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International criminal court, surrender of accused persons and transfer of criminal proceedings.

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INTERNATIONAL CRIMINAL COURT, SURRENDER OF ACCUSED
PERSONS AND TRANSFER OF CRIMINAL PROCEEDINGS

DRAGANA RADOSAVLJEVIC

A thesis submitted in partial fulfilment of
the requirements of the University of Westminster
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1969 Inter-American Convention on Human Rights

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1973 Convention on the Prevention and Suppression of Apartheid

1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes

1974 International Convention of the Suppression and Punishment of the Crime of Apartheid

1975 Additional Protocol to the 1957 European Convention on Extradition

1975 Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

1978 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

1978 Second Additional Protocol to the European Convention on Extradition

1981 African Charter on Human and People's Rights

1981 Inter-American Convention on Extradition

1982 United Nations Convention on the Law of the Sea

1984 United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

1989 Declaration of Fundamental Rights and Freedoms

1991 Commonwealth Scheme on Mutual Assistance in the Administration of Justice

1992 Inter-American Convention on Mutual Assistance in Criminal Matters

1993 Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights

1993 International Criminal Tribunal for the Former Yugoslavia Statute

1994 International Criminal Tribunal for Rwanda Statute

1994 Agreement Establishing the World Trade Organisation

1995 Convention on Simplified Extradition Procedure Between Member States of the European Union

1995 General Framework Agreement for Peace (Dayton Peace Agreement)

1996 Convention Relating to Extradition Between Member States of the European Union

1998 Rome Statute of the International Criminal Court

1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lome Peace Agreement)

1999 UNMIK Reg. 1999/1 (On the Authority of the Interim Administration in Kosovo)

1999 UNMIK Reg.1999/24 (On the Law Applicable in Kosovo)

1999 UNMIK Reg. 1999/26 (On the extension of periods of pre-trial detention)

1999 UNSC Res.1244 (1999) (establishing UNMIK)

1999 UNSC Res.1272 (1999) (establishing UNTAET)

2000 Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union

2000 Memorandum of Understanding between the Republic of Indonesia and UNTAET

2000 United Nations Convention Against Transnational Organised Crime

2000 UNMIK Reg.2000/14 (On detention pending extradition)

2000 UNTAET Reg.2000/15 (On the Establishment of Panels with Executive Jurisdiction Over Serious Criminal Offences)

2000 UNMIK Reg.2000/57 (On the appointment of local judges and prosecutors)

2000 Vienna Declaration on Crime and Justice

2001 U.N. Convention Against Transnational Organised Crime

2001 Protocol to the Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union

2001 Treaty of Nice

2001 UNMIK Reg.2001/1 (On the prohibition of trials *in absentia* for serious violations of international humanitarian law)

2001 UNMIK Reg.2001/28 (On the rights of persons arrested by law enforcement authorities)

2002 Directive on Serious Crimes (2002/99) on Amending the Criteria for Determining whether Offences Appropriately Dealt with in a Community Reconciliation Process (18 May 2002)

2002 European Council Framework Decision (European Arrest Warrant) (13 June 2002)

2002 Memorandum of Understanding between UNMIK and INTERPOL (17 Dec. 2002)

2002 Treaty Between the United Nations and Sierra Leone Establishing a Special Court for Sierra Leone

2002 UNSC Res.1410 (2002) (establishing UNMISSET)

2003 Agreement between the UN and the Government of Cambodia over the Law on the Establishment of the Extraordinary Chambers

2003 UNGA Res. 57/225 (On the Situation of Human Rights in Cambodia) (26 Feb.2003)

2003 UNGA Res. 57/22B (On Khmer Rouge Trials) (22 May 2003)

2003 United Nations-Cambodia Agreement

Table of Abbreviations

A

AI	Amnesty International
AMCHR	American Convention on Human Rights 1978
AMICC	American Non-Governmental Organizations Coalition for the International Criminal Court
ASIL	American Society of International Law
ASPA	American Servicemembers' Protection Act 2002

B

BIA	bilateral immunity agreement
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C

CDF	Civil Defence Force
CDPC	European Committee in Crime Problems of the Council of Europe
CJICA	Criminal Justice (International Co-operation) Act 1990
CPIA	Criminal Procedure and Investigations Act 1996

E

ECHR	European Court of Human Rights
ECJ	European Court of Justice
ETS	European Treaty Series
EU	European Union
EUGRZ	Europaishe Grundrechte-Zeitschrift

F

FAR	Governmental Rwandan Forces
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia

H

HRW	Human Rights Watch
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I

ICC	International Criminal Court
ICCLR	International Centre for Criminal Law Reform and Criminal Justice Policy
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International criminal law
ICPC	International Criminal Police Commission

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States
ICTY	International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
ILM	International legal materials
J	
JHA	Justice and Home Affairs
K	
KLA	Kosovo Liberation Army
KWECC	Kosovo War and Ethnic Crimes Court
L	
LSMS	Kosovo Legal Systems Monitoring Section
M	
MINUGUA	United Nations Verification Mission in Guatemala
MLAT	mutual legal assistance treaties
N	
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
O	
OAS	Organisation of American States
OAU	Organisation for African Unity
OSCE	Organisation for Security and Co-operation in Europe
OTP	Office of the Prosecutor
P	
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee
R	
RPE	Rules of Procedure and Evidence
RUF	Revolutionary United Front
S	
SCSL	Special Court for Sierra Leone
SCWC	Special Court for War Crimes

SFOR	NATO-led Stabilisation Force
SFRY	Socialist Federal Republic of Yugoslavia
SLA	Sierra Leonian Army
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
T	
TRC	Truth and Reconciliation Commission
U	
UCMJ	Uniform Code of Military Justice
UN	United Nations
UNAMSIL	United Nations Assistance Mission for Sierra Leone
UNCLOS	United Nations Law of the Sea Convention 1982
UNMBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMISSET	United Nations Mission of Support in East Timor
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
W	
WTO	World Trade Organisation

Abstract

The present research focuses on analysing the judicial uncertainty in the implementation, interpretation and application of the ICC Statute both in international and national arenas. In this context examined are the parameters of state sovereignty as the main source of theoretical as well as practical contemporary debate on the relationship between *lex specialis* character of ICC norms and domestic legal regimes. Varying and frequently inconsistent degrees of international and national compliance with international criminal law due to the multiplicity of legal regimes are scrutinised by analysing the relationship between national and ICC measures with regard to aspects of pre-trial proceedings, such as surrender of accused persons and transfer of criminal proceedings, rights of suspects and defendants as well as some aspects of sentencing in so far as they affect the *prima facie* jurisdiction.

One of the main objectives of the ICC Treaty is to advance the unification of international criminal law. Whilst it may be contended that this body of law is acquiring a great degree of specificity and uniformity in content through the Statute, both its development and importantly its scope are fundamentally reliant on interpretation and application at national level; it is here that international criminal law is fragmented. Consequently, its understanding and enforcement are inconsistent.

The ICC Statute presents issues that are the result of the fusion of common and civil law traditions as well as a blend of diverse criminal laws within each one of those systems. Distinguishing between Anglo-American and Continental European criminal procedures has become increasingly complex and transgressed. Such blend of legal traditions, whilst it must ensure that justice is rendered with equality, fairness and effectiveness, generates nevertheless ever-increasing lack of legal orientation. The aim of this pastiche is therefore to establish an international, uniform standard across contemporary justice

systems. However, the application of the ICC provisions will depend on particular method of implementation of the Rome Treaty into domestic law, local political situation, the nature of a conflict (armed conflict is where most of the ICC crimes are likely to occur), any peace process involving regional amnesties and pardons and domestic policies and rules on sentencing.

The general perception of the ICC and the law it represents is that of a powerful, centralised regime. Contrary to this belief, a proposition is made here for a less hierarchical international criminal justice that is fundamentally reliant upon national courts and law enforcement agencies. Such a proposition emphasises the need for the ICC involvement at a local level. In this context, the thesis sets out to clarify the ICC law and related Statute enforcement issues.

The law stated is correct as of 15th February 2006.

Introduction

The present study focuses on analysing the judicial uncertainty in implementation, interpretation and application of international criminal law as codified by the ICC Treaty. I begin my examination by assessing the scope of state sovereignty as the main source of theoretical as well as practical contemporary debate on the duties to comply in good faith with the ICC Treaty as well as to respect fundamental pre-trial procedural rights of suspects and accused persons. By establishing the sui generis normative nature of the Court, under scrutiny here is the relationship between national and international courts in particular with a view of determining the varying degrees of observance of pre-trial procedural laws. The aim of my work is to evaluate the contemporary literature on the ICC, which purports a uniform, even universal normative ICC system, therefore a supranational standard of international criminal justice. In this context I aim to provide an insight into both monist and dualist legal reasoning in defining the hierarchical relationship between international and national law against claims that such relationship is well defined and rigid¹.

The parameters of legal structures within which perpetrators of most serious international crimes are surrendered to the International Criminal Court and the legal frameworks within which the rights of such individuals are best protected are not sufficiently precise in international law. The ICC Statute tentatively attempts to reconcile the fragmented approach to international and national enforcement schemes. The study tests the supposition which visualises the ICC Statute as one of the most important tools in the harmonisation process between civil and common law traditions, the adversarial and inquisitorial criminal justice orders. The supposition is founded on the fact that the ratification and correct implementation of the Rome Treaty has led to adequate legislative and policy amendments in the domestic legal orders of numerous States Parties. Moreover, the validation of the International

¹E.g., Broomhall B., *“International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford Monographs in International Law)”* (2004).

Criminal Court's surrender and deferral mechanisms is analysed here against the ICC Statute's procedural safeguards vis-à-vis national ones. These two aspects of the ICC regime produce a lack of clarity and uniformity of legal standards. Furthermore, the present research questions claims of universality of international criminal law and certain human rights; it investigates causes and effects of the fragmentation and regionalism of these bodies of law.

The Court's jurisdiction may not be triggered automatically nor be imposed on States by virtue of accession to the Statute alone. From this perspective, the International Criminal Court has features of an arbitration tribunal, operating only according to contingent political will. Chapter 1 presents the overall context of the thesis and qualifies the assertion of a fragmented application of the ICC Statute which is analysed both through the scrutiny of the text of the Statute, therefore its lacunae, and by the investigation of the outcomes of the multiplicity of implementation methods which result in and reflect the above said fragmentation. Rights of States vis-à-vis the ICC within the scope of complementarity are also examined here. Chapters 2 and 3 aim at providing examples, therefore substantiating the premises of Chapter 1 in particular with a view to revealing how the non-uniformity of the application of the ICC law affects the rights of the accused persons in pre-trial proceedings. Here, mostly the judicial sovereignty of States is examined in light of diverging ICC Statute implementation models, the survival of traditional extradition defences such as *ne bis in idem* in the ICC surrender regime, the right of States to prioritise domestic prosecutions or competing jurisdictional requests, the survival of amnesties and the right of States to enter into treaties which effectively defeat the object and purpose of the Rome Treaty. Chapter 4 specifically questions the position and therefore the validity of Article 98 (2) immunity agreements in the context of the *sui generis* nature of the ICC. The examination of the immunity agreements serves to further establish the inequalities in the application and interpretation of the ICC Statute. The thesis studies the ICC system in a wider, nation-orientated context in order to outline the issues inherent in validating the ICC regime as a centralized accountability mechanism and proposes the decentralization of the same; as such it may develop into an effective apparatus for assisting nations in advancing the rule

of law, emancipating it to international standards. In consideration of the fact that the jurisprudence of the Court has not evolved significantly since the undertaking of the present study, certain aspects of the thesis are necessarily speculative but they seek to define criteria against which the assessment of the ICC is to be based. The objective of Chapters 1 and 4 is to scrutinise the ICC as a part of wider, complex legal and political environment where interests of States, individuals and victims compete. Chapters 2 and 3 on the one hand are concerned with revealing how the consequences of the binary and jurisdictionally imbalanced ICC legal regime reflect on substantial law such as the rights of suspects and accused persons. Rights granted by the ICC Statute as well as those of States within the realm of the surrender model are examined here. Whereas the ICC Treaty arguably erodes national judicial sovereignty by imposing international duties and rights more directly to the citizens of nations in their individual capacity, rather than governments, varying implementation methods will define, broaden or limit the scope and legitimacy of the ICC surrender model. This is illustrated for instance, from observing the extent to which traditional extradition defences have survived the ICC surrender model as well as the existence and enforcement of regional amnesties. In turn, this is strongly indicative not only of the binary nature of the interpretation and application of the ICC Statute, but also of the subsequent disparity in availability of remedies to suspects and accused persons whose rights have been infringed.

Problems of ICC Treaty interpretation go beyond the mere Treaty language; notwithstanding the principle of *pacta sunt servanda* (i.e. treaties are binding on the Parties and must be performed in good faith) these lie in the contradiction between the legal principle through which it is possible to arrive at an interpretation and reconciliation with constitutionalism. In fact, international treaties may be considered to be contracts, legislation and even constitutions. One of the main characteristics of the parliamentary model, such as the British model, is its non-recognition of any so-called 'higher law' that could interrupt the validity of an Act of Parliament. Pursuant to the parliamentary model, even if a court finds legislation defeating the object and purpose of the ICC Statute or even being in clear violation of it, such finding

will not affect the validity or the enforcement of those provisions. Generally, in the parliamentary model courts do not examine whether legislation is or is not compatible with rules of international law as an Act of Parliament cannot be *ultra vires*, beyond Parliament's jurisdiction. From this perspective immunity agreements, or ICC Article 98 (2) agreements, cannot be deemed void ab initio, or be construed as being incompatible with the Rome Statute. In the constitutional model on the other hand, a parliament cannot be 'sovereign' because its legislation must be compatible with the 'higher law'. Importantly, this model affords greater flexibility as far as judicial bodies and not parliaments assess the compatibility of national law with international norms. If a court reaches the conclusion that a national norm is incompatible with the international one, it will not apply that norm.

Developing themes around state culpability pursuant to the Rome Treaty becomes challenging as the actual impact of the association between Security Council action and the operation of the Court is political in nature and consequently, highly ambiguous. From this perspective, it becomes hard to persuade a country to become a party to the ICC Statute, a Statute that may apply to all States except to the permanent members of the Security Council. Consequently, complementarity, or primacy of national judicial authority, must be respected unreservedly. An examination of the Security Council referral of the situation in Sudan shows how in practice complementarity is bypassed. Obviously, the persistent weakness and obstruction of the rule of law in certain parts of the world demand continuous international attention and monitoring. However, whereas the failings of the rule of law through its obstruction may be restored through ICC intervention or interference, the weaknesses of the rule of law, which is entrenched in a political dimension and therefore a result of it, should only be adequately dealt with by the Security Council and not through ICC action.

The ICC Statute surrender model introduces independent rights for the individual as a subject of a transfer order prior to or after actual surrender. The enforcement measures endorsed by the ICC are not as coercive in nature as those of the ICTY/ICTR, but instead encompass a greater margin of

appreciation for human rights. Human rights discussed here relate to those relevant both to pre-trial and, to a lesser extent, trial proceedings as individuals should have the right to be tried within a jurisdiction that affords them optimum procedural safeguards. In order to establish the legitimacy of the ICC surrender model, which is different in nature and scope with those of the ICTY and ICTR, compliance with transfer orders of the ICC demands full and unreserved observance and enforcement of fundamental rights. Some of the rights concern the prohibition of prolonged arbitrary detention, rights to a fair trial, to proportionate sentencing, as well as the general interests of the accused persons and interests of criminal justice in acceptance of illegally obtained persons and/or evidence. Legal scrutiny is a fundamental component in legitimising the work of the ICC, although the Court's relationship with the Security Council questions the adequacy of the Statute's review mechanism. In this theoretical context, the legal status of the ICC is evaluated and the relevant treaty regulatory frameworks analysed.

The experience of the ICTY underscores great obstacles of investigating crimes from The Hague. Notwithstanding the ICC Prosecutor's partial powers to conduct investigations on a territory of a State, the geographical distance between the ICC investigative teams and witnesses will render the assessing of what is relevant material, evidence or testimony especially difficult. Moreover, the elementary importance of interpreting is often neglected; under international jurisdiction, witness statements will be recorded in English, only to be translated into French or other relevant languages, by different persons each time and therefore increasing the gap between the initial witness testimony and the final product².

The authority of international criminal law may only benefit from a synchronized approach to the nature and extent of applications for judicial reviews at a national level. Such trans-national convergence represents a unique opportunity to legitimise a uniform and long lasting authority, therefore application of international criminal law as codified by the Rome Treaty. The

² Pantz S., "*From Bosnia to Kosovo and to Bosnia Again*" *Journal of International Criminal Justice*, Vol.2, No.2 (2004) p.459.

institutional need for independent judicial review by national organs in executing surrender orders is necessary in facilitating transfer to the detriment of upholding the Court's unsatisfactory review process. Such conclusion seems in line with the principles of complementarity. Consequently, and in the interests of consistently promoting advanced domestic application of international law, national prosecutions for international crimes will enjoy greater integrity and legitimacy. As the following chapters propose, national investigations and prosecutions, albeit more infrequent than international ones and less compliant with higher standards of international criminal justice, are crucial in developing themes around individual and state culpabilities. In turn, the effects of this serve a twofold purpose. The first one is to rebuild, with international monitoring and assistance, national accountability or judicial institutions that, with a long lasting effect, promote deterrence. The present thesis questions in several parts the boundaries of the ICC Statute premise that common bonds unite all people and that their cultures are pieced in a shared heritage. Such presumption neglects to respect the nature of divergences among nations created through collateralism; such disregard as a result, neglects the need to find the root causes to conflicts or obstructions of law in general and ultimately provide adequate remedies. The root causes are customarily political and socio-economic 'emergencies'. As such, they frequently invite a 'pragmatism' that departs from principled respect of human rights and international criminal law. From this viewpoint, complementarity is a reflection and encouragement of operational collateralism that, in practice, diminishes the uniformity of the ICC law both in interpretation and application. This collateralism would appear to be justified for instance, by the exclusion of universal jurisdiction in the Rome Statute, its non-express prohibition of amnesties and pardons for perpetrators of the most heinous crimes of human kind and the extensive number of Article 98 (2) immunity agreements. The marginal treatment of these 'obstructions' to the effective enforcement of the ICC Statute necessitates the Court's constant involvement in national proceedings through training and monitoring which should, over time, result in institutional manipulation, through which the process of harmonisation of international criminal substantive and procedural law may be facilitated and advanced. What is needed therefore is the ongoing development

of the law of the ICC Statute. That this is conceivable and achievable in practice is determinable through the experience of mixed tribunals for example.

The study aims at contributing to the scholarship in the field of international criminal law and is a comprehensive legislative review; it offers a pragmatic way of looking at and utilising the ICC mechanisms. The object of the present study is also to structure these concepts into a more comprehensive system of surrender and deferral that sees the emancipation of municipal international criminal law. Instrumental in the vision of synchronizing the practices of States in successfully executing the ICC Statute is a decentralized operability of the Court. The study is an important and timely endeavour to underline the uncertainty of the ICC Statute both in terms of its hierarchy in contemporary international criminal law both with regard to States and the Security Council and treaty law and with particular reference to substantive elements affecting the transfer of criminal proceedings and surrender of accused persons³. By outlining the vagueness and ambiguities in the enforcement of the ICC provisions in this context, the study furthermore emphasises the need to ‘nationalise’ the ICC Statute through international participation and monitoring.

Methodology

The present thesis scrutinises in the first place substantive elements of the ICC Statute with respect to pre-trial proceedings, notably the transfer of criminal proceedings and surrender of accused persons. It then compares these with national relevant provisions in order to determine how, in a jurisdictional claim, the rights of individuals may be best protected. The thesis describes and

³ In view of the fact for instance that “*the ICC penalty regime reveals lack of substance and the underdeveloped and conflicting penal justifications and the irrationality of praxis*” in Henham R., “Some issues for sentencing in the International Criminal Court”, *International Comparative Law Quarterly*, 52, p.82.

assesses the nature of the relationship between the Court and States Parties within the realms of international treaty law with the aim of illustrating varying and frequently inconsistent degrees of international and national compliance with international criminal law as stipulated by the ICC Statute, due to the multiplicity of legal regimes. It is argued in fact that the ICC Statute reflects a *sui generis* legal regime. From this theoretical perspective, the research progresses towards analysing the judicial uncertainty in implementing, interpreting and applying international criminal law and relevant human rights instruments⁴. Through the examination of the full extent of the principle of complementarity and immunity agreements, I examine the scope of state sovereignty as the main source of theoretical as well as practical debate on parameters of duties imposed on States to enforce the Rome Treaty. Through the evaluation of the case law emanating from other international criminal courts, tribunals and panels, human rights courts as well as local courts, the thesis aims to reveal the impact such jurisdictional contests have on the rights of individuals and the effects of further advancement of international criminal law through *res judicata*. This evaluation also purports to indicate the effects of the imbalance of power between the Court and States Parties, illustrated for instance through the decisions of the Security Council on the future uniformity and potential universality of the ICC Statute. The aim of the present investigation is to validate the ICC legal system and subsequently learn whether a global, uniform standard of international criminal justice is attainable. By depicting the hierarchical relationship between international and national legal frameworks in international criminal law a conclusion is reached that uniformity of the ICC law is, at the present time, hindered by collaretalism and regionalism derived from and maintained by political economies which are not, *per se*, the subject of analysis in the thesis.

Planning and designing the research project consisted of three main phases. The first one consisted of conceptualisation and preliminary consultations. In this phase the research strategy was planned and developed and the

⁴ E.g., Shany Y., “*The Competing Jurisdictions of International Criminal Courts and Tribunals*”, 2003, questioning the consistency of decisions rendered by different courts and tribunals pertaining to similar legal questions but arising out of different disputes, at 79.

international bibliography on the ICC and relevant legislations revised and updated. A strategy was developed according to (a) the purpose and nature of the research project; (b) personal existing knowledge of the subject and (c) deadline for completion. In the second phase data was collected, translated where appropriate, selected, filtered and categorised; in the final, third stage, descriptions and analysis were conducted and conclusions drawn. These steps were not entirely linear for it was necessary to repeat certain steps or approach them from a different perspective as the understanding of legal issues grew.

Developing the thesis, thereby identifying arguments, entailed first of all acquainting myself with both primary and secondary sources on the topic. The initial thinking time was crucial in locating determinative facts and legal issues. Once identified, they were given priority at the beginning of the research process. The original research plan was periodically revised in response to feedback from the research results and/or new developing factors.

Comparative methodology was designated for the purposes of the research and is validated here as being a method of legal science that plays a crucial role in the interpretation of legal norms pertaining to various legal systems. However, similarities and differences between the laws of two or more countries are not the subject of comparison. Rather, the reference to a large number of countries (States Parties) is to be understood collectively as one variable of the comparison, the other being the ICC legal framework. The aim of the present study is not to compare one or more States per se, but instead only one aspect of the variable represented by the ICC States Parties and to a lesser extent States Non-Parties. A further comparative study is conducted between the jurisprudence concerning relevant legal factors of the recent ad hoc tribunals (ICTY/ICTR), international panels, mixed tribunals as well as the European Court of Human Rights judgments and the ICC Statute. The latter form of comparison had the objective of estimating the effectiveness of the ICC decision-making structure as well as determining the impact of ICC res judicata on national proceedings. The large number of countries described and referred to is intended to provide a comprehensive picture of degrees of (non) uniformity and moderate success of the ICC Statute within the realms of local

jurisprudence. The particular selection of the countries under scrutiny seeks to inquire the process by which both common and civil law traditions as well as certain political socio/economic and cultural ideologies advance, alter or otherwise shape ICC law. The systematic examination, both doctrinally and empirically of the methods of implementation and interpretation of the ICC Statute across State Parties purports to investigate to what extent common interests of international criminal justice survive the local legal and political reasoning. The designation of the comparative method provided ample latitude in enabling a study of legal systems, in a collective sense, on a large scale, which was necessary to achieve representation amongst the States Parties. Importantly, the comparative method enabled the identification as to the forms of comparable legal components across jurisdictions as well as revealed shared practices by highlighting the dynamics of process in the application of the ICC Statute.

Systematic comparisons were used to establish correlations and ultimately causal connections and supposed ‘laws’ on one hand and on the other to rigorously test propositions of universality and uniformity in application of the ICC Statute as well as to assess the value and reach of the measures of compellability against unwilling, unable, uncooperative, malevolent or isolationist States.

The data derived through the comparative method consisted of both primary and secondary sources. Secondary sources were largely employed during the initial research phase in order to detect primary sources around which arguments were later developed. Initially, secondary materials such as leading existing literature on the ICC and international criminal law in general, attributable predominantly to judges, lawyers, other practitioners and legal scholars had been reviewed and examined. This process revealed that such literature places the ICC as “*the central pillar in the world community for upholding fundamental dictates of humanity*”⁵. The majority of scholarly

⁵ Cassese A., “*From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*” in 1 *The Rome Statute of the International Criminal Court: A Commentary* 18 (Cassese A. et al eds. 2002).

writings on the ICC also envisage the ICC at the heart of “*global efforts to develop and enforce human rights and humanitarian law*”⁶. It anticipates that the Court is to “*clarify existing ambiguities in the law*” and to set “*highest international standards*”⁷ of due process as well as “*advance international criminal law...thus contribute to the globalisation of criminal justice*”⁸. Moreover, the Court’s supporters believe that the ICC will put an end to impunity for grave human rights violations and act as a deterrent for war crimes around the world⁹. The thesis does not dispute the undeniable need for a homogeneous standard of accountability on a global plane for the most serious of international crimes. It does however challenge the universality assertion and by going beyond leading writings on the subject it suggests that consistency and uniformity are hampered by various factors such as judicial sovereignty, the varying implementation methods which frequently strive to accommodate constitutional and parliamentary models, and the right of States to enter into treaties that defeat the object and purpose of the Rome Treaty. By examining the legal principles which govern transfer of criminal proceedings and surrender of accused persons, the thesis furthermore assesses the limits of the principally common law approach to serious international crimes and its compatibility with other judicial traditions and conditions across the globe. Predominantly, the leading existing literature is ICC-centred and assumes its legal framework as the principal and optimal mechanism for international criminal law enforcement and accountability by endorsing the highest standards of international criminal justice. This is reflected in assertions such as that the establishment of the Court represents a promise of “*universal justice*”¹⁰. Contemporary literature also advances the progression of the monist doctrine of international treaty law, which presupposes the supremacy of

⁶ Bassiouni M. C., “*The Time Has Come for an International Criminal Court*” 1 IND. INT’L & COMP. REV. 1 (1991); Sadat L.N. and Cardens S.R., “*The New International Criminal Court: An Uneasy Revolution*” 88 GEO. L. J. 381 (2000).

⁷ For example, Pejic J., “*Creating a Permanent International Court: The Obstacles to Independence and Effectiveness*”, 29 COLUM. HUM. RTS. L. REV. (1998), pp.291, 294.

⁸ Treiffter O., “*Domesticos de ratificación e implementación*” in La Nueva Justicia Penal Supranacional: Desarrollos Post-Roma 13, 44, 45 (Kai Ambos ed. 2002).

⁹ Politi M., in “*The Rome Statute of the International Criminal Court: A Challenge to Impunity*”, (Politi M. and Nesi G. eds 2001), 8-15.

¹⁰ U.N. Secretary General Kofi Annan, Press release, Statement of Secretary General Kofi Annan before the International Bar Association in New York (June 12, 1997), U.N. Doc. SG/SM/6257 (1997).

international law “giving little weight to the proper or applicable law notions based on the doctrine of autonomy of the will of the parties”¹¹. Essays on the general scope and effectiveness of the ICC Statute are typically confined to comparisons with other international criminal courts and tribunals, with the intention of examining legal constructs of the Statute with a view of studying proceedings to be conducted before the Court¹². In contrast, the present study is nation-orientated and it recommends that a long term, uniform and consistent criterion of international criminal justice may only be aimed at national enhancement and advancement of international criminal legal doctrines and standards. The assumed universality¹³, whilst in the interest of the international community, is at the present unattainable and largely dismissed. The thesis therefore stresses the need for the nationalisation of international law. Instrumental in this vision is the dissemination of the highest standards of international justice through an ICC involvement at a local level, which in turn shall lead to gradual, local institutional reform¹⁴. In this way precision of international criminal law and consistency in the employment of the ICC Statute would be achievable with the aim of warranting greater protection of individual rights during pre-trial proceedings. This conclusion was arrived at through the employment and rigorous study of (primary) qualitative sources. These consisted of the travaux preparatoire of the Rome Treaty, the study of which was aimed at disclosing the legal reasoning, opinions, intentions and reservations of all the States participating at the 1998 Rome Conference. This in turn led to the close following up of national developments concerning the ratification of the ICC Statute as well as

¹¹ Maniruzzman A. F. M., “State Contracts in Contemporary International Law: Monist Versus Dualist Controversies”, European Journal of International Law, Vol.12, No. 2 (2001), pp.309-329.

¹² See e.g. Schabas W. A., “An Introduction to the International Criminal Court” (2004); Safferling C., “Towards an International Criminal Procedure” (2003), p.1: “The Rome Statute provides a workable framework and basis to be filled in and built on by legislative acts, for example the Rules of Procedure and Evidence or judicial acts, that is case-law...”.

¹³ Reydam L., “Universal Jurisdiction: International and Municipal Legal Perspectives” (2003), p.40: “The unilateral limited universality principle also raises the question of compatibility with the International Criminal Court...As first conceived, this notion of the universality principle was a substitute for a non-existing international criminal court, an idealistic solution to the incomplete structure of the international legal order. Now that the ICC is established, it would seem illogical to hold on to it and attribute similar if not broader, powers to a single State than to a treaty-based Court”.

¹⁴ See e.g., Romano C.P.R. et al (eds.), “Internationalized Criminal Court: Sierral Leone, East Timor, Kosovo and Cambodia” (2004).

introduction and/or amendments of other relevant legislation and constitutions. The information gathered derived primarily from actual legislative acts and bills, minutes of parliamentary debates, which provided an in-depth insight into the factual intentions and importance behind the laws. Both legislations and their travaux preparatoire were obtained in their original form and where possible, in the English language. I have personally translated numerous original texts and my fluency in relevant languages (Italian, Spanish and Serbo-Croat) afforded high standards of accuracy.

Several semi-structured interviews were also conducted during the course of the second phase of research with practitioners, academics, politicians and expert witnesses. Interviews were normally based on a standard set of open-ended questions formulated and guided to a certain extent by interpretations of questions asked, local protocol and such topics which those interviewed considered important to an understanding of the subject matter in question. Although the information gathered represents a primary, independent, original source of information, it embodied a collection of diverging judgments on different issues and could not be employed to advance generalised and representative argumentation. In consideration of reliability and validity concerns of primary, qualitative sources, which are normally confined to the study of small components, the information gained through interviews was instead utilised to provide focus to the research and crucially, to locate other primary, sometimes obscure, materials such as for example the original texts of U.S. immunity agreements.

For the purpose of obtaining greater objectiveness and consistency, amply employed were secondary qualitative and quantitative sources which included government reports, leading texts, case law, statutes, judicial and other relevant journals and reviews. Correctly assessing secondary sources was of crucial importance in consideration of four important factors: (1) authenticity referring to the question of how genuine a document is. Wherever possible, every effort had been made to cross-reference secondary materials by identifying the original source; (2) credibility, the issue relating to the amount of distortion in a document concerning either accuracy or sincerity. For

instance, it was always necessary to bear in mind that any report will reflect a view of those responsible for producing it and it was therefore essential to conceptualise the information gathered; (3) representativeness as the natural consequence of the previous criteria and (4) the intended meaning which again involved cross-referencing information in order to objectively interpret the information and accordingly attribute to it the appropriate weight. Systematic and rigorous evaluation of qualitative and quantitative secondary sources led to the conception of primary data.

Chapter 1

ICC Treaty, Implementation Methods and Implementation Effects

1.1 Introduction

One of the main objectives of the Rome Treaty is to advance the unification of international criminal law. Whilst it may be argued that this body of law is becoming more specific and uniform in content, its development remains reliant on interpretation and application at national level where it remains fragmented. Consequently, its understanding and enforcement are inconsistent. The International Criminal Court (ICC) Statute presents issues that are a result of the fusion of common and civil law traditions as well as the blend of diverse criminal laws within each one of those systems. Distinguishing between Anglo-American and Continental European criminal procedures has become increasingly complex and transgressed. Such blend of legal traditions, whilst it may ensure that justice is rendered equally, fairly and effectively, generates nevertheless ever-increasing lack of legal orientation. The aim of this pastiche is also to establish an international and uniform standard across contemporary justice systems. Whereas the application of international criminal law in the International Criminal Court will be, or will attempt to be, as consistent as possible, the application of the same provisions will vary across the globe. The application of ICC procedures will depend for example on a particular method of implementation of the Rome Treaty into domestic law, domestic politics, the nature of a conflict, any peace process involving regional amnesties and pardons, and domestic rules on sentencing. Various states still feel that the way in which the ICC will define, develop and apply international criminal law is still unpredictable. The ICC will have to take account, to a great degree, of the law as stated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Decisions and judgments rendered by these tribunals, when looked at closely, are not infrequently applied on case-by-case basis, and are at times overruled; therefore, some areas of law have not been conclusively or satisfactorily established. Other states, most notably the United States, feel that a transitional period is important to evaluate the performance of the Court before deferring to it any of the sovereign judicial powers. As to the principle of

complementarity, states have not understood it unvaryingly. Some countries feel that under this principle, they have retained their sovereignty whereas others have explicitly declared, even in their amended constitutions, that international law and international obligations and duties emanating from the ICC Statute¹, take precedence over national laws and limit consequently, their jurisdictional sovereignty. Important here will be the discussion on what status the ICC provisions have on a domestic level and how will this status influence the application of international criminal law. With regard to the proposition that the ICC may bind third states, we shall also discuss the relevance of the law of treaties. Moreover, mention will be made of the law on subsequent treaties, namely bilateral (or Article 98) immunity agreements. Such agreements seem to be in contradiction with the Rome Treaty and therefore in contradiction with a state's international obligations to perform the Treaty.

Also, the general perception of the ICC is that of a centralized and uniform regime. Contrary to that belief, a proposition is made here for a less hierarchical international criminal justice system that is fundamentally reliant upon national governments and national courts in prosecuting the core crimes. It emphasises the need for ICC involvement at the national level. A key strategy in this vision is the participation of the ICC in the work of national courts and regional mixed tribunals.

1.2 General overview of the ICC system

The proposition that the enforcement of international criminal law under the ICC Statute is fragmented as its understanding and application will depend on national political, legal, social traditions is based on the premise that the ICC lacks 'political capital'² to achieve its proposed goals. At the time of implementing the Rome Treaty, Norway for example stated that it was “*fully*

¹ Rome Statute of the International Criminal Court (1998), UN. Doc. A/CONF.183/9.

² Iontcheva J., “*Nationalizing International Criminal Law*” 2004, Conference Paper, 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, Canada, p.3.

aware that the Court's actual efficiency and effect in practice will depend on the adherence of the various states to the Statute and on their political will to support the Court"³. Similarly, Brazil stated: "the success of the ICC depends upon the continuing support it receives from its States parties and from international community as a whole"⁴. In Africa, where the ICC Prosecutor officially initiated criminal investigations into the situations in the Democratic Republic of Congo and northern Uganda, 11 of the 26 African states that are parties to the ICC had not made any payment toward their assessed share of the ICC's budget for 2002, 2003 and 2004⁵. Some of these states could clear their arrears for all three years with a single payment of less than 3,000 Euros. Illustrative of the qualified support for the ICC⁶ is also the general lack of support from the United States that has led to substantial limitations on the Court's powers⁷, and numerous compromises and restrictions in the final wording of the ICC Statute. Pinpointing lacunae in the ICC system relates here mainly to:

- a) Non-surrender agreements/Art. 98 (2) agreements⁸. As of 13 July 2004, of 139 signatories to the Rome Treaty, of which 98 States Parties, 92 bilateral agreements have been entered into⁹. Thirty-eight ICC States Parties have signed and/or ratified these agreements¹⁰. The Irish Minister of Foreign Affairs

³ Transcript of the debate in the Plenary of the Storting (The Norwegian Parliament) on 27 January 2000 (unofficial translation) provided by the Council of Europe, "The Implications for Council of Europe Member States of the Rome Statute of the International Criminal Court-Norway", 18 October 2001, Consult/ICC (2001) 42, p.4.

⁴ Statement by Ms Luiza Ribeiro Viotti, Mission of Brazil to the United Nations, Security Council Public Meeting "on the proposed renewal of the provisions of Security Council resolution 1422 (2002), 12 June 2003.

⁵ Speech of Stompor J., "Africa, Human Rights, and International Criminal Court: A 21st Century Testing Ground", American Branch of the International Law Association, 16 October 2004.

⁶ The Rome Statute of the ICC was adopted by a vote of 120-to-7, with twenty-one countries abstaining, see Sadat and Carden, "The New International Criminal Court: An Uneasy Revolution", 88 Georgetown Law Journal (2000) at 384.

⁷ See Goldsmith J., "The Self-Defeating International Criminal Court", 70 University of Chicago Law Review 89 (2003), pp.89-104.

⁸ Immunity Agreements will be fully examined in Chapter 4.

⁹ Press Statement by Boucher R., U.S. State Department, upon Eritrea's signing of the Article 98 Agreement, 13 July 2004, at <http://www.state.gov/r/pa/prs/ps/2004/34347.htm>

¹⁰ These are: Albania, Bosnia-Herzegovina, Georgia, Macedonia FRY, Romania, Tajikistan, Botswana, Burkina Faso, Burundi, Democratic Republic of Congo, Congo-Brazzaville, Djibouti, Gabon, Gambia, Ghana, Guinea, Liberia, Madagascar, Malawi, Mauritius, Nigeria, Senegal, Sierra Leone, Uganda, Zambia, Antigua and Barbuda, Belize, Bolivia, Colombia,

noted in fact that his government saw “*no prohibition within the Rome Statute itself to the adoption of certain types of bilateral agreements under Article 98 (2)*”¹¹.

b) Amnesties and pardons¹². State Parties have undoubtedly conferred some of their penal powers to the ICC but they have also refused to ‘*relinquish sovereign prerogatives in administering criminal justice*’¹³. Importantly, the Statute lacks provisions on amnesties, pardons, parole, and sentence commutations¹⁴. During the Rome Conference in fact, many delegations maintained that “*the Statute should not permit the Court to intercede in the administrative (parole) or political decision-making process (pardons, amnesties) of a State*”¹⁵. Recently, the Chief of Cabinet and Head of the Jurisdiction, Complementarity and Cooperation Division¹⁶, ICC Office of the Prosecutor, responded to a request to assess the ICC practicality of an amnesty which was promised to rebels in Uganda, by stating that “*in the case of Uganda, as with the Democratic Republic of Congo, we have to look at the peace process and make sure that our investigations are not an obstacle to these peace settlements*”¹⁷. Furthermore, it had been perceived that conferring jurisdiction to the ICC could undermine essential national and transnational efforts, and actually obstruct the effective fight against these crimes¹⁸. The problem is not prosecution, but rather investigation. These crimes require “*an ongoing law enforcement effort against criminal organisations and patterns of*

Dominica, Guyana, Honduras, Panama, Afghanistan, Cambodia, East Timor, Fiji, Mongolia, Marshall Islands, Nauru.

¹¹ Mr Cowen, Irish Parliamentary Debates, Written Answers on International Criminal Court, 03 December 2002, Vol.558, p.1058, para.220.

¹² For a full discussion see Chapter 2.

¹³ *Op. cit*, Iontcheva, note 2, p.9.

¹⁴ *Ibid*.

¹⁵ El Zeidy M. M., “*The Principle of Complementarity: A New Machinery To Implement International Criminal Law*”, 23 Michigan Journal of International Law (2002), p.941.

¹⁶ Ms Silvia Fernandez de Gurmendi at the Third Session of the Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, Wellington, New Zealand, 06 December 2004, at http://www.pgaction.org/prog_inte_past.asp?id=170

¹⁷ *Ibid*.

¹⁸ Statement of Hon. Scheffer D. J., Ambassador-at-large for war crimes issues, Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, One Hundred Fifth Congress, Second Session, “*Is a U.N. International Criminal Court in the U.S. National Interest?*” (July 23, 1998) p.14, at http://www.amicc.org/docs/SIOC7_23_98.pdf.

*crime with police and intelligence resources. The Court will not be equipped effectively to investigate and prosecute these types of crimes*¹⁹. Moreover, the ICC has been criticised for underestimating and “*fundamentally confusing*”²⁰ the importance and proper roles of “*political and economic power, diplomatic efforts, military forces and legal procedures...The ICC’s advocates make a fundamental error by trying to transform matters of power and force into matters of law*”.

c) No inclusion of universal jurisdiction in the Statute. As it is evident throughout the ICC drafting process, many countries expressed an unequivocal preference for domestic prosecutions. The Rome Conference does in fact reflect the careful and reserved approach to the admissibility of cases and limits of ICC jurisdiction²¹. This resulted in the exclusion of universal jurisdiction under the Statute, which means that the Court would, in theory, not be able to prosecute criminals who only temporarily find themselves on the territory of a State Party. This ICC jurisdictional limitation is founded too in general treaty law. All existing international courts have jurisdiction only over states that are parties to a particular treaty providing for their jurisdiction²². Treaties establishing international courts, except those created by the UN Security Council acting under UN Chapter VII (such as ICTY and ICTR), afford states parties discretion over the powers that the courts will have in relation to jurisdiction and remedies²³. For example, ICJ jurisdiction depends on the consent of states that are parties to the dispute. Such state consent to ICJ jurisdiction may be given in advance either through a compromisory clause contained in a treaty providing that some or all categories of disputes arising under that treaty will be submitted to the ICJ or through a declaration under the

¹⁹ *Ibid.*

²⁰ *Ibid.*, Statement of Hon. Bolton J., p.27.

²¹ See International Criminal Court (ICC-OTP), “*The Principle of Complementarity in Practice*” (2003), p.7, available at <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>

²² See United Nations “*Handbook on the Peaceful Settlement of Disputes between States*” (1992), p.70.

²³ See e.g. 1945 Statute of International Court of Justice (ICJ) Art.34 (1), the International Tribunal on the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea 1982) Statute Art.20 (1) and the WTO 1994 (Art. 2(1)) dispute settlement system. These instruments also provide considerable flexibility regarding exemptions from compulsory settlement system.

ICJ Statute's 'optional clause'²⁴ which stipulates that a state agrees to accept ICJ's jurisdiction for some or all categories of future disputes. State practice in the use of the optional clause shows that the 'state' is still largely in control with regard to making advanced jurisdictional grants²⁵.

Reflecting the U.S. position, it has been noted that:

*"The jurisdiction of the Court (ICC) over nationals of non-parties is not simply a question of erga omnes obligations allegedly binding upon the international community as a whole. It also involves the institutional question of the obligatory submission without consent to a specific international forum of the prosecution of the alleged violation of such obligations. Indeed this is not in accordance with international treaty law"*²⁶.

As reflected in the 1969 Vienna Convention on the Law of Treaties, treaties cannot bind non-parties²⁷. Some commentators contend however that the objection that the ICC Treaty's conferral of jurisdiction over Non-Party nationals violates the law of treaties can only be valid if the Treaty provisions are the exclusive basis of that ICC jurisdiction. For example, if the jurisdiction to be exercised by the ICC is the pre-existing jurisdiction of States Parties which they have delegated to the Court, then potentially the ICC's jurisdiction is derived from sources outside the ICC Treaty which, far from binding Non-Parties, are merely agreements among the States Parties regarding the manner in which they will exercise their jurisdiction through the delegation of territorial and universal jurisdiction²⁸.

²⁴ ICJ Statute, Article 36 (2).

²⁵ Less than a third of the members of the United Nations currently have in force declarations under the optional clause and many of those states have made reservations that substantially limit the effect of their declarations, see Merrills J. G., *"International Dispute Settlement"* (1998) p.123.

²⁶ Malanczuk P., *"The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind"*, European Journal of International Law, Vol.11, No.1 (2000), p.81; See also Committee on Human Rights Law and Practice, *"Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences"*, prepared by Kamminga M., International Law Association, Report of the 68th Conference, Taipei, Taiwan, 1998.

²⁷ Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Arts. 34-38.

²⁸ For a full discussion see Chapter 3.

In 1998, at the Preparatory Committee, Germany introduced a proposal that would have granted the Court universal jurisdiction over all core crimes²⁹. This would have given the ICC the authority to prosecute a crime without securing the consent of any State. This proposal was rejected, as it was perceived that universal jurisdiction would stretch existing interpretations of international law too far and would be politically unacceptable to key States³⁰. South Korea proposed the most accepted solution that would have required the consent of any of these States: (1) the State of nationality of the accused; (2) the State on whose territory the crime was committed; (3) the State of nationality of the victim; (4) or the State with custody over the accused³¹.

The Vienna Convention is a general framework in place to resolve any difficulties presented by the relationship between national and ICC (special) laws but it had been observed that Convention provisions are ‘residual’ in nature and can be superseded by an agreement³². The ICC Statute provides that disputes relating to the interpretation or application of the Statute may be referred to the ICJ³³ whereas disputes relating to the competence of the ICC will be settled by the ICC itself³⁴.

Strong arguments have been put forward that potential exercise of jurisdiction over nationals of Non-Party States is a contravention of international law and threatens the legitimacy of the ICC. Consent of the State of nationality of the accused is mandatory, according to this line of argument, if the ICC is to exercise jurisdiction. Exercise of such jurisdiction undermines State sovereignty and is therefore contrary to the principle of complementarity. The United States in particular, maintained that such interpretation of ICC jurisdictional powers violates the principle of *pacta tertiis nec nocent nec*

²⁹ See U.N. Doc. A/AC.249/1998/DP.2.

³⁰ *Ibid.*

³¹ See Art.8, Draft ICC Statute, UN Doc. A/CONF.183/C.1/L.6 (08 June 1998).

³² International Law Commission (ILC), “*Fragmentation of international law: difficulties arising from the diversification and expansion of international law*”, Chapter X, Report of the ILC on the work of its 56th Session, 2830th Meeting, A/CN.4/L.663/Rev.1, 09 August 2004, p.293, para.330. On application of successive treaties relating to the same subject matter see Chapter on Bilateral Immunity Agreements.

³³ ICC Statute Art.119 (2).

³⁴ This reflects the position of the majority of States at the United Nations Diplomatic Conference of Plenipotentiaries at the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. See for example Colombia’s proposal, at the 4th plenary meeting, 16 June 1998, p.84, para.25, UN Doc. A/CONF.183/SR.4.

prosunt, by which a treaty may not create obligations or rights for a state non party to a treaty without that state's consent.

Numerous States favoured universal jurisdiction for the ICC. During the ICC negotiations, Belgium for example stated that since it adopted in 1993 legislation providing for universal jurisdiction, it would be difficult for it to accept an international court without such universal jurisdiction³⁵. At the same time it concluded that Non-Party States have to declare that they accept the Court's jurisdiction in order to be bound by the same obligations on cooperation as States parties³⁶. Slovakia also reiterated that if the crime occurred in a State Non-Party, criminal prosecution would be possible only with the consent of the State³⁷. In recent years few local courts have attempted to exercise universal jurisdiction either through the doctrine of *erga omnes* or through applying domestic laws retroactively. For example, the Dutch Supreme Court ruled in 2001 that the limitations imposed by its Wartime Offences Act in cases where the Netherlands is not involved in an armed conflict do not apply to the repression of violations of the laws and customs of war³⁸. However, the exercise of such jurisdiction is sporadic, non-uniform, and generally requires a strong territorial link. In Senegal for instance, the highest court upheld the decision barring criminal proceedings against the accused, a former President of Chad, who was charged with complicity in crimes of torture. The Court ruled that Senegalese courts lacked jurisdiction to prosecute and try aliens present on the territory of Senegal³⁹. Another example illustrating the necessary territorial link to the exercise of universal jurisdiction is a decision of a Spanish court not to exercise that jurisdiction with respect to acts of genocide committed in Guatemala. A magistrate had accepted jurisdiction on the basis of a national law which provides for universal

³⁵ See Rome Conference, 6th plenary meeting, 17 June 1998, p.97, para.4.

³⁶ *Ibid*, para.3.

³⁷ Mr Valo (Slovakia), Rome Conference, 5th plenary meeting, 17 June 1998, A/CONF.183/SR.5, p.91, para.4.

³⁸ Supreme Court (Hoge Raad), 11 November 1997-This decision is the fourth in a series relating to the same case (Arnhem District Court, 21 February 1996; Supreme Court, 22 October 1996; and Arnhem Court of Appeal, 19 March 1997).

³⁹ Hissain Habre, Case No.14, 20 March 2001, Cour de Cassation. The decision was also based on absence of any legislative measure establishing such jurisdiction over torture related offences, as required by Art.5(2) of the 1984 Convention against Torture.

jurisdiction over acts of genocide⁴⁰. The Spanish Court noted that Article 6 of the 1948 Genocide Convention provided that criminal jurisdiction over genocide is to be exercised by the states on whose territory genocide was committed or by an international court. It was of the view that Art. 6 of the Convention did not prevent other states to exercise jurisdiction over genocide committed abroad but it had the effect of giving precedence to the territorial state⁴¹. The Court made a comparison with the ICC principle of complementarity; given that the unwillingness of Guatemala's authorities to prosecute had not been demonstrated, and that there was no legal impediment to such prosecution under Guatemalan law, the Court concluded that there was no need for a Spanish court to exercise universal jurisdiction⁴².

The idea of delegated universal jurisdiction (which was hoped for by many but rejected by the majority and therefore not included in the ICC Treaty⁴³) as a basis for ICC jurisdiction over Non-Parties does not account for ICC jurisdiction over a number of crimes under its Statute, crimes that are not however subject to universal jurisdiction⁴⁴. For example, some violations of Protocol I to the 1949 Geneva Conventions⁴⁵ are not subject to universal jurisdiction under customary law⁴⁶ and thus the delegated universal jurisdiction theory of ICC jurisdiction over Non-Parties would not account for jurisdiction over some of the crimes within the ICC Statute. Here is an example. Recently, in a case before the Special Court for Sierra Leone it was ruled that the recruitment of child soldiers is a crime and a violation of international law⁴⁷. The Defence argued here that the Special Court had no jurisdiction to try the accused for crimes relating to the recruitment of child

⁴⁰ Art.23 of the Ley Organica 6/1985.

⁴¹ Decision of the Audencia Nacional (Sala de lo Penal), 13 December 2000.

⁴² For a different position see e.g. Swiss Military Court of Cassation, 27 April 2001, Arrêts du Tribunal militaire de cassation 2001/2002, Office de l'Auditeur en chef, Vol.12, 3ème fascicule, pp.1-31, no.21.

⁴³ *Op cit*, note 34, Germany Proposal, p.83, para.21.

⁴⁴ Morris M., "*High Crimes and Misconceptions: The ICC and Non-party States*", 64 Law and Contemporary Problems 1 (2001), p.28

⁴⁵ Protocol Additional to the Geneva Conventions, 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 08 June 1977, U.N.T.S. 3.

⁴⁶ For example, conscription of child soldiers, prohibited under Protocol I is placed within the jurisdiction of the ICC but is not a crime customarily subject to universal jurisdiction.

⁴⁷ Special Court for Sierra Leone, Prosecutor v Sam Hinga Norman, Appeals Chamber "*Decision on preliminary motion based on lack of jurisdiction (child recruitment)*", Case No. SCSL-2003-14-AR-72(E), 31 May 2004.

soldiers under the age of 15 recruited “*into armed forces or groups or using them to participate actively in hostilities*”⁴⁸ due to the fact that this crime was not part of the customary international law at the time relevant to the indictment. The Defence also argued that although the ICC Statute criminalizes the recruitment of child soldiers, it does not codify customary international law. During ICC negotiations, States had different views as to whether this is the case. For example, Sudan’s understanding was that the Court would consolidate customary norms⁴⁹ whereas India declared that the function of the Rome Conference was to establish an institution, not to develop and codify substantive international law⁵⁰. The Prosecution on the other hand argued that the crime of recruiting child soldiers was part of international customary law. It argued that international criminal liability for this crime resulted from various factors accumulated over time, and that unlike a national legal system, international law is without a Parliament with legislative power, and therefore there cannot be a statute that declares certain activity as criminal under customary international law. In a dissenting opinion, Justice Robertson traced the preparatory work leading to the adoption of the Special Court Statute and argued that the state of law at the relevant time (1996) in respect of child enlistment was unclear to the UN Secretary-General himself⁵¹. Importantly, he also pointed that because there was no evidence of national prosecutions of such crimes, it is difficult to find evidence of explicit state practice in criminalizing the crime. According to him therefore, the crime was not part of customary law⁵².

Furthermore, many States also consider that customary law may not become part of their legal systems without the involvement of the parliament, which should codify it into national law. During the Rome Conference for example,

⁴⁸ Special Court for Sierra Leone Statute, Art. 4 (c).

⁴⁹ Mr Yassin (Sudan), Rome Conference, 7th plenary meeting, 18 June 1998, A/CONF.183/SR.7, p.105, para.3.

⁵⁰ *Op cit*, note 34, Mr Lahiri (India), p.86, para.52.

⁵¹ See Summary of Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Prosecution v Sam Hinga Norman, Case No. SCSL-2003-14-AR72(E), 31 May 2004, p.2, para12.

⁵² *Op cit*, note, 47, para.22.

Andorra stated it was deeply concerned about acts that affected children⁵³. It is worth mentioning however, as an example, that the Canadian Crimes Against Humanity and War Crimes Act 2000 provides that “*For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law*”⁵⁴. Words ‘for greater certainty’ appear to imply an artificial codification of customary international law that represents a purposive adoption of the ICC Statute rather than uniform state practice.

d) Reservations. The ICC Treaty does not permit any type of reservations⁵⁵. Although, in theory at least, treaty law recognises the right to a reservation as a means of respecting the autonomy of the reserving state, it is a rule of international law⁵⁶, and the ICC Statute confirms it, that a State may not invoke the provisions of its internal law as a justification for its failure to perform treaty obligations⁵⁷. The interests of contracting parties and that of the international community must be considered. Upon ratification of the ICC Treaty, the Eastern Republic of Uruguay made an interpretative declaration to which most ICC States objected as it effectively amounted to a reservation⁵⁸. Uruguay declared that, “*As a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic*”⁵⁹. In response

⁵³ See statement by Mr Minoves Triquell, Rome Conference, UN Doc. A/CONF.183/13 (Vol.II), p.81, para.2.

⁵⁴ Article 4 (4).

⁵⁵ ICC Statute Art.120.

⁵⁶ Vienna Convention on the Law of Treaties, Art.27.

⁵⁷ See General Assembly, International Law Commission, “*Report of the International Law Commission on the work of its fifty-fourth session (2002)*” 14 January 2003, A/CN.4/529, p.15, para.51.

⁵⁸ See e.g. General Assembly, International Law Commission, 55th Session, 27 May 2003, A/CN.4/535, “*Eight report on reservation to treaties*” by Pellet A., Special Rapporteur.

⁵⁹ See declaration made upon ratification on 28 June 2002 (ICC implementing law, Ley No. 17.510, 27 June 2002) available at <http://www.un.org/law/icc/statute/romefra.htm>, at 14; See also Uruguayan General Assembly debate “*Se establecen procedimientos para la aplicacion en el ambito interno del Estatuto de Roma de la Corte Penal Internacional*”, 17/01/03, at

to this declaration various States made objections. Germany for example, responded by declaring:

“Germany considers that the Interpretative Declaration with regard to the compatibility of the rules of the Statute with the provisions of the Constitution of Uruguay is in fact a reservation⁶⁰ that seeks to limit the scope of the Statute on a unilateral basis...Germany therefore objects to the... ‘declaration’ made by the Eastern Republic of Uruguay. This objection does not preclude entry into force of the Statute between the Republic of Germany and Eastern Republic of Uruguay”⁶¹.

Other countries have explicitly declared that the ICC Statute should be interpreted in light of the Charter of the United Nations and the general principles and rules of international law and international humanitarian law⁶².

Although the ICC Statute does not permit reservations, Article 124 allows States to opt out of the Court’s jurisdiction for seven years for crimes of war. So far, France and Colombia have made declarations under Article 124. Upon ratification, France stated: *“The French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory”⁶³*. Naturally however, a significant number of States declared that the principle of non-retroactivity of the jurisdiction of the Court, pursuant to ICC Articles 11 and 24, shall not invalidate the well established principle that no war crime shall be barred from prosecution due to

<http://www.presidencia.gub.uy/proyectos/2003011701.htm> ; Diario de Sesiones de la Camara de Representantes, Cuarto Periodo Ordinacion de la XLV Legislatura, 29a Sesion, 02 July 2003, the Chamber of Representatives states its aim to *“ratify the will of the Chamber of Representatives to defend the sovereign exercise of criminal jurisdiction, and the principle of jurisdictional complementarity of the International Criminal Court as established in the Rome Statute, in order to prosecute crimes of genocide, crimes against humanity, war crimes and crimes of aggression”*, translation of communiqué available at http://www.pgaction.org/uploadedfiles/uruguay-Michelini%20communique%20_english_.pdf Uruguay adopted the ICC implementing law, Ley No. 17.510, 27 June 2002. Although the Constitution remains of a higher rank to which all other laws are subject, Uruguay stated that this will not in any way, constitute a reservation to any of the provisions of that international instrument.

⁶⁰ *Op cit*, note 57, p.20, para.81.

⁶¹ At <http://www.un.org/law/icc/statute/romefra.htm> p.15.

⁶² See Egypt declaration No.2 upon signature at <http://www.un.org/law/icc/statute/romefra.htm> p.8.

⁶³ Declaration No. 7 (III) at <http://www.un.org/law/icc/statute/romefra.htm> p.10.

the statute of limitations and no war criminal shall escape justice or escape prosecution in other jurisdictions⁶⁴. The justification for ex post facto creation of war crimes may be found in Article 15 (1) of the International Covenant on Civil and Political Rights which states that “*nothing...shall prejudice the trial and punishment of any person for any act or omission which at the time when it was committed was criminal according to the general principles of law recognised by the community of nations*”⁶⁵. However, most constitutional orders prohibit the retroactive application of the law even if it relates to the commission of serious crimes such as torture⁶⁶. At the time of ratification⁶⁷, France made a reservation to ICC Article 124 which excludes prosecutions of French citizens for war crimes from the ICC’s jurisdiction for seven years⁶⁸. Throughout the ICC negotiations, France supported the automatic jurisdiction of the Court for core crimes except war crimes since such crimes, as defined in the 1907 Hague Conventions, the 1949 Geneva Conventions and the 1977 Additional Protocols, might be isolated acts⁶⁹. Similarities may be drawn here with the European Convention on Human Rights which has not been adopted universally and consistently. In the United Kingdom the Convention had been implemented by the Human Rights Act 1998. The Convention has been largely understood to represent a three-tier hierarchy⁷⁰ of rights which determine the

⁶⁴ See e.g. Egypt Declaration No.5 upon signature at <http://www.un.org/law/icc/statute/romefra.htm> p.9. On jus cogens see also Haas and Priebke Cases, Italian Military Court of Appeal, Supreme Court of Cassation, 07 March 1998/16 November 1998.

⁶⁵ See e.g. *Polyukhovich v The Commonwealth of Australia and Another* (1991), 172 Commonwealth Law Reports 501, F.C. 91/026: “*The wrongful nature of the conduct ought to have been apparent to those who engaged in it (war crimes) even if, because of the circumstances in which the conduct took place, there was no offence against domestic law*”, per Justice Dawson, p.643.

⁶⁶ See e.g. The Decision of the Dutch Supreme Court (Hoge Raad), Criminal Chamber, Judgment of 18 September 2001, No.00749/01 (CW2323) where the Court found that the Dutch Act implementing the Convention against Torture was not applicable to the facts in the case (Bouterse’s acts in 1982), since Art.16 of the Dutch Constitution prohibits retroactive application of the law. See also the Cavallo Case, Juez Sexto de Distrito de Procesos Penales Federales en el Distrito Federal, Extradicion de Miguel Angel Cavallo, Expediente de Extradicion 5/2000, 11.06.2001.

⁶⁷ Enacted Cooperation Legislation: LOI no 2002-268 (26-02-02) relative a la cooperation avec la Cour penale internationale (1).

⁶⁸ See country progress by the Coalition for the International Criminal Court (CISS), France, at <http://www.iccnw.org/countryinfo/europcis/france.html>

⁶⁹ *Op cit*, note 35, Mr Vedrine (France) p.101, para.77.

⁷⁰ Black-Branch J. L., “*The Derogation of Rights under the UK Human Rights Act: Diminishing International Standards?*” 22 Statute Law Review 1 (2001), p.71.

strength of a given right and the degree to which it is guaranteed and upheld⁷¹. It has also been widely accepted that this hierarchy would prevail under the Human Rights Act, whereby depending on the position of a right the Government “*may impair its integrity, or courts may limit its scope based on special pressing needs of the day. In other words, the position of a right in this hierarchy will determine its effectiveness*”⁷². Absent from this Act is the derogation clause under Article 15 of the Convention and present are sections 14 and 15 which allow for designated derogations and reservations to be placed on any right or freedom; these rights are not only derogable, but the set of reasons for derogating have also been removed opening it up potentially to any political reason. It follows that “*we have moved into a new era whereby formalized rights have been accorded to the citizen under domestic legislation on the one hand, but their realization is now subject to political scrutiny, on the other*”⁷³. Moreover, the effectiveness of rights depends on two variables: (a) whether a government can derogate from its responsibility in the first instance and (b) the degree to which the right in question may be qualified. Derogation is defined as “*the partial repeal or abolishing of a law, as by a subsequent act which limits the scope or impairs its utility and force*”⁷⁴. In signing the First Protocol⁷⁵ of the European Convention, the United Kingdom issued the following reservation: “*the principle affirmed in the second sentence of Article 2 is accepted ...only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure*”⁷⁶. This is just an example of the political power accorded to states to derogate from their responsibilities⁷⁷.

⁷¹ *Ibid.*

⁷² *Id.*

⁷³ *Id.*, p.72.

⁷⁴ Black’s Law Dictionary (1991). On subsequent treaties, see Chapter 4.

⁷⁵ Protocol I – Enforcement of certain Rights and Freedoms not included in Section 1 of the Convention.

⁷⁶ Human Rights Act 1998, Schd.3.

⁷⁷ See e.g. *Brogan and Others v United Kingdom* (Ser. A, No. 145-B; App. Nos. 11209/84; 11234/84; 11266/84; 11386/85) (1989) 11 ECHR 117, 29 November 1988.

e) Sentencing. Under closer examination, the ICC penalty regime reveals lack of substance and ‘*the underdeveloped and conflicting penal justifications and the irrationality of praxis*’⁷⁸. The ICC Statute is in effect silent on the purposes and principles that govern the rules on sentencing⁷⁹. This is the end result of substantive debate on the matter at the 1998 Rome Conference, which focused instead on capital punishment⁸⁰. This ‘omission’⁸¹ significantly destabilizes the impact of ICC sentencing law and it inevitably leads to application of inconsistencies among States Parties as sentencing is based and justified on different national objectives and beliefs. Sentencing methods serve a major role in promoting deterrence, retribution or reconciliation. For example, one of the principal aims of the ICTY was to deter future violations of international criminal law. The Trial Chamber of the ICTY had in fact discussed the objectives of deterrence in the context of the United Nations Security Council’s overriding concern to maintain peace and security in the former Yugoslavia⁸². The Tribunal drew a clear distinction between ‘*general prevention (or deterrence), reprobation, retribution as well as collective reconciliation*’⁸³, suggesting that these purposes should provide guidance in determining the appropriate punishment for a crime against humanity, yet no attempt was made to define these purposes, or explore their meaning⁸⁴. The ICTY gave equal weight to retribution and deterrence, but went on to suggest that incapacitation of the dangerous and rehabilitation were also desirable objectives⁸⁵ but no consideration was given to defining these objectives in the context of ‘*demands for collective retribution personified by state interests and the adopted common law tradition which favours the individualisation of*

⁷⁸ Henham R., “*Some issues for sentencing in the International Criminal Court*”, International Comparative Law Quarterly 52 (2003), p.82.

⁷⁹ Only the ICTR Statute includes a reference to the need to contribute to ‘national reconciliation’. This commitment comprised in the Preamble of the Statute and is arguably therefore of limited legal authority.

⁸⁰ Schabas W. A., “*An Introduction to the International Criminal Court*” (2001), p.140.

⁸¹ See Hall C., “*The Fifth Session on the UN Preparatory Committee on the Establishment of the International Criminal Court*” 1998, 92 American Journal of International Law, p. 331.

⁸² See Prosecutor v Erdemovic, Case No. IT-96-22-T, Sentencing Judgment (29 November 1996).

⁸³ *Ibid*, para58.

⁸⁴ *Op cit*, Henham, note 78, p.87.

⁸⁵ Prosecutor v Tadic, Case No. IT-94-1-S, Sentencing Judgment (14 July 1997) para.61.

*sentences*⁸⁶. The relevant provisions of the ICTY and ICTR Statutes seem to be limited to imprisonment as there is nothing to suggest the application of the death penalty, as well as corporal punishment, imprisonment by hard labour and fines or national commutation of sentences. In determining these, the judges of the ad hoc Tribunals are called to consider the intent of the Security Council, relying upon preparatory documents such as the Secretary General's report, statements submitted to the Security Council by Member States, as well as the statements of the permanent representatives during the meetings of the Security Council⁸⁷. Moreover, the ICTY Statute provides that the Tribunal “*shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia*”⁸⁸.

This ICC Statute permits the Court to impose two types of penalties: imprisonment for a specified term or life imprisonment (Article 77). After debate over whether minimum and maximum limits should be set on the terms of imprisonment, eventually, Article 77 only contains a 30year maximum. Life imprisonment was opposed by a number of countries, particularly Latin American ones, whose constitutions prohibit this penalty as a violation of human rights, being cruel, inhumane, and inconsistent with the aims of rehabilitation. A provision for a mandatory review of penalties, when the person has “*served two thirds of the sentence or 25 years in the case of life imprisonment*” (Article 110) was added to mitigate some of the concerns about life imprisonment. The Court may also order fines and forfeitures. The Statute recognizes that these penalties would be *in addition to* imprisonment.

There were divergent and strong views on whether the death penalty should be explicitly included as a penalty, with Trinidad and Tobago, Arab states, Nigeria, and Rwanda being in favour of its inclusion. Not only did these States feel that the core crimes should be punished by the maximum penalty, but they feared that the prohibition of the death penalty in the Statute would impact on their domestic laws. The United States, supported by Japan, made an intervention that the principle of complementarity would nevertheless permit

⁸⁶ *Op cit*, Henham, note 78, p.88.

⁸⁷ Schabas W. A., “*Sentencing by International Tribunals: A Human Rights Approach*” 7 Duke Journal of Comparative and International Law 2 (1997), p.445.

⁸⁸ ICTY Statute Article 24 (1).

countries to apply capital punishment to punish the core crimes. Subsequently, the exclusion of the death penalty in the Statute warranted a provision titled “Non-prejudice to national application of penalties and national law”⁸⁹ which was offered as a compromise to those States pushing for the inclusion of the death penalty; it reads that *"nothing in this part of the statute affects the application by States of penalties prescribed by their national law"*.

The principal aim of ICC sentencing practice will aim at ensuring that there is no justification for serious violations of international criminal law. Whilst pursuing this goal, a balance should be reached between proportionality⁹⁰ and culpability which means that consistency demands similar crimes to be dealt with by equal punishment and furthermore that the penalty imposed be proportionate to the wrongdoing⁹¹.

The possibility of unjust and disproportionate sentences is addressed only in Part 8 (Appeal and revision) of the ICC Statute which specifies that *“a sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence”*⁹².

Failure to deal adequately with consistency and disproportionality issues, significantly undermines the capacity of the ICC to deliver a sentencing practice and correspond with contemporary due process concepts and instruments promoting access to justice and fair trial, such as the European Convention on Human Rights⁹³.

Inconsistencies that are likely to emerge from the application of ICC law will inevitably become apparent as depending on how the ICC Treaty is being implemented into national law, as well as on whether national laws provide for amnesties and pardons, two defendants accused of the same crime may be subject to two different sentences. One defendant may earn a life term

⁸⁹ ICC Statute Art.80.

⁹⁰ ICC Statute Art.81 (2) (a) provides that *“a sentence may be appealed...on the ground of disproportion between the crime and the sentence”*.

⁹¹ See Prosecutor v Todorovic, Case No.IT-95-99/1-S, Sentencing Judgment (31 July 2001), para.30.

⁹² ICC Article 81 (2) (a).

⁹³ *Op cit*, Henham, note 78, p.95.

sentence, while the other might walk free under a national amnesty provision. However, the ICTY confirmed in the Celebici case the importance of the principle applied, that ‘gravity is determined in personam and is not one of universal effect’⁹⁴. As an author explains: “the potential for the systematic dysfunction of sentencing practice in the ICC is significantly enhanced by the absence of mechanisms designed to secure consistency. Inevitably, this will invite comparison, adoption or expansion of existing paradigms drawn from either state or interstate jurisdictions”⁹⁵. In fact, neither the ICC Statute nor the Rules of Procedure and Evidence provide for techniques of securing consistency⁹⁶. ICC Article 76 (1) by providing that “the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence” positively encourages⁹⁷ an unreasonable amount of discretion, without taking into consideration primary rationales for sentencing⁹⁸. As with the ad hoc tribunals, this primary sentencing purpose is deterrence⁹⁹. However, the ICC’s effective contribution to deterrence is, as already pointed out, largely overstated¹⁰⁰. In Portugal, strong opposition was expressed against the ICC sentencing regime. Dr Marques Mendez, President of the Foreign Affairs Commission, maintained a persuasive position against “demagogic tendencies aimed at imposing imprisonment-sentences that would go against the principle of humanity and frustrate the principle of rehabilitation and social re-

⁹⁴ See the ICTY Appeal Chamber in the Celebici Case, Sentencing Judgment (09 October 2001), para.30.

⁹⁵ *Op cit*, Henham, note 78, p.96.

⁹⁶ See also Council of Europe’s 1993 recommendations on consistency in sentencing, Recommendation No. R (92) 17.

⁹⁷ *Op cit*, Henham, note 78, p.96.

⁹⁸ The consequences are further exemplified by ICC Article 77 (1) which indicates imprisonment as the preferred sanction for any crimes under Article 5 (genocide, crimes against humanity, war crimes and the crimes of aggression) with fines and forfeitures regarded as additional under Article 5(2).

⁹⁹ See e.g. Prosecution v Jelusic G., Case No. IT-95-10-4, Judgment (05 July 2001) where the accused, a war criminal was sentenced by the Tribunal to 40 years of imprisonment and transferred to Italy to serve the sentence. However, since Italian law envisages a maximum sentence of 30 years, an Italian court reduced the sentence by 10 years. See e.g. Nanetti M., “La Cassazione riduce la pena di 10 anni a Jelusic, il boia serbo”, Il Messaggero, 03 February 2003.

¹⁰⁰ In justifying the US opposition to the Court it had also been said that “all available historical evidence demonstrates that the Court and the prosecutor will not achieve their central goal, the deterrence of heinous crimes, because they do not and should not have sufficient authority in the real world”, *op cit*, note 18, Statement of Hon. Bolton J., p.26.

integration of convicted persons”¹⁰¹. In Kosovo, the 2004 Law on Execution of Penal Sanctions¹⁰² provides that “*The execution of penal sanctions shall aim at the reintegration of the convicted person into society and prepare him or her to conduct his or her life in a socially responsible way, without committing criminal offences*”¹⁰³.

The ICC Statute prescribes the sentence of imprisonment for a certain number of years, no longer than thirty, and that of life imprisonment¹⁰⁴. The FYROM Criminal Code for example contains the same sanctions but besides life imprisonment specifies the sentence of imprisonment for a certain time, limited to a maximum of fifteen years. The implementation by a domestic court of a sanction prescribed for criminal acts contained in the ICC Statute could result in activating the complementarity jurisdiction of the Court, with the explanation that the delivered sentence is not rigid enough and therefore not equitable, notwithstanding the provision of the ICC Statute about non-discrimination in the national implementation of punishments. National laws leave space for variations in the system of punishments in national legislation¹⁰⁵. Angola stated that in the case of conflict between ICC provisions on penalties (Art. 77), including the possibility of life-imprisonment in exceptional cases and a maximum penalty of 24 years of imprisonment, the Angolan laws would be interpreted in line with the ICC Statute¹⁰⁶.

Future challenges for the ICC lie in the extent to which it succeeds in developing its penalty praxis by adopting principles and approaches designed to reconcile the ‘local’ with the ‘global’, both at the moral and normative level, or whether it is destined to function merely as a symbolic component of globalisation that exists to provide a language and mechanism for asserting

¹⁰¹ Conference on ICC Ratification in Lusophone Countries, PGA International Law and Human Rights Programme, 19/20 February 2001, Lisbon, Portugal, Summary of the Conference Proceedings, pp.3-4.

¹⁰² 19 November 2004, UNMIK/REG/2004/46.

¹⁰³ Law on the Execution of Penal Sanctions 2004, Article 3 (emphasis added).

¹⁰⁴ ICC Statute Art.77.

¹⁰⁵ ICC Statute Art. 80.

¹⁰⁶ Op cit, Dr Diogenes Boavida, President of the Constitutional and Legal Affairs Commission and former Minister of Justice, note 101, p.4.

hierarchies of international power¹⁰⁷. As with the ad hoc tribunals, this will depend on the ability of the ICC to extend beyond performance and legitimise its sentencing practice in terms designed to engage successfully with local mechanisms of accountability and the institutions of punishment¹⁰⁸.

f) Plea Bargaining. Plea bargaining is an illustration *‘of the relationship between due process principles and practice and their significance for ICC sentencing through an evaluation of the rationale for discounting sentencing in return for guilty pleas and the status and function of a plea agreement in the context of international sentencing’*¹⁰⁹.

Under the ICC Statute when an accused admits guilt¹¹⁰ the Trial Chamber must satisfy itself as to the voluntariness of the admission, that the accused understands the consequences and that the admission is supported by the charges and factual evidence available to it¹¹¹. However, neither the ICC Statute nor the Rules of Procedure and Evidence provide an adequate explanation as to the impact of guilty pleas on sentencing. This is important; the reduction of sentences in return for a guilty plea is a problematic concept for common law jurisdictions where the fundamental due process objection is that such ‘discounts’ undermine the presumption of innocence and the necessity for the prosecution to prove its case¹¹². In common law countries, a plea bargain occurs only where there is a change of plea from not guilty to guilty but no charge or fact bargain is involved. In such circumstances the ‘bargain’ relates to the defendant exchanging his right to trial and possible acquittal for the certainty of a lower sentence than he would otherwise have

¹⁰⁷ Colquhoun C., “*Human Rights and Extradition Law in Australia*”, 6 Australian Journal of Human Rights 2 (2000), p.106.

¹⁰⁸ Op cit, Henham, note 78, p.90.

¹⁰⁹ *Ibid*, p.100.

¹¹⁰ ICC Article 64 (8) (a).

¹¹¹ See ICC Article 65 (4) which provides that “Where a Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interest of justice, in particular the interests of the victims, the Trial Chamber may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or (b) Order that a trial be continued under the ordinary trial procedures provided by the Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber”.

¹¹² See Ashworth A. J., “*The Criminal Process: An Evaluative Study*” 1998, pp.288-92.

received upon conviction¹¹³. In contrast, in civil law jurisdictions the guilty plea may not be accepted at all¹¹⁴. The fundamental due process issues surrounding guilty pleas relate to questions of whether evidence has been reviewed successfully in all of the pre-trial stages where pressure exists to encourage defendants to plead guilty as early as possible in the proceedings and whether there is a significant risk in developing inconsistencies in sentencing for defendants who plead guilty as compared to the sentences of those who go through a trial. The novel model emanating from the recent practice of the ad hoc tribunals takes two forms. The first one involves the proposition of unilateral fixed offers (take it or leave it basis) and the other involves negotiating with the defendants over benefits that they would receive in exchange for an act of self-condemnation¹¹⁵. The latter does not necessarily amount to a guilty plea¹¹⁶. Originally, the ICTY rejected suggestions made by the Government of the United States to introduce provisions under the ICTY Rules of Procedure and Evidence encouraging plea-bargaining as a way of eliciting evidence against most important defendants¹¹⁷. In arguing that plea-bargaining is incompatible with the unique objectives of international criminal courts, Cassese A. explained:

“Those in favour contend that it will be difficult for us to obtain evidence against a suspect and so we should do everything possible to encourage direct testimony. They argue that this is especially true if the testimony serves to establish criminal responsibility of those higher up in the chain of command. Consequently, arrangements such as plea-bargaining could also be considered in an attempt to secure other convictions. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and inhumane acts. After due reflection, we have

¹¹³ See Goldstein A., “Converging Criminal Justice Systems: Guilty Pleas and the Public Interest”, 49 Southern Methodist University Law Review (1996) pp.574.575.

