council and the fact that it is given special powers relating to the use of force under Chapter VII of the UN Charter. In the Aegean Case²⁷ there was a simultaneous seizing of the Court and the Security Council. The Court was asked to order provisional measures of protection which it declined. It is clear that this was because it felt the criteria for the granting of these were not met and not because of any inhibition flowing from the fact that the Security Council was seized of aspects of the dispute.²⁸ The Council was seized

²³ 2002 ICJ Rep 620.

²⁴ 1949 ICJ Rep 151.

²⁵ 1988 ICJ Rep 308.

²⁶ 1998 ICJ Rep 420.

²⁷ 1967 ICJ Rep 47.

²⁸ R. Higgins, "International Criminal Court and the International Court of Justice", in H.A.M. Von Hebell (ed.) Reflections on the International Criminal Court (T.M.C.Asser, The Hague, 1999), p.98.

of the matter on 25 November 1979. Four days later the United States took the matter to the ICJ. The Court took note of the actions being taken by the Security Council and then preceded, in the context of a request for provisional measures, to issue a series of measures which it considered were required in the case. In turn, in a resolution of November of December 1979, the Security Council took note of the Court's order in deploring the continued detention of hostages. The Court then proceeded to hear the case on merits, during the course of which it stated:

It does not seem to have occurred to any member of the (Security) Council that there could be anything irregular in simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.

In the Military and Paramilitary Activities in and against Nicaragua Case²⁹ the Security Council was not actively seized of the disputes between Nicaragua and the United States, but only because the United States had vetoed a resolution on the matter proposed by Nicaragua in the Security Council. However, the United States raised as an objection to the admissibility of Nicaragua's application, the contention being that there was an ongoing dispute relating to the use of armed force, and that the matter was thus essentially one for the Security Council. The Court referred to its earlier finding in the Tehran Hostages Case³⁰ to support its decision that the fact that a matter is before the Security Council should not prevent the Court from dealing with it; both proceedings could go ahead on parallel tracks. As for the point relating to the use of force, the Court noted that Article 24 gives the Security Council a primary responsibility in the maintenance of international peace and security. But it continued to state as follows:

The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate, but complementary functions with respect to the same events.³¹

The Court has on several occasions tried to delink its judicial functions from the political role of the Security Council. In its opinion in Certain Expenses of the United Nations the

²⁹ ICJ.Reports (1984).

³⁰ ICJ Reports (1980).

³¹ Supra , note 28.

Court stated while emphasizing its discretion to give or not to give an opinion and its authority to answer only “a legal question,” held that it cannot “attribute a political character to a request which invited it to undertake an essentially juridical task, namely, the interpretation of a treaty provision.”³²

This unfortunately was not the case in the Lockerbie Case.³³ Despite the above elaborate provisions the relationship between the Security Council and the International Court of Justice has not been smooth. This was clearly brought out in the Lockerbie case. The facts of the case are that on 21 September 1988, a bomb exploded on board a Pan Am flight 103 from London to New York over Lockerbie, Scotland. The explosion caused the plane to crash, killing all 259 people on board and 11 on the ground. After lengthy investigations, the United States and the United Kingdom concluded that the bomb had been placed on the plane by two Libyan nationals alleged to have acted as agents of the Libyan government. In a joint declaration on 27 November 1991, the British and American governments demanded that Libya surrender the two suspects for trial in the United States or the United Kingdom.

When Libya refused to do so, the Security Council adopted Resolution 731 of 21 January 1992.³⁴ The resolution, which had a character of a non binding recommendation, asked Libya to comply with the request made by the British and American governments, including the call for surrender of the two suspects. While the matter was still pending before the Security Council, Libya, acting on the basis of Article 14 of the Montreal Convention, filed an application asking the ICJ to find that it had complied with all its obligations under the Montreal Convention and that the United Kingdom and the United

³² ICJ Reports.1962.p.155.

³³ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie. (Libyan Arab Jamahiriya v. United Kingdom), Request for the indication of Provisional Measures, Order of 14 April 1992, ICJ Reports (1992). Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Request for indication of Provisional Measures. Order 14 April 1992 , ICJ Reports (1992).

³⁴ UN Doc. S/RES/731 (1991).

States were in violation of their obligations under that Convention, and that they were obliged to desist from the use of any force or threats against Libya.

On the same day that the application was filed, Libya also submitted a request for the indication of the following provisional measures:³⁵

- a) To enjoin the United States from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside Libya; and
- b) To ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's application.

