

**THE INTERNATIONAL CRIMINAL COURT:
IS IT A DETERRENT TO INTERNATIONAL
CRIMES?**

2005

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**THE INTERNATIONAL CRIMINAL COURT:
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BY

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Declaration

I declare that the contents of this dissertation are the result of my own work except where otherwise stated and acknowledged.

Signature

Date

Student No: 204001657

Dedication

This dissertation is dedicated to my beloved brother Mohammad Ali Shalan, to my parents who always pray for me and to my best South African friends, namely Bilal Randary, Abd Al kader Mohemady, Yousuf Badat and Farhana Loonat.

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ABSTRACT

The International Criminal Court (hereinafter ICC) is a new permanent international judicial tribunal which plays an important role in combating international crimes and dispensing justice. It was established in 1998 by the international community after much effort and compromise. It is designed to be an independent international body, with the autonomy to determine its budget and control its funding.

This study discusses how the ICC acts as a mechanism to create a nexus between international criminal and humanitarian law by prosecuting crimes like genocide, crimes against humanity, war crimes and the crime of aggression, that fall within its jurisdiction.

The study seeks to show that the international jurisdiction of the ICC is a potential safeguard against arbitrary national criminal procedures in respect of those who are accused of committing serious international crimes. The ICC's jurisdiction is complementary to that of national courts that are unable or unwilling to investigate and prosecute these crimes. National judicial systems are still required to play a primary role in combating international crimes and it is important that states, organisations and individuals assist the ICC if it is to become an effective deterrent to perpetrators of international crimes. The rationale behind the ICC's establishment is that the international community is under a legal obligation to prosecute violations of international law in either national or international courts.

The study also analyses the role of the ICC in balancing the rights of the victims and the rights of the accused by applying the guarantees and safeguards for conducting fair trials set out in the Rome Treaty. In this way, it seeks to show that prosecuting and punishing perpetrators of international crimes is an important contributing factor in the creation of a human rights' culture, while also serving as a deterrent to prospective violators of international human rights and humanitarian law.

CHAPTER ONE

Introduction

1.1 Background

Communities around the world see the eradication of crime as a means of achieving peace and stability within states. States that are able to protect their citizens by preventing crime and extending protection to those who are accused of wrongdoing are likely to have a relatively high standard of human rights.

A high standard of human rights cannot be attained unless states recognise that certain crimes must be tried either nationally or internationally. Nation states must, in fact co-operate to provide effective prosecution and sentencing of offenders.¹ In this age, more than ever, crimes are committed against people that constitute an assault on humanity in general, and these require a concerted response from as many nations as possible.²

The twentieth century has witnessed wars that have brought about atrocities on an unprecedented scale. The Second World War (hereinafter WWII) resulted in great devastation: millions of men, women, and children were killed.³ An estimated one hundred and seventy million people have died in two hundred and fifty conflicts since WWII.⁴ Since then, the international community⁵ has had a growing interest in the establishment of a permanent international criminal tribunal to serve as a deterrent to prospective perpetrators of international crimes.⁶

¹ Stewart, N. 1999. "The Permanent International Criminal Court". Available at www.hardwickecrime.co.uk/resources/articles/99102701.htm (accessed on 20 May 2004).

² Waynecourt-Steele, T. 1997. "A Universal Extradition Treaty Linked to the International Criminal Court as a Solution to the Problems with the Existing Law of Extradition". Masters Dissertation: p1.

³ See generally Bassiouni, M.C. 1997. "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", *Harvard Human Rights Law Journal*, 10.

⁴ Sadat, L.N. and Carden, R.S. 2000. "The New International Criminal Court: An Uneasy Revolution", *Georgetown Law Journal*, 18 (March): p384.

⁵ The term 'international community' is used in this dissertation to refer to the member states of the UN.

⁶ Mirceva, S. 2004. "Why the International Criminal Court Is Different". Available at www.globalpolicy.org/intjustice/icc/2004/0126different.htm (accessed on 2 February 2004).

The international community wants to bring about a situation in which countries will not be allowed to give refuge to heads of states who have been accused of large-scale crimes such as Idi Amin,⁷ Augusto Pinochet⁸ and others⁹. A campaign sponsored by states, government organisations, non-government organisations (hereinafter NGOs) and individuals to establish a permanent tribunal for the prosecution of serious international crimes was set up in 1994 and has since gained momentum.¹⁰

In 1995, the United Nations (hereinafter UN) General Assembly established the first Preparatory Committee (hereinafter PrepCom).¹¹ It was tasked with the worldwide negotiation and drafting of a treaty for the establishment of an ICC.¹² From its inception, PrepCom worked on the drafts of this treaty.¹³ On 17 June 1998, the necessity for intensive co-operation to suppress “the most serious international crimes” led the plenipotentiaries of member-states of the UN to adopt the Rome Treaty (hereinafter Rome Statute) for the establishment of an ICC.¹⁴ One hundred and twenty states voted in favour of the Rome Statute.¹⁵ Seven states voted against it, namely, the United States (hereinafter US), China, Iraq, Israel, Libya, Qatar and Yemen. Twenty-one states, including Russia, abstained from voting.¹⁶

⁷ Idi Amin was the Commander-in-Chief in Uganda. In 1971 he seized control of the Ugandan government. It is alleged that Amin was responsible for the deaths of hundreds of thousands of Ugandans in 1976. He died in 2003 in Jada in Saudi Arabia.

⁸ Augusto Pinochet, the former Chilean president, overthrew president Salvador Allende in 1973. On 16 October 1998 he was arrested in London. On 29 January 2001 the Chilean Supreme Court placed him under house arrest. He faces more than two hundred accusations of crimes committed by him during his period in power. The Chilean prosecutor alleges that Pinochet committed torture and murder and killed prisoners.

⁹ Roth, K. 2003. “New Justice vs. Impunity”. Available at www.hrw.org/editorials/2003/icc061803.htm (accessed on 11 December 2003).

¹⁰ Note 1 above.

¹¹ UN Doc. A/RES/50/46 (1995).

¹² Note 1 above.

¹³ Ibid.

¹⁴ Sadat, L.N. 2000. “The Evolution of the ICC: From The Hague to Rome and Back Again”. In Sewall, S.B. and Kaysen, C. (eds). *The United States and the International Criminal Court: National Security and International Law*: p41.

¹⁵ The Rome Statute of the International Criminal Court (1998), UN Doc. 2187 U.N.T.S. 3 (1998). Available at www.un.org/law/icc (accessed on 29 November 2003).

¹⁶ The Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court 15 June-17 July 1998, UN Doc. A/CONF.183/10 (1998). Available at www.un.org/law/icc (accessed on 30 November 2003).

1.2 The Importance of the International Criminal Court

Since the establishment of the UN,¹⁷ there have been major developments in international criminal law.¹⁸ It is submitted that the ICC has been the most important achievement in human rights and international humanitarian law. It provides the means for the international community to try those accused of international crimes and reduce infringements of human rights. By dispensing justice to all categories of criminals who breach laws, the ICC makes effective the enforcement of international criminal law.¹⁹

The ICC deals with 'international crimes'²⁰ when those in power do not intend or do not have the power to prosecute wrongdoers. In this regard it is submitted that the 'universal jurisdiction'²¹ of the ICC fills a gap where national legal procedures may shield the perpetrators of international crimes.

The ICC is also an important instrument in the preservation of human rights, with emphasis on the right to protection of the physical and mental integrity of human beings.²² Regardless of whether the person in question is the accused, the witness, or the victim, he or she, during the period of detention, has the right to freedom from arbitrary detention, or any credible threat, be it mental, physical or sexual, as well as from murder or inhuman treatment.²³

¹⁷ The Charter of the United Nations (1945). Available at www.unhchr.ch/html/menu3/b/ch-cont.htm (accessed on 11 June 2004).

¹⁸ Note 16 above.

¹⁹ Note 4 above.

²⁰ It meant by the term 'international crimes', not only crimes committed between nations, but also crimes the gravity of which is such that they deserve to be identified and condemned by the international community. Chapter 3.1 of this dissertation will further clarify this point.

²¹ The universal jurisdiction of national courts means that states have jurisdiction to try the accused persons in their custody for crimes committed abroad. The universal jurisdiction of the ICC means that the ICC has jurisdiction over the accused persons of states which are not party to the Rome Statute when the alleged crimes are committed in territories of a state party to the Statute. See Douglas, L. 2004. "Judgments Unlimited", *The Times Literary Supplement*, 24 September: p6.

²² Mayerfeld, J. 2003. "Who shall be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Right", *Human Rights Quarterly*, 25(1): p99.

²³ Articles 6, 10, and 12 of the International Covenant of Civil and Political Rights (1966), entered into force on 23 March 1976, UN Doc. A/6316 (1966), 999 U.N.T.S. 171. Available at www1.umn.edu/humanrts/instreet/b3ccpr.htm (accessed on 12 June 2004).

The present study discusses the justice that will be conferred on the victims of crimes within the jurisdiction of the ICC. The ICC may compensate the victims through the Trust Fund (a financial organ of the ICC that compensates the victims of crimes under its jurisdiction).²⁴ In order to analyse the role of the ICC in balancing the rights of the victims and the rights of the accused, the study will explore the various rights conferred upon the accused and the victims.

It is submitted that the international jurisdiction of the ICC is a potential safeguard against arbitrary national criminal procedures in respect of those who are accused of committing serious international crimes, such as genocide, crimes against humanity, war crimes and the crime of aggression. It is submitted that in the international effort to deter people from committing serious international crimes, it is vital to ensure that those who enforce the law do not violate human rights.

1.3 Research Approach and Methods

Data was gathered from the most important documents on the basis of which the ICC was established, as well as from historical documents that were prepared before the establishment of the ICC. This study takes into consideration the Rome Statute, the Rules of Procedure and Evidence of the ICC²⁵ (an instrument for the application of the Rome Statute), the Elements of Crimes²⁶ (an instrument to assist the ICC in the interpretation and application of Articles 6, 7 and 8, and which is consistent with the Rome Statute) and PrepCom documents.²⁷ Consideration was given to *ad hoc* documents on the establishment of the ICC,²⁸ as well as other documents issued at the UN Diplomatic

²⁴ Article 79, note 15 above.

²⁵ The Rules of Procedure and Evidence of the International Criminal Court (2000), UN Doc. PCNICC/2000/1/Add.1. Available at www.icc-cpi.int/php?id=rules (accessed on 30 May 2004).

²⁶ The Elements of Crimes (2000), UN Doc. PCNICC/2000/1/Add.2. Available at www.icc-cpi.int/basicdocs/elements.htm (accessed on 30 May 2004).

²⁷ Preparatory Commission documents (1996-1997), UN Doc. A/RES/51/207 (1996) and UN Doc. A/RES/52/160 (1997). Available at www.un.org/law/icc (accessed on 20 November 2004).

²⁸ *Ad Hoc* Committee for the Establishment of an International Criminal Court documents (1995), UN Doc. A/49/53 (1994). Available at www.un.org/law/icc (accessed on 20 November 2003).

Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter the Rome Conference).²⁹ Secondary sources were textbooks, journals, reports and articles and critical and evaluative works on the primary data.

1.4 The Structure of the Research

The purpose of this research was to look at the normative role of the ICC as a mechanism to prosecute international crimes. The relevant functions of the ICC were summarised in each chapter in order to analyse how guilt or innocence and punishment should be determined, the ways in which the ICC may enforce penalties and the role of the UN Security Council (hereinafter UNSC) in facilitating the task of the ICC to discourage such crimes in future.

To understand the principles underlying the formation of the ICC, a literature review was provided in chapter two. An attempt was made in chapter three to illustrate and investigate some criminal acts that fall under the jurisdiction of the ICC. This chapter investigates the definitions of the crimes in the Rome Statute, and emphasises the necessity for their being prosecuted. The second part of chapter three investigates crimes that are not under the jurisdiction of the ICC.

This study investigates crimes codified in the Rome Statute in the light of the four Geneva Conventions.³⁰ The study also determines the essential character of some acts that constitute crimes within the jurisdiction of the ICC, in order to analyse the developments in international criminal law in terms of the Rome Statute.

In chapter four, the functions of the ICC were examined. Explanations was offered as to why co-operation between states and the ICC is required in terms of the principle of complementarity – that is, that the jurisdiction of the ICC is supplementary to

²⁹ Note 16 above.

³⁰ Geneva Conventions Relative to the Protection of Civilian Persons in Time of War (12 August 1949), 6 U.S.T 3516, 75 U.N.T.S 287 (1949). Available at www.icao.int/icao/en/Ieb/Genev.htm (accessed on 20 November 2003).

that of the national courts. The circumstances in which priority should be given to the national jurisdiction of a state, rather than the ICC, was explained. Finally, the role of the ICC was critically assessed.

Further, this thesis examined whether or not the role of the ICC is one of effective deterrence to those intending to commit crimes under the jurisdiction of the ICC. Chapter five outlines the future role of the ICC and reaches the conclusion that despite the reluctance of nations to surrender any part of their national sovereignty, members of the international community are beginning to realise that the ICC must have an effective system of prosecuting international crimes. A number of recommendations were made as to how this can be facilitated.

1.5 The Extent to which the International Criminal Court Can Dispense Justice

The Rome Statute has paved the way for international co-operation in the acquisition and exchange of information³¹ which, it is submitted, will enhance the ability of the international community to combat international crimes and will therefore act as a deterrent to these crimes. Since the ICC needs to obtain evidence, it has the right to request crucial information at the commencement of any investigation, through diplomatic or any other appropriate channel, and to require the states parties to co-operate with it.³²

It is submitted that successful, that is to say, just judgments require full co-operation from states, organisations and individuals. The ICC may request information from states parties without prejudice to the sovereignty and privacy of the concerned state.³³ The study will seek to review the duty of states parties to bring their laws into conformity with the Rome Statute, in order that the latter may be properly applied.

³¹ Article 86, note 15 above.

³² Article 87(a), note 15 above.

³³ Article 72(1), (2) and (3), note 15 above.

In 2007, the first review of the Rome Statute will be held. The UN Secretary-General will invite countries that participated in the Rome Conference as well as those who were invited to participate, but did not attend, to a Review Conference.³⁴ Participating states have yet to agree on the definition of aggression as an international crime, and the conditions under which the ICC will have jurisdiction over the crime of aggression.³⁵

It is submitted that the ICC has the right to act on behalf of the international community to combat international crimes and uphold justice. Prince Zeid Bin Raad Al Hussein, president of the ASP and Jordanian envoy to the UN said, "The ICC is not just a court on paper. Now we have a very final legal instrument in place."³⁶ It is submitted that a proper assessment of the functions of the ICC will determine what steps should be taken in the future to deter crimes within its jurisdiction.

³⁴ Annex I, Resolution F, note 16 above.

³⁵ Clark, R. 1999. "Article 123: Review of the Statute". In Triffterer, O. (ed). *Commentary on the Rome Statute of the International Criminal Court*: p1273.

³⁶ Rizvi, H. 2002. "Rights: NGOs Win Fight for Equal Representation of the ICC Judges". Available at www.globalpolicy.org/nogs/rol/globalact/int-inst/2002/0907icc.htm (accessed on 4 March 2004).

CHAPTER TWO

The Establishment of the International Criminal Court

2.1 Historical Attempts to Establish an International Criminal Court with ‘Universal Jurisdiction’

The idea of establishing a criminal court with ‘universal jurisdiction’ is not new. Centuries before the International Military Tribunals established to try alleged German war criminals (hereinafter the Nuremberg Tribunals) were set up by the four major Allies in WWII namely, the US, the United Kingdom (hereinafter UK), France and the former Soviet Union, scholars, philosophers and distinguished jurists toyed with the idea of a mechanism to prosecute international crimes.³⁷ Their purpose was to establish an international tribunal with unlimited jurisdiction to try offenders who committed atrocities in times of war and peace.³⁸

In 1474, the first recorded instance of an international court, in the international military tribunal sense, was constituted in the duchy of Burgundy by Charles the Bold, Duke of Burgundy.³⁹ This tribunal tried and convicted Peter von Hagenbach of murder, rape, perjury and other crimes violating ‘the laws of God and man’ after hostilities had ceased between him and the coalition rebels.⁴⁰ However, this was ‘victors’ justice’ set up by those who had triumphed, similar to the *ad hoc* tribunal which sat at Nuremberg five centuries later.⁴¹ It would be sufficient to add that the concept of crimes violating

³⁷ Stone, J. and Woetzel, K. 1970. *Toward a Feasible International Criminal Court*: p159.

³⁸ *Ibid.*

³⁹ Miskowiak, K. 2000. *The International Criminal Court: Consent, Complementarity and Cooperation*: p11.

⁴⁰ Peter von Hagenbach, the governor of Breisach, (a German town) under the Duke of Burgundy, Charles (the Bold), was tried and convicted in Austria for atrocities committed during the occupation of Breisach by a court of representatives of a coalition that had liberated it. Von Hagenbach argued that he was just following orders, and that the court had no authority to try him. In May 1474 he was condemned and executed by the rebels. Information about Von Hagenbach is available at World History at KMLA: History of Warfare Swiss-Burgundian War 1474-1477

www.zum.de/whkmla/military/15cen/swissburg14741477.html (accessed on 24 June 2004).

⁴¹ Note 39 above.

‘the law of God and man’ at that time was, for all intents and purposes, the same as our current understanding of crimes against humanity.⁴²

Later, in 1872, after the Franco-Prussian War of 1870-1871, Gustave Moynier of Switzerland suggested a court similar to the present-day ICC should be established to prevent anyone from violating the 1864 Geneva Convention.⁴³ The aim of this proposal was to create a mechanism to prosecute crimes committed outside state borders, with or without the consent of the state’s government.⁴⁴ Nevertheless, the proposal did not lead to the establishment of a court, the chief reason being a lack of confidence amongst the leading legal experts at that time, that an international court could be impartial.⁴⁵

Several international conferences subsequently addressed the necessity of establishing such a ‘universal court’. In 1889, an important attempt was made at the first Peace Conference held at The Hague in the Netherlands.⁴⁶ More than one hundred delegates from twenty-six countries attended the conference.⁴⁷ At the end of the session, delegates, who included lawyers, statesmen, military personnel, technical and scientific experts, agreed to the establishment of the Permanent Court of Arbitration.⁴⁸ The conference also adopted the Convention of the Law and Customs of the War on Land and the Convention of Maritime Warfare.⁴⁹ The idea of establishing a ‘universal criminal court’ was accepted at the Second Peace Conference in 1907 after long negotiations.⁵⁰

⁴² Ibid.

⁴³ Gustave Moynier was born in 1826. In 1858 he was appointed president of the Geneva Society for Public Welfare. In 1863 Moynier and other lawyers drew up the 1864 Geneva Convention. In 1864 he organised an international conference of 13 nations in Geneva to discuss the possibility of making warfare more ‘humane’. On 22 August 1864, at the end of the conference, the representatives signed the Geneva Convention. Information about Gustave Moynier is available at the National Archive Learning Curve www.spartacus.schoolnet.co.uk (accessed on 24 June 2004).

⁴⁴ Note 39 above, at 12.

⁴⁵ Ibid.

⁴⁶ Sadat, L.N. 2001. *The International Criminal Court and the Transformation of International Law: justice for the new millennium*: p22.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Note 46 above, at 34.

The forty-four countries that sent delegations adopted thirteen conventions relating to international law.⁵¹

In 1919, after the First World War (hereinafter WWI), the first Commission on the Responsibilities of the Authors of War and on the Enforcement of Penalties (hereinafter the 1919 Commission Report) was established by the Allies⁵² and other associated powers to impeach German and Turkish war criminals who were held responsible for crimes committed against humanity.⁵³ On 28 June 1919, at the end of this commission, the Allied Powers and German representatives reached a compromise and a peace treaty (hereinafter the Treaty of Versailles) was subsequently signed in Versailles.⁵⁴ Articles 227, 228 and 229 of the Treaty of Versailles provided for the establishment of international criminal trials to prosecute more than twenty thousand Germans before a military tribunal, either in Germany or on the Allied territory. Those subject to prosecution included the German Kaiser Wilhelm II and high-ranking German officials who had allegedly breached the laws and customs of wars.

There have been four other International Commissions, namely:

1. The 1943 United Nations War Crimes Commission (hereinafter UNWCC), which was established by the Allied powers in London before the end of WWII, but before the establishment of the UN. Its aim was to prosecute Nazi war criminals before an international tribunal;
2. The 1946 Far Eastern Commission (hereinafter FEC), which was established to investigate crimes committed by Japanese war criminals in countries which they had invaded in the Far East;

⁵¹ Ibid.

⁵² The five great Allies in the First World War were the US, the British Empire, France, Italy and Japan. The additional states comprising Allied and Associated powers were Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti and many other states.

⁵³ Note 3 above.

⁵⁴ The Treaty of Versailles (1919). Available at www.lib.byu.edu/~rdh/wwi/versailles.html (accessed on 24 September 2004).

3. The 1992 Yugoslavia Commission of Experts, which was established pursuant to UNSC Resolution 780 (1992). The Commission's function was to investigate war crimes and other violations of international humanitarian law within the former Yugoslavia; and
4. The 1994 Independent Commission of Experts, which was established pursuant to UNSC Resolution 935 (1994). It aimed to investigate grave violations of international humanitarian law on Rwandan territory.⁵⁵

There are many instances of international criminal trials that were conducted more than seventy years before the establishment of the ICC. Germany prosecuted thousands of German citizens between 1921 and 1923 in the German Supreme Court pursuant to the Allies' requests to bring persons accused of committing acts in violation of the laws and customs of war before military tribunals.⁵⁶ These prosecutions are known as the Leipzig Trials.⁵⁷

On 8 August 1945, the four major Allies in WWII signed the London Agreement to establish the Nuremberg Tribunals for the prosecution of individuals who were accused of committing crimes against peace, war crimes and 'crimes against humanity'.⁵⁸ During the course of the Nuremberg Tribunals, the four major Allies in Europe conducted international prosecutions between 1946 and 1955.⁵⁹ In Tokyo, International Military Tribunals for the Far East (hereinafter the Tokyo Tribunals) were established by the Allies in the Far East to prosecute the Japanese accused of war crimes in the territories they had colonised or occupied.⁶⁰ Under the jurisdiction of the Tokyo Tribunals, military prosecutions were conducted between 1946 and 1951.⁶¹

⁵⁵ Note 3 above.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ See the London Agreement (8 August 1945). Available at www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm (accessed on 30 November 2003).

⁵⁹ Note 3 above.

⁶⁰ Ibid.

⁶¹ Ibid.

After the conclusion of the Nuremberg and Tokyo Tribunals, it took more than forty years to establish other *ad hoc* tribunals for prosecuting perpetrators of serious international crimes. In terms of UNSC Resolution 827 (1993), genocide and war crimes have been tried in an *ad hoc* tribunal for the former Yugoslavia.⁶² Subsequently, on 8 November 1994, a similar tribunal was established for Rwanda by Resolution 955 (1994) of the UNSC.⁶³ These tribunals, established as subsidiary organs to the UN, had three major limitations:

1. They were established on the authority of the UNSC, in terms of Articles 39, 41 and 42 of Chapter VII of the UN Charter.⁶⁴ Their purpose was to avert perceived threats to international peace and security, which followed conflicts in the former Yugoslavia and Rwanda.⁶⁵
2. Further limitations were the *ratione temporis* (the relationship to a particular time)⁶⁶ jurisdiction, and the territorial jurisdiction.⁶⁷ The International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) is restricted in its jurisdiction to the crimes committed during the armed conflict, which started in 1991 on the territory of the former Yugoslavia. The International Criminal Tribunal for Rwanda (hereinafter ICTR) is equally restricted to a specific time and area.⁶⁸

⁶² The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the territory of the Former Yugoslavia since 1991, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993). Available at www.un.org/icty/basic/statut/statute.htm (accessed on 20 May 2004).

⁶³ The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide, and other Serious Violations of International Humanitarian Law Committed on Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Serious Violations Committed on the territory of Neighbouring States Between 1 January and 31 December 1994, UN Doc. S/RES/955 (1994). Available at www.icttr.org/ENGLISH/basicdocs/statute.html (accessed on 20 May 2004).

⁶⁴ Note 17 above.

⁶⁵ Note 6 above.

⁶⁶ In Rwanda, for example, a retrospective time limitation applies: crimes committed before 1 January 1994 are not liable for prosecution.

⁶⁷ Note 6 above.

⁶⁸ *Ibid.*

3. The crimes over which the tribunals had jurisdiction were enumerated in their founding Statutes. No discretion was given to the judges of these tribunals to amend, remove or add crimes.⁶⁹

It is submitted that the establishment of these two *ad hoc* tribunals, the ICTY and the ICTR, paved the way for a clearer international vision of the ICC. Article 8 of the ICTY Statute makes it clear that the temporal jurisdiction of the ICTY extends from 1 January 1991, but the Statute itself does not provide a limited time for temporal jurisdiction.

2.1.1 Preparations towards the Establishment of the International Criminal Court

In the 1940s and 1950s much preparatory work was undertaken by the UN General Assembly assisted by multinational conventions to define and establish the principle of complementarity and establish an ICC.⁷⁰ On 9 December 1948, the UN General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the 1948 Geneva Convention) by Resolution 260 A (III).⁷¹ This Resolution invited the International Law Commission (hereinafter ILC) – a special committee charged with preparing a Statute for the ICC – to research the desirability and possibility of establishing an international judicial organ for trying persons charged with genocide, ‘ethnic cleansing’, rape, torture and other crimes that fall under the jurisdiction provided for by the 1948 Geneva Convention.

The ILC produced a draft in 1951 that was revised in 1953.⁷² The 1953 Draft was regarded as inadequate and was ultimately abandoned because the definition of aggression did not cover cases that some delegates believed were the main motivators for establishing an ICC in the first instance.⁷³ As a result, it was recommended that the 1953

⁶⁹ Ibid.

⁷⁰ Reeder, R. 1962. *The Establishment of an International Criminal Court: Some General Problems*: p31.

⁷¹ The 1948 Geneva Convention entered into force on 17 September 1953, UN Doc. A/RES/260/III (1948). Available at www.icao.int/icao/en/leb/Genev.htm (accessed on 20 November 2003).

⁷² Cassese, A. 2001. *International Criminal Law*: p334.

⁷³ Ibid.

Draft be handed over to another international body that was mandated to produce a comprehensive re-definition.⁷⁴ However, the delay in the establishment of the ICC was not entirely due to a lack of consensus concerning the definitions and functions of the aforesaid court. At the time, the world was divided into two opposing camps, namely, the US and its allies and the former Soviet Union and its allies. Leaders of the opposite sides of the Cold War lacked the political will to compromise and run the risk of angering their home constituencies.⁷⁵

2.1.2 Concrete Steps towards the Establishment of the International Criminal Court

In the 1980s, the tensions of the Cold War began to ease and this culminated in the fall of the Berlin Wall in 1989. At this point, more concrete steps could be taken towards the establishment of an ICC. Thirty-six years after the rejection of the 1953 Draft, Trinidad and Tobago proposed to the UN General Assembly that a specialised ICC should be established to deal with drug trafficking.⁷⁶ This was a response to the UN General Assembly's mandate arising out of the 1989 special session to discuss the problem of drug trafficking.⁷⁷ In 1992, the ILC was mandated by the UN General Assembly in Resolution 47/33 to assemble a draft statute for the establishment of an ICC.⁷⁸ In 1994, the ILC completed a draft statute which was submitted to the forty-ninth session of the UN General Assembly.⁷⁹ This report was not limited to drug trafficking, but included other international crimes such as genocide and crimes against humanity.⁸⁰

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Economides, S. 2001. "The International Criminal Court". In Smith, K.E. and Light, M. *Ethics and Foreign Policy*: p115.

⁷⁷ Ibid.

⁷⁸ Bassiouni, M.C. 1997. "Observations Concerning the 1997-98 Preparatory Committee's Work". In Bassiouni, M.C. *The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee, and Administrative and Financial Implications*: p7.

⁷⁹ Note 78 above, at 8.

⁸⁰ Politi, M. 1997. "The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee". In Bassiouni, 1997: p119.

In 1995, an *ad hoc* committee of the UN General Assembly was formed for the purpose of establishing an ICC, but after two sessions it failed to convene a plenipotentiaries' conference to approve a Statute of the ICC.⁸¹

On 17 December 1996, the UN General Assembly established a PrepCom by Resolution 51/627. According to this Resolution, the PrepCom was to consist of representatives of all member-states of the UN. It met at the UN Headquarters in New York over a period of several weeks and embarked on the negotiations that would culminate in the Rome Statute.⁸² The Resolution by which this PrepCom was established defined the matters that PrepCom was to deal with. Its function was to deliberate on:

1. A list of definitions and the elements of crimes that were to be under the jurisdiction of the ICC;
2. Principles of criminal law and penalties;
3. The organisation of the ICC;
4. Procedures of the ICC;
5. Complementarity and trigger mechanisms;
6. Co-operation with any concerned state if and when required;
7. The establishment of the ICC and its relationship with the UN;
8. Final clauses and financial matters; and
9. Other matters.⁸³

This PrepCom formulated a report proposed to the UN General Assembly and paved the way for nine weeks of meetings between 1997 and 1998.⁸⁴ The 1997-1998 PrepCom was mandated to meet and finalise its work before the Rome Conference was held.⁸⁵

⁸¹ Note 78 above, at 9.

⁸² Note 78 above, at 11.

⁸³ UN Doc. A/51/627 (1996).

⁸⁴ Note 72 above.

⁸⁵ *Ibid.*

During the Rome Conference, the delegates were separated into three working groups, which drew up the provisions of the Rome Statute.⁸⁶ The thirteen parts of the Statute were elaborated among the different working groups of the PrepCom, which was eventually responsible for negotiating the Statute as a whole.⁸⁷

The first of these working groups was the so-called ‘like-minded states’.⁸⁸ This group included countries of the European Union (hereinafter EU), the Middle East and other parts of the world. Prominent among them were delegates from Canada and Australia.⁸⁹ This group favoured a fairly strong ICC with a broad ‘automatic jurisdiction’, the establishment of an independent prosecutor empowered to initiate proceedings and an extensive definition of war crimes that included crimes committed in internal armed conflicts.⁹⁰ There was debate as to whether the ICC should have inherent (automatic) jurisdiction, which means that there is no need for supplementary state consent in a particular case once the state has ratified the Rome Statute.⁹¹ The like-minded states, who supported the concept of ‘inherent jurisdiction’, aimed at ensuring the widest possible support for the Statute without substantially weakening the ICC.⁹²

The second group included delegates from the US, UK, Russia and China, i.e. the members of UNSC, but excluding France.⁹³ They wanted provisions in the Rome Statute that would allow them certain prerogatives that would enable them either to refer matters to the ICC or to prevent cases from being referred to the ICC as they saw fit.⁹⁴ These states opposed any attempts to define aggression, or to include it in the list of crimes stipulated in the Rome Statute, or to include any reference to nuclear weapons.⁹⁵ This

⁸⁶ Note 72 above, at 342.