¹¹⁴ See Jung H. on France and Germany practice in “Plea-Bargaining and its Repercussions on the Theory of Criminal Procedure” 5 European Journal of Crime, Criminal Law and Criminal Justice (1997) at 112. See also Maffei S., “Negotiations ‘on Evidence’ and Negotiations ‘on Sentence’-Adversarial Experiments in Italian Criminal Procedure”, Journal of International Criminal Justice, Vol.2, No.4 (2004), pp.1050-1069.

¹¹⁵ Damaska M., “Negotiated Justice in International Criminal Courts” Journal of International Criminal Justice, Vol.2, No.4 (2004), p.1019.

¹¹⁶ *Ibid.*

¹¹⁷ See UN Doc. IT/14, 17 November 1993. See also Combs N. A., “Prosecutor v Plavsic”, 97 American Journal of International Law, 2003, pp.929-937.

decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be”¹¹⁸.

The ICTY jurisprudence shows however that although guilty pleas may not satisfy the common law general requirement that the prosecution prove its case they are significant in the work of an international trial¹¹⁹ and as such may form part of the ICC praxis. Judge Cassese A. concluded:

“It is apparent from the whole spirit of the Statute (ICTY) and the Rules, that by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attended difficulties. These difficulties, it bears stressing, are all the more notable in international proceedings. Here, it often proves extremely arduous and time consuming to collect evidence. In addition it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses...Thus, by pleading guilty, the accused undoubtedly contributes to public advantage”¹²⁰.

Such rationale for the acceptance and encouragement of guilty plea-bargaining undermines the quest for the truth¹²¹. Importantly, charge bargaining also distorts the historic record generated by international courts¹²².

What is also important here is that, and related to the different character of the act of self-condemnation, there are different effects of Anglo-American guilty pleas and Continental admissions of facts. Continental concessions lead to the reduction of punishment, Anglo-American ones can also affect charges. Again,

¹¹⁸ Statement made at a Briefing of Members of Diplomatic Missions, UN Doc. IT/29, 11 February 1997 at 649,652.

¹¹⁹ See i.e. Prosecutor v B. Plavsic, Case No. IT-0039&40/1-S), Sentencing Judgment, 27 February 2003 at 132; Plea Agreement Between Jean Kambanda and the Office of the Prosecutor, Case No. ICTR-97-23-1, 29 April 1998.

¹²⁰ Prosecutor v Erdemovic, Case No. IT-96-22, Separate and Dissenting Opinion of Judge Cassese to Erdemovic Appeals Judgement, 07 October 1997, para.8. Following the practice of the ICTY Bosnia and Herzegovina has too introduced in relevant national legislation designed to deal with the core crime the instrument of plea-bargaining “because it makes proceedings much more speedier, efficient, and less expensive” in Prosecutor v Zeljko Mejakic et al., Case No. IT-02-65-PT, Rule 11bis Hearing, 03 March 2005, p.215 at 23-24.

¹²¹ See Prosecutor v Todorovic, Case No.IT-95-99/1-S, Sentencing Judgement, 31 July 2001, para.81.

¹²² Scharf M. P., “Trading Justice for Efficiency: Plea-Bargaining and International Tribunals” Journal of International Criminal Justice, Vol.2, No.4 (2004), p.1070.

the ICTY is an excellent example. In the Plavsic Case¹²³, the Tribunal permitted ‘*charge bargaining*’ by agreeing to drop the charge of genocide and to issue a relatively lenient sentence of eleven years in return for the defendant’s guilty plea on one count of crimes against humanity. More recently, in the Babic Case, the defendant entered a guilty plea to one of the fifteen counts in the indictment¹²⁴. In exchange for Babic’s plea of guilt and his continued extensive cooperation with the ICTY Office of the Prosecutor, the Prosecution recommended that the Trial Chamber impose a sentence of no more than eleven years of imprisonment (he was sentenced to thirteen years) and decided to withdraw several charges as well as alternative forms of criminal liability charged in the indictment¹²⁵.

Consequently, if the ICC follows and adopts such an ‘administrative’¹²⁶ approach to justice, provisions relating to the presumption of innocence, equality between the parties¹²⁷, the protection of self-incrimination, the validity and the commitment to the protection of such fundamental rights covered in the Statute and Rules will be questionable. By pleading guilty, a defendant voluntarily waives his significant procedural rights, such as the right to plead not guilty, the right to be presumed innocent until guilt has been proven beyond reasonable doubt at a trial, the right to a trial before the international court, the right to cross-examine witnesses, the right to compel and subpoena witnesses to appear on the accused’s behalf, the right to testify or to remain silent at trial and the right to appeal a finding of guilty or to a pre-trial ruling¹²⁸. As Henham R. explains¹²⁹: “*As such, beyond the potential for undermining [the] process, plea bargains in the international context may similarly be seen as unconstitutional in implicitly contravening the principles*

¹²³ Prosecutor v B. Plavsic, Case No. IT-0039&40/1-S), Sentencing Judgment, 27 February 2003, at 132.

¹²⁴ Prosecutor v M. Babic, Case No. IT-03-72-S, Sentencing Judgment, 29 June 2004, para.4.

¹²⁵ *Ibid*, paras.101-102.

¹²⁶ *Op cit*, Henham, note 78, p.105.

¹²⁷ See Chapter 2.

¹²⁸ Prosecutor v Erdemovic, Case No. IT-96-22, Sentencing Judgment, 05 March 1998, para.10.

¹²⁹ *Op cit*, note 78, p.107.

of legality established by relevant Statute and Rules of Procedure and Evidence”¹³⁰.

Moreover, under the ICC complementarity system, where a case falls within the realms of national law a State may either offer guilty pleas and thereby potentially demonstrate ‘unwillingness and inability’ to effectively investigate and try persons¹³¹, or offer guilty pleas in exchange for a lower sentence, in order to avoid exposing to the international arena the extent of egregious crimes committed either on its territory or by its nationals.

1.3 Asserting jurisdiction: national v international prosecution

Problems arising out of competing jurisdictions between national and international courts have so far only been tentatively resolved. These problems emerge when one or more states seek to assert criminal jurisdiction over specific crimes on grounds such as territoriality, nationality or universality. As Cassese A. argues¹³²:

“There are no general rules determinative of this matter, just as there are no customary international rules designed to resolve the question of concurrent jurisdiction of two or more States, by giving pride of place to one legal ground of national jurisdiction (say, territoriality) over another such ground (say, nationality)...while not even treaty rules have settled the possible conflict between States asserting jurisdiction over the same person...”

Cassese does however suggest that in a jurisdictional claim between a State and international criminal courts, the matter is actually resolvable by treaty

¹³⁰ See e.g. Ellison L., *“The Adversarial Process and the Vulnerable Witness”* (2002), p.72: *“Granting defendants an affirmative right to face their accusers corresponds with cultural perceptions of fairness and by so doing strengthens the integrity and legitimacy of the adversarial fact-finding process”*. See also Home Office, *“Promoting Public Confidence in the Criminal Justice System”* (2002), London.

¹³¹ In Iraq for example, plea-bargaining is permitted under Art.129 of the Iraqi Criminal Procedure Law but absent from the Statute of the Special Tribunal.

¹³² Cassese A., *“International Criminal Law”* (2003), p.348.

rules or ‘*binding resolutions*’¹³³, as in the case of Security Council resolutions for the creation of ICTY¹³⁴ and ICTR¹³⁵. With regard to the ICC however, national courts do benefit from a jurisdictional ‘priority’¹³⁶ under the complementarity principle.

Whilst the Rome Treaty won approval by an overwhelming majority, sovereignty concerns persist in many States. In fact, many reluctant nations needed assurances that the ratification of the Treaty would not effectively amount to their country’s handing over the power to prosecute their own nationals. One such assurance had been the passage of domestic legislation that criminalizes offences within the subject matter jurisdiction of the ICC. In this regard India stated that the only durable basis for the development of international cooperation was scrupulous regard for the fundamental principles of the Charter of the United Nations, thus the elimination of obstacles to the effective implementation of international criminal justice¹³⁷.

Generally, States are also reluctant to defer their disputes to third parties and as already noted, both the ICJ jurisprudence and the law of treaties reflect that. Although there has been an increase in the use of third-party adjudication in interstate disputes, states prefer retaining control in the resolution of their disputes, and local (or regional) resolution is still predominant¹³⁸. The more uncertain the outcome of a third-party conclusion over a dispute, the less willing a state will be to seek such adjudication. It follows that States will also be unwilling, and this was largely illustrated during the ICC Treaty negotiations (in particular with regard to the definition of crimes), to surrender to an international forum by making broad jurisdictional grants in advance, not knowing how the relevant law will be interpreted, applied, extended or limited. Recent ad hoc tribunals faced similar problems. For example, in the case of

¹³³ *Ibid.*

¹³⁴ Resolution 808 (1993), 22 February 1993, S/RES/808, Security Council 3175th Meeting for the establishment of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

¹³⁵ Resolution 955 (1994), 08 November 1994, S/RES/955 (1994), Security Council 3453rd Meeting for the establishment of International Tribunal for Rwanda.

¹³⁶ *Op cit*, Cassese, note 130, p.352.

¹³⁷ *Op cit*, Mr Lahiri (India), note 34, p.86, para.47.

¹³⁸ See e.g. *op cit*, Merrills, note 25, pp. 164-66.

Rwanda, it was perceived that there were “*no precedents or experiences to draw or learn from*”¹³⁹. Similarly, the ICC is perceived as potentially performing a twofold function. When the Court deals with cases of individual culpability, it will have much in common with national courts and relatively little in common with inter-state dispute resolution international courts such as the ICJ¹⁴⁰. Problems arise in fact when the ICC has to determine the legality of official acts, adjudicating therefore on national laws that an accused thought were valid at the relevant time. During the Rome Conference, Singapore for instance stated that “*Whereas the ICC must be endowed with the flexibility to contribute to the progressive development of legal principles, that must be distinguished from the power to create offences*”¹⁴¹. This is where the ICC moves from dealing with individual responsibility and has to confront sensitive political issues between States and navigate between opposing interests of the various parties. In performing such function, the ICC will inevitably resemble the ICJ¹⁴². A comparative example can be made here with a case before the European Court of Human Rights¹⁴³: several Moldovan nationals who had been sentenced to death or to terms of imprisonment by the “Supreme Court of the Moldovan Republic of Transdnistria” brought the case forward against the Republic of Moldova and the Russian Federation. The self-proclaimed Transdnistria Republic was in de facto control of the judicial authorities in that part of Moldova. The ECHR considered that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, did not exercise authority over part of its territory, namely the part which was under the control of the Moldovan Republic of Transdnistria (MRT). However, even in the absence of effective control over the Transdnistrian region, Moldova still had a positive obligation under Article 1 of the European

¹³⁹ See “*The position of the Government of the Republic of Rwanda on the International Criminal Tribunal for Rwanda (ICTR)*” Government of Rwanda, 07 May 1998, p.3, available at <http://www.rwandemb.org/prosecution/position.htm>

¹⁴⁰ *Op cit*, Morris, note 44, p.25.

¹⁴¹ *Op cit*, note 34, p.81, para.4.

¹⁴² *Ibid*.

¹⁴³ ECHR, Application No. 48787/99, *Ilie Ilascu et al. v Moldova and the Russian Federation*, Grand Chamber Judgment of 04 July 2001.

Convention¹⁴⁴ to take the measures that it had the power to make and that were in accordance with international law to secure to the applicants the rights guaranteed by the Convention. Consequently, the applicants were within the jurisdiction of the Republic of Moldova for the purpose of Art.1, but its responsibility for the acts complained of were to be assessed in the light of its positive obligations under the Convention (under the ICC Statute, such positive duty relates to states actively investigating and prosecuting international crimes). These related both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures required to ensure respect for the applicants' rights, including attempts to secure their release.

The European Court of Human Rights delivered a judgment¹⁴⁵ that illustrates the problem of de facto control of a self-proclaimed state's judicial organs. In ratifying the 1950 European Convention on Human Rights, Moldova had declared that it would be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Republic within the territory actually controlled by such organs, until the conflict in the region was finally resolved. The ECHR Grand Chamber, in considering the admissibility of the application, enquired into the nature of the declaration¹⁴⁶. The Moldovan Government maintained that it had to be interpreted as a reservation within the meaning of the European Convention. The Grand Chamber concluded that the declaration "*cannot be equated with a reservation ...so it must be invalid*".

As this case demonstrates, States with which the ICC will have to deal most of the time are nations that are either in a conflict or in a post-conflict transition. Before such States cooperate with the Court, it will be necessary for them to re-establish functioning legal systems and introduce, in cases of secession for

¹⁴⁴ 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention*".

¹⁴⁵ ECHR, Application No. 48787/99, Ilie Ilascu et al. v Moldova and the Russian Federation, 04 July 2001.

¹⁴⁶ The declaration was made with regard to Article 57 of the European Convention on Human Rights which provides that "*On receipt from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention*".

example, new constitutions that will allow for the ratification of the ICC Statute¹⁴⁷. Other issues may arise from the emergence of a new state or new federations, where national constitutional legal and political issues must be resolved in the first place, in order to determine who and to what extent existing international obligations bind and to determine who has the power to enter into international agreements¹⁴⁸. Furthermore, where national constitutions do not meet high international legal standards¹⁴⁹, it must not be presumed that such a State is either unable or unwilling to prosecute the crimes under the ICC and it will be difficult for the Court to contend so. ICC provisions will be interpreted and applied in harmony with constitutional traditions, legal, political and social aims and purposes which may, and often will, differ from those advanced by the Rome Treaty. For example, the Statute of the Special Court for Sierra Leone criminalizes abuses of girls under fourteen, as well as the abduction and forced recruitment of children¹⁵⁰. These provisions reflect the nature of the atrocities committed in Sierra Leone, where thousands of children were abducted and forced to fight¹⁵¹. The Special Court also has the jurisdiction to try persons who were fifteen or older at the time they committed the crime¹⁵² and provides special safeguards in trials of juvenile offenders by emphasising the need for rehabilitating and reintegrating such offenders back into society¹⁵³.

¹⁴⁷ See for example Venice Commission, “*Opinion on Responsibilities for the Conclusion and Implementation of International Agreements under the Constitution of Bosnia and Herzegovina*”, adopted by the Commission at its 39th Plenary meeting, CDL-INF(1999)009e, 21 June 1999.

¹⁴⁸ Venice Commission, “*Draft Opinion on the Compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina*”, CDL(1996)056e-rev-restr, 05 July 1996.

¹⁴⁹ See for example Venice Commission, “*Commentary on the Draft Albanian Constitution as Submitted for Popular Approval on 06 November 1994*”, CDL(1995)005e-restr, 16 January 1995. The 1998 Albanian Constitution provides in its Article 4 (2) that “*The Constitution is the highest law in the Republic of Albania*”.

¹⁵⁰ Statute of the Special Court for Sierra Leone Arts. 4(c) and 5 (a).

¹⁵¹ See Bassiouni M. C., “*Post-Conflict Justice*” (2001), p.583.

¹⁵² Statute of the Special Court for Sierra Leone Art.7.

¹⁵³ Statute of the Special Court for Sierra Leone Art.7. On ‘constructive, pluralistic’ approach to the problem of child soldiers see Iontcheva J., “*Nationalizing International Criminal Law*”, Conference Paper, The International Society for the Reform of Criminal Law, 18th Conference, Montreal, Canada, August 8-12, 2004, p.41, available at www.isrcl.org/papers/2004/Turner.pdf

1.4 Relationship between the ICC and National Legal Systems

Crucial to the valuation of the relationship between the ICC regime vis-à-vis States Parties is the question of whether, and if so to what extent, the rules of international criminal law bind the domestic legislator. It is important examining here the methods by which national courts determine the content of international criminal law. Answers to these questions will depend very much upon political, philosophical and the practical premises of each country.

One of the most important features of international law is that it is based on a voluntary cooperation of States and in order for an inter-state community to exist the international legal system is largely based on the principle of sovereignty of States. As far as public international law is concerned, demands for justice and order have in many instances overlapped and the Nuremberg Tribunal for example, while it represented a fundamental breach from state sovereignty, it undermined the need for justice by attempting to restore order instead. This judicial flaw along with contradictions surrounding the sovereignty of states and their total independence or inter-dependence, seems to be the main source of theoretical as well as practical contemporary debate on the relationship between international and municipal law. Theoretical debates over (non) parallel roles of national and international laws lead to no conclusive and satisfactory explanations despite current trends in academic literature to advance and presuppose international law as the overriding legal system. The distinction in fact between public international law and internal law is not sufficiently precise. Disputes between monists¹⁵⁴ and dualists are not, for the present argument, important per se, but are instead to be interpreted as a manifestation of the constant need to question the position of international law. Such constant debate illustrates the perception of international law as uncertain.

¹⁵⁴ See e.g. Schachter O., *“International Law in Theory and Practice”* 1991, pp.305-314; Allott P., *“The Concept of International Law”*, European Journal of International Law, Vol.10, No.1 (1999), pp.31-50.

There are three general theories on the relationship of the two systems. According to Cassese A.¹⁵⁵ these are: (1) monist theory advocating the supremacy of municipal law; (2) monist theory maintaining the supremacy of international law, “*giving little weight to the proper law or applicable law notion based on the doctrine of the autonomy of the will of the parties*”¹⁵⁶; (3) dualist theory proposing the existence of two separate distinct legal orders. This doctrine is typical of common law systems. Dualists base their argumentation on the thesis that international courts exclusively apply sources of international law and view domestic law as having only the quality of a ‘fact’¹⁵⁷; dualists rely on numerous findings of the PCIJ and ICJ to conclude that domestic law does not belong to the same legal order as international law¹⁵⁸. It is further suggested that the legal order of domestic law derives from international law by way of delegation¹⁵⁹. This is a policy-orientated perspective on the impact of international law upon national law that does not recognise two distinct systems of laws but suggests instead the ‘*distribution of jurisdiction*’¹⁶⁰ over particular events. Harris D. J. appears to approach the monist/dualist debate in a similar fashion: “*On the inter-governmental plane...international law is not only supreme, but in effect is the only system there. Domestic law does not, as such, apply at all in the international field...It is a supremacy not arising from content but from field of operation*”¹⁶¹. This proposition reflects the idea that each legal system is supreme in its own field

¹⁵⁵ Cassese A., “*International Law*” (2003), p.162.

¹⁵⁶ Maniruzzaman A. F. M., “*State Contracts in Contemporary International Law: Monist versus Dualist Controversies*”, *European Journal of International Law*, Vol.12, No. 2 (2001), p.310.

¹⁵⁷ *Ibid.*

¹⁵⁸ Treatment of Polish nationals and other persons of Polish origin or speech in the Dantzig territory (Dantzig Case), P.C.I J., Ser.A/B. NO.44, Advisory Opinion N. 4 (1932); See e.g. the Georges Pinson Case brought before the France-Mexico Claims Commission where the umpire dismissed the view that in a case of conflict between the constitution of a state and international law, the former should prevail, by point out that this view was “*absolutely contrary to the very axioms of international law*”, Decision of 18 October 1928, in the United Nations Reports of International Arbitral Awards, Vol.5, pp.393-4. See also Lauterpacht H., “*Oppenheim’s International law*” (1955), pp.37-39; Fitzmaurice G., “*The General Principles of International Law Considered from the Standpoint of the Rule of Law*” (1957), II 92 PC 5, pp.70-71,79-80.

¹⁵⁹ Encyclopaedia of Public International Law (1987), *International law and Municipal law*, pp.238-239.

¹⁶⁰ Weston B., Falk R., Amato A., “*International Law and World Order*” (1980), p.186.

¹⁶¹ Harris D. J., “*Cases and Materials on International Law*” (1998), pp.68-69.

and neither has hegemony over the other¹⁶². During ICC negotiations, Paraguay was in favour of a restrictive concept of the powers of the Court, under complementarity, to ‘supervise’ national proceedings by pointing out that the ICC should not be converted into a court of higher instance over local courts¹⁶³. It stressed the importance of ensuring that the ICC is not manipulated to diminish the role of national courts or to interfere with internal affairs.

Dualist theories maintain that there are two distinct legal systems and that they differ in¹⁶⁴ (1) their subjects; usually individuals in national and states in international legal systems; (2) their sources; parliamentary statutes and common law on one hand and treaties and customary rules on the other; (3) the content of the rules; national law regulating the internal functioning of a state and the relations between the state and individuals, whereas international law governs relations between sovereign states.

The question of the relationship between international and domestic law may be resolved in a variety of ways; every state has its own rule of internal constitutional law and specific statutory provisions in dealing with compatibility matters. There are different approaches as to the domestic applicability of customary international law and international treaties. In the United Kingdom, for example, there are several problems related to the incorporation of customary rules. It was said in *Chung Chii Cheung v R* [1939]¹⁶⁵ that “*International law has no validity save insofar as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law and procedure... On any judicial issue they (the courts) seek to ascertain what the relevant rule is and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes*”¹⁶⁶.

¹⁶² On views of Fitzmaurice and Rousseau see generally Brownlie I., “*Principles of International Law*”, (1998), p.55.

¹⁶³ *Op cit*, note 35, Mr Sarubbi C. (Paraguay), p.102, para.90.

¹⁶⁴ *Op cit*, Cassese, note 154, p.163.

¹⁶⁵ *Chung Chi Cheung v The King* [1939] AC 160

¹⁶⁶ *Ibid*. Per Lord Atkin at 167-168. See also Lord Denning and Shaw LJ in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 (CA) at 554 and 579 respectively where they emphasised that international law does not know the rule of precedent and it overrules it

With regard to treaties, the main problem is that in case of conflict statute prevails over treaty. As the House of Lords has held: “*As matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament*”¹⁶⁷. This constitutional rule is accompanied by the rule of construction¹⁶⁸ which requires that Acts of Parliament and statutory instruments be interpreted as not to conflict with international law but, perhaps in contradiction to some extent, the same rule does not apply if the statute is otherwise clear and unambiguous, in which case it must be applied. Accordingly, there is a distinction between statutes enacting the treaty and those dealing with the same subject-matter but not enacting the treaty itself. If the treaty forms an integral part of the enabling Act, being attached to it as a Schedule, the treaty and the Act are as one. If the domestic legislation is not clear and is reasonably capable of more than one meaning, the treaty then becomes relevant and the meaning that is consonant with it would be preferred, notwithstanding the rule of construction. Generally, the dominant principle in the application of customary international law is based on a monist approach. The doctrine of incorporation states that a specific rule of international law becomes part of national law without the need for express adoption. As a result, domestic courts have to apply that rule of international law as long as there is no explicit contradicting piece of law or judgment. The doctrine of transformation on the other hand stipulates that rules of international law do not become part of national law until they have been expressly adopted by the state.

Then there is the so-called harmonising approach by which national legislatures and the courts to some extent have competence to bring about

therefore. The case is relevant as it reinforced the doctrine of incorporation of customary rules; see also e.g. *Westland Helicopters Ltd. V Arab Organisation for Industrialisation* [1977] 1 All ER 881

¹⁶⁷ Per Lord Oliver in *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER, at 545

¹⁶⁸ See e.g. *Derbyshire County Council v Times Newspapers Ltd.* [1992] 3 All ER 65 where the Court of Appeal outlined the circumstances in which domestic courts may rely on ECHR, including to resolve uncertainties or ambiguities in a statute (or in common law in general), to determine how courts should exercise discretion.

harmonisation. This is most apparent in the field of human rights. In Hungary, for example, the Constitution provides that the domestic legal system accepts the generally recognised principles of international law and shall harmonise the country's domestic law with the obligations assumed under international law¹⁶⁹. As already mentioned, domestic law, according to radical monist theory, has no functions in international law and in general, international courts should not deal with its interpretation or method of application on domestic laws. More importantly and in sharp contrast, national courts must always observe international law to the partial discretion when dealing with customary rules. As Brownlie I. observes: “*International Tribunals cannot declare the internal invalidity of rules of national law since international legal order must respect the reserved domain of domestic jurisdiction*”¹⁷⁰.

For the purpose of harmonising contemporary international criminal law as well as humanitarian law and with the aim of encouraging conditions for the training of national judiciary and other relevant authorities, numerous states¹⁷¹ have established committees in which members of the ICC could have participatory roles, having the function of: (a) promoting effective national implementation of international humanitarian rules and aims, including coordination with concerned agencies and the presentation of proposals in accordance with the public interest¹⁷²; (b) contributing to the preparation of training and development programs for persons in charge of serving international humanitarian law in the light of local national needs¹⁷³ and (c) recommending proposals for legislative regulations for the implementation of

¹⁶⁹ See e.g. 1949 Constitution of the Republic of Hungary, Act XX, Ch. I, Art.7. See also Mexican proposed Constitutional Amendment, 14 December 2002 at <http://www.iccnw.org/resourcetools/ratimptoolkit/nationalregionaltools/analysis/mx.const.am.sp.pdf> and the Final Act, Gaceta Parlamentaria VI, No.1162, 06 January 2003.

¹⁷⁰ Brownlie I., “*Principles of International Law*” (1998) p.40. See e.g. Permanent Court of International Justice (PCIJ) Case concerning the Payment in Gold of Brazilian Loans issued in France [1929], Dissenting opinion by Pessoa M, at 139, PCIJ Ser. A, No.20/21, Judgment No.15, 12 July 1929; Anglo-Iranian Oil Co. (United Kingdom v Iran) [1952], Judgment of 22 July 1952

¹⁷¹ See e.g. Slovenian Decree No. 762-01/99-1 (B) of 02 April 1999 setting up the Interdepartmental Committee for International Humanitarian Law; Ukrainian Cabinet of Ministers resolution No.1157 of 21 July 2000; Uruguayan Decree No.677/992, 12 May 1992; Hungarian Government Resolution 2005/2000 (V.9).

¹⁷² Egyptian Prime Minister's Decree No.149/2000 on the establishment of a National Committee for International Humanitarian Law, Art.2.

¹⁷³ Ibid.

the obligations stemming from the 1949 Geneva Conventions and their 1977 Additional Protocols, conventions of international humanitarian law, including the Statutes of international criminal courts¹⁷⁴.

1.5 Implementing and applying ICC law

Several factors emphasise the significance of the debate on potential constitutional incompatibilities with the ICC Treaty. Procedural and political realities of amending a constitution are often controversial and complex. Numerous constitutions provide either that certain ratified treaties take precedence over domestic laws¹⁷⁵ or that such treaties benefit from a constitutional rank or provide for them to have pre-eminence over other constitutional provisions¹⁷⁶. In the Republic of Argentina, for example, the constitution affords constitutional rank to certain treaties such as the Convention on the Prevention and Punishment of Genocide, the American Convention on Human Rights and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment¹⁷⁷. In Portugal, the Constitution provides that, once approved, international rules apply to national laws and once ratified and published become Portuguese law¹⁷⁸. The Portuguese Constitution now also stipulates that it “*accepts the jurisdiction of the International Criminal Court, with the conditions of complementarity and other stipulations as foreseen in the Rome Statute*”¹⁷⁹. In Paraguay, the constitution takes a step further providing that the country “*accepts a supranational legal system that would guarantee the enforcement of human rights, peace, justice, and cooperation, as well as political, socio-economic,*

¹⁷⁴ Greek Ministerial Decision of 20 March 2000 on the establishment of a Commission for the Implementation and Dissemination of International Humanitarian Law, Art.3 (1).

¹⁷⁵ See for example Article 11 of the 1992 Constitution of Slovakia and Article 10 of the 2002 Constitution of the Czech Republic.

¹⁷⁶ Duffy H., “*National Constitutional Compatibility and the International Criminal Court*” 11 Duke Journal of Comparative & International Law 3 (2001) p. 6.

¹⁷⁷ 1994 Constitution of the Republic of Argentina, Art.75 (22).

¹⁷⁸ 2001 Constitution of the Republic of Portugal (No.1/2001), Art.8.

¹⁷⁹ *Ibid.*, Art.7 (7).

and cultural development”¹⁸⁰. In Angola, the government concluded that there is perfect constitutional compatibility between the ICC Statute and the Angolan basic law¹⁸¹, which recognises the primacy of international law over national laws by requiring that “*Constitutional and other legal norms be interpreted and integrated in line with the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights and other international instruments to which Angola is a party*”¹⁸². In contrast, Mozambique for example, encountered numerous problems in ratifying the Rome Treaty as the Constitution allows for the ratification of treaties only when they are compatible with the Constitution¹⁸³. In FYROM, the Constitution¹⁸⁴ provides that international treaties that are ratified in accordance with the Constitution become part of the legal order and cannot be changed by law¹⁸⁵.

This is similar to the ‘self-executing’ model on treaties, predominantly adopted by the U.S. Self-executing treaties being applicable by national courts without any legislative act so long as their provisions are clear and precise enough for direct implementation. However, the distinction between treaties that are self-executing and those that are not may be problematic. It has been said in fact that, “*A treaty...does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing ...In determining whether a treaty is self-executing, courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution...In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts*”¹⁸⁶.

¹⁸⁰ 1945 Constitution of the Republic of Paraguay Art.145.

¹⁸¹ *Loc cit*, note 106.

¹⁸² 1992 Constitution of Angola, Art.21 (2).

¹⁸³ 1990 Constitution of Mozambique, Art.85 (2).

¹⁸⁴ 1992 Constitution of FRYOM, Art.118.

¹⁸⁵ The Law on Ratification of the Rome Statute on the International Criminal Court was adopted in 2002, Official Gazette No.12/2002.

¹⁸⁶ Judgment of Gibson CJ in *Sei Fujii v State* (1952), 38 Cal.2d 718, 242 P.2d 617 (1952).

States have adopted two ways of responding to the ICC Treaty implementation requirements. A small number of States have amended their constitution to ensure that it is compatible with the Treaty. For example, France amended its Constitution and has ratified the Statute. These amendments concern three specific aspects of the constitution but the amended constitution does not itself specify these issues. They related firstly to ICC Art.27 (Irrelevance of official capacity), secondly to the fact that the Court could challenge national rules on statutory limitations or nationally adopted amnesty laws and thirdly to the ICC Prosecutor's capacity of conducting investigations on national territory without representatives of the French judicial system¹⁸⁷. The Constitution now reads, "*The Republic may recognise the jurisdiction of the International Criminal Court under the conditions specified by the treaty signed on July 18, 1998*"¹⁸⁸. Germany had taken a slightly different approach, whereby it amended a particular provision of the German Constitution, the Basic Law, concerning the extradition of nationals, previously prohibited by the Constitution. Similarly, Jordan adopted a new implementing law establishing compliance with the Rome Statute and harmonising its own constitution with it, particularly with regard to the non-extradition of nationals. Article 9 of the Constitution provides that "*(i) no Jordanian may be deported from the territory of the Kingdom; (ii) no Jordanian may be prevented from residing in any place, or be compelled to reside in any specified place, except in circumstances prescribed by law*". Article 3 of the new law provides the need for the Statute's implementation into national law.

Other States have either concluded that their constitutional rules are consistent with the Statute and that any amendments are unnecessary, or that a constitution and the ICC Treaty may coexist as two parallel instruments. Nigeria for example, expressed the view during the ICC Treaty negotiations that it would "*have difficulties with the statute if a hierarchy is established in which the ICC would be superior to national courts. Rather, recourse to the*

¹⁸⁷ Decision 98-408 DC of 22 January 1999-Treaty on the Statute of the International Criminal Court, in *Journal Officiel*, No.20, 24 January 1999, p.1317.

¹⁸⁸ Constitution of the Republic of France 1958, 1999, Art. 53 (2). Brazil and Belgium have also followed this approach.

Court should only be in the absence of national jurisdiction”¹⁸⁹. Norway stated that, “*The International Criminal Court will not take precedence over national criminal jurisdictions in cases that come within the scope of the Court, such as war crimes, genocide etc. It will only exercise its functions of investigation, trial and conviction when the State concerned does not have the will or the ability to exercise these functions efficiently itself*”¹⁹⁰. Similarly, the Swiss Federal Law on Cooperation with the International Criminal Court 2001 provides that the Swiss Central Authority may assert jurisdiction or, if necessary, it may challenge the jurisdiction of the Court¹⁹¹.

The constitutional amendment approach seemed to be preferred by countries where constitutional changes were absolutely necessary, or where the constitutional change was simplified and straightforward. Various states, like Germany, looked at the ICC Treaty ratification as a timely opportunity to ‘update’ national provisions.

The other principal way of ratification is the interpretative approach, which implies that the ICC Treaty and the constitution can in fact be read harmoniously¹⁹². Most importantly, the manner in which a constitution is interpreted will depend significantly on domestic constitutional theory and practice. On its face, this may imply practical inconsistencies amongst States when interpreting and applying ICC provisions, which may lead potentially to dissimilar application results. This could affect the rights of the accused. It is therefore important to view different constitutions as being flexible and interpreted as “*embracing scenarios not contemplated by their creators*”¹⁹³. It is widely accepted that a constitution should be interpreted consistently with its own object and purpose without undermining the original intent of a particular constitutional provision.

¹⁸⁹ Statement of Ayewah I. E (Nigeria), U.N. GAOR, 50th Sess., at 2 U.N. Doc. A/C.6/50/SR, 1995.

¹⁹⁰ Transcript of the debate in the Plenary of the Storting (The Norwegian Parliament) on 27 January 2000 (unofficial translation), provided by the Council of Europe, “*The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court-Norway*”, 18 October 2001, Consult/ICC (2001) 42.

¹⁹¹ CICCL of 22 June 2001, Art.7.

¹⁹² *Op. cit*, Duffy, note 175, p. 13.

¹⁹³ *Ibid*.

Consideration of basic constitutional values and objectives and their compatibility with those of the ICC Statute will present a major contest in applying ICC provisions. Particular provisions that typically raise questions of constitutional compatibility are concerned with human rights¹⁹⁴. Arguably therefore, any interpretation of the constitution that militates against the ability to hold accountable those responsible for grave international crimes may be inconsistent with a constitution's own purpose. Another principle of constitutional construction, which is the core of the present chapter, is that constitutional provisions should be interpreted consistently with international law obligations. This may include an obligation on a State not to recognise foreign law that is in violation of international law obligations but it may not include a duty on a State to enforce an ICC provision that would be in breach of an existing multilateral or bilateral treaty obligation. In fact, where there is a clear conflict between constitutional and international law, it will be for the municipal law to determine the hierarchy between the two and apply the relevant law accordingly. Admittedly, however, where constitutional provisions permit different possible interpretations, there is a strong argument in favour of construing the constitution and international law consistently. If ICC provisions do represent, according to some, *erga omnes* obligations then contemporary international law accords such obligations priority over any other norms¹⁹⁵. Optimistic ICC supporters would argue that by ratifying treaties (without any major reservations) such as the Convention against Torture, States have already accepted the duty to prosecute or extradite, notwithstanding any constitutional provision against such action which may be interpreted as indicating that relevant constitutional provisions, such as those granting immunities, did not apply to the prosecution of the crimes that are the subject matter of the treaties¹⁹⁶. Such interpretation of the relationship between

¹⁹⁴ *Ibid.*

¹⁹⁵ On *erga omnes* obligations see e.g. Malanczuk P., “*The International Criminal Court and Landmines: What are Consequences of Leaving the US Behind*”, 11 *European Journal of International Law* 1 (2000), p.77-90; Committee on Human Rights Law and Practice, “*Report on the Exercise of Universal Jurisdiction on Respect of Gross Human Rights Offences*”, prepared by Kamminga M., International Law Association, Report of the 68th Conference, Taipei, Taiwan, 1998.

¹⁹⁶ See e.g. Vienna Convention Art. 31 (3) (c) (general rule of interpretation) which states that “*There shall be taken into account, together with the context, any relevant rules of*

the ICC and States Parties is incomplete and somewhat simplistic. It is the recognition of constitutional autonomy that the ICC is based on, through the principle of complementarity, and it is in acceptance of constitutional sovereignty that the Rome Treaty is silent on the issues of amnesties and pardons. In Armenia for example, the Constitutional Court has declared incompatibilities with the Rome Statute as the ICC is seen as supplementing the national judicial system¹⁹⁷ and because national authorities would be deprived of the right to grant pardons. There are inherent limits to the technique of treaty interpretation in light of ‘*any relevant rules of international law applicable in relations between parties*’¹⁹⁸, as a means of reducing the occurrence of inconsistencies. These limits arise for example from the different context in which other rules of international law may have been developed and applied and/or the progressive purpose of many treaties in the development of international law¹⁹⁹. Armenia nevertheless introduced in 2003 a new criminal code that covers ‘*crimes against peace and human security*’. This section of the new code provides definitions of genocide, serious breaches of international humanitarian law during armed conflicts and crimes against human security, excluding any reference to the Rome Treaty.

Constitutions and the values they represent would be better served by the ratification of the Statute than not²⁰⁰. In some States it has been perceived that such ratification requires parliamentary approval because of a perception that the executive may have excessive powers in the field of foreign affairs. In Australia it was felt that “*the practice, whereby treaties were entered into by*

international law applicable in the relations between parties”. See also European Court of Human Rights jurisprudence in *Al-Addani v United Kingdom*, Application No. 35763/97 123 I.L.R. (2001) 24; *McElhinney v Ireland*, Application No. 31253/96; *Golder v United Kingdom*, Judgment 21 February 1975, ECHR Ser. A [1995] No.18;

¹⁹⁷ Contradicting Articles 91 and 92 of the 1995 Armenian Constitution.

¹⁹⁸ Vienna Convention Art. 31 (3) (c).

¹⁹⁹ *Op cit*, ILC, note 32, p.300, para.346. See also para.349 where it was said that Article 31 (3) (c) which is essential for promoting harmonisation and guaranteeing the unity of international legal system, did not however indicate any particular way in which this should take place (carry out the interpretation). Different rules would have to be weighted against each other in a manner that was appropriate in the circumstances.

²⁰⁰ *Op cit*, Duffy, note 175, p.16.

the executive without significant parliamentary involvement, is 'undemocratic'"²⁰¹. And that:

*"Parliamentary approval of legislation which implements treaties is not a satisfactory form of accountability. Even when treaties are not implemented by legislation, they may still have domestic consequences. Treaties can affect the interpretation of law, by being used to resolve ambiguities in legislation or gaps in the common law. They are considered by the courts to be a legitimate source of influence on the development of the common law, and may be the source of a 'legitimate expectation' under administrative law, the government officials will comply with the treaty when making administrative decisions which affect the rights of people"*²⁰².

Accountability is fundamental from the standpoint of international law; conflict over domestic process of treaty ratification may undermine the legitimacy of international law itself and result in a lack of public support for treaties and their results²⁰³. A system where the power to ratify treaties is removed from the executive until approval has been granted by the legislature would potentially offer a better balance²⁰⁴. In Sierra Leone for example, it was recently held that the Government of Sierra Leone acted unconstitutionally in establishing the Special Court²⁰⁵. It had been pointed out that there should have been a postponement of all operations of the Special Court until the Sierra Leone Government was able to actually hold a referendum in accordance with the Sierra Leone Constitution²⁰⁶. In Ireland, the

²⁰¹ Cranwell G., *"The Case for Parliamentary Approval of Treaties in Australia"* 8 Murdoch University Electronic Journal of Law 4 (2001), p.2, at <http://www.murdoch.edu.au/elaw/issues/v8n4/cranwell84.html>

²⁰² *Ibid*, pp. 2-3.

²⁰³ Shearer I., *"The growing impact of international law on Australian domestic law-implications for procedures of ratification and parliamentary scrutiny"* 69 Australian Law Journal (1995), p.404.

²⁰⁴ See Hendry J., *"Treaties and Federal Constitutions"* (1955) p.89 *"The great disadvantage of the English system is that, if the executive cannot obtain the necessary parliamentary approval for a treat, or if the courts declare the treaty unconstitutional, the state is internationally in default"*.

²⁰⁵ Special Court for Sierra Leone, Prosecutor v Kondewa, Case No. SCSL-2004-14-AR 72 E, the Appeals Chamber *"Decision on Constitutionality and Lack of Jurisdiction"*, 13 March 2004, para3

²⁰⁶ SCSL, Prosecutor v Morris Kallon, *"Preliminary motion based on lack of jurisdiction: establishment of Special Court violates Constitution of Sierra Leone"*, 16 June 2003, Case No. SCSL-2003-07-PT, para23.

implementation of the Rome Treaty did indeed require a referendum²⁰⁷ as it was recognised that an ICC implementing act²⁰⁸ contradicting the Constitution and necessitating other legislative amendments could only be introduced by democratic referendum. Only such a referendum could justify democratic change in the Constitution. Referring back to the process in Sierra Leone, it was submitted that for the part of the Sierra Leone Government the President signed the Agreement on the establishment of Court between Sierra Leone and the United Nations. The main problem was the understanding by some that the Special Court amended the judicial framework and court structure in Sierra Leone and under the Sierra Leone Constitution (Art. 108 (4)) such amendments cannot be made without a referendum of the people of Sierra Leone and no such referendum had been held²⁰⁹. It was suggested that Sierra Leone acted “*unconstitutionally in bypassing the views and wishes of the people of Sierra Leone*”²¹⁰. The opposing view maintained that under the Ratification Act²¹¹ (S.11 (2)) the Special Court did “*not form part of the Judiciary of Sierra Leone*” and that “*the Special Court does not exist or operate at all within the sphere of municipal law...and is not a national court of Sierra Leone*”²¹². It was also emphasised that the Constitution is only “*concerned with the judiciary of Sierra Leone*”²¹³, within municipal law. The ICJ observed in the Norwegian Loans Case²¹⁴ that:

“National legislation...may be contrary, in its intention or efforts, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel, and if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory

²⁰⁷ Referendum to the 23rd Amendment to the Constitution (of 29 December 1937) was held on 07 June 2001.

²⁰⁸ See Twenty-third Amendment of the Constitution Bill 2001.

²⁰⁹ *Op cit*, note 205, paras 5-7.

²¹⁰ *Ibid*, para 18.

²¹¹ 2002 Special Court Agreement (Ratification) Act.

²¹² *Op cit*, note 204, para 9 (a).

²¹³ 1991 Constitution of Sierra Leone, Chapter 7.

²¹⁴ Case of Certain Norwegian Loans, ICJ Reports (1957) 9, p.27.

character, in order to shelter it effectively from any control by international law”.

In another case, the Pyramids Case²¹⁵, a tribunal accepted that national law, Egyptian law, was the proper applicable law but at the same time it took the view that international law is indeed part of Egyptian law and concluded that: *“Reference to Egyptian law must be construed so as to include such principles of international law as may be applicable and that national laws of Egypt can be relied upon only in as much as they do not contravene said principles”*²¹⁶.

In South Africa, the adoption of the Rome Treaty represented a ‘*compromise package*’ where unresolved issues, primarily those relating to national laws, pose serious challenges to the ICC²¹⁷. In the AZAPO Case²¹⁸ the South African Constitutional Court, by holding the amnesty legislation to be constitutional, is said to have proceeded from the assumption that international law was irrelevant if it was inconsistent with the Constitution. This is confirmed by the 1996 Constitution which provides that *“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”*²¹⁹. As a result, the Court maintained that *“International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are...relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution*²²⁰ *should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law”*²²¹. It is worth noting that the 1996 South African

²¹⁵ SPP (Middle East) Ltd and Southern Pacific Projects v Egypt and EGOTH [1998] LAR 309.

²¹⁶ *Ibid* at 330. See also Polish Nationals in Dantzig Case, P.C.I.J, Ser.A/B, no.44,1931, at p.24 where it was said that *“according to generally accepted principles...a state cannot adduce as against another state its own constitution with a view to avoiding obligations incumbent upon it under international law or treaties in force”*.

²¹⁷ See 2001 South Africa International Criminal Court Bill, Government Gazette No. 22456 (04 July 2001).

²¹⁸ Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others, Const. Court CCT17196, Judgment of 25 July 1996.

²¹⁹ Sec.232 of the 1996 South Africa Constitution, Act. No. 108. See also Sec.233 which provides that *“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”*.

²²⁰ 1996 Constitution of the Republic of South Africa.

²²¹ *Op cit*, note 217, para.26.

Constitution provides that “*The Republic is bound by international agreements which are binding on the Republic when the Constitution took effect*”²²² and in striving to achieve harmony between South African and international human rights jurisprudence, when interpreting the Bill of Rights, a court must consider international law²²³ and may consider foreign law²²⁴. It has also been noted²²⁵ that in light of the prescriptions in the South African Interim Constitution relating to the importance of international human rights law in the process of constitutional interpretation²²⁶ and the place of customary international law in domestic law²²⁷, the Constitutional Court would have examined the conventional and customary rules that demand prosecution for human rights violators, the practice of other states in transition and whether the drafters of the Interim Constitution intended to overrule international law on amnesties²²⁸. By contrast, the Czech Republic’s 1992 Constitution provides that ratified and promulgated international accords on human rights and fundamental freedoms are immediately binding and are superior to national law²²⁹. Some commentators maintain however that a conclusion in which international law overrides national laws in the event of inconsistencies and so attributes supremacy to international law, is an expression of the monist doctrine but such a formulation is “*in doubt because it is contrary to the practice of most states*”²³⁰.

In the United Arab Emirates, the government is currently examining the ICC Statute and how to modify the national laws in accordance with the crimes in the Rome Treaty, prior to ratification. Reports have indicated that whilst legal compatibilities issues have nearly been resolved, political barriers remain the

²²² Section 231 (5).

²²³ 1996 South African Constitution Sec.39 (1) (b).

²²⁴ *Ibid.* Sec.39 (1) (c).

²²⁵ Dugard J., “*International Law and the South African Constitution*”, European Journal of International Law, Vol.8, No.1 (1997) pp.88-89.

²²⁶ 1993 South Africa Interim Constitution Act 200, Sec. 35 (1). See also e.g. Keightley R., “*Public International Law and the Final Constitution*” 12 South African Journal of Human Rights (1996) at 408.

²²⁷ 1996 Constitution, Sec. 231 (4).

²²⁸ *Op cit*, note 224, p.89.

²²⁹ Art. 10 of the 1992 Czech Republic Constitution.

²³⁰ *Op cit*, Maniruzzman, note 155, p.318.

main obstacle to ratification²³¹. Many Arab countries have delayed the ratification of the ICC Treaty having concerns about the non-definition of the crime of aggression in the Treaty. The Syrian Arab Republic has for example indicated that it would wait until the crime of aggression was defined before deciding its position on the ICC²³².

From a theoretical perspective, the question is how can there be an impartial and politically independent legal order in which *‘there are no institutions for the interpretation of law which are independent of states’*²³³. Speculating further the argument may be extended so as to conclude that there is little to be expected from the possibility of an independent judiciary, as judges are inevitably state appointees, both at national and international level²³⁴. As Prof. Carty A explains:

*“Even if an individual judge is independent in spirit, the power of a state apparatus considers that its national security is at issue. This is, in fact, reflected in judicial interpretations of the meaning of the concept of national security. The power of the state has, further, huge implications in terms of the access of the judiciary to the facts that could form basis of an objective decision. The court is not necessarily in any better position to extract information from individual states than is a political body such as the Security Council”*²³⁵.

During the Rome Conference, it was largely felt that granting the Security Council substantial powers to determine the docket of the Court was incompatible with the establishment of an effective judicial body. Many States had in fact expressed concerns about the not-sufficiently defined relationship between the Court and the Security Council. Defining the relationship between

²³¹ See Country Report by the Coalition for the International Criminal Court (CICC) at <http://www.iccnw.org/countryinfo/northafricamiddleeast/unitedarabemirates.html>

²³² *Ibid*, Report on Syria, at <http://www.iccnw.org/countryinfo/northafricamiddleeast/syria.html>

²³³ Carty A., *“The terrors of freedom: the sovereignty of states and the freedom to fear”* in *“Law after Ground Zero”* Strawson J (Ed) 2002, p.47. For a further discussion see inconsistent understanding and application of international law see Carty A., *“Convergences and Divergences in European International Law Traditions”* 11 *European Journal of International Law* 3 (2000) 713-732.

²³⁴ *Ibid*, Carty (2002).

²³⁵ *Ibid*.

the United Nations and the Court is important in strengthening and legitimising the work of the Court. The respective competence of the Court and the Security Council must be carefully appraised as to reconcile the former's independence with the latter's prerogatives²³⁶. The United States described as simplistic the argument that Security Council referrals would politically influence the ICC Prosecutor and that proprio motu investigations would ensure impartiality²³⁷. Such argument either ignores or underestimates the considerable political pressure that States and organisations would impose on the Prosecutor. In addition, the argument that the Prosecutor could base a decision on whether to initiate investigations solely on legal criteria is, as the United States stressed, weak and not persuasive²³⁸. If the Prosecutor has authority and responsibility to pursue all credible allegations, there would be many more complaints than the Prosecutor could possibly handle²³⁹. In order to prioritise the most serious allegations, the Prosecutor will inevitably be required to assume public policy decisions. Such decisions, in the views of many participants at the Rome Conference, would be best made elsewhere, namely the Security Council. For example, the Czech Republic argued that the Court should not be able to consider an act of aggression unless the Security Council had first determined that such an act had been committed²⁴⁰.

The complementarity provisions of the ICC Statute (Articles 17 to 19) are central to the understanding of the effect of constitutional incompatibilities with the ICC. The ICC Statute limits the Court's investigations to those situations where a State concerned is unable or unwilling to investigate and prosecute, and thus if it carries out genuine investigations the ICC will have no jurisdiction, thereby potential constitutional incompatibilities will be avoided. The Court must not supplant national criminal justice systems or act as a

²³⁶ Statement by Mr Minoves Triquell (Andorra), Rome Conference, UN Doc. A/CONF.183/13 (Vol.II), p.81, para.2. Also, Ms Almeida (Observer for the International Centre for Human Rights and Democratic Development) said that granting the Security Council sweeping powers to determine the docket of the Court was incompatible with the establishment of an effective judicial body.

²³⁷ Mr Scheffer (United States), Rome Conference, 9th plenary meeting, 22 June 1998, A/CONF.183/C.1/SR.9, p.202, para.127.

²³⁸ *Ibid*, para.128.

²³⁹ *Ibid*.

²⁴⁰ Mr Janda (Czech Republic), Rome Conference, 10th plenary meeting, 22 June 1998, A.CONF.183/C.1/SR.10, p.209, para.81. Supported by Australia, see Mr Rowe, at p.213, para.15.

supervisory body over them²⁴¹. For example, with regard to ICC Article 19 (3), which provides that the Prosecutor may request the Court to review a decision of inadmissibility, it was said during the Treaty negotiations that such a review procedure gave the ICC Prosecutor too wide a power of appreciation over national proceedings²⁴². In order to be able to have jurisdiction over a case under the complementarity principle, several countries have amended their domestic legislation²⁴³. The need for such changes, as already discussed, depends on the efficiency of existing national law. The process of implementation of the ICC Treaty has involved, amongst other things, including the crimes within the ICC jurisdiction into domestic law²⁴⁴; elevating national rules to international standards and characterising them, where appropriate, as international crimes. In Germany for example, the Federal Cabinet adopted the Act of Ratification of the Statute of the International Criminal Court and the Act Amending Article 16 of the Basic Law which allows for the extradition of nationals to the ICC and to other member states of the European Union²⁴⁵, by specifying “*it will be possible to decide differently by law regarding the extradition to a member state of the European Union and to an international court*”²⁴⁶. In other States such as Canada and New Zealand, implementation has involved extending the jurisdiction of domestic courts to cover crimes committed outside the territory of these States, providing for universal jurisdiction²⁴⁷.

²⁴¹ *Op cit*, Statement from Ghana, note 34, p.85, para.38.

²⁴² See Mr Holmes (Canada), Rome Conference, 11th Meeting, 22 June 1998, A.CONF.183/C.1/SR.11, p.213, para.21.

²⁴³ See for example how the Republic of South Africa amended its Criminal Procedure Act 1977 by adding to its sec.18 (g) the crime of genocide, crimes against humanity, war crimes and the crime of aggression as contemplated in sec.4 of the South African International Criminal Court Act 2001, and amendments to the Military Discipline Supplementary Measure Act 1999.

²⁴⁴ This is a fundamental aspect of a correct implementation of the ICC law because a state should not circumvent its obligations simply because the international crimes lack adequate definition in domestic law. See e.g. Cameroon Case No.337/COR, Court of Appeal, 21 February 1997 where a request was surrendered was challenged on the grounds that the crimes in the relevant arrest warrants were not criminal offences under the ordinary penal law of Cameroon.

²⁴⁵ Adding to draft law No.715/99.

²⁴⁶ The Cabinet approved the final drafts and the Code of Crimes Against International Law and the Implementing Act on January 16, 2002, full text available at http://www.iuscrim.mpg.de/forsch/online_pub.html*legaltext

²⁴⁷ For example, Canada and New Zealand have adopted such implementing legislation. See Canadian Crimes Against Humanity and War Crimes Act 2000, c.24., and 2000 New Zealand International Criminal Court Act.

The most noticeable constitutional barriers in implementing the Rome Treaty relate to (1) the jurisdictional monopoly of national courts to adjudicate individuals; (2) the regimes of expulsion and extradition, which are constitutionally reserved to national judicial authorities and are subject to constitutional discipline; (3) in many States, the constitutional prohibition of life-imprisonment and (4) the regulation on immunities for certain State officials, which is contrary to the ICC Statute.

The most important and most recurrent of these incompatibilities between the national laws and provisions of the ICC Statute relate to the prohibition of extradition of nationals. Usually such prohibitions are a direct bar on extradition. For example, the Bulgarian constitution provides that “*no citizen of the Republic of Bulgaria shall be expatriated or extradited to another state*”²⁴⁸; the Latvian constitution provides that “*a citizen of Latvia may not be extradited to a foreign country*”²⁴⁹. Other constitutions such as that of Estonia, provide that extradition of its citizens is permitted in cases prescribed by an international agreement, such as the ICC Treaty. In Portugal, a solution had been proposed to avoid the “*painful process of surgical review of the Constitution*”²⁵⁰ and to establish an acceptance clause in the Constitution and leave all specific issues to the implementing legislation that gives effect to complementarity²⁵¹. Constitutional inconsistencies regarding the prohibition against extradition of nationals and obligations under the ICC Statute have been resolved, in theory at least, by introducing the concept of ‘surrender’ to an international court as opposed to ‘extradition’ to another state²⁵²; complementarity will not always resolve these incompatibilities but it is a method of exercising jurisdiction by States and a method of preserving their constitutional sovereignty in areas such as immunities, amnesties and sentences.

²⁴⁸ Article 25(4) of the 1991 Bulgarian Constitution.

²⁴⁹ Article 98 of the 2003 Latvian Constitution.

²⁵⁰ *Op cit*, note 101, Dr Jorge Lacao, President of the Portuguese Constitutional Affairs and Civil Liberties Commission.

²⁵¹ *Ibid*.

²⁵² For a full discussion see Chapter 2.

The Rome Statute does not explicitly impose the duty to adopt cooperation legislation,²⁵³ although States are under an obligation to adopt appropriate legislation to implement the cooperation obligations under Part 9 of the Statute. Neither the signatory States nor the States Parties have any clear obligation to bring their domestic legislation into harmony with the basic provisions of the Rome Statute, nor is there an explicit obligation under the Rome Statute on States Parties to prohibit in their national law the crimes falling within the ICC's jurisdiction²⁵⁴. The Council of Europe's Spanish Progress Report²⁵⁵ for example, concludes that: "*Strictly speaking, the Statute does not include any obligation on the part of the States parties to incorporate those criminal provisions into their internal law, as they only concern the scope and exercise of the jurisdiction of the Court*"²⁵⁶. As "*any interpretation of an international treaty has to start with its text, such absence militates its existence*"²⁵⁷, it is reasonable to conclude that the Court is susceptible as it is fundamentally dependant on the political will of domestic authorities to enforce its mandate. These lacunae in the Rome Statute are the result of an "*unusual last-minute negotiating history*" which resulted in issues not being addressed nor resolved²⁵⁸. There was no debate on either the text or its substantive merits and the final text was described as a "*take-it-or-leave-it package that had been cobbled together behind closed doors during the middle of the night...of the last day of the Conference*"²⁵⁹. In the United States it has been pointed out in fact that "*Because of the extraordinary way the Court's jurisdiction was framed at the last moment, a country willing to commit war crimes could join the treaty and opt out of war crimes jurisdiction for 7 years,*

²⁵³ On the view that States do not have an obligation to implement see e.g. Robinson D., "*The Rome Statute and its Impact on National Law*" in Cassese A., Gaeta P. and Jones J. (eds.), "*The Rome Statute of the International Criminal Court: A Commentary*" (2002), p.1860.

²⁵⁴ *Op cit*, Iontcheva, note 2, p.10.

²⁵⁵ Council of Europe, "*The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court-Progress Report by Spain*", CONSULT/ICC (2001) 28, 04 September 2001, p.5.

²⁵⁶ Note however that this conclusion does not affect jus cogens norms outside the ICC regime. See e.g. Prosecutor v Anto Furundzija, Case No. IT-95-17/1, Judgment of 10 December 1998, paras.153-155.

²⁵⁷ Kleffner J. K., "*The Impact of Complementarity on National Implementation of Substantive International Criminal Law*", Journal of International Criminal Justice 1(1) [2003], p.91.

²⁵⁸ Newton M., "*Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*", 167 Military Law Review (2001), p.22.

²⁵⁹ *Ibid*.

while non-party states could deploy its soldiers abroad and be vulnerable to assertions of jurisdiction”²⁶⁰.

The challenge to the ICC’s legitimacy and authority has three dimensions. Firstly, there are only few structural checks in place to ensure that the Court’s functions and powers are executed fairly and consistently. For example, concerns have been expressed over the wide scope of discretion that the ICC Prosecutor enjoys in initiating investigations *proprio motu*, without any external oversight. The ICC Statute provides that the Prosecutor’s actions are subject to review by a three-judge ICC Pre-Trial Chamber, which must find reasonable grounds for an investigation²⁶¹. This does not reflect a general proposition made during the negotiation of the ICC Treaty, that the Prosecutor should have the consent of the interested State before proceeding with an investigation²⁶². States have however expressed different approaches to the possible primacy of an ICC investigation and prosecution. Portugal for example clearly stated its *“intention to exercise its jurisdictional powers over every person found in the Portuguese territory, that is being prosecuted for the crimes set forth in article 5, paragraph 1²⁶³ of the Rome Statute...within the respect for the Portuguese criminal legislation”*²⁶⁴. The Swiss Federal Law on Cooperation with the International Criminal Court provides that it is its Central Authority that finalises decisions on the admissibility of cooperation, on cooperation procedures and challenges to the jurisdiction of the ICC²⁶⁵. It also provides that *“If the Court (ICC) claims jurisdiction over proceedings, the Central Authority may, in agreement with the competent authorities in the Swiss proceedings, assert Swiss jurisdiction as indicated in article 18 of the Statute...”*²⁶⁶. Similarly, Pakistan expressed its preference for the exhaustion of

²⁶⁰ *Op cit*, Scheffer, note 18, p.13.

²⁶¹ ICC Statute Art.15 (4).

²⁶² See 1995 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Session, Supp. No.22, U.N. Doc.A/50/22 (1995), para.25.

²⁶³ ICC Art. 5 (1) (a) the crime of genocide; 5 (1) (b) crimes against humanity; 5 (1) (c) war crimes; 5 (1) (d) the crime of aggression.

²⁶⁴ See Portuguese Declaration upon ratification at www.un.org/law/icc/statute/romefra.htm p.12

²⁶⁵ CICCL Art.3 (2) (b). Article 6 (1) also provides that *“On application by the Federal Department of Justice and Police (Department), the Federal Council shall decide on questions of immunity relating to Article 98 in conjunction with Article 27 of the Statute which arise in the course of the execution of requests”*.

²⁶⁶ CICCL Art.7 (1).

domestic remedies before deferring jurisdiction to the ICC: *“In the first instance, the actions required should be taken by national authorities. Where all such national measures of redress have been exhausted or are unavailable or inactive, recourse can be made to available international mechanisms”*²⁶⁷. Australian ICC legislation is also interpreted as not compromising Australia’s sovereignty²⁶⁸. Importantly, this legislation provides that no prosecution may be initiated, or proceedings conducted, without the consent of and in the name of the Attorney General²⁶⁹. The Australian legislation also includes a clause limiting judicial review of any decision of the Commonwealth Attorney General to give or refuse consent to an arrest on a warrant issued by the Court, the surrender of a person to the Court, or conduct a prosecution under Australian law in relation to the offence contained in implementing legislation²⁷⁰. Similarly, in Denmark, the ICC implementing legislation provides that the Minister of Justice decides upon a request from the Court on extradition of persons against whom the Court has initiated criminal proceedings²⁷¹. In addition, he/she decides upon a request on extradition for execution of the Court’s judgment²⁷².

Secondly, and this is highly debatable, it has been contended that the Court cannot base its authority exclusively on State consent, because it can exercise its jurisdiction over nationals of States that are not parties to the ICC Treaty²⁷³. Thirdly, the isolation of the Court from national legal processes and legal opinions, severely limits the extent to which the Court’s interpretation of

²⁶⁷ See statement by Ambassador Munir Akram, Permanent Representative of Pakistan to the United Nations, to the Security Council on the occasion of renewal of Resolution 1422 regarding International Criminal Court, 12 June 2003, para. 5.

²⁶⁸ See Statement by the Australian Prime Minister, The Hon John Howard, MP on 20 June 2002, at http://www.pm.gov.au/news/media_releases/2002/media_release1708.htm

²⁶⁹ *Ibid.* Similarly, in South Africa criminal prosecution cannot be instituted without the consent of the National Director of Public Prosecutions, who must also designate a court to hear any matter arising from the application of International Criminal Court Bill 2001, Part 3, Art.9 of the same.

²⁷⁰ *Ibid.*

²⁷¹ Act No.342 of 16 May 2001, Sec.2.

²⁷² *Ibid.*, Sec.2 (2).

²⁷³ On state consent see generally the ICJ jurisprudence, e.g. the Monetary Gold Case (Italy v France, United Kingdom and the United States, 1954, I.C.J. 19, 15 June 1954 and the Nicaragua Case (Concerning Military and Paramilitary Activities in and Against Nicaragua, 1984, I.C. J, Jurisdiction and Admissibility Judgement of 26 November 1984, 431) where the ICJ held that the requirement for consent to jurisdiction by each party to the dispute applied only where the legal interests of the non-consenting state *“would not only be affected by a decision, but would form the very subject-matter of the decision”*.

international criminal law could be informed and rendered legitimate. In this context and with reference to ICC war crimes provisions, the United Kingdom declared: “*The United Kingdom understands that the term ‘the established framework of international law’ used in article 8 (2) (b) and (e), to include customary international law as established by State practice and opinio juris*”²⁷⁴. Similarly, Switzerland expressed the view that “*it is still true that one of the main characteristics of public international law remains the general need for States to implement international customary and treaty norms in order to guarantee its efficiency, effective application and respect by individuals*”²⁷⁵. From a more theoretical perspective, there is a line of argument according to which the consent of states is not enough to ground international law; the ‘constitution’ of an international community rests “*not on a formal treaty but on a formlosen Konsensus whereby states recognise each other as equal and subject to, especially, original norms necessary for the creation of further law*”²⁷⁶.

At the Rome Conference, numerous States also expressed reservations about the precedent effects of ICC decisions, as the rules of genocide, war crimes and crimes against humanity are still very much in formation. For example, ICC Statute Art.30 aimed at codifying and setting a uniform standard for the mental incapacity of individual criminal responsibility but had in fact failed to do so. What Article 30 has done instead was to present an opportunity for a consistent understanding of mens rea²⁷⁷.

Likewise, the definition of the crime of aggression is inconclusive and unsatisfactory²⁷⁸. Its non-inclusion in the Statute is also one of the main

²⁷⁴ United Kingdom of Great Britain and Northern Ireland Declaration upon ratification at www.un.org/law/icc/statute/romefra.htm p.13.

²⁷⁵ Weber D., “*Implementation of the Law of Armed Conflict: National Measure*”, written summary of the speech delivered on 29 October 1999 on the Swiss Seminar on the Law of Armed Conflict (SLAC) in Geneva, available at <http://www.vbs.admin.ch/internet/GST/KVR/f/weber-art.htm>

²⁷⁶ *Op cit*, Carty, note 232, p.716.

²⁷⁷ Werle G. and Jessberger F., “*Unless Otherwise Provided-Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*”, *Journal of International Criminal Justice*, Vol.3 (1) [2005], pp. 35-55. See i.e. Arnold R., “*The Mens Rea of Genocide under the Statute of the International Criminal Court*”, *14 Criminal Law Forum* (2003), pp.127-151.

²⁷⁸ ICC Statute, Article 5 (1) (d) provides for jurisdiction over the crime of aggression but the Statute also provides that the ICC shall not exercise its jurisdiction over that crime until such

reasons some States have been reluctant to ratify the Treaty²⁷⁹. Some have criticised the ICC Statute for deliberately leaving the definitions of crimes to national legislature, a “*gap that could lead to prosecutorial abuse and make any ICC prosecution the equivalent of a common law crime*”²⁸⁰. In Ireland, the International Criminal Court Bill provides that it is the law of the State, including common law, which should determine whether a person has committed an ICC offence²⁸¹. In the Netherlands, on the other hand, the legislation does not know a criminalisation of “crimes against humanity” as such. Since crimes against humanity are usually qualified as common offences, Dutch law will cover their commission in the Netherlands²⁸². In East Timor, crimes against humanity are defined in Security Council Regulation 2000/15²⁸³. This definition corresponds to ICC Article 7 except for two differences²⁸⁴. Further, Colombia declared the “*Rome Statute is limited exclusively to the exercise of complementarity jurisdiction...and to the cooperation of national authorities with it, Colombia declares that none of the provisions of the Rome Statute alters the domestic law applied by the Colombian judicial authorities in exercise of their domestic jurisdiction within the territory of the Republic of Colombia*”²⁸⁵. On a different note, Jordan made the assertion that “*nothing under its national law including the Constitution, is inconsistent with the Rome Statute...As such, it interprets such national law as giving effect to the full application of the Rome Statute and the exercise of relevant jurisdiction there under*”. Egypt also stated that it “*affirms the importance of the Statute being interpreted and applied in conformity with the*

time as the Treaty is amended to include provisions defining the crime of aggression and setting out the conditions under which the Court will exercise its jurisdiction (ICC Article 5 (2)).

²⁷⁹ For example, Syrian Arab Republic indicated that it would wait until the crime of aggression was defined before deciding its position on the ICC. See Coalition for the ICC Country Report at <http://www.iccnw.org/countryinfo/northafricamiddleeast/syria.html> (16 Oct.2003).

²⁸⁰ Wible B., “*De-jeopardising Justice: Domestic Prosecutions for International Crimes and the Need for Transnational Convergence*”, Denver Journal of International Law and Policy, Vol.31, No.2 (2003) p.267

²⁸¹ 2003 International Criminal Court Bill, Part 2 (Domestic Jurisdiction in ICC Offences), Art.13 (1).

²⁸² See Council of Europe, “*Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court-Progress Report by the Netherlands*” 19 July 2001, Consult/ICC (2001) 21, p.4.

²⁸³ Sec.5.

²⁸⁴ Op cit, Cumes, note 93, p.44.

²⁸⁵ Colombia’s Declaration No.4.

general principles and fundamental rights which are universally recognised and accepted by the whole international community”²⁸⁶. By extension, differences in procedural rules and judicial interpretations of definitions could raise the ex post facto issue²⁸⁷. Australia for example declared “*its understanding that the offences in Article 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law*”²⁸⁸. During the Rome Conference, Singapore stressed the importance of precision and consistency in interpreting the ICC Statute provisions. It said for example that “*The principle nullum crimen sine lege must apply in defining precisely what conduct entailed criminal responsibility so that individuals could be fully aware of the consequences of their actions*”²⁸⁹.

At present, international criminal law cannot be precise²⁹⁰. Instead, it develops like common law, gradually applying the principles of previous decisions to new situations²⁹¹. That international criminal law cannot be precise can be demonstrated through three types of legal ‘fragmentation’²⁹² in a self-contained regime, such as that of that of the ICC, which to a great extent represents a *lex specialis* regime. A first example of fragmentation is evident from conflicting interpretations of general law²⁹³; the second emanates from the emergence of special law as an exception to the general law²⁹⁴ and the third form appears from the conflict between different types of special law²⁹⁵; the *lex specialis* aims at harmonising conflicting standards through interpretation or establishment of definite relationships of priority between them. It is often difficult to distinguish between the interpretations of a special law (ICC, human rights law²⁹⁶, humanitarian law²⁹⁷) in the light of general law

²⁸⁶ Arab Republic of Egypt Declaration upon signature, No.2.

²⁸⁷ *Op cit*, Wible, note 279, p.268.

²⁸⁸ Australia’s Declaration upon ratification at www.un.org/law/icc/statute/romefra.htm p.2.

²⁸⁹ *Op cit*, note 34, p.81, para.4.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Op cit*, ILC, note 32, p.284, para.303.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Id.*

²⁹⁶ See e.g. *Bankovic v Belgium and others* (52207/99), 123 I.L.R. (2003), p.108, para.57; *Fogarty v the United Kingdom* (37112/97) 21 November 2001, ECHR 2001-XI, para.36.

(municipal law) and the setting aside of this general law in view of the existence of a conflicting specific rule²⁹⁸. Lex specialis should not be seen in ‘*overly formal or rigid*’ manner²⁹⁹; its ‘*legal-systemic*’³⁰⁰ environment always conditions its adoption and interpretation. A self-contained regime is never actually isolated from general law as such a regime “*can receive (or fail to receive) legally binding force (“validity”) only by reference to (valid and binding) rules or principles outside it*”³⁰¹. In fact, whether a State exercises its territorial jurisdiction, for example, is traditionally a question to be treated by reference to general law. What is more, a superior legal order does not automatically overrule rules of general law as they remain in operation if the special regime fails to function properly (i.e. mixed tribunals).

It is usually perceived that special law derogates from general law and it is by extension more authoritative than a general rule. The special legal system may be used to (1) determine the relationship between a special and general provision³⁰²; (2) determine provisions in two different instruments; importantly, (3) determine between a treaty and a non-treaty standard³⁰³; and between two non-treaty provisions³⁰⁴. A special rule can be interpreted as being an application, elaboration or updating of a general standard (look at states that have amended their laws-Germany) or it may be taken as overruling or setting aside of a general rule. This distinction has however been described as ‘artificial’³⁰⁵. The preference for the special rule does not necessarily extinguish the general rule that remains ‘*in the background*’³⁰⁶ and importantly, ‘*affects the interpretation*’³⁰⁷ or the special rule. Although most general international law could derogate from lex specialis, there are instances

²⁹⁷ See e.g. Legality of the threat or use of nuclear weapons, Advisory opinion, I.C.J. Reports, 1996, paras.24, 27, 34, 37 and 51.

²⁹⁸ *Op cit*, ILC, note 32, p.284, para.304.

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid*, p.290, para.318.

³⁰² See Beagle Channel Arbitration, Argentina v Chile, 18 February 1977, U.N.R.I.A.A., vol. XXI, p.55.

³⁰³ See e.g. INA Corporation v Government of the Islamic Republic of Iran, Iran-United States Claims Tribunal, Case No. 161, 08 July 1985, Iran-U.S. CTR 1985-I, vol.8, p.378.

³⁰⁴ See e.g. Right of Passage over Indian Territory, Portugal v India, Judgment, I.C.J. Reports, 1960, p.44.

³⁰⁵ *Op cit*, ILC, note 32, p.286, para.308.

³⁰⁶ *Ibid*.

³⁰⁷ *Ibid*.

where the general rule prohibits such derogation such as in cases of *jus cogens*. *Lex specialis* can either operate as an interpretative device of the national laws or in an independent special legal regime (ICC).

The next point is the hierarchy of laws as, according to the International Law Commission, there is no homogenous, hierarchical system “*realistically available to deal with problems arising from conflicting rules or legal regimes*”³⁰⁸. It is widely agreed that there is no formal or informal hierarchy between the sources of international law: “*If a treaty was normally given to a general custom this was not due to a hierarchy in law but merely to the need to give effect to the will of the parties*”³⁰⁹. Importantly, it may not always be appropriate to draw hierarchical analogies from domestic legal systems, as there is “*no well-developed and authoritative hierarchy of values in international law and thus no suitable hierarchy of techniques by which to resolve conflicts*”³¹⁰.

Bassiouni M.C.³¹¹ also argues that there have been limited attempts to impose a hierarchy on the criminal justice system. This can be demonstrated by looking at the recent ad hoc tribunals. For example, the ICTY and ICTR share a common appeals chamber and theoretically apply consistent law. The Special Court for Sierra Leone is also required to follow ICTY and ICTR precedent³¹² but there is no common appeals chamber and no formal mechanism to ensure consistency. The Government of Rwanda, whilst making proposals to optimise the work of the ICTR Prosecutor and relevant national authorities, emphasised that “*For purposes of uniformity of international jurisprudence, the Appeals system in force would remain*”³¹³. Appeals made at national level will be different and inconsistent³¹⁴. The U.N. Secretary General explicitly rejected a proposal that a common Appeals Chamber for the

³⁰⁸ *Ibid.* p.291, para.324.

³⁰⁹ *Ibid.* Emphasis added.

³¹⁰ *Ibid.* pp.302-03, para.353.

³¹¹ Bassiouni M.C., “*Crimes against Humanity: The Need for a Specialized Convention*” 1994,

31 *Colombia Journal of Transnational Law*, p.470.

³¹² See Article 20 (3) of the Statute of the Special Court directs the judges of the Special Court’s Appeal Chamber to be guided by the Yugoslav and Rwanda Tribunals. Article 14 (1) adopts the Rwanda Tribunal’s rules of procedure and evidence ‘*mutatis mutandis*’.

³¹³ *Op cit*, note 138, p.4.

³¹⁴ *Op cit*, Wible, note 279, p.268.

Yugoslavian and Rwandan Tribunals with the Special Court for Sierra Leone³¹⁵ should be shared.

The history of the recent ad hoc tribunals demonstrates furthermore that the remoteness of international tribunals damages both their legitimacy and effectiveness. The ICTY has been perceived as an inconsequential and biased tribunal, which had a very small contribution to make in the reconciliation process in the countries of the region³¹⁶. For example, press reporting over the years since the creation of the ICTY shows almost inevitably that Serbs regard the tribunal as undeniably biased against them³¹⁷ (the (non) validity of such claims is not discussed here).

Moreover, even legal professionals admit they do not understand the ICTY procedures because of its unique blend of civil and common law procedures³¹⁸. Judge Cassese A. points out that “*International criminal procedure does not originate from a uniform body of law. It substantially results from an amalgamation of two different legal systems, that obtaining in common-law countries and the system prevailing in countries of civil law (although for historical reasons, there currently exists at the international level a clear imbalance in favour of the common-law approach)*”³¹⁹.

One of the objections raised with regard to the extensive use of common law in the ICTY relates to evidence by hearsay, evidence that is usually inadmissible in civil laws. An ICTY expert witness pointed out the danger on relying

³¹⁵ See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, at 8, U.N. Doc. S/2000/915 (2000) rejecting a joint appeal chambers as “*legally unsound and practically not feasible*”.

³¹⁶ Nizich I., “*International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*”, 2001, 7 ILSA Journal of International and Comparative Law, pp.353, 355.

³¹⁷ See i.e. Verfuss T., “*Trying Poor Countries’ Crimes in a Rich City: The Problems of the Press from the Former Yugoslavia*”, Journal of International Criminal Justice, Vol.2, No.2, 2004, pp.509-515.

³¹⁸ The ICTR has also been perceived as ‘*an inherently foreign*’ institution that has ‘*forfeited any impact on Rwandan society*’, see International Crisis Group, “*International Criminal Tribunal for Rwanda: Justice Delayed*” 24, 2001.

³¹⁹ Separate and Dissenting Opinion of Judge Cassese to Erdemovic Appeals Judgment, Case No. IT-96-22, 07 October 1997, para.4. Civil law legal tradition is the basis of the law in the majority of countries of the world, especially in continental Europe but also in Quebec (Canada), Louisiana (USA), Japan, Latin America.

substantially on common law³²⁰. He pointed out that in civil law systems there could usually be no murder without a body. The ICTY tried persons for murder for example without discovering a body, relying instead on hearsay. In his opinion *“testimony of a witness who heard something from someone else, that is hearsay, is the lowest degree of evidence of a witness. Many authors in the world, both in America and in Europe, write that such testimony is more an indication that a testimony, than evidence”*³²¹. He also maintained that not even the accumulation of such indications could represent such evidence³²².