On 31 March 1992, three days after the closing of the hearings on the requests for provisional measures, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 748.³⁶ In this resolution it determined 'that the failure by the Libyan government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the request in Resolution 731 (1992) constitute a threat to international peace and security,' and decided that Libya had to comply with the request expressed in the joint declaration of the British and American governments. In the case of non-compliance, the Security Council would impose sanctions on Libya that included an embargo on air travel to and from Libya and an arms embargo.

Despite the fact that Resolution 748 (1992)³⁷ had been adopted after the filing of the application, the Court decided to take it into account in its decision. On this basis, the Court dismissed the application in only a few sentences. It held that the parties were obliged to accept and to carry out Security Council resolutions in accordance with Article 25, and that this obligation *prima-facie* also applied to Resolution 748 (1992). For this reason, the Court considered the right of Libya under the Montreal Convention as inappropriate for protection by means of provisional measures. The Court also pointed

³⁵ *Supra*, note 33.

³⁶ UN Doc. S/RES/748 (1992).

³⁷ UN Doc. S/RES/748 (1992).

out that this decision did not prejudice its position on other questions it might be called upon to decide upon at a later stage of the proceedings.³⁸

The Security Council's action, and reliance of the Court on Resolution 748, however, troubled many of the judges, including some of the majority, because they saw a source of potential conflict between the Court and the Security Council, and a possible challenge to the Court's jurisdiction under the Charter. Under Article 25 of the Charter, members of the United Nations "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Without commenting on the legal effect of Resolution 748, the Court was prepared to give the Resolution *prima facie* legitimacy for the purposes of the request for interim measures. The majority was not, therefore, prepared to make any express comments on the respective powers of the Council and the Court. Other members of the Court were not so reticent.³⁹

Of the dissenting judges, Judge Bedjaoui was perhaps the most critical of the actions of the Security Council. He noted that for the first time there was the possibility of one organ of the United Nations influencing the decision of the other and the possibility of conflict between the two decisions. On the facts of the case, he questioned the prudence of the Council in acting under Chapter VII as follows: how is it that three years after the event the matter now constitutes an imminent threat to peace? He also noted that evidence implicating the accused did not appear strong and drew attention to the General Assembly Resolution 41/38 of November 20, 1986, indicating that the United States was engaging in a campaign of misinformation against Libya.⁴⁰ In so far as the respective powers of the Security Council and the Court were concerned, Judge Bedjaoui recognized that the two organs were being asked to decide different questions. The Council considered Libya's international responsibility for state sponsored terrorism, while the Court considered the question of the rights of the parties under the Convention. Moreover, the Court was making a legal determination and the Council a political one.

³⁸ G. P. Mc Ginley. "The ICJ Decision in the Lockerbie Case," 22 Georgia Journal of International and Comparative Law 598(1992).

³⁹ Ibid.

⁴⁰ Judge Bedjaoui, Separate Opinion. *Libya v United Kingdom*, ICJ Reports (1992) p. 41-43, para 18-21.

In his separate opinion in the Lockerbie Case, Judge Shahabudeen held that the question raised by Libya's challenge to the Security Council resolution was:

Whether a decision of the Security Council may override the legal rights of states, and if so, whether there are any limitations on the powers of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's power of appreciation? ...if there are limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?⁴¹

The Security Council's Resolution created a grey area of overlapping jurisdiction; however, while the Court could not be used as a Court of Appeal against the decision of the Security Council, the Security Council should not subvert the integrity of the Court's legal function.⁴² What many governments now worry about is the (selective) activism the Council has practiced since 1990. The UN Secretary General has stated as follows in that regard:

With the permanent members largely unanimous, does the Security Council have unlimited powers? How far can it extend the scope of its activities? Is it up to the Council alone to interpret what its powers are? These are fundamental issues that have to do with the balance between the organs, relations between the organization and member states, the political function vested in the United Nations and even the Charter itself.⁴³

Another weakness of the current structure of international adjudication compliments that failure. Even though, under the Charter, the Security Council is authorized to make recommendations or to decide upon measures to be taken to give effect to judgments of the court, its voting to give effect to such judgment is subject to the same limitations which govern voting upon its other substantive matters.⁴⁴

⁴¹ Judge M. Shahabudeen. Separate opinion. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the aerial incident at Lockerbie (Libya v UK; Libya v U.S.), Provisional measures, 1992. ICJ Rep 28,

⁴² Ibid (Libya v U.K.) at 34 to 35, paras 4-7.