⁸⁷ Arsanjani, M. 1999. “The Rome Statute of the International Criminal Court”, *American Journal of International Law*, (93)1: p22.

⁸⁸ Note 39 above, at 78.

⁸⁹ Ibid.

⁹⁰ Note 87 above.

⁹¹ Note 72 above, at 342.

⁹² Note 39 above, at 78.

⁹³ Note 72 above, at 342.

⁹⁴ Note 72 above, at 342-343.

⁹⁵ Note 72 above, at 342.

second group also felt that matters that were of ‘an overriding national interest’ should not be dealt with by an international body.⁹⁶

The third group included members of the Non-Aligned Movement (hereinafter NAM).⁹⁷ This group supported the inclusion of aggression, drug trafficking and the use of nuclear weapons as crimes under the jurisdiction of the ICC.⁹⁸ It strongly opposed the assignment of any role to the UNSC which might influence judgements of the ICC.⁹⁹ NGOs also participated in this group.¹⁰⁰

Parallel to the deliberations of the working groups and formal consultations, informal discussions were conducted among political and regional groups, such as the NAM, the Arab group, the Latin American and Caribbean group, the EU group and others.¹⁰¹

⁹⁶ Ibid.

⁹⁷ See generally Bassiouni, M.C. 1999. “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court”, *Cornel International Law Journal*, 32.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ In 1995 NGOs formed the NGO Coalition for an ICC. The coalition includes over 2,000 NGOs worldwide united in their support for a fair and effective ICC. The NGOs significantly contributed to the process from the early stages at the UN, through the Rome Statute, the ratification campaign and beyond. These NGOs include Amnesty International, Human Rights Watch, No Peace without Justice and others. A complete list of the NGO Coalition for an ICC is available at www.iccnw.org/documents/statements/ngos/NGOJointStatemntEng23June00.pdf (accessed on 20 October 2004).

¹⁰¹ The Arab states formed one of the most active informed groups; they met frequently and adopted a common position. This group includes 22 states whose first language is Arabic. Egypt and Jordan were considered to be the driving force for the completion of the Rome Statute by the participating states at the Rome Conference. The Latin American and Caribbean Group include all the Latin American and Caribbean states, such as Mexico and Argentina. The European Union Group includes delegations of states members of the European Union such as France and Germany. See note 97 above.

2.2 The Rome Statute of the International Criminal Court

International criminal law is a branch of general international law and is derived from primary sources, i.e. treaties and customary law and secondary sources, i.e. rules, commentary and interpretation of customary law and treaty provisions.¹⁰² The general principles of international criminal law are recognised as a subsidiary source.¹⁰³ International criminal law is almost entirely based on customary law.¹⁰⁴ Comprehensive understanding of international criminal law must include the analysis of several interpretations of international law, codified law and custom.¹⁰⁵ Treaties, protocols, conventions, charters and international agreements constitute an essential part of international criminal law.¹⁰⁶

However, the criminal responsibility of individuals under international criminal law is a relatively new issue. Classic jurisprudence recognised the state as a party in international law, which governed the relationship between states, but it rarely recognised the responsibility of individuals when it imposed a duty upon countries.¹⁰⁷ So at this early stage, rulers or other important persons who represented the state would not bear international individual criminal responsibility related to their acts, because states bore responsibility for the actions of their citizens.¹⁰⁸

In the twentieth century, the growing concern of the international community resulted in a demand for holding individuals criminally responsible for international crimes.¹⁰⁹ For this reason law-makers, knowing that states had always endeavoured to

¹⁰² Note 72 above, at 22.

¹⁰³ Ibid.

¹⁰⁴ Chibundu, M. 1999. "Making Customary International Law through Municipal Adjudication: A Structure Inquiry", *Virginia Journal of International Law*, 39(4): p1076.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ See generally Jains, W. 2003. *An Introduction to International Law*.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

protect their citizens from criminal liability, felt that a mechanism had to be found to impose duties upon individuals as well as giving them rights.¹¹⁰

International criminal law is currently in a transitional phase.¹¹¹ Attaching old norms concerning the sovereignty of states makes territorial independence inviolable.¹¹² The principle of sovereignty has always been regarded as sacrosanct and an unassailable attribute of statehood.¹¹³ In recent years, this concept has been assailed by the more liberal forces at work in democratic societies, particularly in the field of human rights.¹¹⁴ A tendency towards increasing faith in international institutions can be observed.¹¹⁵ However, it is worth emphasising that there is no infringement on the sovereignty of states if states consent to being bound by the jurisdiction of the ICC when ratifying the Rome Statute, as the state's consent to the Statute is in itself an act of sovereignty.¹¹⁶

The ICC was established in a world made up of sovereign governments, each with its own national interests, but with a growing understanding of the common interests of all states.¹¹⁷ National autonomy was lessened, not because of any lack of intelligibility, or because it contained contradictions, but in cases where it appeared inconsistent with newer norms (as in the universally recognised human rights and the rules of international law).¹¹⁸ International law, the emerging norms proclaim, ought to be more 'legal' and less 'political', more protective of the individual than of the state, less relativistic and more universal.¹¹⁹ In the period from the Nuremberg Tribunals until the establishment of the ICC, little attention has been given to the procedural and substantive aspects of

¹¹⁰ See generally Wedgwood, R. 1999. "The International Criminal Court: An American View", *European Journal of International Law*, 10.

¹¹¹ Note 104 above, at 1071.

¹¹² *Ibid.*

¹¹³ Note 39 above, at 79.

¹¹⁴ Note 107 above.

¹¹⁵ Note 39 above, at 79.

¹¹⁶ *Ibid.*

¹¹⁷ Chayes, A. and Slaughter, A. 2000. "The ICC and the Future of the Global Legal System". In Sewall and Kaysen, 2000: p244.

¹¹⁸ Note 104 above.

¹¹⁹ *Ibid.*

international criminal law, because there has been no body competent to deal with these matters.¹²⁰

The international community recognises the value of protecting human rights by means of international instruments such as the UN Charter,¹²¹ the 1948 Universal Declaration of Human Rights¹²² and other conventions.¹²³ It is submitted that the enforcement of international criminal law helps to protect and develop these values and to allow the ICC to evolve as an institution to enforce international criminal law and protect human rights.

2.2.1 The Application of the Rome Statute

The Rome Statute is a set of guidelines that contains international provisions for general definitions on the subjective elements of international crimes.¹²⁴ The Rules of Procedure and Evidence have been adopted in order to help the ICC to apply the procedure, while the Elements of Crimes assists the ICC in the interpretation and application of Articles 6, 7 and 8 of the Statute.¹²⁵ From 1999 – 2000 the ASP held several sessions within the PrepCom to elaborate on both the Rules of Procedure and Evidence and the Elements of Crimes.¹²⁶ In 2000, the amendments were adopted by a two-thirds majority of the members in the ASP, which is a requirement for any amendments to the Rome Statute.

The judges of the ICC will bring their own interpretation of the law to bear in specific jurisdictions.¹²⁷ Awareness of the difficulties encountered by the *ad hoc* tribunals and a critical analysis of the efficacy of the solutions proposed in that context is

¹²⁰ Swart, M. 2002. “Ad Hoc Rules for the Ad Hoc Tribunals? The rule-making power of the judges of the ICTY and ICTR”, *South African Journal on Human Rights*, 18(4): p574.

¹²¹ Note 17 above.

¹²² On 10 December 1948 the UN General Assembly adopted and proclaimed the Universal Declaration of Human Rights by Resolution 217 A (III), UN Doc. A/RES/217 A (III). Available at www.un.org/overveiw/rights (accessed on 10 August 2004).

¹²³ Note 72 above, at 22.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Note 39 above.

¹²⁷ Howland, T. and Calathes, W. 1998. “The UN’s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation”, *Virginia Journal of International Law*, 39(1): p145.

particularly important to the future of the ICC since the interpretation of the provisions of the Statute and the Rules of Procedure and Evidence are left to the discretion of the judges, who also define the form of conducting the proceedings.¹²⁸ If the Rules of Procedure and Evidence fail to provide for a specific situation before the ICC, a two-thirds majority of the judges may apply provisional Rules on a temporary basis until the ASP adopts or rejects the Rules in its next session.¹²⁹

The Rome Statute departs from the ICTY Statute procedure in that it does not grant the judges the power to alter the Rules of Procedure and Evidence of the ICC.¹³⁰ The judges of the ICTR adapted the Rules of Procedure and Evidence of the ICTR at the first session, held from 26 to 30 June 1995.¹³¹ Article 14 of the ICTR Statute provided that the judges of the ICTR should adopt the Rules of the ICTY, making such changes as they might deem necessary. Specifically with regard to procedural rules, it was unusual and therefore questionable for a judiciary to make its own rules.¹³² It is submitted that the Rome Statute, by not allowing the judges the power to alter the Rules of Procedure and Evidence of the ICC, is in agreement with the principle of separation of powers and the principle of legality.

The Rome Statute separates the provisions of the Rules of Procedure and Evidence from the Regulations of the ICC, which are also called the Rules of Practice.¹³³ Generally, the provisions of the Statute will prevail over the Rules of Procedure and Evidence, whilst the Regulations confirm the Statute and the Rules of Procedure and Evidence.¹³⁴

According to Article 52 of the Rome Statute, the Regulations of the ICC are necessary for its routine functioning, including its internal organisation and

¹²⁸ Ibid.

¹²⁹ Article 51, note 15 above.

¹³⁰ Note 120 above, at 577.

¹³¹ Ibid.

¹³² Note 9 above.

¹³³ Report of the Working Group on Composition and Administration on the ICC, UN Doc. A/AC/249/1998/L.14, and A/AC.249/1998/CRP.2/Add.5 and Add.5/Corr.1.

¹³⁴ Behrens, H. 1999. "Article 52: Regulations of the Court". In Triffterer, 1999: pp696-697.

administration. Pursuant to this Article, the Regulations are adopted by the judges by an absolute majority, taking into consideration any consultation with the prosecutor and the registrar taking part in the elaboration of the Regulations. States parties have the right to strike down any Regulation within six months if objections are lodged by a majority of them; they do not, however, have a right to impose any alternative Regulation.¹³⁵ Article 52, paragraph 3 provides that the Regulations are to be immediately circulated to states parties for any commentary or remark, ensuring that they are in conformity with the Rome Statute and the Rules of Procedure and Evidence. The judges also authorise amendments to the Regulations in the same way.¹³⁶ The Regulations of the ICC and their amendments go into operation upon adoption, unless the judges decide otherwise.¹³⁷

Article 10 of the Rome Statute states: “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

Otto Triffterer states that the provisions of the Rome Statute should be interpreted in light of a comprehensive understanding of Article 10 of the Rome Statute, which permits the development of international law and thus opens the door for the possibility of revising the provisions of the Statute in the light of changes in that law.¹³⁸ According to Triffterer, interpretations of Article 10 must take into consideration the Rome Statute and the Rules of Procedure and Evidence as well as the Elements of Crimes. He argues that the Statute does not prejudice international law, which will be applied when no provision has been made in the Statute. This will ensure that the ICC takes into consideration developments in international criminal law.¹³⁹ What has already been codified in the Rome Statute will not thwart future developments in international criminal law.¹⁴⁰ Article 10 indicates that the scope for reflecting on unwritten rules is still open. It

¹³⁵ Article 52(2), note 15 above.

¹³⁶ *Ibid.*

¹³⁷ Note 134 above.

¹³⁸ Triffterer, O. 1999. “Article 10”. In Triffterer, 1999: p317.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

is submitted that this scope for further development indicates that reflection on and interpretation of unwritten rules is still desirable.

The ICC operates at the cutting edge of the development of international criminal law and universal human rights considerations.¹⁴¹ With this in mind, the application of the Rome Statute can be seen to have fulfilled three major purposes, namely:

1. The criminalisation of conduct causing harm to others, like genocide, crimes against humanity (rape, mass expulsions, ethnic cleansing), and war crimes. Although at present uncertainty of definition does not allow the crime of aggression to be prosecuted on the prosecutor's own initiative or by the state party's referral, it is submitted that in future, clearer conceptualisation of this crime may be achieved;
2. The minimisation of the risk of repeating international crimes in the future; and
3. The development of rules to protect the "human values" considered important by the entire international community, and consequently binding states and individuals.¹⁴²

In this age of 'universal human rights' and rules of international law, it is internationally recognised that the most serious crimes that are not tried by a national court, such as genocide, crimes against humanity and war crimes, should be investigated and prosecuted by the ICC. Hans-Peter Kaul concludes that serious crimes committed during an internal conflict can be prosecuted if the suspect is in the custody of a state party.¹⁴³ He believes that, in general, the territory of states parties would become a risky place for perpetrators of such crimes. It is submitted that the application of the Rome Statute will be an increased deterrent to committing these crimes.

¹⁴¹ Note 72 above, at 22.

¹⁴² Ibid.

¹⁴³ Kaul, P. 2001. "The Continuing Struggle on the Jurisdiction of the International Criminal Court". In Fischer, H.; Kress, C. and Luder, S.R. (eds). 2001. *International and National Prosecution of Crimes under International Law*: p24.

2.2.2 The Structure of the International Criminal Court

The ICC is composed of six major divisions, namely, the Presidency, the Appeals Division, the Trial Division, the Pre-Trial Division, the Office of the Prosecutor and the Registry.¹⁴⁴

According to Article 35 of the Rome Statute, there are three judges in the Presidency, one of whom has the title of president. Each serves full time from the beginning of his or her mandate. Pursuant to Article 44 of the Statute, the president, together with the prosecutor, decides on staffing matters.

Article 39, paragraph 1 of the Rome Statute states that:

The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court.

Members of the Appeals Division will serve their entire nine-year terms in the Appeals Division, an arrangement which was devised because of widespread dissatisfaction with the ICTY practice of judges moving from one chamber to another during their terms.¹⁴⁵ The Appeals Division is competent to exclude the prosecutor or judges from participating in a case when there are grounds to do that.¹⁴⁶

The Pre-Trial Division has the power to issue warrants of arrest and summons and to take other necessary measures for the protection of witnesses and victims.¹⁴⁷ It has

¹⁴⁴ Article 34, note 15 above.

¹⁴⁵ Schabas, W.A. 2001. *An Introduction to the International Criminal Court*: p154.

¹⁴⁶ Roy, L. 1999. "Creating an international Criminal Court of Procedure and Compromises". In Hebel, H.; Lemmers, J. and Schukking, J. (eds). *Reflections on the International Criminal Court*: p150.

¹⁴⁷ Ambos, K. 2000. "The Legal Basis of the International Criminal Court". In Arbour (ed). *The Prosecutor of a Permanent International Criminal Court: Cooperation with the Office of the Prosecutor of the International Criminal Tribunals (ICTY and ICTR)*: p24.

authority to give the prosecutor permission to institute relevant evidence-preserving measures.¹⁴⁸ Judges from the Trial Division (see below) and lawyers apply for the hearing of evidence in this division.¹⁴⁹

Trials are carried out in the Trial Division.¹⁵⁰ This division ensures that the procedure is performed in a fair manner, taking into account the interests of victims and the rights of the accused.¹⁵¹

The prosecutor initiates the investigations and is particularly dependent on the cooperation of states in order to perform investigations effectively.¹⁵² He or she collects much of the evidence and requests that other evidence be produced to prove the commission of crimes within the jurisdiction of the ICC.¹⁵³ The context in which the crime occurred may be controlled by the state to which the national who allegedly committed the crime belongs.¹⁵⁴ For instance, evidence about a military command structure or about the information available to a suspect about the status of a military target might be controlled by the state whose national stands accused of the crimes.¹⁵⁵ In this case the prosecutor may collect the information from the state involved and look for corroboration from other states, organisations or resources.¹⁵⁶

Article 36, paragraph 6 of the Rome Statute defines the process by which the prosecutor and judges should be appointed. They should be elected by an absolute majority of the ASP by secret ballot. A state which nominates a judge or a prosecutor must ascertain that the candidate possesses high qualifications.¹⁵⁷ Experience in criminal prosecution is required, and the independence and impartial competence of the nominee

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Robertson, G. 2002. *Crimes against Humanity*: p354.

¹⁵¹ Ibid.

¹⁵² Danner, A.M. 2003. "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", *American Journal of International Law*, 97(1): p527.

¹⁵³ Ibid.

¹⁵⁴ Note 152 above, at 528.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ingadottir, T. 2003. "Nomination and Election of Judges". In Ingadottir, T. (ed). *The International Criminal Court: Recommendations on Policy and Practice*: p154.

must be generally known in his or her country.¹⁵⁸ In order to stand for election to the office of judge, candidates have to be qualified for the office of a high court judge (or equivalent) in their own countries.¹⁵⁹

In February 2003, the ASP elected the prosecutor and eighteen judges by secret ballot from a large group of highly qualified individuals nominated by the states parties.¹⁶⁰ On 11 March 2003, the judges were sworn in, in the presence of the UN Secretary-General and the Queen of the Netherlands (the ICC has its permanent seat at The Hague).¹⁶¹ According to Article 36, paragraph 8 of the Rome Statute, the process of electing judges took into consideration fair representation of both genders and the principles of “equitable geographical representation, [and] representation of the principle legal systems in the world”.

The Registry, headed by the registrar, is responsible for the non-judicial aspects of the ICC such as administration and servicing.¹⁶² The registrar is the principal administrative officer of the ICC¹⁶³ and must be consulted on the Rules of Procedure and Evidence.¹⁶⁴ Pursuant to Article 52, paragraph 2 of the Rome Statute, the registrar will be consulted in the elaboration of the Regulations and their amendments.

According to Article 43 of the Rome Statute, the judges elect the registrar for a five-year term and he or she is eligible for re-election once. If required, the judges may also elect a deputy registrar for a five-year or shorter term.¹⁶⁵ The registrar and the deputy registrar must be available to administer and be consulted on commencement of their

¹⁵⁸ Article 36(3), note 15 above.

¹⁵⁹ Note 157 above, at 154.

¹⁶⁰ Note 65 above.

¹⁶¹ Simons, M. 2003. “Argentine Is Expected to Be Prosecutor for War Crime Court”. Available at www.genocidewatch.org/ICCProsecutorMarch24.htm (accessed on 20 December 2005).

¹⁶² Note 147 above, at 29.

¹⁶³ Article 43(2), note 15 above.

¹⁶⁴ Note 147 above, at 29.

¹⁶⁵ Note 145 above, at 155.

terms in office.¹⁶⁶ On the other hand, various professionals have to be hired on a full-time basis in order to help the ICC whenever it needs consultation.¹⁶⁷

All ICC core staff, namely, judges, prosecutor, deputy prosecutor, registrar and deputy registrar, are required to serve on a full-time basis and are not allowed to engage in any other occupation of a professional nature.¹⁶⁸ They are forbidden to engage in activities likely to interfere with their judicial functions, or affect confidence in their independence.¹⁶⁹

2.2.3 The Jurisdiction of the International Criminal Court

The ICC exercises its jurisdiction over the most serious international crimes, namely, genocide, crimes against humanity and war crimes.¹⁷⁰ The definitions of these crimes have been accepted by the states that participated in the Rome Conference and have had legal force since 1 June 2002.¹⁷¹ The crime of aggression was also included in the jurisdiction of the ICC, but requires further definition.¹⁷²

The Assembly of States Parties (hereinafter ASP) to the Rome Statute of the ICC is composed of the congress of states that ratified the Rome Statute.¹⁷³ ASP has limited powers to modify the definitions of crimes within the jurisdiction of the ICC and to add any act to the list of crimes.¹⁷⁴ Such an amendment should be adopted by a two-thirds majority of members of the ASP.¹⁷⁵ The ICC prosecutor, any state party, or an absolute majority of the ICC judges may propose the addition.¹⁷⁶

¹⁶⁶ Ibid.

¹⁶⁷ Ingadottir, T. and Romano, C. 2003. "The Financing of the International Criminal Court". In Ingadottir, 2003: p86.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Article 5, note 15 above.

¹⁷¹ Stampa, L. 2002. "The Time of Human Rights". Available at www.globalpolicy.org/intljustice/icc/crisis0702hr.htm (accessed on 20 November 2003).

¹⁷² Article 5, note 15 above.

¹⁷³ The roles and functions of the ASP are further explained in chapter 4.9.7.

¹⁷⁴ Article 123, note 15 above.

¹⁷⁵ Article 122, note 15 above.

¹⁷⁶ Ibid.

An ICC prosecution may be initiated in one of three ways:

1. It may be triggered by the UNSC.¹⁷⁷ It is possible for the ICC to exercise its jurisdiction in states that have not ratified the Rome Statute via a referral by the UNSC of a case to the prosecutor.¹⁷⁸ The UNSC would in this instance be acting under Articles 39, 41 and 42 of Chapter VII of the Charter of the UN.¹⁷⁹ Subject to the UNSC referral, states parties to the Rome Statute and non-ratifying states should accept the jurisdiction of the ICC and co-operate with the ICC.¹⁸⁰
2. It may act on the initiative of the prosecutor *proprio motu* (own initiative) if he or she determines that there is a reasonable basis to commence an investigation¹⁸¹ under two conditions:
 - (a) the approval of pre-trial judges must be sought before commencing the investigation. Here, there must be reasonable grounds to initiate an investigation;¹⁸² and
 - (b) the prosecutor should inform the ASP of his or her decision to commence the investigation.¹⁸³ The state concerned has the right to notify the prosecutor within one month of receipt of the notification that it is investigating or has investigated the crimes within the jurisdiction of the ICC, which the prosecutor intended to investigate.¹⁸⁴ In that case, the prosecutor has a duty to defer the investigation subject to the principle of complementarity.¹⁸⁵

The principle of complementarity is examined in this dissertation in conjunction with ICC endeavours not to allow perpetrators of international crimes to evade

¹⁷⁷ Article 13(b), note 15 above.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Article 39, note 17 above.

¹⁸¹ Article 15, note 15 above.

¹⁸² *Ibid.*

¹⁸³ Article 18(1), note 15 above.

¹⁸⁴ Article 18(2), note 15 above.

¹⁸⁵ *Ibid.*

punishment. The ICC generally accepts a case where there has been a collapse in the national courts of a state, making the state unable to prosecute crimes, or making it difficult for its judicial system to maintain justice in trials.¹⁸⁶

3. It may be triggered by a state party's referral of a case to the prosecutor.¹⁸⁷ In January 2004, the first case was brought to the ICC when the Ugandan president Yoweri Museveni referred the file of the Ugandan rebels' crimes to the ICC.¹⁸⁸ This landmark case demanded great effort from the prosecutor to fulfil the requirements of impartial justice because of tribal and other conflicts within Uganda, which had given rise to many years of conflict.¹⁸⁹

It is submitted that the ICC must avoid becoming partisan in the politics of nations. The prosecutor is obliged to investigate whether the referring parties had political goals prior to the commencement of the investigation.¹⁹⁰ The Rome Statute provides for the principle of 'no immunity',¹⁹¹ which implies that in the course of the investigation no individual or group is exempt from ICC prosecution.¹⁹²

2.2.4 Obstacles to the International Criminal Court

Substantial obstacles had to be overcome before the final draft of the Rome Statute was submitted to the states that participated in PrepCom sessions.¹⁹³ These obstacles related to definitions of crimes, especially the crime of aggression, the principle of complementarity and the rules governing the granting or refusal of immunity for

¹⁸⁶ Article 17(1), note 15 above.

¹⁸⁷ Article 13(a), note 15 above.

¹⁸⁸ Jams, L.; Odinkalu, G. and Smith, J. 2004. "A Crucial Case for the International Criminal Court". Available at www.globalpolicy.org/intljustice/icc/2004/0226crucial.htm (accessed on 4 March 2004).

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ The principle of no immunity means that there is no immunity for any individual who is accused of having committed crimes within the jurisdiction of the ICC irrespective of his or her capacity. This principle is analysed in chapter 4.2.

¹⁹² Article 98, note 15 above.

¹⁹³ Black, I. 2003. "International Criminal Court Comes to Life". Available at www.globalpolicy.org/intljustice/icc/2003/0311judges.htm (accessed on 20 November 2003).

individuals, in particular heads of states and those who work in the name of peace-keeping.¹⁹⁴ All these obstacles will be examined.

The ICC has the power to try the nationals of non-ratifying states if they have committed international crimes in the territories of states parties.¹⁹⁵ Article 12 of the Rome Statute articulates the grounds upon which nationals of non-ratifying states may be tried without the need for further treaties or agreements to legitimize the prosecution, namely, when the alleged crimes occurred on the territories of states parties.

This study also considers the problems related to obtaining evidence from countries that are in a state of civil turmoil, war or invasion. Some crimes under the jurisdiction of the ICC, such as murder, rape, sexual slavery and deportation, require a quick response if reliable evidence is to be gathered, especially when perpetrators of the crimes obscure or destroy evidence relating to crimes that have been committed or intimidate witnesses of crimes.¹⁹⁶

The research will take into consideration the problems related to obtaining information from non-ratifying states that refuse the prosecutor's request for information, justifying their refusal in terms of 'the principle of national sovereignty' – that is, the protection of national security information and interests of the state.¹⁹⁷ This study will examine the way in which states and organisations may, in the absence of compulsory obligations, co-operate with the ICC in order to surrender those suspected of having committed international crimes.

Obstacles related to the principle of national sovereignty create an environment of uncertainty as to whether the ICC will be capable of fulfilling its task.¹⁹⁸ This climate of uncertainty formed part of the focus of the present research, and an attempt will be made

¹⁹⁴ Ibid.

¹⁹⁵ Article 12, note 15 above.

¹⁹⁶ See chapter 4.7.

¹⁹⁷ The principle of national sovereignty is examined in chapter 4.5.1.

¹⁹⁸ Engelbrecht, G.A. 2002. "Going It Alone? An Evaluation of American Concerns about the International Criminal Court". Masters Dissertation: p62.

to determine whether or not the ICC functions as a successful court for the prosecution of serious international crimes.

2.3 Financing of the International Criminal Court

The ICC has an independent financing system to which the states parties and other organisations contribute (see below). It is separate from the framework of any states or organisations. Article 114 of the Rome Statute provides that the expense of the major organs of the ICC and the ASP, including its bureau and subsidiary bodies, shall be paid from the funds of the ICC.

2.3.1 The Budget of the International Criminal Court

The ASP adopted the euro as the currency of the statutory headquarters of the ICC and its Finance Regulations, therefore the ICC's budget is presented in euros.¹⁹⁹ According to Article 118 of the Rome Statute, an independent auditor audits the budget annually. This auditor audits the records and accounts of the ICC, including its financial statements. Thordis Ingadottir and Cesare Romano state that the budget reflects ICC policy-making because its budget determines its resources.²⁰⁰ In other words, budgetary considerations will limit some activities whilst prioritising others. They conclude that two important elements shape the budget of the ICC, namely, the jurisdiction of the ICC and the nature of the ICC as an international criminal prosecution mechanism.

The Office of the Prosecutor bears the costs of investigating cases and gathering evidence, wholly or in part, as well as the costs of defending persons who are accused,

¹⁹⁹ The Financial Regulations of the International Criminal Court (2002), Statutory Instrument 2002 no. 822. Available at www.icc-i.int/officialjournal.html (accessed on 30 June 2004).

²⁰⁰ Note 167 above, at 83.

their maintenance while in detention and witness protection.²⁰¹ The Office of the Prosecutor also covers any costs incurred in protecting victims and witnesses.²⁰²

According to Ingadottir and Romano, the budget is to some extent dependent on the prosecutor's planning and the number of investigations and indictments which he or she decides on.²⁰³ They state that when the prosecutor initiates investigations *proprio motu*, rather than at the request of a state, it is likely that the evidence he or she requires will be more difficult to obtain and analyse. When a situation is referred to the ICC, either by a state or the UNSC, the Office of the Prosecutor will be required to respond quickly in order to handle the initial phase and it will also require funding for the prosecutor's work.

Since the presidency bears the final responsibility for the administration of the ICC, it also has the right to make the final decision regarding the budget proposals of the Registry.²⁰⁴ The budget of the registrar is largely dependant on the planning of ICC divisions.²⁰⁵

Ingadottir and Romano state that the budget for the judges will be made up of the expenses of the divisions, the prosecution and the registry, while the budget of the ASP will entail costs associated with its meetings and the expenses of its bureau and subsidiary bodies.²⁰⁶ They point out that the budget should also consider instances where the ICC might not have any cases for years or alternatively, several cases might be referred to it at the same time.

According to Article 115 of the Rome Statute, the expenses of the ICC shall be provided by the following sources:

²⁰¹ Ibid.

²⁰² Note 167 above, at 87.

²⁰³ Ibid.

²⁰⁴ Note 167 above, at 95.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

1. Assessed contributions of all states parties.
2. Funds provided by the UN, subject to the approval of the ASP, in particular, in relation to expenses incurred by UNSC referrals.

2.3.1.1 Assessed Contributions from the States Parties

The Financial Regulations are mandated to assess the amounts of states parties' contributions.²⁰⁷ According to Regulation 5 (7) of the Financial Regulations, the assessed contributions from the states parties shall be paid either in euros or in other currencies; it is stipulated that states parties will bear the exchange cost of the euros.

Article 117 of the Rome Statute provides that the contributions of states parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the UN for its regular budget and adjusted in accordance with the principles on which that scale is based.

The assessment scale of the UN is based on the so-called 'capacity to pay', which will depend on the national income of a state adjusted by factors such as external debt and size of population.²⁰⁸ This is adjusted and expressed as a share of the total income of UN members. The maximum share must not reach 25% and the minimum should not be less than 0.001% of the budget.²⁰⁹ Developing countries' contributions should not exceed 0.01%.²¹⁰ Since scales of assessment of most international organisations are subject to arbitrary floors and ceilings, Ingadottir and Romano have suggested that the floor and ceiling could also be applied to the ICC scale.²¹¹ It is submitted that such limits could alleviate problems concerning contributions for developing countries.

²⁰⁷ Note 167 above, at 57.

²⁰⁸ Note 167 above, at 100.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

The power to decide the ICC scale of assessments is vested in the ASP, which made its decisions when the budget was submitted to it in 2003.²¹² Pursuant to Article 112, paragraph 7 of the Rome Statute, efforts should be made to adopt the scale by consensus. Failing that, the decision would need to be taken by a two-thirds majority, as the adoption of the scale of assessment is a decision on matters of substance and not procedure.

According to Ingadottir and Romano, the contributions of states parties are expressed in terms of a percentage of the total budget; adjustments will be required upon the accession or withdrawal of a state.²¹³ They point out that decisions relating to amendments of the scale also constitute a substantive decision-making process. Such decisions place the obligation on each state to bear the expenses allocated to it. Payment of contributions is a fundamental obligation of membership. Joining the ICC means the acceptance of the burdens and obligations of contributing to its funding. Pursuant to Article 112, paragraph 8 of the Rome Statute, issues of non-payment or delayed payment will be decided by the ASP.

On 9 September 2002, a committee on budget and finance of the ICC was established by the ASP.²¹⁴ Its task was to draw up the first formal budget for the ICC. The committee held ten meetings in New York from 4-8 August 2003.²¹⁵ The draft budget for 2004 was adopted by the ASP in September 2003.²¹⁶

²¹² Washburn. J. 2003. "Committee Considered 2004 ICC Budget", *The International Criminal Court Monitor*, 25 September: p10.