During ICC negotiations, France proposed that the Court should draw both from Romano-Germanic legal tradition and the common law. France therefore committed it self to provide training to national judges who would participate in investigating cases in cooperation with the Prosecutor from the preliminary stage³²³. In the ICTR for example, the personnel was recruited from both common and civil law backgrounds and this factor created problems with the interpretation and application of the relevant law³²⁴:

“One of the first issues that should have been thrashed out as a prelude to mapping out a prosecution strategy is how to marry these two major legal systems. It was one of the first problems Nuremberg tried to grapple with. The ICTR has never addressed this fundamental problem. It has proceeded on the false and unfair assumption that only people from common law backgrounds are sufficiently competent to do the work, dismissing decades of professional work spent by people from civil law backgrounds”.

An ICTY Investigations Commander recounts that being labelled as a French magistrate, placed her in an *“uneasy position”* with respect to other

³²⁰ Dr Aleksic Zivojin, Expert Witness for the Defence in Prosecutor v D. Tadic, Case No. IT-94-1-T, Open Session Transcript, 26 April 2001, p. 11070, at 10-11. See e.g. Scallen E., *“Constitutional Dimensions of Hearsay Reform: Toward a Three Dimensional Confrontation Clause”*, 76 Minnesota Law Review (1992) p.623.

³²¹ *Ibid*, p.11072, at 5-10.

³²² The ICTY has tentatively moved towards increased production of written evidence. See ICTY Rules of Procedure and Evidence, Rule 92(bis) and Rule 94 (B). See Kay S. QC, *“The Move from Oral Evidence to Written Evidence”*, Journal of International Criminal Justice, Vol.2, No.2, 2004, pp.495-502.

³²³ *Op cit*, note 35, Mr Vedrine (France) p.101, para.73. Mr Frieden (Luxembourg) also stated that *“The Court must apply international law and general principles of law applicable in most Member States”*.

³²⁴ *Loc cit*, note 138.

investigators and legal advisors, the majority of whom were from common law backgrounds³²⁵. Partly in recognition of this problem and from the need to engage national judiciaries, the ICTY recently adopted a Rule³²⁶ permitting the referral of a case under indictment to the authorities of a state of which the accused is a national, or where the crime was committed.

By comparison, even in the European Union, where the majority of states are civil law countries, it had been said, whilst negotiating the European Constitution³²⁷, that the unification of so many different criminal laws and legal traditions would be impossible, as it had been widely accepted that fundamental national traditions may not be transferable to other states and susceptible of subjecting foreign individuals³²⁸. What was considered more attainable was an agreement on and adoption of a set of common criteria for the interpretation of criminal law³²⁹.

When interpreting the ICC provisions States will inevitably have to look at the legislative history of the ICC Statute. The methods and extent of using such sources differ in common and civil law systems. In France, for example, a judge has the power and the obligation to interpret statutes on the basis of the French Penal Code³³⁰, which provides that criminal law must be applied strictly. Under the French Code, judges are however prohibited from making general law-making pronouncements on matters submitted to them³³¹. This is substantially different from the common law tradition. This means that all cases are based on statute. When the statute is clear it must be applied, but when it requires interpretation the French codes contain no provisions regarding methods of interpretation. It would seem therefore that most civil

³²⁵ Pantz S., Investigations Commander within the Investigations Section of the ICTY Office of the Prosecutor (OTP) from 1996 to end 1999, “*From Bosnia to Kosovo and to Bosnia Again*”, Journal of International Criminal Justice, Vol.2, No.2, 2004, p.461.

³²⁶ ICTY Rules of Procedure and Evidence, Rule 11.

³²⁷ Treaty establishing a Constitution for Europe 2004, Official Journal of the European Union, 16 December 2004, No. 2004/C 310/01.

³²⁸ Prof. Dr. Bacigalupo E., “*Il Metodo Comparatistico e L’Unità del Diritto Penale Europeo*”, at the Conference on “*The Evolution of Supranational Criminal Justice-Comparing International and European Criminal Law*”, 27 May 2004, European University Institute, Florence.

³²⁹ *Ibid.*, p.11.

³³⁰ French Penal Code [2004], No. 2004-164, 20 Feb. 2004, Article 111-4.

³³¹ *Ibid.* Article 5.

law countries would have to resort to legislative history and travaux préparatoires to interpret the ICC Statute³³².

1.6 ICC involvement at the national level

A possible way of implementing international criminal law in the absence of a strong ICC is for national courts to prosecute crimes committed on their territory or by their nationals. Such prosecutions may be initiated either under international law or domestic legislation. Whereas some national courts have been lagging in their obligation to prosecute war criminals and gross human rights violators, others have persistently pursued such trials. Compared to international trials, national prosecutions seem to be more effective in the long run and rarely encounter serious enforcement problems³³³. On the other hand, however, political pressure on local judges or a serious lack of resources can lead to unfair trials and seriously undermine the rights of accused persons. Because international tribunals are more likely than local courts to be impartial, they are also more able to build objective records of events³³⁴. However, the top-down theories of international prosecutions seem to rest on a series of overstated claims. It is suggested the deterrent effect of international trial is at best minimal³³⁵ and that the record-building function of international tribunals has often been exaggerated³³⁶. On the other hand, with regard to the almost unexpected ratification of the ICC Treaty by Burundi and Liberia,

³³² Documents of the legislative history of law include in France: (1) the Government's statements of reasons for bill (expose des motifs); (2) the reports of successive examinations, with amendments proposed and rejected, by Parliamentary Committees in both the National Assembly and the Senate and (3) the floor debates in the two houses. See Germain C. M., "Approaches to Statutory Interpretation and Legislative History in France" 13 Duke J. of Comp. & Int'l L 3, 2003, p.199. On Greek growing tendency to give importance to case law, see Tassopoulos I. A., "New Trends in Greek Contemporary Constitutional Theory: A Comment on the Interplay between Reason and Will", 10 Duke J. of Comp. & Int'l L. 1, 1999, pp.223-247.

³³³ *Op cit*, Iontcheva, note 2, p. 16.

³³⁴ See Judge Claude Jorda in U.N. SCOR, 55th Session, 4161st meeting, at 3, U.N Doc. S/PV.4161.

³³⁵ Wippman D., "Atrocities, Deterrence, and the Limits of International Justice" 1999, 23 Fordham International Law Journal, at 473.

³³⁶ Alvarez J. E., "Crimes of States/Crimes of Hate: Lessons from Rwanda" 1999, 24 Yale Journal of International Law, at 365.

countries which are both situated in major conflict centres in Africa, it has been commentated that *“the very fact that ICC jurisdiction is being accepted by governments is already starting to have a deterrent effect against the commission of heinous crimes on the continent”*³³⁷.

Because international criminal tribunals are isolated from the communities affected by their decisions, diverse perspectives do not test their judgments³³⁸. This inevitably undermines the courts’ accountability. The ICC’s contribution to a uniform and harmonised global international criminal law is undeniable but rather symbolic. The isolation of the ICC, which is implied in a dominant and centralised ICC regime, will undermine the Court’s legitimacy. Before the Preparatory Committee for the ICC it was said that:

*“If the ICC is to function at all, we will have to rely on the maximum possible cooperation from all States, including States Non-Parties. Therefore, we should always start from the assumption that cooperation and assistance from States Parties should be forthcoming and that any exceptions from this rule are in need of well-founded justification. We should also try and find ways of making cooperation with States non-Parties as easy as possible”*³³⁹.

The Court will have to make difficult legal, political and moral judgments and therefore advance further developments and clarifications in international criminal law that are unquestionably needed³⁴⁰. In light of this, several nations felt that it was *“unrealistic to conceive of inherent or compulsory jurisdiction for the Court in view of the widely diverging views on the specific elements of certain crimes, the proposed inclusion of elements from multilateral instruments to which several states were not parties and the absence of*

³³⁷ Statement by William Pace, Convenor of the CICC on Burundi and Liberia ratification of the ICC Treaty, Coalition for the International Criminal Court, September 22, 2004.

³³⁸ *Op cit*, Iontcheva, note 2, p.19.

³³⁹ Statement made by the Representative of Germany, Mr.Hans-Peter Kaul from the Permanent Mission of Germany to the United Nations, before the Preparatory Committee on the Establishment of an International Criminal Court at the United Nations General Assembly 52nd Session-International Cooperation and Judicial Assistance, New York, 1 December 1997.

³⁴⁰ See Morris M., *“The Democratic Dilemma of the International Criminal Court”* 5 Buffalo Criminal Law Review 2 (2002) pp.597-98.

consensus on the current status of customary international law with respect to several of those crimes”³⁴¹.

The open-ended nature of international criminal law raises in fact vital questions about the direction in which these international norms should advance and what the appropriate context and forum for debating them is³⁴². For example, problems will become apparent when the Court has to find support in statutory text for many complex decisions it encounters and the judges do not have a solid base of precedent to guide them in their interpretation of the Statute. The jurisprudence on crimes against humanity, genocide and war crimes is limited to the judgments of the Nuremberg, Tokyo tribunals and ad hoc ICTY/ICTR³⁴³. The difficulties the ICC Preparatory Committee had in writing the Elements of Crimes³⁴⁴, which were to serve as non-binding guidelines to judges, reflect the lack of authoritative sources and agreement on the content of international criminal law and “*the second obstacle was that such a document had never before been elaborated in international law. While some crimes had been examined by Nuremberg, Tokyo, former Yugoslavia, and the Rwandan international criminal tribunals, many crimes had not. Even in those cases where crimes had been discussed, their elements were often unclear*”³⁴⁵. Nevertheless, Norway stressed the importance of the Elements of Crimes, stating that they should be, and will be, disseminated by the Norwegian authorities to its armed forces³⁴⁶. It also emphasised the need for all ICC States Parties to “*translate and internalise in their own system*”³⁴⁷ the Elements of Crimes. The Irish International Criminal Court Bill 2001 provided for example that a court, when interpreting the Act, may take into account, inter alia, “*the travaux preparatoires relating to the*

³⁴¹ *Op cit*, Mr Lahiri (India), note 34, p.86, para.48.

³⁴² See Marquardt P. D., “*Law Without Borders: The Constitutionality of an International Criminal Court*” 1995, 33 Columbia Journal of Transnational Law 73, p.136.

³⁴³ *Op cit*, Iotncheva, note 2, p20; the Elements of Crimes, which were meant to provide more detailed guidance are not binding on the judges, ICC Statute Art.9.

³⁴⁴ Report of the Preparatory Commission for the International Criminal Court, New York, Part II, Finalised draft text of the Elements of Crimes, UN DOC PCNICC/200/1Add.2 (2000) (02 November 2000).

³⁴⁵ Kirsch P. and Oosterveld V., “*The Post-Rome Preparatory Commission*”, in Cassese A., “*The Rome Statute of the International Criminal Court: A Commentary*” (2002), p.98.

³⁴⁶ Statement by H.E. Mr. Ole P. Kolby, Ambassador and Permanent Representative of Norway to the UN, before the Sixth Committee of the 57th Session of the UN General Assembly, 14 October 2002, GA/L/3214.

³⁴⁷ *Ibid*.

ICC Statute and published views of commentators on its text and give them such weight as may appear to the court to be appropriate in the circumstances”³⁴⁸. Referring to war crimes, Malta’s International Criminal Court Act 2002 provides that when interpreting and applying provisions relating to such crimes, a national court should take into account “*any relevant judgment or decision of the ICC and account may also be taken of any other relevant international jurisprudence*”³⁴⁹.

The United States government strongly asserts that there exists significant evidence in the military sphere to strongly support the claim that a “*distant legal body will have no deterrent effect on hard men like Pol Pot and Saddam Hussein most likely to commit crimes against humanity*”³⁵⁰. And that, “*the ICC’s advocates mistakenly believe that the international search for justice is everywhere and always consistent with the attainable political resolution of serious political and military disputes*”³⁵¹. From this point of view, experiences in Bosnia, Rwanda, South Africa, Cambodia and Iraq militate in favour of a case-by-case approach rather than the artificially imposed uniformity of the ICC.³⁵²

Ad hoc tribunals on the other hand have been described over the years as inadequate because (1) they were only temporary forums with limited *ratione personae* and *ratione tempore* jurisdiction; (2) they encountered great difficulties in apprehending persons indicted for international crimes and are perceived to encourage selective justice³⁵³. A former ICTY Investigations Commander for the OTP concludes that “*Luxurious, expensive and distant courts cannot and will not suffice alone to do justice, ensure peace and reconcile human beings, and neither will the International Criminal Court. In regions traumatized by war, crisis and hatred, all efforts must first and foremost be channelled at re-establishing the rule of law on the ground*”³⁵⁴.

³⁴⁸ Article 3 (1) (c).

³⁴⁹ Malta International Criminal Court Act 2002, Act XXIV, Art.54 E (4).

³⁵⁰ *Op cit*, note 18, statement of Hon. Bolton J., p. 27.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ Noone P. G. and Moore W. D., “*An introduction to the International Criminal Court*”, Naval Law Review (1999), p.117.

³⁵⁴ *Op cit*, Pantz, note 325, p.459.

Mixed tribunals, because of their location, manage better to coordinate their functions with other domestic institutions dealing with human rights abuses such as for example, the Truth and Reconciliation Commissions set up in Sierra Leone and East Timor³⁵⁵. Moreover, such coordination prevents overlap and encourages a more efficient division of institutional responsibilities for dealing with the past³⁵⁶.

For example, with regard to the situation in East Timor, the UN Security Council observed recently that “*Increasing national ownership of the process is important*”³⁵⁷. Although the Timorese justice system does not have the capacity to handle a great number of cases the government is developing plans for the serious crimes process. In the meantime, UNMISSET³⁵⁸ has taken preliminary measures to assist the governments in addressing the issue³⁵⁹. The role of UNMISSET includes assistance in the conduct of serious crimes investigations and proceedings as well as assistance in changing the current judicial composition of the Special Panels so that Timorese judges can hear cases with little or no international participation³⁶⁰. At the moment, UNMISSET civilian advisers continue to perform line functions as judges, public defenders, prosecutors and court administrators at both the Court of Appeal and district courts³⁶¹. Furthermore, the presence of international judges has reduced the backlog of pending cases, although the operation of district courts remains sporadic and weak³⁶². Whilst the Serious Crimes Unit, the Defence Lawyers Unit and the Special Panels are preparing to handover the necessary materials to the Timorese authorities³⁶³, the government is still heavily reliant on international judicial support as it was announced in January 2005 that all national judges had failed the written evaluation test and could not therefore

³⁵⁵ *Op cit*, note 2, Iontcheva, p.42.

³⁵⁶ *Ibid*.

³⁵⁷ UN Security Council, “*Progress Report of the Secretary-General on the United Nations Mission of Support in East Timor (for the period from 10 November 2004 to 16 February 2005)*”, 18 February 2005, S/2005/99, p.7, para.30.

³⁵⁸ UNMISSET has been established by the UN Security Council Res. 1410 (2002). 17 May 2002. On the role played by the United Nations after independence of East Timor, see “*Report of the Secretary-General on the United Nations Transitional Administration in East Timor*”, 17 April 2002, UN Doc S/2002/432, paras.62-98.

³⁵⁹ *Loc cit*, note 358.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid*, p.5, para.18.

³⁶² *Ibid*. Only the district court in Dili operates on full-time basis.

³⁶³ *Ibid*, p.7, para.29.

become career judges³⁶⁴. It follows that national judges will have to discontinue the exercise of their judicial functions, which will result in complete reliance on international judges for both criminal and civil cases³⁶⁵. Moreover, access to justice including access to legal services and advice remains weak. However, international presence and international judicial assistance have encouraged the National Parliament to strengthen the country's legal framework through adoption of key legislation relating to, amongst others, statutes on the Public Prosecutor³⁶⁶. In this regard, the UN Security Council also noted that the Timorese Government is making constant efforts to meet its human rights treaty obligations. At the same time, the Security Council Report predicted that a significant number of cases would not have been investigated or prosecuted by the end of May 2005³⁶⁷. A number of cases that have been referred to the Serious Crimes Unit by the Commission for Reception, Truth and Reconciliation involve serious crimes and are considered therefore to be unsuitable for reconciliation process. These cases have not yet been investigated. The formal legal process of such crimes at the national level is a crucial aspect of efforts to reach reconciliation.

The recent praxis of the Security Council demonstrates how in practice complementarity is bypassed as the outcome of the latest SC resolution indicates that international crimes should be investigated and prosecuted under international mechanisms even where states are able and willing to investigate. Such policy on the part of the Council is incompatible of ICC Article 17 and the essence of the Rome Treaty. Confirming fears of political interference and influence on the ICC, in its recent report on Sudan, the Security Council reasoned that *“there may indeed be instances where a domestic legal system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However the very nature of most international crimes implies, as a general rule, that they are committed by State officials or with their complicity; often their prosecution is therefore*

³⁶⁴ *Ibid*, p.5, para.19.

³⁶⁵ *Ibid*.

³⁶⁶ *Ibid*, p.2, para3.

³⁶⁷ *Ibid*, p.8, para31. The indictments filed by the Serious Crimes Unit cover 572 of the estimated 1.400 murders committed in the 1999 violence.

better left to other mechanisms”³⁶⁸. At the Rome Conference, India expressed the view, with regard to proprio motu investigations by the ICC prosecutor, that such investigations would interfere with a state’s sovereignty (if that state has a functioning legal system) and that the approach of the ad hoc tribunals could not constitute a precedent or be considered automatically applicable to the ICC³⁶⁹. In its report, the Secretary-General also stated, in contradiction to its conclusions on the situation in East Timor, that “*national ownership of the process is important*” and should be encouraged through a reconciliation process and that referring the matter to the ICC would be “*conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations*”. This may be interpreted as the Security Council attributing political rather than exclusively legal functions to the ICC to which a number of both ICC Party and non-Party States objected. During the Rome Conference some states supported the use of the ICC as an important tool in the hands of the Security Council in maintaining peace and security³⁷⁰. Russia saw “*no conflict between the ‘political’ role of the Security Council and the activities of the Court. The Council is intended to have a political impact on States and the Court would be playing an essential role in the maintenance of peace and security*”³⁷¹. It is important remembering that Security Council referrals to the ICC will be more significant that those referred to by States in that the Security Council could oblige every country to comply with the ICC. India furthermore argued that any pre-eminent role of the Security Council in triggering ICC jurisdiction constitutes a “*violation of sovereign equality and equality before the law because it assumed that five veto-wielding States did not by definition commit the crimes covered by the ICC Statute, or if they did, that they were above the law and possessed de jure impunity from prosecution. The anomaly of the composition and veto of the Security Council could not be reproduced in an*

³⁶⁸ UN Security Council, “*Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of the Security Council resolution 1556 (2004), paragraph 15 of the Security Council resolution 1564 (2004) and paragraph 17 of the Security Council resolution 1574 (2004)*”, 31 January 2005, UN Doc. SC Res. S/2005/57, p.144, para.568.

³⁶⁹ *Op cit*, Mr Lahiri (India), note 34, p.86, para.50.

³⁷⁰ *Ibid*, Statement from Albania, p.82, para.14.

³⁷¹ *Op cit*, note 241, Mr Gevorgian (Russian Federation), p.212, para.9.

international criminal court”³⁷². France also firmly stated that the Court could only exercise its jurisdiction on States Parties³⁷³. To enable the Court to act effectively, the State on whose territory the crimes were committed and the State of nationality of the perpetrators of the crimes would have to be parties to the ICC Statute.

During the Rome Conference, delegations expressed different positions on the role of the Security Council under the ICC Statute. Some States supported an affirmative action before the Court could act,³⁷⁴ whereas others were in favour of an affirmative action to require the Court not to act³⁷⁵. With regard to the first option, only Malawi expressly supported the option which prohibits the Court from commencing a prosecution arising from a situation with which the Security Council is dealing, unless the Council decides otherwise³⁷⁶. New Zealand too expressed concern at the ‘secrecy’³⁷⁷ of the Security Council indicating very likely politicisation of the Council, emphasising that the Council must be transparent in its relationship with the Court. New Zealand objected at this implied politicisation by referring to the secret informal consultation where the permanent members of the Security Council have “*the upper hand in the agenda-setting opposed to the smaller states who rotate every two years*”³⁷⁸. The Czech Republic also stated that it could not support the idea that the Security Council should have the power to preclude proceedings before the Court if the Security Council, under Chapter VII, is dealing with a situation³⁷⁹. It argued that “*Chapter VII situations are precisely those in which crimes within the Court’s jurisdiction are most likely to be committed*”³⁸⁰. At the Conference it was stressed that the ICC must be

³⁷² *Op cit*, Mr Lahiri (India), note 34, p.86, para.51.

³⁷³ *Op cit*, note 35, Mr Vedrine, p.101, para.76.

³⁷⁴ See Art. 10 (7) of the ICC Draft Statute, Option 1, A/CONF.183/2/Add.1 (1998)

³⁷⁵ See Singapore Proposal, Art. 10 (7), ICC Draft Statute, Option 2, A/CONF.183/2/Add.1 (1998)

³⁷⁶ Mr Nyasula (Malawi), Rome Conference, 6th plenary meeting (18 June 1998), p.172, para.29.

³⁷⁷ *Op cit*, note 375, Ms Trotter (New Zealand), p.100, para.64. See also No Peace Without Justice, “*New Zealand Protests at Security Council ‘Secrecy’*”, 23 June 1998, at 2.

³⁷⁸ *Ibid*. See also Hafner G., Boon K., Rubesame A. and Huston J., “*A Response to the American View as Presented by Ruth Wedgwood*”, 10 European Journal of International Law 1, 1999, p.114.

³⁷⁹ Mr Talicka (Czech Republic), Rome Conference, 3rd plenary meeting (16 June 1998), A/CONF.183/SR3, p.74, para.23.

³⁸⁰ *Ibid*.

impartial and independent from political influence of any kind, including that of United Nations organs, in particular the Security Council³⁸¹.

This potential for political interference by the ICC through a referral mechanism by the Security Council is also the primary reason why many States have not ratified the Rome Treaty and/or do not wish to become parties. The U.N. Secretary-General once stated that “*The fact that trial proceedings would be conducted in the Hague...far away from the community over which those persons still wield authority and where their followers live, might ensure a natural atmosphere and prevent trials from stirring up political, ideological or other passions*”³⁸². This seems at odds with the deterrent effect of the ICC Treaty whereby national trials should be encouraged and given financial support precisely with the goal of exposing the extent of atrocities and therefore helping nations to initiate a transition from militant politics and ideologies to a democratic political and judicial process³⁸³.

With regard to the ICTR, it was said that there was a “*regrettable misconception*”³⁸⁴ of the role and the mandate of the Tribunal and that the Prosecutor had made decisions “*which are difficult for the Rwandese public to comprehend or accept*”³⁸⁵. The ICTR Prosecutor was found to have said on record that her objective is to render “*deluxe justice*”³⁸⁶. The ICTR was established not only to try persons responsible for genocide but also to promote reconciliation and peace in Rwanda³⁸⁷. It had also been said that the Tribunal, and the Prosecutor in particular, should show understanding for the

³⁸¹ *Op cit*, Hafner, Rubesame and Huston J, note 379, p.115. See also Italian Foreign Affairs Minister, Mr Dini, who called for solutions that balance relations between the Security Council and the Court, ensuring that it can perform its judicial functions in total independence and without hindrance, Opening Statement before the Plenipotentiaries Conference on the Establishment of the International Criminal Court, 17 June 1998.

³⁸² UN Security Council, “*Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of the Security Council resolution 1556 (2004), paragraph 15 of the Security Council resolution 1564 (2004) and paragraph 17 of the Security Council resolution 1574 (2004)*”, 31 January 2005, UN Doc. SC Res. S/2005/57, p.144, para572.

³⁸³ See e.g. on the influence of international presence on national political and judicial process UN Security Council “*Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*”, 14 February 2005, UN Doc S.2005/88.

³⁸⁴ *Loc cit*, note 138.

³⁸⁵ *Ibid*.

³⁸⁶ *Ibid*.

³⁸⁷ See Security Council Res. S/RES/955 (1994), 3453rd Meeting, 08 November 1994.

people, sensitivity for their customs³⁸⁸ and respect for their institutions³⁸⁹. The ICTR Prosecutor had been perceived as “*displaying bitter hostility to Rwanda’s new judicial system and political institutions*”³⁹⁰.

At the Rome Conference it was also stressed that since the ICC will not have its own enforcement agencies and its effectiveness will depend on the cooperation of States Parties, then “*account must be taken of the diversity of regional interests, different stages of development and social and cultural traditions, and the position of the major Powers, in order to achieve a broad consensus and build an effective, working institution*”³⁹¹.

In Kosovo, in consideration of the sensitive nature of the crimes committed during and after the conflict, as well as the level of inter-ethnic hatred, special measures were necessary to enable and ensure efficient criminal investigation and prosecutions³⁹². UNMIK successfully re-established a functioning justice system in less than a year. Initially, UNMIK rejected the proposal for an international judiciary in Kosovo as it was perceived that Kosovan judges were fully competent to handle these serious crimes, knowing that the qualifications for becoming an international judge or prosecutor in Kosovo do not require any knowledge of the relevant Yugoslav law, or of international human rights or humanitarian law³⁹³. Similarly, the proposal for a Kosovo War and Ethnic Crimes Court (KWECC)³⁹⁴, which envisaged the participation of international judges, was rejected. UNMIK however had great difficulty recruiting qualified individuals to serve as judges and prosecutors, which resulted in UNMIK

³⁸⁸ Ibid. The ICTR had been criticised for having exhumed mass graves without notice to the authorities or relatives of the victims and left the remains on site. The Rwandan people perceived this as ‘abomination’ of their culture.

³⁸⁹ *Loc cit*, note 386.

³⁹⁰ *Ibid*.

³⁹¹ *Op cit*, Singapore, note 34, p.82, para.6.

³⁹² See Cerone J. and Baldwin C., “*Explaining and Evaluating the UNMIK Court System*” p.48 in Romano C. P. R. et al. (Eds.) “*Internationalised Criminal Courts-Sierra Leone, East Timor, Kosovo and Cambodia*” (2004).

³⁹³ Sec.2 of the UNMIK Regulation 2001/1 provides the criteria for appointing international judges and prosecutors in Kosovo. These include: a university degree in law, five years of experience, high moral integrity and a clean criminal record.

³⁹⁴ Originally, the intention was to give KWECC subject matter jurisdiction over crimes under international law, as well as serious inter-ethnic offences under domestic law. See US Mission to Kosovo, “*Kosovo Judicial Assessment Mission Report*” April 2000, p. 23, available at <http://pristina.usmission.gov/jud.pdf>

Regulation 2000/34³⁹⁵, through which a system of international judges and prosecutors was introduced, including the appointment of international judges to the Supreme Court. UNMIK Regulation 2000/64 now governs the use of international judges and prosecutors which allows “*the competent prosecutor, the accused or the defence counsel*” to petition the Department of Justice³⁹⁶ for the assignment of an international prosecutor and the appointment of a panel consisting of a majority of international judges on a case-by-case basis. The presence of international personnel in mixed tribunals in Kosovo has, to a degree, dismissed a perception of bias and judicial partiality³⁹⁷. The task of international judges and prosecutions has also been to train and monitor the local judges, enhance the existing standards of justice, and remedy this widely spread reality of a biased judicial process. The presence of international judges and prosecutor has “*improved the appearance of objectivity*”³⁹⁸ which has resulted in important investigations and prosecutions.

Internationalised prosecutions are not exclusively concerned with international crimes. For example, the Special Court for Sierra Leone may prosecute a number of crimes under Sierra Leone law³⁹⁹. The Cambodian Law on Extraordinary Chambers⁴⁰⁰ provides for the prosecution of crimes under the Cambodian Penal Code⁴⁰¹. In Kosovo, the International Panels can deal with ‘sensitive cases’⁴⁰²; these include the prosecutions for war crimes, genocide but also ‘ordinary crimes’ of murder, illegal possession of weapons and drug trafficking⁴⁰³. Also, in East Timor, UNTAET Panels have been established with exclusive jurisdiction over serious criminal offences.

³⁹⁵ UNMIK Reg. 2000/34 On the Appointment and Removal from Office of International Judges and International Prosecutors of 27 May 2000.

³⁹⁶ UNMIK Reg. 2000/64, Sec.1.1.1.

³⁹⁷ OSCE Mission in Kosovo “*Report 9 On the Administration of Justice*”, March 2002, pp.6-7.

³⁹⁸ *Loc cit*, Cerone, note 393.

³⁹⁹ See Article 5 of the Statute of the Special Court for Sierra Leone.

⁴⁰⁰ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea 2001, Law NS/RKM/0801/12.

⁴⁰¹ See Article 13. The crimes under Cambodian law are homicide, torture and religious persecution.

⁴⁰² Section 2 of UNMIK Regulation 2000/64, 15 December 2000, On Assignment of International Judges/Prosecutors and/or Change of Venue.

⁴⁰³ See UN Security Council “*Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*” 02 October 2001, UN Doc S/2001/926 para.49.

In Cambodia the UN General Assembly approved in 2003 the agreement between the United Nations and the Cambodian Government (UN Agreement) for UN assistance in the establishment and operation of “Extraordinary Chambers” within the domestic court system of Cambodia⁴⁰⁴. These Chambers have the jurisdiction to prosecute serious violations of Cambodian penal law and international humanitarian law committed between 1975 and 1979⁴⁰⁵. The previous agreement between the United Nations Transitional Authority in Cambodia (UNTAC) and the Cambodian government, the Paris Peace Accords 1991, did not impose an obligation on either parties to prosecute similar crimes. Two trials were conducted in absentia and were considered show trials. The proposed trial of Ta Mok, Khmer Rouge general, for genocide under Cambodian law by a Cambodian military court was postponed in 1999 under a law that permitted the extension of detention without trial for up to three years⁴⁰⁶.

Despite the United Nations involvement and the exercise of international judicial and prosecutorial presence, the Extraordinary Chambers are criticized for failing to meet fundamental international standards of justice and “*threatening the integrity of the United Nations in the provision of post-conflict justice*”⁴⁰⁷. Accordingly, in 1999 the Cambodian government sought assistance from the United Nations in drafting domestic legislation to establish a specialized national court with jurisdiction to try, with international participation⁴⁰⁸, Khmer Rouge officials. The court was to be therefore in the form of “*national courts, within the existing court structure of Cambodia, established and operated with international assistance*”⁴⁰⁹. In Chambers, procedural matters are dealt within the realm of national law and the Agreement adds: “[w]here Cambodian law does not deal with a particular

⁴⁰⁴ Draft Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 17 March 2003, Approved by GA Res. 57/228B. 13 May 2003.

⁴⁰⁵ Article 1 UN Agreement and Article 1 Special Law.

⁴⁰⁶ Williams S., “*The Cambodian Extraordinary Chambers-A Dangerous Precedent for International Justice?*” International Criminal Law Quarterly, Vol. 53, January 2004, p.227.

⁴⁰⁷ *Ibid*, p.228; see e.g. Human Rights Watch, “*Serious Flaws: Why the UN General Assembly Should Require Changes to Draft Khmer Rouge Tribunal Agreement*” 30 April 2003, at <http://hrw.org/backgrounder/asia/cambodia043003-bck.pdf>

⁴⁰⁸ Letter from Prime Minister of Cambodia, Hun Sen, to HE Hammarberg T, Special Representative of the UN Secretary-General for Human Rights in Cambodia, 17 July 1999.

⁴⁰⁹ GA Res. 57/228, para2.

*matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the national level*⁴¹⁰. The Law, like the Agreement, refers to national procedural law with regard to investigation, prosecution and trial proceedings. The opening in the Law for the use of international procedural standards provides that only “[i]f necessary, and if there are lacunae in these existing procedures”, the Extraordinary Chambers, co-prosecutors, or co-investigating judges “*may seek guidance in procedural rules established at the international level*”⁴¹¹.

In Kosovo, the Legal Systems Monitoring Section (LSMS), part of the Human Rights Rules of Law Department of the United Nations Interim Administration Mission in Kosovo (UNMIK) Pillar III (Organisation for Security and Cooperation in Europe-OSCE), has the mandate to monitor the justice system in Kosovo in promoting its compliance with domestic and international human rights standards, and towards recommending sustainable solutions to ensure that such standards are met⁴¹². The LMSM has two main objectives. The first one is achieving compliance with human rights standards and the second to ensure that courts apply consistently the guarantees and standards provided in applicable legislation. Importantly, the scope of LMSM is to provide comprehensive overviews of all the cases in which acts of war crimes and genocide have taken place against the civilian population, as defined by the applicable law in Kosovo and “*place the trials and judgments in the broader context of other international humanitarian law jurisprudence, as developed by various national jurisdictions and by the international criminal courts*”⁴¹³ such as ICTY and ICTR. LSMS conclusions possess merely a recommending nature and address war crimes jurisprudence in Kosovo:

⁴¹⁰ Article 12 of the 2003 Agreement between the UN and the Royal Government of Cambodia over the Law on Establishment of the Extraordinary Chambers.

⁴¹¹ Articles 20, 23, 33 and 36.

⁴¹² UNMIK, Department of Human Rights and Rule of Law, “*Kosovo’s War Crimes Trials: A Review*”, September 2002, p.6

⁴¹³ *Ibid.*, p.7.

*“The universal character of these crimes and the public attention that they usually attract means that the verdicts are regarded as a body of legal opinions, which, by virtue of their quality, may form sound jurisprudence aimed at guiding or providing reference during subsequent similar trials or to legal professionals interested in researching such cases. Furthermore, considering that the court panels hearing these cases have mostly been composed of international judges, the standards of legal writing and argumentation should be even higher”*⁴¹⁴.

In Kosovo, a comparison of factual allegations in the indictments with the crimes charged demonstrated that local prosecutors often did not understand the elements of criminal offences they laid out, nor did they effectively assess how the evidence at their disposal could support the elements of the crime⁴¹⁵. Local prosecutors charged genocide in four cases but none of them resulted in a conviction for genocide⁴¹⁶. The ICTY acknowledged the difficulties of genocidal convictions in the Jelisić Case where it pointed out that *“it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system”*⁴¹⁷. To establish such intent means that evidence towards a systematic and organised operation is required. Such evidence must be collected and supported by *“extensive work of research and analysis from historical, legal and sociological perspectives”*⁴¹⁸. Providing in-depth analysis and citations to relevant cases or other authorities in Supreme Court decisions would help local judges, prosecutors and attorneys increase their capacity for understanding the legal issues involved in war crimes trials. It would also render the judgments more persuasive. Moreover, such judgments could help establish the basis for a dynamic, critical, independent jurisprudence of a state (Kosovo)⁴¹⁹. This in turn aims at attaining a higher level of professionalism, coherence and overall legal equality, and thus fulfils

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*, p.34.

⁴¹⁶ *Ibid.* Sec. II: Case Summaries, pp.12-29.

⁴¹⁷ Prosecutor v Jelisić, Case No.IT-95-10, Trial Chamber I, Judgment of 14 December 1999, para.101.

⁴¹⁸ *Op cit*, note 413, p.34.

⁴¹⁹ *Ibid.*, p.8.

its ultimate scope of promoting truth and reconciliation on Kosovo. UNMIK reports demonstrate that the presence of international legal personnel has also contributed to the consistency in interpretation and application of the law. In fact, reports suggest that differential treatment of similar cases has been substantially reduced⁴²⁰.

It is crucial here to understand the importance of dealing with international crimes at 'home', the causal effect of exposing the nature and extent of atrocities rather than promoting a culture of denial⁴²¹, as well as accepting responsibility and studying how to approach such serious crimes under a regime that aims at achieving international legal standards. It is a painful and long process for any country in transition but it is also an essential one; domestic trials are of crucial importance for the evolution of a society towards reconciliation and acknowledgment of the truth as any society in transition has the need to balance legal, political and cultural interests as it moves towards a democratic ideal⁴²².

⁴²⁰ UNMIK, "*Strategy for Justice*" (2001), available at http://www.osce.org/kosovo/documents/reports/justice/strategy_justice_e.pdf

⁴²¹ See e.g. Green P.S., "*A fugitive Croatia General is a Hometown Favourite*", New York Times, June 05 2003; Erlanger S., "*Did Serbia's Leader Do the West's Bidding Too Well*", New York Times, March 16, 2003, reporting that only 12% of Serbs supported extradition of Serb suspects to the Hague.

⁴²² McGregor L., "*Individual Accountability in South Africa: Cultural Optimum or Political Facade*" 95 American Journal of International Law 2001, p.32. In an important Italian comparative study on the Swiss, German and Austrian law reforms, it had been concluded that it is the historic-comparative research method that the theoretical speculation put itself in line with reality, see Grispigni F., "*Il nuovo Diritto Penale negli avamprogetti di Svizzera, Germania ed Austria*", Scuola Positiva, 1911, p.3.

1.7 Conclusion

This chapter aims at assessing and ultimately validating the institutional legitimacy of the ICC judicial framework against the predicted degree to which the Court administers equal justice in comparable cases. This examination of the objectives and balances of justice, in a broad sense, is conducted from a series of perspectives such as legitimacy, accountability, impunity and deterrence. Legitimacy is assessed against the political background surrounding the interconnectedness between the Court and the Security Council. The institutional furtherance of disproportionate treatment of ICC States Parties emanates from the continued advancement of the unequal power among Security Council permanent members; as well as giving the latter the authority to refer cases to the Court and to suspend cases from investigation and prosecution, the veto held by the permanent members protects them against referrals to the ICC. In practice this creates a paradox and a binary applicability of the ICC Statute, to the detriment of the principles of equality and fairness in criminal proceedings. An author provides the correct example of Chechnya. He explains: “*The Russian Federation is the State of territoriality and nationality jurisdiction. If it were not a state party at the relevant time the only possibility of referral would be from the Security Council, a possibility which the Russian Federation could veto*”⁴²³. This determination of fundamental fragmentation and therefore inconsistent application of the ICC Statute (outlined here through the preservation of national judicial sovereignty through the examination of implementation methods on the one hand, and consequential ICC Statute is compromised through the compatibility of amnesties, sentencing, plea-bargaining and immunity agreements on the other) and international criminal law in general between States Parties and States Non-Parties is inherently reflected in the multiplicity of implementation methods and diverse political and legal dimensions within which the Rome Statute is applied. The discussion on the

⁴²³ McGoldrick D., “*The Legal and Political Significance of a Permanent International Criminal Court*” in McGoldrick et al. (eds.) “*The Permanent International Criminal Court*”, 2004, p.461.

consequences these diverging implementation and interpretation models have on the definition of the law as codified by the ICC Statute, their reach and scope, leads to a conclusion that the application of the ICC Statute is irregular and fragmented. This is further emphasised by the fact that non-Western legal traditions are not represented in the Statute to a sufficient degree⁴²⁴. For these reasons, regional and local measures of (non) accountability have survived in the implementation of the ICC Statute. Nonetheless, the need for the ICC is undeniable, and its doctrinal value is timely and decisive in the move towards a global and uniform system of standardised accountability mechanism. However, in its present embryonic phase the Court may serve its purpose most efficiently through the encouragement of national proceedings at which the ICC should have a participatory function, through training of local judiciary and monitoring of local trials. In this way the ICC should play an important, leading role in deterrence, thus decreasing impunity by stimulating States through dissemination of international criminal law, to enforce compliance with the responsibility to investigate and prosecute relevant crimes, and by not being part of the international peace and security institutional structure (like ICTY and ICTR for example), provided of course that complementarity is not bypassed. This interconnectedness between international standards of criminal justice and national socio-legal traditions should be promoted with a particular view of meeting the needs of the host country and of involving the local people with the proceedings. The needs of the State in question are met by the adoption of both international and national laws, whereby national laws are gradually amended or introduced to meet international standards of justice.

⁴²⁴ See e.g. Sadat L., “*The ICC and the Transformation of International Law*” (2002).

Chapter 2

Surrender of Suspects and Accused Persons under the ICC Regime

2.1 Introduction

As seen in the previous Chapter, the lack of a clear framework contributing to judicial vagueness in enforcement systems of international criminal law represent major uncertainties in the functionality and effectiveness of the ICC legal regime. The fragmented approach to the ICC is very clear when extradition and surrender are considered. Surrender under the ICC Statute is examined here at three levels. The first examination goes behind the reasoning for adopting the term ‘surrender’ in place of ‘extradition’. The second analysis focuses on the necessary and predictable survival of extradition laws in ICC proceedings, especially with regard to defences to extradition such as *ne bis in idem*, amnesties and specialty. The judicial relationship between surrender and extradition is of particular importance when the rights of the accused are considered, such as that of habeas corpus. The third point of analysis questions whether States have the power, under their constitutional orders for instance, to waive due process and fundamental fairness guarantees available under extradition proceedings and what are the consequences for the ICC in adhering to the *mala captus bene detentus maxim*. As illustrated in the previous chapter, it seems not only that States will retain the power to control, to a great degree, the pre-trial proceedings, not least because of complementarity, but also as they are under duties emanating from human rights laws not to act to the detriment of an accused and to respect fundamental procedural guarantees. The primary obligation rests on national authorities to interpret and apply domestic law since failure to comply with domestic law entails a breach of international law¹. Consequently, national courts “*can and should exercise a certain power to review whether this law has been complied with*”². The exception to this position will be surrenders executed under a Security Council resolution or where it is considered that the interests of the international community outweigh the interest of an individual who then becomes but a

¹ ECHR Art.5 (1) stipulating that no one shall be deprived of his liberty unlawfully, without the applicable extradition procedure being followed.

² *Ocalan v Turkey*, App. No. 46221/99, Judgment of 12 May 2005, para.84.

subject of international criminal law. This latter exception is more likely to occur in monist legal systems³, as there are no standards of procedure applicable to all States. Accordingly, the ensuing question is whether the fundamental right of a presumption of innocence will survive the interests of the international legal community by bringing to trial defendants charged with atrocities. Lacunae revealed by a non-uniform model of applying the ICC Statute may be remedied through human rights law. However, the greatest human rights tensions are likely to emerge when they interfere with a surrender process, since such procedures frequently reflect a pronounced political dimension. Yet the correct implementation and effective application of the ICC Statute and human rights remains a responsibility incumbent, without exception, on the State Parties and the Court itself.

Surrender proceedings in the realm of the International Criminal Court will yield benefits only if its regime is generally fair and effective. A fair and effective judiciary in the context of the ICC system requires a culture of respect for the fairness and impartiality of the extradition and surrender process and the derivative rights of suspects and accused persons as well as equality.

2.2 ICC, extradition and surrender

The obligation imposed on national authorities to surrender persons to the Court is one of the most important aspects of the duty to cooperate. The surrender mechanism in this context is different from extradition, which refers to the surrender of a person by one state to another, usually under the principle of reciprocity and double criminality. Surrender in the ICC regime consists of

³ See e.g. Art.10 of the 1947 Italian Constitution on the supremacy of international legal order over national laws or Art.25 of the German 1949 Constitution.

a transfer of one person by a State to the Court where no reciprocity exists⁴. States Parties are in theory, obliged to comply with ICC requests for arrest and surrender, regardless of whether they have included the ICC Statute's crimes in their domestic legislation⁵. The non-inclusion should not be a valid defence against requests from the ICC⁶. The ICC Statute expressly instructs that 'surrender' means delivering of a person by a State to the Court, whereas 'extradition' involves the delivering of a person by one State to another as provided by a treaty, convention or national legislation⁷. During the drafting of the ICC Statute, the Republic of Congo for example strongly favoured the term 'surrender' in preference to that of 'extradition'; in their view, the term 'extradition' was highly problematic since extradition is a matter of relations between *equal* States⁸. The use of such terminology is demonstrative of the fact that States "*did not...consent to extradite nationals in general but accepted such an obligation only in the very specific context of the Court...Such clear distinction at the terminological level should, as was the underlying thinking, at the same time contribute to a growing awareness on the national level for the substantial differences between horizontal and vertical cooperation*"⁹.

ICC travaux préparatoires also reveal that the most important reason for this terminological distinction was a need to avoid any possibility of an accused raising the defence of political offence to his/hers surrender¹⁰. In other words, what is being avoided is the use of traditional extradition defences as 'extradition' refers to the domestic restrictions of extradition laws that are in

⁴ For example Article 29 (e) of the ICTY Statute, Article 28 (e) of the ICTR and Article 102 of the ICC Statute.

⁵ See ICC Statute, Part 9 (International Cooperation and Judicial Assistance).

⁶ ICC Art.88. In relation to the ICTY and ICTR see Security Council Resolution S/RES/827 (1993), 25 May 1993 and S/RES/955 (1994) and Amnesty International, "*International Criminal Tribunals: Handbook for Government Cooperation*", AI Index: IOR 40/07/96, August 1996.

⁷ ICC Statute Art.102.

⁸ See Republic of Congo: Proposal regarding article 87, A/CONF.183/C.1/WGIC/L.4, 25 June 1998.

⁹ Kress C., "*Article 102: Use of Terms*" in Triffterer O. (Ed), "*Commentary on the Rome Statute of the International Criminal Court*" (1999) pp.1157-58.

¹⁰ See e.g. Dutch International Criminal Court Implementation and Amendment Act 2002; Swedish Act on Cooperation with the International Criminal Court 2002, No.329.

contravention with the cooperation regime of the ICC¹¹. It is worth remembering that ICC States Parties may still refuse extradition of nationals due to constitutional provisions¹². In fact, the opening wording of ICC Article 102 (use of terms), “*for the purpose of this Statute*”, reveals the emergence of discretionary powers as to whether or not to implement literally the wording of this Article¹³.

For instance, most extradition treaties usually provide for reciprocal surrender of persons arrested within the respective states’ jurisdictions. Depending on the national laws of the state concerned, the judicial branch may be empowered to render a decision against the extradition of a requested person¹⁴. In Europe, in order to harmonise and therefore facilitate cooperation in extradition, a Framework Decision on the European Arrest Warrant (EAW) has replaced the main multilateral extradition treaties and agreements such as the 1957 European Convention on Extradition, its First Additional Protocol 1975, Second Additional Protocol 1978, the U.N. Model Treaty on Extradition 1990 and the Convention Relating to Extradition between Member States of the European Union 1996. The EAW is implemented in the form of a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. Member States will execute these arrests warrants on the basis of mutual recognition. However, in a number of these States, implementation has been mired with difficulties in national parliaments due to lack of trust in standards in the application of basic procedural safeguards in criminal proceedings¹⁵. Therefore, although all EU Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms

¹¹ See e.g. Dutch International Crimes Act 2003, Sec.12 which stipulates that crimes referred to in the ICC Statute and the Act should not be considered to be offences of a political nature for the purposes of the 1998 Extradition Act or the Surrender of War Crime Suspects Act.

¹² For a full discussion see Chapter 1.

¹³ *Op cit*, Kress, note 9, p. 1158.

¹⁴ Dixon R. and Khan K., “*Archbold-International Criminal Courts: Practice, Procedure and Evidence*” 2002, p.424.

¹⁵ See Amnesty International, “*Justice and Home Affairs Council 19th February 2004: Amnesty International Concerns Regarding Implementation of the European Arrest Warrant*”, available at <http://www.amnesty.ie/layout/print/content/view/full/1606>

(ECHR), governments still retain the right to refuse to extradite an individual if such extradition would result in a breach of that person's human rights¹⁶. The EAW may be relevant in supplementing the ICC Statute by facilitating cooperation when a suspect or accused person is found in one of the European countries and should be either extradited to another European state for the prosecution of the ICC crimes or the Court itself.

In extradition proceedings, a custodial state receiving the extradition request is generally not required to comply. If it finds that proceeding in the requesting state would be unfair or the punishment excessive, it may refuse to extradite¹⁷. Yet, there is little indication that states do actually scrutinize the requesting state's procedure and most refusals to extradite are made by European countries opposing the death penalty¹⁸. In order to reconcile the ICC Statute surrender mechanism and interstate extradition, some commentators have advanced the idea that the ICC should be understood as an extension of the State's own jurisdiction¹⁹.

Issues underlying the prohibition against extradition involve the guaranteeing of due process rights of the accused. These rights along with human rights have been largely incorporated into the ICC Statute and its Rules of Procedure and Evidence²⁰. The French Conseil Constitutionnel found recently that the ICC Statute indeed contained sufficient guarantees for the protection of the basic rights of accused persons²¹.

The process of surrender begins when the ICC Prosecutor submits a request to a State to obtain custody of the accused. In cases of surrender the accused is

¹⁶ Ibid. In September 2001 Extraordinary European Council agreed in principle with the development of the European arrest warrant as part of the EU response to the events of 11th September 2001 stating, "*In parallel, fundamental rights and freedoms must be guaranteed*".

¹⁷ Topiel M. S., "*The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There Room for Reconciliation?*" 9 Cardozo Journal of International and Contemporary Law, 2001, p.408.

¹⁸ See e.g. Bassiouni M. C., "*International Extradition: United States Law and Practice*" (2002), 602.

¹⁹ Bassiouni M. C., "*Observations on the Structure of the Consolidated Text*" in Sadat Wexler L. (Ed.) "*Observations on the Consolidated ICC Text 12*" (1998).

²⁰ See ICC Arts. 55 and 67.

²¹ See Decision No. 98-408 DC, 1999 J. O. (20) 1317.

usually already in the custody of relevant national judicial authorities whereas in requests for transfer, those national authorities have already acted in accordance with the Court's order to secure the custody of the accused. Noticeably, as the experience of the ICTY and ICTR show, the success of these proceedings have not been in recent years consistently adhered to²².

An ICC State Party that receives a request for arrest and surrender has an obligation to “*immediately take steps to arrest the person in question in accordance with its laws*”²³. That State must therefore bring the accused before a ‘competent judicial authority’ where it should be determined whether: (1) the warrant applies to that person, (2) procedural safeguards have been protected and (3) the rights of the accused have been respected²⁴. These determinations are to be conducted in accordance with the national laws of the custodial state. In particular, ICC Article 89 (1) emphasises that once the ICC transmits the arrest warrant, “*States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender*”.

While there are provisions in the ICC Statute that govern cooperation and judicial assistance, the wording of Article 89 is somewhat problematic²⁵ as the exclusion of extradition laws at a national level vis-à-vis ICC requests has not been completely abandoned, even though there is no explicit reference to them in the ICC Statute. It is argued in fact that the lack of consensus regarding the wording in the Statute suggests that States will approach the execution of arrest warrants on their own terms, on a state-to-state basis or use extradition laws where it is politically convenient²⁶. Consequently, failure to specifically exclude the use of extradition laws as reflected in the plain language of ICC Art. 89 (1), could effectively, allow custodial states and accused persons to

²² See Escurel A., “*Surrender of Accused by Domestic States to the ICTR*”, Memorandum for the Office of the Prosecutor, November 29, 2001, Issue 9, New England School of Law-International War Crimes Project Rwanda Genocide Prosecution.

²³ ICC Art.59 (1).

²⁴ ICC Statute Art.59.

²⁵ Sunil Kumar Gupta, “*Sanctum for the War Criminal: Extradition Law and the International Criminal Court*”, 3 California Criminal Law Review, 2000, p.4, para.18, available at www.boalt.org/CCLR/v3/v3guptanf.htm

²⁶ *Ibid.*, para.28.

assert extradition defences in matters before the ICC²⁷. This legal vagueness is a potential impediment with regard to laws on surrender within the ICTY and ICTR judicial framework. In fact, numerous countries felt it necessary to specify that the fact of nationality could not preclude cooperation as sending an accused to a Tribunal was a matter of surrender and not extradition²⁸. This is very important, as nationality is a major extradition defence. For example, the U.S. Restatement of Foreign Relations Law provides that a state may regulate the activities, interests, status or relations of its nationals outside as well as within its territory²⁹. The idea that underlines nationality jurisdiction is that citizens of a nation owe certain duties to their homeland, regardless of their current residence, as long as they maintain bonds of allegiance³⁰. Nationality jurisdiction is considered linked to the burdens and benefits of citizenship³¹. If an accused is found in a state that is not tied to the conduct in question or is not the state of nationality of the accused, there may not be the problem of the reluctant state. Thus, such a state's application of extradition laws may be more appropriate. Provided there are no other parties with jurisdiction able or willing to prosecute the accused, the custodial state may in fact cooperate through its extradition safeguards. However, it is perhaps more likely that an accused will remain in a state that is favourable to him, not one that is willing to extradite him. Therefore, it is more probable that the ICC will receive cases in which the States involved are reluctant to become cooperative because of their refusal to genuinely investigate and prosecute³². In fact, knowing that a State is favourable to one's interests and that traditional extradition law would be applicable, an indicted war criminal will specifically seek sanctum in one of these reluctant States. Consequently, allowing these

²⁷ See e.g. (Malta) International Criminal Court Act 2002, XXIV, Art. 14 (Amendment of the Extradition Act)

²⁸ See e.g. Art. 5, Austrian Federal Law on Cooperation with the International Tribunals, Bundesgesetzblatt No.37/1995, 25 May 1995, which refers to 'citizenship', whereas the 1996 Croatian Law on Cooperation (Constitutional Act on the Cooperation of the Republic of Croatia with the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991) makes reference only to 'residence' (Art.16 (b)).

²⁹ Sec.402 (2) Third Restatement of Foreign Relations Law.

³⁰ See e.g. *Chandler v United States*, 171 F.2d 921 (1st Cir. 1948), treason and relations with enemy.

³¹ Estey W., "*The five basis of extraterritorial jurisdiction and the failure of the presumption against extraterritoriality*", *Hasting International and Comparative Law Review*, 1997-1998, Vol.21, p.182

³² *Op cit*, Gupta, note 25.

nations additional mechanisms under extradition law to prevent the ICC from hearing a case only intensifies the exact problem the ICC was designed to prevent³³. Illustrative of the problem are ICC implementing legislations and relevant, already existing, national provisions of States Parties. Here are some examples from different jurisdictions that demonstrate how various countries have overcome or have attempted to overcome the apparent conceptual contradiction between surrender and extradition.

Latin America represents in this respect an awkward situation since the laws of its countries have failed for almost a decade to provide for legal surrender to the two ad hoc tribunals (ICTY/ICTR). In most cases, states here refuse to extradite their nationals, undertaking instead to try them in their own courts. In other cases, extradition requests are dismissed if the crimes committed are political, military, or tax crimes or when they are time-barred or have been the matter of amnesty laws or when the extradition may impair ‘*national sovereignty, security or public order or other essential interests*’³⁴. Most domestic legislations in Latin American countries refer exclusively to inter-state extradition³⁵. Only the adequate implementation of the Rome Statute’s provisions will lead the way in avoiding conflicts of law with constitutional or statutory provisions and thus ensure effective cooperation with the Court³⁶. In Argentina the proposed draft bill on the implementation of the Rome Treaty expands the scope of jurisdiction currently acknowledged in the Penal Code. The Argentine Penal Code essentially restricts its courts’ jurisdiction to the territoriality principle. However, the implementing bill also encompasses the active personality principle and any other principle ‘*established in international conventions to which the Argentine Republic is a party*’, thus

³³ *Ibid*, p.3, para.15.

³⁴ Relva H., “*The Implementation of the Rome Statute in Latin American States*” (2003) 16 Leiden Journal of International Law 2, p.358.

³⁵ *Ibid*. See 2000 Venezuelan Penal Code Art.6; Mexican Law on International Extradition Art.14; 1998 Ecuadorian Constitution Art.25, 1949 Costa Rican Constitution; 1995 Honduran National Constitution Art.102; 1992 Nicaraguan Penal Code Art.20. *Contra* Art.27 of the 1985 Constitution of Guatemala.

³⁶ The term ‘extradition’ is still frequently adopted in legislation regarding the ICC. See for example Article 8 of the Ecuador’s Draft Implementation Law 2002 provides “*A los fines de la extradición entre la Republica del Ecuador y un Estado Parte del Estatuto de Roma que no tenga un tratado de extradición, podrá considerarse la presente ley como base jurídica necesaria para la extradición...*”.

including the passive personality and universal personality principles when recognised by treaty. The bill also includes a restrictive form of the *aut dedere aut judicare* rule, pursuant to which Argentina undertakes to try any accused person in its own courts if an extradition request by another state is refused. A broader form, as the one found in Article 7 (I) of the Convention against Torture, would require submission of the case to the appropriate authorities for prosecution whether or not another state has requested extradition, thereby avoiding the possible problem of impunity in the absence of an extradition request³⁷. A further positive aspect of the implementation bill is that it permits the ICC Prosecutor to fulfil, directly and without the intervention of Argentine competent authorities, a request for assistance provided no coercive measures are needed³⁸.

In the Republic of Croatia, international agreements concluded, ratified and published in accordance with the Constitution make up a constituent part of the interior legal order of Croatia attaining a status above national law.³⁹ Since the Rome Statute is an international agreement, Article 140 of the 2004 Croatian Constitution⁴⁰ comes into operation. Under the Constitution, a Croatian national may not be extradited to another country, but there is no impediment for the surrender of a Croatian national to the International Criminal Court⁴¹. The requirements for extradition have been specified in the Croatian Criminal Procedure Act 2003⁴² in compliance with Article 2 of the European Convention on Extradition. Under ICC Article 89(1) the Court may transmit a request for the arrest and surrender of a person, together with material supporting the request, to any territory of which that person may be found and shall request the cooperation of that State. The above represents a unilateral obligation of extradition to the body of international jurisdiction, different

³⁷ See e.g. Supreme Court of Spain, Judgment of 25 February 2003 (327/2003) on the jurisdiction of Spain for genocide and torture in Guatemala.

³⁸ *Op cit*, Relva, note 34, p.361.

³⁹ Mandic Mirta, Representative of the Ministry of Foreign Affairs of the Republic of Croatia on the Progress Report on Croatia, Prague Conference on Ratification and Domestic Implementation of the Statute of the International Criminal Law, Prague 7-8 December 2001, available at www.npwj.org/modules.php?name=newsfile=article&sid=159

⁴⁰ Official Gazette, No.55, June 15, 2001.

⁴¹ 2001 Constitution of Republic of Croatia, Article 9(2).

⁴² Article 512 (Official Gazette no.62/03).

from extradition to another country. In order to comply with such requests Croatia has adopted a Law on the Amendments to the Law on Ratification of the Convention on the Transfer of Sentenced Persons of the Council of Europe in which it extended the application of this Convention in respect of procedures provided in Art. 9(1)(a), 10(1) and (2)⁴³.

The provisions of the ICC Statute regarding extradition and surrender (ICC Article 89 and 102) could also be in contradiction with the constitutional clause regarding the prohibition on extradition of FYROM nationals (Art.4), which provides that a national of the Republic of Macedonia cannot be expelled or surrendered to another State⁴⁴. So far many States have amended or are in the process of amending their constitutions in order to overcome the extradition related limitations. Other States have accepted the distinction between extradition and surrender offered by the ICC Statute itself, Article 102 and on the basis of this distinction the constitutional prohibition is interpreted as a prohibition relating only to extradition⁴⁵. For the purpose of compatibility, FYROM Constitution prohibits extradition of nationals to other States, defining this as a prohibition of ‘expulsion or surrendering’. The Constitution does not however prohibit surrendering to the International Criminal Court as it “*implicitly accepts the already established practice in the previous trials for international crimes*”⁴⁶. Moreover, the same provision regulating extradition or surrender in the Rome Statute demonstrates that the apparently very stringent principle of extradition of a State’s nationals does not provide for protection from criminal prosecution in general⁴⁷, but it does provide for protection from prosecution in another state if the basic guarantees are not ensured and if there are possibilities of human rights violations⁴⁸. Since the FYROM Constitution prohibits surrender to other States, but not to the ICC, despite the fact that it is

⁴³ Croatia is also preparing a new, specialized Law on International Legal Assistance and Enforcement of International Agreements in Criminal Matters.

⁴⁴ The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court, Progress Report by the Former Yugoslav Republic of Macedonia, para. 4 (a), (29 October 2003) Council of Europe, 3rd Consult/ICC (2003) 13.

⁴⁵ *Ibid.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See for example ICC Article 55 on Rights of the Persons During an Investigation and Article 59 on the Arrest Proceedings in the Custodial State.

located in another State, experts accept that there is no need for changing and adapting the Constitution, it not presenting an obstacle for implementation of the provisions of the ICC Statute relating to the surrender FYROM nationals to the Court⁴⁹. What the FYROM government is required to introduce, however, is legislation adjusting the procedure for assistance and cooperation with the ICC and for implementation of its decisions which would deal with international cooperation and judicial assistance under Part 9 of the ICC Statute, having in mind that assistance and cooperation with the Court differ from other kinds of mutual criminal-legal assistance that include extradition, small criminal legal assistance and transfer of criminal proceedings all of which are contained in the provisions of the FYROM Law on Criminal Procedure⁵⁰.

In Poland, the adopted interpretation is that the prohibition to extradite a Polish citizen as stipulated by the 1997 Constitution⁵¹ applies to relations with states and its scope does not cover the ICC⁵². Reconciliation between national provisions on extradition and those of the ICC Statute has been achieved by declaring that (1) the institutions of surrender and extradition are two qualitatively different forms of international cooperation; (2) ICTY and ICTR had already been operating at the time the Polish Constitution of 1997 was enacted; arguably, there was no need to introduce separate regulations concerning surrender which gives grounds for an assumption that the concept of surrender, stipulated in the Statutes of both tribunals, was not considered to amount to extradition.

Lithuania introduced the new Code of Criminal Procedure in 2004, the provisions of which are fully compatible with the provisions of the Rome Statute and provide that officers of foreign courts, prosecution and pre-trial investigation institutions of the ICC shall be permitted to institute proceedings on Lithuanian territory only in cases provided for in an international agreement

⁴⁹ *Loc cit*, note 44.

⁵⁰ *Ibid*.

⁵¹ The Constitution of the Republic of Poland 1997, Dziennik Ustaw No.78, Article 55.

⁵² Council of Europe, “*The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court – Progress Report by Poland*”, 07 August 2001, CONSULT/ICC (2001) 22.

to which Lithuania is a party and with the participation of the officers of the Republic of Lithuania⁵³. The Code also provides that the person whose extradition or transfer to the ICC is requested shall be arrested on the grounds provided for in international agreements to which Lithuania is party and the Code itself⁵⁴. The ICC Statute should govern the duration of detention.

As will be shown below, notwithstanding the generally uniform acceptance of the doctrinal, qualitative differences between ‘surrender’ and ‘extradition’, in practice extradition and its traditional defences will apply to ICC proceedings.

2.3 Ne bis in idem and other conventional extradition safeguards

As already mentioned, one of the reasons for distinguishing extradition from ICC surrender proceedings, is to limit the scope of traditional extradition defences. The defence of ne bis in idem or double criminality survived this distinction and is provided for in ICC Art.20. The maxim states that no one can be put on trial twice for acts for which he/she has already been judged and for which a final court decision has been delivered. The principle of ne bis in idem is a safeguard present in several multilateral and regional conventions⁵⁵, most extradition treaties and domestic constitutions⁵⁶. The status of the norm in international criminal law is considered somewhat anachronistic as it serves an important purpose predominantly in conventional inter-state extradition proceedings and the jurisprudence of international criminal courts and tribunals indicate that it does not stretch far enough to constitute a uniform human right guarantee⁵⁷.

⁵³ 2004 Code, Article 67 (4).

⁵⁴ *Ibid.* Art.72.

⁵⁵ See e.g. 7th Additional Protocol of the ECHR Art.4; American Convention of Human Rights Art.8 (4); ICCPR Art. 14 (7); 1970 European Convention on the International Validity of Criminal Judgments and 1972 European Convention on the Transfer of Proceedings in Criminal Matters.

⁵⁶ See e.g. Art.14 of the 1992 Constitution of the Former Yugoslav Republic of Macedonia.

⁵⁷ See Tallgren I., “Article 20” in Triffterer O., “Commentary on the Rome Statute on the ICC” 1999; A. P. v Italy, B 204/1984, para.7.3 where the U.N. Committee for Human Rights held

The ICC Statute, although based on complementarity, does not exclude the prospect of a second trial before the ICC, subsequent to a final decision reached by a national court. Thus, for instance, if there is a final decision that stops investigations or prosecutions, it should not be forgotten that the jurisdiction of the Court could be activated. ICC negotiating history illustrates that this latter jurisdiction may be justified if the ‘*other court*’⁵⁸ fails to take proper account of the grave nature of the crime, at either the trial or the sentencing stage⁵⁹. If there is an assessment that the procedure before the domestic court is not conducted independently and/or impartially, another trial is not unfeasible even if the previous procedure culminated in a final decision. It has been noted that such an inquisition into a State’s ‘unwilling or unable’ judiciary is “*a difficult allegation to prove, especially if ICC judges are deferential to nation states sensitivities about their justice system*”⁶⁰. Yet, the ICC Statute holds on the maxim *ne bis in idem* that there can be no retrial for an act for which the person is sentenced or released by the Court⁶¹. Despite this apparent collision of a domestic (constitutional) norm and the ICC Statute, it is worth noting that the norm resolves the issue of respecting ‘*res judicata*’ in the national legal system. However, amending national laws or constitutions in order to implement ICC Article 20, implies, on a practical level, expressing doubts about the domestic judiciary. This in turn may be inconsistent with other constitutional principles, particularly regarding an independent and impartial judiciary, and therefore render itself unreasonable. In such a case and contrary to the complementarity rule, national laws become subordinate to the ICC Statute⁶². Following Article 20 a person sentenced by the ICC, and who is in the custody of the State of enforcement, shall not be subject to prosecution or punishment before a third State for any conduct engaged in prior to that person’s delivery to the State of enforcement, unless such prosecution or

that the relevant provisions of the international human rights conventions do not guarantee *ne bis in idem* with regard to the national jurisdictions of two or more States.

⁵⁸ ICC Statute Art.20 (3).

⁵⁹ UN A/CONF.183/13, p.29, fn.64.

⁶⁰ Robertson G., “*Crimes Against Humanity*” (1999), p.350.

⁶¹ ICC Art.20.

⁶² Knoops G-J A., “*Surrendering to International Criminal Courts: Contemporary Practice and Procedure*” (2002), p.317.

punishment has been approved by the Court at the request of the State of enforcement⁶³. Some States have correctly declared that this provision is contrary to the principle of independence of justice under the International Covenant of Civil and Political Rights and thus contrary to national constitutions⁶⁴.

a) Nulla poena sine lege

Directly related to the observance of ne bis in idem is the principle of nulla poena sine lege. Traditionally, extradition proceedings have been reserved for persons who have allegedly committed a serious offence and therefore based on the maxim of *nulla poena sine lege*, a request for extradition will only be granted if the alleged conduct of the accused amounts to a crime in both the requesting and the requested state⁶⁵. The principle of reciprocity has resulted in most states complying with the principle of double criminality ensuring that a requested state is not forced to extradite a fugitive for conduct which is not regarded as criminal; in inter-state situations the requested state has no jurisdiction to inquire into the substantive criminal law of the requesting state to determine whether the conduct amounts to an extraditable offence⁶⁶. In the ICC regime, this will probably only pose a problem concerning cooperation requests with non-Party States.

In the United Kingdom the House of Lords recently considered the double criminality principle in respect to extraterritorial offences in the case of *ex parte Pinochet (No.3)* [1999]⁶⁷. Lord Goff agreed with the analysis as to the

⁶³ ICC Art.108 (1).

⁶⁴ The International Centre for Criminal Law Reform and Criminal Justice Policy, *International Criminal Court – Manual for the Ratification and Implementation of the Rome Statute*, March 2003 (Second ed.), p.58.

⁶⁵ See e.g. *Cvjetkovic Case*, Austrian Supreme Court, Decision of 13 July 1994, where the defendant, accused of genocide, argued that a lower court erred in applying Art.64 of the Austrian Penal Code (acts committed abroad which are punished without consideration for the law in force in the place where they were committed) instead of Art.65 (acts committed abroad which are only punished if they are punishable under the law in force in the place where they were committed). See also the *Cvjetkovic Case*, Judgment of 31 May 1995.

⁶⁶ See also the effect of a negative list of crimes in Justice Comments (Memorandum from Justice) on the Council's Framework Decision on the European arrest warrant and surrender procedures between Member States, October 2001.

⁶⁷ *Ex parte Pinochet (No.3)* [1999] 2 All ER 97

determination of which charges survived the application of the double criminality principle but disagreed with the finding on immunity⁶⁸. He would have found that Pinochet did have immunity *ratione personae* as a former head of state because the Torture Convention lacked an express waiver of immunity and because the application of the double criminality principle eliminated the other charges that would have led to a finding of systematic or widespread torture⁶⁹.

Under the ICC Statute, when the arrested person believes he or she has already been prosecuted for the same offence, or conduct that relates to that offence, the person may bring a challenge before the national court under the principle *ne bis in idem*⁷⁰. If a person sought for surrender makes such a challenge, the requested State is under an obligation “*to consult immediately with the Court to determine if there has been a relevant ruling on admissibility*” by the Court⁷¹. If the latter has already determined that the case is admissible, then the requested State must proceed with the surrender. If on the other hand an admissibility ruling is pending, the requested State may postpone the execution of the request until the Court makes its determination on admissibility⁷². When such a situation arises, the Chamber dealing with the case must “*take steps to obtain from the requested State all the relevant information about the ne bis in idem challenge brought by the person*”⁷³. As long as the admissibility ruling is pending, the ICC Prosecutor may seek an order from the Court requesting the State to prevent the escape of the accused⁷⁴. It is interesting to observe here the reach of complementarity. Substantive ICC implementing legislations vary, as seen in Chapter 1, from implementation of rules in general terms⁷⁵ to detailed enumeration of the crimes, either by adopting definitions incorporated in the

⁶⁸ *Ibid.* Opinion of the Lords of Appeal, per Lord Goff, at 77.

⁶⁹ *Ibid.*

⁷⁰ See Article 20 and Article 89 (2).

⁷¹ Article 89 (2).

⁷² *Ibid.*

⁷³ Rule 181.

⁷⁴ Article 19 (8) (c).

⁷⁵ See e.g. 2000 Canada’s Crimes Against Humanity and War Crimes Act, Sections 4 and 6; 1998 Congolese Law on the Rendition and Repression of Genocide, War Crimes and Crimes against Humanity (No.8-98), Art.4.

Statute verbatim⁷⁶, or, as seen in Germany, by redefining them⁷⁷. Other States, such as those in Latin America, rely instead on ‘ordinary’ domestic crimes⁷⁸. For instance, pursuant to the U.N. Convention on Torture⁷⁹ and the regional Inter-American Convention on Forced Disappearance of Persons⁸⁰, States Parties are obliged to prosecute such crimes whenever they are committed, even if they are committed in an isolated or sporadic manner. This means that crimes under these conventions do not need to be part of a widespread or systematic attack against a civilian population, a requirement of crimes against humanity as defined under the ICC Statute. The ordinary crime exception to the principle *ne bis in idem* was omitted from the Draft ICC Statute as members of the Preparatory Committee had differing views on a definition of ‘ordinary crimes’ and some opposed the concept as such⁸¹. Hence, it cannot be argued that the classification of a conduct as an ordinary crime renders the national legal system unable to carry out investigations, as it had been the case under the ICTY regime. Here, a person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal if the act for which he/she was tried was characterized as an ordinary crime⁸². Nevertheless, investigations and prosecutions on the basis of ordinary crimes do not seem to automatically constitute cases inadmissible. This conclusion is supported by the ‘upward’⁸³ *ne bis in idem* maxim as laid down in the ICC Statute in Article 20 (3). This provision allows for a new trial by the ICC of a person who has

⁷⁶ Kleffner J. K., “*The Impact of Complementarity on National Implementation of Substantive International Criminal Law*”, Journal of International Criminal Justice, Vol.1, No.1 (2003) p.95.

⁷⁷ Germany’s Code of Crimes Against International Law 2002, Sections 8-12.

⁷⁸ *Op cit*, Relva, note 34, p.338.

⁷⁹ Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], June 26, 1987, Arts.4, 5 and 7.

⁸⁰ Inter-American Convention on Forced Disappearance of Persons 1996, 33.I.L.M.1429, Articles I (b) and VII

⁸¹ ICC Draft Statute, Art.18, March 1998. See Holmes T. J., “*The Principle of Complementarity*” in Lee R. S. (Ed.), “The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results” 1999, pp.57-58.

⁸² ICTY Statute Art.10 (2) (a); ICTR Statute Art. 9 (2) (a); see also 1996 Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 48th Session, 06 May-26 July 1996, GAOR, 51st Session, Supplement No. 10 (A/51/10), Draft Art. 12 (2) (a) (i).

⁸³ C. van den Wyngaert and Ongena T., “*Ne bis in idem Principle, Including the Issue of Amnesty*” in Cassese A., Gaeta P. and Jones J., “International Criminal Court: A Commentary” (2002) pp.724-726.

been tried by another court for conduct, not crimes, under ICC Arts. 6, 7 or 8. The choice of the term *conduct* and not *crimes* seems to suggest that the classification of a conduct as an ordinary crime is not sufficient to render Art. 20 (3) applicable and thus does not allow for a retrial before the ICC⁸⁴. Hence, exceptions to the ‘upward’ ne bis in idem principle do not include the possibility of a retrial before the ICC of a person previously tried by a national court for acts constituting ICC crimes on the ground that those acts had been characterized as ordinary crimes⁸⁵. Contrary to this conclusion is the argument that characterization of an ICC crime as an ordinary crime presupposes determining adequate and proportional sentences against the gravity of the crime and “*states parties implementing the Rome Statute are bound to establish a standard not inferior to that created by this international instrument*”⁸⁶. Gravity in turn must match the conduct constituting a crime belonging to the most serious crimes of international concern⁸⁷. In this respect international rules differ from ordinary crimes in as much as they protect the interests of the international community⁸⁸. The problem becomes apparent if one considers a situation in which the ICC would characterize pillage as a war crime⁸⁹ but the national court would determine a sentence for the ordinary crime of theft⁹⁰. A further example is the crime of murder⁹¹ which gives rise to extensive analysis as its prosecution may occur within a legal framework that permits prosecution under both national and international law⁹². A case in

⁸⁴ *Op cit*, Kleffner, note 76, p.96.

⁸⁵ See e.g. El Zeidy and Mohamed M., “Egypt and Current Efforts to Criminalize International Crimes” International Criminal Law Review, Vol.5, No.2, 2005 pp.247-266.

⁸⁶ *Op cit*.34, Relva, p.339.

⁸⁷ ICC Art. 5 (1) on Jurisdiction, Admissibility and Applicable Law.

⁸⁸ ICTY stated that “*core crimes transcend the individual because when the individual is assaulted, humanity comes under attack and is negated*” in Prosecutor v Erdemovic, Case No. IT-96-22-T, Trial Chamber Judgment, 29 November 1996, para.28; see also Attorney General of Israel v Eichmann, 36 International Law Reports (ILR) 5 (Jerusalem District Court 1961); Attorney General of the Government of Israel v Adolf Eichmann (1962)(Isr. Supreme Court 1962), 36 ILR 28; Federación nationale des deportés et internes résistants et patriotes and others v Barbie (1988) 78 ILR 125 and the Demjanjuk Case (1996) 445 US 1016, 89 L. Ed. 2d 312.

⁸⁹ ICC Art. 8 (2) (b) (xvi) and 2 (e) (v).

⁹⁰ *Op cit*, Kleffner, note 76, p.97.

⁹¹ The International Law Commission declared that “*murder is a crime that is clearly understood and well defined in the national law of every State*”, Report of the ILC on the work of its 48th Session, 06 May-26 July 1996, p.96.

⁹² See e.g. Prosecutor v Kupreskic et al., Case No. IT-95-16, Judgment of 14 January 2000, para.821; Prosecutor v Akayesu, Case No. ICTR-96-4-T, Judgment of 02 September 1998, para.587.

point is East Timor, where the regulatory framework of UNTAET affords prosecuting authorities significant influence in deciding as to which law, national or international, is relied upon in individual prosecutions⁹³. Here the prosecutor has the discretion to determine whether an offence will be pursued in spite of the absence of precise instructions as to the compatibility of Indonesian law⁹⁴. Under UNTAET Regulations crimes against humanity are one of the most serious criminal offences within the jurisdiction of the Special Panel and this jurisdiction⁹⁵, unlike that for murder under national law, is universal⁹⁶. Under the Regulations, the definition of crimes against humanity corresponds to the ICC Statute⁹⁷. Article 7 of the Elements of Crime⁹⁸ sets out the context element for the offence of murder as a crime against humanity within ICC Art.7 (1) (a); it addresses the issue of knowledge regarding a “widespread or systematic attack against a civilian population” in general terms, not addressing therefore the specific knowledge which is required to constitute the mental element of murder⁹⁹. Hence, the Article is drafted in broad terms. As a result, reliance has to be sought in provisions outside the ICC Statute, such as in the jurisprudence of other international tribunals, mainly the ICTY and ICTR¹⁰⁰.