⁴³ B. Fassbender, The UN Security Council Reform and the right of veto. A constitutional perspective. (Kluwer law International, The Hague, 2006), p. 13.

⁴⁴ S. M. Schwebel. Justice in International Law. Selected Readings. (Grotius Publications, Cambridge University Press, Cambridge, 199), p.10.

5.5. The Security Council and the International Criminal Court

The relationship between the Court and the Security Council has probably caused more controversy and consumed more time than any other issue related to the Statute. Whereas, for some, the Security Council is the guardian of legality in the international system, in its relationship with the Court, the Council rather symbolizes political intervention in an independent international judiciary. With the showdown in the Security Council over the submissions of UN operations under the jurisdiction of the court, the intricacies of this relationship have already tarnished the entry into force of the statute.

The relationship between the Security Council and the International Criminal Court has proved to be one of the most controversial aspects of the Rome Statute. This relationship was initially outlined in Article 23 of the ILC's 1994 Draft Statute for an International Criminal Court.⁴⁵ It was however substantially rethought in Rome. While partially settled through the adoption of Articles 5, 13(b) and 16 of the Statute, the debate over the role of the Security Council in respect of the crime of aggression is at present continuing in a Preparatory Committee established for that purpose.

The relationship between the International Criminal Court and the Security Council of the United Nations and their respective roles are important issues raised during the preparatory stages as well as the Rome Conference. The draft Statute prepared by the ILC envisaged in its draft Article 23 three specific roles for the Security Council in the Court's regime, namely, (i) the Court would not be able to deal with complaints of or directly related to acts of aggression unless there has been a prior determination by the Council that the state in question had committed the act of aggression which was the subject matter of the complaint; (ii) the Council could refer matters to the Court pursuant Chapter VII of the Charter of the United Nations; and (iii) the Court could not, in the

⁴⁵ See Draft Statute for an International Criminal Court in Report of the International Law Commission on the work of its forty-sixth session; UN Doc. A/49/10 (1994).

absence of the approval of the Council, commence a prosecution if it arose out of a situation which was being dealt with by the Council under Chapter VII of the Charter.⁴⁶

The current version of Article 16 has its origin in Article 23 of the ILC draft Statute, which provided that ‘no prosecution may be commenced under this statute arising from a situation which is being dealt with by the Security Council as a threat or breach of peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’⁴⁷ This section came under criticism at the Preparatory Committee because it seemed to imply that the Council could bar the exercise of the Court’s jurisdiction by merely putting a given situation on its agenda. It was, therefore, replaced by a proposal submitted by Singapore, which was guided by the intention to limit the suspension of jurisdiction of the ICC to cases in which the Council requests the Court not to initiate or continue specific proceedings. The Singapore text read: ‘no investigation or prosecution may be commenced or proceeded with under the Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given direction to that effect’. This proposal was later amended by the proposal from Costa Rica, which required a ‘formal and specific decision’ of the Security Council, and a British proposal, which replaced the word ‘direction’ with ‘request’ and became the basis of the current Article 16 of the Statute. The purpose of this provision is quite clear. It was negotiated to enable the Council to delay the exercise of jurisdiction by the ICC in situations in which the resolution of a specific conflict warrants a deferral of prosecution.⁴⁸

As for the Council's power to defer investigation or prosecution, had Article 23(3) of the ILC Draft Statute been adopted, it would have constituted the most extensive reach of the Council's creeping jurisdiction in the field of international criminal law by allowing it, in

⁴⁶ L.Yee, “The International Criminal Court and the Security Council: Articles 13(b) and 16,” in R.S Lee (ed) *The Making of the Rome Statute. Issues. Negotiations. Results* (Kluwer Law International, The Hague, 1999), P144

⁴⁷ See the ILC Draft Statute for an International Criminal Court, Report of the International Law Commission on the work of its forty-sixth Session, 1 September 1994, UN Doc.A/49/355 .