²¹³ Note 176 above, at 66.

²¹⁴ Note 212 above, at 10.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

2.3.1.2 Funds Provided by the United Nations

Ingadottir and Romano point out that because the UN convened the Rome Conference, the expenses of the ICC during the preparatory phase from 1998 to 2003 were borne by the UN.²¹⁷ Under Article 112, paragraph 6 of the Rome Statute, the ASP can meet either at the seat of the ICC or at the headquarters of the UN. According to Ingadottir and Romano, the UN will reduce ICC costs by providing free space and secretarial and conference services to the ICC. They suggest that the UN contributions should be used to pay for the extra costs derived from new investigations and eventual trials and not to help states parties defray costs which they would have incurred in any event. Details on how to organise transfers and how to use possible surpluses deriving from the UN contributions are addressed in a special agreement between the ICC and the UN and the Financial Regulations.²¹⁸

Article 115 of the Rome Statute considers the funds of the UN as an assessed contribution. It stipulates that the approval of the ASP is required for the UN payments. Such approval must be given in proper time and form. This provision seeks to impose an obligation on the UN to finance part of the expenses of the ICC, since creating an obligation on a third party will not succeed without the approval of that party.²¹⁹ When the UNSC refers a case to the ICC, the UNSC should bear the expense incurred.²²⁰ It is submitted that referrals by the UNSC are likely to have much effect on the expenses of the ICC, and this must be taken into account in the amount of the ICC's costs covered by the UNSC.

2.3.1.3 Voluntary Funds

Article 116 of the Rome Statute authorises the ICC to receive and utilise voluntary contributions from states, inter-government organisations, NGOs, individuals, co-operations and other entities as additional funds.

²¹⁷ Note 167 above, at 70.

²¹⁸ Note 167 above, at 72.

²¹⁹ Halff, M. and Tolbert, D. 1999. "Article 116: Voluntary Contributions". In Triffterer, 1999: p1228.

²²⁰ Note 219 above, at 1229.

Voluntary contributions will be accepted if they meet the appropriate criteria adopted by the ASP.²²¹ According to Maarten Halff and David Tolbert, these criteria ensure that the donor is not suspected of human rights abuses and does not intend to give a donation with ulterior motives, which might compromise the ICC.²²² They believe that the ICC must investigate issues related to its financing, such as dubious or politically awkward sources, for example, states with a history of gross violation of human rights. It is submitted that they likely to be right in this matter and the discretion of the prosecutor or registrar must be exercised in accepting donations.

The ‘appropriate criteria’ referred to earlier should be incorporated into the Financial Regulations and should not be subject to conditions which might defeat the aims of the ICC.²²³ For instance, if contributions are used to provide support and compensation to victims, they should not benefit or discriminate against any particular ethnic, religious or political group.²²⁴ The criteria and the Financial Regulations define ways in which funds or resources are to be transferred, how they are going to be used and how they are going to be accounted for.²²⁵

Gifts from states or private persons, such as administrative support, equipment, office space and surfaces may be beneficial to the ICC.²²⁶ These costs should not be defrayed if the ASP accepts them as donations from third parties.²²⁷

Voluntary contributions will not be included in the budget, nor can they affect the budget on either side of the balance sheet.²²⁸ Cash contributions earmarked for a particular investigation or work of the prosecutor should not be allowed.²²⁹ Such contributions will not fully cover the expenses of the ICC, nor can they be considered to

²²¹ Article 116, note 15 above.

²²² Note 219 above, at 1229.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Note 167 above, at 78.

²²⁶ Note 167 above, at 79-80.

²²⁷ *Ibid.*

²²⁸ Note 219 above, at 1231.

²²⁹ *Ibid.*

be a stable source of funding. Voluntary funds will not relieve the obligation on states parties to contribute, because such donations are unpredictable.²³⁰

2.3.2 The Trust Fund

Halff and Tolbert believe that the significance of the financial situation of the ICC is described in Article 112 of the Rome Statute, which defines the financial matters to be governed by the Statute as well as Financial Regulations devised by the ICC judges in 2002.²³¹ They point out that the Statute provides for financial matters such as the Trust Fund, which was established under Article 79 of the Rome Statute to compensate victims.

The Trust Fund (see chapter 1.2) does not have any direct links with the divisions of the ICC and the Rome Statute does not make provision for the ICC to control or utilise the Trust Fund.²³² According to Halff and Tolbert, the Statute merely describes how the ICC can make contributions to the Trust Fund by way of reparations, fines and forfeitures.²³³ The Trust Fund is excluded from the basic budgetary considerations of the ICC.

Ingadottir and Romano state that the nature of the Trust Fund is also very different from that of the ICC.²³⁴ They point out that the Trust Fund cannot be used for any of the judicial processes of the ICC, but only for purposes of victim compensations. Being a Trust Fund, it cannot incur obligations unless the necessary cash has been received.²³⁵ By contrast, the ICC must operate, and thereby incur expenses.²³⁶ The ICC is able to contribute funds to the Trust Fund and order that any award for reparations be made through the Trust Fund.²³⁷ According to Article 79, paragraph 3 of the Rome Statute, the ASP determines the management criteria of the Trust Fund.

²³⁰ Note 167 above, at 79-80.

²³¹ Note 219 above.

²³² Rule 85, note 25 above.

²³³ Note 219 above.

²³⁴ Note 167 above, at 115.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

Article 79 of the Rome Statute touches on the Trust Fund's financing only insofar as it originates from the ICC. Reparations are transferred to the ICC first; the ICC is free to decide whether to transfer them directly to the victims or to use the Trust Fund.²³⁸ The beneficiaries of the Trust Fund are victims of crimes within the jurisdiction of the ICC.²³⁹ Rule 85 of the Rules of Procedure and Evidence defines victims as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC. The family of the victim may also benefit from the Trust Fund.²⁴⁰ Educational institutions and religious or charity organisations that have sustained direct harm to their prosperity might be compensated through the Trust Fund.²⁴¹

Fines will be collected from states parties in accordance with the procedures of national law and confiscated property and funds will be transferred to the ICC.²⁴² The ICC may ultimately order money and any other property collected through fines or forfeiture to be transferred to the Trust Fund.²⁴³ In determining fines in accordance with the criteria provided in Rule 89 of the Rules of Procedure and Evidence, the ICC shall take into account such factors as the gravity of the crime and the individual circumstances of convicted persons, for instance, age, socio-economic conditions, the motivation for the crime and whether it was ordered by a superior.²⁴⁴

²³⁸ Note 176 above, at 116.

²³⁹ Article 79(1), note 15 above.

²⁴⁰ Rule 85(b), note 25 above.

²⁴¹ *Ibid.*

²⁴² Note 167 above, at 81.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

CHAPTER THREE

Crimes within the Jurisdiction of the International

Criminal Court and Fair Trials

3.1 Crimes under the Jurisdiction of the International Criminal Court

The fourth paragraph of the preamble of the Rome Statute limits the jurisdiction of the ICC to “the most serious crimes of concern to the international community as a whole”. It makes it clear that the ICC should target genocide, crimes against humanity and war crimes as defined in the Rome Statute for prosecution.²⁴⁵ When these crimes were defined in the Elements of Crimes, the international community had to consider what sort of perpetrators it wanted to punish or deter.²⁴⁶ Deciding these matters was critical to the description of the ‘mental element’ of the crimes.²⁴⁷ If the aim is to deter only those at the highest levels of the planning and direction of the crimes, then the definition might include a ‘mental element’ encompassing purposeful participation in the planning of the crimes.²⁴⁸

3.1.1 Genocide

The definition of genocide as stated in Article 6 of the Rome Statute reproduces almost word for word the text of Article II of the 1948 Geneva Convention.²⁴⁹ The definition in Article 6 restricts the judicial interpretation of the crime by clearly laying out the acts that constitute criminal behaviour.²⁵⁰ This has led to a consideration of the context in which the definition was arrived at, starting from its origin in the 1948 Geneva Convention and ending in its use in the reports of the PrepCom between 1997 and 1998.²⁵¹

²⁴⁵ Note 179 above, at 353.

²⁴⁶ McAuliffe de Guzman, M. 2000. “The Road from Rome: The Developing Law of Crimes against Humanity”, *Human Rights Quarterly*, 22(2): p341.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Note 100 above.

²⁵⁰ Schabas, W.A. 1999. “Article 6: Genocide”. In Triffterer, 1999: p108.

²⁵¹ Ibid.

The forms of genocide outlined in the Rome Statute relate to ‘physical genocide’.²⁵² There are five acts that define genocide as a crime within the jurisdiction of the ICC.²⁵³ According to Article 6 of the Rome Statute, genocide occurs whenever an act is committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group. The Rome Statute enumerates the following genocidal acts:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²⁵⁴

3.1.1.1 The Importance of Intention in Genocide

The five acts of genocide specified in Article 6 stipulate that for a crime to be classified as genocide the intention must be to destroy the group in whole or in part.²⁵⁵ In other words, the perpetrator of a wilful killing must have the intent to cause the death or destruction of a specific protected group of persons as defined in the Article.²⁵⁶ If the special intent or *dolus specialis* of destroying a group and the context of a manifest pattern of similar conduct are present, the perpetrator will be committing genocide.²⁵⁷

Any harm which is sufficient to threaten and destroy the group, in part or wholly, irrespective of this harm being mental or physical, meets the criteria spelt out in genocide and therefore constitutes genocide.²⁵⁸ The term ‘mental’ in this instance refers to permanent mental impairment.²⁵⁹ The PrepCom working groups decided that a reference

²⁵² Ibid.

²⁵³ Article 6, note 15 above.

²⁵⁴ Ibid.

²⁵⁵ Note 250 above, at 109.

²⁵⁶ Article 6, note 15 above.

²⁵⁷ Ruckert, W. and Witschel, G. 2001. “Genocide and Crimes against Humanity in the Elements of Crimes”. In Fischer, Kress and Luder, 2001: p67.

²⁵⁸ Note 250 above, at 109.

²⁵⁹ Ibid.

to 'mental harm' should be understood to mean more than just a minor or temporary impairment of mental faculties.²⁶⁰

Wiebke Ruckert and Georg Witschel state that the language used to describe intent was similar to the descriptions of crimes against humanity, the war crime of wilful killing and other war crimes in Article 8 paragraph 2 (b) of the Rome Statute.²⁶¹ They point to the fact that the common character of the intent in these crimes lies in the point that even a single murder would be sufficient to constitute the crime of genocide.²⁶² If the perpetrator merely intended to cause bodily harm to an individual or individuals and expected the possibility of death to arise from his or her action, he or she would be committing the genocidal act of wilful killing.²⁶³

As has been indicated, the accused would be tried for genocide irrespective of the number of victims. It would not matter whether the intention of offenders was the complete destruction of the whole group or not. A specific intent to destroy any portion of it would be sufficient.²⁶⁴ The focal point of this crime is that if an offender commits mass murder without a clear intention to exterminate a specific group of persons, his or her act does not constitute genocide.²⁶⁵ In these circumstances, the judges must examine the intention to destroy and decide whether it meets the stringent definition in Article 6 or not.²⁶⁶

According to William Schabas, sexual assault also constitutes genocide.²⁶⁷ He points out that sexual assault with intent to change the ethnic fabric of a community may be constituted genocide. According to the case law of ICTY, rape may be used to change the ethnic character of the population, but genocidal intention must be proved.²⁶⁸

²⁶⁰ Ibid.

²⁶¹ Note 257 above, at 63.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Vyver, J. 1999. "Universal Jurisdiction in International Law", *South African Yearbook*, 24: p129.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Note 250 above.

²⁶⁸ Ibid.

Sometimes rape is used to systematically prevent women from procreating in future, when fear of having children as a consequence of rape may lead women to voluntary sterilisation.²⁶⁹

3.1.2 Crimes against Humanity

The list of crimes against humanity falling under the jurisdiction of the ICC was drawn up with the purpose of criminalising the conduct of those who committed certain acts as part of a systematic and/or widespread attack on a civilian population.²⁷⁰ Such crimes do not require an armed conflict or a general element of destroying groups in part or whole to be present.²⁷¹ This clear statement of a test of crimes against humanity is counterbalanced by the definition of ‘attack’ in Article 7, paragraph 2 (a) of the Rome Statute.²⁷²

According to Ruckert and Witschel, this definition establishes that an ‘attack’ implies multiple commissions of inhuman acts, pursuant to or in furtherance of a state or organisational policy.²⁷³ They believe that the policy element introduces a lower threshold and a more flexible check than the term ‘systematic’.²⁷⁴ According to the Elements of Crimes, the definitions of such crimes extend by stating that in the case of torture, no specific purpose must be proven for the crimes to be prosecutable.²⁷⁵

It is submitted that proof of a widespread and/or systematic attack on the civilian population is essential for the decision that persons committed crimes against humanity. It is the central element that will elevate what might have been termed ‘not serious’ violence to one of the most serious crimes known to the human race. Furthermore, if a person was convicted of crimes against humanity, yet was truly unaware of the widespread and/or systematic nature of the acts, this would violate the principle of *actus*

²⁶⁹ Ibid.

²⁷⁰ Article 7, note 15 above.

²⁷¹ Note 257 above, at 71.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Footnote 2, note 26 above.

non facit reum nisi mens sit rea (an act does not make the person doing it guilty unless it is accompanied by a guilty mind).²⁷⁶

It is difficult to imagine a situation where a person could commit a murder as part of a systematic attack while credibly claiming to have been completely unaware of that attack.²⁷⁷ It is submitted that this might happen if the perpetrators of murder were under superior orders to kill certain people and were not aware that their actions formed part of a superior intent of a systematic attack against a population. In such a case, the accused would have the intention for murder, but not for the far more serious charge of committing crimes against humanity.²⁷⁸

Article 7, paragraph 1 of the Rome Statute enumerates the acts that constitute crimes against humanity. These are:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

²⁷⁶ Robinson, D. 1999. "Defining "Crimes against Humanity" at the Rome Conference", *American Journal of International Law*, 93(1): p52.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

Article 7, paragraph 1 (e) makes reference to “other severe deprivation of physical liberty” in order to preclude an inappropriately restrictive interpretation of the term ‘imprisonment’.²⁷⁹ Pam Spees and Vahida Nainar believe that this would probably include the policy of any apartheid regime of banning political activists to, or restricting the movement of people in one country.²⁸⁰ Consequently, it is submitted that the Rome Statute recognises new forms of crimes against humanity.

The reference to rape was expanded and clarified in paragraph 1 (g), to include a wide range of sexual crimes.²⁸¹ This provision confirms that these acts, which have been persistent throughout history, warrant special attention and should be included within the definition of crimes against humanity.²⁸² The precise determination of the preconditions of rape as a crime against humanity, especially when it occurs in war, differs considerably in national legal systems.²⁸³ Thus these preconditions were left to the discretion of the judges.²⁸⁴

3.1.2.1 Examples of Acts Defined in the Rome Statute as Crimes against Humanity

1. Murder

The material element of murder is described in the Rome Statute as the killing of one or more persons.²⁸⁵ However, according to the Elements of Crime, the term ‘killed’ can be interchangeable with the term ‘caused the death of civilian’ in respect of genocide.²⁸⁶ This reference to the ‘causation of death’ does not provide for any particular test with regard to cases of indirect causation.²⁸⁷ The term ‘murder’ was considered sufficiently clear in terms of the applicable sources of law and thus did not to require additional clarification.²⁸⁸

²⁷⁹ Note 276 above, at 52-53.

²⁸⁰ Spees, P. and Nainar, V. 2000. *The International Criminal Court: The Beijing Platform in Action*: p18.

²⁸¹ Article 7, note 15 above.

²⁸² Note 276 above, at 53.

²⁸³ Note 257 above, at 74.

²⁸⁴ *Ibid.*

²⁸⁵ Article 7(2), note 15 above.

²⁸⁶ Footnote 2, note 26 above.

²⁸⁷ Note 257 above, at 74.

²⁸⁸ Note 276 above, at 52.

2. *Extermination*

Extermination was included under the crimes against humanity in international instruments preceding the Rome Statute such as the ICTY Statute, but was not defined in any of them.²⁸⁹ The question therefore arises as to how the crime of extermination differs from that of murder. The ILC, in its commentary on the Draft Code of Crimes against the Peace and Security of Mankind, pointed out that extermination differs from murder, because in extermination, the criminal conduct is directed against a group of individuals and contains an element of mass destruction.²⁹⁰ Also, extermination can be distinguished from genocide in that the group affected does not necessarily share common characteristics and the killing is not necessarily directed against the whole group.²⁹¹

Ruckert and Witschel believe that the material elements of extermination are in line with the ILC's reasoning.²⁹² The first material element specifies that extermination requires that the perpetrator killed one or more persons.²⁹³ Nevertheless, in contrast to murder, for extermination to be deemed to have taken place the killing must have taken place as part of a mass killing of members of a civilian population.²⁹⁴ This second material element constitutes the element of mass destruction that distinguishes extermination from murder.²⁹⁵

3. *Deportation or Forcible Transfer of a Population*

The Rome Statute includes not only deportation, but also the forcible transfer of a population.²⁹⁶ The definition of 'forcible transfer' seeks to include the relocation of a population within or outside of the borders of a state.²⁹⁷ There may be grounds that permit the deportation or forcible transfer of a population under international law in

²⁸⁹ Article 5, note 62 above.

²⁹⁰ Note 257 above, at 75.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ Note 276 above.

²⁹⁵ Note 257 above, at 75.

²⁹⁶ Article 7, note 15 above.

²⁹⁷ Note 257 above, at 77.

certain special circumstances, for example, in national disasters and in cases of genuine national crisis.²⁹⁸

3.1.3 War Crimes

The ICC also has jurisdiction over war crimes, which are adequately defined in the four Geneva Conventions²⁹⁹ and Additional Protocols I³⁰⁰ and II.³⁰¹ William Fenrick argues that both customary international law and the four Geneva Conventions are needed for a comprehensive understanding of the fundamental aspects of war crimes as defined in the Rome Statute.³⁰² War crimes constitute a grave breach of the four Geneva Conventions if the acts mentioned in Article 8, paragraph 2 (c) of the Rome Statute were committed against persons or property protected under the provisions of the Conventions.³⁰³ According to Fenrick, the four Geneva Conventions apply under the following conditions:

1. In all armed conflicts between two or more parties to the Conventions, even if one or more parties do not recognise a state of war;
2. In all cases of partial or total occupation of the territory of a party to the Conventions, even if the occupation meets with no armed resistance; and
3. If a party subscribing to the Conventions is at war with a power that is not a subscriber, the Conventions shall be applied if the latter power accepts and applies the provisions of the Conventions.³⁰⁴

²⁹⁸ Ibid.

²⁹⁹ Note 30 above.

³⁰⁰ Additional Protocol I, to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 U.N.T.S 3, 16 ILM. Available at www.icao.int/icao/en/leb/Genev.htm (accessed on 20 November 2003).

³⁰¹ Additional Protocol II, to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 U.N.T.S 609, 16 ILM. Available at www.icao.int/icao/en/leb/Genev.htm (accessed on 20 November 2003).

³⁰² Fenrick, W. "Article 8: War Crimes paragraph 1". In Triffterer, 1999: p183.

³⁰³ Ibid.

³⁰⁴ Ibid.

The fact that the definition of war crimes admits the possibility of lawful incidental injury or collateral damage does not in any way justify violations of the law as applicable in armed conflicts.³⁰⁵ However, Article 8 of the Rome Statute does not address the justifications for war or other rules related to war.³⁰⁶ It merely reflects on the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.³⁰⁷

Article 8, paragraph 2 of the Rome Statute enumerates the acts that constitute war crimes. These are:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - i. Wilful killing;
 - ii. Torture or inhuman treatment, including biological experiments;
 - iii. Wilfully causing great suffering, or serious injury to body or health;
 - iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - vi. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - vii. Unlawful deportation or transfer or unlawful confinement;
 - viii. Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in

³⁰⁵ Note 302 above, at 184.

³⁰⁶ Note 302 above, at 183.

³⁰⁷ Note 302 above, at 184.

accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

- iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- v. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- vii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- viii. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- ix. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xi. Killing or wounding treacherously individuals belonging to the hostile nation or army;
- xii. Declaring that no quarter will be given;
- xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- xiv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

- xv. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
 - xvi. Pillaging a town or place, even when taken by assault;
 - xvii. Employing poison or poisoned weapons;
 - xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - xix. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xx. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123;
 - xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - xxii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - xxiii. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - xxiv. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - xxvi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the 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, namely, any of the following acts committed against persons taking no active part in the

hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - iii. Taking of hostages;
 - iv. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - v. Pillaging a town or place, even when taken by assault;
 - vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;
 - vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

- viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - ix. Killing or wounding treacherously a combatant adversary;
 - x. Declaring that no quarter will be given;
 - xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Some war crimes that have been included in Article 8 of the Rome Statute, for example outrages upon personal dignity, have not been mentioned in the four Geneva Conventions.³⁰⁸ It is submitted that the inclusion of new war crimes in the Statute is a significant development in international criminal law which will raise the standards of human rights. Knut Dormann states that the inclusion of new war crimes is largely based on the case law of the ICTY, which recognises that serious attacks on human dignity may constitute inhuman treatment.³⁰⁹ Ultimately, the PrepCom decided that the crime of “outrages upon personal dignity, in particular humiliating and degrading treatment” would cover such conduct as constitutes an attack on human dignity.³¹⁰

Article 8, paragraph 2 (c) does not apply to international conflicts, nor does it apply to internal tensions such as riots and isolated and sporadic acts of violence. Paragraph 2 (c) allows for the necessary distinction between international armed conflicts

³⁰⁸ Dormann, K. 2001. “War Crimes in the Elements of Crimes”. In Fischer, Kress and Luder, 2001: p113.

³⁰⁹ Ibid.

³¹⁰ Ibid.

and internal armed conflicts. Article 1, paragraph 4 of Additional Protocol I to the Geneva Conventions defines armed conflicts as situations where people are fighting against colonial domination, alien occupation and racist regimes in the exercise of their right of self-determination.³¹¹ Article 1, paragraph 1 of Additional Protocol II to the Geneva Conventions states that Additional Protocol II applies to all armed conflicts not covered by Additional Protocol I to the Geneva Conventions. However, armed conflicts taking place between two or more states are international armed conflicts.³¹² Fighting between governmental forces and organised, armed national groups is defined as an internal armed conflict.³¹³ Such conflict only becomes an international armed conflict if another state intervenes in favour of one or more organised national groups.³¹⁴

3.1.4 Innovations in the Definitions of Crimes under the Rome Statute

As international law developed in the last half century, it is submitted that many innovations were incorporated into definitions of crimes in the Rome Statute. Notably, forced pregnancy (that is pregnancy resulting from rape) is included as both a crime against humanity and a war crime. This dual inclusion reflects outrage at the experiences of the case law of the ICTY.³¹⁵

In a similar reflection of concern with earlier armed conflicts,³¹⁶ apartheid has also been included as a crime against humanity after South Africa insisted, at the Rome Conference, that the crimes of former high-ranking members of the South African

³¹¹ See generally Cottier, M. 1999. "Article 8: War Crimes paragraph 2 (b) (xiv) and (xv)". In Triffterer, 1999.

³¹² Ibid.

³¹³ Note 308 above.

³¹⁴ Ibid.

³¹⁵ David, M. 1999. "Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law", *Michigan Journal of International Law*, 20(2): p362.

³¹⁶ There was long debate about whether the South African Conflict was internal or international, given that there were major conflicts between the African National Congress (hereinafter ANC) and the Former South African regime. The ANC was banned by the former apartheid regime in South Africa from 1960 until 1990 and much of the conflict between it and former government forces was 'external' in that ANC forces were based outside of South Africa. It is nevertheless the case that the ANC undertook a campaign of sabotage and other acts of destabilisation within the country. See Saunders, C. (ed). 1995. *Illustrated History of South Africa: the Real Story*: p530.

apartheid regime be criminalised internationally.³¹⁷ In a somewhat controversial measure, the definition of war crimes was extended to include transfer of population and a state's transfer of members of its own civilian population into the territory it occupies.³¹⁸ According to Geoffrey Robertson, Israel settled over 200,000 Jews on the West Bank and the Gaza Strip after the 1967 Six-day War.³¹⁹ He points out that Israel voted against the Rome Statute, since it feared that its leaders might be put on trial.

3.1.5 Opt-out Declaration

According to Article 12 of the Rome Statute, once a state becomes a party to the Statute, it immediately accepts the jurisdiction of the ICC over genocide and crimes against humanity. At the request of France at the Rome Conference, in respect of war crimes, a state may accept the jurisdiction of the ICC immediately or declare that it will not accept this jurisdiction for a period of time after it ratifies the Rome Statute, if these crimes are alleged to have been committed by its citizens or on its territory.³²⁰ Such a declaration may be withdrawn at any time.³²¹ Article 124 of the Rome Statute provides that this transition period of time shall be reviewed at the Review Conference.

Andreas Zimmermann gives two interpretations of Article 124:

- Either any such opting-out completely bars the exercise of jurisdiction by the court in regard of alleged crimes committed either by nationals or on the territory of the state which has made the declaration.
- Alternatively, opting-out could also have the sole effect that the state which has made the declaration has simply not accepted the jurisdiction of the court for its nationals under Article 12 para 2 of the Statute. Notwithstanding the exercise of jurisdiction by the court could then be still based it on the alternative jurisdiction link that the state on the territory of which the alleged crimes has been committed is a

³¹⁷ Note 276 above.

³¹⁸ Note 315 above, at 361.

³¹⁹ Note 179 above, at 351.

³²⁰ Zimmermann, A. 1999. "Article: 124 Transitional Provision". In Triffterer, 1999: pp1279-1280.

³²¹ Ibid.

contracting party or has otherwise consented to the exercise of jurisdiction by the court.³²²

The opt-out declaration excludes not only the jurisdiction of the ICC over war crimes during the opt-out period for that state party, but also the duty of the state party to co-operate with the ICC.³²³ It is limited to a non-renewable period of seven years from 1 June 2002.³²⁴ The opt-out declaration is only effective when the case is triggered either by the prosecutor *proprio motu*, or referred by a state party under Article 14 of the Rome Statute.³²⁵

It is submitted that Article 124 is an opting out clause that enables states to shield persons responsible for war crimes from prosecution. It may seem strange that a non-ratifying state can be subject to the jurisdiction of the ICC for war crimes whereas states parties can choose to be excluded from ICC jurisdiction for a limited period of time.³²⁶ Kristina Miskowiak observes that states parties can accordingly be less bound by this jurisdiction than non-ratifying states.³²⁷ She points out that the US is a non-ratifying state and France is a state party that has decided to opt out of ICC jurisdiction over war crimes for a period of seven years.³²⁸ In the same peace-keeping operation, the actions of a US serviceman could fall under the jurisdiction of the ICC, since the alleged crimes are committed in territories of a state party. However, the actions of a French soldier could not be prosecuted since France, as has been indicated above, has chosen not to be under the jurisdiction of the ICC as regards war crimes.³²⁹

Miskowiak argues that the opt-out declaration creates a theoretical possibility that Article 124 might be used to deter citizens of non-ratifying states from committing

³²² Note 320 above.

³²³ Note 264 above, at 128.

³²⁴ Article 124, note 15 above.

³²⁵ Note 320 above.

³²⁶ Note 39 above, at 16.

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ Note 39 above, at 29.

crimes under the jurisdiction of the ICC in the territory of a states party.³³⁰ In terms of this Article, the likelihood of citizens of non-ratifying states being prosecuted, whilst citizens of states parties are immune from prosecution, is reduced through the principle of complementarity, which gives states the option of prosecuting offenders nationally.³³¹

3.1.6 Instances where Perpetrators Will be Held Responsible

The Rome Statute specifies in what circumstances perpetrators would be held individually responsible for crimes committed under orders from their superiors.³³² It is submitted that Article 28 (a) of the Rome Statute makes a distinction between the deliberate intentions of military superiors and their culpable negligence. Military superiors will be held responsible for crimes committed by forces under their effective command when:

1. They know or, due to the circumstances at the time when the crimes are committed, have the obligation to have knowledge or information that their forces were committing or were about to perform such crimes;
2. The crime is committed consequent to the superior's failure to exercise effective control over the forces and his or her failure to take all necessary and reasonable measures to avoid or suppress their commission; and
3. The superior fails to submit the case to the competent authorities for investigation and prosecution.³³³

In the past, international criminal law instruments dismissed the defence of 'superior orders', but treated them as a mitigating factor in imposing sentence.³³⁴ The Nuremberg Tribunals recognised a wide range of mitigating factors, including superior

³³⁰ Note 39 above, at 27.

³³¹ *Ibid.*

³³² Article 28, note 15 above.

³³³ *Ibid.*

³³⁴ Note 145 above, at 143.

orders, age, position in the military hierarchy, suffering of the victims, efforts of the criminal to reduce suffering, and duress.³³⁵ Even when the defence is unsuccessful, the fact that the defendant was obeying the orders of a superior will encourage a degree of mitigation.³³⁶

According to Ruckert and Witschel, the Rome Statute takes a pragmatic view.³³⁷ They conclude that it leaves the prosecutor and judges to develop criteria for determining whether there are grounds for excluding criminal responsibility or not. Consequently, paragraph 5 of the General Introduction to the Elements of Crimes provides that “grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime”.

Article 30 of the Rome Statute states:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this Article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this Article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

Ruckert and Witschel believe that Article 30 proved to be the benchmark in stipulating that a person be held criminally responsible whenever the material elements of the criminalised acts are in similarity with intent and knowledge.³³⁸ Therefore, paragraph 2 of the General Introduction to the Elements of Crimes confirms the requirement of

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Note 257 above, at 63.

³³⁸ Ibid.

Article 30.³³⁹ This Article envisages that persons may be considered guilty when the intentions to commit crimes together with the knowledge that the envisaged acts constitute crimes are present, unless the provisions of the Rome Statute state otherwise.³⁴⁰

Although the Rome Statute makes it clear that intention, knowledge and the nexus must be present, it is submitted that the judges have considerable power of decision in the use of the categories ‘genocide’, ‘crimes against humanity’ and ‘war crimes’. Paragraph 2, therefore, only provides a basis on which judges are required to use their discretion.³⁴¹

It is submitted that the legal understanding of genocide has in recent years become increasingly complex. Article 6 (c) of the Rome Statute recognises that the infliction of conditions calculated to bring about a group’s physical destruction is a genocidal act. However, Article 6 (d) extends the definition of genocide to include the imposition of measures intended to prevent births within the groups.³⁴² Ruckert and Witschel believe that the question of whether knowledge of the possibility of the destruction of a group is required for the commission of genocide is particularly contentious.³⁴³ The common last element in the Elements of the Crimes provides that it is required for the commission of crimes against humanity that “the perpetrator knew that the conduct was part of, or intended the conduct to be part of a widespread or systematic attack directed against a civilian population”.³⁴⁴

Dormann believes that the above provision gives some guidance in determining the requisite degree of knowledge.³⁴⁵ He argues that there are indications in the Elements of Crimes that the prosecutor must prove a higher degree of knowledge than in the case

³³⁹ Paragraph 2 of the General Introduction to the Elements of Crimes states that “As stated in Article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e. intent, knowledge or both, set out in Article 30 applies. Exceptions to the Article 30 standard, based on the Statute”.