⁹³ Cumes G., “*Murder as a Crime against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor*”, European Journal of Crime, Criminal Law and Criminal Justice, Vol.11, No.1 (2003), p.41.

⁹⁴ Linton S., “*Rising From the Ashes: the Creation of a Viable Criminal Justice System in East Timor*” 25 Melbourne University Law Review, 2001, p.137.

⁹⁵ UNTAET Regulation 15/2000, Sec.1(3).

⁹⁶ Ibid, Sec.2(2). On the ‘legitimizing link’ whereby universal jurisdiction does not apply in cases where some kind link cannot be established between the crime and the prosecuting state see Ambos K. and Wirth S., “*Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts (1994-2000)*” in Fischer H. et al. (Eds.) “*International and National Prosecution of Crimes Under International Law-Current Developments*” (2001) pp.778-783

⁹⁷ ICC Art.7.

⁹⁸ Report of the Preparatory Commission for the International Criminal Court, Part II, Finalised draft text of the Elements of Crimes, UN Doc PCNICC/2000/1Add.2 (2000).

⁹⁹ See e.g. Elewabadar M., “*Mens rea-Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*” International Criminal Law Review, Vol.5, No.2, 2005, pp.203-246; also Timmerman W. K., “*The Relationship between Hate Propaganda and Incitement to Genocide. A New Trend in International Law Towards Criminalisation of Hate Propaganda*”-Leiden Journal of International Law, Vol.18, Issue 2, 2005, pp.257-282.

¹⁰⁰ For example, on the ‘context element’ of crimes against humanity see Prosecutor v Blaskic, Case No. IT-95-14, 03 March 2000, Trial Chamber, para.151; Prosecutor v Kunarac, Kovac and Vukovic, IT-96-23, 22 February 2001, Trial Chamber, para.410 ff.; Prosecutor v Dusko Tadic, Opinion and Judgment, 07 May 1997, Trial Chamber, para.559; Prosecutor v Clement Kayishema and Obed Ruzindana, ICTR-95-1-T, 21 May 1999, para135; Prosecutor v Alfred Musema, ICTR-96-12, Judgment of 27 January 2000, para.215.

There is an additional problem with States that have established offences that, although not based in international law, are categorized as ‘international’. An example is the Congolese ICC implementing legislation that widens the group against whom genocide may be committed¹⁰¹. Another one is the Colombian New Penal Code which includes the failure to provide humanitarian assistance in favour of protected persons despite being obliged to do so¹⁰². In fact, several Latin American states have adopted innovations in relation to the Genocide Convention’s four ‘protected groups’ as defined in all international instruments in which the crime is set out¹⁰³. Some of these States have eliminated ‘racial groups’ in their penal codes¹⁰⁴. Peru added ‘social groups’ whereas Costa Rica replaced the reference to ‘ethnic groups’ with ‘political groups’¹⁰⁵. Not following the ICC Elements of Crimes¹⁰⁶, Germany took the position that it is not necessary for the crime of genocide, under international customary law, for the killing to be committed in a larger context of similar acts. With regard to general principles, Germany also chose a non-literal adoption of Part III of the ICC Statute. It will instead apply general principles as provided in its Criminal Code¹⁰⁷. This Code goes further than the ICC Statute in comprising and defining *dolus eventualis*¹⁰⁸.

These unilateral introductions of apparently international law provisions potentially broaden the scope of international offences and the punitive regime applicable to them¹⁰⁹. Some ICC implementation laws specifically provide that constitutional and other legal norms must be interpreted in accordance with

¹⁰¹ Congo/Brazzaville Law No.8-98, Art.1.

¹⁰² Colombia’s New Penal Code, Law 599/2000, 24 July 2000 (Offences Against Persons and Objects Protected by International Humanitarian Law) Art.152.

¹⁰³ Genocide Convention, Art. II; Draft Code of Crimes against the Peace and Security of Mankind, Art.17; ICTY Statute, Art.4.

¹⁰⁴ 1989 Penal Code of Paraguay, Art.319; 1973 Bolivian Penal Code, Art.138 (Bolivia is not a party to the Genocide Convention); 1973 Guatemalan Penal Code, Art.376.

¹⁰⁵ 1997 Costa Rican Penal Code, Art.375 (No.7732).

¹⁰⁶ Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2.

¹⁰⁷ Code of Crimes against International Law of the Federal Republic of Germany of 29 June 2002, Sec.2 (Application of general law).

¹⁰⁸ Ibid.

¹⁰⁹ For a discussion see e.g. Gaeta P., “*The Defence of Superior Orders: The Statute of International Criminal Court versus Customary International Law*”, 10 European Journal of International Law 1999, 172-191.

international instruments to which a particular states is party to¹¹⁰. Although the ICC Statute provides that the principle *nullum crimen sine lege* shall not affect the characterization of any conduct as criminal under international law independently of the Statute¹¹¹, the unilateral scope-broadening of international law risks undermining the rights of the accused under *ne bis in idem* terms. For instance, Argentina, Chile, Uruguay and Venezuela do not punish genocide despite being parties to the Genocide Convention. A further example is Uruguay where torture is not classified as a crime, despite Uruguay being party to the U.N. Convention on Torture, the Inter-American Convention on Torture and the Rome Statute. Again, Germany is a further solid example. The only crime Germany was able to prosecute until recently was genocide, as it was provided for and defined in the German Criminal Code¹¹² as a result of the ratification of the Genocide Convention. Therefore, prosecution of crimes against humanity and war crimes was not possible as these crimes lacked definition in German law. Thus, a Bavarian Court tried and convicted an accused from the Bosnian war for aiding and abetting manslaughter, instead of the war crime of wilful killing¹¹³. Moreover, there are war crimes as provided for in the Geneva Conventions (e.g. forcing a protected person to serve in the forces of a hostile power) that cannot be prosecuted at all under domestic laws for lack of definition, even as ordinary crimes¹¹⁴.

The reference to ‘another court’ in ICC Article 20 (3) lacks any precise standard as to the judicial weight to be attributed to it. This is important as rulings of investigatory domestic commissions may well provide basis for a defence to surrender¹¹⁵ as a “*sincere truth commission project amounts to a form of investigation that does not suggest ‘genuine unwillingness’ on the part*

¹¹⁰ See e.g. 1992 Constitution of Angola, Art.21 (2).

¹¹¹ ICC Art. 22 (3).

¹¹² 2002 German Criminal Code, Sec.220 (a).

¹¹³ Djajic Case, Bayerisches Oberstes Landesgericht (BayObLG), Judgment of 23 May 1997, 3 St 20/66.

¹¹⁴ Wirth S., “*International Criminal Law in Germany Case Law and Legislation*”, Presentation to the Conference “Combating International Crimes Domestically”, 3rd Annual War Crimes Conference, Ottawa, 22-23 April 2002.

¹¹⁵ ICC Statute Art.89 (2).

of the state to administer justice”¹¹⁶. The surrender related problem here is that State-established investigation commissions provide no uniformity of practice neither with respect to evidentiary principles nor with regard to *ne bis in idem*¹¹⁷. Being one of the major surrender defences, unfortunately, the principle of double criminality relies substantially on the subjective assessment of legal value of domestic investigation efforts and trials¹¹⁸.

b) Specialty

In addition to *ne bis in idem* and *nulla poena sine lege*, the majority of treaties also contain reciprocal specialty provisions requiring states to undertake to prosecute the accused only in respect of extradition crimes set out in the extradition request. The specialty rule aims at providing the fugitive with protection against unfair treatment in the requesting state¹¹⁹. It is an important safeguard against the abuse or circumvention of other protective principles and procedures as it ensures that requests made in respect of offences and circumstances which meet the requisite conditions for extradition and are not used as a pretence to obtain surrender for offences for which extradition would not be granted. In order to comply with the rule, the requesting state must give the fugitive an opportunity to leave the country before instituting criminal proceedings for any other offence. For example, under Article 14 of the 1957 European Convention on Extradition a person has 45 days to leave before being charged with a new offence. Under the ICC Statute, a person surrendered to the Court may not be prosecuted for any conduct committed prior to surrender, other than the conduct which forms the basis of the crimes

¹¹⁶ Schabas W. A., *“An Introduction to the International Criminal Court”* (2001) p.69. See also Villa-Vicencio C., *“Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet”* 49 Emory Law Journal 1, 2000, p.215 where the author describes the ICC Statute as *“both morally impressive and legally a little frightening”* as *“it could be misinterpreted, albeit incorrectly, as forbidding the use of truth commissions”*.

¹¹⁷ Ratner S. R. and Abrams J. S., *“Accountability for human rights atrocities in international law: beyond the Nuremberg legacy”* (2001), p.255.

¹¹⁸ See e.g. 1995 South Africa Promotion of National Unity and Reconciliation Act.

¹¹⁹ See the Preparatory Committee on Establishment of International Criminal Court where Finland expressed the view that the inclusion of the specialty rule was essential, 09 April 1996, 1st Session, 20th Meeting, L/2780.

for which the person was surrendered¹²⁰. However, the Court is empowered to request from the custodial State a waiver of this requirement if necessary after the provision of additional information¹²¹. The accused person may provide his/her views to the ICC on a perceived violation in this matter¹²². Specialty is yet another extradition safeguard and as such, according to some, should be expressly excluded for crimes under international law¹²³ and should not prevent the ICC Prosecutor from amending an indictment. Nonetheless, this provision is present in most ICC implementing legislations.

2.4 Aut Dedere Aut Judicare

Crimes under the ICC Statute are crimes in respect of which international law imposes obligations on States to investigate and prosecute. States parties to international instruments such as the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984), the Genocide Convention (1948), the Geneva Conventions on the Laws and Customs of War (1949), the U.N. Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions¹²⁴ commit themselves to investigate and prosecute these crimes.

Traditionally, the offence-orientated approach to extradition has been widely applied in multilateral conventions prescribing international crimes. Typically those instruments consist of two provisions. The first one confers a jurisdictional competence on the signatory states to prosecute the respective offence or obliges them to establish such a jurisdiction. The jurisdictional clause is usually followed by a separate proviso on the principle aut dedere aut judicare¹²⁵. As far as national jurisdictions go, the former provision can be

¹²⁰ ICC Article 101 (1).

¹²¹ ICC Article 101 (2).

¹²² ICC Rules of Procedure and Evidence, Rule 196.

¹²³ Amnesty International, “*Ireland-Comments and recommendations on the International Criminal Court Bill 2003*”, AI Index: EUR 29/001/2004, 29 April 2004.

¹²⁴ See General Assembly, A/C.3/57/L.56/Rev.1, 57th Session, Third Committee, 19 November 2002, “*Extrajudicial, summary or arbitrary executions*”, at 6.

¹²⁵ See Bassiouni M. C. and Wise E. M., “*Aut Dedere Aut Judicare*” (1995), p.68.

seen as a corollary of the former, which establishes the obligation of a state party to extradite or prosecute an individual who is allegedly responsible for the crime defined in the ICC Statute. The jurisdictional component of this system is intended to secure the possibility for the custodial state to fulfil its obligation to extradite or prosecute by opting for the second alternative with respect to such an individual. This alternative for the custodial state consists of a prosecution by its competent national authorities through the complementarity norms. It is meaningful only to the extent that the courts of the custodial state have the necessary jurisdiction over the crimes set out in the particular instrument to enable that state to opt for the prosecution alternative. Failing such jurisdiction and providing an extradition treaty exists between the parties, the custodial state would be forced to accept any requests received for extradition, which would be contrary to the alternative nature of the obligation to extradite or prosecute and under which the custodial state does not have an absolute obligation to grant a request for extradition.

The custodial state has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that state or by another state which indicates willingness to prosecute the case by requesting extradition¹²⁶. The custodial state is in a unique position to ensure the implementation of the Rome Treaty by virtue of the presence of the alleged offender on its territory. The principle *aut dedere aut judicare* is considered as representing not only a rule of customary international law but also a rule of *jus cogens*¹²⁷.

¹²⁶ Examples of this approach can be found in both multilateral and bilateral treaties on extradition. The 1957 European Convention on Extradition provides one of them. Its Article 6 (1) (a) confers on the contracting states a right to refuse extradition of their nationals. Consequently, paragraph 2 of that Article stipulates that "If the requested Party does not extradite its national, it shall at the request of the requesting State submit its case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means of article 12 (1). The requesting Party shall be informed of the result of its request. See also Article 44 (a) Treaty on Legal Assistance in Criminal Matters 1992 and the UN Model Treaty on Extradition.

¹²⁷ Wise E. M., "*Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*" (1999), p.28.

The ICC Statute, while based on the principle of complementarity, demands the requested State to give priority, in cases of competing requests, to a request by the Court¹²⁸. In particular, the ICC Statute stipulates that where a State Party receives a request from the Court for the surrender of a person, as well as one from any other State for the extradition of the same person for conduct other than crime for which the Court seeks the person's surrender, the requested State shall¹²⁹ (a) if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court and (b) if it is under an existing obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making this decision, the State must give due weight to all relevant factors, including but not limited to the interests of the requesting State, including whether the crime was committed on its territory and the nationality of the victims and/or the possibility of subsequent surrender between the ICC and the requesting State¹³⁰, but shall give special consideration to the relative nature and gravity of the conduct in question. At the Rome Conference, Croatia suggested the inclusion of a provision under which a State should not refuse a request for surrender of persons by the Court as obligations deriving from such a request shall prevail over any legal impediment to do so, be it under national law or extradition treaties of the State concerned¹³¹. However, ICC negotiations show that there is a general agreement that where the Court has determined a case inadmissible, this does not on its own place the requested State under any international obligation to surrender the person to the requesting State¹³². For example, through its ICC implementation Act, Germany will step back and leave a case for the ICC only under very particular circumstances when requirements for complementarity are not fulfilled. Under the German Rome Statute Implementation Act, Germany need not prosecute a suspect if the ICC

¹²⁸ ICC Statute, Article 90 (2).

¹²⁹ ICC Statute Art. 90 (7).

¹³⁰ *Ibid*, Art. 90 (6).

¹³¹ Croatia: Proposal regarding art.87, A/CONF.183/C.1/WGIC/L.9, 29 June 1998. For a similar position see Italy at A/CONF/183/C.1/WGIC/L.3, 25 June 1998.

¹³² UN A/CONF.183/C.1/WGIC/L.11.

has agreed *in advance* to take over a case¹³³. In the United Kingdom, the interpretation afforded to Article 90 is that States Parties must give priority to the ICC request unless the country requesting extradition is a non-Party and the requested State is under an existing obligation to extradite the person to that State Non-Party¹³⁴. In a case of an interpretational conflict, the ICC should enforce the principle *in dubio pro reo*, whereby the more favourable construction to the interests of the accused should be adopted¹³⁵. Some ICC implementation laws stipulate that when a State has effectively initiated or is conducting an investigation with regard to a person sought by the Court, that State has the right to ask the ICC Prosecutor to restrain its competence in favour of the jurisdiction of the State¹³⁶.

Nevertheless, countries in transition reveal potential indistinctness between the obligation to investigate, prosecute or surrender on the part of former and present governments. The American Court of Human Rights decision in *Velasquez Rodriguez*¹³⁷ and the Inter-American Commission conclusions in cases involving Argentina and Uruguay¹³⁸ held that a succeeding government is under an obligation to prosecute those members of the previous government responsible for human rights violations. South Africa is a case in point. In the *Azapo Case*¹³⁹, the Court was expected to thoroughly examine conventional and customary rules that appeared to require prosecution of human rights violators as well as the practice of other states in transition. It was also expected to consider whether the drafter of the, at the time, Interim Constitution intended to overrule international law on amnesty. This was not done and the Court only considered the question whether the provisions of the 1949 Geneva Conventions requiring prosecution for ‘grave breaches’ were

¹³³ Law for the Implementation of the Rome Statute of the International Criminal Court, 21 June 2002, Sec.28.

¹³⁴ House of Commons, “*International Criminal Court Bill-Explanatory Notes*”, 14 December 2000, para.13, available at <http://www.publications.parliament.uk/pa/cm200001/cmbills/070/en/01070x-b.htm>

¹³⁵ ICC Art.22 (2). See also Pacegueiro C., “*International Criminal Court*”, The International Society for the Reform of Criminal Law, 17th International Conference, The Hague, Netherlands, August 24-28, 2003, available at www.isrcl.org/papers/ylp_brazil.pdf

¹³⁶ See e.g. 2002 Ecuador’s Draft Implementation Law, Art.130.

¹³⁷ Judgment of 29 July 1988, Series no.4, reported in ILR 259.

¹³⁸ Inter-American Commission of Human Rights, Reports nos.28/92 and 29/92, 02 October 1992.

¹³⁹ See Chapter 1.

applicable (which were held not applicable in the South African situation), and had not examined whether customary law rules relating to genocide, torture, war crimes and crimes against humanity required prosecution of offenders¹⁴⁰. No attempt had been made by the Court to assess apartheid as a crime against humanity under customary law. The General Assembly¹⁴¹ and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid had classified early apartheid as a crime against humanity.

Most national rules provide, and this is a long-standing principle of civil law countries, that a prosecutor must prosecute if there is sufficient evidence¹⁴². Some national legislation also provides for deferral of a case if a foreign prosecutor is closer to the crime, providing therefore for inter-state complementarity in extradition matters¹⁴³.

2.5 Arrests and surrender under the ICC Statute

Article 55 (1) (d) ICC Statute provides that when the Court is investigating a case '*a person shall not be subject to arbitrary arrest or detention and shall not be deprived of his liberty*'. The ICC will have to substantially rely on national authorities to detain suspects, or otherwise put a notice that their presence is required at the Court and then to ensure the attendance by those persons before the Court. The Court may request these forms of assistance by: (1) issuing an arrest warrant along with a request for arrest and surrender of the person;¹⁴⁴ (2) issuing a warrant along with a request for provisional arrest in urgent cases where the required supporting documentation is not yet

¹⁴⁰ Dugard J., "*International Law and the South African Constitution*", European Journal of International Law, Vol.8, No.1, 1997, p.89.

¹⁴¹ See GA Res.39/72A, 1984.

¹⁴² See e.g. 2001 German Code of Criminal Procedure, Sec.152 (2).

¹⁴³ For a full discussion see Kress C., "*War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*", 30 Israel Yearbook on Human Rights, 2000, 103, 170.

¹⁴⁴ ICC Statute Articles 58, 67,89 and 91 and Rules 117, 123 (1) and 187.

available;¹⁴⁵ (3) issuing a summons with or without conditions restricting liberty (other than detention) if provided by national law where the Pre-Trial Chamber is satisfied that a summons is sufficient to ensure the person's appearance. It seems that both accused persons and suspects have the right to challenge the jurisdiction of the Court or the preliminary admissibility of a case¹⁴⁶. Throughout the ICC Treaty negotiations it was suggested in fact that the right to these challenges should not be limited only to 'accused',¹⁴⁷ persons but should extend to 'suspects' who are subject to an investigation and are arrested on the basis of a pre-indictment arrest warrant¹⁴⁸.

The European Court of Human Rights confirmed in three separate judgments that Article 5(4) of the European Convention on Human Rights is applicable to pre-trial detention. Article 5 (4) of the Convention provides: "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to make proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful*". In *Garcia Alva and Lietzow Case*¹⁴⁹, the ECHR concluded that German authorities had improperly elevated the prosecution's interest in the integrity of the investigation above the fundamental freedom interest secured by Art.5 (4). In the *Ocalan Case*, the ECHR emphasised again the need to prioritise rights enshrined in Art.5 (4) against other interests¹⁵⁰ emphasising also that remedies required under this provision must be of judicial nature¹⁵¹. Whereas the European Court acknowledged that in the interest of an effective investigation there may be instances where some information may be kept secret in order to prevent suspects from interfering with evidence and undermining the course of justice, information which is essential for the assessment of the lawfulness of a detention should be made available in an 'appropriate manner' to the suspect's

¹⁴⁵ ICC Statute Article 58 (5), 67 and 92 and Rules 117, 123 and 187-9.

¹⁴⁶ ICC Statute Art.19.

¹⁴⁷ For example, under the U.K.1989 Extradition Act, Art.1 (1) (a) extradition may be granted in respect of an 'accused person'; for a purposive interpretation of 'accused persons' see e.g. *Rey v Government of Switzerland* [1998] 3 WLR 1.

¹⁴⁸ UN A/CONF.183/13 p.28, fn.53.

¹⁴⁹ *Garcia Alva v Germany* (23541/94) [2001] ECHR 86, 13 February 2001; *Lietzow v Germany* (24479/94).

¹⁵⁰ *Ocalan v Turkey*, App. No. 46221/99, Judgment of 12 May 2005, p.22, para.60.

¹⁵¹ See e.g. *Winterwerp v the Netherlands*, Judgment of 24 October 1979, Series A no.33, p.24, para.60.

lawyer¹⁵². In this case the German Code of Criminal Procedure required that a suspect be given the opportunity at his or her detention hearing to “*present those facts which are in his favour*”¹⁵³. This right may only be enjoyed if a suspect or one’s defence have been given the chance to become aware of such favourable evidence in possession of the Prosecution¹⁵⁴. This is the reason why the German Code of Criminal Procedure grants the defence the right to inspect the prosecution file upon request in pre-trial detention proceedings¹⁵⁵. The ICC Statute provides that when the Pre-Trial Chamber issues an arrest warrant, the application of the Prosecutor shall contain a summary of the evidence and any other information which establish reasonable grounds to believe that the person committed the alleged crimes¹⁵⁶. At the confirmation of the charges before the trial and within a reasonable time before the hearing, the person “*shall be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing*”¹⁵⁷. In addition to these disclosure obligations, the Prosecutor¹⁵⁸ must also, as soon as practicable, disclose to the defence any exculpatory evidence, or evidence mitigating the guilt of the accused, or which may affect the credibility of prosecution evidence¹⁵⁹.

An accused also has the right to ‘provisional liberty’¹⁶⁰ or bail before his/her surrender to the Court. Where an application for bail is made, the State has to consult with the ICC and such application should not be granted without full

¹⁵² Garcia Alva v Germany (23541/94) [2001] ECHR 86, 13 February 2001, para.42; see also Schops v Germany (25116/94), 13 February 2001 where the ECHR refused the German government’s formalistic approach to the requirement that the suspect or his lawyer request access to the file.

¹⁵³ German Code of Criminal Procedure, Sec.115 (3).

¹⁵⁴ See Chapter 3.

¹⁵⁵ German Code of Criminal Procedure, Sec.147.

¹⁵⁶ ICC Statute Art.58 (2) (d).

¹⁵⁷ ICC Statute Art.61 (3) (b).

¹⁵⁸ ICC Statute Art.67 (2).

¹⁵⁹ For similar national guarantees see e.g. 2002 U.S. Department of Defence Military Order on the Rules and Procedures governing Trials before Military Commissions (21 March 2002), Sec. 5(E) providing that “*The Prosecution shall provide the defence with access to evidence the Prosecution intends to use at trial and with access to evidence known to the Prosecution that tends to exculpate the accused*”.

¹⁶⁰ 2004 Argentine Draft Implementation Bill, Art.33.

consideration of any recommendations made by the ICC¹⁶¹. In considering any application for bail, the ICC should consider whether given the gravity of the offence, there are urgent and exceptional circumstances justifying release on bail and also whether any necessary measures have been or will be taken to secure that the person will surrender to custody in accordance with the terms of the bail. When an accused is already in the custody of the ICC in the pre-trial stage, the Pre-Trial Chamber may set conditions restricting liberty, including for instance that the person must not travel beyond limits set by the Court; the person must not contact directly or indirectly victims and witnesses or that the person must not engage in certain professional activities¹⁶².

The ICC Statute confirms that the accused person has the right to a fair trial and pre-trial process¹⁶³ which includes the right to be properly informed and in detail of the nature, cause and content of the charge, in a language that the accused fully understands and speaks¹⁶⁴. These rules form part of the obligations on States Parties under the Statute to fully comply with requests for arrest and surrender¹⁶⁵. What would be of significant assistance to the Court is local authorities undertaking to inform the Court, if they arrest an accused, and if these authorities are also made aware beforehand of the possibility that the ICC may send some additional documentation with the request for arrest and surrender¹⁶⁶. It would be of ample assistance too if the arresting authorities were required to provide this additional documentation to the arrested person on behalf of the Court in order to ensure that all the arrested person's rights are protected from the moment of arrest and avoid any possible process challenges¹⁶⁷.

¹⁶¹ ICC Article 59 (5). See e.g. 2002 Malta's Draft International Criminal Court, Art.26 N (b) and (c).

¹⁶² ICC Rule 119 (Conditional Release).

¹⁶³ ICC Statute Article 67.

¹⁶⁴ ICC Statute Article 67 (1). Also, under Rule 187 the Court's request for arrest and surrender must be accompanied by the translation of the warrant of arrest or of the judgment of conviction and by the translation of the text of any relevant provisions of the Statute, in a language that the accused fully understands.

¹⁶⁵ ICC Article 89.

¹⁶⁶ The International Centre for Criminal Law Reform and Criminal Justice Policy, "*The International Criminal Court. Rules of Procedure and Evidence – Implementation Considerations*" March 2003, p.17.

¹⁶⁷ See e.g. *Barayagwiza v Prosecutor*, Case No. ICTR-97-19-AR 72, Appeal Chambers Decision, 03 November 1999, paras.102-112 where the Tribunal held that in the event of

Furthermore, the ICC Pre-Trial Chamber is also under an obligation to ensure that the person that has been arrested is notified of the provisions of Article 61 (2) which authorise the Court to hold a confirmation hearing in the absence of the accused, *inter alia*, where the accused has waived his right to be present¹⁶⁸. The Pre-Trial Chamber is also required to ensure that the arrest warrant has actually been issued¹⁶⁹ and if the warrant of arrest has not been executed within a reasonable period of time after issuance of the same, that all reasonable measures have been taken to locate and arrest the person¹⁷⁰. The need for cooperation of the requested State under these circumstances is consistent with the obligations to “*immediately take steps to arrest the person in question*” once the request is received and to “*consult with the Court without delay*”¹⁷¹ on issues relating to the execution of a request from the Court¹⁷².

In urgent cases the ICC may request States to provisionally arrest a person¹⁷³. The requirements for supporting documentation in such cases are different from requests for arrest and surrender¹⁷⁴. Delivery of the ICC’s arrest warrant and the request for surrender cannot serve as prerequisites for provisional arrest. However, persons who are provisionally arrested are entitled to receive certain information from the ICC once they have been arrested and the Court is aware of their arrest. Namely, they are entitled to (1) a copy of the arrest warrant issued by the Pre-Trial Chamber, together with relevant provisions of

deliberately misleading prosecutorial conduct the only remedy available was dismissal of indictment and release of the accused.

¹⁶⁸ Under Article 61 (2) (b), in determining whether to hold the hearing in absence of the accused is whether “*all reasonable steps have been taken to inform the person of the charges and that a hearing to confirm those charges will be held*”. See U.N. A/CONF.183/13, pp.297-298.

¹⁶⁹ It is important that arrest and surrender requests be transmitted strictly according to the provisions of the Statute and the Rules and in cases of states non-parties through proper diplomatic channels so as to avoid the challenging of or refusal to execute requests. See e.g. Cameroon Case No.337/COR, Court of Appeal, 21 February 1997 where the Court refused to execute an extradition request on procedural grounds, namely that the request did not meet the conditions laid down in the Cameroon’s extradition law since it had not been forwarded through diplomatic channels (*unreported*).

¹⁷⁰ ICC Rule 123 (3).

¹⁷¹ ICC Article 59.

¹⁷² ICC Article 97.

¹⁷³ ICC Article 92.

¹⁷⁴ See ICC Article 92 (2).

the Statute;¹⁷⁵ and (2) notification of the provisions of Article 61 (2) on confirmation hearings¹⁷⁶. Where the ICC subsequently forwards the request for surrender to the State, it must be accompanied by documents such as a translation of the warrant of arrest and as already stated above, a translation of the text of any relevant provisions of the Statute, in a language that the person fully understands and speaks¹⁷⁷. As with the execution of arrest warrants, the requirement for this document to be given to the arrested person does not place any obligation on the requested State.

Furthermore, the ICC Statute allows the Court to issue summons with or without conditions restricting liberty, other than detention, as long as these conditions are provided for by national law¹⁷⁸ and it is for the Court to ascertain the relevant national provisions of the State receiving the summon¹⁷⁹.

Once a person has been arrested, or provisionally arrested by national authorities, that person must be brought promptly before the competent national authority in the custodial State¹⁸⁰ and be provided with the opportunity to apply for interim release pending surrender¹⁸¹. There are however some unresolved issues of customary international law in this respect.

¹⁷⁵ ICC Rules of Procedure and Evidence, Rule 117 (1).

¹⁷⁶ Rule 123 (1).

¹⁷⁷ See Rule 187.

¹⁷⁸ Article 58 (7). See also Rule 119 (1) that provides some examples of conditions that the ICC may impose. These include that (a) the person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber; (b) the person must not go to certain places or associate with certain person as specified by the Pre-Trial Chamber; (c) the person must not contact directly or indirectly victims or witnesses; (d) the person must not engage in certain professional activities; (e) the person must reside at a particular address as specified by the Trial Chamber; (f) the person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber; (g) the person must post bond or provide real or personal security or surety for which the amount and the schedule and mode of payment shall be determined by the Pre-Trial Chamber and (h) the person must supply the Registrar with all identity documents, particularly his or her passport.

¹⁷⁹ ICC Rule 119 (5).

¹⁸⁰ ICC Article 59.

¹⁸¹ ICC Article 59 (2) and (3). Also, under Article 59 (5) the ICC Pre-Trial Chamber must be notified and make recommendations if a person applies for interim release. Under Rule 117 (4), the Pre-Trial Chamber must observe any time limits that the custodial State may set upon the Pre-Trial Chamber in terms of providing its recommendations. National authorities in this respect must give full consideration to such recommendations before rendering any decisions on interim release (Article 59 (5)). See also Article 59 (6) and Rule 117 (5) on State's obligation to cooperate with the ICC if the person is granted interim release.

The Milosevic Case¹⁸² in the ICTY reflects this. Here the defendant appealed against the decision of the federal government to defer a criminal case to the ICTY, on which appeal the Supreme Court of the Republic of Yugoslavia had to decide within 15 days after receipt of a notice for appeal. This condition was not met as he was transferred to the ICTY at the time the appeal pursuant to the cooperation decree¹⁸³ was still pending. The rendition of the accused absent a judicial finalisation reflects a major source of uncertainty in international law¹⁸⁴. By accepting a rendition of an indictee or even by cooperating with the sending State, the ICC could indirectly transpose the national proceedings to it, thus substitute the national authorities in this area¹⁸⁵. It can be conceded therefore that acceptance of a defendant that has been transferred to the seat of the Court prior to hearing his motion for habeas corpus relief will amount to an infringement on of Articles 9 (4) ICCPR and 5 (1) and (4) of the ECHR¹⁸⁶. It is worth also observing that the International Covenant on Civil and Political Rights confirms that “*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*”¹⁸⁷. Decisions upheld by the Human Rights Committee suggest that this provision does oblige the parties to provide for a complete second treatment of the merits of the case¹⁸⁸.

¹⁸² Prosecutor v Milosevic S., Case No. IT-02-54.

¹⁸³ Art.13 (1) Decree on the Procedure Ruling the Cooperation with the ICTY, 23 June 2001, Appendix 2.

¹⁸⁴ Again, the ICTY in its decision on preliminary motions did not pronounce on the element of ultra vires governmental conduct.

¹⁸⁵ See e.g. State v Ebrahim [1991] 2 S. Afr. L. R. 553; U.S. v Toscanino, 500 F. 2d 267 (1974), para.275 holding that a court must “divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights”; see also Drozd and Janousek v Spain and France (12747/87) [1992] ECHR 52, 26 June 1992 where the Court found that national authorities could refuse a transfer in the case of a serious and flagrant breach of, inter alia, fundamental rights of the defence, such as to deprive the judgment of legal validity; see mututis mutandis in Soering v the United Kingdom, Judgment of 07 July 1989, Series A, No. 161, p.45, para13.

¹⁸⁶ See e.g. Prosecutor v S. Musabyimana, ICTR-2001-62-1, “*Defence Motion on the Violation of Rule 55 and International Law at the Time of Arrest and Transfer*” 05 October 2001 where the Defence contended that a transfer under these circumstances is null and void. The Motion was denied in its entirety. See also R v Horseferry Road Magistrate’s Court, ex parte Bennett [1994] 1 AC 42; Reg. v Hartley [1978], New Zealand Law Reports 1978, Vol.2, p.199; United States v Toscanino [1974] 555 F. 2d. 267, 268 and the decision in Mohammed and Dalvie v The President of the Republic of South Africa and Others, Constitutional Court of South Africa, 28 May 2001 (CCT 17/01, 2001 (3) SA 893 CC).

¹⁸⁷ ICCPR Art.14 (5); see e.g. Benham v the United Kingdom, Judgment of 10 June 1996, Reports of Judgments and Decisions 1996-III, p.753, at 41.

¹⁸⁸ See Antonio Martinez Fernandez v Spain, Views of 29 March 2005, Comm. No.1104/2002.

Where a person has been provisionally arrested and denied interim release, the national authorities may subsequently release the person from custody if the request for surrender and documents supporting the arrest are not received within 60 days from the date of provisional arrest¹⁸⁹. However, once the relevant documents arrive, the person must be arrested again and brought back before the competent judicial authority. Moreover, a provisionally arrested person may voluntarily consent to being surrendered to the ICC before the relevant documents arrive, if national law permits this¹⁹⁰. In that case, the requested State may surrender the person to the Court as soon as possible and the Court is not required to provide the documents¹⁹¹.

ICC Article 59(4) states that it shall not be open to the domestic court to consider whether the ICC properly issued the warrant of arrest. Article 59 (5) is intended to implement that obligation. It also provides that the competent court shall not consider whether there is evidence to justify the person's trial before the ICC. However, the Statute does not set any other adjudication limits. Both in national and international criminal law there is a pre-trial defence available to an accused that intends to challenge his/her arrest and surrender to the ICC¹⁹²; that is the fundamental human right to presumption of innocence or the defence of alibi. In executing arrest and surrender order from international courts, common law countries in particular hold that at the extradition hearing in the requested States, the requesting state must submit evidence tantamount to a prescribed domestic standard which requires the proof the allegations beyond reasonable doubt, or on the balance of probability. Civil law jurisdictions on the other hand are more flexible since surrender may be approved without the need to conduct extradition proceedings or rules¹⁹³. Some national extradition laws clearly specify that the hearing court be required to examine the exculpatory evidence directly at the hearing, in order to determine his/her innocence. The rationale here is that it

¹⁸⁹ ICC Rule 188.

¹⁹⁰ ICC Article 92 (3).

¹⁹¹ ICC Rule 189.

¹⁹² See e.g. the 1988 Constitution of the Republic of Brazil 1988, Art.5 (LIV).

¹⁹³ See e.g. Spanish Implementing Legislation, Organisation Act 15/1994, Art.6, U.N. Doc. A/49/278.

would be unjust for an accused person to await trial in the requesting State before this defence can be lodged¹⁹⁴. In the case of surrendering to the ICTY and ICTR it was held by a Dutch court that the defence of alibi or innocence was not available to an accused subject to surrender proceedings because of the supremacy of the ICTR in this case, as a subsidiary organ of the Security Council¹⁹⁵. In disregard of the ICTR Rule that the defence of alibi may be presented at a pre-trial stage¹⁹⁶, the Dutch court had to set aside both domestic law and treaty obligations. In fact, with regard to the ICTY/ICTR substantive defences as to the lack of criminal liability, intent or guilt are to be exclusively dealt with by these tribunals. The jurisdictional supremacy of the ICTY and ICTR over national courts should not however result in the breach of fundamental human rights at a local level. As it was reasoned by the ICTR: *“The Statute of the tribunal does not include specific provisions akin to speedy trial Statutes existing in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, and has been recognised by national courts”*¹⁹⁷. The jurisprudence of several common law countries upholds the principle that a stay of proceedings is the only possible remedy for failure to bring an accused to trial promptly¹⁹⁸.

Whereas resort to habeas corpus may not be available at national level arising from requests from the ad hoc Tribunals, this right must exist at the surrender stage under the ICC complementarity principle and ICC Article 59 (2) or (3)¹⁹⁹. The right to be free from arbitrary arrest and detention is widely protected in various international instruments and regarded as *“an essential*

¹⁹⁴ See e.g. 1988 Dutch Extradition Act, Art.26 (3).

¹⁹⁵ Prosecutor v Simon Bikindi, ICTR-2001-72-1 The defence of alibi was based on the fact that the accused was not present in Rwanda at the time the alleged crime was committed.

¹⁹⁶ ICTR Rule 67 (A) (ii) (a).

¹⁹⁷ Prosecutor v Barayaguiza J. B., ICTR-97-19-AR72, Appeal Chamber Decision, 03 November 1999, at 105; See ICTR Statute Art.19 (1).

¹⁹⁸ See e.g. the Canadian Supreme Court ruling in R. v Askov, 2 R. C. S. 1199 (1990).

¹⁹⁹ ECHR has stressed the importance of remedies such as habeas corpus, to provide protection against arbitrary behaviour and incommunicado detention (see for example Brannigan and McBride v United Kingdom, ECHR, 26 May 1993, Series A, No.258-B, pp.55-56, paras.62-63). See also Bozano v France, ECHR, Judgment 18 December 1986, Series A, p.23, para.54 and Wassink v the Netherlands, ECHR, 27 September 1990, Series A, No.185-A, p.11, para.24.

element of the due process protections which provide safeguards for any person from abuse of power”²⁰⁰. Anticipating domestic and international law defences of alibi or innocence inevitably results in lifting the warrant of arrest²⁰¹ and there are no principles of national or international law that prohibit a domestic court to control the arrest proceedings initiated by the ICC by virtue of Article 59 (3), and grant interim release for example.

Other pre-surrender defences under international human rights law include the defence of life imprisonment²⁰² and political asylum. Although the ICC Statute does not contemplate that the possibility of imposing life sentence is a bar to surrender²⁰³, the ICC negotiating history reveals that, in practice, this might lead to defences pursuant to a request under ICC Art.59 (2). A complaint against a custodial State or an application for interim measures under ECHR Rules is also a possible route²⁰⁴. Another unresolved issue under the ICC Statute is the question of how to resolve a surrender request for a person who has applied for political asylum in the requested State for reasons of risk of persecution in the host State of the Court or a third State²⁰⁵. As yet, the ad hoc tribunals have not addressed this issue so it will be interesting to see how the ICC will confront the matter. According to the non-refoulement principle a refugee may not be sent back to the country where he risks persecution²⁰⁶. For example, this guarantee may be found in the 1951 UN Convention on the Status of Refugees. It prohibits expulsion or return to the frontiers of territories where a refugee’s life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion²⁰⁷. The exception to this guarantee occurs in a situation where a

²⁰⁰ Bassiouni M. C., “*Extradition Law and Practice of the United States*” II International Criminal Law p.260, 1999. See e.g. ICCPR Art.9 (1), Universal Declaration of Human Rights Art.9, AMCHR Art.7 (3), African Charter on Human and People’s Rights Art.6.

²⁰¹ Schlunck A., “*Commentary on Article 58, Margin No.22 and 25*” in Triffterer O. (Ed.), “*Commentary on the Rome Statute of the ICC*” 1999, p.768

²⁰² For a full discussion see Chapter 3.

²⁰³ Constitutional obstacles as regards maximum penalties might challenge surrenders to the ICC (See Chapter on Transfer of Criminal Proceedings).

²⁰⁴ Rules of Court of the ECHR, Rule 39.

²⁰⁵ *Op cit*, Knoop, note 62, p.189.

²⁰⁶ See e.g. Lopez Burgos, U.N. Doc.A/36/40 (1981) where the Human Rights Committee ruled that forcible abduction of a Uruguayan refugee from Argentina, by Uruguayan agents, represented a violation of ICCPR Art. 9 (1).

²⁰⁷ 1951 UN Convention on the Status of Refugees, Art.33 (1).

refugee who is regarded as a danger to the security of the country or who, having been convicted of a particular serious crime, constitutes a danger to the community of that country. From this perspective a surrender request of the ICC could be an impediment to an asylum grant but at the same time an asylum claim may result in the suspension of surrender to the ICC as long as the domestic asylum or refugee procedure is not concluded. The requested State might then be able to conditionally surrender the person under the promise of return to it after the finalization of proceedings before the ICC. The question is what position, in the hierarchy of national laws, do these provisions hold and whether they will supersede, through complementarity, obligations under the ICC Statute. In a situation of such concurrence, States will have to make balancing judgments taking into consideration current human rights law. In *Amuur v France* for example, the ECHR ruled that detention or confinement “*must not deprive the asylum seekers of the right to gain effective access to the procedure for determining refugee status*”²⁰⁸. However, refugee protection is not absolute and the 1951 Convention provides that these guarantees should not apply if there are serious doubts that a person has committed a crime against humanity, against peace, a war crime or a serious non-political crime before being admitted to the country as a refugee²⁰⁹. What must be borne in mind however is that States have granted amnesty in respect of acts of torture²¹⁰. Amnesties are generally regarded as incompatible with the duty of States to investigate crimes²¹¹ but they are, as it will be evidenced later, still applicable for the crimes under the ICC Statute. The International Covenant on Civil and Political Rights also grants an accused habeas corpus relief at a

²⁰⁸ *Lalima, Abdelkader and Amuur v France*, ECHR No.17/1995/523/609, 20 January 1994, para.50

²⁰⁹ 1951 UN Convention on the Status of Refugees, Art.1 (f) and U.N. Declaration on Territorial Asylum, Art 1 (2), G.A. res.2312 (XXII), 22 U.N. GAOR Supp. (No.16) at 81, U.N. Doc. A/6716 (1967). There are exceptions to these provisions and states are allowed to take measures in cases involving national security (see. e.g. the Angolan reservations).

²¹⁰ See e.g. Human Rights Committee, General Comment 20, 10 April 1992, para.9.

²¹¹ ECHR Art.3 states that “*No one shall be subjected to torture or to inhumane or degrading treatment or punishment*”. In *Chahal* the Court held that Article 3 ECHR makes no provision for exceptions and no derogation from it are permissible even in the event of a public emergency threatening the life of the nation (*Chahal v U.K.*, No.70/1995/576/662, Judgment of 15 November 1996, paras.79-80); See also *Ahmed v Austria* (1996) 24 EHHR 278, Judgment of 17 December 1996.

domestic court of the State where asylum is sought prior to actual surrender to the ICC²¹².

ICC Article 59 (6) provides that a competent court shall also consider whether the person has been lawfully arrested under the warrant and whether his rights have been respected. Subsection (6), following Article 59(2), does not seek to spell out all the rights that the court may consider. If a domestic court considers that there have been violations of proper process or of the person's rights, the ICC will be informed of this determination. It is intended that this determination will not, however, affect the court's decision whether or not to issue a delivery order under subsection (2). Importantly, this clause does not exclude any other procedure available under domestic law for the remedy of a violation of a person's rights.

If the arrested person is already being investigated, or is serving a term of imprisonment for a different offence than the one described in the ICC arrest warrant, then the requested State must consult with the Court after granting the request for surrender, in order to determine the most appropriate course of action²¹³. The requested State may in fact postpone the execution of the request for a period agreed with the Court if the immediate execution of the request would interfere with an ongoing investigation or prosecution of a different matter²¹⁴. Moreover, the requested State may temporally surrender the person sought by the Court²¹⁵. In such cases, the person will be kept in custody whilst appearing before the ICC and transferred back to the requested State when the necessary proceedings have been completed²¹⁶.

Significantly, where the surrender of the accused would require the requested State to act inconsistently with its obligations under international law, the ICC

²¹² ICCPR Art. 5 (2): "*There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such right or that it recognizes them to a lesser extent*".

²¹³ ICC Article 89 (4).

²¹⁴ ICC Article 94.

²¹⁵ ICC Rule 183.

²¹⁶ *Ibid.*

will be prevented from requesting the surrender of the accused under ICC Art. 98. Some domestic rules assert furthermore that requests for assistance may be refused on the ground that the request requires a State to carry out measures that are inconsistent with its national laws and practice²¹⁷. Immunities obtained by the United States²¹⁸ through Article 98 (2) ensure de facto immunity from ICC jurisdiction for US nationals with the effect that the rule encompassed in Art. 27 of the ICC Statute does in practice not apply to nationals of non-state parties²¹⁹. For example, it is yet to be assessed to what extent the application of Article 98 immunity agreements will dilute overall ICC jurisdiction at both international and national levels²²⁰. ICC Article 27 (Irrelevance of Official Capacity) has also proved to cause compatibility problems with regard to immunity provisions in national constitutions and although States have indicated readiness to overcome these problems, incompatibilities remain. An example is the Dutch International Crimes Act 2003 providing for immunities of foreign heads of states, heads of government and ministers of foreign affairs and other persons as long as they are in office²²¹, and other persons in so far as their immunity is recognised under customary international law²²². Further, the Act recognises immunity for those persons who have been granted immunity under a treaty or convention to which the Netherlands is a party²²³.

As seen in Chapter 1, some countries have amended their constitution (Luxembourg), some have announced that constitutional amendments might be necessary (e.g. Austria, Slovenia, Mexico) while others have stated that amendments of their constitution is probably not necessary (Spain, Norway). Others have chosen to ratify the ICC Statute first and deal with possible incompatibilities later (Belgium, Italy)²²⁴. States have also avoided the issue of

²¹⁷ See e.g. 2003 Mauritius Mutual Assistance in Criminal and Related Matters Act, Act No.35 (17 September 2003), Art.5 (2) (b) (viii). Requests for assistance may also be refused if the compliance with it would be contrary to the Constitution (Art. 5 (2) (i)).

²¹⁸ See Chapter 4.

²¹⁹ Van Alebeeck R., “*From Rome to the Hague; recent developments on immunity issues in the ICC Statute*” 13 Leiden Journal of International Law 3 (2000), p.485.

²²⁰ See Chapters 1 and 4.

²²¹ 2003 Dutch International Crimes Act, Sec.16 (a) relies inter alia, on the ICJ decision of 14 February 2002 in D.R. Congo v Belgium.

²²² *Ibid.*

²²³ 2003 Dutch International Crimes Act 2003, Sec.16 (b).

²²⁴ *Ibid.*

Article 27 incompatibility by declaring that constitutional immunities are only relevant within the internal constitutional order and are therefore not affected by the ratification of the Statute. This argument however avoids the actual process of surrender to the ICC because the surrender to the Court (under Art. 27) of a head of state by national authorities is at least in breach of any inviolability the head of state may enjoy within the constitutional order²²⁵. The ICC Statute does however address the possible conflict between a request for surrender or assistance and requested State's obligations under international law when this would put the requested State in the position of having to violate its obligations under international law with regard to immunities. It does so by purporting that the relevant provision on cooperation with respect to waiver of immunity and consent to surrender²²⁶ does not, in any way, undermine the effect of ICC Article 27 on the irrelevance of official capacity. Possibly, the customary law status of Article 27 leads to the conclusion that there are no immunities under international law for acts within the jurisdiction of the Court²²⁷. Such interpretation, based on ICC Article 98 (1), does not affect the Court's initial jurisdiction since it only plays a role at the stage of the request of surrender and does not affect the possibility that other States Parties, not under an international obligation to refrain from surrender, will be able to surrender when they obtain jurisdiction over the individual concerned²²⁸.

Moreover, an ICC State Party that has been requested to surrender a person must notify the Court where it also receives a request from any other State for the extradition of the same person for the same alleged conduct which forms the basis of the crime for which the Court seeks the person's surrender. If the ICC subsequently finds the case to be inadmissible, but the State Party then decides not to extradite the person to the requesting State, the requested Party must notify directly the ICC Prosecutor of this decision.²²⁹ The Statute

²²⁵ *Ibid.*

²²⁶ ICC Article 98 (1)

²²⁷ See for example section 70 of the Canadian Crimes Act (Bill C-19) and the 1985 Canadian State Immunity Act.

²²⁸ See The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), International Criminal Court - Manual for the Ratification and Implementation of the Rome Statute, March 2003, (Second ed.), p.80.

²²⁹ See Article 90 (8) and Rule 186.

however does not add any other clarifications where the arrested person is already being investigated by the requested State for the same offence so the State may postpone execution of the request in most circumstances²³⁰.

The Court may also request the temporary transfer of a person in custody of a State Party in order for him/her to assist with an ICC investigation or prosecution²³¹. The person must consent to such a transfer and the requested State needs to agree, subject to conditions it may wish to impose. In such a situation, the State should make the necessary arrangements but the ICC Registrar will be responsible for the “*proper conduct of the transfer, including the supervision of the person while in the custody of the Court*”²³².

The ICC Statute sets out the arrangements for transferring persons from the State of enforcement upon completion of their sentences but it fails to clarify what should happen to a person who is released from custody of the Court other than on completion of a sentence²³³. This may occur after a successful admissibility challenge by the accused, or by a government²³⁴. Lastly, any prosecutorial misconduct affecting surrender proceedings must be taken into account in the sentencing judgment. ICC Article 78 (1) allows for such a determination, aside from the obligation to deduct time, if any, previously spent in detention pursuant to an ICC order. The drafting history of this Article reveals that in avoiding the controversial question of aggravating and mitigating factors the final text abstains from implementing an exhaustive list of such factors. The final text only addresses the gravity of the crime and the individual circumstances of the convicted person²³⁵ and omits the prohibition of a more severe punishment without deducting the previous conviction already served. This is a principle of deduction, frequently encountered in

²³⁰ The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), “*The International Criminal Court. Rules of Procedure and Evidence – Implementation Considerations*” March 2003, p.23, para.2.4 (g).

²³¹ Article 93 (7).

²³² Rule 192 (2).

²³³ Article 107.

²³⁴ See Article 19.

²³⁵ Jennings M., “*Commentary on Article 79*” in Triffterer O. (Ed.), “*Commentary on the Rome Statute of the International Criminal Court*” 1999.

domestic legislation, especially in circumstances of prior detention in the requested State.

As already stated, an accused person has a right to a second level of jurisdiction. The Human Rights Commission has held that whereas this right does not include a right for an appeal court to re-conduct the trial in toto, it concerns the right to review by a higher court of the proper conduct of the proceedings of the first instance trial, including the application of the rules that lead to the finding of guilt. Contrary to the proposition that an appeal should not permit genuine review of the conviction and sentence and that an appeal is intended only to standardize the interpretation of the law²³⁶, the object of the review is to verify that the decision at first instance is not manifestly arbitrary and that it does not constitute a denial of justice²³⁷. Such a review should also include an examination of facts, the law and the judgement²³⁸. The Commission held that limited review by a higher tribunal does not meet the requirements of ICCPR Article 14 (5).

2.6 Mala captus, bene detentus and the right to challenge the legality of arrests

This maxim²³⁹ is based on a doctrine that presupposes the benefits of trying persons who have been abducted or lured in order to face criminal proceedings and have committed a crime that outweighs the injury caused by non-adherence to procedural laws. In the context of international crimes, it has been contended that it may not be ‘arbitrary’ to capture a person whose

²³⁶ See e.g. *Alba Cabriada v Spain*, decision 01 November 2004, Comm. No. 1101/2002; *Cesario Gomez Vasquez v Spain*, Case No.701/1996, View of 20 July 2000

²³⁷ For instance, in *Riepan v Austria*, 35115/97 [2000], ECHR 573 p.175 the Court said: “*Given the possible detrimental effects that a lack of public hearing before the trial court have on fairness of the proceedings, the absence of publicity could not in any event be remedied by anything other than a complete re-hearing before the appellate court*”.

²³⁸ *Antonio Martinez Fernandez v Spain*, Views of 29 March 2005, Comm.No.1104/2002.

²³⁹ Also known as the ‘Eichmann Principle’, see *Attorney General v Eichmann* [1961] 36 ILR 5 68-71 (DC), (1962) 305-306; in the United States also called *Ker-Frisbie-Machain* doctrine.

activities form part of an armed attack for example, and are therefore deemed as violations of the laws of the United Nations²⁴⁰. Moreover, the praxis of the ICTY and ICTR reveals that if capture and transfer are conducted as part of a Security Council authorised operation in preventing or ending, for example, acts of aggression, then the illegal arrest appears to be justified. The compatibility of forcible abductions with both national and international laws has been examined extensively in domestic courts as well as in the European Court of Human Rights. Whereas in most legal systems *in personam* jurisdiction is sufficient to proceed with a case²⁴¹, as far as international law is concerned, every person must enjoy the fundamental right to habeas corpus and have the opportunity, before trial proceedings commence, to challenge the legality of his arrest and/or detention. However, remedies for infringements of this right vary. While at a domestic level such rendition may be properly remedied by the release of the person in question, amounting effectively to a defence against surrender, in cases of egregious international crimes, the illegal arrest may be a mere mitigating sentencing factor²⁴². Here, I will be assessing both national and international jurisprudence on the matter as suspects and accused persons may fall, under complementarity, into either of these legal regimes.

Generally, the courts of prosecuting states should either proprio motu or at the request of an accused raise the illegal nature of the apprehension and refuse to hear the case. New Zealand was the first country within the Commonwealth legal system that distanced itself from the *mala captus, bene detentus* approach²⁴³. In the Zimbabwean case of Beahan it was affirmed that:

“[I]t is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo trial in

²⁴⁰ Paust J. J., “Universality and the Responsibility to Enforce International Criminal Law: No. U.S. Sanctuary for Alleged Nazi War Criminals” 11 Houston Journal of International Law, pp.337-340 (1989)

²⁴¹ See e.g. United States v Yunis (No.3) (1991) 924 F 2d 1086.

²⁴² See e.g. ICC Statute Art.69 (7) (b) on illegally obtained evidence.

²⁴³ See R v Hartley [1978] 2 NZLR 199 followed then in Levinge v Director of Custodial Services [1987] 9 N.S.W.L.R. 546.

circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State...For abduction is illegal under international law...A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of private individuals”²⁴⁴.

Several human rights bodies have highlighted how a state-organised abduction of an individual for the purpose of trial may indeed constitute a violation of his fundamental rights²⁴⁵. For instance, although the ECHR had been criticised for its avoidance in conducting independent examinations of the evidence and the tendency to succumb to the position of the relevant national government²⁴⁶, it had all the same recognised that “*a government’s discharge of [its] responsibilities is essentially a delicate problem of appreciating complex factors and balancing conflicting considerations of the public interest*” and expressed respect for the space that the government needs to make these difficult policy determinations²⁴⁷. In deciding how wide a margin to afford to a government, the ECHR tends to look at the degree of consensus among the national laws of signatory states with respect to the challenged policy²⁴⁸. In a recent judgment in the Ocalan Case²⁴⁹, the European Court of Human Rights pointed out that it is “*well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence*”²⁵⁰. It held nevertheless that even in these circumstances the rights of suspects and accused persons must be respected as such obligations impose an absolute prohibition on states to use coercive measures such as torture, inhumane or degrading treatment or punishment, irrespective of the victim’s conduct²⁵¹.

²⁴⁴ Chief Justice Gubbay in *State v Beahan* [1992] (1) SACR 307 (A), at 317

²⁴⁵ See e.g. *Castillo Garcia v Ecuador*, U.N. Doc. CCPR/C/43/D/319/1988 (1991); *Celiberti de Casariego*, U.N. Doc. A/36/40 (1981).

²⁴⁶ Gross O., “*Once More Unto the Breach: The Systematic Failure of Applying the European Convention on Human Rights Entrenched Emergencies*”, 23 *Yale Journal of International Law*, 1998, pp.437-497.

²⁴⁷ *Lawless v Ireland*, 1 ECHR (Ser.B) at 408 (1960-1961)

²⁴⁸ Helfer L. and Slaughter A., “*Toward a Theory of Effective Supranational Adjudication*”, *Yale Law Journal*, Vol.107, No.2, 1997, pp.316-317.

²⁴⁹ *Ocalan v Turkey*, Application no. 46221/99, Judgment of 12 May 2005.

²⁵⁰ *Ocalan v Turkey*, Application no. 46221/99, Judgment of 12 May 2005, at 179.

²⁵¹ See e.g. *Almeida de Quinteros v Uruguay*, HRC Comm. No.R24/107 (Decision of 21 July 1983); *Celiberti de Casariego v Uruguay*, Comm. No.13/56 (Decision of 29 July 1981) and *Canon Garcia v Ecuador*, Comm. No.319/1988.

Importantly, the European Convention makes no provision for exceptions and no derogation from it is permissible²⁵² even in time of war or other national emergency²⁵³. International human rights law forms part of the applicable law of the ICC as its Articles 21 (1) (b) and (3) unequivocally impose an obligation to harmonise the Statute's law "*with internationally recognised human rights*". From this perspective, the ICC judiciary carries the responsibility of upholding the international rule of law²⁵⁴.

Since the Statute is silent on ICC obligations to enquire into the custodial State's legality of arrest and detention, I will here look at some of the case law from the ICTY/ICTR and the European Court of Human Rights (ECHR) in order to try and determine what approach the ICC is likely to adopt in the future.

In recent years, there have been a number of irregular arrests legitimised by '*implicit justification*'²⁵⁵. They include the aim of safeguarding the functioning and effectiveness of the judiciary in which case detention may be justified if there are grounds to believe that the suspect indeed attempted to suppress evidence, either by destroying evidentiary material or by influencing witnesses or where it is believed that the alleged offender is likely to commit further criminal acts²⁵⁶. Another instance where procedurally irregular detention is tolerated is in ending atrocities. This concept has traditionally been regarded consistent with the *mala captus bene detentus* rule. Normally, national courts tend to follow this doctrine but recently there have been instances in which several jurisdictions have questioned the validity of this norm and occasionally ruled that trying an offender that was unlawfully arrested, could amount to abuse of court process²⁵⁷. However, safeguards such as those contained in ECHR Art. 5 (4) are not absolute, and thus their applicability is not uniform. The enforcement of this provision depends in fact largely on the context of the

²⁵² Not even under Art.15 of the Convention.

²⁵³ See e.g. *Chahal v the United Kingdom*, Judgment of 15 November 1996, Reports 1999-V, p.1855, at 79.

²⁵⁴ ICC Statute Art.21 (1) (b) and (c).

²⁵⁵ Safferling C. J. M., "*Towards an International Criminal Procedure*" (2003), p.137.

²⁵⁶ *Ibid.*

²⁵⁷ See e.g. *Mullen* [1999] 2 Cr App R 143.

particular case and, where appropriate, also on the terms of the relevant statute under which the power of detention is exercised²⁵⁸. In the Cevizovic Case²⁵⁹, the European Court of Human Rights held that the German government had been in violation of ECHR Article 6 (1) by keeping a defendant in detention and not suspending an arrest warrant on the basis that the applicant remained under a strong suspicion of having committed the crimes he was accused of and on the grounds that, considering the serious nature of those offences, the applicant would be very likely to abscond if released. Whilst the European Court accepted that there was indeed reasonable suspicion that the accused committed the offence of a very serious nature, it observed that the possibility of a severe sentence alone is not sufficient, after a certain lapse of time, to justify detention based on a danger of flight²⁶⁰. Concluding that there have been relevant and sufficient grounds for the continued detention of the accused, his rights had to be protected. The Court found that there has been a violation of Article 5 (3) of the European Convention, namely that the accused has not been brought promptly before a judge and it awarded damages.

As an alternative to seeking a warrant of arrest, the ICC Prosecutor “*may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear*”²⁶¹. However, successful granting of such application is subject to the existence of reasonable grounds to believe that the person has committed the crimes alleged and that a summons is sufficient to ensure the person’s appearance. Furthermore, the Pre-Trial Chamber shall issue the summons “*with or without conditions restricting liberty (other than detention) if provided by national law, for the person to appear*”²⁶². The ICC Statute does not however go as far as the Sierra Leone Special Court Statute which provides that “*where a person against whom a warrant of arrest is issued...escapes or is unlawfully at large, he may be arrested without warrant by an arresting officer and, if so arrested, shall be delivered into the custody of*

²⁵⁸ See e.g. in the ICTY the Dokmanovic Case (IT-95-13a), Talic (IT-99-36/1) and in the ICTR the Nzirorera Case (ICTR-98-44-1).

²⁵⁹ Cevizovic v Germany, App. No. 49746/99, Judgment of 29 July 2004

²⁶⁰ The Court looked at Wemhoff v Germany, Judgment of 27 June 1968, Series A, No.7, para.14; B v Austria, Judgment of 28 March 1990, Series A, No.175, p.16, para.44.

²⁶¹ ICC Statute Art.58 (7).

²⁶² *Ibid.*

the Special Court”²⁶³. This seems to suggest that an accused person does not have the right to domestic remedies before appearing before the Special Court. The ICC Statute acknowledges a summons to be less restrictive than a warrant of arrest as it does not necessarily constrain the liberty of the person sought and does not entitle detention²⁶⁴. Consequently, substantive deficiencies in the variety of arrest warrants can reflect on the legality of a subsequent surrender order and actual transfer to the ICC²⁶⁵. The ECHR explained in the *De Cubber* Case that the possibility certainly exists that a higher court or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention’s provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies (namely Art.6 (1) – right to a fair trial)²⁶⁶.

While under the ICC Statute national authorities are forbidden from inquiring whether the warrant was properly served by the Pre-Trial Chamber and direct recourse to the Court seems, *prima facie*, the only remedy available to challenge any deficiency in an arrest warrant, domestic courts will nevertheless have to observe ECHR Art. 5 (4). In particular, they must observe the principle that it is not merely the right of judicial review of pre-trial detention that is guaranteed under the Convention, but a full, fair and effective judicial review of pre-trial detention and of the ‘equality of arms’ doctrine. The German Code of Criminal Procedure for example, provides that a detained suspect must appear before the judge without delay for a hearing during which he or she can challenge the basis of the detention²⁶⁷. The suspect must also be informed of the right to appeal a decision of his or her confinement. The suspect may challenge the detention at any time at a full judicial hearing²⁶⁸. The ICC Statute does not explicitly stipulate that the accused should be informed of his right to appeal²⁶⁹. The European Court of Human Rights

²⁶³ Supplement to the Sierra Leone Gazette Vol.CXXX, No.11, 07 March 2002, The Special Court Agreement, 2002, Ratification Act, 2002, Sec.28.

²⁶⁴ ICC Statute Art. 58 (7).

²⁶⁵ *Op cit*, Schlunck, note 201, p.768.

²⁶⁶ *De Cubber v Belgium* ECHR, 26 October 1984, 8/1983/64/1999

²⁶⁷ 2001 German Code of Criminal Procedure, Art.115.

²⁶⁸ *Ibid.*, Art.118a.

²⁶⁹ See ICC Art. 67 (Rights of the Accused).

affirms that where state authorities are involved in a luring, the rights of the individual under the Convention are violated²⁷⁰. The European Court interprets Article 5 (2) of the European Convention as meaning that every person arrested should be told the essential legal and factual grounds for his arrest so as to be able, as he sees fit, to apply to a court to challenge its lawfulness. This implies that the accused must be informed under which law he was arrested and the reasons for being held. This type of safeguard is very important in cases of abduction and illegal detention as these “*necessarily involve infringements of human rights, as well as the infringement of territorial sovereignty*”²⁷¹. The issue of sovereignty infringement will usually arise only when the injured State protests in some way against the fact that the accused was taken out of its territory without the national authorities being involved in the cross-border transfer of the accused²⁷². Whereas the European Convention on Human Rights contains no provisions concerning the circumstances under which extradition may be granted or the procedure to be followed before extradition is granted, it implies nonetheless that those procedures should be a result of cooperation between States. This cooperation should provide the legal basis for the order for arrest, through an arrest warrant issued by the authorities of the accused’s State of origin²⁷³. This is significant as an arrest warrant made by the authorities of one State on the territory of another State, without the consent of the latter, affects the accused’s right to security (ECHR Art.5 (1))²⁷⁴. Again, the proper remedy for the infringement of this right would have to be of judicial nature, be it in the requesting or requested State, or before the ICC. Conventionally, the powers of national courts have not encompassed the right to consider the issue of fair trial in the requesting state or question the legality of an arrest in that state. However, it was recently held in *Ex parte*

²⁷⁰ *Stocke v Germany*, Judgement of 19 March 1991.

²⁷¹ Borelli S., “*Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Cooperation*” (2003) 16 *Leiden Journal of International Law* 4, p.803.

²⁷² See e.g. Kirgis F. L., “*Alleged CIA Kidnapping of Muslim Cleric in Italy*” ASIL Insight, 07 July 2005; also *Prosecutor v Dragan Nikolic*, Case No. IT-94-2-PT, “*Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*”, 09 October 2002, para.95

²⁷³ The Court stated that if such procedure is followed “*even an atypical extradition cannot as such be regarded as being contrary to the Convention*” in *Ocalan v Turkey*, App. No. 46221/99, Judgment of 12 May 2005, para. 89.

²⁷⁴ *Ibid*, para.85; see also *Stocke v Germany*, 12 October 1989, Series A No.199, Opinion of the Commission, p.24, para.167.

Rachid Ramda²⁷⁵ that a court may refuse extradition if satisfied that evidence supporting the request may have been obtained by oppression and that the requesting state may indeed refuse to hear argument in the matter²⁷⁶. Similarly, in *Re Saifi*²⁷⁷ the Court decided that it could refuse a request for extradition if satisfied that the evidence on which the request for extradition was based had been obtained in bad faith. However, making assessments of foreign justice systems may create political difficulties and may also be, as for example, in the case of the European arrest warrant, contrary to the principle of mutual recognition and reciprocity²⁷⁸. Under the ICC Statute, States are not able to question and examine the basis and content of arrest warrants.

The ICC Statute does not specify which rights of the accused should be respected, nor does it specify what would happen if the competent national judicial authority determines that there has been a violation of Article 59 (2) (b) and (c), that a person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that the person has been arrested under proper process and that the person's rights have been respected. In particular, nothing in the Statute allows a State to refuse surrender to the ICC on the grounds that the person has not been properly arrested or his rights have not been respected. Hence, the United Kingdom government has chosen to interpret the Statute as meaning that it will be for the ICC to determine the consequence of any violations. This is innovative, although it remains to be seen how it will be applied in practice, particularly since the ICTR has consistently held that it lacked jurisdiction to review the legal circumstances attending the arrest of a suspect in so far as the arrest had been made pursuant

²⁷⁵ *R v Secretary of State for the Home Department, Ex Parte Rachid Ramda* [2002] EWHC 1278

²⁷⁶ See e.g. ICTR Rule 66 entitled "Evidence obtained by means contrary to internationally protected rights" provides that "*any evidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall not be admissible*".

²⁷⁷ [2001] 4 All ER 168.

²⁷⁸ The Tampere Council Conclusions in 1999 endorsed the principle of mutual recognition as "*the cornerstone of judicial cooperation*" as "*enhanced mutual recognition of judicial decisions and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of human rights*".

to the laws of the arresting state²⁷⁹. The United Kingdom's interpretation stems from the ICC Statute which emphasises that "*It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)*"²⁸⁰; States will be unable to contest the reasonable grounds on which it is believed a crime has been committed, nor will they be able to question the necessity of an arrest²⁸¹. Nevertheless, the International Criminal Court Act 2001 in the United Kingdom provides that a competent court may of its own motion, and on the application of the person arrested, determine whether the person was lawfully arrested in pursuance of a warrant and whether his rights have been respected²⁸². However, any determination to this effect remains inconsequential as far as the rights of the accused are concerned; a competent court may determine whether or not a person has been lawfully arrested or whether or not that person's rights have been respected but the court is only obliged to make a declaration and may not grant any other relief²⁸³. In the United Kingdom a court may also adjourn proceedings and extend the detention period pending the outcome of any challenge before the ICC as to the admissibility of a case or the jurisdiction of the Court²⁸⁴. The 2001 Act leaves in this case the issue of unlawful detention unresolved as it does not specify the procedural guarantees and remedies if a case is found inadmissible before the ICC and where national authorities decide not to prosecute. Any court that does examine an appeal against detention must provide guarantees of a judicial procedure²⁸⁵. For example, Article 5 (4) of the European Convention on Human Rights stipulates: "*Everyone who is deprived of his*

²⁷⁹ See Prosecutor v Karemera, Case No. ICTR-98-44-1, 10 December 1999, para.4.3.1.; Prosecutor v Ntirumpatse, Case No. ICTR-97-44-1, para.56; Prosecutor v Kalelijeli, Case No. ICTR-98-44-1, (08 May 2000), paras.34-35. Also in Brdjanin and M. Talic, IT-99-36-PT, the ICTY held that no order for detention of an accused is required following his lawful arrest and transfer to the seat of the Tribunal for that detention to be lawful. The detention remains lawful, with or without a formal order of detention.

²⁸⁰ ICC Art.59 (4).

²⁸¹ See e.g. U.K. 2002 International Criminal Court, Art.5 (5)(b) which provides that "*In deciding whether to make a delivery order the court is not concerned to enquire...whether there is evidence to justify his trial for the offence he is alleged to have committed*".

²⁸² *Ibid.*, Art. 5 (6) (a) and (b).

²⁸³ *Ibid.*, Arts. 5 (7), (8) and (9).

²⁸⁴ *Ibid.* Art. 5 (4).

²⁸⁵ For internationally recognised right to appeal see e.g. ICCPR Art. 14 (5); Universal Declaration of Human Rights Art.10; American Convention on Human Rights Art. 8 (2) (h); African Charter on Human and People's Rights Act. 7(1).

liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". Moreover, proceedings in that case should be according to the ECHR and many constitutional provisions²⁸⁶ adversarial in nature²⁸⁷.

The ICC Rules of Procedure and Evidence provide that suspects may have their arrest warrant re-examined on their request by a court of law. Importantly, the competent court, as illustrated above is the ICC and not a national court²⁸⁸. This is problematic as State authorities may arrest persons and conduct seizures without the need of a formal request from the ICC and as in the case of Germany's relevant legislation, under certain circumstances even citizens, and not merely official authorities, are empowered by law to provisionally arrest suspected perpetrators of core crimes²⁸⁹.

In relation to this principle and the abuse of process doctrine, the ICTY stated that there exists a close relationship between the obligation of the Tribunal to respect the human rights of the accused and the obligation to ensure due process of law that encompasses more than merely the duty to ensure a fair trial for the accused. It also includes questions such as how the parties have been conducting themselves in the context of a particular case and how the parties have been brought into the jurisdiction of the Tribunal. In a situation where an accused is very seriously mistreated, perhaps even subjected to inhuman, cruel or degrading treatment or torture before being handed over to the International Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. In the case of Barayagwiza the ICTR stated that cumulative breaches of the accused's rights could cause irreparable damage to the integrity of the judicial process. It further found that

²⁸⁶ See e.g. 1988 Constitution of the Republic of Brazil, Art.5 (LV) which provides "*litigants in court or administrative proceedings and defendants in general are assured of the use of the adversary system and of full defence, with the means and remedies inherent thereto*".

²⁸⁷ For ECHR jurisprudence on the matter see e.g. *Imbrioscia v Switzerland* [1993] IIHRL 100 Judgment of 24 November 1993, Series A no.275, p.13, at 36; *Schops v Germany*, No. 25116/94, 13 February 2001, para.44. See also Chapter 2.

²⁸⁸ ICC Rules of Procedure and Evidence, Rule 117 (3).

²⁸⁹ Sec.13 (1) of the 2001 Draft Rome Statute Implementation Act, in connection with Sec.127 of the Code of Criminal Procedure.

the dismissal of charges and release of the accused are the only possible remedy and such a disposition should serve as a deterrent in committing serious violations in the future²⁹⁰. This decision was later reversed on the grounds that new facts have emerged²⁹¹. The Tribunal observed that “*in national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result*”²⁹². The ICC Statute and Rules of Procedure and Evidence merely provide that the Court shall determine whether a national authority has violated ICC Article 59 (2) (b) and (c) but as already stated, nothing in the Statute prevents that authority from surrendering a person to the Court. Moreover, the ICC Statute does not specify what remedies, if any, are available to an accused.

In the ICTY Nikolic Case, the accused argued that he had been arrested and detained by SFOR and transferred to the Tribunal. He argued that this involved kidnapping. The degree of illegality and the extent of violations of fundamental human rights were so degrading that the dangers of appearing to condone by a judicial body set up with, inter alia, objectives of preserving human rights, can have no proper outcome but to make it plain that jurisdiction will not be entertained in such circumstances. The critical issue was therefore what effect any illegal act committed during arrest prior to handing over of the accused to the Tribunal could have on the proceedings. The ECHR reaffirmed recently that ill treatment must attain a minimum level of severity if it is to fall within the scope of the Convention’s Article 3. The assessment of this ‘minimum’ depends on all the circumstances of the case such as the duration of the treatment, both its physical and/or mental effects and in some cases, the sex, age and state of health of the victim²⁹³. In addition, the public nature of the treatment or the mere fact that the victim is humiliated in his/her own eyes

²⁹⁰ Barayagwiza, Jean Bosco v Prosecutor, Case No: ICTR-97-19-AR 72, Appeals Chamber (Decision) (03 November 1999) para.105

²⁹¹ Barayagwiza, Jean Bosco v Prosecutor, Case No:ICTR-97-19-AR 72 “Decision: Prosecutor’s Request for Review or Reconsideration”, Appeals Chamber (31 March 2000), para.41.

²⁹² *Ibid.* para.39.

²⁹³ Ocalan v Turkey, App. No. 46221/99, Judgment of 12 May 2005, para.180. On inhumane treatment see e.g. Kundla v Poland, No.30210/96, s.92, ECHR 2000-XI.

may be a relevant consideration²⁹⁴. In the Nikolic Case, the Defence tried to rely on the principle upheld by various national jurisdictions, that the unlawful rendition of a defendant should lead to the conclusion that international law has to some degree been breached and that the violation, be it one of human rights or state sovereignty, needs to be remedied above all considerations. The ICTY Trial Chamber reviewed the case law of various national jurisdictions relating to the question of forced cross-border abductions and noted that it is far from uniform²⁹⁵. Importantly, the Chamber attached importance to the fact that all case law is based on various forms of cross-border abductions which occur between States (on the horizontal level) and that therefore the interpretation of national case law must be “translated” in order to apply to the particular context in which the ICTY operates (on the vertical level). The ICTY Trial Chamber emphasised the difference between the legal context in which national case law has been developed and again the context in which the Tribunal operates. In deciding in the Nikolic Case that there was no breach of state sovereignty²⁹⁶, the Tribunal concluded even if there was a violation, the accused should first have been returned to the Federal Republic of Yugoslavia, whereupon the State would have been immediately under an obligation to surrender the accused to the Tribunal²⁹⁷. This is because the ICTY was established under Security Council mandate; it was nevertheless reiterated by an ICTY Judge that even Article 29 should be construed in a manner which gives effect, rather than nullifies, the customary right to challenge the legality of one’s arrest; such an approach is consistent with the general rule of interpretation set out in the Vienna Convention on the Law of Treaties. Yet, the ICTY adopted a pragmatic approach by distinguishing between luring and forcible abduction, reckoning that the former was acceptable while the latter

²⁹⁴ See e.g. *Tyrer v the United Kingdom*, Judgment of 25 April 1978, Series A, no.26, p.16, at 32.

²⁹⁵ See e.g. *Re Argoud*, Cour de Cassation, 04 June 1964, 45 ILR JDI 92 (1965), p.98 where it was held illegal rendition was no impediment to trial; followed in a German case Bundesverfassungsgericht, Decision of 17 July 1985-2 BvR 1190/84, in EUGRZ 1986, at 18-21. See also *Prosecutor v Dragan Nikolic*, Case No.IT-94-2-PT, “*Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*”, 09 October 2002, paras 74 and 94.

²⁹⁶ *Ibid.* The Trial-Chamber observed at para.114 that the “*assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals was of an egregious nature*”. The Trial Chamber reasoned that ‘some violence’ did not suffice to raise concerns of abuse of process, para.113.