⁴⁸ C. Stahn. “The Ambiguities of Security Council Resolution 1422 (2002),” 14 *European Journal of International Law* 86(2003)

a situation being dealt with under Chapter VII as a threat to or breach of the peace, to bar the commencement of a prosecution by the Court until the Council decided to allow it to proceed. In practice, this implied the potential power of a permanent member of the Council to obstruct the Court without temporal limitation, as the open-ended nature of the sanctions adopted against Iraq well illustrate, and in respect of any of the crimes within the Court's jurisdiction, since any of these have been or could be linked to Council determinations under Article 39. This has elicited several arguments.⁴⁹

According to Gowlland-Debbas⁵⁰ the above situation has been reversed. The Security Council must act affirmatively on the basis of a resolution requesting the Court to defer its investigation, which would mean having to obtain the consensus of all five permanent members of the Council in any effort to block the Court. Moreover, the temporal time limit - although subject to renewal - acts as an additional safeguard. Since the resolution is one adopted under Chapter VII, there must presumably be a prior determination under Article 39, the prerequisite for any action. This leads to speculation as to what would then have to constitute the threat to or breach of the peace, the situation itself or the Court's commencement of an investigation into the commission of a crime? Could justice be seen here as undermining security?⁵¹

Article 16 was already controversial at the preparatory commission and at the Rome Conference. Due to the precedence of the Charter over other international agreements, (Articles 103 and 25), UN members are under an obligation to follow the Council rather than the court. On article 16 it has been argued:

First political considerations were given much, if not more, weight than legal arguments in the determination of the appropriate role for the Security Council in the ICC proceedings. Secondly, the Security Council's deferral power confirms its decisive role in dealing with situations where the requirements of peace and

⁴⁹ V. Gowlland-Debbas. "The Relationship Between the UN Security Council and the International Criminal Court" 1 Journal of Armed Conflict Law. 114 (1996).

⁵⁰ *Ibid.*, at p. 48.

⁵¹ *Ibid.*

justice seem to be in conflict. Thirdly, article 16 provides an unprecedented opportunity for the Council to influence the work of a judicial body.⁵²

The adoption of the SC Resolution 1422,⁵³ which exempted UN personnel of non member states from the ICC jurisdiction for one year confirms the primacy of the political over the legal, a primacy which was intended by the Charter (Articles 103 and 25) and the ICC Statute. Nevertheless the primacy should not be unlimited; it should exist within legal bounds. Contrary to the ILC proposal, which contained an automatic bar for prosecution relating to situations under Council review, Article 16 of the Statute only grants a temporary stay of proceedings. Bergsmo and Pejic insist that Article 16 applies only after charges have been brought.⁵⁴ Hence, the Security Council cannot block the collection of information or a 'preliminary explanation' before a pre trial chamber's authorization of an investigation. Even after the Security Council has invoked article 16, they maintain that the prosecutor may preserve evidence. What they fail to address is the question as to who is to assess whether the Council has acted within the legal limits set by Article 39 of the Charter and Article 16 of the Statute. One is also bound to ask whether the Council may take advantage of its primacy under the Charter to circumvent the Statute.⁵⁵

One⁵⁶ has argued that the relationship between the Security Council and the Court is such that the ICC is actually two courts in one. In this regard they argue that the pursuit of international justice sometimes depends as much on matters of administration as it does on questions of law, and how these matters of administration are treated by the Rome Statute suggests that these funding questions are just one part of a larger issue: the fact that the court functions differently when it hears cases referred by the Security Council. For example, many of the Rome Statute's provisions on jurisdiction do not apply to Security Council referrals, suggesting that cases coming from that legal avenue are

⁵² See Bergsmo and Pejic, "Article 16 of the Rome Statute in O.Triffterer and C Rosbaud (eds). The Rome Statute of the International Criminal Court. (Oxford University Press, Oxford, 2000), p.377.

⁵³ UN Doc. S/RES/1422 (2002).

⁵⁴ Supra, note 52, at p.385.

⁵⁵ A. L .Paulus, "Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court" 14 European Journal of International Law 843 (2003.)

⁵⁶ Ibid.

placed on a separate judicial track. Article 115 of the Rome Statute grants authority over the Court's budget to the Assembly of State Parties, with funding coming from assessed contributions by state parties. However Article 115(b) allows for funding directly from the United Nations as approved by the General Assembly, in cases of Security Council referrals. This funding scheme suggests that the ICC is really two courts in one. When acting on referral from state parties, or when acting under the Prosecutor's independent authority under Article 15 (1), the Court is an independent judicial body governed by the Rome Statute and funded by the Assembly of state parties. But when acting under a mandatory Security Council referral, the ICC becomes an altogether different entity. It becomes, it seems, a judicial organ of the UN, subject to the prosecutorial discretion of the Security Council, not its own prosecutor, and funded by the UN through the budgetary authority of the UN General Assembly. In such cases the ICC becomes a court called to order in service of the international peace.