³⁴⁰ Note 257 above, at 62.

³⁴¹ *Ibid.*

³⁴² Note 257 above, at 66.

³⁴³ *Ibid.*

³⁴⁴ Article 7, note 26 above.

³⁴⁵ Note 308 above, at 106.

of other crimes.³⁴⁶ Furthermore, it appears that generally proving the existence of intention and knowledge objectively will be sufficient.³⁴⁷ In such circumstances, an accused cannot argue that he or she did not understand the nexus.³⁴⁸

It will be up to the judges of the ICC to determine how to bring case law in line with Article 30 of the Rome Statute.³⁴⁹ The judges might face a similar problem with the term ‘wilful’, which is used in some of the crimes under Article 8 of the Rome Statute, and which has not been repeated in the Elements of Crimes.³⁵⁰ Furthermore, the judges will have to determine whether the standard contained in Article 30 and the definition of ‘wilfulness’ in the case law of the ICTY and ICTR coincide.³⁵¹

With respect to war crimes, the words ‘in association with’ in Article 8 of the Rome Statute were meant to reflect the case law of the ICTY and ICTR that required a sufficient connection to be established between the offences and the armed conflicts.³⁵² Acts such as murder for purely personal reasons, for example, are unrelated to an armed conflict, i.e. if a jealous soldier kills a civilian or a war prisoner because the latter had a relationship with the soldier’s wife, this is not considered to be a war crime.³⁵³

It is submitted that the Elements of Crimes merits much more detailed discussion, and may profitably become the subject of other studies. It is further submitted that since the main focus in this dissertation is the general structure and process of the ICC, a discussion of that nature falls outside the scope of the present work.

³⁴⁶ Ibid.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Note 308 above, at 98.

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Note 308 above, at 106.

³⁵³ Ibid.

3.1.7 Investigations, Trials and Sentencing

Article 15 of the Rome Statute specifies on what basis prosecutions or investigations may be initiated by the prosecutor. According to this Article, the prosecutor must analyse the information concerning the circumstances, the persons involved and the alleged crimes in order to arrive at a fair conclusion that a crime within the jurisdiction of the ICC has been committed. He or she will then initiate an investigation whenever it is in the interests of the victims and in the interests of justice to do so.³⁵⁴ According to Article 15, paragraph 4, the prosecutor must request authorisation from the Pre-Trial Division before initiating an investigation. Article 17, paragraph 2 of the Rome Statute mentions that the obligation of the prosecutor to consider the interests of justice, as required by Article 53, paragraph 1 of the Rome Statute, is still effective after obtaining the authorisation to initiate an investigation from the Pre-Trial Division.³⁵⁵

3.1.7.1 Elements to be Considered by the Prosecutor

Article 58, paragraph 7 of the Rome Statute authorises the prosecutor to summon a person directly if there are reasonable grounds to believe that the person committed the crime. In particular, if a warrant of arrest is issued, this Article determines its binding force, and that it is not to be questioned by national authorities.³⁵⁶ Once the person has been arrested the custodial state has to apply the provisions of the Rome Statute rather than its national law.³⁵⁷

According to Allison Danner, Article 58 also deals with the extent to which the prosecutor should be expected to function as a political agent who can be held accountable and the extent to which he or she will be able to claim legitimacy.³⁵⁸

The Rome Statute is almost silent with respect to the larger policy problems which relate to the question of whether the prosecutor should pursue any suspects.³⁵⁹ The

³⁵⁴ Bergsmo, M. and Kruger, P. 1999. "Article 53: Initiation of an Investigation". In Triffterer, 1999: p706.

³⁵⁵ Note 354 above, at 707.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Note 152 above, at 511.

prosecutor has an important policy-making role in determining what kind of crimes should come under the jurisdiction of the ICC.³⁶⁰

According to Danner, the prosecutor will have to determine which charges to bring against individuals he or she has decided to prosecute and decide how many charges to bring and for what kind of crimes.³⁶¹ These decisions will significantly affect the complexity and character of the individual case.³⁶² He believes that the significance of the prosecutor's decisions takes on importance in the light of the Rome Statute's rejection of plea-bargaining. It is submitted that crimes under the jurisdiction of the ICC must be fully prosecuted and the rejection of plea-bargaining will not lead to immunity for perpetrators of these crimes.

The practical form of liability created by the Rome Statute will enhance the long-term viability of the ICC without making the prosecutor dependent on the directives of any particular state.³⁶³ Pragmatic forms of liability help both to protect against the prosecutor's exceeding his or her power and ensure that other agents – including non-ratifying states whose nationals may face prosecution before the ICC – have the ability to influence the prosecutor's use of his or her powers to investigate cases.³⁶⁴ If an individual is being targeted in a way that a state feels is illegal or unjust, that state may try to influence the prosecutor's investigation or prosecution.³⁶⁵ It is submitted that allowing victims to make representations to the Pre-Trial Division during the early stage of investigations according to Article 15, paragraph 3 of the Rome Statute, and also allowing them to submit observations to the ICC according to Article 19, paragraph 3 of the Rome Statute, may prevent states from trying to influence the prosecutor's investigation.

³⁵⁹ Note 152 above, at 521.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² Note 152 above, at 522.

³⁶³ Note 152 above, at 526.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

Because states have the power to remove a case from the purview of the prosecutor and challenges to the jurisdiction of the ICC or the admissibility of case, according to Article 19 of the Rome Statute, they wield the ultimate power over the prosecutor's discretion.³⁶⁶ The Pre-Trial Division scrutinises the prosecutor's plans or proceedings with special care.³⁶⁷ This Division has the right to review the prosecutor's decision if it so wishes and can request the prosecutor to reconsider his or her decision.³⁶⁸ The Pre-Trial Division is given the right to review the prosecutor's decisions, not solely in the interests of justice, but also in the interests of victims.³⁶⁹ On the other hand, the prosecutor has discretionary power to resurrect an investigation or prosecution if new facts or information become available, though in these circumstances the Pre-Trial Division also has the power of review.³⁷⁰

In some cases, it may be difficult for the prosecutor to prosecute particular crimes, for example gender-based crimes, effectively.³⁷¹ It is submitted that this is because the prosecution of such crimes requires certain expert evidence (such as forensic evidence) which may no longer be available, before proof can be offered. However the prosecutor will take into consideration the following elements when he or she initiates prosecution:

1. The gravity of the crime will be considered. Crimes on the lower scale of gravity, and therefore not under the jurisdiction of the ICC, will be left to national jurisdiction;
2. After the prosecutor has completed the formal investigation and gathered the necessary information, he or she must balance the evidence available in order to determine whether to proceed with prosecution or not.³⁷²

³⁶⁶ Note 152 above, at 527.

³⁶⁷ For further information about the Pre-Trial Division, see chapter 2.2.2.

³⁶⁸ *Ibid.*

³⁶⁹ Note 354 above, at 713.

³⁷⁰ *Ibid.*

³⁷¹ Moshan, B. 1998. "Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity", *Fordham International Law Journal*, 22 (November): p183.

³⁷² *Ibid.*

3. Other elements will be considered, such as the interests of the victim, the age of the alleged perpetrator (the ICC requires that the perpetrator be over eighteen years) and his or her role in the alleged crimes.³⁷³

The prosecutor may decide to stop a prosecution for two reasons:

1. No sufficient legal or focal basis to seek a warrant or summons under Article 58 of the Rome Statute; and
2. The inadmissibility of particular cases under Article 17 of the Rome Statute.³⁷⁴

3.1.7.2 Requirements Imposed upon the Prosecutor

The Pre-Trial Division must approve the prosecutor's requests for orders or warrants that are necessary for the purpose of an investigation.³⁷⁵ The Pre-Trial Division is free to reject a prosecutor's request for these orders or warrants and is unwilling to issue orders or warrants too frequently, or in relation to minor offences.³⁷⁶

The prosecutor must notify the UNSC if the case was referred by the UNSC.³⁷⁷ As shown in chapter 1.4, referrals made by the UNSC to the ICC are merely one way in which cases can be brought before the ICC. This indicates that the overall role of the UNSC in the working of the ICC, even though significant, is not great.³⁷⁸

The prosecutor must notify a state party when a case is referred by it, or notify states parties when he or she initiates an investigation *proprio motu*.³⁷⁹

³⁷³ Note 354 above, at 709.

³⁷⁴ See chapter 4.4.1.

³⁷⁵ See chapter 2.2.2.

³⁷⁶ Guariglia, F. and Harris, K. 1999. "Article 57: Functions and Powers of the Pre-Trial Chamber". In Triffterer, 1999: p748.

³⁷⁷ O'Shea, A. 1999. "The Statute of the International Criminal Court", *South African Law Journal*, 116: p248.

³⁷⁸ *Ibid.*

³⁷⁹ Article 18(1), note 15 above.

3.1.7.3 Sentencing Policy

The ICC may impose penalties not exceeding thirty years imprisonment, or a term of life imprisonment depending on the circumstances of cases.³⁸⁰ Unlike the Nuremberg and Tokyo Tribunals, the ICC cannot impose the death penalty.³⁸¹ Sentences may be served in states that have indicated their willingness to accept sentenced persons.³⁸² However, the ICC may order fines that may not be prejudicial to third parties.³⁸³ The accused and the prosecutor may appeal to the Appeals Division on procedural errors or error in facts and law.³⁸⁴

In effect, the Rome Statute leaves the criteria to be applied in the imposition of multiple sentences to the judges.³⁸⁵ It imposes a ceiling and, from a practical standpoint in the cases of the most serious crimes, there will be little discretion to exercise because individual offences will deserve the maximum available sentence.³⁸⁶ It is submitted that since the ICC deals only with serious crimes, no minor penalties of imprisonment are appropriate. It is further submitted that even in a case which does not constitute genocide, crimes against humanity, war crimes and the crime of aggression, such as that of an official of the ICC who has been corrupted in connection with his or her official duties (see chapter 3.1.7.5), a major sentence such as ten years of imprisonment should be a minimum. Given the nature of the crimes with which the ICC deals, it is unlikely that a sentence of less than ten years would be passed. Proof of the lack of the victim's consent is required in order to convict, and a reasonable doubt about this consent entitles an acquittal.³⁸⁷

³⁸⁰ Article 77, note 15 above.

³⁸¹ Ibid.

³⁸² Article 103(1), note 15 above.

³⁸³ Article 77(2), note 15 above.

³⁸⁴ Rakate, P. 1998. "An International Criminal Court for a new millennium – The Rome Conference", *South African Yearbook*, 23: p220.

³⁸⁵ See generally Bergsmo, M.; Cisse, C. and Staker, C. 2000. "The Prosecutors of International Tribunals". In Sewall and Kaysen, 2000.

³⁸⁶ Note 145 above, at 144.

³⁸⁷ Piragoff, D.K. 2001. "Procedural Justice Related to Crimes of Sexual Violence". In Fischer, Kress and Luder, 2001: p394.

When sentence is pronounced for more than one offence, the Rome Statute does not specify the sentence for each offence as well as the total period of imprisonment.³⁸⁸ The total period cannot be less than the highest individual sentence pronounced, nor may it exceed the total length of sentence mentioned above.³⁸⁹

3.1.7.4 Agreements of the International Criminal Court on the Prison Policy

Once judgments have been given, there is a general obligation on states parties to recognise and aid in their fulfilment, although that obligation does not extend to providing prison facilities.³⁹⁰ The ICC makes arrangements and/or agreements with states parties that are able to provide prison facilities.³⁹¹ If no other arrangement is made for prison facilities, the sentence of imprisonment will be served in the host state.³⁹² In this case, the ICC shall bear the cost of imprisonment.³⁹³

In choosing a state of detention, the ICC does not take into account the views of the sentenced person or his or her nationality.³⁹⁴ The ICC chooses the state of detention, which must comply with widely accepted international standards governing the treatment of prisoners.³⁹⁵ There can obviously be no question of sending a prisoner to a state with prison conditions that do not meet international standards.³⁹⁶ Furthermore, conditions of detention must be neither more nor less favourable than those available to prisoners convicted of similar offences in the state where the sentence is being enforced.³⁹⁷

A sentence of imprisonment must be served under the supervision of the ICC, which will ensure that the full sentence is served.³⁹⁸ However, the sentenced person can

³⁸⁸ Article 77, note 15 above.

³⁸⁹ Article 78(3), note 15 above.

³⁹⁰ Crawford, J. 1994. "The ILC's Draft Statute for an International Criminal Tribunal", *American Journal of International Law*, 88: p152.

³⁹¹ Article 103(1), note 15 above.

³⁹² Article 103(4), note 15 above.

³⁹³ Ibid.

³⁹⁴ Article 103(3), note 15 above.

³⁹⁵ Note 145 above, at 145.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Article 106, note 15 above.

petition the ICC for pardon, parole or commutation of sentence.³⁹⁹ Nevertheless, when the sentenced person has served two-thirds of the sentence, or twenty-five years in the case of life imprisonment, the ICC shall review it *proprio motu* to determine whether the sentence should be reduced or not.⁴⁰⁰ It is submitted that such petition of sentenced persons must be entertained, according to the health of the sentenced persons and that, given the length of sentences likely to be imposed by the ICC, the question of parole must at least be considered after two-thirds of a sentence has been served.

3.1.7.5 Sanctions for Offences against the Administration of Justice or Misconduct

The ICC is empowered to rule on crimes that constitute an offence against the administration of justice, such as corruption or destruction of its procedures.⁴⁰¹ It may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.⁴⁰² Deliberate misconduct before the ICC or a refusal to comply with its directions or ruling is also punishable.⁴⁰³

Article 70, paragraph 1 of the Rome Statute states:

The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to Article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;

³⁹⁹ Note 390 above, at 152.

⁴⁰⁰ Article 110(3), note 15 above.

⁴⁰¹ Articles 70 and 71, note 15 above.

⁴⁰² Article 70(3), note 15 above.

⁴⁰³ Article 71, note 15 above.

- (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

Misconduct is defined as any behaviour violating the dignity of the ICC or interfering with the procedures necessary to guarantee its independence, objectivity or effectiveness.⁴⁰⁴ Misconduct is possible at any stage of prosecution.⁴⁰⁵ The ICC does not punish misconduct before the trial is held.⁴⁰⁶ The disruption of proceedings may occur through physical attacks on a judge, prosecutor, witness or legal expert, or by making a disturbance that negatively affects the function of the ICC.⁴⁰⁷ Neglecting to heed advice or warnings from the ICC or deliberately refusing to comply with its orders and other serious misconduct may lead the ICC to impose sanctions such as a fine or removal from the ICC courtroom.⁴⁰⁸

According to Triffterer, misconduct by the defendants, witnesses, experts or victims is punishable in a public or closed session.⁴⁰⁹ He states that misconduct is defined within two limitations:

1. Place limits: misconduct must take place in the ICC courtroom, or in places where the ICC is held, which includes the public gallery but excludes other rooms in the building; and
2. Time limits: misconduct must occur when court is in session. No sanction will be given before the judges appear or after they leave the place of trial.

⁴⁰⁴ Triffterer, O. 1999. "Article: 71 Sanctions for Misconduct before the Court". In Triffterer, 1999: p930.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Article 71, note 15 above.

⁴⁰⁹ Note 404 above.

3.2 The Challenges of Defining the Crime of Aggression and Crimes not under the Jurisdiction of the International Criminal Court

3.2.1 The Crime of Aggression

Customary international law appears to consider the crime of aggression as an international crime.⁴¹⁰ The crime of aggression has always been defined as planning, organising, preparing, or participating in the first use of armed force by a state against the territorial and political independence of another state, in contravention of the UN Charter, and provided that the acts of the crime of aggression have large scale and serious consequences.⁴¹¹

Unlike the crime of aggression, genocide, crimes against humanity and war crimes are defined in the Rome Statute. These definitions draw heavily on definitions of these crimes as established in prior specific conventions, other international agreements and *ad hoc* tribunals.⁴¹²

The first major outstanding issue at the fifth PrepCom session was whether or not to adopt a broad definition or a list of specific acts on Resolution 3314 (1974) of the UN General Assembly, which defines the crime of aggression.⁴¹³ Some support seemed to be emerging for the creation of a comprehensive definition with illustrative examples.⁴¹⁴ This debate led to a decision on what procedure would enable the ICC to exercise jurisdiction.⁴¹⁵ According to Christopher Hall, permanent members in the UNSC argued that the UNSC must be allowed to determine where aggression occurred.⁴¹⁶ Like-Minded states suggested that the International Court of Justice, the UN General Assembly, or

⁴¹⁰ Note 72 above.

⁴¹¹ *Ibid.*

⁴¹² Note 315 above, at 361.

⁴¹³ Hall, C.K. 2000. "The First Five Sessions of the UN Preparatory Commission for the International Criminal Court", *American Journal of International Law*, 94: p788.

⁴¹⁴ *Ibid.*

⁴¹⁵ Nanda, V. 1998. "The Establishment of a Permanent International Criminal Court: Challenges Ahead", *Human Rights Quarterly*, 20: p419.

⁴¹⁶ Note 413 above.

another organ could start proceedings in cases of suspected aggression.⁴¹⁷ States were divided on whether co-operation between the ICC, the International Court of Justice or the UN General Assembly was necessary, though general agreement would be required in order to decide that aggression had occurred.⁴¹⁸

The US and some other states were concerned that the inclusion of aggression as a crime was highly political, and might result in politically motivated charges being brought by rival states.⁴¹⁹ These states also strongly resisted the inclusion of nuclear weapons and land mines in the list of prohibited weapons in terms of the definition of the crime of aggression, on the grounds that the threat of using such weapons was not actually prohibited under existing international law.⁴²⁰

According to the UN General Assembly, aggression as an international crime must occur under the following conditions:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by 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;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets 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 or any extension of their presence in such territory beyond the termination of the agreement;

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

⁴¹⁹ Note 415 above, at 419.

⁴²⁰ Krisch, P. and Holmes, J.T. 1999. "The Rome Conference on an International Criminal Court: The Negotiating Process", *American Journal of International Law*, 93(1): p7.

- (f) The action of a State in allowing 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 against a third State;
- (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 of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁴²¹

It is submitted that in order to analyse the definition of the crime of aggression in the future, the specific acts enumerated in the 1974 definition as constituting this crime should be retained as the basis for defining it under the Rome Statute. The 1974 definition gives the UNSC the power to decide whether the crime of aggression has occurred in each case and recommends that it should, where possible, use this definition as guidance when determining, in accordance with the UN Charter, the existence of an act of aggression.⁴²² The particular acts listed in the definition can inform the UNSC and still serve as an official definition of what constitutes the initiation and/or waging of an aggressive war.⁴²³ It is submitted that the ends of international justice will be better served if the 1974 definition of the crime of aggression is used by the judicial chamber of the ICC to determine the existence of an act of aggression and no reference is made to the UNSC.

Leila Sadat and Richard Carden argue that the debate on how to allocate jurisdiction over the crime of aggression is complicated by the fact that Article 39 of the UN Charter declares that the determining of situations of aggression is a prerogative of the UNSC.⁴²⁴ If the UNSC is the arbiter of situations of aggression, it means that the ICC can only prosecute aggression once the UNSC has declared a particular act or acts as constituting aggression.⁴²⁵ Such a view seems contrary to the independence of the ICC, and could mean that permanent members of the UNSC are unlikely to face prosecution

⁴²¹ UN Doc. A/RES/ 3314 (XXIX) (1974).

⁴²² Note 4 above, at 444.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Note 4 above, at 445.

for the crime of aggression, since each permanent member has the power of veto.⁴²⁶ The ICC needs to have the power to undertake prosecutions in cases of aggression without such cases being referred by the UNSC.⁴²⁷

The Rome Statute does not state explicitly that an affirmative determination by the UNSC is required prior to a complaint of aggression being brought before the ICC.⁴²⁸ Sadat and Carden suggest that the ICC should not leave the determination of such a central factual issue to a political body like the UNSC.⁴²⁹ In the words of former Nuremberg war crimes prosecutor, Benjamin B. Ferencz, the international community must ultimately decide “whether it prefers the law of force or the force of law”⁴³⁰ and to this, it is submitted that determining where the acts of the crime of aggression occur is a non-procedural matter, and it is not appropriate that a judicial issue be decided by a political body such as the UNSC.

Before it exercises its jurisdiction, the ICC should define and set conditions under which its jurisdiction can be exercised so as to take into consideration the UN Charter.⁴³¹ Article 2, paragraph 4 of the UN Charter provides that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”. This Article should be read together with Article 51 of the UN Charter, which grants an inherent right of individual or collective self-defence if an armed attack occurs against a member of the UN.⁴³² This Article is unclear as to what constitutes aggression and this has led to long-standing disagreement among states and international scholars on the criteria for determining acts that constitute aggression.⁴³³ It remains, therefore, for the UN to convene an international conference to

⁴²⁶ *Ibid.*

⁴²⁷ Note 145 above, at 27.

⁴²⁸ Note 4 above, at 449.

⁴²⁹ *Ibid.*

⁴³⁰ Note 4 above, at 444.

⁴³¹ Note 384 above, at 219.

⁴³² *Ibid.*

⁴³³ *Ibid.*

define what constitutes an aggressive act sufficiently serious to come within the terms of the UN Charter.⁴³⁴

The journey toward a generally accepted definition of aggression has been long and difficult.⁴³⁵ It is submitted that a list of definitions, such as those in Resolution 3314, tends to be clearer and less controversial than an illustrative list of examples of aggression, and would therefore be more acceptable for inclusion in the Rome Statute at the Review Conference.

Participating states at the Review Conference will need to apply a three-part test in assessing aggressive acts: the first part defines an aggressor; the second decides who initially committed the act of violence, and the third determines subjectively the existence or non-existence of aggressive intent.⁴³⁶

It is submitted that the next step would be to scrutinise and possibly amend the 1974 definition of aggression. According to Sadat and Carden, the ICC understanding of the crime of aggression required the use of a list of definitions, combined with a more general preamble.⁴³⁷ This list would address many of the concerns about ICC powers and avoid claims that individuals have no knowledge of whether given acts are criminal.⁴³⁸ It is submitted that, if this list could be agreed upon, it would reconcile earlier objections, either by incorporating or refuting the arguments which they advanced.

Indeed, the best way to create a statutory crime is to list the specific actions that constitute the perpetration of the crime.⁴³⁹ However, an illustrative list of examples of aggression may lead to an individual's simply choosing to commit acts not mentioned in the list in order to escape liability.⁴⁴⁰ On the other hand, a list of the definitions may

⁴³⁴ *Ibid.*

⁴³⁵ Note 4 above, at 438.

⁴³⁶ Note 4 above, at 440.

⁴³⁷ Note 4 above, at 442.

⁴³⁸ *Ibid.*

⁴³⁹ Note 4 above, at 444.

⁴⁴⁰ Note 4 above, at 442.

follow existing international law more closely, while at the same time allowing for the development of this law.⁴⁴¹

3.2.2 International Crimes outside the Jurisdiction of the International Criminal Court

During the deliberations for the establishment of the ICC at the Rome Conference in 1998, some delegates suggested including other international crimes under the jurisdiction of the ICC.⁴⁴² Algeria, India, Sri Lanka and Turkey attempted to include the act of terrorism in the Rome Statute.⁴⁴³ However, the wording of Article 5 of the Rome Statute excludes acts of terrorism and other international crimes such as drug trafficking from the jurisdiction of the ICC.⁴⁴⁴ The content of Article 5 of the Rome Statute draws attention to the limitation of the jurisdiction of the ICC with regard to the international crimes stated above.⁴⁴⁵

3.2.3 The Crime of Terrorism

Up to the present time, there is no satisfactory definition of terrorism. It is submitted that the crime of terrorism should be distinguished from the crime of aggression. As indicated above, aggression occurs as an international crime when states commit such acts against another state. It is further submitted that terrorism may be undertaken mainly by organised group or individuals outside the framework of states. Terrorism may manifest itself as murder, extermination, torture, rape and persecution, all of which are mentioned in the Rome Statute.⁴⁴⁶ Acts of terrorism may amount to crimes against humanity when they meet the special requirements of these crimes, i.e., when they are part of a widespread or systematic attack on civilians; and when perpetrators are aware or cognisant of the fact that their criminal acts are part of a general or systematic pattern of

⁴⁴¹ Ibid.

⁴⁴² Note 97 above.

⁴⁴³ UN Doc. A /CONF. 1831/L71 (1998).

⁴⁴⁴ Note 72 above.

⁴⁴⁵ Article 5, note 15 above.

⁴⁴⁶ Note 72 above.

conduct.⁴⁴⁷ Terrorism may constitute genocide if perpetrators target a specific national, ethnical, racial or religious group.⁴⁴⁸ There is much debate as to whether terrorism should be defined as a war crime and whether terrorist acts can be interpreted as war crimes.⁴⁴⁹ As long as there is no specific definition of the crime of terrorism, and the ICC has no official jurisdiction over terrorism, the ICC cannot prosecute alleged terrorists.⁴⁵⁰

The exclusion of this crime from the jurisdiction of the ICC allows certain terrorists to escape justice even though their acts constitute serious international crimes.⁴⁵¹ It is submitted that non-judicial measures may be used to deal with persons accused of terrorism, and these measures might be in contravention of human rights. To leave the crime of terrorism outside the jurisdiction of the ICC might deprive those accused of terrorism of their rights, or bring them into a situation where human rights standards are not applied. It is further submitted that there are many cases where strongly partisan feelings within a state make it difficult for a person accused of terrorism to receive a fair trial nationally.

The ICC is an international institution that is able to deal jointly with the prosecution and deterrence of international acts of terrorism.⁴⁵² The international community could send a clear message that terrorist acts are internationally condemned and will incur prosecution on the international level by the ICC.⁴⁵³

According to Mira Banchik, the future definition of terrorism should include the financing of terrorist acts.⁴⁵⁴ Banchik points out that without adequate finance, terrorist attacks could not be carried out. However, it is submitted that despite the absence of a satisfactory or comprehensive definition, there is general agreement that terrorism

⁴⁴⁷ Ibid.

⁴⁴⁸ See chapter 3.1.

⁴⁴⁹ Banchik, M. [n.d.] 1999. "The International Criminal Court and Terrorism": p14. Available at www.peacestudiesjournal.org.uk (accessed on 20 May 2004).

⁴⁵⁰ Note 449 above, at 9.

⁴⁵¹ Note 449 above, at 3.

⁴⁵² Note 415 above, at 419.

⁴⁵³ Note 449 above, at 18.

⁴⁵⁴ Ibid.

consists of unprovoked attack on civilians, and that there is a strong link between all such acts. For examples, kidnapping of hostages, attacks on large buildings and random shootings have as their common elements violence against innocent individuals and may come within the category of terrorism.

It is submitted that a proper definition of what constitutes an act of terrorism should be made so that the ICC as a judicial system decides who is a terrorist. Terrorism should be a separate category and, as such, deserves separate contemplation and prosecution.⁴⁵⁵ This would mean that the ICC would not have to charge alleged terrorists with already existing crimes like crimes against humanity or war crimes.

3.3 The Human Rights of the Accused and the Victims

“We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well”.⁴⁵⁶ These are the words of Robert Jackson, the chief prosecutor at the Nuremberg Tribunals. It is submitted that this reflects on the necessity for ICC officials to show awareness of human rights.

The human rights obligations imposed by the Rome Statute extend to all laws applied and interpreted by the ICC.⁴⁵⁷ These include the operations of the ICC, the prosecutor, the judges, the ASP and acts of states parties, organisations, individuals and others who co-operate with the ICC.⁴⁵⁸ These obligations are included in the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence and other principles and rules of international law referred to in Article 21 of the Rome Statute.⁴⁵⁹

⁴⁵⁵ Note 449 above, at 18.

⁴⁵⁶ Scharf, M.P. 1995. “A Critique of the Yugoslavia War Crimes Tribunal”. In Bassiouni, 1997: p259.

⁴⁵⁷ Edwards, G. 2001. “International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy”, *Yale Journal of International Law*, 26: p323.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

3.3.1 Rights and Guarantees Aimed at Ensuring Fair Trials

The Rome Statute defines the rights of the accused throughout the different stages. The rights of the individual provided for in Article 55 of the Statute during an investigation in the pre-trial stage include a number of important internationally recognised safeguards. Article 55 states:

1. In respect of an investigation under this Statute, a person:
 - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
 - (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
 - (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
 - (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Hall believes that the impact of Article 55 on the law and practice of states parties may well prove to be one of the more significant aspects of the Rome Statute.⁴⁶⁰ All these states will need to ensure that the rights of persons questioned by their authorities at the request of the prosecutor are assured.⁴⁶¹ This will probably influence national law and practices in other cases involving crimes of lesser magnitude.⁴⁶² States parties will also need to respect these rights in cases where they are conducting national investigations of persons suspected of crimes within the jurisdiction of the ICC if they wish to avoid the ICC exercising its concurrent jurisdiction under the principle of complementarity.⁴⁶³

Despite the fact that Article 55, paragraph 2 (a) grants the accused the right to be informed that he or she is a suspect prior to being questioned, the Rome Statute does not state that the accused person must be informed prior to the initiation of the investigation.⁴⁶⁴ A further right of accused persons is granted to them under Article 60, paragraph 2 of the Rome Statute which states that the accused has the right to apply for bail.⁴⁶⁵

Article 56, paragraph 1 (b) of the Rome Statute entitles the Pre-Trial Division, upon request of the prosecutor, to take the necessary measures to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence. This Article attempts to balance the situations of the accused persons and the prosecutor at the pre-trial stage by providing some degree of equality of rights during this phase of the procedure, rather than obliging the defence to rely solely on his or her right of cross-examination at trial.⁴⁶⁶

⁴⁶⁰ Hall, C.K. 1999. "Article 55: Rights of Persons during an Investigation". In Triffterer, 1999: p728.

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ Note 460 above.

⁴⁶⁵ Note 39 above, at 54.

⁴⁶⁶ Note 376 above, at 749.

3.3.1.1 The Presumption of Innocence

The presumption of innocence should apply from the investigation stage and continue until the conviction or acquittal of the accused.⁴⁶⁷ The Rome Statute proscribes the person from the presumption of innocence after guilt is proven.⁴⁶⁸ Therefore, the prosecutor carries the burden of proof and the accused is convicted when the judges find that his or her guilt is proved beyond reasonable doubt.⁴⁶⁹

The presumption of innocence applies in the Pre-Trial Division even when a *prima facie* case has not been confirmed.⁴⁷⁰ It follows, among other things, that the investigating authorities must also investigate all circumstances which appear to favour the suspect in order to exclude any reasonable doubt.⁴⁷¹

If the accused refuses to plead, the Trial Division enters a ‘not guilty’ plea.⁴⁷² Furthermore, the accused may elect to remain silent and not to speak in his or her defence.⁴⁷³ As has been noted, the presumption of innocence aims to protect the right of the accused to refuse to answer questions, because he or she is presumed innocent and hence has no obligation to contribute to the proceedings.⁴⁷⁴ It would seem that another consequence is that the accused is under no obligation to give evidence before the ICC and, in addition, no adverse inference may be drawn from his or her decision not to testify on his or her own behalf.⁴⁷⁵ It is submitted that these safeguards for accused persons are adequate.