²⁹⁷ ICTY Statute Art.29.

might constitute grounds for dismissal²⁹⁸. Such a distinction is largely regarded as resting on an artificial distinction between luring and abduction²⁹⁹; even where the manner of apprehension violates international law, courts may apply the ‘Eichmann Principle’³⁰⁰, while at the same time recognising that the *mala captus bene detentus* principle is generally inconsistent with the modern law of human rights³⁰¹. The ICTR had too consistently ruled that the manner in which a sovereign State exercises its powers is beyond its authority. In comparison, the ICC will only look into national proceedings where there are concerns regarding a State’s unwillingness or inability to conduct proceedings but it is unlikely that it will provide an appeal forum where accused persons can challenge the legality of their arrest and decisions of first instance courts. It is argued that the parties “*for the simple reason that errors, mistakes and deficiencies of the investigations may be restored in the appeal procedure*”³⁰² do not take first instance proceedings seriously. If the ICC assesses that first instance proceedings are inadequate, it may ask for a case to be deferred to it. If this occurs, the jurisdiction of the ICC prevails which means that an accused will be denied of the right to domestic remedies, such as the right to judicial review.

The enforcement of arrest warrants and surrender orders within the ICC system relies on the duty imposed on States Parties but no explicit provision is endorsed as regards interference by NATO and UN led forces³⁰³. In contrast to the ICTY and ICTR³⁰⁴, the ICC is not a supranational organization and non-compliance with its orders does not carry Security Council sanctions. However, the validity of the potential relationship between the ICC and a

²⁹⁸ Prosecutor v Slavko Dokmanovic, IT-95-13a; for a commentary see Scharf M. P., “*The Prosecutor v S. Dokmanovic: Irregular rendition and the ICTY*”, Leiden Journal of International Law, Vol.11, No.2, 1998, p.369.

²⁹⁹ *Ibid.*

³⁰⁰ Attorney-General of the Government of Israel v A. Eichmann (1961) 36 ILR 5.

³⁰¹ *Loc cit*, note 298.

³⁰² De Roos T. A., “*Appeal in Dutch criminal procedure in an international and comparative perspective*”, The International Society for the Reform of Criminal Law, 17th International Conference, The Hague, Netherlands, August 24-28, 2003, p.5, available at http://www.isrcl.org/Conference_Papers/deRoos.pdf

³⁰³ *Op cit*, Knoops, note 62, p.374.

³⁰⁴ See e.g. Gaeta P., “*Is NATO Authorised or Obligated to Arrest Persons Indicted by the ICTY?*” 9 European Journal of International Law 1998, pp.174-181; also Jones J. R. W. D., “*The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia*” 7 European Journal of International Law 1996, pp.226-244.

military force like SFOR is crucial. A determination should be made as to the effects of this type of relationship developing into one of agency. It would be useful to decide what will be the responsibility of the ICC in taking over an accused from peacekeeping forces for example; who will the illegal conduct be attributed to and whether such conduct may form the basis of jurisdiction by the Court under the *mala captus bene detentus maxim*. It is not difficult to imagine the Security Council establishing a peacekeeping force with respect to a situation referred to it by the ICC. Sudan, a party to the ICC is a prime example³⁰⁵. The Security Council, acting under Chapter VII, adopted a resolution establishing the United Nations Mission in Sudan (UNMIS)³⁰⁶ consisting of up to 10.000 military personnel and 715 civilian police and mandated with supporting the implementation of the Sudan North-South Peace Agreement. In addition, the United States, non-party to the ICC, adopted recently the Darfur Peace and Accountability Act 2005³⁰⁷, which stipulates that, notwithstanding the American Servicemembers' Protection Act 2002, the United States should render assistance to the efforts of the ICC to bring to justice persons accused of genocide, war crimes or crimes against humanity in Darfur³⁰⁸. It must be concluded that the cumulative effect of the Security Council's resolutions modifies the effect of the Rome Statute (namely the concept of complementarity), especially in light of the fact that Sudan has expressed its willingness to investigate and prosecute crimes in the Darfur region. Sudan has in fact issued a resolution setting up a national committee for investigation. Accordingly, the Sudanese National Assembly urged prompt action and implementation of recommendations of national investigations³⁰⁹.

³⁰⁵ U.N. Security Council referred the situation in Sudan to the ICC through Resolution 1593 (2005).

³⁰⁶ Security Council Resolution 1590 (2005), 24 March 2005, 5151st meeting, S/RES/1590.

³⁰⁷ 2005 Darfur Peace and Accountability Act (29 June 2005) HR 3127.

³⁰⁸ *Ibid.* Sec. 4(6). This assistance is subject to assurances by the Security Council or the ICC that no current or former United States official or employee (including any contractors), member of the United States Armed Forces, or United States national will be subject to prosecution by the ICC in connection with those efforts.

³⁰⁹ Sudanese National Assembly, Emergency Session, Resolution of the National Assembly on Security Council Resolutions Nos. 1590, 1591, 1593 regarding situations in Darfur, para. 1(2), 17 April 2005. The Sudanese government felt that "*the United Nations, deliberately collaborating with the United States, persisted in unfairness and exaggerated in unjust and prejudiced attitudes its unfair selective... duplicity. This became evident in resolutions 1591 and 1593 in both of which it gave no consideration whatsoever to law, principles of international legitimacy, the role of international organisations and the rights of the people of the Sudan... This impedes the efforts of the state in keeping security*".

Absent any explicit provisions and legal mandates, the legal position of the said forces with respect to their enforcement role within the confinements of the ICC Statute, remains entangled in the same dichotomy as that faced by the ICTY and ICTR³¹⁰.

The ICC has yet to determine how much of the ICTY jurisprudence it will draw upon regarding these issues since the Tribunal, not having found any of the arrests illegal, decided it would not consider the issue as to whether it would still have jurisdiction over an accused if his/her arrest had violated fundamental human rights. What the ICTY emphasised recently is that domestic procedures relating to the surrender and transfer of a person from a State in respect to whom a request for arrest and transfer has been made are not to be used as a basis for not complying with the request³¹¹. Notwithstanding the well-established doctrine of international law that states are under a duty to bring national law in conformity with obligations under international law³¹², ICC Article 88 provides that States “shall” ensure that there are domestic procedures available for the execution of ICC surrender requests. The choice of this term elucidates a balancing act in light of the controversy surrounding the very topical debate on horizontal and vertical approach in international penal cooperation.

In the Talic Case³¹³ the accused sought to enforce a right which, it was argued, arose out of Article 5(4) of the ECHR, which allows a detainee to challenge the lawfulness of his detention. Talic relied on a statement of the European Court of Human Rights in *Brogan v United Kingdom* [1988]³¹⁴ according to which, in such proceedings and pursuant to Article 5(4), the court should

³¹⁰ See e.g. Neha Jain, “*A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*” *European Journal of International Law*, Vol.16, No.2, 2005; see also Simic et al. Case No. IT-95-9-PT, “*Decision on Motion for Judicial Assistance to be provided by SFOR and others*” (18 October 2000) paras.9 and 46-47. See also International Law Commission, Art.11 of Draft Articles of States for Internationally Wrongful Acts 1998 on Responsibility of States for Internationally Wrongful Acts, A/53/10.

³¹¹ *Prosecutor v Slobodan Milosevic*, Case No. IT-02-54, Trial Chamber on Preliminary Motions, 08 November 2001, para.45.

³¹² See e.g. PCIJ *Exchange of Greek and Turkish Populations*, Advisory Opinion [1925], PCIJ, Series B, No.10, 21 February 1925, at p.17.

³¹³ *Prosecutor v Talic*, Case N. IT-99-36-PT

³¹⁴ *Brogan and Others v The United Kingdom* [1988], (11209/84) 11EHRR 117, Judgment of 29 November 1998.

examine not only the compliance with procedural requirements but also the reasonableness of the suspicion grounding the arrest³¹⁵. Importantly, in the Brogan case, the Court emphasised that the purpose of deprivation of liberty must be considered independently of its achievement. This conclusion prompted a notice of derogation under Article 15 ECHR by the U.K. government. The ICTY Pre Trial Chamber rejected this argument in the Talic case by pointing out that the ECHR had stated that the scope of the review is not uniform, that it depends on the context of the particular case and, where appropriate, also on the terms of the relevant statute under which the power of detention is exercised. The ECHR held lately that on the question of whether detention is ‘lawful’, including whether it complies with a ‘*procedure prescribed by law*’, the obligation is on national law to conform to substantive and procedural rules thereof³¹⁶. In the United Kingdom for example, the Human Rights Act 1998 had been adopted “*to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights*”. Under the Convention there is an implicit three-tiered hierarchy of rights which ultimately affect the strength of a given right, and the degree to which its guarantee will be upheld.³¹⁷ Absent from the new Act is the derogation clause under Article 15 of the Convention and present are sections 14 and 15 which allow for designated derogations and reservations to be placed on any right of freedom. Not only are all rights now derogable, but the set of reasons

³¹⁵ *Ibid* at para 65: “According to the Court’s established case-law the notion of ‘lawfulness’ under paragraph 5 (4) has the same meaning as in paragraph 1 (art. 5 (1)); and whether an ‘arrest’ or ‘detention’ can be regarded as ‘lawful’ has to be determined in the light not only of the domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by article 5 para. 1”. Article 5 (1) says that no one shall be deprived of their liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person effected for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious disease, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

³¹⁶ *Ocalan v Turkey*, App. No. 46221/99, Judgment of 12 May 2005, at 83.

³¹⁷ Black-Branch J. L., “*The Derogation of Rights under the UK Human Rights Act: Diminishing International Standards?*” (2001) *Statute Law Review*, Vol.22, p. 71.

for derogations have also been removed opening it up potentially to any political reason. As a result, we have moved into a new era whereby formalized rights have been accorded to the citizen under domestic legislation on the one hand, but their realization is now subject to political scrutiny, on the other³¹⁸. In *R v Latif* (1996)³¹⁹ it was pointed out that:

*“It is for the judge to decide whether there has been an abuse of process which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed. The speeches in ex parte Bennett conclusively establish that proceedings may be stayed in the exercise of a judge’s discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. The judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be charged and the competing public interest is not conveying the impression that the court will adopt the approach that the end justifies the means”*³²⁰.

In applying *Bennett* and *Latif* in the *Mullen* case, the illegal deportation of the defendant from Zimbabwe had been described as *“a blatant and extremely serious failure to adhere to the rule of law...The need to discourage such conduct on the part of those responsible for criminal prosecutions is a matter of public policy to which...very considerable weight must be attached”*³²¹.

The House of Lords rejected in *ex parte Bennett* the *mala captus bene detentus* principle as inconsistent with evolving standards of human rights³²². However, in *Mullen* [1999]³²³ where the British authorities initiated the appellant’s deportation by unlawful means in disregard of extradition arrangements, and in order to prevent him from challenging his deportation, and denied him access to legal advice, the court reversed the position held in *Bennett* and in exercising discretionary powers, maintained that a court should balance the

³¹⁸ *Ibid.*

³¹⁹ *R v Latif* [1996], 1 All ER 353.

³²⁰ *Ibid.* Per Lord Steyn at p.112 H.

³²¹ Per Lord Justice Rose in *R v Mullen* [1999] 2 Cr. App.R.143, pp.156-157.

³²² *Regina v Horseferry Road Magistrate’s Court (ex parte Bennett)* [1994] 3 All ER 138

³²³ *R v Mullen* [1999] 2 Cr App R 143.

seriousness of the crime against the need to discourage such conduct on the part of those who are responsible for criminal prosecutions. Also in *R v Davis and others* [2000]³²⁴ the Court of Appeal said that there was authority suggesting that the safety of a conviction was to be considered irrespective of the trial process by which it had been procured, but the court preferred the approach of *Re Mullen*. Worth mentioning briefly is that in the United State's criminal procedure, the exclusionary rule invalidates the unlawful arrest of a suspect; in practice, however, the U.S. Government continues to employ luring as an alternative to extradition, and the U.S. court system has upheld the legality of this practice. The U.S. has in fact authorized law enforcement officials to lure defendants out of their homeland even where there is an existing treaty with that country. It was the case of *United States v Alvarez-Machain* [1992]³²⁵ that affirmed that U.S. courts had jurisdiction to try an individual forcibly abducted from Mexico absent the consent of that country³²⁶.

In the *Nzitorera Case*³²⁷, the accused contested his arrest on the basis that there was no arrest warrant³²⁸, indictment, or any other document presented to him at his arrest. It was also argued that the arrest of the accused was in violation of the ICTR Rules that “*in case of urgency, the Prosecutor may request any State [...] to arrest a suspect and place him in custody...*”³²⁹. In support of this argument, the Defence submitted that at the time of the arrest of the accused, there was no urgency. The Defence concluded that there was no legal basis for the arrest of the accused and that it was illegal. The Defence further contended that the accused was arbitrarily detained for more than one month because he was not promptly informed of the reasons for his arrest. For example, the ICC Statute provides that an arrested person shall be ‘*promptly*’ informed of

³²⁴ *R v Davis and others* (No.2) in the Court of Appeal, 17 July 2000

³²⁵ *United States v Alvarez-Machain*, 504 US 655, at 699 (1992)

³²⁶ For a discussion see e.g. Wilke S. and Schiller T., “Jurisdiction over Persons Abducted in Violation of International Law in the Aftermath of *United States v Alvarez-Machain*” (1998) 5 *University of Chicago Law School Roundtable*, 205-242.

³²⁷ *The Prosecutor v J. Nzitorera*, Case No. ICTR-98-44-T, “Decision on the Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized” 07 September 2000, paras.1-8.

³²⁸ In violation of ICTR Statute Articles 17 and 18 and Sub-Rules 55 (A) and (B).

³²⁹ ICTR Rule 40.

charges against him or her³³⁰. On a national level however such promptness varies, so in Germany, a provisionally detained suspect must be brought before a judge no later than one day following his arrest, in order to be informed of the nature of the accusation and to permit the suspect to object to his or her detention³³¹. In East Timor this period amounts to no more than 72 hours³³².

The ICCPR³³³ also provides that everyone has the right to liberty and security of person, that no one shall be subjected to arbitrary arrest and detention, and that no one shall be deprived of his liberty except on such grounds and in accordance with, such procedure as established by law.

Contrary to the ICTY distinction between abduction by fraud and abduction by force, scholarly opinion suggests that international law must condemn the use of irregular rendition:

*“Abducting a person from a foreign country or enticing a person under false pretences to come voluntarily from another country in order to subject a person to arrest and criminal prosecution, is contrary to public international law and should not be tolerated and should be recognised as a bar to prosecution. The victim of such violation should have the right to be brought into the position which existed prior to the violation”.*³³⁴

³³⁰ ICC Statute Art.59 (2).

³³¹ 1994 German Basic Law, Art.104.

³³² UNTAET Regulation 2000/30, 25 September 2000, as amended by UNTAET Reg. 2001/25, 14 September 2001 on Transitional Rules of Criminal Procedure, Sec.2 (2) (e); see e.g. Yugoslav Draft Law on Cooperation 2002, Art.22 (1) providing that, where there is a threat that the suspect will disappear, a judge may order detention that would last until the request for surrender is served. If the request for surrender, together with a confirmed indictment is not served within 48 hours, the suspect must be released (Art.22 (2)). Also, in the Ocalan Case, Judgment of 12 May 2005, the ECHR found that seven days in detention were unjustifiable and ruled that such amount of time is in breach of Art.5 (3) of the Convention; see also e.g. *Dikme v Turkey*, No. 20869/92, ECHR 2000-VIII (Judgment of 11 July 2000), para.66.

³³³ ICCPR, Art.9 (1).

³³⁴ XVth Congress of the International Association of Penal Law resolution on the Regionalisation of International Criminal Law and the Protection of Human Rights in International Cooperation in Criminal Proceedings.

2.7 Amnesties and the Statute of the International Criminal Court

Although the quest for justice is perceived as inconsistent with peace and reconciliation processes, both punitive and restorative accountability schemes aim at resolving the aftermaths of conflict-torn societies by acknowledging and accepting responsibility for crimes and wounds inflicted on the victims; by creating a just and inclusive social and political order that creates means of peaceful resolution of future conflicts as well as guaranteeing conditions for non-recurrence of conflicts and by restoring a sense of common purpose among a divided population³³⁵. Amnesties are often applied to encourage authoritarian leaderships to relinquish their powers and therefore advance peace processes on one hand, and on the other³³⁶, they aim at persuading the perpetrators to expose the extent of the crimes they have committed and therefore, disclose the truth³³⁷, this being the indispensable element of the reconciliation process³³⁸.

The Rome Treaty is frequently described as a ‘compromise package’³³⁹ among participating nations, since unresolved issues such as the status of national amnesties pose a serious challenge to the Court. Amnesties and pardons have been rejected at the international level by, inter alia, the UN Secretary General,

³³⁵ Statement by Ambassador Dr. Gunter Pleuger, Permanent Representative of Germany to the United Nations at the Security Council on “*National Reconciliation on Post-Conflict Situations: The Role of the United Nations*”, 26 January 2004.

³³⁶ See e.g. Russian Federation Amnesty declaration with respect to persons who committed socially dangerous acts in connection with the armed conflict in the Chechen Republic, issued 13 December 1999, introduced “*in order to achieve civil peace and accord in the Russian Federation and guided by the principles of humanism...*”.

³³⁷ See e.g. Boraine A., “*A Country Unmasked: South Africa’s Truth and Reconciliation Commission*” (2000).

³³⁸ For a different view see e.g. Roussio H., “*The Vichy Syndrome: History and Memory in France since 1944*” (1991) p.215 where the author asserts that “*Nothing but a trial could satisfy the victims’ need for justice...And their statements after the trial made it clear that this is what they felt too, far more that they cared about participating in any educational process*”.

³³⁹ Phenyio Keiseng Rakate, “*International criminal justice and reconciliation: lessons from the South Africa Truth and Reconciliation Commission and the International Criminal Tribunal for the Former Yugoslavia*”, Foundation for Global Dialogue, Occasional Paper No.19, July 1999, available at www.igd.za/pub/g-dialogue/multilateral_analysis/icj.htm

the UN General Assembly³⁴⁰, the UN High Commissioner for Human Rights, the ICTY, the Committee against Torture and the Human Rights Committee. These organs have followed the lead of the 1993 World Conference on Human Right, which concluded: “*States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law*”³⁴¹. In many parts of the world state practice has been ‘*distinctly unsupportive*’³⁴² of the duty to prosecute the most serious international crimes and to grant amnesties and condone de facto impunity. In fact, the Human Rights Committee has expressed in recent years serious concerns regarding the incompatibility of recently introduced amnesties in Argentina, Croatia, El Salvador, France, Nigeria, Peru, the Republic of Congo and Uruguay with the obligations of States Parties under the ICCPR. For example, the Committee expressed its concern with the Croatian Amnesty Law³⁴³ because, while it specifically states that amnesty does not apply to war crimes, the term ‘war crimes’ has not been defined in the legislation and there is danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations³⁴⁴. The Committee has welcomed the prohibition in national law of amnesties for violations of the ICCPR in countries such as Ecuador³⁴⁵. Also, the Committee against Torture has repeatedly criticised amnesties and recommended that they not apply to torture in a number of countries, including

³⁴⁰ The General Assembly has opposed legislative and other measure of impunity with regard to crimes against humanity and war crimes since the early 70’s. See e.g. “Principles of International Cooperation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity”, GA Res. 3074 (XXVII) (1973), para. 8: “*States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*”.

³⁴¹ World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna 14-15 June 1993, UN Doc.A/CONF.157/23, 12 July 1993, para.60.

³⁴² Scharf M. P., “*The Amnesty Exception to the Jurisdiction of the International Criminal Court*” 32 Cornell International Law Journal 3 (1999), p. 521.

³⁴³ Law on General Amnesty 1996 provide for amnesty from prosecution and proceedings applied to acts perpetrated in the period between 17.08.1990 and 23.08.1996.

³⁴⁴ Ibid. Art.3. See “*Concluding Observations of the Human Rights Committee: Croatia*”, U.N. Doc. CCPR/CO/71/HRV, 30 April 2001, Para 11.

³⁴⁵ See “*Concluding Observations of the Human Rights Committee: Ecuador*”, U.N. Doc. CCPR/C/79/ADD.92, 18 August 1998, Para 7: “*The Committee welcomes the information that Article 23 of the Constitution prohibits the enacting of amnesty legislation or granting pardons for human rights violations*”.

Azerbaijan, Kyrgyzstan, Peru and Senegal and it has welcomed the absence of amnesties for torture in Paraguay³⁴⁶.

The Trial Chamber of the ICTY stated in the Furundjija case³⁴⁷ that *“It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition on torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision-would not be accorded international legal recognition”*³⁴⁸. Yet, the prohibition of national measures, such as amnesties and pardons, which prevent or mitigate the punishment for the commission of the core crimes, are not absolute. In fact their proscription is not widespread even under the ICTY/ICTR compulsory regimes. The ICTY Statute provides: *“If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law”*³⁴⁹.

With regard to pardons, it is the Tribunal and not national authorities that finalise the decision, which consequently, is not subject to appeal³⁵⁰. In determining whether a pardon is appropriate the Tribunal takes into account, inter alia, *“the gravity of the crimes for which the prisoner was convicted, the treatment of similarly-situated persons, the prisoner’s demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the*

³⁴⁶ See “Concluding Observations of the Committee against Torture: Azerbaijan”, U.N. Doc. A/55/44, paras. 68,69.

³⁴⁷ The Prosecutor v Furundjija, Case No.IT-95-17/1-T10, Judgment, Trial Chamber 10 December 1998, para.155

³⁴⁸ See e.g. Teitel R. J., “Transnational Justice” (2000), p.60 asserting that “Crimes against humanity pose a limit on considerations of clemency and political restraints, a limit that appears to be largely immune to national politics”.

³⁴⁹ ICTY Statute, Art.28; see e.g. Art.9 (Measures Relating to Pardon) of the Italian Provisions on Cooperation with the ICTY (Decree-Law No. 544 of 28 December 1993).

³⁵⁰ See ICTY, “Practice direction on the procedure for the determination of application for pardon, commutation of sentence and early release of persons convicted by the international tribunal”, IT/146, 07 April 1999, at 9.

Prosecutor”³⁵¹. Importantly, in the case of a granted pardon, and at the discretion of the President of the Tribunal, the Registry shall inform all persons who testified before the International Tribunal during the trial of the convicted person of his or her release, the destination he or she will travel upon release, and any other information that the President considers relevant³⁵².

National amnesties and pardons that aim at preventing the materialization of accountability may potentially enable the ICC to exercise its concurrent jurisdiction under Article 17 (2) (a). This Article envisages that in deciding whether a State is unwilling to exercise jurisdiction, the Court should determine whether the proceedings were or are being undertaken, or whether the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court. During the drafting of the ICC Statute it was strongly maintained by numerous states that the standards for determining ‘unavailability’ and ‘effectiveness’ were not intended to allow the ICC to pass judgment on the operation of national courts in general³⁵³. However, as it will be evidenced in the next Chapter, the inquiry into national proceedings by the Court relates, according to the guidelines for the Office of the Prosecutor (OTP), only to proceedings and not the outcome. There is therefore a general duty to investigate and prosecute, an obligation that “*is undoubtedly relevant but is not determinative of the stance of the ICC in carrying out its mandate*”³⁵⁴. Furthermore, a duty to prosecute implies that prosecution is the only acceptable way of fulfilling one’s duties under the ICC Statute. This may be misleading; referring to the ongoing peace process in Uganda and the Republic of Congo, which include amnesties, the ICC Office of the Prosecutor stated that: “*We have to look at the peace process and make sure that our*

³⁵¹ ICTY Rules of Procedure and Evidence, Rule 125 (General Standards for Granting Pardon or Commutation).

³⁵² *Op cit*, note 350, at 11.

³⁵³ Ad Hoc Committee on the Establishment of an International Criminal Court, U.N.GAOR, 50th Session, U.N. Doc. A/AC.244/1/add, at 9, para.43.

³⁵⁴ Meintjes G., “*Domestic Amnesties and International Accountability*” in Shelton D. (ed.), “*International Crimes, Peace and Human Rights: The Role of the International Criminal Court*” 2000, at 90.

investigations are not an obstacle to these peace settlements”³⁵⁵. This implies that as a consequence of complementarity, the amnesty defence to surrender survives its apparent incompatibility with the ICC Statute and other international norms. Moreover, under ICC Article 53, the Prosecutor may exercise his discretion not to prosecute and/or defer if an investigation or prosecution is deemed not to be in the interest of justice³⁵⁶. Specifically, this Article requires the Prosecutor to consider whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that the investigation would not serve the interests of justice³⁵⁷. Obviously, the ICC must be resolute in endorsing widespread prosecution of international crimes as the most effective strategy in ensuring accountability and deterrence. There are however limits to a State’s duty to prosecute. These limitations are twofold as this duty is not absolute, since transitional governments for example are not required to prosecute all offenders; prosecution of those bearing the greatest responsibility may be sufficient³⁵⁸. Secondly, the duty is subject to the exception of ‘*necessity*’³⁵⁹ where new governments cannot be required “*to press prosecution to the point of provoking their own collapse*”³⁶⁰. These ‘necessities’ may also involve active participation of truth and reconciliation commissions that may well be empowered to grant amnesties on a case-by-case basis³⁶¹. Hence, these claims of necessity must be subject to international scrutiny, as a State would still be under an obligation to demonstrate that there had been an investigation and then justify its decision. In transitional societies dealing with mass atrocities, amnesties for lower-ranking offenders coupled with the prosecution of those

³⁵⁵ Ms Silvia Fernandez de Gurmendi at the Third Session of the Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, Wellington, New Zealand, 06 December 2004, at http://www.pgaction.org/prog_inte_past.asp?id=170

³⁵⁶ ICC Statute Art.53 stipulates that the Prosecutor shall initiate an investigation unless he/she decides that there is no reasonable basis to proceed.

³⁵⁷ ICC Statute Art.53 (1) (c).

³⁵⁸ Orentlicher D. F., “*Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime*” Yale Law Journal Vol.100, No.8, 1991, p.2548. See also Huyse L, “*Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*” in Kritz N.J. (ed.), “Transnational Justice: How Emerging Democracies Reckon with Former Regimes” 1995; Morgan J. P., “*The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget*” 27 Communist and Post-Communist Studies 1994, pp.95-109.

³⁵⁹ Ibid.

³⁶⁰ Id.

³⁶¹ See e.g., The South African Model, sections 16-21 of the 1995 Promotion of National Unity and Reconciliation Act 1995.

most responsible for such crimes is likely to invoke and justify a deferral from the ICC. The most ardent supporters of the ICC have also concluded that there is scope for it to defer to national amnesties and truth commission initiatives when these are determined necessary mechanisms to a transition from conflict to peace and stability³⁶².

Under complementarity, the Court does not have supervisory powers over domestic policies regarding sentencing³⁶³. This is an additional issue posed by amnesty law, since a country where a person is serving a sentence could decide on an amnesty and justify such decision according to its own national law³⁶⁴. As far as sentencing goes therefore, the enforcement model does not impose any binding obligations on States Parties to enforce ICC sentences and such enforcement relies entirely on States' willingness to do so³⁶⁵. In this respect ICC Article 106, enabling '*supervision of enforcement of sentences and conditions of imprisonment*', seems out of place as it inflicts a hierarchical relationship between the ICC and the enforcing State. The employment of amnesties substantiates the conclusion that States Parties have rather autonomous powers in commuting ICC sentences. For example, the Danish ICC implementing legislation states that execution of sentences shall as far as possible be in accordance with Danish rules and may not result in the deterioration of the convicted person's situation under criminal law³⁶⁶. The Costa Rican government also reiterated during the ratification of the ICC Treaty that whilst the application of the penalties regulated by the Statute are subject to national law, the constitutionality of ICC provisions on sentencing³⁶⁷ can be maintained but extradition of a person likely to be condemned to life

³⁶² *Op cit*, Scharf, note 342, p.507.

³⁶³ See e.g. UN A.CONF.183/C.1/WGP/L.3/REV.1

³⁶⁴ For a full discussion see e.g. Kamatali J. M., "*The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR*", 16 Leiden Journal of International Law 2003, pp.115-133.

³⁶⁵ The ICTY for example had to enter into separate agreements with States to ensure that domestic authorities are not allowed any latitude in altering the sentences imposed by the Tribunal; for example Germany signed two ad hoc agreements of 17 October 2000 with regard to Dusko Tadic and on 14 November 2002 with regards to Dragoljub Kunarac. See also Agreement of the Italian Government, (06 February 1997), the Finland Agreement (07 May 1997), United Kingdom (11 March 2004).

³⁶⁶ See e.g. Sec.3 (2) of the Danish Act. No.342 of 16 May 2001.

³⁶⁷ ICC Statute Arts.77-78.

imprisonment would violate constitutional principles and thus would not be possible³⁶⁸.

It is also possible to envisage the endorsement of amnesties through the U.N. Charter doctrine of preservation of international peace and security. In this unlikely but purely theoretical scenario, it is conceivable that the Security Council may request deferral from the ICC where a sensitive truth and reconciliation process is ongoing. Determinative considerations by the Council would involve the advancement of international peace and security, which may include the abovementioned national necessities or emergencies, conflict prevention, peace building and reconciliation. The rationale behind the employment of amnesties may be adduced by describing briefly the South African experience. Although apartheid has been recognised in the Rome Treaty as a crime against humanity³⁶⁹, South Africa's Constitutional Court upheld the amnesty process for this crime at the time the Rome Treaty was being negotiated. This Court held that amnesty for criminal liability was permitted because without it there would be no incentive for offenders to disclose the truth³⁷⁰. The Court argued that the truth might come to the surface with such an amnesty, assisting in the process of reconciliation and reconstruction³⁷¹. It maintained that amnesties were a crucial component of the negotiated settlement without which the South African Constitution would not have been realised. It also found that amnesty provisions were not inconsistent with international norms and did not breach any of the country's obligations in terms of public international law instruments³⁷². The Court took into consideration the experience of other states in post-conflict transition and concluded that there was not a single uniform international practice in relation to amnesty³⁷³. Furthermore, the Constitutional Court described how international law and the content of international treaties to which South

³⁶⁸ Consulta preceptiva de constitucionalidad sobre el proyecto de ley de aprobacion del Estado de Rome de la Corte Penal Internacional, EXP.00-008325-0007-CO, Res.2000-09685, 01 November 2000.

³⁶⁹ ICC Statute Art. 7 (2) (h).

³⁷⁰ See Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others, Constitutional Court, Judgment 25 July 1996, CCT17/96.

³⁷¹ See e.g. Mexican Law on Amnesty (situation in Chiapas), 20 January 1994.

³⁷² *AZAPO*, para.26.

³⁷³ *Ibid.* para.24.

Africa is or is not a party at any given time, are relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution would not have authorised any law which might constitute a breach of the obligations of the State in terms of international law³⁷⁴. South Africa ratified the Rome Treaty in 2000. Parallel to its efforts to comply with the provisions of the ICC Statute it has also developed a discussion on legislation providing further amnesties³⁷⁵. Two other African States have adopted legislation providing for amnesties for acts of rebellion, but expressly excluded crimes under international law. The Democratic Republic of Congo adopted legislation in 2003 stipulating that, pending the adoption of an amnesty law, a temporary amnesty for acts of war and political offences would apply for the period between 02 August 1998 and 04 April 2003, with the exception of war crimes, genocide and crimes against humanity³⁷⁶.

In Sierra Leone, through the Lome Peace Agreement 1999³⁷⁷, the parties committed themselves to respect human rights. This ceasefire agreement proposed measures to promote peace and reconciliation and the creation of a Truth and Reconciliation Commission. This Commission has the power to deal with impunity and questions of human rights violations in Sierra Leone since the beginning of the conflict in 1991. Article IX of the Agreement provides that *“In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon. After the signing of the present Agreement, the government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present*

³⁷⁴ The U.N. Secretary-General Kofi Annan had suggested that it would be ‘inconceivable’ for the ICC to set aside an approach to the peace process like that adopted in the South African situation, Speech at the Witwatersrand University Graduation Ceremony (01 September 1998), quoted in Villa-Vicencio, *“Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet”*, 49 Emory Law Journal (2000), 205, at 222.

³⁷⁵ See Amnesty International and Human Rights Watch, *“Truth and Justice: Unfinished Business in South Africa”*, 13 February 2003, AI Index: AFR/53/001/2003.

³⁷⁶ Art. 1 Decret-Loi No.03-001, portant amnestie pour faits du guerre, infractions politiques et d’opinion.

³⁷⁷ Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, S/1999/777.

Agreement”³⁷⁸. The Agreement was subsequently amended and a disclaimer had been attached to it to the effect that amnesty provisions “*shall not apply to international crimes of genocide, crimes against humanity and other serious violations of international humanitarian law*”. Nonetheless, this provision does not cover future amnesties or pardons after conviction by the Special Court³⁷⁹.

Some ICC implementing laws have rendered the prohibition of amnesties operative. In Brazil the ICC implementing legislation expressly excludes the granting of amnesties for genocide, crimes against humanity and war crimes. Article 3 of the 2002 draft legislation provides: “*The crime of genocide, crimes against humanity and war crimes are imprescriptible and are not subject to amnesty, clemency or pardon*”³⁸⁰. A trial court in Argentina also held recently that amnesties for crimes against humanity violated international law as incorporated in Argentine law³⁸¹.

The ICC Statute provides moreover for non-applicability of a statute of limitations³⁸². This provision is innovative with regard to many domestic criminal norms³⁸³. Being a recognised universal principle, it is utilized in

³⁷⁸ Article IX furthermore provides: “*To consolidate peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations. In addition, legislative and other measures necessary to grant immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality*”.

³⁷⁹ Swart B., “*Internationalized Courts and Substantive Criminal Law*” in Romano C.P.R. et al. (eds.), “*Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*”, 2004, p.314.

³⁸⁰ See Federative Republic of Brazil Constitution 1988 (Constitutional text of October 5, 1988, with the alterations introduced by Constitutional Amendments No.1/92 through 18/98 and the Revision Constitutional Amendments No.1/94 through 6/94), Chapter I (Individual and Collective Rights and Duties), Art.5 (XLIII) provides that “*The practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable and not subject to grace or amnesty and their principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable*”; see also Legislative decree no.112, 12 June 2002.

³⁸¹ See for example Simeon and Del Cerro Case, Order of 06 March 2001, Case N. 8686/2000, Juzgado Nacional en lo Criminal y Correccional Federal N.4, Buenos Aires. The Order has been appealed to the Supreme Court.

³⁸² ICC Statute, Art.29; see also Council of Europe’s treaty on Non-applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, E.T.S. No.82, 25 January 1974.

³⁸³ See e.g. Congolese Law on the Implementation of the Statutes of the International Criminal Court, March 30, 2002 (Statement of Motives).

different national orders when common criminal acts are dealt with. Prescription however cannot be invoked in cases of grave violations of international law. For instance, the 1968 United Nations Convention on Imprescriptibility of Crimes of War and Crimes against Humanity determines that there is no prescription for these crimes regardless of the date they were committed³⁸⁴. There are in fact numerous examples of national courts deciding to exercise jurisdiction over persons accused of crimes under international law covered by national amnesties in other countries. For example, in the United Kingdom, the House of Lords permitted a Magistrate's court to determine whether extradition of the former Chilean President Pinochet could proceed despite a national amnesty and a similar measure of impunity.

During the ratification of the Rome Statute the issue of amnesties and pardons was initiated in the Netherlands and the question arose as to whether Article 122 of the Constitution stipulating that pardon is granted by 'royal decree' (i.e. by the Minister of Justice) after approval by the Head of State, would be in conflict with Article 110 of the ICC Statute.³⁸⁵ It was decided that there was no conflict for there was another constitutional measure that allows this administrative power to be transferred to an international organisation³⁸⁶. Article 122 (1) of the Dutch Constitution 1983 provides that "*pardon shall be granted by royal decree upon the advice of a court designated by act of parliament and with due regard to regulations to be laid down by or pursuant to an act of parliament*". Article 122 (2) also states that, "*amnesty shall be granted by or pursuant to an act of parliament*".

³⁸⁴ Convention on Imprescriptibility of Crimes of War and Crimes against Humanity, G.A. Res. 2391 (XXII) of 1968.

³⁸⁵ Council of Europe, "*The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court*", CONSULT/ICC (2001) 21, para. 2 (d).

³⁸⁶ *Ibid.* Article 92 of the Constitution.

2.8 Conclusion

Considering that the primary aspect of surrender implies a deprivation of the right to freedom, national courts must exercise a degree of supervision, through habeas corpus writs, over fundamental human rights that involve, *inter alia*, protection from arbitrary arrests and *prima facie* cases before the ICC. Individuals should be able to invoke and enforce State responsibility regarding State obligations and acquired rights or conditions to surrender. If the ICC decides to take over a case and the rights of the accused have been infringed in the custodial State, the Court in tandem with human rights law, must afford remedies by creating a process whereby an accused may challenge the legality of his/her arrest. A progressive application of the common law doctrine of abuse of process should be elevated to the international level in order to resolve the pragmatic imbalance posed by the *mala captus bene detentus* principle.

The substantive resumption of extradition proceedings in the ICC surrender model strongly elucidates not only the binary nature of ICC Statute interpretation (monist/dualist) but also the subsequent disparity in both the nature and availability of protection of fundamental human rights. Such conclusion demonstrates that the ICC legal system is *sui generis* and also that the model fails to harmonise and raise different legal systems to international elevated standards of criminal justice. The ICC surrender model seeks to diminish inconsistencies between domestic and international legal obligations by producing in the Statute the lowest common denominator between States Parties³⁸⁷. This approach implies setting low evidentiary thresholds in order to charge an accused prior to his surrender and undermines most domestic probable cause standards and human rights norms. In this respect the application of international law remains fragmented and to a large extent, with the exception of the Security Council law enforcement methods, remains in the hands of national courts.

³⁸⁷ The final wording of ICC Article 88 is evidence of an attempt to endorse the principle of equality in order to minimise the many different domestic cooperation measures.

The ICC as well as States Parties will have to demonstrate their integrity by respecting the proper judicial process in surrender proceedings. Valuing human rights of all individuals, even of those accused of the most serious of ICC crimes, must be respected in the Court as the Court is yet to fully gain public confidence and wider political support.

Chapter 3

Pre-trial Issues Relating to Transfer Criminal Proceedings under the ICC Model

3.1 Introduction

This Chapter examines pre-trial issues surrounding the transfer of criminal proceedings and deferral mechanisms under the ICC Statute and assesses their scope and effectiveness in initiating criminal proceedings and establishing a *prima facie* case. The validation of the ICC deferral model is examined through ICC procedural safeguards vis-à-vis national safeguards and the jurisprudence of the Yugoslav and Rwandan Tribunals. This comparison unveils disparities, a conclusion that leads to a discussion as to the degrees of impact such inconsistencies are likely to have on the rights of the accused in pre-trial proceedings. In particular, under scrutiny here is the process of transfer of criminal proceedings within the ICC regime as opposed to interstate deferrals. Whereas deferral of jurisdiction is relatively unproblematic from an inter-state perspective, when the ICC model is examined, the inconsistent application of the Statute denotes that with respect to analogous facts or circumstances, the model causes varying outcomes with regard to jurisdiction and accordingly, the rights of the accused in pre-trial proceedings.

Circumstances in which transfer of proceedings may be requested both on the part of the ICC and national courts are analysed here. This two-way system is particularly examined within the parameters of complementarity and the need for judicial scrutiny over the *proprio motu* Prosecutor in the interest of protecting the rights of suspects and accused persons. Because of this fundamental complementarity principle on which the ICC Statute is based, an accused may well face criminal proceedings both before national and international courts. Firstly, the procedural safeguards in asserting and exercising jurisdiction are examined, followed by substantive elements relating to pre-trial equality of arms in collecting, admitting and disclosing evidence. Particular reference is made here to the jurisprudence of the *ad hoc* International Tribunals for Yugoslavia and Rwanda.

Transfer of criminal proceedings is studied here through (1) the hierarchy of obligations within the correlative proprio motu Prosecutor¹ vis-à-vis complementarity where the imbalance of investigative and prosecutorial powers are revealed through a discussion of ‘equality of arms’; (2) a proposition that transfer of criminal proceedings within the ICC system is primarily a question of jurisdiction rather than the end result of an agreement, where the proceedings are more likely to succeed in consideration of matters such as the location of evidence and the proximity between the victims and the crime committed and finally and most importantly (3) through an analysis of the nature and extent of all of the above factors and consequential interference with the rights of the accused as protected both in the ICC Statute and fundamental human rights instruments.

3.2 Pre-trial procedural considerations in asserting jurisdiction

Fundamental questions concerning pre-trial investigations concern the interaction between the Prosecutor and the Pre-Trial Chamber as well as the respective roles of the prosecution and defence.

The general powers of the Prosecutor are to (1) to conduct on site investigations on the territory of a State² in accordance with the provisions of Part 9 (International Cooperation and Judicial Assistance)³, or if it is authorised by the Pre-Trial Chamber⁴, (2) collect and examine evidence, (3) request the presence of and questioning investigated persons, victims, witnesses in order to obtain oral and written statements or testimonies, (4) to take or request necessary measures for the preservation of evidence. There is a strong view that for the purposes of effective investigation and prosecution the

¹ Originally, in the ILC draft there was no mention of a power for the Prosecutor to initiate investigations proprio motu, Security Council and States being the only trigger mechanisms. See e.g. Crawford J., “*The ILC adopts a Statute for an International Criminal Court*”, 88 American Journal of International Law (1995), pp.404-416.

² ICC Article 54 (2).

³ ICC Articles 93, 96 and 99.

⁴ ICC Article 57 (3) (d).

Prosecutor is required to have a ‘permanent presence’ on the territory where crimes have been committed⁵.

Throughout the investigation and prosecution, interventions of the Pre-Trial Chamber may be structured under three main categories of function⁶: (1) authorise ‘ex ante’, upon application of the Prosecutor, the exercise of “*intrusive and coercive powers of investigation that interfere with individuals’ rights and liberties, in particular detention and search and seizure*”⁷, (2) ‘post factum’ judicial review of the legality of prosecutorial actions with respect to investigation and the conduct of proceedings and finally (3) filter charges which appear unfounded and are not susceptible to further developments even prior to the preliminary hearings⁸.

The ICC Prosecutor may seek assistance from various international organisations for preliminary witness identification or information that may be relevant to the assessment of a situation or crisis. Identification activities should be as broad as possible to allow an early start to the investigation, while maintaining that these activities are necessary ancillary functions of the preliminary examination and not as such part of an investigation. Some ICC Statute implementing laws, such as Malta’s International Criminal Court Act 2002⁹, offer a comprehensive list of tasks that national authorities may undertake in complying with an ICC assistance request. This legislation provides that the Minister may enact regulations aiming to meet requests for assistance by the ICC and in particular, without prejudice to the generality of that power, may enact regulations prescribing the conditions and procedures for the execution of such request for all or any of the following purposes: (a) the questioning of persons being investigated or prosecuted by the ICC; (b)

⁵ See “*The position of the Government of the Republic of Rwanda on the International Criminal Tribunal for Rwanda (ICTR)*”, Government of Rwanda, 07 May 1998, p.3, available at <http://www.rwandemb.org/prosecution/position.htm>

⁶ Virgil-Constantin I., “*International Criminal Court, Pre-Trial Proceedings, Pre-Trial Functions and Powers of the ICC Prosecutor*” (2003) Conference Paper, International Society for the Reform of Criminal Law, 17th International Conference, 24-28 August 2003, The Hague, p.18.

⁷ Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court 1998, Article 8.

⁸ *Ibid.*

⁹ International Criminal Court Act 2002 (XXIV), Art.4.

taking or producing of evidence; (c) service of any document or act of the proceedings before the ICC; (d) temporary transfer to the ICC of a prisoner for the purpose of identification or for obtaining testimony or other assistance; (e) entry and search of any premises and the seizure of any item; (f) taking of fingerprints or non-intimate samples; (g) the exhumation of a body; (h) provision of records and documents; (i) investigation of proceeds of any ICC crime; (j) freezing or seizure of proceeds for eventual forfeiture; (k) verification of evidence or other material. In addition, and with the aim of facilitating investigations, several other implementing legal instruments, such as the Uruguayan proposed ICC legislation, authorise ‘any other type’ of assistance not prohibited under the ICC Statute¹⁰.

Under ICC Article 15, the Prosecutor and the Pre-Trial Chamber must assess the issue of admissibility and jurisdiction in relation to an authorisation under that Article. However, this assessment appears to be only of a preliminary nature and does not affect any subsequent determinations¹¹. Moreover, it is unclear from the ICC Statute whether the notification to States of an investigation shall take place before or after authorisation of the Pre-Trial Chamber¹².

ICC Article 15 (2) requires that the Prosecutor receive written or oral testimony at the seat of the Court. Given that the Prosecutor may seek information from States and other entities listed under Article 15 (2) and the fact that the limitation applies only to testimony received by the Prosecutor, there appears to be nothing preventing the Prosecutor from asking States and/or organisations to obtain information from potential witnesses as part of ‘seeking information’, including through obtaining voluntary written statements. Potentially, the Prosecutor may also be able to directly obtain information from witnesses as ‘other reliable sources’ with the State’s consent,

¹⁰ See Uruguayan General Assembly on the procedures for the national application of the ICC Statute, 17 January 2003, available at <http://www.presidencia.gub.uy/proyectos/2003011701.htm>

¹¹ ICC Article 15 (4).

¹² See ICC Article 18 (2).

provided these do not amount to the type of testimony that needs to be taken at the seat of the Court.

Whether or not the Prosecutor's gathering of information at the pre-authorisation stage constitutes an 'investigation' and therefore whether or not cooperation under Part 9 of the ICC Statute be made available is unclear from the ICC Statute and the Rules. The important question is whether the Prosecutor initiates an investigation under Article 13 or 15. The negotiating history of the Rome Treaty points out that there was a general intention not to allow States to challenge the admissibility of a case at this preliminary stage. Irrespectively, it is clear that the difference is foreseen in the activities of the ICC Prosecutor's pre and post-authorisation competence¹³. Obtaining information and evidence at this stage will have to be drawn from hearings in the Pre-Trial Chamber¹⁴. It would be useful therefore if the information received was in a form that would later be admissible at a confirmation hearing and trial¹⁵ where the Prosecutor decides to use it as evidence¹⁶. The Prosecutor may also, when he/she considers that there is a serious risk that it may not be possible for the testimony to be taken at a later stage, request the Pre-Trial Chamber to appoint a counsel or a judge from the same Chamber to attend an Article 15 hearing or written testimony¹⁷. However, given the differing standard and purpose of Article 15 hearings and the limited ways in which information will be gathered, it may not always be possible to obtain it in admissible form.

An important issue at the preliminary stage will be the protection and preservation of information pending authorisation for the initiation of an investigation. At this stage the Prosecutor will have to protect the confidentiality of the received information and testimony or take other

¹³ International Criminal Court, Informal Expert Paper, "*Fact-finding and investigative functions of the Prosecutor, including international cooperation*"(2003) p. 7, para.32, available at

http://www.icc-cpi.int/library/organs/otp/state_cooperation.pdf

¹⁴ ICC Statute Art.15.

¹⁵ ICC Article 61.

¹⁶ See ICC Rules of Procedure and Evidence, Rule 47.

¹⁷ ICC Article 15 (2).

necessary measures¹⁸. These measures may include, and most inevitably will involve, questioning individuals through national authorities. Consequently, the Prosecutor's relationship with the relevant State will be critical in facilitating cooperation and so the degree to which there is a cooperative arrangement with that State will determine the Prosecutor's ability to act effectively within its territory. Under the ICC Statute, the standards that need to be followed in such circumstances are unquestionably, legal standards¹⁹ but their successful application will depend to a great extent on political discussions and arrangements undertaken between the Court and the State²⁰. The ICTY for example faced many problems in investigating freely and effectively. Numerous states, including those civil law countries where prosecutors are endowed with different roles in the investigation of cases, found it difficult pursuant to national norms to authorise an international prosecutor to conduct investigations in the most effective way²¹. Under the ICC model, culpability of an uncooperative State will be referred to the Assembly of States or the Security Council. States Parties have no remedies available to them against potential abuse of power on the part of the Court, namely the Prosecutor; the ICC binding power vis-à-vis State Parties to cooperate through a referral mechanism inherent in the relationship with the Security Council attributes asymmetrical powers and functions to the parties of the Rome Treaty²². Not only does this represent a serious power imbalance but it also questions the accountability in international law of the Security Council in rendering legal judgments and opinions. In unilaterally altering the terms of obligations of States vis-à-vis the ICC, the Council effectively extends the veto of the Court therefore *"seriously calling into question the principle of equality*

¹⁸ ICC Rules of Procedure and Evidence, Rule 46.

¹⁹ ICC Article 17 (Issues of Admissibility).

²⁰ *Op cit*, note 13, p.8, para.37.

²¹ Amnesty International, *"International Criminal Tribunals-Handbook for government cooperation"*, August 1996, AI Index: IOR 40/07/96, p.9.

²² See for example Swiss Federal order on cooperation with the ICTY (21 Dec.1995), Art.3 (1) (c) and Art.9; Romanian Law on Cooperation with the ICTY (Law No.159/28 July 1998) Art.1 and 6; some states, whilst providing for the primary jurisdiction of the ICTY, impose conditions on automatic transfer of proceedings and accused persons. See Greek Cooperation Law (Law No.2665-17 Dec.1998) Art.5; Italian Cooperation Law (Decree Law No.544-29 Dec.1993) Art.3.

of individuals before the law”²³. As an author concludes: “*the UN Charter does not tie the Security Council in any way either to decisions of the International Court of Justice or even international law...There is clearly nothing to oblige the Council to consider any question in an impartial or quasi-judicial fashion*”²⁴.

As already described above, States are not, at least in theory, allowed to challenge the admissibility of a case during an Article 15 stage, though pursuant to ICC Article 19 the determination on the issue of admissibility becomes more decisive. In case of a deferral, the Prosecutor will have to follow up the national development of the case in question and the State may be under a duty to provide the Prosecutor with periodical information on its progress²⁵. In such cases it will be difficult for the Prosecutor to conduct an investigation and it is uncertain whether he/she could have any recourse to the measures of cooperation under Part 9. Consequently, information from external sources, in possession or control of a State, may be the only material available of forming the basis for a review of a deferral under ICC Article 18 (3)²⁶. The Prosecutor may also apply for an authorisation for provisional investigative measures²⁷. In case of a deferral these provisional measures amount to ‘*necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain evidence or there is a significant risk that such evidence may not subsequently be available*’.²⁸ Thus, it may be possible for an investigation to be deemed as initiated for the purpose of imposing provisional measures explicitly authorised by the Pre-

²³ Gowlland-Debbas V., “*The International Legal System in Quest of Equality and Universality*” (2001), p.637. See also Boas G., “*Comparing the ICTY and ICC: Some Procedural and Substantive Issues*” 47 Netherlands International Law Review (2000), pp.267-292.

²⁴ Carty A., “*The terrors of freedom: the sovereignty of states and the freedom to fear*” in Strawson J. (Ed), “*Law after ground zero*” (2002), p.48; for an opposing view see Shaw M. N., “*The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*” in Mulles A. S. et al., “*The International Court of Justice: Its Future Role after Fifty Years*” (1997), p.228.

²⁵ ICC Article 18 (5).

²⁶ This Article states that “*the Prosecutor’s deferral to a State’s investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation*”.

²⁷ ICC Article 19 (8).

²⁸ ICC Article 18 (6).

Trial Chamber in spite of a deferral, and thus Part 9 on cooperation may indeed be applied.

Challenges to the admissibility of a case should be done at a stage when Part 9 on cooperation becomes available and investigations should be suspended pending the outcome of such challenge²⁹. Then, the available measures are more extensive and may include the taking of testimony from witnesses, completion of the collection and examination of evidence already initiated and preventing a suspect from escaping³⁰. Meanwhile, orders and warrants ordered by the Court before the challenge remain valid and States Parties continue to be under the obligation to fulfil requests based on such orders and warrants³¹.

3.3. Investigations and deferral of criminal proceedings

It is often perceived that the prosecution of grave international crimes at an international level gives rise to complex conflicts and highlights the tension between international politics on the one hand and the enforcement of law's natural justice goals on the other. From this angle, and assuming a good faith execution of the ICC Statute, the decision to initiate domestic investigations and prosecutions of ICC crimes may be founded on the principles of legality, or in the pursuance of governmental policies. For instance, the German penal system embraces the principle of legality with respect to the exercise of functions of criminal investigations and prosecutions. Unlike the Italian³² or

²⁹ ICC Articles 19 (7) and (8).

³⁰ See ICC Articles 58 and 87.

³¹ See ICC Article 19 (9).

³² Chiavario M., "*L'Azione Penale tra Diritto e Politica*" (1995), Cedam: Padova.

the Spanish³³ systems, the German legal structure affords the prosecutor only a very limited political discretion³⁴.

In this respect, the ICC differs from other ad hoc international criminal tribunals. As already explained, the Prosecutor under the ICC Statute enjoys ample and unprecedented powers. Prosecution may be initiated by the Prosecutor or by a reference to the Prosecutor from any State Party, cooperating state, or by referral from the Security Council so long as the required nationality or territoriality link exists. In fact there should be “*a preliminary presumption that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred*”³⁵.

Many States have expressed concern over the extensive powers conferred to the ICC Prosecutor³⁶: “*A prosecutor who is housed in a democratically responsible political branch of government perforce is democratically accountable in a system of checks and balances. This situation will not exist in the ICC*”³⁷. Moreover, from the American perspective: “*While sovereigns have the right to try non-citizens who have committed offences against their citizens or on their territory, the United States has never recognised the right of an international organisation to do so absent consent or a UN Security Council mandate and Security Council oversight*”³⁸. In contrast, the Philippines reiterated: “*The ICC is endowed with competence and jurisdiction as a judicial body. The exercise of such jurisdiction must not be limited by the*

³³ See Spanish Constitution 1978, Part VI, Art. 124 (4). Here the Chief Prosecutor is appointed and removed by the Government; Italian Constitution 1947, Art.105.

³⁴ See e.g. Hermann J., “*Bargaining Justice-A Bargain for German Criminal Justice?*” 53 University of Pittsburgh Law Review 755 (1992).

³⁵ Eurojust Annual Report (2003), p.61. See e.g. Adv. J. H. De Lange, South African Hansard (11 June 2002) on the implementation of the Rome Statute of the International Criminal Court Act, p.27 on the ‘need’ for extraterritorial jurisdiction.

³⁶ See Representative of Argentina to the 6th Committee of the 57th session of the UN General Assembly, 15 October 2002: “*El problema mas delicato que enfrenta hoy la Corte Penal proviene de los temores de que sus juices lleven a cabo un desempeno inadecuato de sus funciones, o de la eventual politizacion de sus funciones judiciales*”.

³⁷ Statement made by Mr. Rostow N. (United States), General Counsel, US Mission to the United Nations, to the 6th Committee of the 57th session of the UN General Assembly, 15 October 2002.

³⁸ *Ibid.* On surrender of US citizens to a Security Council Tribunal see for example the 1994 Agreement on Surrender of Persons between the Government of the United States and the ICTY, Art.1.

*determination of political bodies of the United Nations, which are not only judicially incompetent to determine facts but are also not impartial arbiters of events*³⁹.

Nonetheless, the interpretation of the actual duties arising from the ICC Statute, Part 9, should be enhanced by the general obligation to cooperate⁴⁰. This obligation demands a purposive interpretation of the ICC Statute. State Parties have to comply with requests for the types of assistance listed in the Statute,⁴¹ which must also be included into national laws, and with any other types of request for assistance unless prohibited by domestic law⁴². Exception to these obligations may be asserted under national security provisions⁴³. The Statute also requires that the requests should be executed in the manner specified unless national law prohibits this⁴⁴. In fact, the Prosecutor may specify what is necessary for evidence gathering. The request process under Part 9 is the starting point for evidence gathering on the part of the Prosecutor unless a situation relating to Article 99 (4) arises, which allows him/her to act without the presence of national authorities and execute requests directly. For example, the Prosecutor may specify in the request that he/she wishes that investigators within his Office be notified of the time and place of witness questioning in order to attend these and have the opportunity to directly interview the witnesses. The requested State may not be able to refuse to carry out such request unless it can prove there is a relevant prohibition under national law⁴⁵. The understanding and correct application of provisions relating to other forms of cooperation are crucial here⁴⁶ since they may well be interpreted as establishing the basis for on-site investigations⁴⁷. A duty of

³⁹ See Representative of the Philippines to the 6th Committee of the 57th session of the UN General Assembly, 14 October 2002.

⁴⁰ See ICC Article 86.

⁴¹ ICC Article 93 (1) (a) to (k).

⁴² ICC Article 93 (1) (1).

⁴³ ICC Article 72. Also, under Article 93 (4) a State may deny a request for assistance on national security grounds and the reference to 'relevance' of national security issues in this Article will be read in the context of Article 72 which refers to 'prejudice' to national security. It is unclear whether the determination of what amounts to information and evidence relating to national security will also be dealt by ICC judges.

⁴⁴ ICC Article 99 (1).

⁴⁵ *Ibid.*

⁴⁶ ICC Article 93.

⁴⁷ Article 93 (1) (1).

passive assistance seems to be implied in the wording of Part 9 provisions⁴⁸. In practice this entails that the requested State will retain control over the execution of the request. At the same time it must also be acknowledged that States, as well as international organisations, may have legitimate reasons for wishing to withhold and protect sensitive information or sources⁴⁹. It follows that the ICC Statute consents national authorities participating in the execution of requests and the Prosecutor should maximise the requests for assistance in order to avoid the need to review requests in light of new questions as well as to ensure admissibility of evidence in subsequent proceedings. However, since States indicting international crimes rely on mutual legal assistance to collect evidence, officials in the country where the evidence is located may have profound influence on the trial's shape⁵⁰. Evidence may be located in a country unwilling to cooperate with the Court, or in a State that wishes to establish, under complementarity, a case ahead of the Court.

In order to comply with requests of 'other forms of cooperation'⁵¹, the requested State may use procedures under its national law such as ICC implementing legislation. The lack of national procedures does not constitute grounds for refusal⁵² but it may emphasise a political setback. The requested State may also rely on an existing fundamental legal principle of general application in order to make the execution of the request conditional and/or modified. Additionally, what constitutes a national existing fundamental principle will be determined, in case of interpretational conflict, by ICC judges⁵³.

⁴⁸ See Article 99 (1).

⁴⁹ Statement by Ms Johnson (Norway) at the Rome Conference, 2nd plenary meeting (15 June 1998) Vol.II, A/CONF.183/13, p.66, para.22

⁵⁰ Wible B., "*De-Jeopardising Justice: Domestic Prosecutions for International Crimes and the Need for Transnational Convergence*" 2003, *Denver Journal of International Law and Policy*, Vol.31, No.2, p.281.

⁵¹ ICC Article 93 (1).

⁵² ICC Article 88 (Availability of Procedures under National Law).

⁵³ See ICC Article 119. For a discussion on ICC 'competence de la competence' see Rowe and Donnelly in "*The Permanent International Criminal Court: Legal and Policy Issues*" (2004), at 89; and Safferling C. J. M., "*Towards International Criminal Procedure*" (2003), at 93.

As previously mentioned, the ICC Prosecutor may in certain circumstances execute requests directly without a submission to the State Party⁵⁴. However, the relevant provisions are limited to measures that do not require a court order or other forms of judicial authorisation and are intended mainly for the Prosecutor to interview witnesses. Importantly, in fact, the requested State is able to raise concerns and impose conditions on the request⁵⁵; the consent of that State is not actually required in so far as the State cannot impose conditions contrary to the meaning and purpose of Article 99 (4), such as requiring the presence of officials of the State⁵⁶. With regard to Art.4 of a Human Rights Watch report concluded that “*The Court may exercise its functions and powers...on the territory of any State Party and, by special agreement, on the territory of any other State*” does imply, to a degree, a consent regarding restriction of national sovereignty⁵⁷ and that “*consensual limitations on sovereignty are the prerogative of the State in its contraction of international obligations*”⁵⁸. Canada’s purposive interpretation is that: “*The Rome Statute is a carefully balanced instrument which fully respects the sovereignty of law-abiding states willing and able to fulfil their existing legal obligations to investigate and, where necessary, prosecute those who commit the most heinous crimes*”⁵⁹. In exceptional circumstances, the ICC Statute allows for *in situ* investigations without securing the cooperation of the State. It may be predicted that if the consent of the State in question is not sought, such investigations will be extremely difficult to conduct without the assistance and possible obstruction of the local authorities. Even the most unrestrained domestic legislations on assistance stipulate that fundamental

⁵⁴ See Article 99 (4) and 93.

⁵⁵ See Article 99 (1) of the Republic of Panama ICC implementation law, 14/2002, Gaceta Oficial 15/03/2002, No.24. 512, which seems to imply that generally no conditions may be imposed on a request for assistance, unless specific form of assistance would amount to a breach of a national provision.

⁵⁶ *Op cit*, note 13, p. 15, para.68.

⁵⁷ See e.g. the 2003 Constitution of Cuba (Gaceta Oficial, edicion extraordinaria, No.3), Art.11 which reads “*The Republic of Cuba rejects and considers illegal and null all treaties, pacts and concessions which were signed in conditions for inequality or which disregard or diminish its sovereignty and territorial integrity*”.

⁵⁸ Questions Raised by the Technical Services of the Legislative Assembly of Costa Rica Regarding the Rome Statute of the International Criminal Court, available at http://www.hrw.org/campaigns/icc/docs/costarica_final.pdf

⁵⁹ Statement by Ms. Chatsis D., Representative of Canada to the 6th Committee of the 57th session of the UN General Assembly, 15 October 2002.

principles of national legal order must be observed⁶⁰. In order to authorise an on site investigation the Pre-Trial Chamber must determine beforehand that “*the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9*”⁶¹. National legislations enabling on site investigations vary. Under the Provisional Memorandum of Understanding on Privileges and Immunities⁶² between the International Criminal Court and the Democratic Republic of Congo, the Court (in effect the Office of the Prosecutor) is guaranteed in particular the authority to carry out its activities in the field independently, safely and confidentially⁶³. In contrast, other governments have felt it necessary to express within their ICC implementing legislation that the ICC Prosecutor may operate within the State’s territory only with the participation of national officers. For example, the Lithuanian new Code of Criminal Procedure⁶⁴ provides that officers of foreign courts, the prosecution and pre-trial investigation institutions, or the International Criminal Court shall be permitted to undertake proceedings in the territory of the Republic only with the participation of the officers of the Republic of Lithuania⁶⁵.

Under the Statute, the Pre-Trial Chamber performs a two-fold role by issuing necessary orders and warrants that may facilitate investigations and also by scrutinising the work of the Prosecutor following completion of an investigation⁶⁶. Upon the application of the Prosecutor, the Pre-Trial Chamber decides whether or not to issue a warrant for the arrest and surrender of a

⁶⁰ See e.g. Portuguese Statute on the international judicial assistance in criminal matters, No.104/2001, Art.146 (2): “*At the express request of the foreign State, or by virtue of an international agreement, treaty or convention, the assistance may be given in compliance with the legislation of that State, provided it does not contravene the fundamental principles of Portuguese law and does not cause serious damage or loss to those involved in the proceedings*”.

⁶¹ ICC Statute Art. 57 (3) (d).

⁶² Signed on 12 October 2004.

⁶³ A similar memorandum of understanding between the Government of Rwanda and the ICTR has been described “*futile*”, see op cit. note 5, p.3.

⁶⁴ 2004 Code of Criminal Procedure, Part 4, Art.67.

⁶⁵ The Republic of Lithuania has ratified the Agreements on the Privileges and Immunities of the International Criminal Court (2002), on 14 December 2004.

⁶⁶ ICC Statute Art.57 (3) (a).

person suspected of committing an ICC crime⁶⁷. Prior to issuing a warrant, the ICC Chamber must take into consideration various factors, including reasonable grounds to believe that the person committed the crime under investigation⁶⁸. States Parties are required to assist the Court in executing requests to arrest and surrender persons to the ICC⁶⁹. Once the person is brought before the Court, either voluntarily or by means of a warrant, the Pre-Trial Chamber must hold a confirmation hearing to ensure that the Prosecutor has sufficient evidence to support each charge⁷⁰. The accused has a right to apply for interim release at several stages in the pre-trial phase⁷¹. There are also several opportunities for the accused as well as the competent national authorities to challenge the Prosecutor's decision before the Pre-Trial Chamber and to request a review of the same prior to the commencement of a trial⁷². Either party may appeal against a decision rendered by the Pre-Trial or the Trial Chamber in preliminary proceedings on an issue that would significantly affect the fair and expeditious conduct of the proceedings or, the outcome of the trial⁷³. However, in its first decision, dismissing an appeal requested by the Prosecutor challenging the authority of one of the Court's organs to issue warrants of arrest and requests for cooperation, the ICC Pre-Trial Chamber held that not every issue that may influence the course of the proceedings in general terms may form the basis for an appeal⁷⁴; it is only those issues that are bound to specifically affect the decision of the trial in favour of or against the accused, namely those relating to his/her guilt or innocence⁷⁵. In this Motion, the Prosecutor submitted that irregular issuance of an arrest warrant “*significantly affected the fair and expeditious conduct of the proceedings or*

⁶⁷ ICC Statute Art.58. On the functions of the Pre-Trial Chamber see e.g. Marchesiello M., “*Proceedings before the Pre-Trial Chamber*” in Cassese A., Gaeta P. et al (eds.), “The Rome Statute of the International Criminal Court: A Commentary” (2002) pp.1231-1246.

⁶⁸ ICC Statute, Article 58.

⁶⁹ ICC Statute, Articles 58 and 89.

⁷⁰ ICC Statute, Article 61 (5).

⁷¹ ICC Statute, Articles 59 (3) and 60 (2).

⁷² ICC Statute, Articles 19 and 53.

⁷³ ICC Statute, Article 82 (1) (d).

⁷⁴ Pre-Trial Chamber II, Situation in Uganda, “*Decision on the Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58*”, ICC-02/04-01/05, para.48, 19 August 2005.

⁷⁵ *Ibid.* For examples of these ‘significant issue’ see Prosecutor v Bizimungu C. et al., Case No. ICTR-99-50-T, “*Decision on the Motion of Bicamunupaka and Mugenzi for Disclosure of Relevant Material*” (04 February 2005), para.26.

*the outcome of the trial*⁷⁶. The Prosecutor further argued that, in denying his request to prepare and transmit the request in question, the Chamber incurred both errors of law and procedural errors⁷⁷. The consequences of such argument are twofold. Firstly, it implies that the Chamber failed to correctly consider the objectives of ICC Art.89 (1) which envisages some flexibility in issuing orders by a an organ of the Court which has the widest capability to obtain international cooperation and exploit any opportunities for a possible arrest. Secondly, it was submitted by the Prosecution that the timing of issuance of requests⁷⁸ was erroneous and that “*a breach of trust of any organ of the Court, the mishandling of information provided confidentially to the Court or of a cooperation relationship could potentially undermine an extremely precarious security situation and/or damage the network of cooperation*”⁷⁹ which in the case of Uganda “*thus far has strongly supported the ongoing investigations*”.

The Prosecutor’s request for appeal here underscores the fact that the Chamber’s Decision represented the first, unexploited opportunity to interpret the Statute and the Rules of the Court regarding the preparation and the transmission of requests for Part 9 cooperation. The Prosecutor felt it improper to leave the determination of the correct process for the preparation and transmission of requests for final review after a determination of the merits of a case at trial. This is a significant point since an accused person has a right to such appeal under national law and therefore every ground to maintain that his/her criminal proceedings are to remain within national competence. It can be said with a sufficient degree of certainty, that as far as interlocutory appeals are concerned, the Court will endorse the approach taken by the ad hoc tribunals; their jurisprudence indicates that the question of the possible impact of the timing of interlocutory appeals sought on issues concerning the fairness of the proceedings are normally raised only at the trial stage⁸⁰.

⁷⁶ *Id.*, p.4, para.9.

⁷⁷ *Ibid.*

⁷⁸ *Id.* The Prosecutor maintained in fact that the Chamber incorrectly determined that it should automatically ‘make’ a request for cooperation simply because the Pre-Trial Chamber was requested by the Prosecutor to issue a warrant order or decision, p.5, para.10 (iv). ICC Art. 57 (3) (a) sets out in fact that the Pre-Trial Chamber ‘may’ and not ‘shall’ issue such order as may be required in the interests of an investigation.

⁷⁹ *Id.* para.26.

⁸⁰ *Id.*p.20, para.30.

3.4 Transfer of criminal proceedings from the ICC to national courts

Whereas the previous paragraphs dealt with the procedural requirements in determining jurisdiction, under examination at present are the effects of complementarity by which the ICC may refer proceedings to national authorities. Instrumental to this assessment is the reference to the recent experience of the ICTY and ICTR. Clearly defined procedures regarding cooperation and transfer of proceedings from the Court to national competent authorities are essential both within the Statute and implementing legislations, in order to enhance and advance the interaction between the two parties, with the aim of benefiting suspects and accused persons in pre-trial proceedings. In the Ntuyahaga case for example, the Tribunal refused to cooperate in the transfer of the defendant to Belgium due to a lack of power under the ICTR Statute and Rules of Procedure and Evidence⁸¹ to defer investigations and criminal proceedings to national courts⁸².

The accumulation of cases at the ICTY and the length of time it takes to adjudicate a case have resulted in creating a facilitating scheme for the Tribunal to operate effectively and within a reasonable time frame⁸³. As part of a new policy which involved returning cases to national courts of the former Yugoslavia, the so-called “*Rules of the Road*” Agreement⁸⁴ was implemented in order to enable a screening procedure of domestic investigations by the

⁸¹ See ICTR RPE, Rule 11 bis.

⁸² Prosecutor v Ntuyahaga, No. ICTR-98-40-I, Decision of the Trial Chamber, 18 March 1999.

⁸³ See Security Council Resolution 1534, 26 March 2004 which urges the ICTY and the ICTR Prosecutors to review the case load of those Tribunals with a view to determine which cases should be proceeded with and which should be transferred to competent national jurisdictions. In reviewing and confirming any new indictments, each Tribunal should ensure that any such indictments concentrate on the most senior persons responsible for war crimes within the jurisdiction of the relevant Tribunal. On 15 February 2006 the ICTR Prosecutor filed his first motion under Rule 11 bis requesting the Trial Chamber to transfer the case of Michel Bagaraza to the Kingdom of Norway for trials, see ICTR/INFO-9-2-471.EN, 15 February 2006.

⁸⁴ Signed on 18 February 1996.

ICTY Prosecutor, without whose consent a local prosecution could not have taken place⁸⁵.

Successful local prosecution of serious international crimes and enforcement of ICTY jurisdiction became challenging for a short while in Bosnia as three main ethnic groups began arresting individuals from the other groups. Many of these local arrests were based on political rather than legal bases. The Rules of the Road severely limited the parameters within which the police and other national authorities could arrest and detain persons. Only after an individual has already been indicted by the ICTY for serious violations of international humanitarian law, or of an indictment by one of the three parties has already been reviewed by the Tribunal and found to be consistent with international legal standards, may that person be arrested⁸⁶. In order to facilitate and implement a mechanism for transfer of cases to Bosnia and Herzegovina's courts, the establishment of a special court had been considered. The ICTY arrived at the conclusion that only mixed composition Special Chambers could ensure prosecution in full respect for the integrity of the judicial process, due process and impartiality⁸⁷. In fact, issues associated with such a court were⁸⁸: political and other influence upon proceedings; serious concerns about the independence of the judiciary, widespread concerns over impartiality and ethnic bias⁸⁹, objections to cantonal or district courts having a role as that would have been open to influence at local level, need for a mixed judiciary representing the three main ethnic groups, protection of witnesses and the need to harmonise local law with the practice of ICTY jurisprudence and therefore

⁸⁵ See Bohlander M., *"Last Exit Bosnia-Transferring War Crimes Prosecutions from the International Tribunal to Domestic Court"*, Criminal Law Forum 14 (2003) p.60. See also ICTY Press Release CC/PIU/314-E where the Prosecutor declared readiness to assist national authorities in the prosecution of ICTY crimes.

⁸⁶ *Ibid.* See also Jones J. R.W.D., *"The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia"*, European Journal of International Law, Vol.7, No.2 1996, pp.226-244.

⁸⁷ See *"Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts"*, UN Doc. S/2002/678 (12 June 2002).

⁸⁸ *Op cit*, Bohlander, note 85, p.68.

⁸⁹ For example, Zadar (Croatia) District Court, 24 April 1997, K.74/96 where 19 Serbs were sentenced for genocide in absentia (unreported); Split (Croatia) District Court, 26 May 1997, K.15./95 where the Court sentenced 39 people, 27 of them in absentia for war crimes.

reduce the disparity between national and international verdicts for persons accused of the same crimes⁹⁰.

In Croatia for example, largely bias and lack of legal professionalism are characteristic of most war crimes trials; officials, judges and lawyers have been criticised for not recognising the need that proper trials require expertise just as much as ethnic impartiality⁹¹. Targeting the grounds for transfer of criminal proceeding from national to international level, a recent report⁹² concluded that trials before ordinary courts suffer from (1) ethnic bias on the part of judges and prosecutors, (2) poor case preparation by prosecutors, (3) inadequate cooperation by the police with investigations, (3) poor cooperation between states on judicial matters, (4) a lack of witness protection mechanisms and (5) uncertainty on prosecuting command responsibility. Ethnic bias is a frequent problem. War crimes trial monitoring by the OSCE during 2002-2003 reveals a significantly different rate of conviction and acquittal depending upon the ethnicity of the defendants. To provide an example, while 83 percent of Serbs were found guilty in 2002, only 18 percent of Croats were convicted during that same year⁹³. On the other hand, 17 percent of Serb defendants were acquitted or the prosecution was dropped, while 82 percent of Croats were found not guilty or the charges were dropped⁹⁴. National investigations and prosecutions of war crimes are frequently obstructed by inadequate police cooperation. In Serbia, for example, where the police committed many of the war crimes, the prosecutors rely on the same police to investigate and obtain relevant evidence regarding these crimes⁹⁵. In Bosnia and Croatia, local police in rural areas are frequently unwilling to investigate crimes against the minority population where suspects are members of the ethnic majority and

⁹⁰ *Loc cit*, note 85.

⁹¹ *Ibid*. Croatian county courts outside large cities, which have heard the majority of war crimes cases, are particularly prone to bias and lack of professionalism. In October 2003, the Croatian parliament adopted legislation that would permit the transfer of war crimes cases from county courts with territorial jurisdiction to county courts in Croatia's four biggest cities (Zagreb, Osijek, Rijeka, Split). The legislation has yet to be applied to any war crimes case.

⁹² Human Rights Watch, "*Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*" October 2004, available at <http://hrw.org/reports/2004/icty1004>

⁹³ *Ibid*, p.9.

⁹⁴ See OSCE Mission in Croatia, Status Report No. 13, December 2003, pp.21-22.

⁹⁵ *Ibid*. p.15.

may hold positions of influence in that local area⁹⁶. Furthermore, the regional legal framework governing cooperation has been and still is rather inadequate. For example, cooperation between Serbia and Bosnia lacks a bilateral agreement on judicial assistance in criminal matters, including extradition⁹⁷. In one of the war crimes trials held in Montenegro⁹⁸ the accused was held in pre-trial detention for 6 years because of the refusal of the Republika Srpska to cooperate with the competent court in the early stages of the proceedings. The above described complexities surrounding national investigations and proceedings must not rule out their usefulness and the necessity to enhance and advance national mechanisms enforcing international law to the highest possible criminal justice standards by imparting knowledge through international presence, training and monitoring⁹⁹. In the last two years there has been an ever-increasing number of war crimes trials conducted by all the relevant parties involved in the former Yugoslav conflict¹⁰⁰. Typically, international observers scrutinize these trials. International organisations, NGOs and representatives of foreign governments monitor all current war crimes trials in Serbia. For instance, the ongoing Ovcar Case¹⁰¹ is screened by the Regional Team of the Centre for Peace, Humanitarian Law Centre from

⁹⁶ *Id.* p.16. See also United Nations High Commissioner For Human Rights, “*Human Rights Field Operation in Serbia and Montenegro*” October 2003, Report with Recommendations in the Investigations into Mass Gravesites in Serbia.

⁹⁷ By contrast, in 1996 Croatia and Bosnia concluded an agreement on judicial cooperation in criminal matters (*Agreement Between the Government of Bosnian and Herzegovina, the Government of the Federation Bosnia and Herzegovina and the Government of the Republic of Croatia on Legal Assistance in Civil and Criminal Matters, Sluzbeni List Republike BiH-official gazette of the Republic of Bosnia and Herzegovina-Special Edition, International Agreements, May 27 1996*) and there is also a bilateral agreement on mutual legal assistance in civil and criminal matters between Croatia and Serbia and Montenegro, concluded in 1998 (*Agreement Between the Republic of Croatia and the Federal Republic of Yugoslavia on Legal Assistance in Criminal and Civil Matters, Narodne Novine-Special Edition, International Agreements, No.6/1998, April 10, 1998*).