The Security Council referral of Darfur case violated the funding scheme suggested by the Rome Statute. As a price for the US acquiescence in the Security Council referral, the Security Council insisted that no UN funds could be used for the Darfur prosecutions. This violates the spirit of the Rome Statute and leaves only two options for funding the Court: assessed contribution from states parties and voluntary contribution from governments, international organizations, individuals, corporations and other entities. The ICC Prosecutor was required by the UN to take up the case but the ICC would have to find a way to pay the bill itself. And failure to find funding would not, it seems, provide a legal justification for ignoring the Security Council referral. This funding scheme was an attempt by the Security Council to blur the line between the two courts within the ICC. The Security Council wanted the authority and power inherent in the ICC as a 'security court', but it balked at the financial commitments these would impose. So the Council borrowed the funding scheme for the ICC as an independent criminal court in an attempt to have its cake and eat it too. The two courts of the ICC are conceptually distinct and an attempt to conflate them only hurts the interest of the Security Council. The result is a deep confusion over who will control the Court during the Darfur case.

This dynamic between the ICC as an independent criminal court and the ICC as a security court is also evident in the Rome Statute's provisions on jurisdiction and what it calls 'admissibility'. As has been noted in the literature, the Rome Statute asserts complementarity, not exclusive jurisdiction over its criminal cases, like the ICTR and the ICTY. Article 18 establishes a procedure regarding admissibility which only applies to cases referred to the court by state parties and cases initiated independently by the prosecutor. Security Council's referrals are specifically exempt from the Article 18 process for challenging admissibility.⁵⁷ Although the Court is able to declare an individual case inadmissible under article 17, most of the standard of admissibility under the provision deal with status of particular individuals facing trial. Although Article 17 (1) (d) deals with 'sufficient gravity' of the case, it is unclear if the court could rule that a case was not sufficiently grave if the Security Council made a referral upon a finding that the case was so grave that it was necessary to restore international peace and security. It is doubtful that the court can overrule the Security Council on this point. This is to be contrasted with Article 18's reference to 'situations' that have been referred to the Court. This suggests that perhaps the court can rule a case inadmissible against an individual suspect under Article 17 for limited reasons, but would be powerless to invoke complementarity to reject a Security Council referral of an entire situation such as the Darfur case, since Article 18 specifically omits Security Council referrals from its discussions. The plausible reading of the Rome Statute would again be consistent with the view of ICC as two courts. It would make sense that when the ICC acts as an independent criminal court, constituted by the Assembly of state parties, there will be a strict process for challenging the jurisdiction of cases before the court that are supported by some state parties but objected to by others. However when cases are referred to the court by the Security Council acting under its authority to restore international peace and security, it would be a natural conclusion to dismiss jurisdictional challenges as being beside the point⁵⁸

⁵⁷ Article 17 of the Rome Statute; UN Doc A/CONF/183/9.

⁵⁸ G. P. Fletcher, and J. D. Ohlin. "The ICC-Two Courts in One?" *Journal of International Criminal Justice* 45(2006) Retrieved from www.oxfordjournals.org visited on 20th July 2006.

According to Higgins, Article 16 of the Rome Statute does not give the Security Council the severe controls originally envisaged.⁵⁹ This unfortunately is not so under Article 16 of the Rome Statute which amounts to interference with the Court by the Security Council which is a political organ. More importantly, the Court could in effect, be deprived of jurisdiction by the mere placement of a situation on the agenda of the Council, where it could remain under consideration for a potentially indefinite period of time. Despite the provision that the Council can only defer prosecution, for a period of 12 months, the same is renewable indefinitely and can oust the Court's jurisdiction. This provision undermines the independence of the Court

The other issue that provides cause for concern is the definition of aggression and the relationship between the Court and the Security Council. In the meantime the matter has been put on hold in view of the fact that the Rome Statute has included the crime aggression within the jurisdiction of the Court, but has stipulated that the Court will exercise jurisdiction over such a crime only when the Statute has been amended to include a definition of aggression and conditions under which the Court shall exercise jurisdiction. The Council's role with respect to the crime of aggression remains an issue to be resolved and this fact is alluded to by an express requirement that the provision adopted must be "consistent with the relevant provisions of the Charter of the United Nations."⁶⁰ This formulation refers to Article 39 of the Charter of the United Nations pursuant to which the Security Council shall determine the existence of any ...act of aggression..." The mandatory language of Article 39 of the Charter seems to indicate that a primary role must be given to the Council to determine the existence of aggression on the part of a state as a precondition to the institution of criminal proceedings against individuals by the Court. This has raised a lot of difficulties, permitting the Security Council, a political body; to determine certain elements of a crime entailing individual responsibility. This violates the basic human rights norm that requires judicial