3.3.1.2 The Rights of the Defence

On 3 February 2003, at its sixth meeting, the ASP was informed that its President, in consultation with his bureau, had appointed a legal expert to act as a focal point for the

⁴⁶⁷ Article 66, note 15 above.

⁴⁶⁸ Schabas, W.A. 1999. “Article 66: Presumption of Innocence”. In Triffterer, 1999: p838.

⁴⁶⁹ Note 468 above, at 842.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

⁴⁷² Article 55(2), note 15 above.

⁴⁷³ *Ibid.*

⁴⁷⁴ Note 72 above.

⁴⁷⁵ *Ibid.*

establishment of an international criminal bar, in order to assist the ASP in future discussions on the matter.⁴⁷⁶ On 22 April 2003, the ASP decided to include an item in the agenda for the second session concerning the establishment of an international criminal bar.⁴⁷⁷ According to Hans Bevers and Chantal Joubert, the ICC encourages a strong defence system that pledges a warning against arbitrary proceedings; the ‘defences’ pillar is the main pillar of the ICC.⁴⁷⁸

It is submitted that the need for such a group of lawyers, sufficiently conversant with the area of jurisdiction and codes of the ICC, arose partly because the accused must be questioned in presence of counsel. Claus Krieb argues that if the defence counsel is required to testify as a witness, it becomes difficult to reconcile Rule 140, paragraph 3 of the Rules of Procedure and Evidence, which provides that “a witness who has not yet testified shall not be present when the testimony of another witness is given”, with the requirement that the accused be continuously assisted by defence counsel.⁴⁷⁹

It is submitted that the problem is that the possibility seems to exist that the defence counsel may also be required to testify as a witness. In adversarial systems the accused is generally allowed to testify as a witness in his or her defence and/or in the defence of a co-accused.⁴⁸⁰ This raises questions under the existing ICC code, however, where the accused is not competent as a prosecution witness even against a co-accused.⁴⁸¹

According to Jacob Cogan, possible reluctance of states parties to co-operate with the ICC might limit the ability of the accused to gain access to materials which might be

⁴⁷⁶ See generally United Nations. 2003. *Assembly of States Parties to the Rome Statute of the International Criminal Court: first session (first and second resumptions)*.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ Bevers, H. and Joubert, C. 2000. *An Independent Defence before the International Criminal Court: Proceedings of the Conference held in The Hague, 1-2 November 1999*: p16.

⁴⁷⁹ Krieb, C. 2001. “Witnesses in Proceedings before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure”. In Fischer, Kress and Luder, 2001: p322.

⁴⁸⁰ Note 479 above, at 321.

⁴⁸¹ It meant by the ICC existence code; the existence of Rule 140(3) of the Rules of Procedure and Evidence which is still applicable in November 2004.

necessary for his or her defence.⁴⁸² He believes that these limitations do not weigh equally on the prosecution since no case could have been brought against the accused if there was insufficient evidence against him or her. Equally, without the co-operation of the relevant state witness, testimony may be unavailable.⁴⁸³ On the other hand, it is submitted that the prosecutor, who serves in all the cases before the ICC and is well-known to the international community, has far greater prestige than the defence counsel, who serves in a single case, and this is also potentially problematic.

The defence counsel is also disadvantaged in the case of state manipulation of defence witnesses.⁴⁸⁴ In these situations, the ICC will probably avoid issuing an order that presents a high risk of non-compliance, so that it can retain the appearance of authority.⁴⁸⁵ The ICC is therefore open to the criticism that the defendant's defence counsel is at a disadvantage regarding the prosecution.⁴⁸⁶ Indeed, these apparent imbalances may create difficulties, which are a matter for the judges to decide on a case-by-case basis.⁴⁸⁷ These sorts of determinations are made all the time in national courts.

The defence is entitled to seek orders that are requests for assistance. Even when these orders originate from the defence, they would emanate from the Pre-Trial Division, which is an organ of the ICC, and so the requisite states would be required to give them the same treatment accorded to other requests for co-operation with the ICC.⁴⁸⁸

The ICC and not, as in most legal systems, the accused or his or her representatives, chooses the defence counsel and tries to select lawyers from different geographical areas.⁴⁸⁹ The Registrar plays a major role in ensuring a geographical distribution of counsel and states when selecting the counsel.⁴⁹⁰ This is similar to the

⁴⁸² Cogan, J.K. 2002. "International Criminal Courts and Fair Trials: Difficulties and Prospects", *Yale Journal of International Law*, 27 (Winter): p128.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Note 482 above, at 132.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ Note 482 above, at 133.

⁴⁸⁸ Note 376 above, at 749.

⁴⁸⁹ Articles 55(2)c, and 67(1)d, note 15 above.

⁴⁹⁰ Rule 21, note 25 above.

procedure at the Nuremberg Tribunals when the accused were not entitled to name their own counsel pursuant to the Treaty of Versailles.⁴⁹¹ It is submitted that giving the accused the right to choose his or her counsel would be an improvement of human rights standards in international criminal procedures.

3.3.1.3 The Norm of a Public Hearing

Article 64, paragraph 7 and Article 67 of the Rome Statute list the norms of a public hearing. Exceptions may occur when there is a need to protect the victims, the witnesses, or the accused.⁴⁹² Article 68, paragraph 2 of the Rome Statute provides another exception – to protect confidential or sensitive information. Where this is the case, it may be decided that parts of the proceedings be conducted in camera or the presentation of evidence by electronic or other special means be allowed, especially in the case of sexual crimes or when a victim or witness is a child. The hearing must be conducted fairly, which means that all persons must be treated with equal civility.⁴⁹³

3.3.2 The Rights of the Accused and the Relationship to the Principles of International Criminal Law

Antonio Cassese believes that the stipulations of the Rome Statute in terms of the procedural guarantees are simply a blend of the common law judicial systems in the US and UK and civil law judicial systems such as those of France and Germany.⁴⁹⁴ The Statute grants the accused the rights which exist in international criminal law.⁴⁹⁵

3.3.2.1 *Ne Bis in Idem*

The Rome Statute provides that a person cannot be tried in two different courts for the same offence, for instance, the accused cannot be tried at the ICC and then in a national

⁴⁹¹ Article 228, note 54 above.

⁴⁹² Article 67, note 15 above.

⁴⁹³ Cattin, D. 1999. "Article 67: Rights of the Accused". In Triffterer, 1999: p851.

⁴⁹⁴ Cassese, A. 1999. "The Rome Statute of the International Criminal Court: Some Preliminary Reflections", *European Journal of International Law*, 10(1): p169.

⁴⁹⁵ *Ibid.*

court.⁴⁹⁶ After the Nuremburg Tribunals, national courts retried those who were acquitted by the Tribunals.⁴⁹⁷ They were charged a second time and in some cases convicted.⁴⁹⁸

In addition to this principle, the resources and court facilities of the judicial system must be conserved.⁴⁹⁹ Article 20 of the Rome Statute prohibits a second trial for anyone who has been convicted or acquitted in respect of the same conduct. In the pre-trial proceedings, where no final decision, such as that to amend or withdraw charges, is arrived at, then the *ne bis in idem* does not apply.⁵⁰⁰ This Article excludes some conditions from the principle of prohibition on double jeopardy when national courts decide to prosecute the accused in order to shield him or her from the ICC prosecution.

3.3.2.2 *Nullum Crimen Sine Lege*

Under Article 22 of the Rome Statute, the ICC will try persons for their conduct, if the conduct that gives rise to crimes is defined in the Rome Statute. The definition of crimes outside the Statute does not criminalise conduct, regardless of the national law of any state party.⁵⁰¹ According to Article 121, paragraph 4 of the Rome Statute, new crimes are brought under the jurisdiction of the ICC by the ASP.

3.3.2.3 *Nulla Poena Sine Lege*

The sentencing provision of Article 77 of the Statute specifies the term of imprisonment in addition to the possibility of fines or confiscation of property.⁵⁰² The ICC has no authority to impose punishment that is not set out in the Statute.⁵⁰³

⁴⁹⁶ Article 20, note 15 above.

⁴⁹⁷ Wyngaert, C.V. and Ongena, T. 2002. "Ne bis in Idem Principle, Including the Issue of Amnesty". In Cassese, A.; Gaeta, P. and Jones, J. (eds). *The Rome Statute of the International Criminal Court: a Commentary*: p718.

⁴⁹⁸ Ibid.

⁴⁹⁹ Tallgren, I. 1999. "Article 21: Applicable Law". In Triffterer, 1999: p421.

⁵⁰⁰ Ibid.

⁵⁰¹ Broomhall, B. 1999. "Article 22: Nullum Crimen Sine Lege". In Triffterer, 1999: p452.

⁵⁰² Schabas, W.A. 1999. "Article 23: Nulla Poena Sine Lege". In Triffterer, 1999: p466.

⁵⁰³ Ibid.

3.3.3 The Search and Seizure Right to Privacy

An accused cannot be forced by the ICC to divulge the size or extent of his or her property, nor can any state be forced to disclose this on behalf of the accused.⁵⁰⁴ If accused persons are exempt from search and seizure of their property, the human rights, even of those suspected of having committed serious crimes, will be protected.⁵⁰⁵ George Edwards believes that though the ICC will probably find this exemption implicit within the Rome Statute and the Rules of Procedure and Evidence, the scope of coverage is uncertain.⁵⁰⁶ It is likely that the ICC will take into account various factors, and may make a distinction between the rights of an accused (presumed innocent) individual, and those of a convicted person.⁵⁰⁷ At present, all law applied is interpreted by the ICC and must be consistent with the search and seizure right to privacy.⁵⁰⁸

The mere existence of the search and the seizure right to privacy is insufficient to ensure realisation.⁵⁰⁹ The ICC must enforce the right, as it is required to enforce all internationally recognised human rights.⁵¹⁰ Furthermore, the ICC is obligated to consider Article 69, paragraph 7 of the Rome Statute, which underlines that evidence shall not be obtained by means which violate the Rome Statute or internationally recognised human rights.⁵¹¹

3.3.4 Protection from Sexual Crimes in the Rome Statute

The enumeration of rape and other gender-based offences as grave breaches of the four Geneva Conventions and as crimes against humanity signifies a formidable development in international law.⁵¹² It aims to deter people from these crimes in future and suggests a

⁵⁰⁴ Note 457 above, at 411.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Note 457 above, at 412.

⁵⁰⁹ Note 457 above, at 375.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² Note 371 above, at 177.

profound shift in attitude within the international community towards crimes of particular gender concern.⁵¹³

As has been shown in part one of this chapter, these crimes include acts of sexual mutilation and sexual exploitation. Listing sexual crimes separately rather than under the other categories of crimes against humanity means the harm implicit in these serious violations is explicitly recognised.⁵¹⁴ This category of crimes is also underlined in the Elements of Crimes, which stipulates that any particular conduct constituting one of the sexual crimes could still constitute one or more of the other crimes, if their conditions were fulfilled.⁵¹⁵

Sexual violence can also occur when the victim is imprisoned in an oppressive environment in which he or she has no choice but to succumb to unwanted advances.⁵¹⁶ Subjugation by fear, psychological oppression, imprisonment or detention, excessively hard labour, generalised terror, abuse of power, duress, or deprivation of psychological or physical support and comfort can also be used to coerce a victim to engage in sexual conduct.⁵¹⁷

One of the PrepCom tasks is to avoid retrograde decision-making and fulfil the mandate of the Vienna Declaration and Program of Action⁵¹⁸ by integrating gender sensitive attitudes throughout the Rome Statute.⁵¹⁹ The idea is to protect women from all forms of violence and traditional practices involving intolerance and extremism,

⁵¹³ See generally Erb, N. 1998. "Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court", *Columbia Human Rights Law Review*, 29 (Spring).

⁵¹⁴ Note 257 above, at 80.

⁵¹⁵ *Ibid.*

⁵¹⁶ Note 387 above, at 394.

⁵¹⁷ *Ibid.*

⁵¹⁸ Vienna Declaration and Program of Action (1993), UN Doc. A/CONF.157/24 (1993). Available at www1.umn.edu/humanrts/instreet/11viadec.html (accessed on 3 September 2004).

⁵¹⁹ Note 512 above.

particularly religious extremism, which affect their rights and freedoms.⁵²⁰ The protection of children against abuse is also a priority.⁵²¹

Due to the particular circumstances in which crimes of sexual violence generally occur (and such crimes come under the jurisdiction of the ICC when they also constitute genocide, crimes against humanity or war crimes), the relationship between elements of crime, defences and proof can become complex.⁵²² Issues of consent that may be pertinent in a case of sexual violence within the context of a national prosecution may not be equally valid in the context of genocide, crimes against humanity or war crimes.⁵²³

It is submitted that the human rights principles which lie behind the prosecution of crimes involving sexual and gender violence have important ramifications for national law reform in states parties. These principles open the door, for example, to the establishment of policies of gender equality.⁵²⁴ Ratification of the Rome Statute paves the way for recognition of gender inequalities in national criminal laws as well as in immigration policies, laws and regulations.⁵²⁵

The efforts of the international community have been geared towards ensuring that the ICC participates in the protection of women from sexual crimes such a rape.⁵²⁶ This is a challenge because resistance to furthering the agenda has become progressively more overt on the part of some delegations with particularly bad gender records.⁵²⁷

⁵²⁰ Sullivan, D. 1994. "Women's Human Rights and the 1993 World Conference on Human Rights", *The American Journal of International Law*, 88: p153.

⁵²¹ Note 513 above.

⁵²² Note 387 above, at 394.

⁵²³ Ibid.

⁵²⁴ Note 280 above, at 18.

⁵²⁵ Ibid.

⁵²⁶ Note 280 above, at 26.

⁵²⁷ Ibid.

3.3.5 The Protection of Children's Rights in the Rome Statute

The Rome Statute does not have a position on whether children below the age of eighteen should be held responsible for the commission of offences; rather it provides that the ICC will not assume jurisdiction for such cases.⁵²⁸ On the other hand, the Statute confirms that adult commanders of child soldiers can be prosecuted for offences committed by their forces.⁵²⁹

John Holmes believes that there are two main reasons why the Rome Statute has not granted jurisdiction over children under the age of eighteen to the ICC.⁵³⁰ First, it would have been difficult to develop a separate system of criminal juvenile justice for the ICC.⁵³¹ International human rights instruments set clear standards for states concerning juvenile justice and if the ICC were to assume jurisdiction it would have to establish a separate juvenile justice system, including a distinct penal institution.⁵³² Creating such a system would mean lengthy negotiations, assuming that states would accept its establishment.⁵³³

The second reason is that if child soldiers could be prosecuted under the Rome Statute, the ICC would victimise children twice.⁵³⁴ According to Holmes, the use of children in armed forces is already a violation of their rights and punishment for being conscripted or enlisting into the armed forces would be unjust.⁵³⁵ Similarly, in crimes under the jurisdiction of the ICC, it is submitted that if children are accused of involvement, it can be assumed that the influences upon them have been corrupting. The ICC should thus concern itself only with prosecuting leaders.

⁵²⁸ Holmes, J.T. 2000. "The Protection of the Children's Rights in the Statute of the International Criminal Court". In Nesi, G.; Politi, M. and Ashgate, A. (eds). *The Rome Statute of the International Criminal Court: a challenge to impunity*: p122.

⁵²⁹ Ibid.

⁵³⁰ Note 528 above, at 120.

⁵³¹ Ibid.

⁵³² Ibid.

⁵³³ Ibid.

⁵³⁴ Ibid.

⁵³⁵ Note 528 above, at 122.

Prohibitions on conscripting or enlisting children are included in two sections of the list of war crimes in Article 8 of the Rome Statute. It is included as a crime in international armed conflicts and also in the section related to non-international armed conflicts, which is essentially the same as for international armed conflicts, except that the former includes conscripting or enlisting children into armed groups as well as into armed forces.⁵³⁶ The Rome Statute does not cover a hypothetical situation where children voluntarily join such forces.⁵³⁷

This implies a prohibition on ‘conscripting’ or compulsorily enlisting children into military service. The Rome Statute uses the term ‘conscripting or enlisting’ rather than the four Geneva Conventions’ term ‘recruiting’; the term was changed in order to clarify that the crime is intended to cover active efforts by members of the armed forces to draw children into their ranks.⁵³⁸ Article 8, paragraph 2 (xxvi) of the Rome Statute prohibits the enlisting of children under the age of fifteen into national armed forces under any conditions. According to this Article, no defence is possible in a case concerning the conscripting or enlisting of children. The word ‘national’ was added to ‘armed forces’ after some Arab states tried to protect stone-throwing children who had not been subjected to any military training from prosecution.⁵³⁹

The provisions in Article 8 relating to the recruitment of children into armed forces closely resemble the Additional Protocols.⁵⁴⁰ Article 77 of Protocol I and Article 4 of Protocol II obligate states parties to refrain from recruiting children into their armed forces, but do not specify the age of the children. Therefore, the inclusion of conscripting or enlisting children under the age of fifteen into armed forces under war crimes in the Rome Statute represents a significant advance in international humanitarian law.⁵⁴¹

⁵³⁶ Note 528 above, at 119.

⁵³⁷ *Ibid.*

⁵³⁸ Note 528 above, at 120.

⁵³⁹ Note 311 above, at 261.

⁵⁴⁰ Note 528 above, at 120.

⁵⁴¹ *Ibid.*

The Rome Statute uses the term ‘participating actively’ in both national and international armed conflicts.⁵⁴² It can be argued that the language of the Rome Statute is broader and it therefore remains for the ICC itself to determine where active participation has occurred.⁵⁴³ This may be a departure from Additional Protocol II, which places no qualification other than the word ‘direct’ on the prohibition against participation in hostilities.⁵⁴⁴ According to Holmes, this change was made for two reasons: First, it was believed that it was necessary to retain some symmetry between the provision for international and internal armed conflicts.⁵⁴⁵ Second, the provisions in Protocol II are not defined as a grave breach of the Conventions whereas ‘active participation’ by children is defined as a war crime in the Rome Statute; thus, a clearer standard was necessary.⁵⁴⁶

The major obstacle in applying the relevant international rules to internal armed conflicts is the insurgent party’s status under international law; the restrictions on conflicts between two states do not necessarily apply here.⁵⁴⁷ However, the insurgent party can be held responsible for violating the rules of internal armed conflicts. Adriaan Bos believes that the ICC may consider Common Article 3 of the four Geneva Conventions as an additional indication of the applicability of fundamental human rights in internal armed conflicts.⁵⁴⁸ He suggests that violations of these rules by the parties, including the insurgents, in internal armed conflicts may be dealt with as crimes under international law. As regards the protection of human rights, there are of course other paragraphs in the Rome Statute that are clearly an improvement over earlier texts on the same subject.⁵⁴⁹

The other contentious issue involving the protection of children’s rights was the forced removal of children from their families. The question of whether the children must

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Note 528 above, at 121.

⁵⁴⁵ Note 528 above, at 120.

⁵⁴⁶ Note 528 above, at 119.

⁵⁴⁷ See generally Bos, A. 1998. “Dedicated to the Adoption of the Rome Statute of the International Criminal Court 1948-1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court”, *Fordham International Law Journal*, 22.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid.

have had a 'lawful residence' before being forcibly transferred was resolved after a majority of delegations at the Rome Conference indicated that the Rome Statute required only transfer from one to another group, not lawful residence.⁵⁵⁰ On the other hand, many delegations wanted to include all persons below the age of twenty-one in the scope of Article 6 (e), which criminalises the forcible transfer of children.⁵⁵¹ After some discussion, a clear majority of delegations emerged in support of the age limit of eighteen years, and consensus was founded on that basis.⁵⁵²

3.3.6 The Rights of Victims and Witnesses

The Rome Statute recognises that without the participation of victims, there can be no effective justice worth protecting.⁵⁵³ It explicitly recognises the right of survivors to participate in the judicial process, directly or through legal representatives at different stages.⁵⁵⁴

In terms of Article 68 of the Rome Statute, victims may participate in the activities of the ICC in a number of ways. First, they may participate in the procedure before the Pre-Trial Division when the prosecutor is requesting authorisation to proceed with an investigation on his or her own initiative.⁵⁵⁵ It is likely that victims will tend to support the prosecutor.⁵⁵⁶ Victims may also participate in the course of challenges to jurisdiction or admissibility, even in cases that have been initiated by states parties or by the UNSC.⁵⁵⁷

⁵⁵⁰ Note 257 above, at 70.

⁵⁵¹ Note 145 above.

⁵⁵² *Ibid.*

⁵⁵³ Note 280 above, at 19.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Article 54(3)b, note 15 above.

⁵⁵⁶ Note 145 above, at 147.

⁵⁵⁷ Article 19(3), note 15 above.

3.3.7 The Victims and Witnesses Unit

There is an increasing trend in criminal justice towards what is called ‘restorative justice’, a victim-oriented approach. This is addressed in Article 75 of the Rome Statute.⁵⁵⁸ To further emphasise this matter, Rule 16 of the Rules of Procedure and Evidence provides for the establishment of a Victims and Witnesses Unit. Pursuant to this approach the ICC established the Victims and Witnesses Unit to ensure that victims and witnesses enjoy their rights and are able to participate effectively in the procedure of the ICC.

Victims regularly appear as witnesses in criminal proceedings.⁵⁵⁹ They and their families may be vulnerable to intimidation or retaliation as a result of the trial.⁵⁶⁰ Moreover, victims may suffer more than other witnesses when testifying.⁵⁶¹ Reliving the traumatic experience during the investigation and prosecution of a case may lead to severe stress; the Rules of Procedure and Evidence contain provisions that seek to avoid secondary traumatisation.⁵⁶²

According to Article 43, paragraph 6 of the Rome Statute, the Victims and Witnesses Unit will provide protection, therapy and other appropriate assistance for witnesses and victims who are deemed to be at risk because of giving testimony. Furthermore, the Unit must include staff with expertise in trauma, including sexual trauma.⁵⁶³ The Rome Statute emphasises the gravity of gender violence by refusing to include such violence under the general heading of outrages upon personal dignity or humiliating treatment.⁵⁶⁴

According to Birte Timm, the group of victims to be notified is broad because *proprio motu* investigations will be typically triggered by information provided by

⁵⁵⁸ Note 145 above, at 147.

⁵⁵⁹ Timm, B. 2001. “The Legal Position of Victims in the Rules of Procedure and Evidence”. In Fischer, Kress and Luder, 2001: p294.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

⁵⁶² Rule 16(2), note 25 above.

⁵⁶³ Note 280 above, at 19.

⁵⁶⁴ See generally, Aafjes, A. 1998. *Gender Violence: the Hidden War Crime*.

victims.⁵⁶⁵ Timm states that notification must therefore be given to all victims that are known to the prosecutor or the Victims and Witnesses Unit. Moreover, the prosecutor may give notice by general means i.e through a public announcement. Timm believes that all notifications at this particularly sensitive stage of the proceedings are, however, subject to the integrity and effective conduct of the investigations and the security, and well-being of victims and witnesses. If these are endangered, no notification will be given by the prosecutor.⁵⁶⁶

According to Article 15, paragraph 3 of the Rome Statute, if victims come forward in response to the notification, they are required to submit written representations within a set time. In the case of the *proprio motu* investigation, the submissions will typically relate to the question of whether there is a reasonable basis to proceed with an investigation, and in the case of a doubt as to the jurisdiction of The ICC, whether the case is of sufficient gravity to justify further action by the ICC.⁵⁶⁷

According to Article 19, paragraph 3 victims may submit observations to the ICC when a ruling of the ICC is sought on a matter of admissibility and jurisdiction. As a general rule, Article 68, paragraph 3 mentions that where the personal interests of victims are affected, the ICC shall permit their views and concerns to be considered by the ICC and in a manner consistent with the rights of the accused and a fair and impartial trial.⁵⁶⁸

⁵⁶⁵ Note 559 above, at 296.

⁵⁶⁶ Ibid.

⁵⁶⁷ Note 559 above, at 295.

⁵⁶⁸ Ibid.

CHAPTER FOUR

The Roles and Functions of the International Criminal Court and its Interaction with National Courts

4.1 Introduction

Most countries throughout the world have similar interests in as far as their national laws are expected to enforce international standards and the rule of international law.⁵⁶⁹ Most of the participating states at the Rome Conference understood that it was in their interests that individual nations should remain accountable for prosecuting violations of international law.⁵⁷⁰

However, it was also necessary for the international community to prosecute certain types of offenders. Where the national courts are inadequate to the task and the crime is both serious and on a large scale or may negatively affect the fabric of a nation or nations, or may threaten the well-being of humanity, then the crime should be prosecuted by the ICC.⁵⁷¹ The forth preamble of the Rome Statute confirms that the perpetrators of serious international crimes (listed in chapter 3.1) must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. The benefits of the ICC processes will not only advance the objectives of the international community with respect to major human rights violations, but will also directly advance the related causes of international criminal law and administration of justice.⁵⁷²

⁵⁶⁹ Note 87 above, at 25.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid.

⁵⁷² Concannon, B. 2000. "Beyond Complementarity: The ICC and National Prosecution. A view from Haiti", *Colombia Human Rights Law Review*, 32: p227.

4.2 The Importance of the International Criminal Court

As stated above, the rationale for the creation of the ICC is to be found in the belief that crimes that are deeply shocking to humanity, threaten world peace, or at least affect people's well-being where they are vulnerable to atrocities, should be prosecuted.⁵⁷³ It is submitted that despite the reluctance of nations to surrender any part of national sovereignty, members of the international community realise that the ICC still needs to have an effective system for punishing criminals whose positions of power allow them to evade punishment nationally. Robert Mounts, Douglass Cassel and Jeffrey Bleich enumerate some of the reasons that justify the existence of the ICC below:

1. To vindicate the rights of victims;
2. To express outrage;
3. To act as a deterrent to crimes of a similar sort;
4. To protect victims and future victims from these criminals while they are imprisoned; and
5. To rehabilitate individuals who have lost all moral sense.⁵⁷⁴

Miskowiak concludes that the importance of establishing the ICC is clear when we look at the pitfalls countries face when they endeavour to prosecute leaders who have fallen from power.⁵⁷⁵ She points out that a country in the process of political transformation will tend to place great value on internal unity. According to her, there is a presumption that prosecuting these political leaders in the ICC would prevent fresh disturbances from surfacing in a conflict-ridden country. Thus it could, in some cases, be an advantage if the ICC, with the impartiality it could ideally be trusted to have, dealt with cases concerning leaders who might still be popular with some sectors of the population.⁵⁷⁶

⁵⁷³ Hafner et al. 1999. "A Response to the American View as Presented by Ruth Wedgwood", *European Journal of International Law*, 10: p116.

⁵⁷⁴ Mounts, R.T.; Cassel, D.W. and Bleich, J. 1995. "Panel II: War Crimes and Other Human Rights Abuse in the Former Yugoslavia", *Whittier Law Review*, 16: p425.

⁵⁷⁵ Note 39 above, at 43.

⁵⁷⁶ *Ibid.*

According to Robertson, individuals who occupy a position of current political or military power in any state are unlikely to be put on trial unless they invade another state and commit war crimes on its territory.⁵⁷⁷ He concludes that an established court is necessary, since a single *ad hoc* tribunal will accomplish little, especially if its fundamental purpose is to discourage people's belief in their immunity from prosecution or if it neglects the importance of national judicial systems.

The ICC will achieve greater success than any *ad hoc* process if the *raison d'être* for its existence resides in the criminal records of national courts around the world.⁵⁷⁸ According to Charney, one role of the ICC should be to serve as a mechanism of judicial processes, then as a monitoring and supporting institution for the prosecution of suspects under its jurisdiction in national courts where possible.⁵⁷⁹ He concludes that this last is perhaps the best outcome, because the purpose of establishing the ICC is to eliminate immunity for crimes of international concern.

Charney argues that success will be achieved when national legal systems cease to allow immunity to any category of criminal.⁵⁸⁰ He points out that the test of that success will not be large case dockets before the ICC, but persistent and comprehensive national criminal proceedings worldwide, facilitated by progress towards discouraging perpetrators of international crimes.

A category of offenders likely to be arraigned in the ICC, with their state's consent, consists of persons who commit international crimes in a cause that has utterly failed, and in a country which decides to refer a case to the ICC because it lacks the facilities or resources to try the matter itself.⁵⁸¹ In such cases justice will not only be served but will also appear to be served, which might make the result more readily

⁵⁷⁷ Note 179 above, at 350.

⁵⁷⁸ Note 4 above, at 384.

⁵⁷⁹ Charney, J.I. 2001. "International Criminal Law and the Role of Domestic Courts", *American Journal of International Law*, 95(1): p124.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Note 179 above, at 350.

acceptable.⁵⁸² On the other hand, the risk of a show trial or too mild a sentence would be higher in a national court, with all the attendant politicking that might still be present, and referring the case to the ICC might prevent this from happening.⁵⁸³

The ICC will be useful in high profile cases because its prestige as a court is great, it has large logistical capability, well-paid international staff and the capacity for complex litigation.⁵⁸⁴ However, these advantages also give rise to certain disadvantages and it may become too cumbersome and expensive for the ICC to pursue minor incidents, low-level soldiers and paramilitaries.⁵⁸⁵

4.3 The Importance of National Prosecutions

National prosecutions are as important as international prosecutions because *ad hoc* tribunals and the ICC can only prosecute a small fraction of the large-scale international crimes that occur.⁵⁸⁶ In fact, it is advisable that it should prosecute only high profile individuals who do not constitute the bulk of ‘hands-on’ perpetrators.⁵⁸⁷ National courts are also important from the perspective of the prosecuting country because victims generally prefer a good local prosecution to the best international one.⁵⁸⁸ It is submitted that national prosecutions offer a valuable opportunity for the local justice system to perform better and for the public to learn to trust it.

Tiffany Steele states that when national courts are able to try high-ranking defendants who have previously served as public officials, this restores confidence and legitimacy in the judicial system of the state, and in so doing, contributes to reconciliation

⁵⁸² Note 39 above, at 42.

⁵⁸³ Note 179 above, at 350.

⁵⁸⁴ Note 572 above, at 226.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Note 572 above, at 225.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ Note 572 above, at 227.

and good governance in a conflict-torn region.⁵⁸⁹ In other words, national trials prove to the international community and nationals that local judicial institutions are capable of rendering effective justice and are committed to the rule of law.⁵⁹⁰

According to Miskowiak, investigation and prosecution in a national court would also be less complicated, because it would be based on familiar procedure and rules.⁵⁹¹ She points out that documents, other physical evidence and witnesses are likely to be more easily available and language problems would also be minimised. A national trial could also be less traumatising for the accused, who may be innocent, although unfortunately, this is not always the case.⁵⁹²

Steele argues that victims prefer a local prosecution if their system can provide an acceptable fair trial, because they do not feel confident in the procedures of a trial to be held outside the country.⁵⁹³ He points out that in a local trial, the victims would better understand the proceedings and could exercise some advantage over government prosecutors and law enforcement agencies. These trials may therefore result in more positive outcomes for victims than international trials.⁵⁹⁴

It is submitted that national prosecutions are more effective than international prosecutions because of the abovementioned reasons, but they must be capable of, and interested in, ensuring a fair trial and the rights of the accused and victims.