⁹⁸ Ranisavljevic N. was charged with a war crime against the civilian population on 09 September 2002, High Court in Bielo Polje, Montenegro.

⁹⁹ So far the ICC has held one seminar with Ugandan Judicial Authorities with the aim of providing information about the ICC and exchange views on the role of national judicial institutions with respect to the operations of the Court (26 October 2005, Kampala). See also Humanitarian Law Centre 2001 and 2003 Specialized Training Courses and Seminar in International Humanitarian Law conducted in Serbia with the aim to educate judges, prosecutors, attorneys and police investigators on how to apply and implement international humanitarian law and the jurisprudence of the ICTY on a national level.

¹⁰⁰ For most recent cases in Bosnia and Herzegovina (BiH) see e.g. the case of Simic Boban, No.KT-RZ-2105, 28th June 2005; in Republika Srpska (BiH) see the proceedings of the Trial Chamber of the District Court of Banja Luka, 17 May 2004.

¹⁰¹ War Crimes Chamber of the District Court in Belgrade, K. V. No.01-2003, 09 March 2004.

Belgrade, Research and Documentation Centre from Sarajevo, NGOs and representatives of the mission in Serbia and Montenegro, representatives of the Government of the Republic of Croatia and members of the “Mothers of Vukovar” Association and representatives of the OSCE mission in Serbia and Montenegro¹⁰².

There are however instances where an accused person fears the bias, non-impartiality or inexperience of the national judiciary. The issue arises then whether he/she has the right for the proceedings not to be referred to the state of nationality¹⁰³. In the Jankovic Case¹⁰⁴ before the ICTY Appeals Chamber the Appellant contested a decision by the Referral Bench to refer his case to the relevant court in Bosnia and Herzegovina (BiH), by submitting that the State lacked a ‘*fully competent judicial system*’. Fearing an unfair trial in BiH, he argued that, since a case might be prosecuted either in an international forum or before a competent national court, his case be referred to Serbia and Montenegro, which had a “*coherent judicial system*”, or instead be tried before the Tribunal. He also submitted that the severity of the crimes in the indictment did not justify referral to national courts¹⁰⁵. The Appeals Chamber rejected both his arguments and stated that neither the gravity of the crimes alleged nor the level of responsibility of the accused demanded that this case be brought to trial before the International Tribunals¹⁰⁶ and that “*nothing in Rule 11bis of the Rules indicates that the Referral Bench is obliged to consider the gravity of the crimes charged...Although the Referral Bench may be guided by a comparison with an indictment in another case, it does not commit an error in law if it bases its decision or referral merely on the individual*

¹⁰² In the Republic of Croatia, the war crimes trial N. K-7/03 against Hrastov M. (member of the Ministry of the Interior of the Republic of Croatia), County Court in Karlovac, 20 September 2004, was monitored by the Committee on Human Rights (Karlovac), Centre for Peace, Non-Violence and Human Rights (Osijek), Humanitarian Law Centre (Belgrade), Centre for Peace Studies (Zagreb) and Civil Committee on Human Rights (Zagreb-Helsinki Committee).

¹⁰³ See Case No. IT-96-23/2-I, Party Confidential Motion by the Prosecutor Under Rule 11bis, With Annexes I, II, III and Confidential Annexes IV and V, 29 November 2004, para.26.

¹⁰⁴ Prosecutor v Gojko Jankovic, Case No. IT-96-23/2-AR11bis.2, Appeal’s Chamber Decision on Rule 11bis Referral, 15 November 2005.

¹⁰⁵ For example, see 1972 European Convention on the Transfer of Proceedings in Criminal Matters Art.8 (a) (b) and Art.31 which provide that in settling concurrent jurisdiction claims the residence of the person must be considered.

¹⁰⁶ Supra, note 103, para.23.

*circumstances of the case...*¹⁰⁷. In an earlier decision the Tribunal also affirmed that under international law it is appropriate to resolve conflict of competing claims for jurisdiction on the basis of the more effective nexus between the crime and the forum State¹⁰⁸. Some ICC implementing legislations provide that if the State that made a request for extradition in a non Party State, extradition should be denied in favour of the ICC request¹⁰⁹ but this approach is exceptional and therefore far from representing uniform state practice. The European Committee on Crime Problems also concluded recently that rather than establishing a hierarchical order among jurisdictions “*the objective is to devise a practical way to determine, on the face of concrete circumstances of a case, using objective criteria, how better to ensure that justice is done*”¹¹⁰. Moreover, “*the sentencing powers of the courts in the different potential jurisdictions must not be a primary factor in deciding in which jurisdiction a case should be prosecuted, and the Prosecution should not seek to prosecute cases in a jurisdiction where the penalties are highest*”¹¹¹.

The gradual increasing willingness of the ICTY to refer war crimes trials to national legal authorities, underscores the importance of effective and fair domestic trials to secure justice and promote the rule of law¹¹².

Furthermore, reports suggest that an understanding and application of international law in national courts is, in general, improving¹¹³. This is

¹⁰⁷ *Ibid* para.26.

¹⁰⁸ *Op cit*, note 104, Prosecution Respondent’s Brief, Appeals Chamber (05 August 2005), para.3.3.

¹⁰⁹ See e.g. Ecuador’s 2002 Draft Implementation Law, Art.9. Contra see e.g. Finnish 2002 Act on Implementation of provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute, Sec.3 (2) and 1994 Finnish International Legal Assistance in Criminal Matters Act (4/1994), Sec.13 (3) and (4).

¹¹⁰ CDPC, Reflection Group on developments in international cooperation in criminal matters (PC-S-NS), Final Activity Report and Summary Report of the 5th Meeting (Strasbourg, 18-20 March 2002), p.22 (emphasis added).

¹¹¹ *Op cit*, Eurojust, note 35, p.31.

¹¹² A significant number of referrals had been made in pursuance of the aims established by Security Council Resolution 1534 (2004), U.N. Doc. S/RES/1534 (2004), 26 March, paras.4-5. See e.g. Human Rights Watch, “*Croatia: Conviction Spotlights Justice Failings*” 19th July 2004, p.3.

¹¹³ See e.g. Humanitarian Law Centre, “*The Failure of the Nis Judicial System*”, 28 July 2005, available at http://www.hlc.org.yu/english/Facing_The_Past/Press_Releases/index.php?file=1214.html It

evidenced, for instance, by an increasing number of accounts of fair trials being conducted in ex-Yugoslavian states¹¹⁴. In order to further advance the correct application of international criminal law it has been proposed that ICTY evidence be admitted into national courts to facilitate and increase the effectiveness of war crimes trials. The use of the Tribunal's evidence allows local judges and prosecutors to benefit from the investigative expertise and resources of the ICTY. Since under the ICC Statute a State may make a request for referral from the Court concerning relevant evidence and additional information¹¹⁵, it would be constructive for such evidence to become automatically admissible in national courts. For example, the ICTY concluded that evidence gathered by the Prosecutor would be of great value for the internationalised Panels in Kosovo¹¹⁶. There should be no statutory limitations to that effect¹¹⁷. By admitting statements given to the ICC during proceedings, national courts could avoid direct examination of witnesses who have already testified in judicial proceedings regarding the same events.

A combination of difficulties in assessing on part of the ICC, the 'unwillingness' and 'inability' to conduct trials, the appropriateness of a referral of cases to national courts constitute significant impediments. States may express a readiness and willingness to investigate and try cases but regional cooperation mechanisms may be missing, a fact which does not automatically imply the 'inability' of the national judicial system to satisfy the requirements under complementarity. Mexico, for instance, expressed dissatisfaction with the definition of complementarity, as not presenting

is important to remember that such failure relates here only to a court and does not reflect on the entire national judicial system.

¹¹⁴ On improving criminal justice standards and fair trials see for example, Humanitarian Law Centre, "*Analysis of War Crimes Trials in Vukovar (Croatia)*", 05 January 2005, available at http://www.hlc.org.yu/english/War_Crimes_Trials_Before_National_Courts/Croatia/index.php?file=1015.html

¹¹⁵ ICC Statute Art. 93 (10) and Rule 194.

¹¹⁶ ICTY Press Release CC/PIU/314-E.

¹¹⁷ In relation to the ICTY, with the exception of Croatia, it is unclear at present whether witness statements made in ICTY proceedings and investigations are admissible in proceedings before national courts. Lawmakers in Serbia have yet to decide on the matter. In Bosnia, a court, in a war crimes trial (Ilijasevic Case, Cantonal Prosecutor v Zenica, Indictment against Dominik Ilijasevic, No. KT. 1/2000, February 20, 2001) refused to admit into evidence videotaped interviews the ICTY conducted with an eyewitness. The court held that the testimony was inadmissible partly because it was not obtained pursuant to the provisions of the law on criminal procedure in the Federation of Bosnia and Herzegovina.

sufficient opportunity for a State to claim jurisdiction at an early stage and for not giving due weight to views of an interested state¹¹⁸. In fact, the ICC Draft Statute provided for the ‘earliest opportunity’ challenge but it left unanswered the question as to what consequences, if any, should flow from a failure of a State to make a timely challenge¹¹⁹. Although ICC Article 17 (Issues of Admissibility) states that the Court “*shall determine that a case is inadmissible*” if the requirements of Art.17 have been met, this phrase must be read in conjunction with the first sentence of Article 19 which requires the Court to satisfy itself as to the jurisdiction, but makes sua sponte determinations of admissibility purely discretionary¹²⁰. The question therefore is whether ICC Articles 17 and 53 (Initiation of an Investigation) permit national measures such as amnesties for example, that may be indicators of ‘unwillingness’ and/or ‘inability’ to interfere or hamper cooperation in preliminary stages. Canada for example, assumed the interpretation of Article 17 (1) (b) as meaning that a State (Canada) may conduct an investigation and then decide not to proceed or to carry out an investigation and accordingly acquit¹²¹. The concept of ‘collapse’ should be evaluated from two perspectives: (1) in relation to the need for competent, independent and impartial courts and (2) from the conduct of criminal proceedings¹²². It follows that the requirements of Article 17 (3) will be satisfied if the national legal system has only collapsed in the region where the crime has been committed. It can be predicted with a substantial degree of certainty that this will often be the case in countries involved in an armed conflict or emerging from one. The question of unavailability on the other hand should not be seen as coinciding with the absence of a national judicial system but only of its substantial unavailability¹²³:

¹¹⁸ Rome Conf. Doc A/CONF.183/C.1/L.14/REV.1 (24 June 1998), p.239.

¹¹⁹ ICC Draft Statute, Art.17 (4), A/CONF.183/13.

¹²⁰ Sadat L. N. and Carden S. R., “*The New International Criminal Court: An Uneasy Revolution*”, 88 Georgetown Law Journal 381 (2000) p.381.

¹²¹ Bennett C. before Canada’s Standing Committee on Foreign Affairs and International Trade on “Crimes Against Humanity” 45th meeting, (11 May 2000).

¹²² Hall C. K., “*Suggestions Concerning International Criminal Court-Prosecutorial Policy and Strategy and External Relations*”, Expert Consultation on the General Issues Relevant to the ICC Office of the Prosecutor (28 March 2003) p.17.

¹²³ *Ibid.*

“First, the system could be functioning perfectly in a region or a state for the general population, but be unavailable to religious, ethnic or political groups or, on certain issues, women. Second, the system could be functioning perfectly well in a region or in the entire state for all crimes except the crimes in the Rome Statute. If the state has given amnesties for these crimes that prevented a judicial determination of guilt or innocence, the emergence of the truth or awards of reparation to victims...If warrants for arrest, subpoenas for the production of evidence or subpoenas to witnesses to appear are not executed in a national system, that confirms unavailability”¹²⁴.

The discontinuance of domestic proceedings does not, per se, preclude a possible institution of fresh proceedings at a later date; the Statute does not however address the matter of when cooperation or deferral begins in such circumstance. Acquittals are interesting to observe here. The ICC Statute sets out that the Prosecutor is entitled to appeal against a decision of acquittal as well as a conviction or sentence¹²⁵. The Prosecutor may appeal for a procedural error, an error of fact or of law. This may be construed as broadening the powers of review on factual issues, which is a significant extension of the right to appeal under certain national laws. For example, the International Criminal Court Bill 2004 of Trinidad and Tobago provides for an appeal on questions of law, on a national level. Specifically, these appeals refer to the ‘Eligibility for Surrender’¹²⁶: if such a situation arises, *‘the party may appeal against the determination to the Court of Appeal on a question of law only’*¹²⁷. Conversely, attributing right of appeal to the Prosecutor may well be criticised for interfering with the rights afforded to an accused under the *ne bis in idem* maxim.

The effect of complementarity will subject national prosecutions for ICC crimes to great scrutiny, opening the proceedings’ legitimacy to question. The fact that national proceedings of international crimes are often idiosyncratic

¹²⁴ *Ibid.*

¹²⁵ ICC Statute Arts.81-83.

¹²⁶ Art. 67(1).

¹²⁷ *Ibid.*, Art. 67(2). Also, Art. 68 provides that “*Rules of the Supreme Court relating to appeals to the Court of Appeal shall, with all necessary modifications, apply to an appeal under s.67*”.

raises many questions; many international crimes remain inadequately defined, leaving domestic courts significant scope to fill in details, and it is often unclear which procedural rules are applicable¹²⁸. As an author explains:

*“The sense of inequity resulting from courts in the north sitting in judgment on leaders from the south is most likely insurmountable in a world of asymmetrical power...whatever one may think of this imbalance as a political or moral matter, the relative quality of courts and judges in, for example, Spain as opposed to the Sudan suggests that there may be reason to prefer this ‘sense of inequity’ to the alternative”*¹²⁹.

Combating and punishing grave violations of international law require conventional, regional mechanisms for cooperation, such that ensure the most effective, long-term assistance between nations in criminal matters¹³⁰.

The detrimental effect of appropriating national investigations and proceedings has, in the long run, a detrimental effect on rebuilding and/or reforming a national judicial apparatus. Taking into account the different legal natures of the ad hoc Tribunals and the ICC, ICTY’s jurisprudence is interesting in understanding the basis on which deferral requests may be made. The Tribunal’s reasoning is not altogether dissimilar from the one adopted by the Security Council in referring the Sudanese criminal proceedings to the Court and it pinpoints to a potential detrimental effect of Security Council referrals to the Court by bypassing the complementarity principle, notwithstanding the willingness of a State to rebuild its judicial accountability mechanisms. In *Re The Republic of Macedonia*¹³¹, the ICTY held that the procedure for deferral

¹²⁸ *Op cit*, Wible, note 50, p.265.

¹²⁹ *Ibid.*, p.266.

¹³⁰ For a recent decision in favour of the locus jurisdiction see *Prosecutor v Zeljko Mejakic et al*, Case No. IT-02-65-PT, Rule 11bis Hearing (03 March 2005), p.199. See also Resolution by the Republic of the Philippines House of Representatives, urging the Philippine President to transmit the ICC ratification Bill to the Philippine Senate, Twelfth Session, Second Regular Session, No.800, October 2000 which stated that individuals must be held accountable nationally as it is crucial to aid victims especially and serve as a deterrence to violations of those crimes.

¹³¹ *Re The Republic of Macedonia*, Case No.IT-02-55-MISC.6, “*Decision on the Prosecutor’s Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia*”, 04 October 2002.

of cases under its Rules of Procedure and Evidence¹³² is to be followed in each case and without exemption. It was maintained that the relevant Rules allowed the Prosecutor to propose that a request for referral be made¹³³, and that these were to be interpreted and applied as to allow only a Trial Chamber to decide with finality on the issue¹³⁴. The ICTY Prosecutor applied to the Tribunal to issue a formal deferral request to the FYROM the day before the commencement of two criminal proceedings regarding five investigations and prosecutions of alleged crimes committed by the National Liberation Army (NLA) and the FYROM forces in 2001. The Prosecutor requested too that the competent authorities of the Republic of Macedonia defer to the jurisdiction of the Tribunal ‘*all current and future*’¹³⁵ investigations and prosecutions of alleged crimes committed by members of the NLA and concerning activities of FYROM forces against FYROM-Albanian civilians in FYROM in 2001. In its response, FYROM proposed that three of the five cases¹³⁶ be deferred to the jurisdiction of the Tribunal and it did not oppose the deferral of two investigations in question¹³⁷. Most importantly, however, it called the Tribunal to deny the request for deferral of all current and future investigations and proceedings in response to which the Prosecutor modified her application and requested the Tribunal to enter a ‘clause’ in its Decision according to which the judiciary of FYROM would be obliged to inform the Prosecutor about its findings in future investigations and, in particular, obliging FYROM to comply with any declaration of primacy by the Prosecutor in the absence of a formal request for deferral to the jurisdiction of the Tribunal which noted the ‘*intense frustrating effect*’ that such far-reaching deferral would have on FYROM jurisdiction. The FYROM government pointed out that such a request for deferral would ‘*effectively block domestic courts from initiating any investigation or prosecution with regard to these groups of alleged*

¹³² In particular, ICTY Rules of Procedure and Evidence, Rule 9 and 10.

¹³³ See for example Spanish Organisation Act on Cooperation with the ICTY (Organisation Act 15/1994 – 01 June 1994), Art. 4 (4): “*No Spanish judge or court may create a conflict of jurisdiction with the International Tribunal. They shall confine themselves to stating the reasons that in their estimation form the basis of their own competence*”.

¹³⁴ Supra note 134.

¹³⁵ *Ibid*, para.7.

¹³⁶ The “NLA Leadership” Case, the “Mavrovo Road Workers” Case and the “Lipkovo Water Resrve” Case.

¹³⁷ The “Neprosten” and the “Ljuboten” investigations.

*perpetrators*¹³⁸. In determining the ‘appropriateness’ of the deferral, the Tribunal took into account the principle of concurrent jurisdiction and the primacy of the Tribunal over national courts which did not aim to preclude or prevent the exercise of jurisdiction by national courts and that, on the contrary, national courts should be encouraged to exercise their jurisdiction in accordance with relevant national laws and procedures. Outside the ICC complementarity regime, the presumption in favour of State action is based on the recognition of duties arising out of the ‘aut dedere aut judicare’ principle¹³⁹. In an earlier case, the Djukic case, the ICTY Prosecutor decided not to request the deferral of criminal proceedings by Bosnian authorities to the competence of the Tribunal on the basis that “*the mere fact of two trials being held simultaneously for the same crime against the same accused is likely to prejudice the rights of the accused*¹⁴⁰...according to which the accused has the right to have adequate time and facilities for the preparation of defence (...)”¹⁴¹.

On the one hand, the focus of the ICC Prosecutor on investigating and prosecuting those bearing the greatest responsibility has raised concerns of a so-called ‘impunity gap’ which may become apparent when the Office of the Prosecutor is limiting, or seems to be limiting its actions to key leaders and major situations of crisis¹⁴². The ICTY recently observed that ‘key leaders’ and ‘persons bearing greatest responsibility’ for the purposes of establishing jurisdiction and recommending referrals are persons, “*who by virtue of their*

¹³⁸ On recent successful war crimes prosecution see the Dusseldorf Supreme Court, Jorgic Nikola Case, 30 April, 3StR 215/98; Bavarian Appeals Court, Djajic Case, 23 May 1997, 3 St 20/96.

¹³⁹ See e.g. Cavallo Case where Mexico extradited the Accused to Spain under the duty to either prosecute or extradite, Juez Sexto de Distrito de Procesos Penales Federales en el Distrito Federal, Extradicion de Miguel Angel Cavallo/Expediente de Extradicion 5/2000 (VII/230/1324/2000).

¹⁴⁰ As stated in Art.14 of the ICCPR and Art.21 (4) (b) of the ICTY Statute.

¹⁴¹ Prosecution v Djukic D., IT-96-20, Decision of Trial Chamber I (26 April 1996) p.160.

¹⁴² See e.g. Colitti M., “*Geographical and Jurisdictional Reach of the ICC: Gaps in the International Criminal Justice System and a Role for Internationalised Bodies*” in Romano C. P. R. et al (eds.), “Internationalised Criminal Court-Sierra Leone, East Timor, Kosovo and Cambodia” (2004) p.418. See also International Criminal Court (ICC-OTP), “*Comments and Conclusions of the Office of the Prosecutor*” in the Summary of Recommendations Received during the First Public Hearing of the Office of the Prosecutor, convened from 17-18 June 2003, Hague, p.2, available at http://www.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf

position and functions in the relevant hierarchy, both de jure and de facto, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the ‘most serious’¹⁴³, rather than ‘intermediate’¹⁴⁴. On the other hand, no clear consensus has yet emerged on the appropriate and relevant form for the complementarity practice of the Office of the Prosecutor. There have been some concerns for the Office not to overstate the presumption in favour of State action in the Statute as a hard rule that somehow demands the exhaustion of local remedies by victims of massive crimes, or shift prosecutorial responsibility as far as possible onto the national level¹⁴⁵, especially in reluctant, uncooperative countries.

In line with this reasoning, ICC Article 94 (1) envisages that in similar circumstances the Court would suspend the criminal procedure in order to enable an accused to efficiently prepare a defence before national proceedings. Nevertheless, if the Prosecutor defers an investigation, he or she may request that the relevant State make available to him or her information on the proceedings¹⁴⁶. If the Prosecutor then decides to proceed with an investigation, he/she will notify the State in which deferral of the proceedings has taken place¹⁴⁷.

Within the scope of the ICC Statute, a compulsory monitoring system would be inconsistent with the purposive interpretation of the Statute once the Court exercises its ultimate competence in determining the unwillingness and/or inability of a State to conduct investigations and prosecutions; once the Court confirms a case to be within the jurisdictional reach of a particular State, respect for the judicial sovereignty of that State and its judgments is implied. In verifying ‘unwillingness and inability’, the Office of the Prosecutor should

¹⁴³ See e.g. ICTY Appeals Chamber refusal to refer a case to national authorities in Prosecutor v Radovan Stankovic, Case No.IT-96-23/2/-AR11bis.1, Decision on Rule 11bis Referral (02 September 2005).

¹⁴⁴ Prosecutor v Dragomir Milosevic, Case No. IT-98-29/1-PT “*Decision on Referral of Case Pursuant to Rule 11bis*” (08 July 2005).

¹⁴⁵ *Supra*, note 145, p.3.

¹⁴⁶ ICC Statute Article 19 (11).

¹⁴⁷ *Ibid.* See also ICC RPE, Rule 53: “*When a State requests a deferral pursuant to article 18 (2) that State shall make this request for deferral in writing and provide information concerning its investigation, taking into account Article 18 (2). The Prosecutor may request additional information from that State*”.

develop a clear criterion in determining unwillingness, avoiding any distinction between objective and subjective criteria to that end, outside the Statute. Types of unwillingness/inability may include immunities of heads of states or ministers, statutes of limitation, an international treaty providing for non-prosecution of war criminals (such as Article 98 (2) agreements) and there should also be institutional preparedness to review the admissibility of a case at the time of surrender and even later, in cases where much time has passed since the finding of admissibility. ‘Unwillingness’ is to be assessed on procedural and institutional factors rather than the substantive outcome¹⁴⁸ and the inability includes firstly the ‘collapse’ or ‘unavailability’¹⁴⁹ of the national judicial system and secondly, the situation wherein a state is unable to obtain the accused, evidence or testimony¹⁵⁰. In addition, the Prosecutor’s authority to conduct activities relating to the presentation of a case in the territory of a State depends largely on whether or not that State has a functioning judicial system. Yet, determining what constitutes a functioning judicial structure is far from straightforward. Instrumental in illustrating difficulties incumbent in such assessment is the experience of Rwanda’s courts with regard to which it was estimated that: *“Even if the judicial system in place before the war had been left intact, it would have been difficult if not impossible for it to cope with the unprecedented number of victims and accused persons as with the magnitude of human destruction...Even when the competent judicial police inspectors were trained to take over from the military and public prosecution officers were set to prepare case files for the eventual resumption of court activity, progress was slow”*¹⁵¹.

In this context it is important to remember that, notwithstanding a State’s duty to cooperate with the ICC, problems inherent within the principle of complementarity such as the need to rely on national laws will remain.

¹⁴⁸ ICC-OTP, Informal Experts Paper *“The Principle of Complementarity in Practice”* (2003). p.14, para.46.

¹⁴⁹ *Ibid.* p.15. Term ‘unwillingness’ is to be given a broad interpretation so as to cover various ‘inability’ scenarios in the latter part of ICC Statute Art.17 (3) as well as to cover typical cases of inability.

¹⁵⁰ *Id.* para.49.

¹⁵¹ Ferstman C. J., *“Domestic Trials of Genocide and Crimes Against Humanity: The Example of Rwanda”*, African Journal of International and Comparative Law, 1997, Vol.9, p.867.

Constitutional barriers to compellability of witnesses, as well as to privileges exempting individuals from the obligation to testify are demonstrative of this¹⁵². In fact, in many countries, it is not constitutionally possible to force a citizen to leave the country to attend judicial proceedings in another country¹⁵³. It is worth noting that some implementing cooperation agreements between states and the ICTY provide that the Tribunal may forward directly to individuals summons and other documents by mail. For example, Article 23 of the Swiss Federal Order on Cooperation¹⁵⁴ provides that “*procedural decisions of the International Tribunal may be served by mail directly to the addressee in Switzerland*”. The Finnish Law on cooperation with the ICTY provides too that a witness “*who in Finland has been summoned by the Tribunal to appear before the Tribunals is under a duty to comply with the summons*”¹⁵⁵. Similarly, the German law on cooperation reads: “*Should the Tribunal request the personal appearance of a person...their appearance may be enforced with the same judicial means as may be ordered in the case of a summons by a German court or a German Prosecutor’s Office*”¹⁵⁶. A further example is the Austrian Federal Law on Cooperation pursuant to which a witness is under a legal duty to execute a summons directly addressed to him/her¹⁵⁷. It is concluded that “*this formula indicates that the Tribunal may directly summon individuals*”¹⁵⁸. Many implementing ICC laws stipulate that national laws should govern the compellability of witnesses under the ICC Statute. For instance, the Trinidad and Tobago International Criminal Court Bill 2004 instructs that the applicable law with respect to compelling a person to give

¹⁵² Alongside those discussed in Chapter 1 on the methods and effects of implementation of the ICC Statute.

¹⁵³ See for example Joint Committee on Human Rights, “*Memorandum from the Committee on the Administration of Justice*” (2003) available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/12/12we12.htm>

¹⁵⁴ 1995 Federal order on cooperation with the International Tribunals for the Prosecution of Serious violations of International Humanitarian Law (21 December 1995).

¹⁵⁵ Section 8 of the Finnish Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the International Tribunal, 05 January 1994/12.

¹⁵⁶ Section 4 (2) of German Law on Cooperation with the International Tribunal in respect of the Former Yugoslavia (Law on the International Yugoslavia Tribunal), 10 April 1995.

¹⁵⁷ Section 11 (2) of the Austrian Federal Law on Cooperation with the International Tribunals, Federal Law Gazette (Bundesgesetzblatt) No.37/1995.

¹⁵⁸ Frowein J. A. et al submission of amicus curiae (“Frowein Brief”) on behalf of the Max Planck Institute for Comparative and International Law in Prosecutor v Blaskic, Case No. IT-95-14-PT, p.45.

evidence or answer questions, or to produce documents or other materials is the national law of Trinidad and Tobago albeit, in order to facilitate cooperation with the ICC, that law applies with any necessary modifications¹⁵⁹.

Any interference by the ICC in the national proceedings will come with the consent of the State in question. National authorities do not require under the ICC Statute an approval to investigate or apprehend suspects or accused persons and the Court is required to respect foreign judgements¹⁶⁰. Notwithstanding this obligation, the ICC may nevertheless request governments to provide information, which is not qualified in the Statute, on the progress of any investigations or trials¹⁶¹. This is important as it gives an opportunity to the Court to monitor the degree to which ICC law is understood and applied correctly. Here is an example. In the Vuckovic Case¹⁶², a Serb was originally convicted of genocide committed during the Kosovo conflict. On appeal, the Supreme Court quashed the verdict and sent it back to the first instance court. The appeal judgement stated that no genocide took place in Kosovo in 1999. This decision was criticised by OSCE as a “*wasted opportunity to thoroughly interpret the genocide statute of the Criminal Code of the Federal Republic of Yugoslavia*”¹⁶³ and to state jurisprudence from other courts and tribunals in support of its conclusion that the evidence at trial did not establish the crime of genocide. A well-reasoned opinion on this issue,

¹⁵⁹ 2004 Trinidad and Tobago International Criminal Court Bill, Art. 85(1).

¹⁶⁰ See for example, with regard to life imprisonment constitutional incompatibilities, Duffy H. “*The ICC will defer to the State’s investigation or prosecution of an egregious crime, irrespective of whether or not the State imposes a life sentence. The underlying objectives of constitutional prohibition on life imprisonment are human rights orientated. They seek to recognise the fact that life imprisonment is considered a violation of human rights in certain national systems, although it is questionable this is so on the international level. The prohibition should not therefore apply to international prosecutions that enshrine internationally (as opposed to nationally) recognised human rights standards. The Statute (ICC) enshrines those human rights relating to the rights of suspects and accused persons that form part of international human rights law*” in “*National Constitutional Compatibility and International Criminal Court*”, 2001, 11 Duke Journal of International and Comparative International Law 1, p.38.

¹⁶¹ ICC Statute, Article 18 (5).

¹⁶² Vuckovic M. and Bisevac B., indicted 29 November 1999 by the internationalised panel of Kosovo’s Supreme Court.

¹⁶³ In particular Art.141.

*disseminated throughout the legal community, would have been useful as a means of increasing understanding of a complex and controversial subject”*¹⁶⁴.

However, a screening procedure with a wider scope from the one already envisaged by the Statute, should be encouraged within States in order to narrow the circumstances under which the jurisdiction of the Court may be triggered.

3.5 Equality of arms in pre-trial proceedings with respect to access and disclosure of evidence

The principle of equality of arms represents one of the most important features of the wider concept of a fair trial whereby each party must be afforded reasonable opportunity to present its case in conditions that do not place one at a disadvantage vis-à-vis one's adversary¹⁶⁵. The ICTY and ICTR have ruled that equality of arms between the parties does not amount to equality of means and resources. In the Kayishema case, the ICTR concluded in fact that the rights of the accused should not be interpreted to mean that the defence is entitled to the same means and resources as the prosecution¹⁶⁶. As far as the ICC is concerned, the Assembly of States has full control over all of the Prosecutor's resources. Notwithstanding the fact that the use of the powers of the Assembly of States Parties may interfere with the preliminary inquiries, investigations and prosecutions undertaken by the ICC Prosecutor¹⁶⁷, no remedy against such violation is provided in the Statute.

The ICC Prosecutor, as an institutional organ of the Court, enjoys unique freedom and ability to identify and access relevant evidence; such imbalanced,

¹⁶⁴ OSCE “*Kosovo's War Crimes Trials: A Review*”, 23 September 2002, p.50.

¹⁶⁵ See e.g. *Foucher v France*, 18 March 1997, Reports 1997-II, at 34; *Bulut v Austria*, 22 February 1996, Reports 1996-II, at 47. Some international instruments on cooperation specifically provide for ‘*judicial equality*’ during proceedings, e.g. 1962 Nordic States Scheme.

¹⁶⁶ *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber (21 May 1999) para.20.

¹⁶⁷ ICC Statute Art.42 (2).

procedural advantage (relating to the equality of arms of the parties in presenting their case) is inadequately restored through defence rights and the disclosure regime imposed on the Prosecution¹⁶⁸. It is therefore fundamental to establish that the Prosecutor's duty, notwithstanding practical restrictions, is proactive rather than dependent on the defence or the Court requesting disclosure¹⁶⁹. The experiences of the ICTY/ICTR and the judgements rendered by the European Court of Human Rights concerning the gathering of evidence and equality of arms of the parties in criminal proceedings are instrumental in predicting the approach the Court is expected to take on these issues, and therefore in upholding the principles of a fair trial. Evidence may be crucial in establishing a *prima facie* case before the ICC, thereby sequestering the opportunity of national authorities to present, under complementarity, a timely jurisdictional claim or challenge. In fact, as part of investigating crimes under duties of 'aut dedere aut judicare' States must collect and assess evidence¹⁷⁰.

The interpretation of the principle of disclosure with respect to the imposition or acceptance of a broad duty has often proved to be difficult and has resulted in miscarriages of justice¹⁷¹. There have been several regional attempts to harmonise the practices among countries¹⁷². The reflecting need for a unified practice in criminal justice the ICC Statute sets out that any application and interpretation is to be conducted consistently with international human rights and without any adverse distinction¹⁷³. The Statute contains a broad provision to protect individuals from human rights abuses. On the one hand, the basic

¹⁶⁸ McIntyre G., "Equality of Arms-Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia" 16 Leiden Journal of International Law (2003), p.276.

¹⁶⁹ Justice Smellie A. QC, "The Prosecutor's Duty to Disclose: The Case for Global Standards", International Society for the Reform of Criminal Law, 18th International Conference, Montreal, Quebec, Canada, 8-12 August 2004.

¹⁷⁰ See e.g. 1991 UN Model Treaty on Extradition, Art.4; Wilkitzki P., "Inclusion of the principle 'aut dedere aut judicare' in the European Convention on Extradition" in European Committee on Crime Problems PC-OC 9 (1987). See also 1949 Geneva Conventions, Articles 49, 50, 129 and 146.

¹⁷¹ See e.g. Australian cases of R v Fisher and Broster [2003] NSWCCA41 and R v Ulman Naruniec [2003] SASC 437.

¹⁷² See e.g. European Commission, Green Paper on "Procedural Safeguards for Suspects and Defendant's in Criminal Proceedings throughout European Union", COM/2003/0075final/. FIND FINAL; Commonwealth Scheme on Mutual Assistance in the Administration of Justice (June 1991), Commonwealth Secretariat.

¹⁷³ ICC Statute Article 21. Article 21 (1) provides that "The Court shall apply in the first place, the Statute, Elements of Crimes and its Rules of Procedure and Evidence".

scheme of procedural protection in the Statute reflects the relevant experience and jurisprudence of the ICTY and ICTR and, on the other, introduces a new set of procedural protection called “*Rights of Persons During an Investigation*”¹⁷⁴. The ICC Statute aims at protecting persons from violations both of substantial human rights and of rights to a fair procedure¹⁷⁵.

Arguably, the ICC regime represents a convergence and a harmonisation between the common and civil law legal structures¹⁷⁶ and the ICC Prosecutor’s functions are characteristic to both systems: “*The Prosecutor acts both as an ‘administrator of justice’, in that he acts in the interest of international justice pursuing the goal of identifying, investigating and prosecuting the most serious international crimes and, as in common legal orders, as a party in an adversarial system*”¹⁷⁷.

Given that the efficacy of the adversarial system is predicated on equality of arms it is difficult to escape a claim that the right to a fair trial requires an approximate equality of arms or some form of compensation for any substantial disparity. Fairness in the adjudicative context consists partly of equality of treatment for the parties concerned, which presupposes an independent and impartial tribunal and informed participation in the process of arriving at a decision¹⁷⁸. From this perspective, pre-trial disclosure is necessary to ensure equality of arms and should be construed as being an inquisitorial

¹⁷⁴ ICC Statute Article 55.

¹⁷⁵ ICC Statute Article 21 (1). For a discussion see e.g. Zappala S., “*The Rights of the Accused*” in Cassese et al (eds.), “*The Rome Statute of the International Criminal Court: A Commentary*”, Vol.2, (2000)1319.

¹⁷⁶ See e.g. 2003 Bosnian new Criminal Procedure Act (Sluzbene Novine Federacije BiH, No.35/2003, 28 July 2003), Art.45 which eliminates the role of the investigative judge and now authorises the public prosecutor to carry out investigations.

¹⁷⁷ Cassese A. in Brandts C. and Field S., “*Discretion and Accountability in Prosecution: A Comparative Perspective*” (1995) p.163. See also Zappala S., “*Human Rights in International Criminal Proceedings*” (2005) stating that “*The solution adopted in international criminal procedure is certainly based more on the civil law approach*”, p.176; Pizzi and Marafioti L., “*The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial System on a Civil Law Foundation*” 17 Yale Journal of International Law 1 (1992), 1-40.

¹⁷⁸ Dennis I. H., “*Human rights and evidence in adversarial criminal procedure: the advancement of international standards*” in Nijboer J. F. and Reijntjes J. M., “*Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence*” 1997, 523.

element to the proceedings¹⁷⁹. The predominantly inquisitorial system of the ICC has been criticised as a system where “*guilt or innocence was determined by judges alone and the rights of confrontation and counsel were highly restricted*”¹⁸⁰.

In upholding the principle of equality of arms as part of a fair trial the European Court of Human Rights opined in *Borgers v Belgium*¹⁸¹ that “*having regard to the requirements of the rights of the Defence and the principle of equality of arms and the role of appearances in determining whether they have been complied with, the Court finds that a violation of Article 6 (1) (the concept of a fair trial) ...has undergone a considerable evolution in the Court’s case law*”¹⁸².

The ICTY decided that it would only find that the principle of equality of arms has been breached where *actual procedural* inequality had been established. Importantly, a UN Secretary-General’s Report on the ICTY concluded that it is “*axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of the proceedings*”¹⁸³. The most recent case law from the international tribunals shows a different trend. The ICTY has in fact, and on occasions, rejected adherence to the interpretation of human rights as understood by national laws as the application of the Tribunal’s Statute is independent from domestic proceedings and institutions¹⁸⁴.

In the interest of punishing the violators of core crimes, broad inquisitorial functions and rights assist international prosecutors in gathering evidence by search and seizure warrants which authorise investigators to request

¹⁷⁹ See Prof. Schwikkard P.J., “*Does the merging of inquisitorial and adversarial procedures impact on fair trial rights?*” 2003 Conference Paper for the International Society for the Reform of Criminal Law, 17th International Conference, The Hague, Netherlands, August 24-28, 2003.

¹⁸⁰ Lee A. Casey before the Subcommittee on International Operations of the Committee on Foreign Relations, U.S. Senate, 105th Congress, 2nd Sess. (23 July 1998), p.71.

¹⁸¹ *Borgers v Belgium*, A214-A (19 91) 15 EHRR 92, para 22.

¹⁸² *Ibid*, para.24.

¹⁸³ Report of Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 888 (1993), (S/25704, 03 May 1993), at para.106.

¹⁸⁴ *Op cit*, Wible, note 50, p.270.

information from various government departments and/or military offices. The defence on the other hand is not entitled to similar investigative powers; the defence cannot, like the Prosecutor, investigate in a general sense¹⁸⁵. For example, governments have offered assistance to the ICTY in gathering documentary and other physical evidence in a number of ways. The United States had provided intelligence information, including overhead photos of suspected gravesites to the Tribunal¹⁸⁶, information that is unlikely to be shared with other states. If such sensitive material is subject to confidentiality, the Prosecutor may agree not to make any disclosures at any stage of the proceedings¹⁸⁷ without adequate prior disclosure consent of the accused¹⁸⁸. All relevant material, such as intelligence information, may only be used with the aim of producing new evidence. The ICC Statute allows the Pre-Trial Chamber to authorise the Prosecutor to take specific measures within the territory of the requested state when there is an urgent need to access evidence. These measures may include the Prosecutor entering into cooperation agreements with the UN and/or other relevant regional organisations. Cooperation with the Court has been interpreted as being of a sui generis form; cooperation should not be seen in its ‘classic’ form, such as that between states, and it should be given wider scope¹⁸⁹. When the Pre-Trial Chamber determines that a State is unable to execute a request for assistance, it will authorise the Prosecutor to take specific investigative measures within the territory of the relevant State¹⁹⁰. The experience of the ICTY delineates that whereas the Prosecutor has the opportunity to secure original materials, either through orders or warrants, the accused is regularly denied the same access. In an ICTY case it was explained that:

“The power of seizure granted to the prosecution is a very powerful weapon in its hands. By seizing material, the prosecution denies such accused persons

¹⁸⁵ *Ibid*, p.280.

¹⁸⁶ *Op cit*, note 21, p.8. Also, States have provided forensic experts or helped non-governmental organisations conducting forensic examinations, including excavations of gravesites.

¹⁸⁷ ICC Statute Art. 54 (3) (e).

¹⁸⁸ ICC RPE, Rule 82 (1).

¹⁸⁹ *Op cit*, note 10.

¹⁹⁰ ICC Article 57 (3) (d). ICC RPE Rule 115 (1) requires the Pre-Trial Chamber to make every effort to inform and invite views from the State Party in question.

*access to that material. Experience has demonstrated that the results can be seriously deleterious to the rights of the accused. In one case, in which the accused became aware of the seizure by the prosecution, the prosecution waited over six months before providing the accused with a copy of the documents. In another case, in which the accused was unaware of the seizure by the prosecution, the accused had obtained an order requiring the relevant Bosnian authorities to produce the documents which was not complied with. Only after the trial had ended was it discovered that the documents had been in the possession of the prosecution throughout trial”.*¹⁹¹

The prosecution, because of its institutional character and the scope of its investigations, will be accorded much greater access to material than an accused and will rarely have to establish a legitimate forensic purpose to gain access.

In the ICTY Tadic Case¹⁹², it was argued for the Defence that the accused had been denied fair trial because of the lack of cooperation and the obstruction of some external entities which prevented it from properly presenting its case at trial. The accused argued that the prosecution did not work under the same difficulties in securing its evidence and thus he faced an inequality of arms in the presentation of his defence¹⁹³. The ICTY Appeals Chamber was asked in this case to construe the principle of “*equality of arms*” as providing substantial and not only procedural equality¹⁹⁴ in the interest of a fair trial¹⁹⁵. In relying on the Trial Chamber’s judgment regarding the difficulties faced by the parties in gaining access to evidence in the former Yugoslavia, Tadic also argued that the authorities in the territory where the evidence was located (Republika Srpska) were uncooperative, which culminated in the defence not having adequate time to prepare for trial. The defence proposed to the Appeals

¹⁹¹ Prosecutor v Brdjanin and Talic, Case No. IT-02-54, 26 February 2002, paras3-4.

¹⁹² Prosecutor v Tadic, Case No. IT-94-I-A, Judgment (15 July 1999) paras. 48-52.

¹⁹³ *Ibid.*

¹⁹⁴ See ICTY Statute, Article 21 (4) (b).

¹⁹⁵ *Supra*, note 196.

Chamber a two-step test to be applied in determining whether there had been a violation of the principle of equality of arms:¹⁹⁶

- 1- Had the defence established on the balance of probabilities that the failure of identified authorities to cooperate with the Tribunal resulted in relevant and admissible evidence not being presented to the Trial Chamber;
- 2- If so, was this the result of procedural imbalance produced between the parties, in which case it must be assessed whether the imbalance was significant enough to undermine the appellant's right to a fair trial.

Whereas international missions such as of IFOR and SFOR have assisted the ICTY and ICTR in collecting evidence and arresting suspects, which are themselves mandated by the Security Council¹⁹⁷, therefore transmit its powers, the ICC cannot enjoy the same 'benefit', unless the Council refers a situation to it. For instance, IFOR has provided logistical assistance to the Tribunal investigators excavating gravesites in Bosnia and Herzegovina¹⁹⁸; the mission had extensive intelligence gathering capabilities, including monitoring of radio communications and access to satellite and aerial inspection. It operated at will throughout the country. Under the peace agreement it had "*complete and unimpeded freedom of movement by ground, air and water throughout Bosnia and Herzegovina*"¹⁹⁹. In order to effectively carry out its responsibilities, it was also authorised to use military force²⁰⁰. The work of the ICTY would have probably been impossible without such assistance. The ICC Office of the Prosecutor on the other hand has so far only signed an agreement with Interpol, which establishes a framework for cooperation between the two

¹⁹⁶ *Ibid.*, para. 33.

¹⁹⁷ NATO issued a Decision Sheet on 16 December 1995 stating that, on the basis of Security Council Resolution 1033: "*Agreeing that, having regard to UNSCR 827, UNSCR 1033, and Annex 1-A of the General Framework Agreement of Peace in Bosnia and Herzegovina, IFOR should detain any person indicted by the International Criminal Tribunal who came into contact with IFOR in its execution of assigned tasks in order to assure the transfer of these persons to the International Tribunal*".

¹⁹⁸ See Letter from the Secretary-General of the North Atlantic Treaty Organisation addressed to the Secretary-General of 22 May 1996, UN Doc. S/1996/375, at para. 9.

¹⁹⁹ General Framework Agreement, Annex 1-A, Art. VI (9) (a).

²⁰⁰ See Article VI.5 of Annex 1-A of the 1995 Dayton Peace Agreement.

entities in the field of crime prevention and criminal justice. The agreement enables the ICC and Interpol to exchange police information and criminal analysis, and to cooperate in the search for fugitives and suspects. The agreement affords the ICC Office of the Prosecutor access to Interpol telecommunications networks and databases. A similar agreement between Interpol and the Special Court for Sierra Leone²⁰¹ provides that cooperation shall also include the publication and circulation of Interpol notices. Under the Agreement, the Special Court has the right to request the Interpol General Secretariat to publish and circulate Interpol notices of all types, including red notices²⁰². The Special Court has primacy over the national courts of Sierra Leone and it may therefore request a national court to defer to the competence of the Special Court²⁰³, which may imply that if Interpol received competing requests for information, priority will be given to the Special Court.

Access to crucial information provided by other international organisations has also proved to be largely inaccessible by the accused. In another case²⁰⁴, the ICTY maintained that the International Committee of the Red Cross had a right under the Four Geneva Conventions, the two Additional Protocols and customary international law to insist on non-disclosure of certain information relating to the work of the ICRC in the possession of one of its employees²⁰⁵. Subsequently, however, the Tribunal changed its position following an application by the Defence to re-open its decision by which it granted leave to the ICRC to appear in matter as *amicus curie*, holding that “*not only equality of arms but also common fairness demanded that Todorovic (the Accused) should have access for the purpose of arguing that the ICRC Decision was wrong*”²⁰⁶. On this issue, the ICC Rules of Procedure and Evidence stipulate nevertheless that if the Prosecutor introduces similar evidence protected under

²⁰¹ Co-operation Agreement between The International Criminal Police Organisation-Interpol and The Special Court for Sierra Leone, Resolution No. AG-2003-RES-08, October 2003.

²⁰² *Ibid.* Art.3 (1).

²⁰³ Special Court for Sierra Leone Statute Art.8 (2) and Rule 10 of its Rules of Procedure and Evidence.

²⁰⁴ Prosecutor v B. Simic, Todorovic et al., Case No.IT-95-9-PT.

²⁰⁵ *Ibid.*, “Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross” (07 June 2000).

²⁰⁶ *Ibid.*, “Decision on (1) Application by Stevan Todorovic to re-open the Decision of 27 July 1999, (2) Motion by ICRC to re-open scheduling order of 18 November 1999 and (3) conditions for access to material” (28 February 2000), para.22.

grounds of confidentiality, the Chamber may not summon the provider of such evidence, nor may the Chamber, for the purpose of obtaining additional evidence, summon the provider or a representative of the provider as a witness or their attendance²⁰⁷, nor ask any questions relating to that evidence²⁰⁸. Importantly, the right of the accused to challenge such evidence presented by the Prosecution is, too, subject to limitations that govern the disclosure of confidential evidence and testimony²⁰⁹. Although the permission of the source of confidential material is required prior to disclosure, the ICTY has taken into consideration the fact that such a procedure may significantly delay proceedings. In *Blaskic*²¹⁰, the ICTY rejected the prosecution's argument that if consent for disclosure had been given it fell to the provider of the confidential information to determine when the disclosure would occur. In another ICTY motion²¹¹, the Defence rejected the position that the ICRC had full immunity from national courts or other tribunals and that "*it is illogical to hold a position that while states (sovereign and independent), even warring states, may be compelled to furnish evidence to this Tribunal, the ICRC may not be so compelled*"²¹². The Tribunal rejected this argument and denied the motion. Whilst maintaining that the ICRC had a right under the Four Geneva Conventions and the Additional Protocols to insist upon non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of one of its employees and that the ICRC had a right under customary international law not to disclose particular information, the ICTY also held that the matter may be reopened in the future if the Defence '*persuades*' the Tribunal that the decision was wrong²¹³.

²⁰⁷ ICC RPE Rule 82 (2).

²⁰⁸ *Ibid.* Rule 82 (3).

²⁰⁹ *Id.* Rule 82 (4).

²¹⁰ *Prosecutor v Blaskic*, Case No. IT-95-I4-T, "*Decision on Prosecutor's Request for Authorisation to Delay Disclosure of Rule 70 Information*" (06 May 1998) para.2.

²¹¹ *Prosecutor v B. Simic, Todorovic et al*, Case No. IT-95-9-PT, "*Defence Further Submission on Motion for Order to the ICRC*" (03 May 2000) p.5.

²¹² *Ibid.*

²¹³ *Op cit.*, note 208.

While the legal arguments behind the Accused's appeal seem clear, those of the Prosecution appear to be twofold²¹⁴. Firstly, the Prosecutor attempted to prevent the accused gaining access to documents in possession of international organisations (ICRC and SFOR) in order to assure the continued cooperation of those organisations²¹⁵. Secondly, it intended to establish a precedent by which other accused persons captured in similar circumstances would be unable to escape justice²¹⁶.

Under the ICC Statute, this possibility of 'persuading' the Court to order disclosure of certain types of evidence appears to be available. According to the ICC Rules of Procedure and Evidence any information, documents or any other evidence may be held to be privileged, confidential and therefore not subject to disclosure. Rule 73 (4) provides that:

"The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the ICRC, any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of performance by the ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement unless: (a) After consultations undertaken pursuant to sub-rule 6, the ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or (b) Such information, documents or other evidence is contained in public statements and documents of the ICRC".

But Sub-rule 6 provides that:

"If the Court determines that the ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and the ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the

²¹⁴ Sloan J., "Prosecution v Todorovic: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction" (2003) Leiden Journal of International Law, Vol.16, No.1, p.119.

²¹⁵ *Ibid.*

²¹⁶ Todorovic however renounced his right to access SFOR information and in return 26 charges out of 27 against him were dismissed.

relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interest of justice and of victims, and the performance of the Court's and ICRC functions”.

With regard to the protection of the confidentiality of third parties that provide information or evidence, the ICC Statute provides that:

“If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organisation or international organisation, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court²¹⁷. If the originator is a non State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator”²¹⁸.

Importantly, the ICC Statute requires the Prosecutor to disclose to the defence, in addition to any other type of disclosure provided for in the Statute, ‘*any evidence in the Prosecutor's possession or control which he/she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence*’²¹⁹.

The issue of disclosure is also significant to national security concerns. The ICC Statute addresses the pertinent issue of the protection of State information that may prejudice its national security interests if disclosed²²⁰. In particular, the Statute provides that the Court and the State in question must resolve any

²¹⁷ Subject to the provisions of ICC Article 72.

²¹⁸ ICC Article 73.

²¹⁹ ICC Statute Article 67 (2). Also, Article 61 (3) (b) and Article 64 (3) (c) and 64 (6) (d) together provide that both the Pre-Trial Chamber and the Trial Chamber may order any relevant evidence to be disclosed prior to the relevant hearing, either the confirmation or preliminary hearing or the trial itself. Rules 76-84 express principles and procedures that all the relevant parties must follow at the pre-trial stage in order to ensure that all relevant evidence is brought before the Court. See also Rule 121.

²²⁰ See ICC Articles 72, 93 (4) and 99 (5).

such concerns through cooperative measures²²¹. Importantly, the States may now under the complementarity principle²²² request the Court to provide different types of evidence to them in order to assist with national investigations or trials of persons suspected of committing a crime within ICC jurisdiction, or which constitute a serious crime under the national law of the requesting State. There is in fact a procedure for requesting and executing such cooperation as well as principles guiding the Court when determining whether or not to meet such requests²²³.

In the Simic Case²²⁴, the ICTY had to introduce a purposive interpretation of its Statute, namely Article 29, which was to be read as conferring on the Tribunal a power to require an international organisation or its competent organ to cooperate with it. Here the Defence requested the Tribunal to issue an order asking SFOR and other military and security forces to assist the Defence in obtaining certain documents and calling certain witnesses. It held that once consent had been given, the defence had an immediate right to discovery of that material²²⁵. It had been contended that the Trial Chamber was asserting its authority to control proceedings in circumstances where the disclosure of information was subject to the consent of the provider: *“Once that consent is given, the limits placed on the control of that information, including disclosure to the accused, is a determination that falls to the trial chamber within the ambit of the Rules and is not one to be dictated by the provider outside the ambit of the Rules”*²²⁶. More recently, in the Milosevic Case, the Tribunal held that not only the identity of the information provider should remain confidential but also the subject and substance of that information²²⁷ so the consent of the provider was needed prior to the disclosure of information²²⁸. At the same time, it was also held that equality of arms requires the Tribunal to

²²¹ ICC Article 72 (5).

²²² See ICC Articles 1 and 93.

²²³ ICC Rules of Procedure and Evidence, Rule 194.

²²⁴ Prosecutor v B. Simic, Todorovic et al, Case No. IT-95-9-PT, *“Decision on Motion for Judicial Assistance to be Provided by SFOR and Others”* (18 October 2000).

²²⁵ *Ibid.* para. 3.

²²⁶ *Ibid.* para. 4.

²²⁷ Prosecutor v S. Milosevic, Case No. IT-02-54-ARbis and AR73-3, *“Public Version of the Confidential Decision on the Interpretation and Application of Rule 70”* (Appeals Chamber) 23 October 2003, para.20.

²²⁸ *Ibid.* para.23.

encourage third parties to provide confidential information to the defence in the same way they are encouraged by the ICTY Rules of Procedure and Evidence to do for the Prosecution²²⁹. The balance achieved in the ICC Statute between the rights of the accused and the protection of victims is comprised in Article 68 (1) providing that these measures “*shall not be prejudicial to, or inconsistent with the rights of the accused and [of] a fair and impartial trial*”.²³⁰

In yet another ICTY case²³¹, where the prosecution admitted that it had been in possession of the archive sought during the trial but did not reveal this to the defence or the Trial Chamber, the defendants had sought prior to their trial and during the proceedings to gain access to information which they believed were in the hands of identified authorities of the former Yugoslavia which themselves claimed otherwise. During appeal it transpired that those particular documents were in fact in the possession of the prosecution. This case illustrated the disadvantages the accused faces by the fact that he does not know the scope of materials held by the prosecution and no obligation is imposed on the prosecutor to provide the accused with this information²³². Where such an obligation has been found to exist and has been violated by the Prosecution, the ICTY failed to impose sanctions²³³. Commenting on this case, an author suggested:

“To avoid this type of situation occurring in the future, one judge of the Tribunal has taken a more stringent approach to the issue of search and seizure warrants requested by the Office of the Prosecutor. He has attached

²²⁹ *Ibid.* See ICTY Rules of Procedure and Evidence, Rules 70 (B) and (F). Rule 70 (F) states that a Trial Chamber “*may order upon an application by the accused or defence council that, in the interest of justice, the provisions of this Rule shall apply mutatis mutandis to specific information in the possession of the accused*”.

²³⁰ See Amnesty International Public Report “*The International Criminal Court: Drafting Effective Rules of Procedure and Evidence Concerning Trial, Appeal and Review*”, 01 June 1999, available at www.amnesty.org/library/index/ENGIOR-400091999

²³¹ Prosecutor v Krdic and Cerkez, Case No. IT-95-14/2-A, “*Decision on Second Motion to Extend Time for Filing Appellant’s Brief*”, paras.9-10, 02 July 2001.

²³² *Op cit*, McIntyre, note 172, p.294.

²³³ See Prosecutor v Brdjanin and Talic, Case No. IT-99-36-T, in relation to disclosure of exculpatory evidence, “*Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved*”, 30 October 2002.

conditions to the prosecution's seizure of documents requiring the prosecution to submit to a judge of the Tribunal a list of all documents seized and to notify all prosecution teams of the seizure of the documents. However, this practice is far from uniform and until it so becomes, and a register of all documents in the hands of the prosecution has been established so that all parties are aware of what documents are held by the prosecution, problems similar to those outlined will continue to occur"²³⁴.

The Tribunal's rulings further reveal that there could be new facts, which, although not known to the Chamber at the time of a decision, may be known to the prosecution; disclosure of such evidence will only be considered in exceptional circumstances, if the accused can prove that there is a possibility of miscarriage of justice. Moreover, the defence must also prove that such evidence could have been a decisive factor in reaching the original decision²³⁵.

A further problem surrounding equality of arms in the disclosure of evidence is the gathering and admissibility of illegally obtained evidence.

One of the major issues arising out of mutual legal assistance agreements is the gathering of evidence in a foreign country²³⁶ and the admissibility of such evidence obtained in breach of foreign law²³⁷. For example, statements deemed to have been obtained as a result of torture should not be invoked as evidence in any proceedings. The ICC Statute provides in fact that "*any evidence obtained by means of violation of the Statute or internationally recognised human rights shall not be admissible*"²³⁸. In extradition proceedings, however,

²³⁴ *Supra*, note 235, p.294.

²³⁵ Prosecutor v Dusko Tadic, Case No. IT-94-I-A, Appeals Chamber Judgment (15 July 1999) para 55.

²³⁶ See for example *Ex parte Bennett* [1994] AC 42 and *R v Mullen* [1999] 2Cr App R 143.

²³⁷ *Supra* note 88, p.233.

²³⁸ ICC Article 69 (7). Also, Article 15 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment is on the one hand designed to deprive the practice of torture of any value when inflicted on a person for such purposes as obtaining from him or a third party information or confession; so statements obtained as a result of torture must be declared absolutely null. On the other hand, Article 15 imposes an absolute obligation on the courts and the authorities of the state in question to examine in an objective and fair manner all the elements needed to establish that the statement was obtained unlawfully.

it is traditionally necessary to establish whether torture is practiced in the requesting state²³⁹ and to look at the circumstances in which the statement issued has been obtained and whether statements obtained as a result of torture are customarily accepted by the courts of the requesting state²⁴⁰.

Intercepts have often presented admissibility difficulties. The issue has been addressed recently by the ICTY in the Milosevic case where it was said: “*The Tribunal has liberal rules regarding the admissibility of such material...In the pure common law system the question would be raised about the way in which the information was gathered, whether the wire tapes were done on court orders or not. This is done in order to protect the human rights of the accused as well as the jury from the possible manipulations of the prosecution*”²⁴¹.

In another case²⁴², the relevant national provisions had been taken into consideration, but the ICTY held that although the national law rendered illegally obtained evidence inadmissible, this did not preclude admissibility in the Tribunal under the Statute.²⁴³ Furthermore, the Tribunal held, relying on ECHR rulings²⁴⁴ that even if the evidence in question had been obtained illegally, its admission during criminal proceedings may not have necessarily interfered with the accused’s right to a fair trial.

²³⁹ See for example P. E. v France [2001], UN Doc. CAT-15/CAT-RP-108-9, Communication 193/2001.

²⁴⁰ No extradition to another State where there are substantial ground to believe that an act of torture has been committed. See for example UNHCHR Complaint No. 219/2002, G. K. v Switzerland and No.110/1998 Celia Nunez Chipana v Venezuela.

²⁴¹ The Prosecutor v Slobodan Milosevic, Case No. IT-02-54-T. See Trial Chamber III “*Final Decision on the Admissibility of Intercepted Communications*”, 14 June 2004.

²⁴² Prosecutor v Kordic and Cerkez, Case No., 02 February 2000, Transcript 13670.

²⁴³ See ICTY Rules of Procedure and Evidence, Rules 89 and 95.

²⁴⁴ Khan v United Kingdom (2001) 31 EHRR 45, para.40 where it was said that absence of a legal basis for interception of a conversation by means of a listening device installed on private property was a violation of ECHR Art.8 but the use of that evidence did not constitute a violation. Also, in Allan v United Kingdom, Judgment (05 November 2002) the ECHR considered Home Office Guidelines 1984 on the use of equipment in police surveillance operations which provide that: in each case, the authorising officer should satisfy himself that the following criteria are met: (1) the investigation concerns serious crime-normal methods of investigation must have been tried and failed, or from the nature of things, be unlikely to succeed if tried; (2) there must be good reason to think that the use of equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism; (3) use of equipment must be operationally feasible; (4) in judging how far the seriousness of the crime under investigation justifies the use of particular surveillance techniques, authorising officers should satisfy themselves that the degree of intrusion into the privacy of those affected is commensurate with the seriousness of the offence. See also P. J. and J. H. v United Kingdom (1998) N.44787/98.

In assessing whether intercepted evidence is admissible, the ICTY held that the correct balance should be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law. In the Brdjanin case²⁴⁵, the ICTY turned to the jurisprudence of national courts and found three approaches adopted in determining the admissibility of illegally obtained evidence:²⁴⁶ (1) the law itself may specifically provide for the automatic exclusion of any evidence which has been illegally obtained or otherwise inappropriately obtained; (2) the issue of exclusion or admission of such evidence may be left to the discretion of the judge who has the judicial duty of ensuring fairness to the accused. In Canada for instance “*the evidence will not be excluded because the initial violation is not serious because...the police relied in good faith on a statute that had not yet been found unconstitutional*”²⁴⁷; (3) the courts might concern themselves only with the quality of the evidence and not consider its provenance at all. The last approach is mostly a common law approach²⁴⁸.

The ICTY also reasoned, with regard to admissibility of illegally obtained evidence, that the drafters of the ICTY Rules chose not to set out a rule providing for automatic exclusion of evidence illegally or unlawfully obtained and opted instead to leave the matter of admissibility irrespective of its provenance to be dealt in accordance with ICTY Rules which provide in essence that the Tribunal shall not be bound by the national rules of evidence,²⁴⁹ that the Tribunal shall apply rules of evidence which best favour a fair determination of a case and are consistent with the purpose of the

²⁴⁵ Prosecutor v Brdjanin, Case No. IT-99-36, “*Decision on the Defence Objection to Intercept Evidence*”, 03 October 2003.

²⁴⁶ *Ibid* para28.

²⁴⁷ See R v Grant (1993) 84 C.C.C. (3d) 173 (S.C.C); for a similar decision see e.g. United States v Leon et al. [1984] 468 US 897 (1984), where the U.S. Supreme Court established that the only significant exception to the exclusionary rule may be relied upon if the police obtain a search warrant and the warrant is later found to be defective, in which case the evidence will not be excluded as long as the police relied on it in “*reasonable good faith*”. Generally, the exclusionary rule in the U.S. is mandatory and not subject to the discretion of the trial judge.

²⁴⁸ *Loc cit*, note 250.

²⁴⁹ ICTY RPE, Rule 89 (A).

Statute²⁵⁰, that the Tribunal may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial²⁵¹ and not admit evidence if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings²⁵².

In implementing this provision, the Norwegian ICC Act sets out that the king may grant leave for the Court to receive testimony about a matter that is being kept secret in the interests of national security or relations with a foreign state²⁵³. Moreover, duty to secrecy or other legislation or instruments shall not preclude a person from testifying before the Court is so far as the Court so orders²⁵⁴. According to a survey conducted by the European Commission²⁵⁵ in 2003, national rules of criminal procedure are more protective of the rights of the accused than is required by Article 6(1) of the European Convention on Human Rights²⁵⁶. Only in seven States (Austria, Denmark, Finland, France²⁵⁷, Germany²⁵⁸, Sweden and the United Kingdom) is evidence obtained in violation of the right to respect for private life in principle admissible in criminal proceedings. In ten other countries surveyed (Belgium, Cyprus, Spain, Greece, Ireland, Italy, Luxemburg, Malta, the Netherlands and Portugal²⁵⁹) such evidence will not usually be admissible²⁶⁰.

²⁵⁰ *Ibid.* Rule 89 (B).

²⁵¹ *Ibid.* Rule 89 (D).

²⁵² *Ibid.* Rule 95.

²⁵³ Sec.7 of Act.No.65 (July 12 2001) relating to the implementation into Norwegian law of the Statute of the International Criminal Court of 17 July 1998.

²⁵⁴ *Ibid.* This Section goes on to state that these provisions apply to the surrender of a document, other objects or information even when subject to secrecy.

²⁵⁵ European Commission, “*Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union*” 30 November 2003, prepared by the European Union Network of Independent Experts on Fundamental Rights, p.6 available at http://europa.eu.int/comm/justice_home/cfr_cdf/doc/avis/2003_3_en.pdf

²⁵⁶ For an early case concluding that certain illegally obtained evidence did not breach Art.6 (1) see e.g. *Shenk v Switzerland*, 13 EHRR 242 (12/07/1988), No.171.

²⁵⁷ See French Penal Code (CCP) Art.171 providing that the exclusionary rule will be triggered only when the violations are considered to have breached significant portions of the Code or other laws related to criminal procedure. For a full discussion see Frase R. S., “*France*” in Bradley C. M. (ed.) “*Criminal Procedure-A Worldwide Study*” 1999, 143-155.

²⁵⁸ In German criminal procedure law there is no exclusionary rule which renders illegally obtained evidence inadmissible. Under Sec. 136 (3) of the 2002 Criminal Code only statements obtained by violence, hypnosis or illegal threats will be inadmissible.

²⁵⁹ See also e.g. The Canada Act 1982 (Part I), Sec. 24 (2) provides that evidence obtained as a result of an illegal police search or seizure of a suspect must be barred from that suspect’s

3.6 Conclusion

National judicial organs through which requests of the Court are put into effect play a crucial role in guaranteeing the fundamental rights of individuals; in many States, pre-trial safeguards are part of constitutional requirements and sometimes these national safeguards might be greater than those existing in international law. From this perspective the appropriateness of the direct application of standards established by the ICC Statute and the Rules of Procedure and Evidence such as those relating for instance to the determination of equality of arms and appropriateness of illegally obtained evidence in pre-trial proceedings are questionable. Application of the equality of arms principle in criminal proceedings should, at all stages, be inclined in favour of the Defence acquiring parity with the Prosecution to minimise the risks of carrying out miscarriages of justice. In requesting the Court to defer proceedings, the interested State should take into consideration the overall purposes of the Court, the principle of complementarity and most importantly the objective of producing the most appropriate jurisdiction for trying the accused. Consideration of the fact that the investigation process and the gathering of evidence might well take place before an alleged criminal is identified is fundamental to the timely assertion of jurisdiction and the observance of the equality of arms doctrine.

When making a decision on whether or not to initiate criminal proceedings, the ICC Prosecutor is not guided merely by legal criteria. Under the Statute, the Prosecutor must assess the political convenience of doing so with a view to satisfying the ‘interests of justice’²⁶¹. The jurisdictional dilemma stems from conflicting needs of the ICC to ensure international justice by punishing violations of international crimes and the interests of the States in retaining

criminal trial and also that the suspect has various remedies available to him such as stay of proceedings, sentence reduction and damage awards from civil courts.

²⁶⁰ *Loc cit*, note 259.

²⁶¹ See ICC Statute Art.53 (2) (c).

discretion regarding methods of accountability, in particular when the lawfulness of their official acts is in dispute. Ultimately, the Prosecutor enjoys a degree of political discretion which must be reconciled with the legal objectives of justice. By claiming jurisdiction or requesting the Court to refer proceedings to a State, national bodies may protect the interests of individuals against arbitrary political considerations of the Court²⁶². In fact, absent a clear definition in the Statute or the Rules of what specifically these interests of justice are, the Prosecutor possess a far-reaching political discretion in deciding whether or not to proceed with an investigation or prosecution²⁶³.

The principle of abuse of rights emanating from a failure to exercise one's duties in good faith²⁶⁴ and in observing the rights of the accused persons is applicable to both States and the International Criminal Court. From comparisons made between legislations and practices of numerous states it is evident that rules of criminal justice procedure diverge in one or more aspects. Whether a domestic trial meets international standards of what constitutes a fair trial will depend in many cases on how closely the national codes of criminal procedure are followed. On the other hand, international rules of criminal procedure both under the ICC Statute and human rights fail to comprehensively establish rules that guarantee universal fundamental rights of suspects and accused persons in pre-trial proceedings.

²⁶² Diez Picazo, L.M., “*El poder de acusar*” *Ministerio Fiscal y Constitucionalismo*” 15 (2000), Ariel, Barcelona.

²⁶³ *Op cit*, note 184, Schefer D. J., “*The Prosecutor undoubtedly is going to have to become not only the receiver of an enormous amount of information in this capacity, he will have to decide and he will have to make judgments as to what he pursues and what does not pursue for investigative purposes. In the end, those kind of judgments by the prosecutor will inevitably be political judgments because he is going to have to say no to a lot of complaints, a lot of individuals, a lot of organisations that believe very strongly that crimes have been committed, but he is going to have to say no to them. When he says no to them and yes to others and he is deluged with these, he may find that he is making some political decisions*”, p.3.

²⁶⁴ See e.g. Lockerbie Case (Case Concerning Questions of Interpretations and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie - Libya v United States; Libya v United Kingdom, Request for the Indication of Provisional Measures) ICJ Rep.1992, p.114.

Chapter 4

International Criminal Court and Article 98 Immunity Agreements

4.1 Introduction

The debate on non-surrender agreements (or Bilateral Immunity Agreements-BIAs) and their effects on the International Criminal Court will be approached from both legal and political perspectives. The legal analysis leads to questioning and understanding of whether these agreements lie within the parameters of ICC Article 98 (2) on cooperation with respect to waiver of immunity and consent to surrender. The political conceptualisation of immunity agreements on the other hand allows appreciation of the policies which determine how and to what extent these agreements will affect the proper functioning of the ICC, affecting therefore the rights of the accused, and to appreciate the still uncertain and dubious relationship between the ICC and the Security Council which is unavoidably political rather than legal in nature.

On one hand the U.S. administration moved towards persuading States to enter into impunity agreements, which seek to prevent States from surrendering US nationals accused of genocide, crimes against humanity or war crimes to the International Criminal Court. Simultaneously, it achieved a Security Council resolution in July 2002 seeking to invoke Article 16 of the Rome Statute deferring any investigation or prosecution by the International Criminal Court of nationals of States Non-Parties for acts or omissions in connection with a UN established or authorized operation. In order to evaluate the relationship between the International Criminal Court and the Security Council, as well as the Council's role in interpreting, applying and even amending the terms of the Rome Treaty, I will be looking at the Security Council's recent resolutions on peacekeeping missions; as it will be shown, in its resolutions, the Council has incorporated the wording of U.S. immunity agreements and therefore advanced through Chapter VII of the U.N. Charter U.S. interests and policies which defeat the object and purpose as well as the credibility and authority of the ICC.

The United States had initially encountered widespread opposition and of those States who signed the agreements many have indicated that their governments will further study the implications and then ratify them. Romania, for example, party to the ICC Statute, has confirmed that the signed agreements will go to the national parliament for review and that Romania will amend the agreement so that it conforms to the EU “guiding principles”¹ on immunity agreements². Some of the States Non-Parties have revealed that it would be premature to sign such agreements with the United States. Japan and the Republic of Korea have responded to Washington’s pressures by concluding that, for the time being, they would not consider such agreements until after they have ratified the ICC Statute. Israel, which like the U.S. unsigned the Rome Statute, concluded a reciprocal immunity agreement (unlike the Romanian one) with the US. This is not surprising as Israel is considering enacting a law that would criminalize cooperation with the ICC, including the prohibition on testimony against the state of Israel by Israeli witnesses.

As of 20 May 2005 the U.S. State Department reported 100 ICC immunity agreements. At the same time, with the ratification of the ICC Statute by the Dominican Republic, ICC ratifications reached 99. Governments, as well as international law experts and NGOs reason that the United States is misapplying ICC Article 98 on which these agreements are founded. Of these 100 agreements, less than a third have been ratified by parliament. Those that have not been properly ratified but constitute executive agreements have been contested, as it will be shown with the case of the Republic of the Philippines, as being unconstitutional and requiring parliamentary approval.

Recently, the parallel or hierarchical relationship of domestic and international jurisdictions has been questioned and redefined through the jurisprudence of the international ad hoc tribunals (mainly the ICTY and the ICTR) and is yet to

¹ Council of the European Union, “*Council Conclusions and EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court*” 30 September 2002, 12488/1/02 REV 1/LIMITE.

² The justification for signing was as expressed by the Romanian ambassador in Washington, “a natural extension of SOFA” signed last year.

be seen how the ICC will deal in practice with competing jurisdictional requests. The discussion on non-surrender agreements will, in this context, be illustrative of the problematic nature of multiple legal regimes. It follows that the theoretical perspective from which I will conduct this discussion is that there are multiple legal regimes as opposed to the proposition that one legal system is superior to or subordinate to another one. Three main questions arise in this regard: a) whether immunity agreements as proposed by the United States are compatible with the existing obligations of ICC States Parties and States signatories; b) how will the ICC deal with the terms of such agreements and c) what law, under the complementarity principle, is likely to decide which of the conflicting obligations under the ICC Statute and an immunity agreement should prevail. The analysis of the latter will elucidate that there is no conclusive answer, which in turn will lead to a conclusion that ICC law will be applied inconsistently and that a significant number of States Parties' national constitutional considerations outweigh the object and purpose of the ICC Statute.

I will also consider the reasoning behind the United States immunity agreements 'movement', through its legislation and policies. This will help understand how the United States as well as States that are parties to the immunity agreements justify such contracts as to their necessity and most importantly it will illustrate how their existence has created diverse degrees of compliance with the Rome Treaty.

4.2 US objections to the ICC Treaty

The U.S. position towards the ICC reflects largely the stance of the majority of ICC Non-Party States. The U.S. opposition to the ICC Treaty is premised

mainly on the following³: (a) jurisdiction over nationals of Non-Parties; (b) ambiguities as to the roles of the Security Council; (c) the ‘unaccountable Prosecutor’ and (d) lack of due process guarantees.

a) One of the major defects attributed to the ICC by the United States is that it may be exploited by some countries to bring trumped-up charges against American citizens who, due to the prominent role played by the U.S. in world affairs, may have greater exposure to such charges than citizens of other countries. Although complementarity ensures, in principle at least, that the Court does not assume jurisdiction over a case involving an American citizen, unless the U.S. is unwilling or unable to genuinely investigate the case itself, numerous U.S. vociferous opponents of the ICC express concern that the Court will be empowered to second-guess a valid determination by U.S. prosecutors to terminate an investigation or decline the prosecution of a person⁴.

Whilst the right of the United States not to ratify the ICC Treaty must be recognised and accepted, their fears have been perceived as misguided. Canada for example, recognized that the U.S. had strong concerns about the ICC, but concluded the ICC Statute provides, in their view, extensive concessions and safeguards to preclude frivolous prosecutions⁵. On the last day of the Rome Conference, the United States sought to exclude from ICC jurisdiction acts by nationals of a State Non-Party committed on the territory of a State Party unless the Non-Party State accepted the Court’s jurisdiction⁶. It is a general principle of treaty law that only nations that ratify treaties are bound to observe

³ Elsea J., “*US Policy Regarding the International Criminal Court*” American Law Division Update (03 September 2002).

⁴ See e.g. The International Centre for Criminal Law Reform and Criminal Justice Policy, “*International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*”, p.13, March 2003.

⁵ Statement by H. E. Mr. Heinbecker P., Ambassador and Permanent Representative of Canada to the United Nations at the 10th session of the Preparatory Commission for the International Criminal Court, 03 July 2002. Liechtenstein also stated that the concerns regarding frivolous and politically motivated investigations are addressed in a thorough and fully satisfactory manner and that there are no substantive, only political and ideological reasons to amend any of the ICC Statute provisions, Statement by Mr. Wenaweser C., Deputy Permanent Representative of the Principality of Liechtenstein to the United Nations, 03 July 2002.

⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/ CONF.183/C.1/L.90, 17 July 1998.

them; some purposive interpretations of the ICC Statute advance the claim that the Court may indeed subject to its jurisdiction and therefore bind citizens of Non-Party nations. The ICC's most ardent supporters maintain in fact that the Court, through delegated jurisdiction (see previous chapter) may extend its competence over persons of Non-Party States⁷. This contention is premature and dubious if it is considered that individuals of the highest rank may be charged for conduct relating to the execution of official policy; here the difference between asserting jurisdiction over individuals and over nations becomes less clear. It would be hasty to suggest that the ICC is empowered to scrutinise laws and policies of States Non-Parties under which individuals act upon⁸. Even if these policies were in breach of jus cogens norms, it would be for the Security Council and not the ICC to look into a particular situation and launch any necessary investigations into any possible breaches of peace and security.