⁵⁹ Supra note 28

⁶⁰ Article 39 of the UN Charter provides that the UN Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

determination of every element of a crime. Article 39 of the Charter stipulates that Court proceedings in relation to the crime of aggression would be subject to a prior determination by the Security Council of an act of aggression by the State concerned. Through this exclusive prerogative, the Council would effectively control access to the Court in so far as aggression is concerned. It should be pointed out that the Security Council has so far not made a formal finding of an act of aggression under Article 39 and its ambiguous language would make it very difficult for the Court to rely on such a finding. If the Council's approval is to remain a precondition for exercise of the Courts jurisdiction, then it is possible to conclude that the Rome Statute provisions amount to politicization of the judicial regime. This also means that prosecution of aggression will never be undertaken against the permanent members of the Council because of the power of the veto over any non-procedural decisions.⁶¹

5.6. Conclusion

This Chapter has brought out the existence of a conflict between the International Criminal Court and the Security Council. These conflicts have their origin in Article 5, 13(b) and 16 of the Rome Statute. These provisions allow the Council to exercise authority over legal issues that are the duty of the Court. These include the determination of existence of a crime (aggression), yet it is the duty of a judicial institution organ to determine all the elements of a crime. Additionally, the Council has powers to oust the Court's jurisdiction without any constitutional basis as the Council hardly states under which Charter provision it is acting.

⁶¹ Article 27(3) of the Charter of the United Nations

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1. Conclusion

This thesis looks at the jurisdiction of the International Criminal Court with respect to the crime of aggression. It also looks at the relationship between the Security Council and the International Criminal Court with respect to the said crime and the provisions of the Rome Statute generally. The research sought to find out if the provisions of the Rome Statute give the Court the autonomy it requires to discharge its mandate. From the outset this research reveals that the Court has a close relationship with the Security Council which is a political organ of the United Nations. The relationship between the Security Council and the International Criminal Court has its origin in Article 23 of the ILC Draft Statute for an international criminal court. This draft Statute envisaged three roles for the Security Council in the Court's regime, namely (i) the Court would not be able to deal with complaints of or directly related to the acts of aggression unless there had been a prior determination by the Council that the state in question had committed the act of aggression which was the subject matter of the complaint, (ii) the Council would refer matters to the Court pursuant to Chapter VII of the Charter of the United Nations; and (iii) the Court could not, in the absence of approval by the Council, commence a prosecution, if it arose out of a situation which was being dealt with by the Council under Chapter VII of the Charter. These three roles formed the basis of the consideration during the subsequent negotiations in Ad Hoc and Preparatory Committees and at the Conference. The compromise reached embodied in Article 5, 13(b) and 16 of the Rome Statute

This research has shown that that the ILC suggestion that prior to prosecution, the Security Council first determine that the state in question has committed aggression was fraught with difficulty in the negotiations that took place in the Preparatory Committee. Most delegations opposed this move as amounting to politicization of a judicial regime if the Council's approval was to be made a precondition for the exercise of jurisdiction. At the end of the Rome Conference, aggression was included in the crimes

within the jurisdiction of the Court but without immediate effect due to a provision stipulating that:

The Court shall exercise jurisdiction over the crime of aggression once, a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of charter of the United Nations.¹

As part of a compromise the duty of coming up with a definition of the crime aggression was given to a Preparatory Committee which is meant to report back in 2007. Article 39 of the UN Charter stipulates that the Security Council shall determine the existence of any threat to peace, breach of peace or act of aggression and shall make recommendations or decide what measures shall be taken to in accordance with Articles 41 and 42, to maintain or restore international peace and security. Article 103 of the Charter similarly provides that in the event of a conflict between the obligations of members of the United Nations under the present Charter and their obligations under any other agreement, their obligations under the Charter shall prevail. From the foregoing, this research has come to the conclusion that if the Preparatory Committee is to come up with a definition in accordance with the Charter, then the Security Council will be able to restrict accessibility to the ICC through the crime of aggression. Additionally, the Security Council will continue to perform a legal function (determination of the existence of the crime of aggression) which ought to be a duty of the Court thereby limiting the jurisdiction of the Court.