⁵⁸⁹ Steele, T. 2002. "The Contribution of the Statute of the ICC to the Enforcement of International Law in the Light of the Experience of the ICTY", *South African Yearbook of International Law*, 27: p23.

⁵⁹⁰ *Ibid.*

⁵⁹¹ Note 39 above, at 42.

⁵⁹² *Ibid.*

⁵⁹³ Note 589 above, at 22.

⁵⁹⁴ *Ibid.*

4.4 The Principle of Complementarity

The provisions of Article 17 of the Rome Statute are as follows:

1. (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The provisions above deal mainly with the principle of complementarity. They state that the ICC will only initiate an investigation where a state is unwilling or genuinely unable to carry out the investigation or prosecution of the crime under its

jurisdiction. It is submitted that the ICC encourages states to prosecute international crimes and does not seek to replace the national judicial authority.

Unlike the ICTY and the ICTR, the Rome Statute has not provided for the ICC to exercise primary jurisdiction over the investigation and prosecution of international crimes within its jurisdiction.⁵⁹⁵ Consensus was reached at the Rome Conference that penal law and law enforcement by police are prerogatives of states.⁵⁹⁶ The jurisdiction of the ICC should be viewed as an exception to such a state prerogative.⁵⁹⁷ The use of complementary jurisdiction is related to the definition of the situation in such 'exceptions' to the state's prerogative would apply.⁵⁹⁸ However, only specific extenuating conditions will trigger complementarity jurisdiction.⁵⁹⁹

One of the 'exceptions' that would justify an ICC investigation is the unwillingness or inability of a government to undertake an investigation and prosecution on its own initiative.⁶⁰⁰ However, according to Article 17 of the Rome Statute, the ICC still has to determine unwillingness in particular cases, and can determine this only if certain conditions are fulfilled.

4.4.1 Determining whether a Case is Inadmissible

The first condition is that the ICC should determine if the case is in the process of being investigated or prosecuted by a state that has jurisdiction over the place where the said offences occurred.⁶⁰¹ According to Article 17, paragraph 1 of the Rome Statute, the ICC might accept the case as 'admissible' if the state was unwilling or genuinely unable to fulfil its judicial obligations. Sharon Williams believes that it appears that the issue of

⁵⁹⁵ Note 6 above.

⁵⁹⁶ Note 589 above, at 9.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Williams, S. 1999. "Article 17: Issues of Admissibility". In Triffterer, 1999: p390.

⁶⁰¹ Note 600 above, at 392.

inability, at least in principle, is acceptable, but unwillingness is more problematic because the ICC would be, in effect, passing judgment on a national judicial system.⁶⁰²

The second condition is that the presumption of ‘inadmissibility’ may be rebutted where the ICC determines that its decision to prosecute a crime has resulted from the unwillingness or inability to prosecute the crime nationally.⁶⁰³

The third condition is that the case will be deemed ‘inadmissible’ if it is not of sufficient gravity to justify further action by the ICC or if an intervention by ICC officials is likely to be ineffective.⁶⁰⁴

4.4.2 The Admissibility of a Case

The principle of complementarity has a concise definition that delineates the different functions and powers of national courts and the ICC.⁶⁰⁵ The ICC is not mandated to admit a case when the state in question fulfils the minimum standard requirements for the trial of persons a under the jurisdiction of the ICC.⁶⁰⁶ Under the principle of complementarity, priority is given to the national courts to investigate and prosecute the perpetrators of international crimes, even when they are within the jurisdiction of the ICC.⁶⁰⁷

According to Ved Nanda, the PrepCom discussions showed that states had different views regarding the criteria that the ICC should use in determining the admissibility of a case before basing it on the principle of complementarity.⁶⁰⁸ Some states preferred a more general criterion, such as lack of good faith or manifest unwillingness in a state to bring the persons accused to justice in the national courts. Other states suggested that these criteria could not be applied to states that are unable

⁶⁰² Ibid.

⁶⁰³ Note 600 above, at 393.

⁶⁰⁴ Ibid.

⁶⁰⁵ Mc Dowell, M. 2003. “International Criminal Court Bill”. Available at www.justice.ie/802569B20047F907/vWeb/pcRXHR5QCBUF (accessed on 20 May 2004).

⁶⁰⁶ Note 600 above, at 392.

⁶⁰⁷ Ibid.

⁶⁰⁸ Note 415 above, at 421.

conduct trials, because they could still investigate pertinent cases. They stated a preference for criteria that could be specifically enumerated and defined, such as unconscionable delay in the proceedings or lack of impartiality.⁶⁰⁹ This study investigates the lack of impartiality and inability of states because it is submitted that the prosecutor plays an important role in deciding whether states are impartial or able to prosecute cases.

4.4.2.1 Lack of Impartiality

It may happen that a state cannot provide a fair trial for an accused. However, during the PrepCom discussions it appeared that the proceedings could still be defective even though the state might have acted in good faith.⁶¹⁰

It might be difficult to prove a lack of impartiality on the part of the state because the prosecutor must prove that the state, contrary to its apparent actions, is in fact devious, and that this is inconsistent with the intent of bringing the persons concerned to justice.⁶¹¹ On the other hand, the advantages of an independent prosecutor, like the one who monitors the ICC investigations and prosecutions, far outweigh the disadvantages.⁶¹²

4.4.2.2 Inability of States

In terms of the principle of complementarity enshrined in Article 17 of the Rome Statute, the ICC may only act in specific circumstances, which are triggered by the inability of a state to investigate or prosecute a case. Thus, the jurisdiction of the ICC is exceptional.⁶¹³ If there is a lack of central government, as when a state finds itself in chaos due to a civil war or national disaster or if any other event that leads to public disorder occurs and the government is unable to initiate proceedings, then the ICC has primacy over the national court.⁶¹⁴

⁶⁰⁹ Ibid.

⁶¹⁰ Note 600 above, at 394.

⁶¹¹ Note 600 above, at 393.

⁶¹² See generally United Nations. 1998. *The U N Security Council and the International Criminal Court: How should they relate? Report of the 29th United Nations Issues Conference 1998, official record.*

⁶¹³ Note 589 above, at 9.

⁶¹⁴ Ibid.

4.4.3 The Possible Impact of the Principle of Complementarity on International Criminal Jurisdiction

Steele believes that the principle of complementarity is a powerful force in international criminal jurisdiction.⁶¹⁵ He argues that without a strong principle of complementarity in which the ICC determines admissibility and prosecutions, states would be left to their own devices to prosecute even the most serious international crimes. It is submitted that this would not facilitate the enforcement of individual criminal responsibility against the perpetrators of these crimes. When the threat of international prosecution induces states to institute national investigations and prosecutions against perpetrators of these crimes, the Rome Statute's mandate to put an end to immunity is realised.⁶¹⁶ When a threat of prosecution does not yield this result, the case becomes admissible before the ICC.⁶¹⁷

Jelena Pejic states that it must be stressed that the principle of complementarity is the most important reason why states agreed to discuss and eventually to establish the ICC.⁶¹⁸ According to Pejic, without complementarity, the very idea of the ICC would probably not have overcome the hurdle of the states' concerns with sovereignty. Therefore, the practical application of the principle of complementarity needs to be closely monitored, given its potential impact on the effectiveness of the ICC, its prestige and its reputation as a trustworthy institution worldwide.⁶¹⁹

The adoption of the principle of complementarity was imperative although the compromises entailed during the PrepCom discussion affected the selection of crimes regarded as admissible, as well as the determination of the level of gravity crimes must have to come under the jurisdiction of the ICC.⁶²⁰ Williams argues that the principle of complementarity would promote broad acceptance of the ICC by states and consequently

⁶¹⁵ Note 589 above, at 27.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

⁶¹⁸ Pejic, J. 1998, "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness", *Columbia Human Rights Law Review*, 29 (Spring): p310.

⁶¹⁹ *Ibid.*

⁶²⁰ Note 600 above, at 393.

enhance its credibility, authority and effectiveness.⁶²¹ He adds that it would avoid overloading the ICC with cases that could be better dealt with by national courts. He concludes that this lowers the financial burden of running the ICC.

Its inherent jurisdiction gives the ICC the authority to prosecute crimes within its jurisdiction without the consent of the particular state party concerned or the ASP.⁶²² According to Bartram Brown, this will allow the ICC to assert jurisdiction over cases involving international crimes without deferring to the jurisdiction of any interested state.⁶²³ He states that such an approach will promote universal and uniform individual criminal responsibility for these crimes. This is because the ICC, and not the different national courts with their different procedures and standards, will investigate crimes and try the accused.⁶²⁴

Bartram Brown argues that the concept of 'universal jurisdiction' would probably be unacceptable to many states and that it would, in any case, be outside the bounds of current international law.⁶²⁵ He believes that the ICC does not, in fact, have 'universal jurisdiction' to investigate or prosecute these crimes at will. If there were to be a complete 'universal jurisdiction', the ICC would be able to investigate any occurrence of a crime under the jurisdiction of the ICC anywhere in the world.⁶²⁶

The principle of 'universal jurisdiction' over crimes generally recognised as being of international concern affords jurisdiction to any state, regardless of the status of the offence or the nationalities of the offender and the offended.⁶²⁷ Offences criminalised under international criminal law and obligations that have become part of customary international law, including *crimen contra omnes*, can be prosecuted in any state on

⁶²¹ Ibid.

⁶²² Note 415 above, at 423.

⁶²³ Brown, B.S. 1998. "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals", *Yale Journal of International Law*, 23 (Summer): p409.

⁶²⁴ Ibid.

⁶²⁵ Ibid.

⁶²⁶ Note 39 above, at 19.

⁶²⁷ Note 264 above, at 108.

behalf of the international community.⁶²⁸ The international crimes defined as being under the jurisdiction of the ICC clearly qualify as violations *erga omnes* within the meaning of the doctrine of ‘universal jurisdiction’.⁶²⁹

4.5 The Interface between the International Criminal Court and National Courts

It is submitted that states parties always have a choice as to whether or not to prosecute nationally a person suspected of having committed crimes that fall under the jurisdiction of the ICC. If a state has jurisdiction over these crimes, then that state can choose to prosecute the suspected person under its own laws or refer the case to the ICC and assist the ICC by providing it with the necessary information and evidence.⁶³⁰

Charney argues that in most situations, states find it more desirable to resolve a matter domestically than to give up their responsibility to an international body.⁶³¹ He believes that, as a rule, states wish to manage issues themselves and voluntarily refer matters to the ICC only when a collapse of national judicial authority has occurred or when an ICC verdict might enable resolution of international disputes arising from domestic difficulties which the state is unable to resolve.⁶³²

When states agreed to grant the ICC inherent, but neither exclusive nor primary jurisdiction over crimes, they established concurrent national and international jurisdiction over the same crimes.⁶³³ The ICC could decline to exercise its inherent authority in cases in which deferral to national jurisdiction was, for some reason, a better option.⁶³⁴ The operational details of reconciling these two jurisdictions could be resolved later.⁶³⁵

⁶²⁸ Ibid.

⁶²⁹ Ibid.

⁶³⁰ Note 623 above, at 433.

⁶³¹ Note 579 above, at 122.

⁶³² Ibid.

⁶³³ Note 623 above, at 434.

⁶³⁴ Note 623 above, at 409.

⁶³⁵ Note 623 above, at 434.

Bartram Brown states that in some circumstances, a state may find that it is in its interests to allow a prosecution to be conducted by the ICC.⁶³⁶ He believes that in some cases a prosecution might be too dangerous to be handled domestically and therefore the state might prefer the trial to be conducted by an international tribunal. In other situations, the state may not be capable of properly prosecuting a complex international criminal matter.⁶³⁷

However, Jonathan Charney points out that in other circumstances, the state might wish to retain control over such prosecutions.⁶³⁸ He argues that for a state to allow its own nationals to be prosecuted for international crimes on its territory by the ICC would deprive the state of control and suggest that its national legal system is inadequate. Furthermore, the state may not wish to have the ICC find that its procedures in dealing with accused persons are inadequate.⁶³⁹

Pejic believes that the principle of complementarity strikes a balance between state sovereignty and the jurisdiction of the ICC.⁶⁴⁰ Article 17 of the Rome Statute indicates that inherent jurisdiction may be mistakenly viewed as an encroachment on state sovereignty. Miskowiak states that it is necessary to have a balance between the obligation of states to investigate and prosecute offenders and the right of the ICC to assume jurisdiction in special cases if justice is served.⁶⁴¹ The system of checks and balances ensures that the circumstances in which the ICC can exercise jurisdiction are well-defined.⁶⁴² It is submitted that no conceivable formulation of the relationship between international jurisdictions will be absolutely water-tight, and diverse interpretations are likely to be offered.

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ Note 579 above, at 122.

⁶³⁹ *Ibid.*

⁶⁴⁰ Note 618 above, at 291.

⁶⁴¹ Note 39 above, at 50.

⁶⁴² *Ibid.*

4.5.1 Primacy and Sovereignty

It is important to note that the Rome Statute does not take any jurisdiction away from the state on whose territory international crimes are committed.⁶⁴³ Thus, the primacy of its territorial jurisdiction is recognised.⁶⁴⁴ This implies that national jurisdiction is recognised as taking precedence over that of the ICC. However, according to Article 17 of the Rome Statute, the primacy of the jurisdiction of a state is subject to the single qualification, that the state be willing and able genuinely to carry out the investigations.

Bleich believes that the rationale for the primacy of the jurisdiction of a state lies not only in the practical considerations cited by the prosecutor in requests for deferral, but also in the following legal considerations.⁶⁴⁵ He states that the first consideration is that one purpose for establishing the ICC is to protect humanitarian interests in the context of a situation identified as a threat to international peace, security and the well-being of the world. He concludes that it therefore follows that extraordinary measures were justified to deal with such grievous situations. These measures might necessitate an investigation or prosecution before the ICC.⁶⁴⁶

The conditions on which national primacy depends are that minimum standards of justice and impartial adjudication shall be met in cases of great international concern.⁶⁴⁷ However, crimes that come under the jurisdiction of the ICC include all cases within the jurisdiction of the *ad hoc* tribunals because of their link to international criminal law, which is recognised by the UNSC.⁶⁴⁸ Looking at the history of ICTY and ICTR, the conclusion emerges that states may raise issues of sovereignty when they are reluctant to turn over an accused for trial before the ICC.⁶⁴⁹

⁶⁴³ Leigh, M. 2001. "The United States and the Statute of Rome", *American Journal of International Law*, 25(1): p125.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ Bleich, J.L. 1997. "The International Criminal Court: Report of the ILA Working Group on Complementarity", *Denver Journal of International Law and Policy*, 25: p399.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ Note 645 above, at 398.

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

When the Rome Statute was adopted, the support for granting a conditional primacy to states, which falls away only in cases where suspects are not prosecuted by national authorities, was much greater than that for unconditional primacy.⁶⁵⁰ Governments in times of peace and especially in times of armed conflicts, should be aware that they have a responsibility to bring to justice those accused of international crimes.⁶⁵¹

States are free to become parties to the Rome Statute and will be guided by their own determinations in making that decision, which does not imply that the ICC will have a better claim to exercise jurisdiction than national courts.⁶⁵² Whether they become parties to the Statute or not, all countries will retain their fundamental rights, including the right to try those accused of having committed crimes on their territory and to try their own nationals accused of committing crimes elsewhere. If a foreign national is accused of committing a crime on territories of non-ratifying states, either this country or the home country of the accused could legitimately try the case.⁶⁵³

According to Bleich, sovereignty considerations become less of an issue when one considers the system of international criminal law that is now in place.⁶⁵⁴ He believes that doubts about the scope of a state's primacy arose from the moment the ICTY Statute was adopted. He points out that a new system has been created, which need not be bound by existing consensual systems for inter-state co-operation and judicial assistance. Miskowiak suggests that the model of national sovereignty and reciprocity characteristic of extradition law need not dominate the relationship between states and the ICC.⁶⁵⁵ It is submitted that the old roles of national sovereignty which prevented the prosecution of international crimes in the past are in the process of development because the majority of states has accepted the jurisdiction of the ICC.

⁶⁵⁰ Note 39 above, at 42.

⁶⁵¹ *Ibid.*

⁶⁵² Note 618 above, at 310.

⁶⁵³ Brown, B.S. 1999. "U.S. Objections to the Statute of the International Criminal Court: A Brief Response", *New York University Journal of International Law and Politics*, 31: p869.

⁶⁵⁴ Note 645 above, at 399.

⁶⁵⁵ Note 39 above, at 71.

4.6 The International Criminal Court as a Deterrent to Serious International Crimes

The deterrent value of national prosecutions directed at individuals of varying levels of responsibility is often greater than the deterrent value of international prosecutions directed at a select few individuals, though they may be high profile.⁶⁵⁶ According to Steele, public knowledge and local media coverage are likely to be more intensive in the case of a national prosecution.⁶⁵⁷ He argues that if the same case was to be tried internationally, it would be likely to be less known nationally and, therefore, might have a weaker deterrent effect.

Therefore, national prosecutions stand a fair chance of demonstrating that immunity where a state refuses to prosecute a particular category of crime does not always succeed in intimidating national institutions or the rule of law.⁶⁵⁸ This has important collective implications for quashing local support for someone who has exercised popular authority and boosting the victims' sense of justice.⁶⁵⁹ National and international prosecutions may ultimately help to build reconciliation and peace between conflicting segments in society.⁶⁶⁰

The ICC may help to deter some of those who might otherwise commit crimes within its jurisdiction.⁶⁶¹ If so, this will reduce the need to send peace-keeping troops to countries throughout the world in the aftermath of such atrocities.⁶⁶² Before the establishment of the ICC when no tribunal existed, *ad hoc* tribunals were often deprived of key evidence; hence perpetrators of international crimes remained immune from prosecution.⁶⁶³ The continuation of the ICC could render *ad hoc* tribunals unnecessary.⁶⁶⁴

⁶⁵⁶ Note 589 above, at 22.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Note 645 above, at 399.

⁶⁵⁹ Note 39 above, at 71.

⁶⁶⁰ Note 589 above, at 22.

⁶⁶¹ Note 574 above, at 412.

⁶⁶² Note 653 above, at 891.

⁶⁶³ Note 574 above, at 412.

⁶⁶⁴ *Ibid.*

According to Robertson, in some cases neither *ad hoc* tribunals nor national courts prosecute people who have formerly perpetrated international crimes.⁶⁶⁵ He states that any former perpetrator of ‘core international crimes’ who retains a power base in his country will remain safe from prosecution, since in retirement he or she is unlikely to constitute a threat to international peace under Chapter VII of the UN Charter, and besides, the home state may lack the will to try them. It is nevertheless that Article 23 of the Rome Statute confirms the principle that a law may not be applied retroactively to crimes committed before it was enacted. On the other hand, according to Article 27 of the Rome Statute, the ICC has no status of limitations, meaning that former perpetrators of international crimes within the jurisdiction of the ICC will not be safe whatever their age.

Nonetheless, any deterrent effect the ICC may have not apply to individual citizens of non-ratifying states; hence, accused persons in such states need not fear prosecution by the ICC.⁶⁶⁶ Furthermore, perpetrators of the crime of aggression can enjoy immunity while the crime of aggression is still being defined by the ASP, in light of the fact that individuals might, or might not, be punished by the UNSC under Chapter VII of the UN Charter.⁶⁶⁷ It is submitted that the ICC acts as a deterrent to serious international crimes in two ways: directly, when its divisions investigate and prosecute these crimes and indirectly when the existence of the ICC motivates states to prosecute those accused of these crimes themselves.

Despite the fact that the ICC has not yet come up with a definition of the crime of aggression, it can prosecute the perpetrators of that crime if they commit other international crimes under the jurisdiction of the ICC. Individual state leaders who are guilty of waging aggressive war are also likely to be guilty of committing other crimes defined in the Rome Statute.⁶⁶⁸

⁶⁶⁵ Note 179 above, at 350.

⁶⁶⁶ Note 574 above.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

4.7 International Co-operation with the International Criminal Court

Before the Rome Conference, a disagreement arose in the PrepCom's working group concerning states' obligation to co-operate with the ICC.⁶⁶⁹ Some states felt that this obligation should be absolute while others felt that a degree of discretion should remain with the state.⁶⁷⁰ Despite the fact that the ICC depends on the international community to perform some of its tasks, the Rome Statute does not provide a definition of the principle of co-operation with national judicial systems. Miskowiak believes that a state should not be able to justify, internally or externally, its lack of co-operation by referring to the absence of clear provisions in the Rome Statute if the ICC requests compliance.⁶⁷¹ However, the general principle of national co-operation with the ICC appears sound and should be encouraged, with appropriate refinements.⁶⁷²

It is submitted that the motivation for setting up the ICC was and is moral and effective. It is up to states to provide the necessary aid to enable it to function effectively, including national co-operation and voluntary assistance.⁶⁷³ The ICC depends on either co-operation on a case-by-case basis or a more general acceptance of its jurisdiction and a national willingness to facilitate its investigations.⁶⁷⁴

4.7.1 The Need for International Co-operation

All international institutions depend to some degree on states' co-operation in order to effect their mandates.⁶⁷⁵ However, according to the fourth paragraph of the Preamble of the Rome Statute, the ICC depends on international co-operation to perform its primary functions.

⁶⁶⁹ Note 39 above, at 71.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

⁶⁷² Note 623 above, at 434.

⁶⁷³ Scharf, M.P. 1994. "Getting Serious about an International Criminal Court", *Pace International Law Review*, 6: p118.

⁶⁷⁴ Ibid.

⁶⁷⁵ Note 152 above, at 527.

According to Miskowiak, the ICC, like any criminal court, has the capability to request co-operation, implying that its requests must be taken seriously.⁶⁷⁶ She points out that national judicial systems rely on the coercive powers granted to them under local law in order to function effectively, while the willingness of states to co-operate with the ICC seems to be related to the political will of each state. It is submitted that if it were not so, the credibility of the ICC would be undermined and its deterrent effect would be minimised.

4.7.2 Co-operation with the Request for Information

Article 18, paragraph 5 of the Rome Statute authorises the prosecutor to request a state to report on the progress of investigations in the state. This Article is mainly concerned with rulings on jurisdiction and admissibility. States parties are obliged to provide the ICC with updated reports indicating the progress of their investigations and cannot unduly delay their submissions.⁶⁷⁷ Article 19, paragraph 11 of the Rome Statute provides similar authority for the prosecutor to request information from a non-ratifying state but in this case the state is not obliged to co-operate with the ICC.⁶⁷⁸ Therefore, such a request for information is not binding upon it.⁶⁷⁹

According to Steele, even though the prosecutor may periodically be able to request information from a state regarding its investigations, this information may not necessarily be sufficient to gauge the willingness or unwillingness of a state to investigate crimes.⁶⁸⁰ He concludes that this can happen when a state intentionally misleads the ICC in order to prevent it from ruling that a case is admissible. It may, in such cases, be possible for the prosecutor to show that a state is unwilling to investigate or prosecute, in accordance with the Rome Statute, at a time after a prosecution is actually launched.⁶⁸¹

⁶⁷⁶ Note 39 above, at 73.

⁶⁷⁷ Note 589 above, at 26.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.*

⁶⁸⁰ Note 589 above, at 15.

⁶⁸¹ *Ibid.*

However, this means that a *mala fide* state seeking to secure its nationals from prosecution by the ICC might use the time between the initiation of an investigation and the commencement of a prosecution to destroy evidence.⁶⁸²

Fairness is achieved when the prosecutor notifies states parties of his or her intention to initiate an investigation.⁶⁸³ Non-ratifying states that are affected by the decision are entitled to receive notification under Article 18, paragraph 1 that a situation has been referred to the ICC, or that the prosecutor, acting *proprio motu*, is conducting an investigation. This puts the relevant states on notice and allows them to challenge the jurisdiction or admissibility of a case before the ICC.⁶⁸⁴ Under this Article, paragraph 2 these states have the right to challenge the admissibility of a case at an early stage of the proceedings and at various intervals thereafter.

These policies are based on the need to prevent a situation in which the ICC and a national state are simultaneously conducting two investigations of the same case.⁶⁸⁵ The policies take into account the fact that it is sometimes necessary to take interim measures to secure evidence or to prevent a person from absconding while the ICC determines the admissibility of a case.⁶⁸⁶

According to Article 93 of the Rome Statute, states are required as far as possible to comply with requests for information which may serve as evidence and, more importantly, using national law as an excuse not to comply with these requests is discouraged. Article 72, paragraphs 2 and 5 of the Rome Statute provides that if a state believes that disclosure of information or documents that the accused may have would prejudice its national security interests, the state shall have the right to ask the ICC to obtain information or evidence from different sources. Citing national security interests as a ground for non-disclosure of information tends to be used too widely to be taken

⁶⁸² Ibid.

⁶⁸³ Note 589 above, at 23.

⁶⁸⁴ Ibid.

⁶⁸⁵ Note 589 above, at 26.

⁶⁸⁶ Ibid.

seriously; as such, interests could be fully protected through procedural provisions.⁶⁸⁷ It is submitted that the ICC may offer to refrain from disclosure of sensitive material or information and this may have a negative effective on the ICC's determination to put an end to immunity. It is further submitted that such offers should occur as rarely as possible.

4.7.3 States' Obligation to Co-operate with the International Criminal Court

The Rome Statute has drawn up different formulae in terms of which states are obliged to co-operate with the ICC.⁶⁸⁸ It affirms that serious crimes of concern to the international community as a whole must be punished and that states have an obligation to take steps at the national level to enhance international co-operation and ensure that the ICC remains effective.⁶⁸⁹

Miskowiak states that the general obligation of states to co-operate, as stated in Article 86 of the Rome Statute, was worded relatively strongly.⁶⁹⁰ She believes that the duty of states to co-operate fully will be the guiding principle in future cases that come before the ICC. This duty creates a strong presumption in favour of the competence of the ICC in relation to co-operation requests, which states must take seriously.⁶⁹¹

Article 93, paragraph 1 of the Rome Statute specifies where states are obliged to co-operate with the ICC as follows:

States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;

⁶⁸⁷ Note 39 above, at 72.

⁶⁸⁸ The Preamble(4), note 15 above.

⁶⁸⁹ Ibid.

⁶⁹⁰ Note 39 above, at 73.

⁶⁹¹ Ibid.

- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) The questioning of any person being investigated or prosecuted;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties; and
- (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

Hall states that states parties should refrain from acts that would defeat the object and purpose of the Rome Statute.⁶⁹² He states that they also have an obligation to carry out their responsibilities to the UN. The ICC ought to have equal authority with any *ad hoc* tribunal established by the UNSC before the Rome Statute was adopted.⁶⁹³ However, unlike the *ad hoc* tribunals, the ICC was not established directly by the UNSC, so at present, it appears that its influence may be less than theirs.⁶⁹⁴ It is submitted that the ICC may exercise power equal to that of the national courts although its power does not derive directly from a national electorate, but from the ratification of the Rome Statute by the state.

According to Steele, if the Pre-Trial Division determines that a state party is unable to co-operate with the ICC, it may authorise the prosecutor to investigate crimes

⁶⁹² Hall, C.K. 1998. "The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court", *American Journal of International Law*, 92: p553.

⁶⁹³ *Ibid.*

⁶⁹⁴ *Ibid.*

on the territory of that state party.⁶⁹⁵ It is submitted that the circumstances under which this authorisation might be given could, for example, be those of a country with no effective government.

According to Article 12, paragraphs 1 and 2 of the Rome Statute, the ICC may only exercise its jurisdiction either in territories of states parties or when the suspect is a citizen of a state party, or if his or her country has accepted the jurisdiction of the ICC in the particular case. Non-ratifying states may declare their agreement that the jurisdiction of the ICC may be exercised with respect to the crimes in question.⁶⁹⁶ Such declaration requires full co-operation from the state to which the request is put without delay.⁶⁹⁷

It is submitted that where the ICC requires co-operation from a non-ratifying state, it will put a formal request to that state. If that state refuses, the ICC may ask the UNSC to make the request on its behalf, which it is empowered to do under chapter VII of the UN Charter.⁶⁹⁸ Miskowiak points out that some state may assist the ICC without being under a legal obligation to co-operate in terms of the Rome Statute.⁶⁹⁹ In other cases, states may wish to co-operate with the ICC without being requested to do so, for example, when a state wishes to clear the name of a person suspected of international crimes.⁷⁰⁰ It should be noted that, in most cases, co-operation will not be voluntary and states, almost certainly, will seek to shield citizens from prosecution, or will try to retain them for prosecution by the national courts.⁷⁰¹

For the ICC to be able to carry out its functions, it is essential that the Rome Statute clearly declare that, whilst states may challenge the admissibility of particular cases, they must comply with the decisions of the ICC, even those not to their liking.⁷⁰²

⁶⁹⁵ Note 589 above, at 27.

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid.

⁶⁹⁸ Kreb, C. and Prost, K. 1999. "Article 87: Requests for Cooperation: General Provisions". In Triffterer, 1999: p1064.

⁶⁹⁹ Note 39 above, at 42.

⁷⁰⁰ Note 39 above, at 50.

⁷⁰¹ Note 39 above, at 51.

⁷⁰² Note 415 above, at 422.

No state is allowed to make a unilateral decision not to co-operate with the ICC in particular cases based on inadmissibility.⁷⁰³

4.7.4 Examples of Co-operation and Non-co-operation with the International Criminal Court

It is submitted that the ICC is a judicial institution that deserves proper support and co-operation from states parties and as much support as possible from non-ratifying states. It incorporates the essential guarantees of the international criminal justice system and recognises the importance of ensuring a fair trial to defendants and complainants alike.⁷⁰⁴ This dissertation examines the actions of various states regarding the implementation of the ICC.

4.7.4.1 South Africa

It is submitted that South Africa is a good example of state co-operation with the ICC. During PrepCom sessions South Africa was considered a valued member of the consortium of like-minded states.⁷⁰⁵ It was represented in the Ding Committee of the Rome Conference by Medard Rwelmira from the University of Western Cape, who was the head of the South African delegation at the Rome Conference and a co-ordinator of the working group on the Composition and Administration of the ICC.⁷⁰⁶

Appropriately, the South African delegation took the lead in having the crime of apartheid included in the definition of crimes against humanity.⁷⁰⁷ During the PrepCom discussions, South Africa submitted a report on the South African Truth and Reconciliation Commission, which appealed to the international community to recognise the processes of the Commission.⁷⁰⁸

⁷⁰³ Ibid.

⁷⁰⁴ Ibid.

⁷⁰⁵ Note 264 above, at 129.