As seen in Chapter 1, the present study asserts that universal jurisdiction cannot be derived from the ICC Statute. However, whether universal jurisdiction, in its absolute form, in truth exists in practice, and outside the Statute, remains a valid, highly debatable subject. Actual state practice does not provide as much support for the concept as many ICC supporters may claim⁹. There are countries that have introduced universal jurisdiction legislations, albeit limited ones that take into account the rules of international and customary law governing immunity and require personal or territorial connection to the country in question. Belgium for example, had to abolish in 2003 its 'Genocide Act'¹⁰, and particularly its section on 'absolute' universal jurisdiction, after the International Court of Justice ruled in 2002 that Belgium violated international law by allowing a Belgian judge to issue and circulate an arrest warrant in absentia against the then Foreign Minister of the Democratic Republic of Congo. The ICJ held in fact that Belgium failed to respect immunity from criminal jurisdiction and the inviolability that the Minister

⁷ Wedgwood R., "*The United States and the International Criminal Court: The Irresolution of Rome*", 64 Law & Contemporary Problems 193, 199 (2001).

⁸ *Ibid.*

⁹ See e.g. China, A/CONF.183/13, p.75, paras35 and 37.

¹⁰ Law relating to the repression of the serious violations of humanitarian international law, No.1999-03-23.

enjoyed under customary international law¹¹. In the United States the War Crimes Act of 1996 covers specified war crimes and the legislation is limited to U.S. nationals or to situations where either the perpetrator or the victim of the act is a member of U.S. armed forces. The Act does not therefore provide the U.S. with the kind of universal jurisdiction over grave breaches required by the Geneva Conventions¹².

As Wedgwood R. points out, “*there is no ordinary precedent for delegating national criminal jurisdiction to another tribunal, international or national, without the consent of the affected states, except in the aftermath of international belligerency*”¹³. As previously explained, during the Rome Conference universal jurisdiction had been expressly rejected by a majority of States and the principle therefore does not form part of the ICC Statute (see Chapter 1). An example of this lack of support is the Swedish law on Cooperation with the ICC providing that:

*“The Government may permit a person who has been surrendered to the International Criminal Court to be transferred from the Court to another State for prosecution...If consent is not given...the Government shall request that the person surrendered to the International Criminal Court shall be returned to Sweden”*¹⁴.

The question as to how the emergence of ICC jurisdiction is determined and how the investigations are triggered has not so far been eradicated. Three options have been put forward¹⁵: (a) the ICC will exercise jurisdiction only with the consent of the States competent to investigate; (b) the ICC will

¹¹ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002, p.26, para.70.

¹² In adopting the Act, the House Committee of the Judiciary decided that “*Expansion of [the draft legislation] to include universal jurisdiction would be unwise [sic] at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight...There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunals*”, H.R. Rep. No.104-698, at 8 (1996).

¹³ *Op cit*, Wedgwood, note 6, p.199.

¹⁴ Sec.10 Cooperation with International Criminal Court Act (2002:329).

¹⁵ Solera O., “*Complementary Jurisdiction and International Criminal Justice*”, International Review of the Red Cross, 2003, N.845, pp. 145-171.

determine its own jurisdiction according to a series of criteria expressly laid down in the Statute; and (c) the ICC would be free to establish its own jurisdiction within flexible parameters.

India, for example, justified its non-ratification of the Rome Treaty by expressing concerns that the Statute gives the UN Security Council a role that violates international law and by observing that the Security Council has the power to refer a case to the ICC, the power to block ICC proceedings and the power to bind Non-Party States¹⁶, while some Security Council members may have no intention to become States Parties to the Statute¹⁷. India was also concerned that the Statute may be interpreted as implicitly providing for delegated universal jurisdiction¹⁸, making no distinction between States Parties and States non-Parties¹⁹. States that have already ratified the Statute accept the criminal prohibition vis-à-vis the acts that constitute crimes within the ICC Statute. For Non-Parties intending to ratify the ICC Treaty in the future, complementarity jurisdiction will come into force two months after deposit of the instrument of ratification or accession. Therefore, criminal and procedural laws should be enacted and entered into force within two months of ratification or accession.

(b) In an interview, the U.S undersecretary Grossman said:²⁰

¹⁶ During Treaty negotiations proposed that Draft Statute Art. 86 (7), which read in part “*or where the Security Council referred the matter to the Security Council referred the matter to the Court, to the Security Council*”, UN Doc. A/Conf.183/C.1/L.80, 15 July 1998, p.335.

Another example is China that could not accept the universal jurisdiction of the ICC without State consent. In its view, the power of the Prosecutor should be based on State consent and the ICC Statute should also be adopted by consensus, A/CNF.183/13 (II), p.188, para.37.

¹⁷ K. Kittichaisaree, “*International Criminal Law*” (2002) p.36.

¹⁸ For example, Art. 2 of the 2004 Constitution of the Republic of Croatia specifically states that “*sovereignty is untransferable*”.

¹⁹ ICC Statute also failed to incorporate India’s proposal to Articles 5 and 8 (5) to proscribe as a war crime the use of weapons of mass destruction, such as ‘*nuclear, chemical and biological weapons*’, see India: proposal reading the Bureau proposal in document A/CONF.183/C.1/L.59, UN Doc. A/CONF.183/C.1/L.72, 15 July 1998, p.248 and A/CONF.183/C.1/L.94, 17 July 1998, p.250.

²⁰ Interview by M. Molinari of Marc Grossman, U.S. Under Secretary for Political Affairs, La Stampa, August 29, 2002; In 1998 Ambassador D. J. Scheffer cited a situation of Chorrillo, Panama (December 1989 invasion, “Operation Restore Hope” in an effort to capture Manuel Noriega) as an example of potential abuse of the U.S. in the ICC- see “*Challenges Confronting International Justice Issues*”, 4 New England international and Comparative Law Annual 1998.

“We believe that the ICC lacks any kind of control, which is much different from the judicial systems in our country. This Court risks politization, it risks raising unjustified cases, it risks putting the U.S. on the defendant’s bench. We are great supporters of international tribunals to punish crimes against humanity, as those established in Rwanda and ex Yugoslavia but a tribunal must be created by the Security Council, so that it can be held accountable”²¹.

Interference by the Security Council with the work of the ICC was specifically what the majority of states objected to during the drafting of the Statute. In complete contrast to the U.S. proposition on the proper role of the Security Council in the work of the ICC, Mexico even suggested that the use of words ‘Security Council’ in any of the Statute’s articles should be replaced with *“the relevant principal organs of the United Nations”*²², suggesting delegation rather than centralisation of power within the U.N. system.

In March 2005, acting under Chapter VII of the UN Charter, the Security Council passed a resolution in which it referred the situation in Darfur²³ to the ICC²⁴. To the disappointment of many ICC States Parties, this SC Resolution recalls Article 16 of the ICC Statute, taking note of the existence of Article 98 (2) agreements²⁵. The Resolution in fact reads: *“the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor...while recognizing that States non party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international*

²¹ See e.g. Cassese A., *“L’orgoglio americano che frena il tribunale mondiale”*, La Repubblica, 17 July 2003, p.17.

²² Doc. A/CONF.183/C.1/L.81, 15 July 1998 in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Rec., Vol. III, p.249.

²³ As of 01 July 2002.

²⁴ UN Security Council Res. 1593 (2005), 5158th meeting, 31 March 2005, S/RES/1593 (2005).

²⁵ Ibid. At the adoption of the Resolution Denmark stressed that reference to such agreements is purely factual. However, Denmark did not comment on the operative paragraph 6, Ms Loj, S/PV.5158, p.6

organizations to cooperate fully”²⁶. By incorporating the exact wording of the U.S. immunity agreements, the Security Council regrettably decided that “*nationals, current or former officials or personnel from contributing State outside Sudan which is not party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions...unless such exclusive jurisdiction has been expressly waived by the contributing State*”²⁷. The United States abstained from the vote as it fundamentally objected to the Council’s decision to refer the situation to the Court, but at the same it did not oppose the Resolution as it was satisfied with the protection from investigation and prosecution it achieved²⁸. It also emphasised that this protection is precedent-setting, as the Resolution clearly acknowledges the concerns of States Non-Parties to the Rome Treaty and recognizes that persons from those States should not be vulnerable to investigation or prosecution by the ICC, without express consent of those States or the Security Council²⁹. The United States actually expressed the expectation that by referring a situation to the ICC, the Security Council will perform its ‘*appropriate function*’ and exercise “*firm political oversight of the process*”³⁰. The Philippines, although party to an immunity agreement with the United States, expressed the belief that the ICC may be a casualty of Resolution 1593. The country’s U.N representative stated that “*operative paragraph 6 of the resolution is killing its credibility –softly, perhaps, but killing it nevertheless*”³¹. Notwithstanding Security Council powers to exclude a group of persons from criminal investigations, one of the important advantages of Security Council referral is that the Court’s jurisdiction over persons and evidence will not then depend upon the ratification by any given state³².

²⁶ UN Security Council Res. 1593 (2005), 5158th meeting, 31 March 2005, S/RES/1593 (2005), para.2.

²⁷ *Id.*, para. 6.

²⁸ Mrs Patterson (United States of America), Security Council 5158th meeting, 31 March 2005, S/PV.5158.

²⁹ *Ibid.*

³⁰ *Id.*

³¹ Statement by Mr. Baja (Philippines), UN Security Council Res. 1593 (2005), 5158th meeting, 31 March 2005, S/RES/1593 (2005)

³² Goldstone R. J. and Simpson J., “*Evaluating the Role of the International Court as a Legal Response to Terrorism*”, Harvard Human Rights Journal, Vol.16, 2003, p.22; see also Wasek-Wiaderek M., “*The Principle of Equality of Arms in Criminal Procedure Under Article 6 of*

For the majority of States, the Security Council's potential control of ICC criminal proceedings was seen as a crucial element in the establishment of the ICC. Because of the permanent status at the Council which endows it with a veto, the United States³³, Russia, France to a lesser extent, and China took a position originally that cases should only be referred to the ICC by the Security Council, thereby limiting the powers of the Court. This approach would have required prior approval by the Council before the ICC Prosecutor could proceed with an investigation and prosecution. In fact, the first draft ICC Statute provided that "*No prosecution may be commenced...arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides*"³⁴. In effect, this is what the United States has achieved through the Darfur Resolution, as ICC decisions to initiate prosecution may be vetoed by just one permanent member. Moreover, the present text of ICC Statute Art.5 (2) provides that the definition on the crime of aggression shall be adopted and conditions be set out "*under which the Court shall exercise jurisdiction with respect to that crime...[The] provision shall be consistent with the relevant provisions of the Charter of the United Nations*". Such wording may be construed as a direct concession to the Security Council's responsibility and right to act and make determinations in cases involving aggression³⁵. The ICC Statute empowers the Court to define and punish the crime of "aggression" which is solely the prerogative of the Security Council under the UN Charter. States Parties will have the opportunity to vote on definitions of aggression after the Treaty has been in effect for seven years, and such definitions will have to be in accordance with the UN Charter which again, is in line with the approach of preserving the role

the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View" (2001).

³³ Ambassador D. J. Scheffer said that the ICC "has to be a court that recognises political realities. It has to be a court that does not contradict, contravene or override the authority of the Security Council to deal with conflict situations", 19th Annual United Nations Parliamentary Forum, Parliamentarians for Global Action, "*Crafting Lasting Peace*", 09 October 1997.

³⁴ 1994 ILC Draft Statute, Art. 23(3).

³⁵ See e.g. Sadat L. N. and Carden S. R., "*The New International Criminal Court: An Uneasy Revolution*" March 2000, *Georgetown Law Journal*, pp.381-459.

of the Security Council³⁶. It would follow that the ICC is merely providing a forum for trying individuals accused of committing ‘aggression’ under international law³⁷. Nonetheless, the Court and the Security Council are likely to act together, not one to the detriment of the other as “*peacekeeping operations and the International Criminal Court are two important pillars for the realization of United Nations goals, and we have to make sure that both instruments work in a coherent and mutually reinforcing manner. Maintenance of international peace and security and the repression of serious crimes cannot be viewed as conflicting objectives*”³⁸.

(c) A further major U.S. objection to the Rome Treaty also relates to the proprio motu, self-initiating Prosecutor, who, as already described, on his or her authority and with the consent of two judges, can initiate investigations and prosecutions without referral to the Court of a situation either by a government that is a party to the Treaty, or by the Security Council³⁹.

The majority of States at the Rome Conference were in favour of a proprio motu Prosecutor. Norway for example, perceived that the ‘supervisory’ role of the Pre-Trial Chamber was a sufficient safeguard against politically motivated, or otherwise inappropriate investigations, and that such a role is a particularly significant step forward, compared to the Statutes of the existing ad hoc Tribunals⁴⁰. According to the U.S. stance, this is not sufficient: “*Even if he (the Prosecutor) has to go to the Pre-Trial Chamber and get the approval of at least two of three judges in the Pre-Trial Chamber, in the end you have three*

³⁶ For a discussion on crime of aggression under the ICC Statute see Kress C., “*The German Federal Prosecutor’s Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq*”, 2 Journal of International Criminal Justice 1, 2004, 245-264.

³⁷ Similarly, the General Assembly adopted a Resolution in 1974 (3314 (XXIX), 2319 plenary meeting) which enumerated the acts that constitute aggression but it left the determination to the Security Council (Art.4). Also, opponents of the ICC may argue that the lack of agreement among nations as to the definition of aggression suggests that any definition adopted only by a majority of member states of the ICC may be sufficiently grounded in international law to be binding as *jus cogens*.

³⁸ Statement by Ms Viotti M .L. (Brazil), SC 4772nd Meeting, 12 June 2003, Press Release SC/7789.

³⁹ ICC Art. 53 (Initiation of an Investigation); Art. 57 (Functions and powers of the Pre-Trial Prosecutor).

⁴⁰ See Statement by Ms Johnson (Norway), A/CONF.183/13, p.66, para.22; see also Mr. Axworthy (Canada), p.68, para.65; Egypt, p.69, para.77.

individuals making that decision”⁴¹. Moreover, maintaining that the fundamental principle of accountability should be at the core of referrals to the Court: “*The value of having a government refer it (situation) to it or the Security Council refer it is they are accountable to somebody. They are accountable either to their people...for doing so, or the Security Council is accountable to the United Nations system*”⁴². In contrast, the Republic of Korea stated that the Prosecutor must enjoy an ex officio authority to initiate investigations; otherwise the effectiveness of the Court would be seriously eroded and the Security Council might not be able to raise cases owing to the exercise of the veto⁴³. Similarly, Brazil was in favour of the ex officio Prosecutor but it emphasised the need for adequate safeguards against the Prosecutor’s discretion⁴⁴. Some implementing States have extended, rather than limited, the means of cooperation with the ICC Prosecutor. The South African International Criminal Court Bill (2001) for example, also provides that “*The President, as head of the national executive, may, on such conditions as he or she sees fit, enter into any agreement with the Court, including any agreement relating to the provision of assistance to the Court, and he or she may agree to any amendment or revocation of such agreement*”⁴⁵.

The U.S. strongly objected to such a role of the Prosecutor, because of a concern that this would encourage overwhelming the Court with complaints and risk diversion of its resources, as well as embroiling the Court in ‘*controversy, political decision making, and confusion*’⁴⁶. Part of the concern is that conferring jurisdiction to the Court in this way may seriously undermine essential national and transnational efforts in the fight against the crimes under the Statute. From the American stance, the problem is not prosecution⁴⁷, but

⁴¹ Scheffer D. J. at the Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, “*Is a U.N. International Criminal Court in the U.S. National Interest*”, 105th Congress, Second Session, 23 July 1998, S. Hrg. 105-674, p.21.

⁴² *Ibid.*

⁴³ Mr. Chung Tae-ik (Republic of Korea), A.CONF.183/13, p.69, para.83.

⁴⁴ Brazil, A/CONF.183/13, p.75, para45.

⁴⁵ South African International Criminal Court Act (2001), Sec.32 (1).

⁴⁶ *Supra* note 41, p.13.

⁴⁷ The U.S. funded and supported 2003 Iraqi Special Tribunal Statute provides for an ex officio Investigative Judge (Art.18 (2)).

rather investigation⁴⁸. Crimes under the ICC Statute require an ongoing law enforcement effort against criminal organizations and patterns of crime with police and intelligence resources; the Court will not be equipped effectively to investigate and prosecute these crimes⁴⁹. Also, launching massive criminal investigations can, according to the U.S. position, have an enormous political impact as a “*zealous independent prosecutor can have a dramatic impact simply by calling witnesses and gathering documents, without ever bringing proper charges*”⁵⁰. Some States have addressed this issue in their ICC implementing legislations. For example, the Swedish law on Cooperation with the ICC provides that in a matter concerning surrender to the ICC, compulsory measures may be used without a special investigation, but there must be evidence supporting the fact that the person subject to the application has committed the alleged crime⁵¹.

The Yugoslav and Rwandan Tribunals reveal some issues posed by the ‘unaccountable’ prosecutorial discretion. Over the years, these Tribunals have been confronted with credibility issues by failing to adopt public regulations, specifying the parameters of prosecutorial discretion, especially with discretion regarding decisions to initiate investigations⁵². Prosecutorial discretion may be limited through customary international law as illustrated in the ICTY Simic case⁵³ where the Trial Chamber refused to exercise its discretionary power to subpoena a witness of the International Committee of the Red Cross⁵⁴. However, the ICTY case of the NATO bombing campaign against the Federal Republic of Yugoslavia demonstrates serious lacunae in

⁴⁸ *Ibid.* p.14.

⁴⁹ *Id.*

⁵⁰ *Id.*, Statement by Bolton J. R., p.61; see e.g. The Statute of the Iraqi Special Tribunal 2003 which provides that it is the investigative judge and not the prosecutor who can act ex officio and obtain or receive information from any source, particularly from the police and governmental organisations (Art.18 (a)) whereas the Prosecutor shall act independently and shall not seek or receive instructions from any Governmental Department or from any other source (Art.8 (b)).

⁵¹ Sec.5 of the 2002 Cooperation with the International Criminal Court Act (2002:329).

⁵² See Regulation No.1/1994, as amended on 17 May 1995, “*Prosecutor’s Policy on Nolle Prosequi of Accomplices*”, in ICTY Annual Reports.

⁵³ Simic et al., IT-95-9-PT, Trial Chamber, 27 July 1999, para.42.

⁵⁴ Discussed in Chapter 3.

prosecutorial independence and transparency⁵⁵. In 2002, the ICTY Prosecutor confirmed to the Security Council that there was no basis for opening an investigation into allegations that NATO personnel and leaders had committed war crimes during the alliance's air campaign against the Federal Republic of Yugoslavia⁵⁶. This conclusion raised serious concerns about the Prosecutor's political impartiality⁵⁷ and the "*use of double standards in the exercise of discretion when applied to 'friendly' powers*"⁵⁸. In determining whether there was a basis to proceed with an investigation, the ICTY Prosecutor adopted the ICC model⁵⁹ and disclosed the factors she had considered in her decision⁶⁰. Reasons for not investigating were based on the fact that either the law is not sufficiently clear⁶¹ or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against less ranking persons for particularly heinous offences⁶². These two reasons raise serious questions of credibility for the ICTY, and yet this is the kind of international court that the U.S. supports and the type of legal reasoning and legal justice it promotes and ultimately, and most importantly, enforces through the Security Council. After the adoption of Resolution 1422 (2002). UN Secretary General, Kofi Annan even issued assurances to the U.S. that its nationals would not be subject to ICC jurisdiction. He suggested that the "*United States at the present juncture, relies on the fact that the jurisdiction of the ICC, as a matter of law, is overtaken by the jurisdiction of the International Tribunal for the Former Yugoslavia. In reality, the situation with respect to international criminal jurisdiction in the territory of the former*

⁵⁵ "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia", 13 June 2000, 39 ILM (2000).

⁵⁶ *Supra* note 40, p. 91.

⁵⁷ *Op cit*, Kress, note 35, p.251.

⁵⁸ Cote L., "*Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*", 3 Journal of International Criminal Justice 2005, p.180.

⁵⁹ Namely ICC Art.18 which provides that the Prosecutor shall initiate investigations, assess the information received and decide whether there is sufficient basis to proceed.

⁶⁰ ICTY Statute does not provide for any judicial control at this stage.

⁶¹ See Ronzitti N., "*Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against Federal Republic of Yugoslavia acceptable?*"

⁸² *Revue Internationale de la Croix-Rouge*, 2000.

⁶² *Op cit*, note 54, para. 90.

*Socialist Federal Republic of Yugoslavia is the same after 01 July 2002, as before that date*⁶³.

In relation to the ad hoc tribunals, even though the relevant Statutes (e.g. Article 29 ICTY) suggest States should cooperate with the Tribunal without undue delay, the implementation of this provision is not uncontested. For example, Article 11 of the Italian Decree-Law No. 544 on Cooperation with the ICTY provides that the final decision on surrender rests with the Minister of Justice⁶⁴. Surrender to the Tribunal may be refused on any of the following grounds (1) the Tribunal has not issued a warrant of arrest; (2) the identity of the accused has not been established; (3) the fact for which the surrender is requested does not fall within the temporal and territorial jurisdiction of the Tribunal; (4) a final judgement was entered against the person for the same facts.

The third ground raises the question of the competence of a national court to pass judgment or otherwise the jurisdiction of the Tribunal, and the last condition is inconsistent with the principle of the primacy of the Tribunal. On the other hand, the Spanish Organization Law on Cooperation with the International Tribunal⁶⁵ represents and foresees a simplified procedure for complying with requests from the Tribunal for the surrender of accused persons without the need for formal extradition proceedings.

The ICC Statute, unlike the ICTY and ICTR, has specific provisions regarding the apprehension of accused persons; the ICC has the power to issue “requests” for cooperation on arrest and surrender with which States must comply. However, as Knoops outlines:⁶⁶

⁶³ Letter from UN Secretary General, Kofi Annan, to US Secretary of State Colin Powell, 03 July 2002, available at <http://www.globalpolicy.org/intljustice/icc/crisis/0703annan.htm>

⁶⁴ For example, Art. 13 of Slovenian Law on Cooperation with the ICC (O Sodelovanju med Republiko Slovenijo in Mednarodnim Kazenskim Sodiscem/700-01/02-69/1) 2002 provides that it is the Supreme Court, composed of five judges, that decides on surrender of persons.

⁶⁵ Act N.15/1994, Art.6.

⁶⁶ Knoops G-J., “*Surrendering to International Criminal Courts: Contemporary Practice and Procedure*” (2002) p.350.

“This structure, far beyond international judicial barriers, contradicts the naturalness of the legal authority of the ICC orders. It must be recalled that neither the ICTY and the ICTR Statutes nor the Rome Statute include an operative article dealing with the important issue of auctoritas rei indicatae, i.e., the power and executability of an irrevocable judicial decision in public law generally. Yet this issue is a prerequisite for the assessment of State responsibility with regard to surrender requests of the international Court”.

As already mentioned, the very Statute of the ICC, in its Article 17, defers jurisdiction to domestic courts, stipulating inadmissibility of a case when the latter is being investigated or prosecuted by a State with jurisdiction over it, or when the accused has already been tried for conduct which is the subject of complaint. On the other hand, however, the effect of Articles 25 and 103 of the UN Charter allocate respectively binding force to decisions of the Security Council, notwithstanding the existence of municipal law to the contrary and superior force of obligations under the Charter over conflicting treaties. As discussed in previous chapters, the extent to which municipal courts can apply international law depends, especially in dualist countries, on how the law is incorporated into domestic legal systems. However, if the relationship between national and international courts is viewed from a moderate monist perspective, if a conflict is resolved at the level of international law, the validity of domestic law contrary to international law will always be of a provisional nature only, and the conflict will be resolved in favour of the international norm; this would also suggest that an unchallenged operation of domestic law will be possible only within the limits set up by international law⁶⁷. Unlike the Rome Treaty, the Statutes of the ICTY and ICTR have not addressed the issue of state responsibility in cases of State failure or refusal to execute arrest and surrender orders of the ICTY and ICTR. Their respective Statutes did not require this, because these Tribunals are, unlike the ICC, U.N. organs and their decisions should have a direct effect into domestic legal structures. The distinct nature of the Yugoslav and Rwandan Tribunals raises a simple state responsibility mechanism⁶⁸, which ultimately results in

⁶⁷See Chapter 1.

⁶⁸For instance, ICTY Rules of Procedure and Evidence, Rule 61.

notification of the Security Council of a failure or refusal by a state to cooperate with the Tribunals⁶⁹. The Security Council that created them has precisely defined the personal, material, territorial and temporal jurisdictions of the ICTY and the ICTR. The ICC Statute lacks any comparable jurisdictional precision; this marks a significant difference between the ICTY and ICTR on one hand and the ICC on the other. The general jurisdictional limits under the ICC Statute depend, in part, on which legal or natural person communicates the *notitia criminis* to the Prosecutor. Both the referral of a situation by the Security Council or a State Party (and the communication by any other legal or natural person of information regarding the alleged commission of a crime within the ICC jurisdiction), constitute a mere transmission of the *notitia criminis*. However, the Rome Statute, unlike some national legal systems, does not allow the Security Council, a State Party or whichever other legal or natural person to file a criminal complaint and become a party to the criminal proceedings before the ICC. Some argue nevertheless that ICC States Parties are automatically bound to recognise that ICC judgments and sentences are *de facto* verdicts rendered by their own domestic judiciary⁷⁰: their supremacy is established from the mere acceptance of ICC jurisdiction through complementarity⁷¹. Some States have however determined that implementing legislation will not affect their right to jurisdiction. An example is Australia where the International Criminal Court (Consequential Amendments) Act 2002 stipulates:

*“It is the Parliament’s intention that the jurisdiction of the International Criminal Court is to be complementary to the jurisdiction of Australia with respect to offences in this Division that are also crimes within the jurisdiction of that Court. [...] the International Criminal Court Act 2002 does not affect the primacy of Australia’s right to exercise its jurisdiction with respect to offences created by this Division that are also crimes within the jurisdiction of the International Criminal Court”*⁷².

⁶⁹ ICTY Statute Art.29; ICTR Statute Art.28.

⁷⁰ *Op cit*, Knoops, note 66, p.349.

⁷¹ *Ibid.*

⁷² Cf. Divisions 268.1 (2) and (3).

As opposed to the political organs established by ICC Article 112, the Office of the Prosecutor has been designed as a separate organ of the Court under Article 42(1) and has been entrusted with investigative and prosecutorial functions⁷³. Even though the ICC Statute provides for a limited judicial control by the Pre-Trial and Appeals Chambers against the Prosecution's decision whether or not to proceed with an investigation⁷⁴, or request authorisation to do so, the Prosecutor is the primary organ at this stage of the proceedings because he/she is entrusted with the reception and assessment of the *notitia criminis*, the development of the preliminary inquiry and the determination of whether or not there is a "*reasonable basis to proceed*" with an investigation⁷⁵.

The Office of the Prosecutor is not controlled by any separate political authority, but is endowed nevertheless, according to the U.S. view, with unchecked discretion to initiate cases that may lead to politicised prosecutions. The Prosecutor however, is not free to conduct investigations and prosecutions as he alone sees fit. There are a number of investigatory actions, such as the issuing of a warrant of arrest which has to be authorised either by the three judges of the Pre-Trial Chamber, or at least by a single judge⁷⁶. The Pre-Trial Chamber also confirms the charges brought by the Prosecutor before the trial may begin⁷⁷, but many decisions of the Pre-Trial Chamber are subject to appeal before the Appeals Chamber of five judges⁷⁸.

In sum, whatever operative provisions a bilateral agreement might include to ensure effective investigation and prosecution, it still has to be noted that it is for the ICC to conclude whether a national court is genuinely able and willing to prosecute and try a given individual. This is central to the principle of complementarity.

⁷³ ICC Rome Statute Arts. 15, 53, 54, 58, 61.

⁷⁴ ICC Statute Articles 15 (3) and (4), 53 (3) (a) and (b), 82 (1) (a).

⁷⁵ Olasolo H., "*The Prosecutor of the ICC before initiation of investigations: A quasi-judicial or a political body?*" International Criminal Law Review, No.3, 2003, p. 91.

⁷⁶ ICC Statute Arts. 57 and 58.

⁷⁷ ICC Statute Art. 61.

⁷⁸ ICC Statute Art. 82.

As previously observed, the ICC Statute does not impose an obligation on States to create a domestic legal regime for prosecution of the crimes under the jurisdiction of the ICC. A State may need to take into consideration that domestic prosecution of the ‘core crimes’ could be costly and more importantly that there is a likelihood of the accused never being faced with a prosecution. The Darfur Resolution elucidates this point. Whilst SC Res. 1593 was an important step in ending the conflict in Sudan, the Resolution provided varying exceptions for different ICC States Non-Parties. On the one hand it exempted large groups of people from ICC jurisdiction and on the other it imposed obligations on Sudan who signed but not ratified the ICC Treaty; the question therefore arises as to why a citizen of Sudan should be subject to the Court’s jurisdiction when the core of the American argument is that U.S. citizens should not be subject to its jurisdiction because the United States is not a State Party. What the Resolution omits to consider here is whether Sudan has at any point expressed its unwillingness to be bound by the ICC Treaty as a consequence of its signature. In this regard Sudan expressed its concern that *“the Council did not settle the question of accountability in Darfur”*⁷⁹ and that *“the resolution was adopted at a time when the Sudanese judiciary has gone a long way in holding trials”*. Inconsistently with the U.S. policy not to be bound by a treaty to which they are not a party, the U.S. Administration acknowledges that this sets a precedent, in that any country (and according to this argument this could apply to the U.S. in the future), that is not a party to the ICC may at some point be referred by the Security Council to the ICC⁸⁰. In yet another contradiction, the U.S. Secretary of State Condoleezza Rice stated: *“We do believe that as a matter of principle it is important to uphold the principle that non-parties to a treaty are indeed non-parties to a treaty. Sudan is an extraordinary circumstance”*⁸¹.

⁷⁹ Statement by Mr Erwa (Sudan), Statement by Mr. Baja (Philippines), UN Security Council Res. 1593 (2005), 5158th meeting, 31 March 2005, S/RES/1593 (2005).

⁸⁰ Mr McClellan, White House Press Briefing, 01 April 2005.

⁸¹ US State Department Press Briefing, 01 April 2005.

When the *notitia criminis* is communicated by the Security Council, Article 12(2) of the ICC Statute provides for no limitation on the personal and territorial jurisdiction and, therefore, the ICC could potentially exercise its jurisdiction over any situation or crisis referred by the Security Council as long as the crimes allegedly committed have taken place after the entry into force of the Rome Statute. Sudan is the case in point. It is not necessary that the Security Council, when referring a situation of crisis to the Prosecutor, expressly empower the ICC to investigate and prosecute such situation because it falls outside the general limits of its jurisdiction.

However, when the *notitia criminis* is communicated to the Prosecutor by a State Party or by any legal or natural person other than a State Party or the Security Council, Article 12(2) ICC Statute limits the personal and territorial jurisdiction of the Court to either the nationals or the territory of the States Parties⁸². In order to prevent the initiation of politically motivated investigations, Articles 13, 15 and 53 differentiate between the subject of ICC investigations, such as crises objectively defined by personal, territorial and temporal considerations and the subject of the ICC prosecutions such as cases consisting of specific facts that amount to one or several crimes within the jurisdiction of the Court⁸³. Importantly, however, the question remains open as to whether or not the Rome Statute grants jurisdiction to the ICC to undertake thorough investigations of situations of crises that take place on the territory of one or more States non-Parties, but in which nationals of State Parties are involved.

A further U.S. objection relates to the ICC's supervisory role⁸⁴. The Rome Statute not only allows the ICC to exercise its jurisdiction when national courts are unable or unwilling to prosecute but it also empowers the ICC to decide

⁸² *Op cit*, Olasolo, note 75, p.93.

⁸³ Note Sec.2 (1) of Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors, 23 April 1999 which provides "*The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference*".

⁸⁴ *Op cit*, note 45, Statement of Casey L. A, p.72: "*Upon this pretext (complementarity) the ICC would be in a position to examine each and every use of American military power to determine whether, in its view, offences within its authority have been committed*".

whether national courts are conducting their affairs properly. It is one of the functions of the Prosecutor to screen the investigations conducted at the national level; one of the main objectives of the preliminary enquiry is to gather information that is needed to determine the competence of national courts⁸⁵. Therefore, when the Prosecutor determines that a national court is ineffective in dealing with the crisis described in the *notitia criminis*, an investigation may begin. The key role of the Prosecutor in the exercise of the ICC supervisory function over national courts is in this way reinforced, by the fact of the Prosecutors' implicit or explicit approval, of national investigations and prosecutions whose decisions are only subject to a non-binding review by the Pre-Trial Chamber⁸⁶.

There are however at least two cumulative safeguards against politically motivated investigations. The first one consists in the definition of the subject of an investigation as a situation of crisis objectively defined by personal, territorial and temporal considerations as opposed to a case composed by specific facts allegedly committed by identified suspects⁸⁷. Article 54 (1) also emphasises the duty imposed on the ICC Prosecutor that “*in order to establish the truth*” he should “*extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, and, in doing so, investigate incriminating and exonerating circumstances equally*”. This implies that the Prosecutor has to investigate and prosecute the crimes committed by the different parties involved within the situation of crisis. Moreover, in order to avoid politically motivated recommendations to the ICC Prosecutor, the *notitia criminis* transmitted by a State Party or the Security Council cannot refer to specific facts allegedly committed but it must refer to objectively defined situations.

⁸⁵ See ICC Statute Articles 15 (2) and (3), 53 (1) and ICC Rules of Procedure and Evidence, Rules 48 and 104.

⁸⁶ ICC Statute Art. 53 (3) (a).

⁸⁷ ICC Statute Articles 13 (a) and (b); 14 (1); 15 (5) and (6); 18 (1) and 19 (3).

Articles 13 (b), 53 (1) and (3) and Article 18 (1) establish the fast track procedure to open an investigation when the *notitia criminis* has been communicated by the Security Council acting under Chapter VII of the UN Charter; this type of procedure presupposes that the Security Council has undertaken a previous investigation of the situation in question. The need for a preliminary inquiry by the Prosecutor is not expressly provided for, whereas a duty to open an investigation is imposed on the Prosecutor unless he/she determines that there is no reasonable basis to proceed under the Statute⁸⁸. The Prosecutor's decision not to open an investigation may be reviewed by the Pre-Trial Chamber at the request of the Security Council⁸⁹ or *proprio motu*⁹⁰ if such a decision is exclusively based on the political discretion conferred upon the Prosecutor in Article 53 (1) (c) ICC Statute⁹¹. However, only in the last scenario will a decision of the Pre-Trial Chamber be binding on the Prosecutor. As an ICTY judge explains: "*The Prosecutor should not take any account of political considerations in issuing charges. Apart from being professionally inappropriate, neither the Prosecutor nor their advisors have the political expertise on which to base such decisions*"⁹².

When a State Party delivers the *notitia criminis* to the Prosecutor, there is an assumption that the State has previously conducted, as far as possible, an investigation of the situation of crisis⁹³. The significant difference between this type of procedure and the previously described one is that in these circumstances the decision of the Prosecutor to open an investigation is subject, in accordance with Articles 18 (1), (2) and (4), to a preliminary ruling on admissibility of the Pre-Trial and Appeals Chambers. There are two

⁸⁸ ICC Statute Art.53 (1).

⁸⁹ ICC Statute Art.53 (3) (a).

⁹⁰ ICC Statute Art.53 (3) (b).

⁹¹ The Article provides: "*The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed...In deciding whether to initiate an investigation, the Prosecutor shall consider whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice*".

⁹² See Goldstone R., "*The Tribunal's Progress*" in Johannesburg, 7-12 May 2001, Institute for War and Peace Reporting, Tribunal Update, no. 220, available at <http://www.iwpr.net/index.pl?archive/tri/tri/220.eng.txt>

⁹³ These provisions do not presuppose that the individual or legal entity has previously conducted an investigation due to a lack of resources.

problems with the complex system of judicial review. Firstly, no judicial review is provided with respect to the fast-track procedure to open an investigation when the Security Council communicates the *notitia criminis*; when the Security Council is the informant, an investigation is automatically opened if the Prosecutor determines that there is a reasonable basis to proceed. This lack of judicial review can potentially strengthen the cooperative relationship between the Security Council and the Prosecutor. The demarcation of functions between the Security Council and the International Court of Justice for example is very clear; the U.N. Charter clearly states that the Security Council has functions of a political nature assigned to it, whereas the ICJ exercises purely judicial functions. Both organs can therefore perform separate but complementary functions with respect to the same matter⁹⁴.

Concerns are inevitable with regard to potential abuse of political discretion by the Prosecutor since, arguably, the ICC depends on the support of the Security Council in order to operate. Secondly, the Prosecutor may disregard previous decisions of the Pre-Trial and Appeals Chamber on jurisdiction and admissibility; the granting of such power to the Prosecutor exceeds the preservation of the adversarial nature of ICC proceedings and the principle of prosecutorial autonomy. As M. R. Brubacher explains⁹⁵:

“The interrelationship of law and politics is complex and requires the Prosecutor to make decisions that are both compliant with objective legal criteria but capable of being implemented in a manner that adapts to the prevailing political and social context. In other words, although the decisions of the Prosecutor must be on the legal criteria of the ICC Statute, these decisions are not made within a vacuum and must be executed in a manner

⁹⁴ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp.434-435, para.95.

⁹⁵ Brubacher M. R., “Prosecutorial Discretion within the International Criminal Court” 2 Journal of International Criminal Justice, 2004, p.74; see also D.D. Ntanda Nsereko, “Prosecutorial Discretion Before National Courts and International Tribunals”, 3 Journal of International Criminal Justice, 2005, 124-144; Danner A. M., “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court”, 97 American Journal of International Law, 2003, 510.

that fosters the support of states so crucial for the long-term success of the Court”.

It is important to distinguish between the political dimensions of a decision from the political pressure exercised on the Prosecutor who is taking a decision⁹⁶: *“The former political component, which characterizes the exercise of prosecutorial discretion, may be acceptable while the latter is highly objectionable as it challenges the independence not only of the Prosecutor but of the whole judicial institution”*⁹⁷. This system for judicial review is not uniform for all of the Prosecutor’s decisions; its scope depends on the natural or legal person who communicated the *notitia criminis* to the Prosecutor. Because of the fast track procedure available for opening an investigation under the ICC Statute, Article 18 (1) (Preliminary rulings regarding admissibility)⁹⁸ is not applicable when the Security Council communicates the *notitia criminis*, so the ICC Statute does not explicitly state that whenever the Security Council is the informant a situation of crisis must be investigated. However, considering that Article 13 (b) of the ICC Statute requires the Security Council to refer to the ICC Prosecutor situations of crisis as opposed to specific cases, and considering also that whenever the Security Council is not the informant the standard of *‘reasonable basis to proceed’*⁹⁹ with an investigation is applied to a situation of crisis and not to specific facts, it may be deduced that when the informant is the Security Council the investigation must also be opened in relation to a situation of crisis. This interpretation is also supported by the intent of the drafters of the Rome Statute to reduce the risk of politically motivated investigations by making sure that the ICC

⁹⁶ *Op cit*, Cote, note 58, p.171.

⁹⁷ *Ibid.*

⁹⁸ The Article provides: *“When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to article 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States”.*

⁹⁹ ICC Statute Articles 53(1) and 15(3) and (4); Rule 48 of the ICC Rules of Procedure and Evidence makes it clear that the standard *‘reasonable basis to proceed’* in these Articles is the same.

Prosecutor could not target a specific political and military authority during his preliminary inquiry and subsequent proceedings to open an investigation¹⁰⁰.

A situation where the Prosecutor may feel under political pressure can arise in cases of competing situations of crises. The drafters of the Rome Statute, in an attempt to shield the Prosecutor from external political pressure, introduced basic guarantees intended to defend his independence. At the Rome Conference it was suggested that if several States have jurisdiction over a case, and one of those States has already challenged the jurisdiction of the Court, the remaining State(s) should not bring additional challenges except on different grounds¹⁰¹. The Swedish law on Cooperation with the ICC shows that it is for governments to prioritise applications for legal assistance. It states that “*If, when processing an application for legal assistance in a criminal matter from the International Criminal Court, it transpires that the application conflicts with such an application for legal assistance in criminal matters from another State that is being dealt with in accordance with the International Legal Assistance in Criminal Matters Act (2000:562), the issue shall be deferred to the Government, which will decide which of the applications shall have precedence*”¹⁰².

Under Article 42 (1) ICC Statute the Prosecutor “*shall act independently as a separate organ of the Court and a member of the Office shall not seek or act on instructions from any external source*”. Article 42 (2) furthermore specifies that the Prosecutor who will have authority over the management and administration of that Office shall head the Office of the Prosecutor. Articles 42 (3) and (4) establish that the Prosecutor and Deputy Prosecutors shall possess high moral character and extensive practical experience in the

¹⁰⁰ See e.g. Ms Poptodorova (Observer for Parliamentarians for Global Action) who said that although all the statements made during the Rome Conference had reaffirmed the view that the ICC must not be a political instrument or politically motivated, the issues involved were undoubtedly highly political, A/CONF.183/13 (II), p.104-05, para.124.

¹⁰¹ ICC Draft Statute Art.17 (Challenges to the Jurisdiction of the Court or the Admissibility of a Case), A/CONF.183/13 (Vol.III), p.29

¹⁰² Sec.15 Cooperation with the International Criminal Court Act (2002:329).

prosecution or trial of criminal cases and that they should not be eligible for re-election once their mandate expires¹⁰³.

The Assembly of States should have full control over the resources of the Prosecutor. Even though the use of these powers by the Assembly of States to interfere with preliminary inquiries, investigations and prosecutions could constitute a violation of Article 42 (2), no remedy against such a violation has been provided for in the Rome Statute. The weak legal position of the Prosecutor vis-à-vis both the Assembly of States and States Parties themselves renders him/her vulnerable to political pressure, especially from influential States Parties. This vulnerability to political pressure is increased by the fact that the Office of the Prosecutor is organised in accordance with the principles of hierarchy and unity under ICC Article 42 (2) so that the political discretion conceded to that Office has been placed exclusively upon the Prosecutor himself. It can be said therefore that ICC Article 42, whilst representing an important step in isolating the Prosecutor from external pressure, does not suffice to guarantee his independence.

As seen in previous chapters, some ICC States Parties have addressed the issue of the ‘unaccountable prosecutor’ in their ICC ratification legislations. Australian law, for example, provides that no prosecution is to be commenced, or proceedings conducted, without the consent of and in the name of the Attorney General. The Attorney General’s powers to consent to arrest, surrender or prosecution provide on the other hand for a wide discretion, limiting the grounds for judicial review of the exercise of those powers¹⁰⁴. Australian legislation also includes a clause limiting judicial review of any decision of the Commonwealth Attorney General to give or refuse consent to

¹⁰³ Unlike the judges who are elected and removed by a two thirds majority of the members of the Assembly of State Parties, the Prosecutor is elected and removed by only an absolute majority of the members of the Assembly of State Parties (Articles 39 (5), 42 (2), 46 (2) (a) and (b) ICC Statute); while an ICC judge can only be removed from the Office after the majority of the judges have so recommended, a mere complaint filed with the Presidency by any natural or legal person could be enough to bring the issue of the removal of the ICC Prosecutor to the Assembly of States Parties (Article 46 (2) (a) and (b) and ICC Rules of Procedure and Evidence 16, 29 and 81 (1)).

¹⁰⁴ 2002 International Criminal Court Act, Art.22.

an arrest on a warrant issued by the ICC, the surrender of a person to the Court; or conduct a prosecution under Australian law in relation to the offences contained in this implementing legislation¹⁰⁵.

(d) The U.S. views the ICC as a close meld of prosecutorial and judicial functions, which reflects the European constitutional model. The U.S. Constitution provides that the exercise of executive power is to be rendered through the law-enforcement power of the President¹⁰⁶. The Congress, all of whose members are popularly elected, both through its statute-making authority and through the appropriations process can exercise significant influence and oversight. European legal structures are therefore criticised for not providing sufficient accountability to warrant vesting the ICC Prosecutor with enormous power of law enforcement that the ICC supporters have obtained.

Moreover, it is argued that the ICC will not offer the accused Americans due process rights (such as the right to a jury trial) guaranteed under the U.S. Constitution. Right to trial by jury is regarded as one of the most critical rights enjoyed by Americans. Such a right “*is not merely a means of determining facts in a judicial proceeding, but is a fundamental check on the use and abuse vis-à-vis the individual*”¹⁰⁷. This procedural safeguard is not however absolute under the U.S. Constitution. For example, cases arising in the armed services are tried by court-martial, which are exempt from the requirement for the jury trial¹⁰⁸. The current U.S. policy about the use of military tribunals in the war against terrorism could lead to suggestions of a double standard on the part of the U.S. with respect to procedural safeguards in war crimes trials. In the U.S. defendants in a military trial have a right to plea-bargaining¹⁰⁹. The United States understood the role of the ICC Prosecutor as not having, strictly

¹⁰⁵ *Ibid.*

¹⁰⁶ 1787 U.S. Constitution, Article II, Sec.3.

¹⁰⁷ *Op cit*, note 45, Bolton D.J., p.69.

¹⁰⁸ Current US policy about the use of military tribunals in the war against terrorism could lead to suggestions of a double standard on the part of the US with respect to procedural safeguards in war crimes trials. On a limited right to a small jury of three members of the military chosen by senior commanders see *United States v Witham*, 47 MJ 297, 301 (1997).

¹⁰⁹ See Chapter 1, p.19.

speaking, an adversarial position. It was through U.S. efforts that the Prosecutor now has a responsibility to look also into exculpatory evidence.

In conclusion, the Rome Statute offers the United States grater substantial safeguards than the ad hoc Tribunal Statutes, although the latter have never elicited the least of concern by the U.S. Administration because of Security Council oversight over the Tribunals' proceedings. Firstly, the ICTY Statute permits the Tribunal to compel national courts to drop a case and cede it to the ICTY (principle of primacy), whereas the ICC Statute provides that the Court can prosecute only if competent national courts do not investigate and prosecute (principle of complementarity). Secondly, a single judge confirms indictments prepared by the ICTY Prosecutor¹¹⁰, whereas the ICC Prosecutor can undertake a prosecution only with the authorisation of a Pre-Trial Chamber composed of three judges. Thirdly, as provided by SC Resolution 1593 on Darfur, ICC Article 98 enables any State requested to cooperate with the Court to invoke a non-surrender agreement. The exclusion of the custodial state as a basis for jurisdiction presents another obstacle to ICC powers to initiate investigations and prosecute. The exclusion of the custodial state through which the ICC can obtain jurisdiction has been criticised widely primarily because it is argued that this will allow criminals to travel freely. The argument put forward to justify this lacuna is that any state can prosecute war criminals under universal jurisdiction but universal jurisdiction has been specifically excluded from the ICC Statute¹¹¹. For instance, the Security Council action on Liberia, which through a resolution, and acting under Chapter VII of the UN Charter, provided for exclusive, status-of-forces type of jurisdiction for UNMIL military personnel deployed to Sierra Leone¹¹².

¹¹⁰ For a discussion see Morris V. and Sharf M., *"The International Criminal Tribunal for Rwanda"*, (1998), p.381: *"The successful outcome of the work of the Yugoslavia Tribunal is in many respects dependent upon the judgment and the experience of a single individual-the Prosecutor"*.

¹¹¹ See e.g. Explanatory Memorandum of the Irish International Criminal Court Bill (2003) which reads: *"Universal jurisdiction...was previously adopted in respect of grave braches in international armed conflict of the Geneva Conventions of 1949 and First Protocol to the Geneva Conventions of 1977. Since many of the grave breaches under the Geneva Convention are comparable with ICC offences, universal jurisdiction is also adopted for those ICC offences which are also offences under the Geneva Conventions Acts 1962 and 1998"*.

¹¹² S/Res/1626 (2005), para.9.

4.3 ICC Statute Article 98 (2)

The U.S. has repeatedly expressed in principle its support for an international criminal court¹¹³; Congress also declared its support, provided the rights of US citizens were recognised¹¹⁴. However, the Foreign Operations Appropriation Act 2000 expressly provides that any US contribution¹¹⁵ to a just resolution of charges regarding genocide or other violations of international humanitarian law should not be construed as an endorsement or precedent for the establishment of any standing or permanent international criminal tribunal or court¹¹⁶. It is interesting to note however that U.S. national courts have cited in their decisions some provisions of the ICC Statute¹¹⁷.

A major achievement of the U.S. delegation to the U.N. Preparatory Commission for the ICC (PrepCom)¹¹⁸ was its successful negotiation of ICC Statute Article 98 on “*Cooperation with Respect to Waiver of Immunity and Consent to Surrender*”. ICC Article 98 (2), which provides that the ICC may not proceed with a request for surrender that would require the requested state

¹¹³Republicans had few reservations – *Statements made by members of Congress*: “As it currently operates, the UN does not deserve continued American support. Its bureaucracy is proliferating, its costs are spiralling, and its mission is constantly expanding beyond its mandate-and beyond its capabilities. Worse, with the steady growth in the size and scope of its activities, the UN is being transformed from an institution of sovereign nations into a quasi-sovereign entity in itself. That transformation represents an obvious threat to U.S national interests. Worst of all, it is a transformation that is being funded principally by American taxpayers. The U.S. contributes more than \$3.5 billion every year to the UN system as a whole, making it the most generous benefactor of this power-hungry and dysfunctional organisation”. *How U.S. Lawmakers View the United Nations*, USIA, U.S. Foreign Policy Agenda, May 1997.

¹¹⁴ Leigh M., “*The United States and the Statute of Rome*”, 95 American Journal of International Law 1, 124-131, (2001)

¹¹⁵ Such as financial aid provided for in the Foreign Assistance Act 1961.

¹¹⁶ Foreign Operations Appropriation Act 2000, Public law 106-429, Sec.552, p.114.

¹¹⁷ On crimes against humanity see for example *WIWA v Royal Dutch Petroleum Co. et al.* 226 F. 3d 88, 532 U.S.941 (2001).

¹¹⁸ For a discussion of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court see Scheffer D. J., “*Staying the Course with the International Criminal Court*” 35 Cornell International Law Journal 47, 68 (2002).

to act inconsistently with its obligations under international agreements, was included in the Rome Statute to provide a methodical process for the handling of suspects among states cooperating with the Court and not to allow a state that has refused to cooperate with the Court to enter into an agreement that would secure exemption for its nationals¹¹⁹.

On the other hand, it can also be concluded that the final wording of ICC Article 98 was a deliberate attempt to increase multilateral support for the Court. In fact, Article 98 only tentatively resolves the conflict between a State's international obligations to other States and its duty to comply with requests and orders from the Court for surrender of suspects. It leaves room for States to create and enter into international agreements that compete or conflict with such requests and orders from the Court. As an author correctly points out *"Article 98 supports current treaties and allows for the negotiation of future treaties or international agreements that would secure a state's jurisdiction over its citizens to supersede ICC jurisdiction. Thus, it protects the power of states to independently negotiate treaties concerning jurisdiction over certain criminal suspects"*¹²⁰. It is also argued that such 'subordination'¹²¹ of ICC jurisdiction to national courts and international treaties is in line with the central ICC Statute principle of complementarity. According to this interpretation of Article 98, the Court will have to give priority to national claims of jurisdiction as well as defer to conflicting international agreements that prevent the surrender of suspects¹²². Such conclusion follows also from the fact that there is nothing in the Statute to say that States are under an obligation not to enter into agreements that would contradict obligations undertaken by signing and ratifying the Rome Treaty, or that obligations under the Statute should prevail in the case of conflict¹²³. Such explicit requirement is present in the UN Charter, Art.103 which reads: *"In the event of conflict between the obligations of Members of the United Nations under the present*

¹¹⁹See e.g. Human Rights Watch, *"United States Effort to Undermine the International Criminal Court: Impunity Agreements"*, 04 September 2002.

¹²⁰Rosenfeld E., *"Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute"*, Washington University Global Studies Law Review, Vol.2, No.1, 2003, p. 277.

¹²¹*Ibid.* p. 278.

¹²²Supra note 119, p.278.

¹²³See e.g. Sadat-Akhavi S. A., *"Methods of Resolving Conflicts between Treaties"* (2003).

Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

ICC Article 98 tracks the terminology used in Status of Forces Agreements (SOFA) which regulate foreign forces present in another’s territory with the consent of the receiving state. These provide for priority to American Tribunals where foreign forces are present with the consent of a receiving state, and do not contain immunities in the strict sense, but establish a concurrent jurisdiction which gives the sending or the receiving state a primary right to exercise jurisdiction over certain crimes. When a State Party is obliged to surrender a U.S. national to the Court, the latter will be transferred on the basis of these agreements to U.S. jurisdiction. SOFAs only apply to military personnel and other closely aligned civilian personnel serving on a state’s territory on an official mission. It is also firmly grounded in the ICC’s ability to assume jurisdiction over a case should it find that an investigation or prosecution was not conducted in good faith¹²⁴.

ICC Article 98 (2) refers to the consent of the ‘*sending State*’ as a prerequisite of surrender; it also acknowledges the so-called Status of Forces Agreements concluded between the sending and the requested states. The provision does not affect the Court’s initial jurisdiction since it only plays a role at the stage of request of surrender and does not affect the possibility that other States Parties, not under an international obligation to refrain from surrender, may be able to surrender when they obtain jurisdiction over the individual concerned. The European Commission concluded that these words require for a situation to be present in which a certain individual is ‘*sent*’¹²⁵ by one State of which he may not necessarily be a national, to another State for a particular reason. To construe the words ‘*sending State*’ as simply meaning “*the state with which*

¹²⁴ See however the exclusive jurisdiction afforded to the contributing state in SC Res.1626 (2005), para.9.

¹²⁵ Council of the European Union, “*Council Conclusions and EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court*” (scope of ‘person’) 30 September 2002, 12488/1/02 REV 1 LIMITE.

they have some connection” would be to depart from the ordinary meaning of the words, which is the basic criterion for their interpretation under international law. The word “*send*” does not have the same meaning as the words “*to be connected to or with*”. Surrender under Article 98 cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the ICC Statute. Article 98 (2) provides for a limitation of the Court’s powers only with regard to surrender; no such limitation is allowed with regard to States Parties’ obligation to comply with the Court’s request for transfer.

A number of bilateral as well as multilateral treaties already exist between states and the U.S., as well as treaties with third states that are ready to engage with the U.S. in review of these arrangements (mainly SOFAs and extradition treaties)¹²⁶, which may fall into the category of agreements defined in Article 98 (2) of Statute. For example, recent U.S. extradition treaties with ICC States Parties (many of these have publicly refused to sign a BIA and lost each under ASPA up to \$2.300.000 in aid¹²⁷) specifically prohibit (by way of a reservation or ‘understanding’ on the part of the U.S.) extradition to the International Criminal Court. For instance, the extradition treaty with Paraguay provides that this understanding is based on the Rule of Specialty¹²⁸ and that the United States shall not consent to the transfer of any person extradited to the Republic of Paraguay to the ICC unless the ICC Statute enters into force in the U.S. by and with the advice and consent of the Senate¹²⁹. Another example is the International Convention for the Suppression of Terrorist Bombings¹³⁰ to which the United States attached a condition¹³¹, which again prohibits extradition to the ICC. Many treaties on mutual legal assistance have similar

¹²⁶ German Government, “*Supportive Interpretation of the Commentary on the EU General Affairs Council Conclusions on the International Criminal Court of 30 September 2002*” October 24, 2002.

¹²⁷ See The American Non-Governmental Organisations Coalition for the International Criminal Court (AMICC), “*Bilateral Immunity Agreements: Country Position*”, 06 October 2004, at <http://www.amicc.org/docs/CGStableofBIAsbyICCstatus%2010-04.pdf>

¹²⁸ Extradition Treaty between the Government of the United States of America and the Government of the Republic of Paraguay 1998, Treaty No. 106-4, Art.XV. See also Extradition Treaty with Peru, understanding of 14 November 2002 (also publicly refused to sign a BIA and lost under the ASPA \$1.300.000).

¹²⁹ *Ibid*, Treaty No. 106-4, Understanding (a), 13 July 1999.

¹³⁰ Adopted by the United Nations General Assembly on December 15, 1997.

¹³¹ Sec.4 (2), Treaty No. 106-6, September 8, 1999.

reservations and conditions on the part of the U.S. For example, the Treaty with Ireland on Mutual Legal Assistance in Criminal Matters 2001 provides for an express prohibition on assistance to the International Criminal Court. The ‘understanding’ furthermore reads: “*The United States shall exercise its right to limit the use of assistance provided under the Treaty so that any assistance provided by the Government...shall not be transferred to or otherwise used to assist the International Criminal Court*”¹³². Late formulation of a reservation is to be deemed as accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received¹³³ and to date none of the above States expressed objections to U.S. reservations, conditions and understandings.

It has been said that under ICC Art. 98 (2) immunity agreements are permissible as they may be treated as a mere extension of existing SOFAs¹³⁴. The NATO SOFA assigns jurisdiction in criminal matters and in cases of concurrent jurisdiction, allocates primary rights of jurisdiction for offences arising out of an act or omission done in performance of official duty by a military person¹³⁵ to the law and courts of the sending State¹³⁶. When instances of exclusive jurisdiction do arise, there is no possibility of waiver requests from one State to the other. The United States has traditionally been the sending State, and sought therefore, to limit the jurisdiction of the receiving States¹³⁷.

¹³² Understanding under Sec. 2, Congressional Record, 14 November 2002, 107th Congress, 2nd Session, 148 Cong Rec S11059. Identical conditions are included in the US-France Treaty on Mutual Legal Assistance 1998, Treaty No.106-17; U.S.-Liechtenstein on Mutual Legal Assistance; U.S.-Greece 1999, Treaty No.106-18; U.S.-Egypt 1998, Treaty No.106-19; U.S.-Ukraine 1998, Treaty No.106-16; U.S.-Poland 1995, Treaty No.105-12.

¹³³ See Pellet A., “*Eighth report on the reservations of treaties*”, GA 55th session, 23 May 2003, A/CN.4/535, p.10.

¹³⁴ See e.g. Senator Biden, Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105th Congress, Second Session, 23 July 1998, p.18-20.

¹³⁵ See also Uniform Code of Military Justice (UCMJ) 1950 which also governs U.S. troops abroad (e.g. Art.134).

¹³⁶ NATO SOFA, Art. VII (3). See e.g., Yoon-HO Alex Lee, “*Criminal Jurisdiction under the U.S.-Korea Statues of Forces Agreement: Problems to Proposals*”, 13 Journal of Transnational Law and Policy 1, 2003, pp.213-248.

¹³⁷ *Ibid.*, Yoon-HO Alex Lee, p.215.

Another important provision of the SOFA is its Article VII (8) that prohibits a second State from prosecuting after an acquittal, or a conviction followed by service of sentence, or pardon based upon the same offence within the territory of the receiving State. Presumably therefore, the receiving State's lack of jurisdiction would appear to preclude it also from arresting that person and surrendering him to the ICC. However, according to this provision, military procedure over violations of disciplinary rules of the sending State's is not prohibited¹³⁸. The validity of this concept is questionable in the view of ECHR case law. The Engel case [1978] is instructive; here the Court underlined that unlike its domestic classification as disciplinary court proceedings, these proceedings may be equivalent to a criminal charge, according to Article 6 (1) ECHR¹³⁹. Here, in concluding that the charges related to disciplinary misbehaviour of Dutch service personnel, the Court found an important criterion for application of Article 6 (1), the nature and severity of the sanction to be imposed by the domestic court martial or military disciplinary proceedings. In case of imprisonment of considerable length (the ECHR held that two days incarceration were insufficient but that few months fell within the scope of Article 6 (1)), Article 6 (1) ECHR may be applicable in military disciplinary and court martial procedures. It follows that the surrender defence of ne bis in idem pursuant to Articles 20 (3) and 89 (2) ICC cannot be set aside merely on the formal characterisation of a domestic trial as being of a primarily disciplinary nature¹⁴⁰.

Generally, bilateral extradition provisions between the U.S. and E.U. States provide the former with a right to demand the extradition of a U.S. citizen if certain conditions are met; this right may have precedence by the requested State over a request for surrender of the same person issued by the ICC, under Article 90 (6) of the ICC Statute. This right to primacy may occur in SOFA and SOMA (Status of Mission Agreements) agreements. It may also be that extradition treaties between E.U. Members and third party States do not allow

¹³⁸ *Op cit*, Knoops, note 66, p.332.

¹³⁹ Engel and Others v the Netherlands (5100/71), Judgment 08 June 1976, ECHR 3, Ser. A, No.22, at 82-83.

¹⁴⁰ *Supra* note 136, p.333.

in every case for a prohibition on the further surrender to the ICC to be included. If that is the case, these treaties could collide with new bilateral treaties with the result that one or the other would have to be terminated.

U.S. immunity agreements are contrary to the intentions of the Rome Statute. Delegates involved in the negotiation of Article 98 of the Statute indicate that this Article was not intended to allow the conclusion of new agreements based on Article 98, but rather to prevent legal conflicts that may arise because of existing agreements, or new agreements based on existing precedent, such as new SOFAs. Article 98 was not intended to allow agreements that would preclude the possibility of a trial by the ICC where the sending State did not exercise jurisdiction over its own nationals. Indeed, Article 27 of the ICC Statute provides that no one is immune from the crimes under its jurisdiction. On closer scrutiny however, such interpretation cannot be final because of the failure to state explicitly that Article 98 (2) was intended to apply *only* to existing SOFAs. The European Council Conclusions¹⁴¹ provide an ambiguous meaning to what type of agreements are permissible under ICC Article 98 (2). It claims that: “*a number of bilateral and multilateral treaties between individual Member States and the United States already exist, as well as treaties with third states, which are of relevance in this context*”¹⁴² and note that a number of “*Member States are ready to engage with the United States in a review of these agreements which may fall into the category of agreements defined in Article 98, paragraph 2 of the Rome Statute*”¹⁴³. Amnesty International concluded that the failure of the Council to make clear that Art. 98 (2) is intended to cover only existing SOFAs was a ‘*fundamental flaw in the decision in the face of the USA demands*’¹⁴⁴. With regard to other agreements, such as extradition treaties, ICC Article 90 (6) makes it clear that a State Party may give priority to a competing extradition request from a court of a Non-

¹⁴¹ *Op cit*, note 123.

¹⁴² *Ibid*, p.2

¹⁴³ *Ibid*.

¹⁴⁴ Amnesty International, “*International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements*”, October 2002, AI Index: IOR 40/030/2002, p.12-13.

State Party only if it considers that compliance with that extradition request will not lead to impunity.

Furthermore, these non-surrender agreements are contrary to the wording of Article 98 itself. These agreements seem to amend the terms of the treaty by effectively denying the concept of the sending State from Article 98 (2); this term indicates that the language of Article 98 (2) is intended to cover only SOFAs, SOMAs and other similar agreements. SOFAs and SOMAs reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully address how the crimes they commit should be dealt with¹⁴⁵. By contrast, the U.S. immunity agreements seek exemption for a wide-ranging class of persons, without any reference to the traditional sending state-receiving state relationship of SOFA and SOMA agreements. This wide class of persons includes anyone found on the territory of the State concluding the agreement with the U.S. who works or has worked for the U.S. Government. Presumably, this includes non-Americans and could include citizens of the State in which they are found, effectively preventing that State from taking responsibility for its own citizens¹⁴⁶. So far, it appears that Bosnia and Herzegovina, in signing and ratifying the Article 98 immunity agreement¹⁴⁷, is the only State to have specified that this agreement should not apply to non-Americans employed with the U.S. diplomatic missions or other organisations in Bosnia.

In order to provide some direction as to how non-surrender agreements should be interpreted and dealt with, the EU General Affairs Council developed a set of principles to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to the U.S. proposals. Moreover, the view of the E.U. is that Article 98 (2) ICC needs further clarification:¹⁴⁸

¹⁴⁵ Coalition for the International Criminal Court, “U.S. Bilateral Immunity or So-Called “Article 98” Agreements”, Questions and Answers, 30 September 2003, p.3.

¹⁴⁶ *Ibid.*

¹⁴⁷ 07 June 2003.

¹⁴⁸ The following is an extract from the “ICC-Supportive Interpretation of the Commentary on the EU General Affairs Council Conclusions on the International Criminal Court of September 2002”.

“It (Article 98, Paragraph 2) refers to two aspects under which possible agreements must be scrutinized: their scope and necessity. The latter criterion is of particular importance in view of existing treaties. It is also important to note that this paragraph only states that certain aspects have to be taken into account if such an agreement is possible, but does not declare that “agreements or arrangements” are “possible”, i.e. not in contradiction to the Rome Statute. The paragraph is silent on the question of admissibility of new bilateral non-surrender agreements under the Rome Statute: “It leaves room for an interpretation of Article 98 (2) of the Statute that was already advanced by many before the Common Affairs Council of 30 September 2002. This view takes Article 98 (2) to allow only for the continued application of “old” (i.e. already existing) SOFA-type agreements, but not for the conclusion of new agreements of this kind. The key argument is that otherwise any State Party to the Statute could, by the simple device of concluding treaties of this kind, redefine, limit or even opt out unilaterally of its obligations under the Rome Statute-something which it could not even have achieved by way of reservation at the time of signature or ratification, as the Rome Statute specifically prohibits reservations (Article 120)”¹⁴⁹.

The uniform implementation of SOFAs and the recognition of concurrent jurisdiction as the international norm for the regulation of peacetime jurisdiction over visiting forces is an indication that States tend to maintain their territorial sovereignty whilst allowing sending States to assert jurisdiction over actions of their forces. In particular, when the laws of both the sending and the receiving States are violated, SOFAs provide that the sending State retains exclusive jurisdiction over persons subject to the military law of that State¹⁵⁰. The receiving State has exclusive jurisdiction over civilian persons

¹⁴⁹ Mexico for example, abstained from adopting the ICC Statute as no reservations are permitted; additional reasons for its abstention were the lack of a clearer definition of complementarity and a lack of requirement for the consent of the State having custody over a person sought by the ICC. Turkey also abstained mainly because terrorism was not included as a crime against humanity, as proposed by it and because there was a lack of a satisfactory formulation allowing the opting out of ICC jurisdiction.

¹⁵⁰ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, 4 U.S.T. 1792, Art. VII 2 (a).

accompanying a military force with respect to offences of the receiving state and the law of the sending state¹⁵¹. The U.S. Supreme Court upheld this provision by eliminating U.S. military jurisdiction over American civilians and dependants in peacetime¹⁵². Under ICC Article 98 (2), a SOFA is an international agreement that requires a host State to obtain the cooperation of the sending State in order to surrender a suspect to the Court. If a U.S. service member committed a crime that could be prosecuted under the ICC Statute and was covered by SOFA, the United States would maintain jurisdiction over the crime. Therefore, Article 98 (2) would preclude a national court from complying with a request or order from the ICC, preventing effectively prosecution and investigation. U.S. non-surrender agreements (whether unilateral or bilateral) consistently provide that ‘persons’, subject to these agreements, are current and former Government officials, employees (including contractors), or military personnel or other nationals of the Parties in question¹⁵³. Some of these agreements, such as the one with India¹⁵⁴, provide that a person of one or both parties may not be sent to ‘any’¹⁵⁵ international tribunal, whereas others, such as the one concluded with the Republic of the Philippines, do not exclude the possibility of a person being surrendered to a tribunal established by the UN Security Council. Agreements with States Non-Parties to the ICC Treaty also acknowledge that an existing international obligation may preclude compliance with a non-surrender agreement, providing however that *both parties* must be part to such an existing international agreement¹⁵⁶. Non-surrender agreements between the

¹⁵¹ *Ibid.*, Art. VII 2 (b).

¹⁵² See e.g. *Grisham v Hagan*, 361 U.S. 278 (1960); *McElroy v Guagliardo*, 361 U.S. 281 (1960).

¹⁵³ See e.g. Agreement between the Government of the Republic of Albania and the Government of the United States of America Regarding the Surrender of Persons to the International Criminal Court (02 May 2003); Art.1 of the Agreement between the Government of the United States of America and the Government of Romania regarding the surrender of persons to the International Criminal Court (01 August 2002).

¹⁵⁴ See para.3 of the bilateral Agreement between the Government of India and the Government of the United States of America regarding the Surrender of Persons to International Tribunals, 26 December 2002.

¹⁵⁵ See para.2 (a) and para.3 of the bilateral Agreement between the United States of America and the Republic of the Philippines, Note No. BFO-028-03, 13 May 2003.

¹⁵⁶ For instance, para.2 (b) of the US-India Non-surrender Agreement provides: “*Persons of one Party present in the territory of the other shall not, absent express consent of the first Party, be surrendered or transferred by any means to any other entity or third country or expelled to a third country, for the purpose of surrender to or transfer to any international*

United States and States Non-Parties¹⁵⁷ also stipulate: “*Each party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court*”¹⁵⁸.

NATO SOFA allows for diplomatic intervention to obtain custody in case of unclear primary jurisdiction¹⁵⁹. This Agreement provides that “*the authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where the other State considers such waiver to be of particular importance*”¹⁶⁰. This provision illustrates a trend whereby most countries agree on an ad hoc basis to U.S. requests for jurisdiction in cases where it retains no legal claim¹⁶¹. On the other hand, there are SOFAs which contain blanket waivers. For instance, SOFAs with Tonga and Philippines, as well as the annex to the NATO SOFA with the Netherlands, provide that, at the request of the United States these countries will waive their primary right to exercise jurisdiction. If a case is of particular importance, such as a situation that would warrant transfer of an accused to the ICC, States may revoke the waiver¹⁶².

tribunal, unless otherwise obliged to do so by an international agreement to which both India and the United States are parties”.

¹⁵⁷ Art.5 of the Agreement between the Government of the United States of America and the Government of Uganda regarding the surrender of persons to the International Criminal Court, 12 June 2003 provides “*this paragraph is for use only in agreements with countries that are not parties or signatories to the Rome Statute*”.

¹⁵⁸ See e.g. Art.5 of the bilateral Agreement between His Majesty’s Government of Nepal and the Government of the United States of America regarding the surrender of person’s to the International Criminal Court, 31st December 2002; Art.5 of the bilateral Agreement between the Government of India and the Government of the United States of America regarding the Surrender of Persons to the International Criminal Court, 26th December 2002.

¹⁵⁹ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 .U.S.T. 1792.

¹⁶⁰ Art. VII, 3 (c), *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces*, June 19, 1951, 4 .U.S.T. 1792. See for instance Art. 19 of the Agreement of 03 August 1959, as Amended by the Agreement of 21 October 1971, 18 May 1981 and 18 March 1993, to *Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Revised Supplementary Agreement)*, 29 March 1998.

¹⁶¹ Fleck D. (Ed.), “*The Handbook of the Law of Visiting Forces*”, 2001, p.112.

¹⁶² See e.g., Paust J. J., “*The Reach of ICC Jurisdiction over No-Signatories Nationals*” 33 *Vanderbilt Journal of Transnational Law* 1 (2000).

Whereas the U.S. SOFAs do not explicitly provide for transfer of individuals to other jurisdictions, they do not prohibit such transfers either. Potentially, this leaves open the possibility that ICC Article 98 may not apply and a receiving State that has obtained jurisdiction over an individual that decides not to try him could transfer that individual to the ICC. The U.N. SOFA,¹⁶³ on the other hand, affords States providing peacekeeping forces exclusive jurisdiction over any criminal offence that may be committed by their personnel in the host territory¹⁶⁴. The maintenance of criminal jurisdiction of participating States over their forces encourages U.N. members to contribute peacekeepers to U.N. missions. Such unconditional provision gives U.S. troops greater protection under ICC Article 98 than would waivers or assignments of jurisdiction found in other SOFAs¹⁶⁵. There are also extradition treaties that fall within the meaning of ICC Art.98. For example, the U.S. concluded a bilateral extradition treaty with the Republic of Korea in 1999¹⁶⁶ which prevents the extradition of nationals of the two parties to the ICC¹⁶⁷. Korea subsequently ratified the ICC Treaty¹⁶⁸.

Correct interpretation of ICC Article 98 (2) is crucial here since two main lines of argument suggest that the Article only refers to existing agreements such as Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs), whereas the other one suggests that the wording of the Article is too vague and it may not have been intended to preclude the creation of new agreements¹⁶⁹. Rome Treaty negotiations suggest, and this is reflected in some provisions of the ICC Statute¹⁷⁰, that the bilateral and multilateral obligations among States refer only to existing agreements and treaties¹⁷¹. For example,

¹⁶³ Model Status of Forces Agreement for Peace-keeping Operations, Report of the Secretary General, U.N.Doc.A/45/594, 09 October 1990.

¹⁶⁴ Id. Art. 6 (47) (b).

¹⁶⁵ *Op cit*, Rosenfeld, note 119, p.290.

¹⁶⁶ 1999 Extradition Treaty between the United States and the Republic of Korea (U.S.T. 168).

¹⁶⁷ *Ibid.*, Art.1.

¹⁶⁸ Republic of Korea ratified the Rome Statute on 13 November 2002.

¹⁶⁹ See Prost K. and Schlunk A., “Article 98: Cooperation with respect to waiver of immunity and consent to surrender” in Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, p.1131 (Triffterer 1999).

¹⁷⁰ ICC Statute Art. 90 (7) (a) and (b).

¹⁷¹ See Draft ICC Statute, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.III, 14 April 1998.

ICC Draft Statute Article 87 provided that grounds for refusing surrender could be justified only if the request would put a State in breach of an existing obligation that arises from peremptory norms of general international law, or a treaty obligation undertaken vis-à-vis another State¹⁷². These existing obligations are also related to diplomatic or state immunity, as framed in the 1961 Vienna Convention on Diplomatic Relations. On the other hand, reference to ‘*existing*’ international obligations was omitted in the wording of Article 98 (2), which only refers to ‘*obligations under international agreements*’. Moreover, if the first interpretation is the correct one, then a question arises as to how this Article affects States who have signed the ICC Treaty, submitted it for ratification, and at the same time entered into a non – surrender agreement. On the other hand it has been argued convincingly that Article 98 “*facilitates negotiation and ratification of future international agreements and limits the Court’s intrusion upon international relations*”¹⁷³. Such a proposition is based on the fact that a new treaty providing for ICC primary jurisdiction over national courts and treaty obligations would violate sovereignty rights, which are upheld through the complementarity principle.

Whereas a number of ICC States Parties maintain that the conclusion of immunity agreements represents the preservation of their sovereignty in relation to the ICC, others, like the Philippines, argue the contrary. Because of the way these agreements are usually concluded, secretly, it is perceived that such agreements take away the opportunity to try and punish the crimes covered in the Rome Statute and therefore limit substantially a State’s sovereign authority to govern effectively. This is of crucial importance since the ICC Statute creates rights and duties that directly affect individuals.

It should be noted that the standard provisions of SOFA agreements emphasise the retention by the sending State of primary jurisdiction but do not deny other

¹⁷² Similarly, Draft Article 90 (other forms of cooperation [and judicial and legal [mutual assistance]]), Option 2, which read: A State Party shall deny a request for assistance in whole or in part only if (f) compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].

¹⁷³ *Op cit*, Rosenfeld, p.279.

legitimate sources of jurisdiction. In the case of extradition agreements and in the case of newer SOFA agreements, there are even provisions that allow receiving States to retain jurisdiction in cases of overriding national interests or of widespread public concerns. In this regard, SOFAs and similar agreements fit into the ICC complementarity principle whereby national jurisdictions have a primary right and duty to carry out investigations and prosecutions.

4.4 Hierarchical obligations for States Parties with regard to the ICC Statute and immunity agreements

The questioning of state sovereignty resurfaces in day-to-day operations of the international tribunals and shapes to a certain degree, their ability to fulfil their mandate; this handicap is also inherent in the ICC. The U.N. Charter too reinforces the concept of sovereignty; Article 2 (1) provides that the U.N. “*is based on the principle of sovereign equality of all of its members*”. Moreover, Article 2 (7) proscribes intervention on part of the U.N. “*in matters which are essentially within the domestic jurisdiction of any state*”. Correspondingly, recourse to the main judicial organ of the U.N., the International Court of Justice, is entirely voluntary, and as with the whole of the U.N. adjudication system, the powers and jurisdiction of the ICJ extend only to the consent attributed to it by member states. The Rome Statute itself, reinforces sovereignty by specifying that implementation is necessary (methods of implementation have already been discussed in Chapter 1). The question is therefore, how and to what degree the ICC differs and whether it may confer obligations to third party states. As a general rule, State’s prescriptive jurisdiction (the one that describes a State’s ability to define its own laws in respect of any matters it chooses) is unlimited and a State may legislate for any matter irrespective of where the event occurs (even if in the territory of another

State) or the nationality of the persons involved¹⁷⁴. Parallel to this principle, a State's enforcement jurisdiction within its own territory is presumptively absolute over all matters and persons situated therein; there are exceptions to this absolute territorial jurisdiction, as where persons are immune from the jurisdiction of local courts but this occurs only by reason of a specific rule of international or national law to that effect¹⁷⁵.