The other role envisaged by the ILC Draft Statute for the Security Council is connected with the trigger mechanism of the Court. The trigger mechanisms in the Rome Statute are set out in Article 13, which specifies the entities empowered to initiate proceedings before the Court. Article 13(b) provides that that the Court may exercise its jurisdiction with respect to the crimes referred to in Article 5 of the Statute if “ a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” This work has shown that this provision was rejected on the ground that it would subject

¹ UN Doc .A/CONF.183/9 (1998).

the functioning of the Court to the decisions of a political body and therefore undermine the Court's independence and credibility. Unfortunately the final provision in Article 13(b) shows that the Court is still subject to control by the Security Council. In deed as shown by chapter four, the Courts seem to function as a subsidiary court of the Security Council while dealing with a referral from the Security Council. This is because Security Council referrals are not subject to the rules of admissibility under the Rome Statute. The funding of the Court while dealing with a referral from the Security Council is also different from the usual contribution of assed state party's contributions. The Court cannot therefore rule on the admissibility of a Security Council referral. The Court functions as a Court called to the service of the Security Council in the maintenance of international peace and security.

The last function of the Court with regard to the ILC statute was stipulated in Article 23(3). This provision allowed the Court to stop ongoing or pending proceedings before the Court. It prohibited the commencement of prosecution if it arose from a "situation which was being dealt with by the Council as a threat to, or breach of peace, or an act of aggression" under Chapter VII of the Charter unless the Council permitted otherwise. The compromise reached herein is embodied in Article 16 of the Rome Statute. This research has shown that the Security Council rarely stipulates the constitutional basis of its decision. In the circumstances, one cannot tell whether the Council is acting under Chapter VII of the Charter or not. Additionally, the Council has interpreted its Chapter VII Chapters in a very broad way. Given this lacuna, the Council can easily oust the jurisdiction of the Court without the existence of a threat to international peace and security. This abuse and ouster of the ICC jurisdiction by the Council without a threat to international peace and security is shown by Security Council resolution 1422(2002)² and 1487 (2003).³ In Article 36(3) of the Charter of the United Nations, the Council is exhorted to encourage states to refer legal disputes to the court, so that the clear implication is that legal disputes are not the business of the Council. In practice however, the expectation that the Council functions under the rule of law is not reinforced by the normal legal safeguards one would expect to find surrounding the exercise of executive

² UN Doc. S/RES/1422 (2002).

³ UN Doc. S/RES/1487 (2003)

powering a democratic constitutional system. Consequently, the Rome Statute seems to impose on the Security Council legal issues which the Council is not meant to deal with. The overall conclusion in this research is that the hypothesis of this study that the Rome Statute as the constitutive instrument of the Rome Statute does not give the Court adequate autonomy it requires in discharging its mandate has been proved..

The Security Council is not bound by the provisions of the Rome Statute. It is only bound by the charter of the United Nations. Its only limitations are the principles and purposes of the United Nations as set out in the Charter. Consequently, the recommendations below seeks to find out the way forward in harmonizing the relationship between the Security Council and the International Criminal Court with a view of making the Court more independent to enable it achieve its objectives

6.2. Recommendations

1. Reforms within the UN system

There is an urgent need for reforms within the UN system to give the Security Council more credibility. There should be a change in the Council's composition to make it more representative of the international community as a whole, as well as the geopolitical realities of today and therefore more legitimate in the face of the world. Its working methods also need to be made more efficient and transparent.⁴

2. Limiting the Security Council through Judicial Review

It should be noted from the outset that the powers that Security Council enjoys are constitutional. The Security Council should, therefore, be controlled within the constitutional nature of the Charter. This position is supported by other jurists.⁵ In this context, the Security Council decisions that are *ultra vires* the Charter provisions should

⁴ UN Doc. A/59/2005.

⁵ D. Bowett. "The impact of Security Council Decisions in Dispute Settlement Procedures".⁵ European Journal of International Law 2(1994). See also B. Martenczuk, "The Security Council, the International Criminal Court and Judicial Review: What lessons after Lockerbie" 10 European Journal of International Law 538 (1999).

be subject to judicial review. There is no reason to suppose that a decision of the is binding on a member state when that decision is *ultra vires*, precisely because states have under Article 25 agreed to accept only such decisions as are in conformity with the Charter. Consequently, a decision taken in violation of the Charter should not be held to be binding. Member states have a right to insist that the Council keeps within the powers they have accorded to it under the Charter. The ICJ has confirmed this in its advisory opinion in Conditions of Admission to the United Nations⁶ where the court held that:

“The political character of an organ cannot release it from the observance of treaty provisions established by the Charter, when they constitute limitations on its power or criteria of judgment”⁷

In the Expenses case, the court stated as follows, with regard to the concept of *ultra vires*:

“When the organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the organization”⁸

Limitations on the powers of the Security Council has been recognized by the ICTY in the case of Prosecutor vs Tadic⁹ in which the court stated as follows:

The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Council is thus subject to certain constitutional limitations on its powers and criteria of judgment.