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid.

⁷⁰⁸ Dugard, J. 2002. "Possible Conflicts of Jurisdiction with Truth Commissions". In Cassese, Geata and Jones, 2002: p699.

On 17 July 1998, South Africa signed the Rome Statute.⁷⁰⁹ On 27 November 2000, it ratified the Statute, becoming the twenty-third state party.⁷¹⁰ The South African parliament adopted legislation, which includes provisions on co-operation with the ICC and recognition of its ‘universal jurisdiction’.⁷¹¹ By adopting this legislation, which came into effect on 16 August 2002, South Africa has consolidated all ICC-related matters into a statute, thus avoiding disparate amendments and provisions.⁷¹² It appends the Statute as a schedule to the South African Constitution, thus making it part of the law and adopting its various definitions.⁷¹³

Section 232 of the South African Constitution⁷¹⁴ states: “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. According to this section, crimes under the jurisdiction of the ICC are recognized as crimes in South Africa. South Africa will co-operate with the ICC even though its courts are not involved in direct co-operation with international tribunals, and the South African diplomatic practice will determine the best way to do this.⁷¹⁵

4.7.4.2 The United States

The US has reservations about the ICC. Since 1998, the negotiating envoys of the US have made extraordinary efforts to secure modifications in the text of the Rome Statute that would enable the US to join the ICC.⁷¹⁶ The US has pressed for restrictive definitions of certain international crimes, especially war crimes and the crime of aggression, the right of veto for permanent UNSC members on any investigation or prosecution, a limit on the power of the prosecutor to initiate investigations, and high thresholds for the

⁷⁰⁹ The International Criminal Court Now website, Country information, South Africa. Available at www.iccnw.org/countryinfo/africa/southafrica.html (accessed on 31 August 2004).

⁷¹⁰ Ibid.

⁷¹¹ Ibid.

⁷¹² Ibid.

⁷¹³ Ibid.

⁷¹⁴ The South African Constitution was adopted on 11 Oct 1996, and amended on 7 February 1997. See ICL Document Status 7 February 1997. Available at www.oefre.unibe.ch/law/icl/sf00000_.html (accessed on 31 August 2004).

⁷¹⁵ Olivera, J. 2000. “National Reports: South Africa”. In *Arbour*, 2000: p479.

⁷¹⁶ Note 643 above, at 124.

jurisdiction of the ICC over genocide and crimes against humanity.⁷¹⁷ The participating states in the Rome Conference rejected these suggestions.⁷¹⁸

The US intends to protect its nationals against prosecution in the ICC, particularly those who work in the name of peace-keeping in states parties, and has therefore submitted objections to some articles of the Rome Statute.⁷¹⁹ Shortly before the fourth session of the PrepCom (13-31 March 2000), the US submitted two lists of suggestions to the other states.⁷²⁰ It consisted of a two-part proposal dealing with co-operation and jurisdiction.⁷²¹ This became the focus of intensive discussion and consultation at the PrepCom.⁷²²

The first proposal was tantamount to giving the right of veto to the state of which the accused is a citizen.⁷²³ This proposal was rejected at the PrepCom meetings, since it was inconsistent with the principle of complementarity.⁷²⁴

The second proposal would prevent the ICC from exercising its jurisdiction over a citizen of a particular state who was accused of a crime on the territory of a state party, unless his or her state authorised the jurisdiction of the ICC.⁷²⁵ This proposal was also rejected since it was contrary to Article 15 of the Rome Statute, which authorises the prosecutor to investigate crimes regardless of the nationality of the accused or whether the state of which the accused is a citizen grants permission.⁷²⁶

On the first day of the fifth session of the PrepCom (12-30 June 2000), the US delegation introduced an amended version of the first part of the above-mentioned two-

⁷¹⁷ Note 692 above, at 556.

⁷¹⁸ Note 264 above, at 109.

⁷¹⁹ Koh, H.H. 2003. "Yale Law School Professor Harold Hongju Koh Defends the ICC Before the US Congress". Available at www.globalpolicy.org/intljustice/icc/2003/0714koh.htm (accessed on 25 October 2004).

⁷²⁰ Note 143 above, at 31.

⁷²¹ *Ibid.*

⁷²² *Ibid.*

⁷²³ Note 143 above, at 32.

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

part proposal intended to prevent the surrender of US citizens to the ICC.⁷²⁷ The US appeared willing to sweep aside all of its objections in exchange for the inclusion of a provision requiring the approval of UNSC as a prerequisite for the jurisdiction of the ICC.⁷²⁸

On 31 December 2000, one of the final acts of the former US government (the Clinton administration) was to sign the Rome Statute on behalf of the US.⁷²⁹ In May 2002, the current US government (the Bush administration) again attempted to put into effect the conditions that exempt US citizens from prosecution under the ICC.⁷³⁰ When the states parties refused to do this, the US withdrew its approval.⁷³¹

With this implicit rejection of ‘universal jurisdiction’, the US began urging states parties to sign bilateral agreements with it.⁷³² Under these bilateral agreements, US citizens or people employed by the US who were accused of crimes and whose crimes were within the jurisdiction of the ICC, would be extradited to the US, pursuant to Article 98 of the Rome Statute, and thereby avoid prosecution in the ICC. It is submitted that limiting the scope of the jurisdiction of the ICC in this way threatens the achievement of justice under the authority of the ICC if the non-ratifying state seeks (through its request for extradition) to shield its citizens from international prosecution.

In 2002, the UNSC adopted Resolution 1422, which was proposed by the US.⁷³³ This Resolution exempts personnel in the UN peace-keeping, diplomatic and philanthropic operations from prosecution in the ICC for one year, such exemption being renewable annually. It is submitted that the aim of the Resolution is to shield the citizens of non-ratifying states. On the other hand, countries that are considered to be strong ICC

⁷²⁷ UN Doc. PCNICC/2000/WGRPE (9)/D.

⁷²⁸ Note 198 above.

⁷²⁹ Note 143 above, at 21.

⁷³⁰ Corell, H. 2004. “A Question of Credibility”. Available at www.globalpolicy.org/intljustice/icc/2004/0523question.htm (accessed on 25 May 2004).

⁷³¹ Human Rights Watch Statement. 2000. “U.S. Proposals to Undermine the International Criminal Court Through a U.N. Security Council Resolution”. Available at www.hrw.org/campaigns/icc/usproposal.htm (accessed on 17 May 2004).

⁷³² Note 198 above.

⁷³³ UN Doc. S/RES/1422 (2002).

supporters, namely Canada, Jordan, New Zealand, Liechtenstein and Switzerland, requested an ‘open meeting’ to discuss the Resolution in order to give non-UNSC members an opportunity to ‘voice’ their opposition to it.⁷³⁴

Human rights observers have condemned the US attitude towards the ICC.⁷³⁵ Many individuals, states and legal consultants have urged the US to adopt the Rome Statute and to stop negotiating the aforementioned bilateral agreements.⁷³⁶ It is submitted that the US is an influential country that possesses strong enforcement measures of its own and it is able to play a part in the implementation of ICC judgments. Also, the US is capable of paying a large percentage of the budget of the ICC, especially since the annual contribution of the US to the UN is approximately 25% of its budget.⁷³⁷

Bartram Brown concludes that the US has a sinister motive for its objections and its refusal to submit to any higher authority.⁷³⁸ Even if there is credible information that a crime has been committed, only the US and the other four permanent numbers of the UNSC will be permitted to judge that conduct.⁷³⁹

Thus, despite the fact that the US is a non-ratifying state, the jurisdiction of the ICC over a US citizen accused of crimes in a state party is generally unavoidable when the state party involved does not have a bilateral agreement with the US that allows for the extradition of the accused of international crimes.⁷⁴⁰ JD van der Vyver believes that the basic problem that confronts the US is that all crimes within the jurisdiction of the

⁷³⁴ Dicker, R. 2003. “U.N: Defend ICC in opening meeting”. Available at www.hrw.org/press/2003/06/icc061103.htm (accessed on 22 December 2003).

⁷³⁵ Kenneth Roth, the Executive Director of Human Rights Watch, wrote letters urging for continued resistance against “the US Immunity Agreements”. Available at www.hrw.org/press/2002/10/eu-icc1021ltr.htm (accessed on 1 December 2003). On 21 October 2002, he sent these letters to the foreign ministers of states parties and signatory states to the Rome Statute. On 1 December 2003, he sent a letter to the Secretary of State, US Department of State, Colin Powell, “on US Bully Tactics against the International Criminal Court”, urging him to bring an end to the “vendetta” against the ICC. Available at www.hrw.org/press/2003/06/usa063003ltr.htm (accessed on 1 December 2003).

⁷³⁶ Ibid.

⁷³⁷ Note 167 above, at 107.

⁷³⁸ Brown, B.S. 2000. “The Statute of the ICC: Past, Present and Future”. In Sewall and Kaysen, 2000: p79

⁷³⁹ Ibid.

⁷⁴⁰ Note 589 above, at 15.

ICC are subject to ‘universal jurisdiction’.⁷⁴¹ He concludes that the US cannot shield its citizens in the ICC by refusing to ratify the Rome Statute.⁷⁴² It is submitted that although the US cannot prevent the ICC from carrying out its functions, the ICC would be stronger with US support.

4.7.5 Co-operation of Individuals and Organisations

One feature that distinguishes the efforts to establish the ICC from most other endeavours to establish international organisations has been the close though sometimes uneasy partnership maintained by governments, inter-governmental organisations and NGOs in the *Ad Hoc* Committee, PrepCom sessions and the Rome Conference.⁷⁴³ This sometimes adversarial relationship has continued to characterise the work of the PrepCom, which has received numerous documents from NGOs. These include a series of papers on war crimes by the International Committee of the Red Cross.⁷⁴⁴

Many organisations that promote human rights, women’s rights and humanitarian aid are in favour of the creation of the ICC.⁷⁴⁵ Furthermore, many dedicated groups such as the Coalition for the ICC have promoted the ICC.⁷⁴⁶ It is unlikely that the state of human rights in the world, whatever its shortcomings, could have progressed as much as it has since WWII without the work of individuals and organisations such as these.⁷⁴⁷

One of the most problematic aspects of organised crime is its international mobility.⁷⁴⁸ This places serious obstacles in the way of national investigations and the detection of criminal conduct.⁷⁴⁹ It is therefore understandable that guidelines of the Rome Statute should solicit effective co-operation arrangements on the exchange of

⁷⁴¹ Note 264 above, at 113.

⁷⁴² Note 264 above, at 114.

⁷⁴³ Note 413 above.

⁷⁴⁴ *Ibid.*

⁷⁴⁵ Note 113 above, at 246.

⁷⁴⁶ Note 738 above, at 62.

⁷⁴⁷ Steiner, H.J. and Alston, P. 2000. *International Human Rights in Context*: p939.

⁷⁴⁸ Strydom, H.; Pretorius, J. and Klinck, M. 1997. *International Human Rights Standard*: p32.

⁷⁴⁹ *Ibid.*

information between individuals and organisations as part of the effort to support the ICC.⁷⁵⁰

Also, assistance from NGOs is important, since they operate on differing mandates that focus on their own priorities and methods of action, bringing a range of viewpoints to the human rights movement.⁷⁵¹ In fact, the Rome Statute stipulates in Article 15, paragraph 2 that the prosecutor may gather information from NGOs when evaluating the seriousness of information relating to cases being investigated by the ICC.⁷⁵²

In this way the participation of individuals and organisations may help to shape the agenda in the direction that would be most beneficial for formulating the ICC.⁷⁵³ This would further the cause of human rights by punishing perpetrators of international crimes and thus enhance the enforcement of international criminal law.⁷⁵⁴

4.8 The Legitimacy of the International Criminal Court

Diplomatic relations are useful to the ICC both in terms of recognising the principle of complementarity and of enforcing judgements. These relations are based on interactions at national and international levels. Sascha Luder argues that the ICC justice system can only operate smoothly when the international community recognises the legitimacy of the ICC.⁷⁵⁵ It is submitted that it is very important for combating international crimes to recognise the legitimacy of the ICC.

⁷⁵⁰ Ibid.

⁷⁵¹ Note 747 above, at 939.

⁷⁵² Note 113 above, at 241.

⁷⁵³ See generally Vagts, D. 1998. "Restriction for Historical Wrong: The American Courts and International Law", *American Journal of International Law*, 92.

⁷⁵⁴ Note 39 above, at 69.

⁷⁵⁵ Luder, S.R. 2001. "Some Preliminary Thoughts on the Legal Nature of the International Criminal Court". In Fischer, Kress and Luder, 2001: p50.

The ICC has the capacity to enter into contracts and commitments necessary for its own proceedings.⁷⁵⁶ It may, for example, establish units to investigate particular human rights violations.⁷⁵⁷ For that purpose, it is endowed with international legal expertise to draw up its agreements and contracts.⁷⁵⁸ It may exercise its statutory functions and powers by special agreements on the territory of any state; for example, it has agreements with its present host, the Netherlands.

On 19 November 2002, the ICC and the Netherlands finalised the Privilege and Immunity Agreement.⁷⁵⁹ This agreement defines the privileges and immunities of the ICC's staff and enables the ICC to carry out its investigative and other tasks on the territory of host states.⁷⁶⁰ In May 2003, the agreement was extended for twelve months.⁷⁶¹ However, the ICC will conclude Privilege and Immunity Agreements with other states parties.⁷⁶² In June 2003, the interim results of the working-level consultations between the ICC and the host state regarding draft articles for a Headquarters Agreement were presented to the ICC.⁷⁶³

In September 2002, the UN Secretary-General and the president of the ICC finalised a Draft Relationship Agreement prepared by the PrepCom and adopted by the ASP.⁷⁶⁴ In December 2003, the UN General Assembly adopted a Resolution allowing the ICC to invite the UN Secretary-General to "take steps to conclude a Relationship Agreement between the UN and the ICC and to present the negotiated draft agreement to

⁷⁵⁶ Note 179 above, at 354.

⁷⁵⁷ Ibid.

⁷⁵⁸ Ibid.

⁷⁵⁹ The International Criminal Court Now website, Country information, the host state. Available at www.iccnw.org/buildingthecourtnew/updatefromthehoststate (accessed on 20 September 2004).

⁷⁶⁰ Ibid.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

⁷⁶³ Ibid.

⁷⁶⁴ Relationship Agreement between the International Criminal Court and the United Nations (2004), ICC ASP/1/3: p243. Available at www.iccnw.org/pressroom/ciccmmediastatements.html (accessed on 5 November 2004).

the UN General Assembly for approval".⁷⁶⁵ On 4 October 2004, the president of the ICC and the UN Secretary-General signed the Relationship Agreement.⁷⁶⁶

The ICC also has the power to make agreements with non-ratifying states, which compel them to provide assistance in investigations. Such agreements will also help to resolve questions of extradition, as they will establish that states may accept the obligation to assist the ICC in matters where it has jurisdiction, even though they are non-ratifying states.⁷⁶⁷ Actually, states parties are unlikely to harbour persons who have committed crimes within the jurisdiction of the ICC. Such persons will generally live in non-ratifying states. Such states are unlikely to allow the ICC and its prosecutor to operate by special agreement on their territory unless the political system in that state recognises the importance of an ICC investigation.⁷⁶⁸

4.9 Challenges Facing the International Criminal Court

There are many problems facing the ICC, especially those relating to the co-operation of state with its judgments in spite of its competence to issue binding orders. This could be envisaged from the problems experienced by the ICTY and ICTR.⁷⁶⁹ The Rome Statute is not a perfect instrument; no internationally negotiated instrument can be that.⁷⁷⁰ Philippe Krisch and Holmes argue that the Statute includes uneasy technical solutions, awkward formulations and difficult compromises that partly satisfy states.⁷⁷¹ However, they conclude that the Statute is a balanced instrument, with enough strength to ensure the effective functioning of the ICC and sufficient safeguards to foster broad support among states.⁷⁷²

⁷⁶⁵ UN Doc. A/RES/58/79 (2003).

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*

⁷⁶⁸ Note 179 above, at 354.

⁷⁶⁹ Note 4 above, at 415.

⁷⁷⁰ Note 420 above, at 11.

⁷⁷¹ *Ibid.*

⁷⁷² *Ibid.*

4.9.1 Enforcement of the Judgment of the International Criminal Court

‘Enforcement’ the term used to describe the rules governing the implementation of judgments by a state through its courts, executive agencies and police action.⁷⁷³ In contrast to national courts, the ICC does not have entire systems in place to carry out its orders, or assist in the investigation and prosecution of cases, and it has no associated police.⁷⁷⁴ It also has no enforcement jurisdiction over citizens of non-ratifying states, although they may enter into *ad hoc* arrangements for co-operation with the ICC.⁷⁷⁵

Cases within the jurisdiction of international tribunals involve fundamental humanitarian interests of concern to the international community as a whole, but the weakest link in international law is the lack of effective enforcement mechanisms.⁷⁷⁶ Sadat and Carden argue that enforcement problems make the jurisdiction of the ICC feeble and have the potential to undermine its efficacy in prosecuting cases.⁷⁷⁷ They conclude that these problems affect the ICC just as they affect other bodies charged with implementing international law in fields such as human rights and the international environment. It is submitted that Sadat and Carden is over standing the case when they uses the term ‘feeble’, since the ICC has right to make use of the law enforcement mechanisms of states parties.

Furthermore, agreeing to ICC judgements may in some cases create enforcement problems by placing national authorities in the awkward position of either violating their national law or violating international treaty obligations to provide judicial assistance.⁷⁷⁸ Bartram Brown points out that the present structure of the Rome Statute gives no guidance in identifying valid bases for challenging requests by the ICC or prosecutor and resisting their orders.⁷⁷⁹ He suggests that the Statute needs to enumerate the specific bases

⁷⁷³ Note 4 above, at 415.

⁷⁷⁴ Note 589 above, at 27.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ Note 623 above, at 408.

⁷⁷⁷ Note 4 above, at 415.

⁷⁷⁸ Note 623 above, at 434.

⁷⁷⁹ *Ibid.*

on which a state may refuse to comply with a request for judicial assistance.⁷⁸⁰ It is submitted that enumerating the specific bases for refusing the request of judicial assistance must be minimised to cases where the requested states violate international obligations.

The ICC accepts assistance from the International Criminal Police Organisation where it is consistent with the Rome Statute.⁷⁸¹ In some circumstances, the ICC can also use regional organisations, with which the state party co-operates to carry out its function.⁷⁸² The state keeps the ICC request for enforcement judgements confidential.⁷⁸³ According to Article 87, paragraph 2 of the Rome Statute authority to make requests and ways of transmitting information are designated by each state party at the time of ratification.

Daniel Brown believes that the more time that passes, the less likely it is that a successful prosecution will take place.⁷⁸⁴ He states that delays during investigations or trials are costly and result in a reduction in the effectiveness of witness testimony, which deteriorates because of memory loss and death. Moreover, time delays provide greater opportunities for loss and destruction of evidence and may lead to the fabrication of evidence.⁷⁸⁵ It is submitted that the ICC should avoid delaying investigations because avoiding unjustified delays will enhance the ability of successful prosecutions.

4.9.2 Surrendering the Accused

The requested state shall surrender the person if the ICC has taken decision on admissibility.⁷⁸⁶ If it is necessary to transport the accused through another state, the requested state could advise the ICC of whether the accused may be delayed or risk

⁷⁸⁰ Note 623 above, at 434.

⁷⁸¹ Article 87(1)(b), note 15 above.

⁷⁸² Note 698 above, at 1060.

⁷⁸³ *Ibid.*

⁷⁸⁴ Brown, D.J. 1999. "The International Criminal Court and Trial in Absentia", *Brooklyn Journal of International Law*, 24: p783.

⁷⁸⁵ *Ibid.*

⁷⁸⁶ Kress, C. and Prost, K. 1999. "Article 89: Surrender of Persons to the Court". In Triffterer, 1999: p1077.

imprisonment.⁷⁸⁷ It is submitted that it is vital that information should be exchanged between the ICC and states required to co-operate before accused persons are surrendered to the ICC. It further submitted that states should refrain from delaying for security reasons compliance with the ICC requests.

Miskowiak believes that because the ICC acts on behalf of the international community, its functions should not be subjected to exacting security in terms of national constitutions, as if the ICC were equivalent to national courts.⁷⁸⁸ On the other hand, Sadat and Carden argue that the national security exception in Article 72 of the Rome Statute may be utilised to respond to legitimate concerns of states.⁷⁸⁹ They believe that disagreement with the provisions of the Rome Statute may make states unwilling to co-operate with the ICC. It is submitted that this problem might have a negative effect on the future of ICC implementation.

Bartram Brown suggests that the PrepCom may consider amendments to the Rome Statute which would exclude non-constitutional, non-fundamental, and discretionary bases for refusing an ICC request to surrender the accused.⁷⁹⁰ Granting the ICC inherent jurisdiction over all cases involving a defined list of international crimes without granting it mandatory power to enforce the surrendering of the accused might be problematic in future.⁷⁹¹ Ultimately, there would have to be a mechanism for the enforcement of that jurisdiction if a state with custody of an accused refused to surrender that individual.⁷⁹²

Daniel Brown states that in a case where the accused has not been surrendered, this might halt an investigation or a trial.⁷⁹³ He argues against trial *in absentia* by stating that it is both unnecessary and unwise to apply rigid constitutional principles to the ICC. On the other hand, trial *in absentia* may serve to thwart the objectives of the ICC and

⁷⁸⁷ Ibid.

⁷⁸⁸ Note 39 above, at 68.

⁷⁸⁹ Note 4 above, at 447.

⁷⁹⁰ Note 623 above, at 434.

⁷⁹¹ Note 623 above, at 409.

⁷⁹² Ibid.

⁷⁹³ Note 784 above, at 783.

permit an accused to evade justice by choosing not to appear before the ICC.⁷⁹⁴ Indeed, *in absentia* authority seems aimed at targeting the accused who deliberately avoid prosecution either by taking refuge in or receiving aid from a friendly state.⁷⁹⁵ It is submitted that trial *in absentia* may, in some cases, serve the goal of justice and motivate accused persons to appear voluntarily before the ICC, since such an appearance would allow them to defend themselves.

Miskowiak argues that, disappointingly, states parties are not always obliged to surrender a person to the ICC when there is an extradition obligation to another state.⁷⁹⁶ She points out that a state party that sympathises with the person in custody could decide to extradite him or her to a country that would ensure that person a sympathetic trial. She suggests that states, on becoming parties to the Rome Statute, need to revise their existing extradition agreements with non-ratifying states, so that they may avoid violating such agreements.

The Rome Statute seeks to specify the grounds on which the requested state party must make its decision if it is under another extradition obligation. Claus Kress and Kim Prost argue that the Rome Statute should ensure that the state in which the accused is surrendered obeys the laws that permit such deliveries.⁷⁹⁷ Under the Statute, the obligation is vague and seems to presume that a state party would not surrender the accused if it had another extradition obligation to a non-ratifying state.⁷⁹⁸ It is submitted that justice might be better served if states, by becoming parties to the Rome Statute, are under a clear obligation to give priority to the requests of the ICC.

⁷⁹⁴ Ibid.

⁷⁹⁵ Ibid.

⁷⁹⁶ Note 39 above, at 65.

⁷⁹⁷ Note 786 above, at 1077.

⁷⁹⁸ Ibid.

4.9.3 Bilateral Agreements

Article 98 of the Rome Statute states:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. 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.

It is submitted that Article 98 raises problems involving international agreements between states, which under certain conditions prevent the ICC from proceeding with a request for surrender for an accused. According to Robinson Everett, before the establishment of the ICC, no such general agreements were known to exist.⁷⁹⁹ He states that not even the Status of Force Agreement (as opposed to agreements between two states) makes general provision for the extradition of accused persons to member-states or to an international tribunal. He concludes that the bilateral agreements that exist arguably only preclude the surrender of an accused person when a state has exclusive or primary concurrent jurisdiction over an offence.

Article 98, paragraph 1 could, in these circumstances, result in a former head of state being granted immunity for crimes within the jurisdiction of the ICC.⁸⁰⁰ A national who is not a citizen of the custodial state, who is suspected of crimes within the jurisdiction of the ICC, might go free if the custodial state perceives the immunity of the person to be consistent with international law.⁸⁰¹ This could happen even if the custodial

⁷⁹⁹ Everett, R.O. 2000. "American Servicemembers and the ICC". In Sewall and Kaysen, 2000: pp138-139.

⁸⁰⁰ Note 589 above, at 13.

⁸⁰¹ Article 98, note 15 above.

state, the state of official permanent residence and the state of nationality of the suspect were all states parties and were thus bound by the jurisdiction of the ICC.⁸⁰²

Article 98 directs the ICC not to take action that would result in states violating their international obligations to accord immunity to foreign officials.⁸⁰³ Miskowiak states that bilateral agreements may be used to prevent other states parties from arresting those accused of crimes under the jurisdiction of the ICC; therefore, such agreements may impede the ability of the ICC to gain custody of state officials.⁸⁰⁴ She adds that Article 27 of the Rome Statute removes the immunity of state officials but the ICC does not have independent powers to arrest them and must rely on states to arrest and surrender them.

According to Dapo Akande, although it is not easy to dismiss the argument that Article 98 preserves the immunity of officials of states parties, under international law, the conferral of power on states to arrest a visiting serving head of state or a serving ambassador would have far-reaching effects.⁸⁰⁵ He states that it is probably the only way that such persons could be subjected to the jurisdiction of the ICC. The ICC, however, would be stronger if the Statute entitled it to prosecute persons accused of committing crimes under the jurisdiction of the ICC, no matter where they were residing as soon as his or her country is a party to the Statute or the crime has been committed in a state party.⁸⁰⁶ It is submitted that participating states in the Review Conference should amend Article 98 and confirm the ICC's rule of 'universal jurisdiction' and the principle of 'no immunity'.

⁸⁰² Note 39 above, at 64.

⁸⁰³ Akande, D. 2004. "International Law Immunities and the International Court", *American Journal of International Law*, 98(3): p420.

⁸⁰⁴ Note 39 above, at 65.

⁸⁰⁵ Note 803 above, at 421.

⁸⁰⁶ *Ibid.*

4.9.4 Theoretical Potential of the Rome Statute to Violate Customary International Law

It is theoretically possible that the Rome Statute could violate international customary law because, in some cases, it could allow the ICC to try individuals for international crimes without the consent of their states.⁸⁰⁷ The theory is that if the ICC tries an individual for a crime, then in some extended sense, that individual's national state is subject to obligations under the Rome Statute.⁸⁰⁸

A fundamental tenet of the principle of international customary law of treaties is that no state can be burdened with obligations from any treaty to which it is not a signatory.⁸⁰⁹ Article 34 of the Vienna Convention on the Law of Treaties⁸¹⁰ states: “[a] treaty does not create either obligations or rights for a third State without its consent”. This Article seems to be in contradiction to Article 12 of the Rome Statute, which gives the ICC jurisdiction in the territory within which the crime in question occurred, even if the accused is a citizen of a non-ratifying state.⁸¹¹ On the other hand, the Statute should, as far as possible, respect customary international law because of the fact that the ICC is an international instrument which is subject to international law.⁸¹²

Michael Scharf concludes that the ICC gains jurisdiction over citizens of non-ratifying states, but does not put any obligation on these states.⁸¹³ Models of the obligations that the Rome Statute places on states parties include the following: they should provide funding; they should assist in the transfer of indicted persons; and they

⁸⁰⁷ Note 198 above, at 1.

⁸⁰⁸ Note 653 above, at 896.

⁸⁰⁹ Scharf, M.P. 2000. “The ICC’s Jurisdiction over Nationals of Non-Party States”. In Sewall and Kaysen, 2000: p220.

⁸¹⁰ On 22 May 1969, the Vienna Convention on the Law of Treaties was adopted. On 23 May 1969 it was opened for signature by the UN Conference on the Law of Treaties. The Conference was convened pursuant to the General Assembly Resolutions 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna, the first session from 26 March to 24 May 1968, and the second session from 9 April to 22 May 1969. On 27 January 1980, this Convention entered into force. Available at www.un.org/law/ilc/texts/treaties.htm (accessed on 31 August 2004).

⁸¹¹ Note 784 above, at 796.

⁸¹² Note 87 above, at 25.

⁸¹³ Note 809 above.

should co-operate with the ICC by providing evidence that may be crucial in aiding the prosecution of criminals.⁸¹⁴ Non-ratifying states, which have not joined the ICC, are therefore not obliged to do the above things.⁸¹⁵

Scharf gives a few examples where international treaties have gained ‘universal jurisdiction’ over the citizens of states that have not ratified and are not signatories to a particular treaty.⁸¹⁶ He points to the four Geneva Conventions, the 1958 Law of the Sea Convention, the 1970 Hijacking Conventions, the 1971 Aircraft Sabotage Convention, the 1973 Internationally Protected Persons Convention, the 1979 Hostage Taking Convention, the 1984 Torture Convention, the 1988 Airport Security Protocol and the 1988 Maritime Terrorism Convention.

There are also a few examples of occasions when one state exercised jurisdiction over individuals of another state without their country’s consent. In 1990, in the case of *United States v. Yunis*,⁸¹⁷ the US exercised ‘universal jurisdiction’ over a citizen of a non-state party to the Hijacking Convention, in spite of the fact that the crime itself was not previously recognised as being subject to ‘universal jurisdiction’ in terms of international customary law.⁸¹⁸ In this case, the US prosecuted a Lebanese man who hijacked a Jordanian Airliner with two Americans on a board at the Beirut Airport, although Lebanon was not a party to the Hijacking Convention and did not consent to its citizen being tried in the US.⁸¹⁹ In 1998, in the case of *United States v. Ali Rezaq*,⁸²⁰ the accused, a Palestinian, was found guilty of the hijacking an Egyptian airliner, even though Palestine was not party to the Hijacking Convention.⁸²¹

⁸¹⁴ Note 809 above, at 220.

⁸¹⁵ Note 113 above, at 238.

⁸¹⁶ Note 809 above, at 220.

⁸¹⁷ See the Appeal from the US District Court for the District of Columbia (Criminal no. 87-00377) 1991. Decided on 29 January 1991. Available at www.terrorismcentral.com/Library/Teasers/YunisAppealT.html (accessed on 13 September 2004).

⁸¹⁸ Note 809 above, at 221.

⁸¹⁹ *Ibid.*

⁸²⁰ See the Decision of the Supreme Court of the US (Criminal no. 97-6203) 1998. Available at www.usdoj.gov/osg/briefs/1997/3mer/2mer/97-6203.mer.html (accessed on 13 September 2004).

⁸²¹ Note 809 above, at 221.

According to Scharf, the US argues that universal jurisdiction cannot be delegated to an ICC that is established by international treaty.⁸²² Customary and conventional international law have established that certain crimes are against the universal interests; they are offences against universal public policy and are universally condemned.⁸²³ After WWII, the Allies invoked the idea of universal jurisdiction when they established, the Nuremberg and Tokyo Tribunals.⁸²⁴

It is submitted that Article 12 of the Rome Statute may not be considered as violations of customary international law. It is further submitted that Article 12 may be considered as a development of international criminal law and contributes to the development of the concept of 'universal jurisdiction'.

4.9.5 States Parties which Fail to Comply with the Rome Statute

Kreb states that the starting point of prosecutions on the international level is the same as in national proceedings: prosecutions will be undertaken after consideration of the matter and will be dependent on witness testimony.⁸²⁵ However, he points out that beyond these initial points there are distinct differences that cannot be ignored. Neither the judges nor the prosecutor or defence counsel has subpoena powers to compel witnesses to appear.⁸²⁶ These subpoena powers continue to reside in the nation state or states involved.⁸²⁷

Cogan argues that even if the ICC had subpoena powers and could, in theory, find a powerful state in contempt for non-compliance, it is unlikely that such a finding would be enforceable without the states' consent.⁸²⁸ He states that instead, it might be

⁸²² Note 809 above.

⁸²³ Denecke, J. 2002. "The Admissibility of a Case before the International Criminal Court: An Analysis of Jurisdiction and Complementarity". Masters Dissertation: p47.

⁸²⁴ Note 823 above, at 48.

⁸²⁵ Ibid.

⁸²⁶ Note 4 above, at 447.

⁸²⁷ Ibid.

⁸²⁸ Cogan, J.K. 2000. "The Problem of Obtaining Evidence for International Criminal Court", *Human Rights Quarterly*, 22(2): p425.

disadvantageous to the ICC to issue orders without taking the dynamics of world politics into consideration because it lacks the mechanism to enforce its order.

The prosecutor can take some kind of initiative by using his or her discretionary powers to bring a complaint before the ICC, especially in a situation where states or the UNSC refuse to file a complaint.⁸²⁹ According to Mounts, Cassel and Bleich, the institutional integrity of the ICC could be eroded if the UNSC influenced the prosecutor's discretion to the extent that indictments appeared to be selective, as was the case in the ICTY and the ICTR.⁸³⁰ It is submitted that the prosecutor's discretion should be independent of UN influence.

4.9.6 The Political Influence of the United Nations Security Council

The Rome Statute uses a comprehensive system of criminal justice, which adds to the collective security system of the UN.⁸³¹ According to Article 2 of the Rome Statute, the ICC is an independent permanent court which nevertheless has a relationship with the UN system and organs. The UN, the UNSC and the ICC will become key components of an international legal order devoted to the maintenance of peace.⁸³²

In a case where a state has deteriorated to such a point that its judicial system is no longer functioning, the UN may consider ways to restore peace and order, even if it means dispatching security forces to the state.⁸³³ Under these circumstances, it is not difficult to imagine that certain organs of the UN could provide judicial assistance to the ICC. According to Daniel Brown, introducing the notion of UN troops assisting the ICC would probably not be politically wise.⁸³⁴

⁸²⁹ Ibid.

⁸³⁰ Note 574 above, at 441.

⁸³¹ Note 755 above, at 49.

⁸³² Note 179 above, at 353.

⁸³³ Note 784 above.

⁸³⁴ Ibid.

The Rome Statute specifies two instances in which the UNSC could have a direct influence on the ICC.⁸³⁵ These are in a case where the UNSC refers a matter to the ICC, and where the UNSC makes a request to the ICC for the deferral of a case in terms of an investigation or prosecution. The UNSC may refer a case to the ICC when it would be in the interests of the maintenance of peace to do so.⁸³⁶ Under Chapter VII of the UN Charter, this request from the UNSC would trigger the second type of jurisdiction (see chapter 4.1). In such cases, co-operation with the ICC would be mandatory and would be backed up by the implicit threat of UNSC sanctions for non-compliance.⁸³⁷ Inability could only occur in the case of non-ratifying states, since the prosecutor has independent initiative in the case of states parties.

It is submitted that it is possible that the ICC might not, at present, be able to investigate or prosecute some cases because the UNSC, from political motives, fails to refer them. According to Article 16 of the Rome Statute, deferral or suspension of jurisdiction is possible for a period of twelve months, and such deferral and suspension may be renewed annually at the behest of the UNSC. Although the jurisdiction limits can be used positively to encourage national prosecutions or resolve an ongoing conflict, they can also be used to frustrate an important international prosecution.⁸³⁸

The ICC has jurisdiction over international crimes committed by perpetrators irrespective of their station in life. However, with a UNSC endorsement, the ICC has wide powers to arrest high-ranking offenders in non-ratifying states if their countries refuse to surrender them.⁸³⁹ The effect of this has been that, contrary to the initial perceived notion of the ICC's independence, the UNSC still has some measure of control.⁸⁴⁰

⁸³⁵ Oosthuizen, G. 1999. "Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council", *Netherlands International Law Review* 46(3): p315.

⁸³⁶ Note 198 above, at 4.

⁸³⁷ Note 673 above, at 118.

⁸³⁸ Note 572 above, at 226.

⁸³⁹ *Ibid.*

⁸⁴⁰ *Ibid.*

On the other hand, the possibility of referring cases of non-compliance to the UNSC would probably be a more effective mechanism than referral to the ASP because the UNSC has the capacity to enforce its decisions while the ASP does not.⁸⁴¹ The chief reason for the failure of the League of Nations was that it lacked the capacity to enforce its decisions, especially when they involved its more powerful members.⁸⁴²

In theory, when national authorities refuse a request, international tribunals can apply to the UNSC for sanctions against the obdurate state.⁸⁴³ On the other hand, the UNSC, even though it established the ICTY and the ICTR, does not have a very good record in terms of prosecuting perpetrators of international crimes or violators of human rights before such tribunals.⁸⁴⁴ However, the ICTY and the ICTR have the formal authority to command that co-operation be granted to them by the UNSC, acting under Chapter VII of the UN Charter.⁸⁴⁵

Political bodies such as the UNSC should not have any control over judicial bodies such as the ICC because it is more acceptable for states to submit a local matter to a judicial body than to refer it to a political one.⁸⁴⁶ If the ICC is perceived to be influenced politically by the UNSC, states may have concerns about whether hearings are impartial or not.⁸⁴⁷

The insistence that the ICC must be a genuine legal instrument motivates the ICC to focus on the criminal liability of individuals who have committed serious crimes and to set up an effective judicial system of international criminal justice.⁸⁴⁸ However, a decision to defer the jurisdiction of the ICC at the request of UNSC and to grant the

⁸⁴¹ Note 39 above, at 77.

⁸⁴² Edgar, A. 2002. "Peace, Justice and Politics: The International Criminal Court, 'New Diplomacy' and the UN System". In Cooper, A.F.; English, J. and Thakur, R. (eds). *Enhancing Global Governments: Toward a New Diplomacy?*: p144.

⁸⁴³ Farer, T. 2000. "Can International Criminal Law Help", *Human Rights Quarterly*, 22: p107.

⁸⁴⁴ Note 198 above, at 5.

⁸⁴⁵ Note 843 above, at 107.

⁸⁴⁶ Note 415 above, at 423.

⁸⁴⁷ Note 559 above.

⁸⁴⁸ Peter, M. 1997. "The Proposed International Criminal Court: A Commentary on the Legal and Political Debates Regarding Jurisdiction that Threaten the Establishment of an Effective Court", *Syracuse Journal of International Law and Commerce*, 24 (Fall): p197.

UNSC a greater say in its jurisdiction may not provide the world with the means it needs to combat international crime.⁸⁴⁹ Instead, the ICC will serve as a lasting reminder that justice can only be achieved when political realities and public support demand it be achieved.⁸⁵⁰

The ICC increases global interest in the prevention and/or punishment of international crimes, regardless of where the crimes take place or the parties involved in the conflict.⁸⁵¹ It should be remembered that, despite the existence of the ICC, the UNSC still reserves the right to create its own *ad hoc* tribunals. This remains an option for the UNSC if it finds that the ICC is not effective or its jurisdiction is too narrow.⁸⁵²

4.9.7 The Role of the Assembly of States Parties to the Rome Statute of the International Criminal Court

According to Article 112, paragraph 6 of the Rome Statute, the ASP will meet annually at the seat of the ICC or at the headquarters of the UN. Representatives of the ICC president, the prosecutor and the registrar can attend meetings of the bureau, which is elected by the ASP to assist it in carrying out its duties.⁸⁵³ According to Article 112, paragraph 1 of the Rome Statute, non-ratifying states may participate as observers in the ASP.

The role of the ASP is to oversee the administration of the ICC.⁸⁵⁴ According to Article 112, paragraph 2, ASP tasks are to approve the ICC budget, adjust the number of judges in response to changes in the caseload and perform any other function consistent with the Rome Statute and the Rules of Procedure and Evidence. It usually considers recommendations of the PrepCom and takes action in the event of a state party failing to

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *Ibid.*

⁸⁵¹ Note 39 above, at 29.

⁸⁵² *Ibid.*

⁸⁵³ Article 112(3)(b), note 15 above.

⁸⁵⁴ Note 87 above.

co-operate with the ICC.⁸⁵⁵ The ASP also has the task of revising and modifying the provisions of the Rome Statute.⁸⁵⁶ According to Article 112, paragraph 7.1 of the Rome Statute, decisions on matters of substance are taken by a two-thirds majority voting of those present.

It may be appropriate for the ASP to assume limited supervisory powers over the negotiated relationships between the ICC and states or organisations, though not over its proceedings as a court.⁸⁵⁷ Under such a clause, a state may request the help of the ICC to provide judicial assistance where that state's ability appears to be inferior to that of the ICC.⁸⁵⁸

According to Article 87, paragraph 7 of the Rome Statute, if the ICC concludes that, in the circumstances, the state to whom the request has been put is not acting in accordance with its obligations under the Rome Statute, it may refer the case to the ASP unless the UNSC has referred the matter to the ICC. In this case, the ICC can refer the non-compliance case back to the UNSC.⁸⁵⁹

It is submitted that, the ICC would still need the support of the ASP and the UNSC to enforce any order it might make. It is further submitted that the relationships between the ICC as a judicial body and other political bodies are sensitive because it is important that the ICC be seen to have some independence from the ASP and some means of distancing itself from politics. It is one thing to acknowledge the way the world works; it is quite another to concede that this is the way it ought to work.⁸⁶⁰

⁸⁵⁵ Article 112(2), note 15 above.

⁸⁵⁶ See generally Anand, R. 1995. "The International Court as a 'Legislator'", *Indian Journal of International Law*, 35(1).

⁸⁵⁷ Note 784 above.

⁸⁵⁸ *Ibid.*

⁸⁵⁹ Note 39 above, at 68.

⁸⁶⁰ Note 828 above, at 425.

CHAPTER FIVE

The Future of the International Criminal Court, Conclusion and Recommendations

5.1 The Future of the International Criminal Court

In the words of James Crawford, “the process of developing a satisfactory permanent International Criminal Court has to be an ongoing process like the process of building Rome itself”.⁸⁶¹

The jurisdiction of the ICC is limited to the crimes mentioned in Article 5 of the Rome Statute. This limitation is premised on the fear that states, although prepared to accept the creation of the ICC in principle, might not be prepared to make the political concessions necessary to ensure that it is optimally functional.⁸⁶² The expectation that lies behind it is that in the future the states parties, after the successful prosecution of those responsible for committing genocide, crimes against humanity and war crimes, will be willing to expand the jurisdiction of the ICC to include other crimes.⁸⁶³

However, limiting the competence of the ICC to these crimes would facilitate a coherent and unified approach to the exercise of jurisdiction.⁸⁶⁴ This, therefore, was believed to be likely to bring about state co-operation.⁸⁶⁵ It is submitted that, in the future, the inclusion of other crimes (like drug trafficking or international terrorism) under the jurisdiction of the ICC will depend on the success rate of ICC prosecutions and the way in which nations see their roles.

⁸⁶¹ Note 39 above, at 81.

⁸⁶² Note 848 above, at 189.

⁸⁶³ *Ibid.*

⁸⁶⁴ Note 87 above, at 25.

⁸⁶⁵ *Ibid.*

Miskowiak concludes that the effectiveness of the ICC will depend on the political will of states to assist it in the investigation and prosecution of crimes.⁸⁶⁶ The many problems relating to co-operation that have been experienced by *ad hoc* tribunals, in spite of their power to issue binding orders, suggest that legal obligations are less relevant than national political will. It is therefore more important that the provisions on co-operation can be imposed effectively than that they are strong.⁸⁶⁷ The problems encountered in establishing the ICC symbolise the difficulties faced in trying to vindicate the cause of human rights.⁸⁶⁸

According to Mounts, Cassel and Bleich, should the need arise to establish enforcement units, at the Review Conference or before, these might make the enforcement of ICC judgments easier or enable arguments in favour of ICC prosecutions in national courts.⁸⁶⁹ They state that the international community is not fully committed to the concept of international justice if it does not permit enforcement measures. They conclude that the ICC stands, not only as a symbol of the application of international criminal law, but also as real evidence of the goodwill of the international community.

In order to make ICC judgements effective, it will be necessary to raise public awareness through dissemination of information and formal educational programmes.⁸⁷⁰ Better training for ICC staff would improve their skills and qualifications.⁸⁷¹ This would improve the development of ICC policies in combating international crimes and establishing procedures to enhance the ICC's performance.⁸⁷² Over and above, it is submitted that providing training programmes for professionals from different parts of the world, such as lawyers, statesmen, politicians and human rights activists, would enhance state's co-operation with the ICC. It is further submitted that this would develop a clear understanding of the role of 'international criminal justice' as a deterrent to international crimes.

⁸⁶⁶ Note 39 above, at 73.

⁸⁶⁷ Note 39 above, at 81.

⁸⁶⁸ Note 574 above, at 426.

⁸⁶⁹ *Ibid.*

⁸⁷⁰ Note 748 above, at 34.

⁸⁷¹ *Ibid.*

⁸⁷² *Ibid.*

In theory, the ICC will deal with practical problems of investigation, prosecution, trial and enforcement. However, in practice, it is submitted that although the implementation of the ICC agenda should lead to impartial enforcement of international criminal law there are, in particular cases, problems in obtaining the co-operation of states. It is further submitted that the concept of the rule of law, accountability and legality, can increasingly be expected to form part of the international community, especially if each state party accepts its obligations. It is further submitted that it seems almost inevitable that the code of the ICC, which is accepted as legitimate, will influence the national laws of states parties. At the present time (October 2004) ninety-seven states are party to the Rome Statute and have therefore conceded a part of the sovereignty of their judicial decision-making to the ICC.⁸⁷³

However, an ICC concept of individual accountability would ultimately necessitate a sustained enforcement of ICC decisions, at least by states parties, and might eventually lead to the use of some kind of coercion.⁸⁷⁴ It is submitted that the ICC dispenses justice by holding important individuals at the top of chains of command responsible for serious international crime; that is, crime committed by an organ of state such as the army or the prison services. It is further submitted that the effect of a state becoming party to the Rome Statute is that its citizens will enjoy the protection of its code and will be influenced to accept its provision.

The Rome Statute is poised to contribute positively to the development of international criminal law. It provides for the prosecution perpetrators of serious international crimes and allows victims to participate in ICC procedures as well as providing permanent legal remedies to such crimes where national systems fail.⁸⁷⁵ The strength of the Statute ensures that individual accountability for crimes is subject to

⁸⁷³ The International Criminal Court Now website, Country information. Available at www.iccnw.org/countryinfo/worldsigsandratifications.html (accessed on 25 October 2004).

⁸⁷⁴ Lattanzi, F. 2003. "The International Criminal Court and National Jurisdictions". In Broomhall, B. *International Justice and the International Criminal Court: between state consent and the rule of law*: p189.

⁸⁷⁵ Note 564 above, at 107.

national and international decisions and these decisions tend to lead to amendments of national law where it is contrary to international law.⁸⁷⁶

According to Crawford, the Rome Statute has clarified much of the confusion surrounding the vague definition of crimes (genocide, crimes against humanity, for example) tried in the Nuremberg and Tokyo Tribunals.⁸⁷⁷ He states that the Statute has included a new, wider jurisdiction over crimes against humanity, redefining them so as to eliminate the necessity for a connection to armed conflicts. In the Rome Statute, genocide, crimes against humanity and war crimes are now listed and further elaborated in the Elements of Crimes.⁸⁷⁸ It is submitted that under the Rome Statute, provision is made for the development of a comprehensive body of international humanitarian law enforceable in the ICC, whereas the Geneva Conventions only made recommendations and there was no standing court.

The Rome Statute itself is not guaranteed to bring about a radical change in international law or the international judicial system without national co-operation.⁸⁷⁹ The ICC is the beginning of a new way of thinking about international law as going beyond obligations of states and regarding individuals as capable of taking responsibility for crimes.⁸⁸⁰ Besides prosecuting serious international crimes at the international level, the ICC will serve a second and vital purpose, namely that of upholding the rule of law.⁸⁸¹

The ICC has repeatedly affirmed that its task is to apply the Rome Statute and sometimes to interpret its provisions. The ICC is expected to play an important part in developing international law, just as the criminal courts of the UK and the US have

⁸⁷⁶ Note 874 above.

⁸⁷⁷ Crawford, J. 2003. "The Drafting of the Rome Statute". In Sands, P. (ed). *From Nuremberg to The Hague, the Future of International Criminal Justice*: p115.

⁸⁷⁸ Clapham, A. 2003. "Issues of Complexity, Complicity and Complementarity: from the Nuremberg Trials to the International Criminal Court". In Sands, 2003: p47.

⁸⁷⁹ Note 653 above, at 869.

⁸⁸⁰ Note 878 above, at 33.

⁸⁸¹ Booth, C. 2003. "Prospects and Issues of the International Criminal Court: lessons from Yugoslavia and Rwanda". In Sands, 2003: p183.

helped to form common law.⁸⁸² The ICC is expected to build a systematic body of international criminal law from case to case.⁸⁸³ This will have an effect on all countries, not only states parties but even non-ratifying states.⁸⁸⁴

It is submitted that international criminal law developments are flowing into new channels. Before the establishment of the ICC there were fewer references in treaties to international criminal tribunals. It is further submitted that now that the ICC is effective, references are likely to increase. In the past, international treaties mainly focused on national courts and conferred complementarity of jurisdiction; they did not address the extent or applicability of international jurisdiction clearly in terms of the gravity or the systematic character of the crimes covered.⁸⁸⁵

These developments may motivate states that have not yet signed the Rome Statute to accept the jurisdiction of the ICC, either in terms of comity, *ad hoc* arrangements, or other non-binding and possibly temporary arrangements with it.⁸⁸⁶ According to Article 125 of the Rome Statute, at present no more non-signatory states may become parties to the Statute since the list of signatories closed on 31 December 2000.

Article 123 of the Rome Statute provides that the Review Conference shall be convened to consider any amendments to the Statute seven years after the entry into force of the Statute, and at any time thereafter. The significance of the provision for the Review Conference should not be underestimated. These will allow a gradual expansion of the jurisdiction of the ICC at the pace of growing international political will and the development of international law.⁸⁸⁷

⁸⁸² Note 856 above.

⁸⁸³ *Ibid.*

⁸⁸⁴ Note 877 above, at 123.

⁸⁸⁵ Note 877 above, at 122.

⁸⁸⁶ Note 653 above, at 869.

⁸⁸⁷ Note 39 above, at 81.

However, according to Article 122 of the Rome Statute, efforts to amend the Statute need not wait until the Review Conference takes place, but may be effected at the annual ASP if a two-thirds majority in favour can be obtained. It is submitted that any amendments of the Rome Statute can affect the future of the ICC positively or negatively. Non-ratifying states that are signatories to the final Act of the Rome Conference are entitled to participate in the PrepCom and suggest amendments to the Rome Statute.⁸⁸⁸ State delegations may, *inter alia*, prepare proposals for practical arrangements, rules of procedure and a definition of aggression.⁸⁸⁹

The ICC is at present moving into the implementation phase and should therefore pursue questions concerning compliance with its legal processes.⁸⁹⁰ International law, as represented and interpreted by the ICC, has continuing links with political science and international relations.⁸⁹¹ It is submitted that, as a generator of new legal norms, the ICC must remain a subject of study in both these disciplines, and may affect their nature and scope.

In this regard the jurisprudence – in particular the case law of the ICTY and ICTR – may provide interpretative insights.⁸⁹² The road ahead is difficult and considerable obstacles continue to prevent the effective protection of potential victims of these crimes under the jurisdiction of the ICC.⁸⁹³ If a state offers immunity for ‘international crimes’ and condones systematic and widespread violations of international criminal law and human rights, it is betraying human solidarity, as well as the victims of conflict to whom it owes a duty of justice.⁸⁹⁴ As well as building a relationship with each nation, the ICC

⁸⁸⁸ Note 39 above, at 82.

⁸⁸⁹ Ibid.

⁸⁹⁰ Note 874 above, at 191.

⁸⁹¹ Ibid.

⁸⁹² Doermann, K., Doswald-Beck, K. and Kold, R. 2003. *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*: p11.

⁸⁹³ Note 892 above, at 14.

⁸⁹⁴ Bassiouni, M.C. 2000. “The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities”. In Schmitt, M. 2000. *International Law across the Spectrum of Conflict*: p38.

has to create a culture of individual responsibility.⁸⁹⁵ This will enable the ICC to prosecute international crime more effectively.⁸⁹⁶

5.2 Conclusion

The aim of this dissertation was to investigate the constitution, power and scope of the ICC in prosecuting individuals and making them take responsibility for ‘international’ crimes, and then to determine whether the existence of the ICC will have a deterrent effect on international crimes. The question of whether the ICC is moving towards the prevention of breaches of international criminal law, and whether it has yet reached its maximum effectiveness must be asked.

The establishment of the ICC is the result of years of negotiations between states. In chapter two, previous efforts to establish an ICC in order to impeach perpetrators of international crimes and the final of establishment of the ICC were investigated. The ICC is independent of any nation state and of the UN in its structure though cases can be referred to it by states and by the UN, which also contributes financially to the budget of the ICC.

In chapter three, crimes listed in the Rome Statute as being under the jurisdiction of the ICC were enumerated and discussed. It is submitted that such a list may function as a deterrent to those who intend to commit such crimes. It was shown that the Statute defines a variety of acts that were not previously categorised as genocide or crimes against humanity. A further category, war crimes, is also defined under the Statute, and though earlier definitions, such as those in the Geneva Conventions, have been applied in *ad hoc* tribunals, the clarity and extension of their definition in the Rome Statute is an improvement in international law. Many innovations have been incorporated into definitions of crimes in the Rome Statute: for example, ideologically motivated rape, with

⁸⁹⁵ Meron, T. 2000. “International Humanitarian Law from Agincourt to Rome”. In Schmitt, 2000: p311.

⁸⁹⁶ Rubin, A.P. 2000. “The International Criminal Court: A Sceptical Analysis”. In Schmitt, 2000: p432.

the purpose of destroying the ethnic fabric of a group, is included both as a crime against humanity and as a war crime.

In chapter 3.3, it was argued that there is a balance between the rights of victims and the accused in the proceedings of the ICC, though this balance could be improved. The ICC has arrangements in place to protect victims. It is submitted that the accused are also likely to benefit because the ICC emphasises that people who are arrested or brought to trial should receive fair treatment from the judicial system, irrespective of the final decision to acquit or convict. It is further submitted that the international jurisdiction of the ICC is a potential safeguard against arbitrary and fallible national criminal procedures against those who are accused of having committed serious international crimes, such as genocide, crimes against humanity, war crimes and the crime of aggression. Its justice is, as far as possible, non-partisan and it therefore avoids the charge often levelled at *ad hoc* tribunals like the Nuremburg Tribunals that they deal in 'victor's justice'. In this regard it is likely to be easier for those accused of crimes to submit to the authority of the ICC with its human rights guarantees; such people will at least be assured that they will face a fair trial, which might not be the case if they were tried by a national court or by an authority with no commitment to upholding human rights.

The obstacles, real or potential, to the successful functioning of the ICC were dealt with in chapter four and include disputes between the ICC and national courts as to which has the right to institute judicial proceeding. A further problem may be the non-judicial and potentially partisan influence of political bodies such as the UNSC upon the ICC. Other executive problems facing the ICC are the enforcement of its decisions and the non-compliance of states parties. Bilateral agreements between states parties and non-ratifying states concerning the extradition of people accused of crimes under the jurisdiction of the ICC may also be problematic.

It has been submitted throughout this dissertation that it is necessary to combat international crimes. The principle of complementarity (explained in chapter four) gives national states priority in the institution of judicial proceedings. It is submitted that a

good national prosecution is more advantageous than a good ICC trial because it generates national support for the international justice system. Dealing with grave matters might also encourage the national judiciary to raise its standards of performance and be more responsive to the concerns of those whose interests are traditionally ignored by the courts and excluded from the system. It has been submitted in chapter four that the ICC encourages states to prosecute international crimes and does not seek to replace the national judicial authority. States parties always have a choice as to whether or not to prosecute nationally a person suspected of having committed international crimes, even though they fall under the jurisdiction of the ICC.

The existence of the ICC may imply a surrender of some part of their sovereignty for states parties, and even for other states that co-operate to a limited extent with the ICC, if they hand over individuals accused of serious international crimes to be tried by the ICC. It is submitted that, despite the reluctance of nations to surrender any part of their national sovereignty, members of the international community are coming to realise that the ICC must have an effective system for prosecuting accused persons whose positions of power might allow them to evade punishment nationally, especially in high profile cases.

It is submitted that in order to minimise the problems facing the ICC the following solutions may be effective:

1. States parties must fulfil their obligations by providing funding to the ICC, assisting the ICC with the transfer of accused persons and co-operating with it further by providing evidence in cases before the ICC.
2. The UNSC must use its influence to persuade states to disclose required information and to enforce of the judgments of the ICC. It is submitted that the UNSC's role should be limited to two functions, namely, the referral of matters to the ICC and the offering of assistance to the ICC (upon its request) in executive measures. Any resolution which aims to exempt individuals from ICC prosecutions, such as

Resolution 1422 (2002) (see chapter 4.7.4.2), impedes the legal function of the ICC and may thwart justice. Relationships between the ICC as a judicial body and political bodies (UNSC and ASP) are sensitive because it is important that the judicial chambers of the ICC are seen as independent of any political bodies. The ICC must also be careful to distance itself from political rivalries.

3. Continued support for the ICC from individuals, organisations and states is necessary in order to enhance its performance. It is very important that confidence in the ICC be maintained.
4. Any bilateral agreements that seek to limit the jurisdiction of the ICC and prioritise the requests of non-ratifying states to extradite individuals accused of serious international crimes rather than surrender them to the ICC are a threat to international judicial proceedings. States parties must refrain from signing the above-mentioned agreements.
5. Anomalies by which non-ratifying states are answerable to the ICC in circumstances in which states parties are not (see chapter 3.1.4) should be removed, preferably by the states parties abandoning their present 'opt-out' clause.

5.3 Recommendations

It is submitted that the following proceedings and enactments are likely to improve the functioning of the ICC.

1. In order to arrive at a definition of the crime of aggression in the future, the specific acts enumerated in the 1974 definition as constituting this crime should be retained as the basis for defining it under the Rome Statute. This definition will be clearer and less controversial than an illustrative list of examples of aggression, and therefore more acceptable for inclusion in the Rome Statute. The ICC must decide *priopro*

moto when acts of aggression occur without such a case being referred by the UNSC. This suggestion addresses the necessity of amending Article 39 of the UN Charter, which declares that determining situations of aggression is a prerogative of the UNSC. The ICC only should determine the situation of aggression.

2. Special legislation, which may be prejudicial to human rights, may be introduced nationally to deal with persons accused of terrorism. To exclude the crime of terrorism from the jurisdiction of the ICC might deprive those accused of it of their rights, or put them in a situation where human rights standards are not applied. Terrorism, in principle, consists of unprovoked, but politically motivated attacks on civilians. Examples are kidnapping of hostages, attacks on large buildings and random shootings; these have violence against innocent individuals as their common element and may come within the category of terrorism.
3. The ICC should, where the alleged crimes are sufficiently grave and large-scale, accept cases when national courts are unable or unwilling to prosecute those accused of international crimes. The Rome Statute should be amended to include under the jurisdiction of the ICC cases where national courts are unable to grant the accused persons the same guarantees and rights which they would receive from the ICC. Alternatively, the ICC should inform itself concerning the details of procedures and fair trials within national states, and investigate whether the rights of accused persons in detention are respected.
4. Successful ICC proceedings are likely to have an effect on national law, at least amongst the states parties. Even non-ratifying states may frame their laws in the consciousness of these internationally accepted definitions of human rights standards because the majority of member-states in the UN are parties to the Rome Statute.
5. The ICC should concern itself only with prosecuting leaders and high-ranking officials of states. The punishment of minor offenders is not necessary to achieve respect for the rule of law.

6. The ICC must grant the defence counsel more prestige. No conceivable formulation of the relationship between international and national jurisdictions will be absolutely water-tight, and diverse interpretations are likely to be offered. The prosecutor, who serves in all the cases before the ICC and is well-known to the international community, has far greater prestige than the defence counsel, who serves in a single case. Establishing a strong International Criminal Bar may give defence counsels more prestige. ICC funding should be used to subsidise the proposed International Criminal Bar at least in the early stages. Allowing the accused persons the right to choose counsel may be considered an improvement in human rights standards in international criminal procedures, and may give defence counsel more prestige. This would be at variance to the procedure at the Nuremberg Tribunals where the accused were not entitled to choose their own counsel.
7. The specific grounds on which states may request to co-operate with the ICC should be clearly specified. Justice might be better served if states, when they become parties to the Rome Statute, understand their obligation to give priority to the requests of the ICC.
8. Because nation states delegated the powers specified in the Statute to the ICC when their parliaments or equivalent bodies ratified the Rome Statute, the ICC should exercise these powers, the most vital of which are those that relate to investigations within states, extradition cases and powers to enforce verdicts.
9. A trial where the accused are *in absentia* may motivate the accused persons to appear before the ICC and defend themselves.
10. The ICC will become stronger as more states ratify the Rome Statute. Non-signatory states can sign *ad hoc* agreements with the ICC. Alternatively they can co-operate with the ICC on the basis of comity. The US is an example of an influential non-ratifying state that possesses strong enforcement measures of its own. It is willing, at

times, to play a part in the implementation of ICC judgments, for example by providing information about the whereabouts of accused persons.

Article 12 of the Rome Statute, which extends the jurisdiction of the ICC to include citizens of non-ratifying states, bolsters the concept of 'universal jurisdiction'. It is submitted that the 'universal jurisdiction' of the ICC in terms of which international criminal law is applied to the accused persons is likely to cause international law to influence national law bodies of law.

The ICC is likely to play a role in the development of international criminal law. Although it has only been operating since 2001 and it is still too early to say whether it has had any effect on the incidence of international crimes (defined in chapter three), it is submitted that because of the powers ceded to it by states parties and the visible implementation of its code within their territories, it is likely to be a deterrent force.

The ICC works as a deterrent to serious international crimes in two ways: directly when it investigates and prosecutes these crimes, and indirectly when its existence motivates states to take judicial action, since they usually prefer not to relocate cases to the ICC's judicial processes if they believe that they belong within the state.

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