The concept of judicial review that has emerged as a general principle of law within the municipal order, can be transferred to the UN legal order. In this regard Security Council resolutions that are against the principle as purposes of the United Nations should be subject to judicial review. Security Council resolutions that have clear errors of law should also be subject to judicial review. Although this standard has never been applied by the court, it has occasionally been advocated by some of its judges. A clear

⁶ Conditions of Admission to the United Nations. Advisory Opinion. ICJ Reports (1948)

⁷ Ibid at p.64

⁸ Certain Expenses of the United Nations, Advisory Opinion, ICJ Reports(1962) at 168

⁹ IT-94-1-AP72 at Para 28

formulation of the standard can be found in the separate opinion of Judge De Castro in the Namibia Case¹⁰

“To challenge the validity of a resolution, it is not sufficient merely to allege that it is possible to find a better interpretation; a resolution can only be criticized if it is demonstrated absolutely impossible to find any reason whatsoever, even a debatable one, upon which an interpretation favorable to the validity to the validity of the resolution may be based.”

This can also be done by reference to an arbitral tribunal or a Commission jurist. The UN should therefore establish a commission of jurists to act as an arbitral tribunal or even a commission of jurists to act as a kind of a constitutional court in the sense that it will be a standing body to which whenever a decision is challenged by a state, the Council will refer the challenge. Ideally the Council should be committed in advance to accept any report from such a commission of jurists. The Council should also agree to suspend the implementation of its decision pending an award or final report.¹¹

3. Amending Article 5, 13(b) and 16 Rome Statute

As we have seen in the preceding chapters the relationship between the Security Council and the International Criminal Court originated from Article 23 of the ILC draft Statute for an international Criminal Court. The compromise reached in Rome over this issue is contained in Article 5, 13(b) and 16 of the Rome Statute. This, however, has not adequately addressed the conflict that is bound to arise between these two important institutions. One writer has suggested that since the provisions relating to the Security Council and the International Criminal Court emanated from Article 23 of the ILC Draft, the same ought to have been formulated as follows in Rome:¹²

1. Notwithstanding Article 21, the Court has jurisdiction in accordance with this Statute with respect to the crimes referred to in Article 20 as a consequence of

¹⁰ Supra , note 5, at p. 185

¹¹ Ibid.

¹² S. Yee, “A Proposal to Formulate Article 23 of the ILC Draft Statute for an International Criminal Court” 19 Hastings International and Comparative Law Review.31(1996).

referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations. Such referral is not, however, binding on either the Prosecutor or any chamber of the Court with respect to whether there is enough evidence for initiating an investigation or prosecution proceeding against an individual or for individual responsibility.¹³

2. The Court shall stay any judicial proceedings (other than investigative operations) upon the request of the Security Council when, acting under Chapter VII of the Charter of the United Nations, the Council concludes that such a stay is necessary as part of its enforcement measures to maintain or restore international peace and security. Such a stay shall be lifted and the proceedings shall continue, however, when:¹⁴
 - a. The Security Council notifies the Court that such a stay is no longer necessary; or
 - b. All relevant sanctions including both military and economic sanctions, if any, imposed by the Security Council have been suspended or terminated; or
 - c. In the absence of active involvement of the Security Council, the Court decides that such a stay is no longer necessary to maintain or restore international peace and security, having given due regard to the relevant actions and views of the Security Council.

The suggestion adequately addresses the problem of referral and deferral under Article 16 of the Rome Statute. This is so because it would ensure that deferrals, in particular, do not last indefinitely by placement of issues or situations with the Security Council under Chapter VII of the UN Charter. Additionally, it is easier to amend the Rome Statute than to amend the UN Charter. To amend the Charter, the consent of the five permanent members is required. While this is academically possible, it is not practical at the political level as the 5 permanent members enjoy a privileged position under the Charter

¹³ Ibid.

¹⁴ Ibid.

on substantial issues. They are not likely to amend the Charter in any manner that may interfere with this privilege.

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