The question is to what legal regime immunity agreements belong and whether such agreements fall within the ambit of such specific forms of international and national law considering that on the international level, they are in conflict with the Rome Statute because they defeat its object and purpose, and on the national one, they leave the problem of competing treaties unresolved for ICC States Parties¹⁷⁶. Competing procedures which are viewed as a threat to the normative "welfare" of the legal system (jurisdictional competition within a single legal system that might lead to inconsistent judgments) are treated with hostility by that system's judicial organs, while "harmless" competition, from a normative point of view (competition between courts and tribunals operating in different national systems) is generally tolerated.

In relation to immunity bilateral agreements, two issues arise:

1. The questionable legality of these bilateral agreements in relation to the ICC considering that the Rome Statute does not constrain State Parties to enter into new agreements and considering that, unlike the UN Charter which deals with competing treaties (Article 103), the ICC Statute does not have a provision which is intended to give it precedence; and

¹⁷⁴ Dixon M. and McCorquodale, "*International Law: Cases and Materials*", 2003, p.268.

¹⁷⁵ See e.g. Irish International Criminal Court Bill 2003, Part II, Art.12 on Extra-territorial jurisdiction.

¹⁷⁶ Interestingly, the Restatement (Third) Foreign Relations Laws of the United States [1987] reads: "*The rules given in this Restatement are said to reflect the law as given effect by Courts in the United States. In general, these Courts may construe US national law so as to not conflict with international law (but see US v Alvarez-Machain). Moreover, the so-called principle of "jurisdiction to prescribe"-being the applicable rules when two or more States are claiming jurisdiction over the same event-are not accepted by all scholars as reflecting customary international law*". American Law Institute (1987), p.235.

2. How will the constitutions of States Parties deal with this coexistence and inconsistency that immunity agreements produce?

As already mentioned, the U.S. State Department reported so far 100 agreements although information is available on 86 immunity agreements¹⁷⁷. Of these agreements, 20 have been ratified by parliament and 11 are considered executive agreements (which means they do not require ratification)¹⁷⁸. 41 ICC States Parties have signed a BIA. Of these agreements 13 have been ratified¹⁷⁹. 57 of 99 ICC States Parties have not signed the agreement, of which 21 States Parties have lost aid under the ASPA. The major US allies¹⁸⁰ and European member States¹⁸¹ that have not signed the agreement have been exempt from U.S. aid cuts. The 2002 American Servicemembers Protection Act (ASPA) also prohibits military assistance to countries that are parties to the Rome Statute, but allows the President to waive this ban if the State enters into a non-surrender agreement with the U.S. or it is decided that it is in the national interest¹⁸². The Foreign Relations Authorisation Act 2001¹⁸³ prohibits funds, “or any other act” from being used

¹⁷⁷ See Coalition for the International Criminal Court (CICC), “*Status of US Bilateral Immunity Agreements (BIAs) as of May 18, 2005*”, available at <http://www.iccnw.org>

¹⁷⁸ In 8 ICC State Parties these agreements constitute executive agreements: Botswana, Dem. Republic of Congo, Malawi, Nigeria, Uganda, Antigua and Bermuda, Colombia and Afghanistan.

¹⁷⁹ Gambia, Ghana, Sierra Leone, Guyana, Honduras, Panama, Cambodia, East Timor, Albania, Bosnia-Herzegovina, Georgia, FYR Macedonia, Tajikistan, see Coalition for the International Criminal Court (CICC), “*Status of US Bilateral Immunity Agreements (BIAs) as of May 18, 2005*”, available at <http://www.iccnw.org>

¹⁸⁰ Australia, New Zealand, Republic of Korea, United Kingdom, Japan, Jordan.

¹⁸¹ Belgium, Bulgaria, Canada, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxemburg, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Czech Republic.

¹⁸² Section 2007. So far, countries affected are: Antigua and Bermuda, Barbados, Belize, Benin, Brazil, Bulgaria, Central African Republic, Colombia, Costa Rica, Croatia, Dominica, Ecuador, Estonia, Fiji, Latvia, Lesotho, Lithuania, Malawi, Mali, Malta, Namibia, Niger, Paraguay, Peru, Samoa, Serbia and Montenegro, Slovakia, Slovenia, South Africa, St. Vincent and Grenadines, Tanzania, Trinidad and Tobago, Uruguay, Venezuela and Zambia. See e.g. Presidential Determination No.2004-41, “Memorandum on Waiving Prohibition on United States Military Assistance with Respect to the Republic of Congo-Brazzaville”, 06 August 2004, para.I.

¹⁸³ Public Law 106-113, SS 705-706, 1999, H. R. 3427 Foreign Relations Authorisation Act (2000-2001). A former US Foreign Relations Act FY 2003, H. R. 1646, Sept.30, 2002 prevented the U.S. dues under regular budget of the U.N. from being used to fund the ICC through 2003. See also the former Hyde Amendment 2002, H. R. 3338, Department of

by or for the support of the ICC, or to extradite a United States citizen to a foreign country obliged to cooperate with the ICC, unless the U.S. receives guarantees that the person will not be sent to the Court. The general prohibition applies to American tribunals, local and federal governments. It includes a prohibition to transfer to the Court any person, an American citizen or a foreign one for inquiry by the Court on U.S. territory. Furthermore, it includes a prohibition to use funds of the U.S. government in order to help the inquiry, the arrest, the detention, the extradition or the prosecution of an American citizen or of a foreigner permanently living in the U.S. by the Court and to process on the territory of the United States any investigatory measure linked to a primary demand, an inquiry, a prosecution or any other procedure by the Court.

The ASPA prevents also other forms of cooperation; it prevents for example, the transfer of documents of national security concerns to the Court¹⁸⁴. It prohibits any military assistance with most States that have ratified the ICC Statute¹⁸⁵. The general principle of this Act provides that, one year after the entry into force of the Court, no military assistance could be given to a State Party to the ICC. As already observed, most U.S. allies are exempted from the effect of this article on US national security grounds¹⁸⁶.

Furthermore, Section 2005 of ASPA restricts American participation to certain U.N. peacekeeping operations. Accordingly, U.S. military participation will be approved only if it takes place on the territory of a Non-Party State. The President should hand a report to the Congress detailing each military alliance which the U.S. is part of and specifying to what extent members of American armed forces could, in the context of a military operation supervised by this

Defence and Emergency Supplemental Appropriations for Recovery from the Response to Terrorist Attacks on the United States Act 2002, 10 January 2002 which prevented funds from 2002 Department of Defence appropriations “*to be used to provide support or other assistance to the International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court*”.

¹⁸⁴ ASPA Sec.2006.

¹⁸⁵ ASPA Sec.2007.

¹⁸⁶ The non-assistance clause does not apply to NATO-state members, to essential allies although NATO members (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, New Zealand and Taiwan).

alliance, be placed under the operational control of the foreign officers submitted to ICC jurisdiction as nationals of State Party to the Statute and evaluate the risk for U.S. Armed Forces.

Whilst the U.S. was unequivocal about its intentions not to be bound, it remains for other parties to a BIA, that are also ICC State Parties, not to defeat the object and purpose of the Rome Treaty¹⁸⁷.

The ICC Statute may be contrasted to those of the ICTY and ICTR, as they are not treaties but *sui generis* legal instruments that resemble treaties in certain respects; these tribunals refer to the Vienna Convention on the Law of Treaties when interpreting their Statutes¹⁸⁸. The ICC will be doing the same. The principles deriving from the Vienna Convention are generally regarded as reflecting international customary law¹⁸⁹. The first principle in Article 31 (1) of the Vienna Convention is that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in light of their object and purpose.

Article 32 of the Vienna Convention also permits alternative means of interpretation such as for example, the preparatory works of a treaty and the circumstances of its conclusion in order to confirm an interpretation arrived at via Article 31; reference to such preparatory work is also permitted where the application of Article 31 still leaves the meaning of a provision “*ambiguous or obscure*”. States are in theory at least independent of each other and possess at least territorial sovereignty¹⁹⁰. Importantly therefore Articles 35 and 36 of the

¹⁸⁷ For a similar U.S. policy see e.g. Roberts S., “*No Exceptions, No Reservations, No Loopholes: The Campaign on the Prohibition of the Development, Production, Stockpiling, Transfer and Use of Anti-Personnel Mines and Their Destruction*”, Colorado Journal of International Environmental Law 9, 1998, pp.371-391 and the so-called Ottawa Treaty, 18 September 1997, 36 ILM 36 (1997).

¹⁸⁸ Prosecutor v D. Tadic, Case No. IT-94-1, “*Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses*” (08 August 1995).

¹⁸⁹ See for example Qatar v Bahrain (Maritime Delimitation and Territorial Questions) ICJ Rep.1995, p. 6, at para.18.

¹⁹⁰ See e.g. the Separate Opinion of Judge Guillaume in Congo v Belgium, ICJ Reports, 2002, para.4; Lord Griffiths and Lord Browne-Wilkinson in Ex parte Pinochet (No.3), 200, 1 AC 147,188; Donaldson LJ in R v West Yorkshire Coroner, ex parte Smith, 1983, QB 335, 358; Island of Palmas Arbitration (1928), 2 RIAA, p.838.

Vienna Convention state that third states may derive rights and obligations from a treaty only if they consent to assuming obligations or exercising the rights laid down in the treaty. The ASPA also recalls this doctrine in its preamble and reiterates: “*an international treaty cannot create obligations towards a State Non-Party*” and consequently that “*the United States refuses any jurisdiction of the Court over their nationals*”.

Massive violations of a treaty by numerous states over a prolonged period of time can be seen as casting that treaty into desuetude, that is reducing it to paper rule that is no longer binding. The violations can also be regarded as subsequent custom that creates new law, supplanting old treaty norms and permitting conduct that was once a violation. This is a risk that the ICC Treaty may face in the future if immunity agreements are given priority in national courts over obligations under the ICC Statute. Finally, contrary state practice can also be considered to have created a *non liquet*, to have thrown the law into a state of confusion such that legal rules are no longer clear and no authoritative answer is possible. In effect, it makes no practical difference which analytical framework is applied. The default position of international law has long been that when no restriction can be authoritatively established, a country is considered free to act¹⁹¹. There is also a possibility for rules to develop which bind only two or a set of states¹⁹² reflecting the need for “*respect of regional legal traditions*”¹⁹³.

As seen in Chapter 1, the relationship between competing treaties, especially in the case of contradictory treaties, is a problematic and largely unresolved issue under international law. Article 30 of the Vienna Convention on Treaties provides some guidance. This codification represents mainly the existing rules of customary law whose core principle is that treaty provisions that are incompatible with *ius cogens* are void; these *ius cogens* rules can be derived

¹⁹¹ Glennon M. J., “*Why the Security Council Failed*”, Foreign Affairs, May/June 2003, pp.23-24.

¹⁹² See claim by Honduras in the El Salvador/Honduras Case, ICJ Reports, 1992, pp. 351, 579; 97 ILR, p.513 that a “trilateral local custom of the nature of a convention” could establish a condominium arrangement.

¹⁹³ See the Eritrea/Yemen (Maritime Delimitation) Case, 119 ILR, pp.417, 448.

both from customary international law and other treaties. General treaty law also reveals that in the case of bilateral treaties between the same parties, either the treaty later in time prevails or the more specific one (*lex posterior derogat legi priori, lex specialis derogat legi generali*)¹⁹⁴.

Article 103 of the UN Charter does not expressly specify whether treaty provisions incompatible with the Charter are void, voidable, suspended or unenforceable¹⁹⁵. The Charter only states that it has a higher rank and that obligations derived from the Charter must prevail; there is no differentiation between obligations incurred among member states of the UN and obligations of and towards non-member states. In the latter case, the Charter should obviously prevail. To the extent that the Charter provides for the competence of UN organs to adopt binding decisions, measures taken in accordance with such provisions can lead to obligations of the members that prevail under Article 103, notwithstanding any other commitments of the members concerned¹⁹⁶. This is true for decisions and enforcement measures of the Security Council under Chapter VII. As far as Article 25 “*to accept and carry out the decisions of the Security Council in accordance with the Present Charter*” binds members of the UN, they are also bound, according to Art.103, to give these obligations priority over any other commitments.

Article 103 represents a partial suspension of the basic international law principle of *pacta sunt servanda*; this suspension will only be acceptable in the case of a conflict between obligations, the superior or stronger of which should prevail. In the case of conflicts between clauses contained in bilateral treaties, all such treaties are equally valid and binding with the consequence that the state, having made incompatible promises, becomes responsible for contractual violations if it does not perform its commitments, even if unable to do so in view of the conflict between treaty provisions¹⁹⁷.

¹⁹⁴ Simma B. (Ed.), “*The Charter of the United Nations: A Commentary*” (2002), p.1118, para.3.

¹⁹⁵ *Ibid* para.6.

¹⁹⁶ *Ibid*, para.10.

¹⁹⁷ *Ibid*, p.1121, para.13.

Where a multilateral treaty (ICC Treaty) prevents any special agreement between the parties on the same matter, such a prohibited agreement should be invalid or unenforceable because it is incompatible with the good faith principle. Importantly, however, bilateral agreements (BIAs) with third states that are non-parties to the multilateral treaty remain valid. The situation often arises in national law that a party has concluded different treaties which it cannot implement at the same time; this party is responsible for all its commitments and in international law, the resolution of such conflict depends on the rules of state responsibility¹⁹⁸. The ICC Statute does not address state responsibility in this context.

The invalidity of a treaty between a UN member state and third parties depends largely on whether a Charter provision represents *jus cogens*. This invalidity resting on the conflict between a treaty provision and *jus cogens* rules is based on Article 103 UN Charter as well as Articles 53 (treaties conflicting with a peremptory norm of general international law-*jus cogens*) and 64 (emergence of a new peremptory norm of general international law-*jus cogens*) of the Vienna Convention on the Law of Treaties 1969. It is the core principle of *jus cogens* that no derogations are permitted and that conflicting norms are invalid for both member and non-member states of the UN.

The question therefore, in relation to the ICC, is whether the provisions of the Rome Statute represent *jus cogens* norms with respect to the surrender model under that Statute. It is suggested that, by contrast to the ICTY and ICTR Statutes, the surrender provisions in the ICC Statute do not transpose UN Charter Chapter VII. However, as discussed above, the functions of the ICC Office of the Prosecutor and its potential relationship with the Security Council may infer some referral of U.N. Chapter VII norms. Therefore, the coexistence of the ICC Statute and immunity agreements in ICC States Parties poses several treaty related problems.

¹⁹⁸ *Ibid*, p.1119, para. 3. Georgia is an example as it first ratified the immunity agreement with the U.S. (13/05/2003) and then adopted a law on cooperation with the ICC (14/08/2003).

It must be recognised that a multilateral treaty structure can and often does, contradict existing principles of customary international law or principles of customary international law that have only partially developed or are in their conclusive phase of evolution. This is reflected in Article 123 of the ICC Statute which provides that seven years after its entry into force a Review Conference shall be convened. This time limit should ensure that there is at least some significant legal practice under the Statute that will provide guidance to further application of the Statute¹⁹⁹.

Furthermore, Knoops [2002]²⁰⁰ offers a critical analysis of the principle *pacta sunt servanda* in the context of Article 42 of the Vienna Convention. Presuming that a treaty in force is binding upon the parties and must therefore be performed by them in good faith, a treaty may become void if it conflicts with an unconditional norm of general international law (*jus cogens*) established after the treaty comes into force, though this does not have retroactive effect on the validity of a treaty. Knoops suggests that fundamental authoritative norms in view of the existing doctrinal basis of the surrender provisions in the ICC Statute (i.e., emerging norms of fair trial to be endorsed in surrender proceedings) could potentially affect the legality of the ICC.

The value protected by immunity *ratione personae* is much more important than the value protected by immunity *ratione materiae*. This type of immunity protects the functionality of a state and the procedures, including arrest, against a head of state or other leading state officials might seriously impair the state's ability to discharge its functions properly. This is why immunities *ratione personae* provide complete protection against any foreign exercise of jurisdiction whereas immunity *ratione materiae* covers only official acts²⁰¹.

¹⁹⁹ Bassiouni M. C., "Negotiating the Treaty of Rome on the Establishment of an ICC", (1999), 32 Cornell International Law Journal, p.467.

²⁰⁰ *Op cit*, Knoops, note 66, p.36.

²⁰¹ Wirth S., "Immunities, related problems and Article 98 of the Rome Statute" (2001) 12 Criminal Law Review 4, p.432.

Article 27 ICC Statute (irrelevance of official capacity) has proven to cause incompatibilities with regard to immunity provisions in national constitutions. States have, however, indicated their readiness to overcome these problems; although some have pointed out that constitutional immunity might form an obstacle to swift ratification, some states have amended their constitutions (i.e. Luxemburg), others have announced that constitutional amendments are probably necessary (i.e. Austria, Mexico, Slovenia), and others that it is not (i.e. Norway, Spain). Also, some states have chosen to ratify the ICC Statute first and deal with possible compatibility questions later (i.e. Italy, Belgium)²⁰². Furthermore, some states have declared that constitutional immunities are only relevant within the internal constitutional order and are therefore not affected by the ratification of the Statute. This argument debatably neglects the process of surrender to the ICC (an act covered by Article 27) because the surrender of a head of state to the ICC by national authorities is at least in breach of any inviolability the head of state may enjoy within the constitutional order.

Requests for surrender or assistance under Article 98 ICC (cooperation with respect to waiver of immunity and consent to surrender) illustrate the possible conflict between the requested State's obligations under international law and national immunity provisions. Article 98 (1) provides that the Court may not proceed with such a request when this would put the requested state in the position of having to violate its obligations under international law with regard to immunities. It has been argued that this does not reduce the effect of Article 27. It should follow that the widely acknowledged customary law status of Article 27 should lead to the conclusion that there are no immunities under international law.

Immunities *ratione personae* constitute a rule of customary international law and “any exception to this rule in the case of international criminal tribunals

²⁰² Van Alebeeck R., “From Rome to the Hague: recent developments on immunity issues in the ICC Statute” 13 Leiden Journal of International Law 3 (2000) p.487.

must be legally justified". This is where the analysis of Article 12 ICC Statute (preconditions to the exercise of jurisdiction) begins in so far as it overrides the customary rule on immunities (Article 27 precludes immunity based on customary or treaty law). If a State has consented to a global custom, then other interested States may validly estop any objection to such custom in the form of a subsequent treaty. The Vienna Convention does not define "*object and purpose*", so it is unclear what these obligation entail, especially in the context of a treaty, like the Rome Statute, that creates and regulates a new international institution. Nor is it clear how long the object and purpose obligation lasts after a nation has signed a treaty. The U.S. Government expressed its opposition to the Rome Treaty by deciding to nullify its signature²⁰³ and declared that "[it] does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature"²⁰⁴. Moreover, the United States objected to the fact that its signature related to a treaty, the final text of which was amended at the last minute, without any notice²⁰⁵ or procedure and to the fact that there was no opportunity for the usual technical review by the Drafting Committee. The United States also maintained that insofar as substantive changes have been made to the original text, mainly in relation to ICC Arts. 12 and 93, should questions of interpretation arise, they should be resolved in conformity with the signed²⁰⁶ rather than the final ICC document²⁰⁷. The U.S. also failed to obtain consensus on its proposal to allow States to "opt-out" of ICC jurisdiction for up to ten years so that the opting-out States could assess the development regarding the ICC and decide whether it was functioning

²⁰³ In a communication received by the UN on 06 May 2002, the Government of the United States stated that "in connection with the Rome Statute of the International Criminal Court adopted on July 1997, 1998, that the United States does not intend to become a party to the treaty". Under Article 11 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986, the consent of the State to be bound by a treaty may be expressed, among other means, by a signature. However, consent has to be given for a signature to have that effect (Article 12 (a)) or such intention was expressed during negotiations (Article 12 (c)).

²⁰⁴ Multilateral treaties deposited with the Secretary-General, Treaty I-XVIII, Note No.6. Similar declaration has also been made by the Government of Israel (Note 3).

²⁰⁵ For the original text presented for signatures see A/CONF.183/C.1/L.76 and Add.1-13.

²⁰⁶ *Ibid.*

²⁰⁷ A/CONF.183/9.

effectively and impartially²⁰⁸. Turkey on the other hand opposed the lack of a satisfactory formulation allowing opting in and out of the ICC's jurisdiction²⁰⁹.

Some countries that have signed but not ratified the ICC Treaty and have at the same time entered into a non-surrender agreement, have attempted to resolve at the domestic level the incompatible relationship between the two. In the Republic of the Philippines for example it was said that the non-surrender agreement concluded with the United States²¹⁰, which in domestic law would be equivalent to a contract adhesion²¹¹, legitimises immunity for the crimes under the ICC Statute and creates a “two-tiered system of justice”²¹². In a petition against the Secretary of Foreign Affairs, Alberto Romulo, who secretly²¹³ entered into the agreement, he was accused of abandoning and waiving the only national legitimate recourse through the ICC to try persons. The object of the petition was to declare the non-surrender agreement constitutionally flawed, set aside and nullified²¹⁴. Moreover, it had been argued that the agreement is detrimental the status of national laws. In the Philippines, national laws do not provide for the prosecution of genocide, crimes against humanity, war crimes or crimes of aggression²¹⁵. The effect of entering into the non-surrender agreement means that the Philippines cannot deliver an American national to the jurisdiction of the ICC but is obliged to deliver a Filipino national who has nothing to do with the United States national interests. It was observed that “*The American armed forces are the primary visiting military forces in Philippine territory. More likely than not, they are the foreign forces prone to commit genocide, crimes against humanity and war crimes against the Filipino people*”²¹⁶. The proposition that a non-

²⁰⁸ *Op cit*, note 41.

²⁰⁹ A/CONF.183/13 (Vol.II), p.106, para.12 and p.124, para.42.

²¹⁰ RP-US Non-Surrender Agreement, through exchange Notes No. BFO-028-03, 13 May 2003.

²¹¹ Republic of the Philippines Supreme Court (Manila), *Bayan Muna v Alberto Romulo*, p.1, at [http://www.pgaction.org/uploadedfiles/Philippines%20petition%20to%20nullify%20BIA%209-30-03\(1\).pdf](http://www.pgaction.org/uploadedfiles/Philippines%20petition%20to%20nullify%20BIA%209-30-03(1).pdf)

²¹² *Ibid*.

²¹³ Discerned from the marking “CONFIDENTIAL” on the original certified copy.

²¹⁴ *Supra* note 208, p.21.

²¹⁵ See e.g. 1932 Penal Code of the Republic of the Philippines.

²¹⁶ *Op cit*, note 208, p.28.

surrender agreement may be defined as an executive order rather than a treaty is questionable. A decisive factor in ascertaining the legal nature of an instrument is whether or not it is intended to create rights and obligations between the parties. Another criterion is whether the agreement involves fundamental political issues or changes in national policy or whether it affects directly and fundamentally the rights and duties of nationals of a particular state. In Australia, for example, it was felt that “*While still of the belief that the Statute of the International Criminal Court is not in the best interests of Australia and Australians...though the majority of submissions opposed Australia’s ratification, Parliament will pass the Bill and Australia will ratify*”²¹⁷. Traditionally, individuals cannot question the constitutionality of executive orders but in the Philippines, the Supreme Court underscored the importance of public interest, ruling that it was the Court’s duty to determine whether or not “*other branches of the government have kept themselves within the limits of the Constitution and the laws and that they have not abused the discretion given to them*”²¹⁸, deciding to “*brush aside technicalities of procedure*”. The Manila Supreme Court had historically allowed ordinary citizens to question the constitutionality of several executive orders even when they involved only an indirect and general interest shared in common with the public²¹⁹.

Main issues in the petition related to whether the RP-US Non-Surrender Agreement constitutes an act which defeats the object and purpose of the Rome Statute and contravenes therefore the obligation of good faith and whether the Agreement is void and unenforceable for a grave abuse of discretion amounting to lack or excess of jurisdiction in connection with its execution. It was correctly argued by the petitioners that the execution of the Agreement could not be isolated from the signing of the Rome Statute²²⁰. Their effect is to prevent States Parties from meeting their obligations under

²¹⁷ Letter from Downey R. to Morris B., Inquiry Secretary, Joint Standing Committee on Treaties, Submission No. 198.1, 11 September 2001, available at <http://www.aph.gov.au/house/committee/jsct/icc/subs/sub198.1.pdf>

²¹⁸ Basco v Philippine Amusement and Gaming Corporation [1994] 197 SCRA 52, 60

²¹⁹ See e.g. Kilosbayan v Guingona Jr., 232 SCRA 110 [1994]; Philippine Constitution Association v Gimenez, 122 Phil. 894 [1965]; Iloilo Palay and Corn Planters Association v Feliciano, 121 Phil. 258 [1965].

²²⁰ *Supra* note 213, p.24.

the Rome Statute²²¹. The Non-surrender Agreement between the U.S. and the Government of Romania acknowledges for example that “*Romania, by becoming a State Party to the Rome Statute of the International Criminal Court, has expressed its commitment to be bound by the rules and principles embodied therein*”²²². Obligations of good faith emanate from the generally accepted principle *pacta sunt servanda* and Article 18 of the Vienna Convention on the Law of Treaties. The non-surrender agreements constitute a conduct equivalent to interferences with contractual relations. This implies (a) the existence of a valid contract; (b) knowledge on the part of the third person of the existence of the contract; and (c) interference by a third person is without legal justification or excuse. This is comparable to contractual estoppel and in international law it is a principle whereby states deemed to have consented to a state of affairs cannot afterwards alter their position²²³. For instance, if a country agrees to cede territory to another, it may not, in the period between signature and ratification, surrender the same to a third country²²⁴. The same expectation applies in the case of the ICC Statute although estoppel, originating from the jurisprudence of the Court is underdeveloped and as a result considered not to form a rule of substantive law.

4.5 ICC Statute and peacekeeping missions

The discussion on the relationship between the ICC Statute and Security Council decisions regarding peacekeeping missions serves here to target the unresolved inconsistencies in the Rome Treaty which indicate at close

²²¹ For instance, it can be argued that non-surrender agreements breach ICC Arts. 27, 86, 87, 98 and 90.

²²² Emphasis added. Agreement between the Government of the United States of America and the Government regarding the surrender of persons to the International Criminal Court, 01 August 2002. The Agreement which done both in English and Romanian, provided that in case of disputes, the English version will prevail.

²²³ See e.g. Sinclair I. “*Estoppel and Acquiescence*” in Lowe A. V and Fitzmaurice M. “Eds.) “Fifty Years of the International Court of Justice” (1996) p. 104.

²²⁴ See e.g. Temple of Preah Vihear (Cambodia v Thailand) ICJ Reports, 1962, p.6 and Cameroon v Nigeria (Preliminary Objections) Case, ICJ Reports, 1998, pp.275, 303.

inspection that since the terms of the Statute may be effectively altered by decisions of the Security Council, it may be feasible to conceive the implementation of immunity agreements by ICC States Parties as not being, *ab initio*, incompatible with the objectives of the Statute.

Eleven days after the ICC entered into force on 01 July 2002, the Security Council adopted Resolution 1422 (2002) as a result of United States threat to the United Nations that it would withdraw all its peacekeeping forces from Bosnia and East Timor unless it obtained immediate agreement that none of its nationals would be subject to any action by the International Criminal Court²²⁵. It was therefore the Security Council and not the ICC who examined, interpreted and accordingly applied the ICC Statute, namely Article 16. Importantly, having applied ICC Article 16 in a unvarying manner, what is now significant is whether the ICC will challenge such interpretation of Art.16, and if so, to what legal consequences.

In July 2003, the Security Council renewed Resolution 1422; this Resolution made in the context of the Security Council debate on the UN mission in Bosnia-Herzegovina, exempted U.N. peacekeepers from ICC jurisdiction if they came from countries that were not parties to the Rome Statute. Paragraph 1 of Resolution 1422 asserted that it is consistent with Article 16 (deferral of investigation or prosecution) of the Rome Statute, which states: “*No investigation or prosecution may be commenced or proceeded with this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions*”.

Paragraph 1 of the 1422 Resolution provides that “*Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing States*

²²⁵ See e.g. Lynch C., “*U.S. Peacekeepers May Leave E. Timor-Immunity Sought from War Crimes Court*”, Washington Post, 18 May 2002.

not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period...not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise”.

The contention that the Resolution was consistent with ICC Art.16 is questionable. This is so because of the intent of the drafters of Article 16 for the provision to be invoked only in rare events where the Security Council makes an individualized determination in a particular case that a temporary deferral of an investigation or prosecution would help the Council to restore international peace and security.

The wording of Article 16 makes it very clear that the requests for which it provides are intended to be binding on the ICC. However, the Article is less specific in making reference to “*acting under the Chapter VII*”. Article 16 becomes anomalous at this point to the extent that²²⁶:

“In assigning functions to the Council, it (ICC Art.16) specifies its legal basis in the Charter. This is a question that, as should be clear from the introductory part of this article, only the Council can decide upon, if it feels necessary to do so, and will arise only if the Council does not first determine that it lacks the power to perform the functions assigned to it”²²⁷.

Article 16 was the subject of intense negotiations. Some states, including the U.S., wanted the ICC to be under the control of the Security Council and able to initiate proceedings only with the Council's consent. Since any permanent member of the Council could then veto proceedings directed against it, many states objected. Article 16 arose as a compromise recognizing that suspension of ICC proceedings might be essential to allow the Council to maintain

²²⁶ Lavallo R., “*A vicious storm in a teacup: the action by the United Nations Security Council to narrow the jurisdiction of the International Criminal Court*”, (2003), Criminal Law Forum 14, p.201.

²²⁷ See also Cassese A., “*L’orgoglio americano che frena il tribunale mondiale*”, La Repubblica, 17 July 2003, p.17.

international peace and security. An essential element of this compromise was the requirement that any extension of the deferral would require a new decision by the Security Council which any permanent member could veto²²⁸.

Since action by the Security Council pursuant to ICC Article 16 does not relate to Article 40 of the UN Charter²²⁹, it is manifest that the only Charter provision under which the Council could take action under ICC Article 16 is Article 41²³⁰. Article 41 of the UN Charter authorises the Council to employ measures falling below the use of armed force.. Since however, Article 41 UN Charter defines its scope by referring to “*measures not involving the use of armed force*”, for the purposes of ICC Article 16 the Council may in principle make the requests specified in ICC Article 16 under Art.41 of the UN Charter²³¹.

It is accordingly argued that Resolution 1422 cannot be interpreted as illegal or inoperable and the question as to whether the Resolution is consistent with Article 16, becomes irrelevant. As Lavallo points out: “*It would seem that if the resolution were constitutional, it would...be mandatory whether or not it is consistent with article 16. The only difference this question makes is that, if the resolution is consistent with article 16, it does not involve interference by the Council in the operation of the ICC. But the resolution is not constitutional and as such should produce no effect*”²³².

²²⁸ *Supra*, note 223.

²²⁹ Article 40 of the UN Charter reads: “*In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures*”.

²³⁰ Article 41 of the Charter reads: “*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations*”.

²³¹ *Op cit*, Lavallo, note 223, p.201.

²³² *Ibid*.

Opponents of Resolution 1422 furthermore maintained that Article 16 was intended to apply on a case-by-case basis²³³ where ICC proceedings could interfere with efforts to restore or maintain international peace and security. They argued that it was not intended to apply prospectively to provide blanket immunity from the Court. Resolution 1422 was extended once in 2003 by Security Council Res. 1487²³⁴. In 2004, when this Resolution should have been extended, the U.S. found difficulties in obtaining the necessary support amidst growing concerns about allegations of abuse at the Abu Ghraib prison in Iraq.

Critics of the Resolution also maintain that it exceeds the Security Council's authority by interfering with the sovereign right of states to enter into treaties and violates an asserted *jus cogens* principle of customary international law that perpetrators of serious violations of humanitarian law must either be prosecuted or extradited to a state that will prosecute.

The Vienna Convention on the Law of Treaties provides that a treaty should be interpreted in accordance with the ordinary meaning of its terms in light of its object and purpose. If the language is ambiguous, resort may be had to supplemental means of interpretation, including the record of the negotiations leading to the treaty. Arguably, Article 16 is ambiguous. There is nothing in its language that expressly excludes the approach taken in Resolution 1422. Nevertheless, the Resolution constituted an unauthorized amendment of the Statute; the Security Council does not have the competence to adopt and interpret international treaties, and by attempting to do so, it weakens the system established by the Charter²³⁵.

There is nothing in the Charter to suggest that the Security Council cannot, where there is an actual threat to the peace, take an action inconsistent with a treaty or customary international law. On the contrary, the Charter implies that

²³³ See SC Press Release, “*Security Council rejects draft proposing of United Nations Mission in Bosnia and Herzegovina*”, SC/7437, 30/06/2002, Statement by French Ambassador to the United Nations Jean-David Levitte.

²³⁴ SC Resolution 1487 (2003), 4772nd meeting (12 /06/ 2003), S/RES/1487 (2003).

²³⁵ See e.g. Mr Wenawesser, SC 4722nd Meeting, 12 June 2003, S/PV.4772, p.8.

such actions might be necessary. Article 2(7) prohibits the U.N. from intervening in matters within the domestic jurisdiction of any state, but indicates that the prohibition does not apply in the case of enforcement measures taken under Chapter VII. The argument that the Security Council must act consistently with jus cogens norms finds some support in the Vienna Convention, which provides that treaties violating jus cogens norms are void. The United Nations Charter does not authorise the Security Council to amend treaties that are consistent with the obligation under the Charter or to require member states of the UN to violate their obligations under such treaties. Brazil for instance described that “*The Security Council cannot alter international agreements that have been duly negotiated and freely entered into by States parties. The Council is not vested with treaty-making and treaty-reviewing powers. It cannot create new obligations for the States parties to the Rome Statute, which is an international treaty that can be amended only through the procedures provided in Articles 121 and 122 of the Statute*”²³⁶. Canada expressed its concern by concluding that Resolution 1422 (2002) sets a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished such as for example the nuclear Non-Proliferation Treaty²³⁷.

An author also explains²³⁸:

“Resolution 1422 does not only re-interpret the ICC Statute, in particular its Article 16, but it in fact turns the past logic of peacekeeping measures in the UN system upside down. If the ICC could, so far, be understood-by proponents as well as opponents-as a peacekeeping measure, because, according to the Statute’s preamble, it shall prevent the threat to peace and security of mankind

²³⁶ These two articles refer respectively to amendments to the Statute and amendments to provisions of an institutional nature. See e.g. Condorelli L. and Villalpando S., “*Referral and Deferral by the Security Council*” in Cassese A., Gaeta P. et al (Eds.) “*The Rome Statute of the International Criminal Court: A Commentary*” (2002), at 647.

²³⁷ See Mr. Heinbecker (Canada), Security Council, 4546th Meeting, 10 July 2002, S/PV.4568, p.3.

²³⁸ Ambos K., “*International Criminal Law has Lost its Innocence*”, 3 German Law Journal, No.10, October 2002, para.4, available at <http://www.germanlawjournal.com/article.php?id=199>

by grave international crimes, it now takes a whole new nature. In the light of the Council's resolution, the Court becomes itself a threat to peace".

Article 103 of the UN Charter suggests that obligations to comply with Security Council decisions made under Chapter VII seem to prevail for States Parties to the ICC Statute over their rights and obligations under the Statute²³⁹. However, although the ICC Statute lacks the UN Charter VII power to compel surrender and transfer, ICC Article 86, addressing specifically the obligations to arrest and surrender, is practically identical to Articles 29 and 28 of the ICTY and ICTR Statutes, respectively. Also, the ICC Statute distinguishes between States Parties and States Non-Parties imposing a subsequent fine distinction of different legal obligations on each. Unlike the ICTY and ICTR cooperation framework, the conclusion must be that although requests for arrest and surrender may be addressed to any State, a binding obligation is only to be imposed on States Parties to the ICC Statute, and in cases other than genocide, on States Parties which have explicitly accepted the ICC jurisdiction with respect to the crime in question.

Res. 1422 (2002) provides that the Security Council is acting under Chapter VII of the Charter of United Nations. In order to act under Chapter VII, the Security Council must make a determination under Article 39 of the UN Charter the wording of which provides that the Security Council must "determine" whether a threat to the peace, a breach of the peace, or an act of aggression exists. The ICC Draft Statute included in fact references to Article 39²⁴⁰. Through the construction of the sentence, such determination is unequivocally singled out as a condition for the use of the particular competences provided in Chapter VII. The Security Council has ordered in the past temporary enforcement measures, within the framework of Chapter VII. If such determination is made, then obligations of UN member states to implement enforcement measures have priority over treaty obligations that are

²³⁹ MacPherson B., "Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings", AJIL Insight, July 2002.

²⁴⁰ See ICC Draft Statute, Art.10 (4) (Relationship between the Security Council and the International Criminal Court), option 2, A/CONF.183/13 (Vol. III), p.24.

otherwise fully consistent with their obligations under the UN Charter. SC Res.1422 (2002) has been criticised for lacking the required determination under Art.39 of the UN Charter²⁴¹ as there was no immediate threat to or breach of the peace or an act of aggression. In 1992 the Security Council recognised that the absence of war and military conflicts amongst states does not per se ensure international peace and security but it recognised nevertheless that Chapter VII is reserved for military conflict²⁴². At the same time it must be said that insufficient determination under Art.39 of the UN Charter in SC Res.1422 (2002) is not without precedent. In 1972 for example, the Security Council determined that apartheid in South Africa ‘disturbed’ international peace and security²⁴³. Such formulation clearly fell short of UN Charter Art.39 prerequisites²⁴⁴.

It must also be mentioned that while a determination of the Security Council is a prerequisite for the imposition of measures under Chapter VII, this is not to say that the determination must also be made with express reference to Art.39²⁴⁵. It was not until Res.598 in 1987 that Art.39 was expressly mentioned. Resolutions 1422 and 1487 do not make any reference to Art.39 nor do they make any determination of a threat to international peace and security²⁴⁶. At the adoption of Resolution 1487, Nigeria²⁴⁷ expressed the understanding that ICC Art.16 was to be invoked only in a practical situation

²⁴¹ See e.g. Amnesty International, “*International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice*”, 01 May 2003, AI INDEX: 40/006/2003.

²⁴² UN Doc.S/23500, 31 January 1992, p.3.

²⁴³ SC Res.311, Question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Republic of South Africa, 04 February 1972; see also Report of the Sub-Committee on the Spanish Question, appointed by the Security Council on April 29, 1946, UN Doc.S/75 (31 May 1946), paras.16-22, where the sub-committee came to the conclusion that neither a breach of peace nor a threat to the peace existed.

²⁴⁴ *Op cit*, Simma, note 191, p.609, para8; see also Conforti B., “*The Law and Practice of the United Nations*” (2000), p.179 expressing serious doubts about the Security Council finding that the failure to extradite was a threat to peace and security; Graefrath B., “*Leave to the Court What Belongs to the Court: the Libyan Case*”, 4 European Journal of International Law” (1993) pp.184-196.

²⁴⁵ See e.g. SC Res. 567 of 20 June 1985 and SC Res.574 of 07 October 1985 (Angola, ‘armed attacks’ and ‘acts of aggression’) SC Res. 502 of 03 April 1982 (‘breach of peace’, Falklands conflict); SC Res. 496 of 15 December 1981 and SC Res. 507 of May 1982 (Seychelles, ‘mercenary aggression’); SC Res. 393 of 30 July 1976 (Zambia ‘armed attack’).

²⁴⁶ Statement by Mr. Wenawesser (Liechtenstein), Security Council 4772nd meeting, 12 June 2003, S/PV.1772, p.7.

²⁴⁷ *Ibid*, statement by Mr. Mbanefo (Nigeria), p.18.

as demonstrated and reinforced by ICC Art. 13 (b): “*A situation in which one or more of such crimes (crimes under Art.5) appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations*”. New Zealand expressed similar unease. It expressed serious concern that the use of the specific procedure laid down in ICC Art.16 was formulated in a generic resolution and not in response to a particular fact/situation and with the intention to renew it on an annual basis; it was inconsistent with both the terms and purpose of that provision and that “*as such, it touched directly on the obligations assumed by States Parties under the Rome Statute, without their consent. Such an approach...stretched the legitimate limits of the role and responsibility entrusted to the Council under the Charter*”²⁴⁸.

During the negotiation of ICC Article 16 it was stressed that any suspension by the Security Council of ICC proceedings must be exceptional in nature and apply for a limited duration and that the prior consent of the Court should be necessary²⁴⁹. Moreover, it was strongly felt that consideration of a matter by the Security Council should not prevent the Court from acting since, whereas the functions of the Council are political, those of the ICC, like those of the ICJ, were purely judicial²⁵⁰. Negotiating parties to the ICC felt that although the Council had exclusive competence and responsibility in determining the existence of an act of aggression, it is only the ICC that could decide whether an individual had committed the crime of aggression. Predominantly in fact, it was the crime of aggression that was considered the major if not the only exceptional circumstance, which could trigger Security Council suspension of ICC proceedings²⁵¹. For example, Art. 10 (4) option no.2 of the ICC Draft Statute provided that: “*The determination [under Art.39 of the Charter of the*

²⁴⁸ *Ibid*, statement by Mr. McIvor (New Zealand), p.5.

²⁴⁹ Statement by Mr. Bandonin (Observer for the International Federation of Human Rights Leagues) at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 6th Plenary Meeting, 17 June 1998, A/CONF.183/SR.6, p.105, para130. See also Verge Sabola (Brazil), 3rd Plenary Meeting, 16 June 1998, A.CONF.183/SR.3, p.76, para.47.

²⁵⁰ Ms Blokar (Slovenia), 11th Plenary Meeting, 22 June 1998, A/CONF.183/C.1/SR.11, p.207, para55.

²⁵¹ See e.g. Statement by Denmark, 11th Plenary Meeting, 22 June 1998, A/CONF.183/C.1/SR.11, p.209, para86; Mr Kessel (Canada) made specific reference to ending a war, 10th Plenary Meeting, 22nd June 1998, A/CONF.183/C.1/SR.10, p.208, para.66.

United Nations] of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression". Even then, it was strongly felt that a 12-month period was unnecessary and overly long²⁵². States like Venezuela, Spain and Japan for example, felt that the ICC Statute provided insufficient safeguards against Security Council interference and that it would be inappropriate to totally prohibit the Court from exercising its functions with respect to a case simply because the case had already been taken up by the Security Council²⁵³. During the adoption of Resolution 1422 (2002) Canada asserted that in the absence of a specific threat to international peace and security, the Council acted ultra vires²⁵⁴:

*"Even if the Security Council has wide discretionary powers [under Article 103 of the UN Charter]²⁵⁵, these powers are not unlimited. The Charter is a legally binding document and no organ is endowed with complete freedom to act or not to act...in a case of manifest ultra vires decisions of any organ, such decisions are not binding and cannot prevail in case of conflict with obligations under other agreements"*²⁵⁶.

During the adoption of SC Resolution 1487 (2003), the UN Secretary General expressed his belief that ICC Art.16 was indeed not intended to cover requests such as those advanced by the United States, but only a more specific request relating to a particular situation²⁵⁷. On an assumption that *"no peacekeeper or any other mission personnel have been anywhere near committing the kind of*

²⁵² See Mr Cuatooor (Trinidad and Tobago) at 11th Plenary Meeting, 22 June 1998, A/CONF.183/C.1/SR.11, p.211, para.2; Mr Sadi (Jordan), p.208, para.65; Mr Diaz Paniagua (Costa Rica), p.208, para.68.

²⁵³ *Ibid.*, pp. 209-212.

²⁵⁴ See Mr. Heidbecker (Canada), Security Council 4568th Meeting, 10 July 2002, S/PV.4568, p.3.

²⁵⁵ UN Charter, Art. 103: *"In the event of a conflict between the obligations of the Member of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"*.

²⁵⁶ Bernhardt R., *"Article 103"* in Simma, *op cit.*, note 191, p.1299; see also Separate Opinion, Judge Shahabuddeen, Question of Interpretation and Application of the Montreal Convention Arising from the Aerial Incident at Lockerbie (Request for Indication of Provisional Measures), Libya v U.S., Order 14 April 1992, ICJ Rep. (1992), para.142; Franck T., *"The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?"* 86 American Journal of International Law (1992), pp. 519-532

²⁵⁷ *Op cit*, note 243, p.2.

*crimes that fall under the jurisdiction of the ICC*²⁵⁸ he also stated that it should be accepted that the “Security Council is acting in good faith, and that its purpose is to make it possible for peace operations to continue, whether established or only authorized by the Council”²⁵⁹.

Jordan expressed its reservations by stating; “We are still concerned over how this resolution has attempted to elevate an entire category of people to a point above the law; a feeling sharpened still further when thought is given to the revolting nature of the crimes covered by the Court’s jurisdiction. The resolution is therefore, in our assessment a misapplication of Article 16, and a contravention of the Statute”²⁶⁰.

Iran too expressed similar concerns at the renewal of Resolution 1422 as it concluded that it “legally disputed and considered to be questioning the authority of a treaty-based international body, the ICC. The resolution unduly interfered with the Statute of the ICC”²⁶¹. The Iranian delegation regretted that “a unilateral approach, which is founded on a misplaced notion of placing one country above the law, has created an untenable and unsound situation in the Security Council and in international relations in general. Undoubtedly, such an approach runs counter to the spirit and letter of the UN Charter, especially Article 24, which maintains that the Council acts on behalf of the general membership”²⁶².

²⁵⁸ *Ibid.*, statement by the Secretary General, pp.2-3. See also statement by the President of the Security Council, S/PRST/2005/21, 31 May 2005 alleging serious sexual misconduct by United Nations Peacekeeping personnel; on U.S. military war crimes (My Lai massacre, Vietnam) see Kelman H.C. and Hamilton V. L., “Crimes of Obedience”, 1989, pp.5-12. See e.g. the trial of Gary Bartlam (10 January 2005) at the military base of Bergen-Hohne, Germany, a British soldier charged with the mistreatment of Iraqi prisoners near Basra (Darren Larkin, Daniel Kanyon and Mark Cooley pleaded guilty to similar charges on 18 January 2005 before the court martial in Osnabruck, Germany). See also the trial of Charles Graner by an American military court (Fort Hood, Texas) sentenced to ten years imprisonment (16 January 2005) for series of abuses against prisoners of the Abu Ghraib prison in Baghdad.

²⁵⁹ *Ibid.*, Secretary General.

²⁶⁰ *Supra* note 243, statement by H.R.H. Prince Zeid Ra’ad Zeid Al-Hussein, Ambassador, Permanent Representative of Jordan to the United Nations.

²⁶¹ Statement by H.E. Dr. M. Javad Zarif, Permanent Representative of the Islamic Republic of Iran before the Security Council on United Nations Peacekeeping, SC 4772nd Meeting, 12 June 2003.

²⁶² *Ibid.*

Furthermore, the E.U. Guiding Principles have been criticised as weak, since reference to the U.S. role in peacekeeping missions has been described as “*irrelevant*”²⁶³ because, as far as Europe is concerned, there are no substantial peacekeeping missions on its territory²⁶⁴. The primary concern of the U.S. addressed through SC Resolutions did not relate to its nationals participating in U.N. peacekeeping missions, but to U.S. nationals, including military and civilian leaders involved in numerous multilateral operations concluded in recent years, such as in Iraq, Kosovo and Afghanistan. In fact, the United States employs only a relatively small number of nationals participating in UN peacekeeping operations, excluding non-UN operations such as KFOR in Kosovo, run by NATO, and International Security Assistance Force (ISAF) in Afghanistan, as well as UN peace-building missions, such as MINUGUA in Guatemala, with over three-quarters of them in Kosovo²⁶⁵. In fact, as of the end of April 2005, the United States participated in 17 UN peacekeeping operations. U.S. personnel serve mainly as civilian police and military observers in seven U.N. peacekeeping missions, with almost 80 percent of them posted in Kosovo²⁶⁶. Moreover, of the 103 nations contributing 66,547 personnel to these UN operations, U.S. participation amounted to just one half of one percent²⁶⁷.

Pakistan, the largest contributor to U.N. peacekeeping operations, following the U.S. strategy, maintained that U.N. peacekeepers should not be exposed to any ‘*arbitrary or unilateral action by any national or international body*’²⁶⁸. Pakistan explained that such a possibility could reduce the incentives for

²⁶³ Amnesty International, “*International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements*”, October 2002, AI Index: IOR 40/030/2002, p.9.

²⁶⁴ At the time of the adoption of SC Resolution 1422 (2002) in Bosnia and Herzegovina the U.S. had 2000 troops and nearly 50 civilian police, see Mr Negroponte (United States), Security Council 4568th Meeting, 10 July 2002, S/PV.4568, p.9.

²⁶⁵ Henry L. Stimson Centre, “*U.S. Personnel Contributions to U.N. Peacekeeping Operations as of 30 April 2005*, Peace Operations Factsheet Series, available at <http://www.stimson.org/fopo/?SN=FO20050518830>

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Op cit*, note 243, Statement by Ambassador Munir Akram, Permanent Representative of Pakistan to the United Nations, to the Security Council, p.21.

member States to offer UN peacekeeping forces²⁶⁹. This is very important and illustrates how ICC Party States, like France, had to support the Darfur Resolution despite its non-immunity provisions for Non-Parties. At the adoption of SC Res. 1487 (2003)²⁷⁰ France pointed out in fact that the principal reason behind their previous support for Res.1422 (2002) was the risk at the time of non-renewal of U.N. missions and the wish, in response to the request by the U.S. to allow it a further period of time to find a lasting solution to its concerns regarding the ICC Statute²⁷¹. A U.S. statement illustrates this: “*even one instance of the ICC attempting to exercise jurisdiction over those involved in a UN operation would have a seriously damaging impact on future UN operations*”²⁷². France abstained from Resolution 1487 as it believed that its previous reasoning was now unjustified and it “*lies in the past*”²⁷³ and was in favour of Resolution 1593²⁷⁴ because of the overriding concerns about the situation in Sudan²⁷⁵.

Furthermore, although nearly all participants to the Rome Conference concurred that jurisdiction over genocide should be automatic, the United States, as well as other countries such as France, argued that states should be allowed to “*consent separately*” to jurisdiction over war crimes and crimes against humanity²⁷⁶. Because both the United States and France have a large

²⁶⁹ *Ibid.* Pakistan also reserved the right to adjudicate in cases involving Pakistani peacekeepers in all peacekeeping operations and duties but suggested that the annual renewal by the Security Council may be avoided in future through separate arrangements, Statement by Ambassador Munir Akram, Permanent Representative of Pakistan to the United Nations, to the Security Council, 12 June 2003, S/PV.4772, p.21.

²⁷⁰ SC Resolution on United Nations peacekeeping, S/RES/1487 (2003), 12 June 2003.

²⁷¹ *Op cit*, note 243, Statement by Mr Duclos (France), p.24

²⁷² *Ibid.*, statement by Ambassador Cunningham J., Deputy United States Representative to the United Nations.

²⁷³ *Ibid.*, statement by Mr Duclos (France), p.24.

²⁷⁴ In favour were Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom, United Republic of Tanzania; no state was against the resolution and abstaining were Algeria, Brazil, China and the United States.

²⁷⁵ See e.g. Security Council 5071st Meeting, 04 November 2004, S/PV.5071 where the Security Council is warned that the situation in Sudan is deteriorating; see also Ms Arbour, United Nations High Commissioner for Human Rights expressing that the Commission of Inquiry concluded that the Government of Sudan had not pursued a policy of genocide and that the Commission recognised that “*only a competent court could determine, on case-by-case basis, whether individuals, including Government official, ordered or participated in atrocities motivated by the genocidal intent to exterminate a protected group*”, SC 5125th Meeting, S/PV.5125, 16 February 2005.

²⁷⁶ Marler M. K., “*The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*”, 49 Duke Law Journal, Issue 3 (1999) p.825.

number of soldiers serving in peacekeeping missions throughout the world, the two countries expressed concerns over politically motivated prosecutions for war crimes before the ICC. This is why the ICC Statute as adopted allows States to opt out of jurisdiction over war crimes, but not crimes against humanity for a period of seven years.

In March 2005 a U.S. Commander stated that while ASPA provides a positive effort in protecting U.S. nationals from ICC prosecutions²⁷⁷:

*“It has an unintended consequence of restricting our access to and interaction with many important partner nations. Sanctions enclosed in the ASPA statute prohibit International Military Education and Training (IMET) funds from going to certain countries that are parties to the Rome Statute...of the 22 nations worldwide affected by these sanctions, 11 of them are in Latin America, hampering the engagement and professional contact that is an essential element of our security cooperation strategy...We now risk losing contact and interoperability with a generation of military classmates in many nations of the region, including several leading countries”*²⁷⁸.

Notwithstanding the argument that the Security Council may not supersede peremptory norms of general international law (*jus cogens*)²⁷⁹ and the obligation on UN Member States to accept and carry out the decisions of the Security Council²⁸⁰, the ICC and the Security Council are likely to act together, not one to the detriment of the other.

²⁷⁷ General Bantz J. Craddock, Commander of United States Army, before the Committee On House Armed Services, 09 March 2005, 109th Congress, Congressional Record, 15 March 2005, p.D241.

²⁷⁸ Ibid. Craddock also stated that *“In Latin America where the contact is the coin of realm, where engagement is really where we make the progress in reinforcing... democratic institutions and ensuring that militaries understand the democratic process and the subordination to civilian leadership, it’s critical we have contact across the board”*.

²⁷⁹ See e.g. Dinstein Y., *“War, Aggression and Self-Defence”* (2001) p.282.

²⁸⁰ See UN Charter, Art.25; see e.g. Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276, International Court of Justice, Advisory Opinion, 1971 I.C.J. Rep.16, 54.

4.6 Conclusion

Much has been said about the ‘illegality’ of U.S. immunity agreements, even more about their political incorrectness. Regardless as to whether the latter statement is accurate or not, it is only relevant in so far as it provides a perspective for understanding a State’s methods of ICC Statute implementation and subsequent interpretation at the national level. Policy considerations offer a tool for understanding and anticipating how both ICC States Parties and Non-Parties are going to apply or misapply the Rome Treaty. Policy considerations will determine which States are likely to give precedence, at the national level, to an immunity agreement. Legal considerations will elucidate what consequences such action is likely to incur but as both immunity agreements and recent Security Council actions illustrate, it will be political and socio-economic forces that determine possible treaty breaches and it will remain for the Security Council to act upon them if it so decides. Whereas these arguments paint a demoralising picture of the ICC, it must not be understated that there are serious flaws in the Statute that allow too much room for varying interpretations and importantly therefore inconsistent applications which will vary around the globe. Immunity agreements, which undermine the object and purpose of the Rome Treaty, do reveal that the ICC Statute has not dealt adequately with State responsibility in case of a treaty breach, and Security Council decisions demonstrate that the Court is not independent from the Council and is therefore, at present, an extension of it.

The ICC must play a leading role in devising legal standards and procedures, which in turn must be understood and perceived as authoritative and as applying equally to all States Parties. Whereas the U.S. position towards the ICC is detrimental to that effect, it must be accepted that unless through action

by the Security Council the ICC Treaty cannot bind Non-Party States. Only the Security Council has such authority and power under Chapter VII of the UN Charter. It must be remembered that universal jurisdiction has been expressly rejected during the Rome Treaty negotiations and the ICC Statute does have a provision to that effect. Nor does the ICC Treaty have a provision, similar to Article 103 of the UN Charter, which regulates conflicts of obligations arising from two or more treaties.

Perhaps the creation of the ICC had been premature and forced upon States in a much-needed mechanism for investigation and punishment of the most serious international crimes. Or perhaps, as previous chapters try to underline, regional redress mechanisms will prove more effective in combating and preventing these crimes. In such a context, the ICC should play a crucial and permanent disseminating role in bringing international criminal law closer to those directly involved, at a national level. In order to function consistently, the ICC Treaty would have had to be adopted through a democratic model, such as the referendum on the ICC in Ireland. As it stands, the Rome Treaty may collapse in certain parts of the world, just as the recent European Constitution had done. Again, the increasing number of immunity agreements are a very valid case in point, just as Security Council resolution 1593 on Sudan is, and they must not be ignored or marginally treated as at present there are more parties to immunity agreements than there are parties to the ICC Statute and the Security Council has, for a third time, since the entry into force of the ICC, significantly interfered with the Court's proceedings. The fact that Security Council decisions had been criticised as *ultra vires* or as representing *jus cogens* breaches, remains valid and interesting, but nonetheless impertinent, until the Court itself makes such a determination and acts on it, by proceeding with investigations and prosecutions, notwithstanding Security Council actions.

The Court will undoubtedly conduct important investigations and it will bring to justice some of those responsible for genocide, war crimes or crimes against

humanity. It seems however such actions will be sporadic and symbolic, rather than global and uniform.

Conclusion

Evaluating a pragmatic approach to the scope and effectiveness of the ICC legal order leads to the conclusion that the system of international criminal justice should be further elaborated, in particular by unifying material and procedural law and by developing instruments of mutual assistance in the suppression of crimes. This would greatly help the process of eliminating obstacles to the effective implementation of international criminal law. Importantly, even if the ICC creates a system of binding precedents that is politically feasible, such a system remains unenforceable in the absence of an independent adjudicative body with appellate criminal jurisdiction.

Although the jurisdiction of the ICC should remain limited to the core crimes while leaving open the possibility of broadening the scope of its jurisdiction through periodic amendments of the Statute, the Statute should have provided for compulsory jurisdiction since any conditioning or requests for additional consent by the States before a case may be referred to the Court is a retrograde step in respect of existing law. It appears that despite the efforts to provide mechanisms that redress the needs of accountability for the commission of the '*most serious crimes of concern to the international community*' only the corpus of general and treaty law proscribing torture has evolved to a relative level of universality. From this perspective the achievements of the ICC Statute remain in a fundamentally embryonic state.

Chapter 1 examines the overall scope and effectiveness of the ICC Statute in advancing a precise and uniform international justice accountability mechanism. It pinpoints to lacunae of the ICC as well as to factors outside its regime which affect or otherwise condition the correct and most efficient application of its norms. In particular, under scrutiny are the effects of national and regional amnesties which survived the ICC Statute. Although no clear rules can be enunciated to distinguish between legitimate and illegitimate amnesties under international law, their recognition and acceptance as an

important instrument in peace processes underscores the validity of national and regional accountability mechanisms whose principles rest on legal values and doctrines that are often in opposition with those of the ICC and of standardized international justice goals. Non-inclusion of universal jurisdiction in the Statute and the right to enter reservations regarding the Court's jurisdiction over war crimes further underline the discrepancy between the text of the Statute, its goals and objectives as well as the consequent fragmented approach to its understanding and applicability. The relationship between domestic and ICC rules on sentencing and plea-bargaining aim at illustrating the difficulties inherent in a hybrid criminal justice system which encompasses diverging legal traditions whereby nations enjoy great, often constitutional discretion, in harmonising through implementation the norms of the ICC with those of national legal orders. The overall result of numerous varying implementation methods and aims is an inconsistent international criminal justice order. Accordingly, Chapter 1 examines through complementarity, jurisdictional links between the Court, States Parties and in part, States Non-Parties. Far from revealing characteristics of universality and consistency of the ICC criminal justice model, this examination identifies the *sui generis* nature of the ICC. From this perspective Chapter 1 outlines the need for decentralisation of the ICC and importantly, its involvement at a local level with the aim of promoting and advancing international justice doctrines by gradually stimulating local legal, ultimately institutional, change.

Chapter 2 examines the varying and often contradictory applications of the ICC rules by evaluating its surrender/extradition model. Traditionally, in the event of conflict between an extradition treaty and a constitutional order provision, the latter prevails. In contrast, in surrender proceedings, such as those enforced by international tribunals operating by transcribing UN Chapter VII authority, a person is in effect prevented from obtaining full adjudication on the merits of domestic laws prior to surrender. However, when *travaux préparatoire* of the Rome Treaty are closely analysed, it becomes apparent that the ICC Statute takes a retrograde step with respect to existing ICTY/ICTR surrender laws as well as judicial and political necessities behind them. Although the ICC Statute does not refer to 'extradition', domestic restrictions

to extradition are, in principle, in contravention with the cooperation and surrender framework of the ICC. From this perspective surrender is examined in particular through the survival of extradition laws in ICC surrender proceedings, especially with regard to defences to extradition such as *ne bis in idem*, *nulla poena sine lege* and specialty. That the ICC Statute establishes only “*minimum...rules of conduct*”¹ and does not prevent States to employ conventional extradition rules may also be evidenced through Article 10 of the Statute, which intends to preserve the existing or developing customary law outside the ICC regime. Moreover, the relationship between extradition and surrender is analysed in the context of the rights of the accused, in particular that of habeas corpus in pre-trial proceedings and against prima facie cases before the ICC since traditional prohibitions against extradition involve the guaranteeing of due process rights. The examination also unveils that the usage of the term ‘extradition’ in ICC implementing legislations favours national proceedings. This in turn is an indicator of the preservation of judicial autonomy. therefore sovereignty. Notwithstanding the underlying acknowledgment of doctrinal differences between ‘*extradition*’ and ‘*surrender*’, Chapter 2 demonstrates that in practice, extradition and its conventional defences will apply to ICC proceedings.

Moreover, in order to determine jurisdictional hierarchy during the surrender process, the principle ‘*aut dedere aut judicare*’ is examined through complementarity norms. This pinpoints to the indistinctness between the obligation to investigate, prosecute or surrender on the part of former and present governments. In this regard the ICC Statute lacks specificity and consequently the rights of suspects and accused persons may be hampered due to the resulting leeway afforded to national authorities. From this perspective the equivalence of pre-trial procedural rights as well as their observance and progression between the ICC vis-à-vis States is analysed. By examining both international and national jurisprudence with regard to *mala captus bene detentus* principle, the reach of the right to challenge the legality of one’s arrest is evaluated with a conclusion that there is no uniform state or

¹ Sadat L. N., “*Custom Codification and some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute*”, 49 De Paul Rev. 2000, p.923.

international practice and that the ICC Statute does not resolve the status of the doctrine nor does it regulate the effects of abuse of process against accused persons in consideration also of the fact that, under the Statute, States are not able to question and scrutinize the basis and content of ICC arrest warrants.

In Chapter 2 amnesties once more illustrate that States retain important powers in controlling pre-trial proceedings especially with regard to reconciling the needs for accountability with national socio-political emergencies and objectives. Moreover, the trend in customary law to prosecute all war crimes must not presume the invalidation of amnesties but rather with annihilation of impunity, particularly in light of the fact that the Statute permits the State Parties to '*opt out*' of the Court's jurisdiction over war crimes for seven years. The furtherance of extradition norms as well as amnesties in ICC surrender proceedings clearly evidence the binary nature of the ICC Statute interpretation as well as the consequential inequality in the nature and accessibility to human rights protections against procedural abuse across the globe.

The language adopted in procedural law of the ICC Statute does not encompass the pure terms of the adversarial or inquisitorial models of criminal procedure nor does it reflect any of the existing hybrid structures. By examining ICC travaux préparatoire it becomes apparent that the drafters of the Statute deliberately applied a degree of vagueness: Court's criminal procedure is unique in that the Statute leaves to the judges to strike the appropriate balance between adversarial and inquisitorial elements. This power or discretion, characteristic of common law systems, is unqualified in the Statute. From this perspective the interplay between pre-trial procedural regime of the ICC and external components such as domestic rules are indispensable in getting an accurate picture of the ICC reach during investigations and initial proceedings. Chapter 3 examines the jurisdictional reach of the ICC by outlining pre-trial issues relating to the transfer of criminal proceedings and in particular those relating to the equality of arms, presumption of innocence and right to habeas corpus against a *prima facie* cases. The research verifies that procedural rights of suspects and accused

persons before national and international courts and tribunals for serious international crimes are sporadically afforded but frequently neglected and denied. In fact, there is no uniform national or international habeas corpus practice and Chapter 3 emphasises the pivotal need for the ICC as well as national authorities to establish and unconditionally protect these rights. Only a synchronised approach to the application of judicial review may validate and ensure authority of international criminal law. Such synchronisation necessitates the evolution of municipal international criminal law. In order to minimise abuse of process, therefore miscarriages of justice, all investigations and prosecutions should be inclined in favour of the defence. In this context parameters of complementarity are also questioned by considering situations that are not envisaged by the ICC Statute or its Rules of Procedure of Evidence. In particular, the research reveals that when assessing whether proceedings are being conducted in good faith by local authorities, variables '*inability*' and '*unwillingness*' are not adequately qualified. Consequently, no satisfactory redress against abuse of process is available to accused persons. By looking into numerous domestic legislations the study furthermore concludes that constitutional orders determine the extent to which the ICC regime may interfere with national judicial sovereignty. Such conclusion is supported by the fact that there is nothing in the wording of the Statute to prevent a State Party to enter into subsequent treaties which regulate obligations between States and the ICC Treaty, therefore modify in practice its scope and reach.

The wording of the Statute lacks specificity, which coupled with the exclusion of forceful enforcement measures generates varying degrees of applicability, cooperation, therefore justice. In international criminal law that is concerned with the most serious international crimes, mutual legal assistance is not necessarily the most adequate method of securing cooperation. The present study locates complexities involved in affirming jurisdiction under complementarity, in identifying sources of procedural safeguards as well as assessing their effectiveness in ICC proceedings. Uncooperative States may be referred to the Security Council, if a situation has been referred by it to the Court. This leads to the conclusion that normative regime of the ICC is

significantly dependant, therefore associated with the Security Council as illustrated most recently with the case of Sudan. In fact, clear lines of authority must be drawn between the Court and the Security Council. The Council must be prevented, through an amendment of the ICC Statute, from halting judicial proceedings whereby the Prosecutor shall have the right to initiate or continue investigations in the absence of any decision of the Council. Most importantly, whatever penal obligation is imposed on a State, it must form part of a duty to achieve highest standards of justice for the defendant. With the objective of addressing State responsibility in investigating and prosecuting the violations of international criminal law, the Security Council and the Court should work concurrently but independently from one another, and not one to the detriment of the other. The type of legal cooperation, depending on whether the ICC is acting on its inherent investigative or prosecutorial powers or in pursuance of a Security Council referral, is not, per se, more relevant than the existence of some form of review process of abuses of individual's procedural and human rights on the part of the ICC as well as national courts and law enforcement agencies in general. Since arrests entail deprivation of liberty, this should be of paramount importance when effecting surrender. Local courts must, through habeas corpus writs, observe fundamental procedural human rights, and the thesis observes namely the protection from the risk of deliberate violation of a fair trial and the protection from a prima facie case against indictee. The enforcement of ICC requests and the observance of human rights must occur in concurrence and not in isolation to the detriment of inconsistency and inequality. In this respect Chapter 3 also assesses the roles of the ICC Prosecutor and national and international safeguards against potential arbitrary exercise of his /her powers and discretion. Beyond the doctrinal evaluation of the '*unaccountable*' Prosecutor, his functions are examined against the right of accused persons to appeal against prima facie cases in particular where principles of equality between the parties in collecting, accessing and presenting evidence are brought into question. Any derogation from procedural requirements and human rights must not be to the detriment of individuals who are now recognised as subjects of ICL. Treaties like the ICCPR, ECHR AND ACHR allow an individual to plead their rights before both domestic and international courts and most importantly to have the international courts

uphold those rights. ICC Art.21 (1) (b) and (3) explicitly impose the obligation on the ICC to synchronise its law making “*with internationally recognised human rights*”. The ramifications of waiving due process and fairness guarantees in pre-trial proceedings on part of the ICC, such as for example accepting illegally obtained accused persons and admitting illegally obtained evidence in order to establish a case will have a significant effect in validating the international criminal process. The Court’s stand that it does not have jurisdiction to question the legality of one’s arrest, not providing habeas corpus redress in such situations and its rules on admissibility of illegally obtained evidence clearly undermine the protection of fundamental human rights. Departure from pre-trial due process guarantees will significantly weaken the credibility and effectiveness of the Court and it will consequently reinforce national political and adjudicative powers and discretion.

The preservation of local judicial autonomy, which furthers inconsistencies in the application of the Statute, is evidenced through Article 98 (2) immunity agreements revealing non-hierarchical obligations for States Parties under the ICC Treaty. Chapter 4 indicates to the strong political dimension within which immunity agreements are concluded and within which the terms of the ICC Statute are commonly altered or reinterpreted. Demonstrative is the evaluation of the role of the Security Council which through its resolutions effectively modified the terms of ICC Article 16 (SC Res.1422 (2002)) and irrefutably reiterated that the Statute cannot bind third parties (SC Res.1593 (2005)), therefore rejected any claims of universality of the same. Immunity agreements, which damage the object and purpose of the Rome Treaty, as well as their recognition in recent Security Council decisions, underline furthermore that the Court is not independent from the Council but is rather an extension of it. These agreements as well as their increasing number must not be undermined or marginally treated as ‘exceptions’ to the correct implementation and application of the Statute. Chapter 4 illustrates that in ICC States Parties, also parties to these agreements, political and economical emergencies are likely to prevail in surrender requests. Identifying and examining U.S. ICC-related national legislation, such as ASPA, illustrate this point.

Immunity agreements do not fall under the provisions of Article 98 (2) as their scope of application *ratione personae* is too broad if the object and purpose of the ICC Treaty is considered. Importantly, however, when their validity is examined against the backdrop of the law of competing treaties, it is revealed that non-surrender agreements are valid regardless of their conflict with the Statute. Consequently, States Parties to these agreements have obligations, on one hand towards the United States and on the other towards the Court and other ICC States Parties. Even when these agreements purport that each party shall investigate and prosecute the 'core crimes' the Court will not be able to assess domestic proceedings by evaluating the 'inability' or 'unwillingness' of a particular judicial system. It remains for ICC States Parties to amend the terms of Art.98 (2) agreements in order to comply with requests under the Statute.

International law and international criminal justice cannot operate and survive in vacuity as a discipline that exists outside the 'State'. Although ICC law as well as human rights should form part of an independent, supranational entity, binding unconditionally and indiscriminately all States, these normative rules are far from having emancipated to a, perhaps utopian, level of totality and uniformity. The creation of the ICC and its enforcement mechanisms represent the proper progress in that direction, but only a tentative one. In fact, the Statute is the end result of numerous conflicting interests and viewpoints. The compromise it represents reflects the need to overcome legal, political and cultural divergences by expressing rules at a level of generality as demonstrated through the survival of doctrines such as those of extradition defences, amnesties, immunity agreements and others. Being a *sui generis*, treaty based organ, it must operate in harmony with all States Parties.

The ICC plays a timely role in promoting awareness of the nature, extent and consequences of crimes such as war crimes, crimes against humanity and genocide as well as in raising levels of international participation in the process of punishment of such crimes. As the thesis purports, much will depend on whether a particular State adheres to a monist or dualist,

parliamentary or constitutional model of appreciation of the relationship between domestic and international law. Unfortunately, international prosecution of the core crimes has typically been reserved for small, poor or third world countries.

A sophisticated strategy to durable international and national accountability mechanisms must aim towards restoration rather than retribution. Both prosecutorial and sentencing policies should have restoration as their primary goal. The aims of accountability under the ICC Statute cannot exist in a vacuum, outside the wider context of societies affected by the crimes committed. Judgments cannot be properly made nor sentences pronounced when questions of how nations should overcome and then deter violence are overlooked. Advancing deterrence demands that these questions do not remain neglected. The centralised Court cannot properly deal with the scale and complexities of such assignments, nor can the U.N. alone². Because of the multiplicity of international criminality, legitimacy and consistency of long-term accountability mechanisms demand a multilateral approach to the enforcement of criminal justice. Monopoly over international criminal justice, as advanced through the powers of the Security Council under the ICC Statute, is contrary to the interests of an international community whose common objectives are, by virtue of being parties to the U.N. Charter, peace and security. Adjudication of a domestic situation, which is distant from its original context, is in most situations inappropriate; the ICC should not sequester the opportunity for a country to expose and then account for serious international crimes. Contrary to the belief that since such crimes are “*of concern to the international community as a whole*”, as reiterated by the ICC Statute, they may only be competently adjudicated internationally, the present thesis concludes that in order to prevent the risks of conflicts and the committing of crimes of humanity, war crimes and genocide, local population and local institutions must be exposed to all the evidence of the execution of such crimes. This in turn will serve to diminish the culture of denial.

² See Annan K., “*We the Peoples: The Role of the United Nations in the Twenty-First Century*”, Report of the Secretary-General of the United Nations to the Millennium Assembly, 2000, A/54/2000.

Significant in this view is the appreciation of the proximity factor; proximity to the crimes, perpetrators, victims, evidence as well as the proximity to the legal process which will restore justice and as a consequence, social as well as political balance. Whereas prosecutions of crimes by the Court may be more immediate and adhere to the higher standards of criminal justice, they do not, per se, affect considerable legal, cultural and/or institutional change. Bridging gaps between warring nations and between perpetrators of crimes and victims may only be effected through negotiation, which begins with accountability and collective acceptance of responsibility. Nonetheless, local judges should be trained to represent the interests of the international community. Bearing in mind that the “*ICC is not an international court of appeal, nor is it a human rights body designed to monitor all imperfections of legal systems*”³ the ICC could play a crucial role by disseminating international law by monitoring national accountability process. Although the ICC does not have the authority to directly supervise or interfere with local proceeding, by training local investigators, prosecutors and judges and by monitoring criminal proceedings the Court could gradually ‘internationalise’ national courts, whereby judges from the ICC could sit provisionally in domestic trials; this would create a symbiosis between the jurisprudence of the Court and that of national courts. It should be observed here that by virtue of correctly incorporating the ICC Statute into national legal system, international crimes retain their international character in a nationalized, international jurisprudence. By employing judges from the Court, the chances of inadequate or arbitrary interpretations of the ICC law would be moderated and a more consistent and uniform application of international criminal law would be increased. In this way greater certainty, therefore predictability of the ICC law would be enhanced and res judicata developed. Moreover, this balanced solution would preserve both national interests of a particular country and the common interests of the international community as a whole. By promoting national and accordingly regional stability, national courts will, in the future, move from answering primarily national concerns to addressing simultaneously also issues of other interested parties, and ultimately, and by implication, those of peace and security which

³ ICC-OTP, Informal Expert Paper: “*The principle of complementarity in practice*” (2003), p.16.

are in the interest of the whole of the international community. This conclusion does not attempt to undermine difficulties inherent in the process of penetrating primarily national political institutions and persuading authoritarian governments to adhere to the above model (in fact, independent from the strategies and aims of the Court, resort to political, economic or military measures must remain open), or if competent, to alone fulfil duties under *aut dedere aut judicare*, which exists also outside the ICC Statute. The integration of ICC law within national legal culture and legal environment remains at present fragmented. Ultimately, this fragmentation reflects regionalism, which entails different perspectives from which the ICC Statute will be appreciated and the degree to which it will interfere with other relevant national and regional rules and conditions. This is largely evidenced through distinct approaches to human rights across the globe. It suffice to mention here the Asian position which infers that human rights, as set out by the West, are founded on individualism and accordingly have no substantial relevance in Asia where the political and legal doctrines are based on principles of collectivism. This communitarian argument is pivotal for a widespread claim against the universality of human rights. In order to reflect and, to a moderate level, accommodate legal and cultural diversities, regional rather than universal human treaties have been introduced, such as the European Convention on Human Rights (1950), the American Convention on Human Rights (1978) and the African Charter of Human and People's Rights (1981). Alleging that the number of ICC States Parties represents the grounds for a consensus and harmonised international society based on peace and security, is an argument dismantled if it is taken into consideration how many of ICC States Parties are parties to Article 98 (2) agreements and how many permanent members of the Security Council are engaged in extensive arming. Whilst in principle human rights are universal and norms of *jus cogens* non-derogable, the application of these rights within each society and culture will vary. Contrary to the proposition in the ICC Preamble that all States share common bonds, the Vienna Declaration acknowledges the importance of appreciating different cultural backgrounds and advises that these factors must be '*born in mind*'.

The extent and scope within which the protection of individual rights is paramount will depend largely upon and therefore reflect the prosecutorial functions, which may be instrumental in either preserving the general constitutional interests or be considered as the apparatus through which governmental policies are implemented. Highest standards of objective justice and legality as visualized by the ICC Statute demand progressive suppressing of all levels of political discretion in order to avoid differential or discriminatory treatment of persons in similar circumstances/cases. Extending this argument further leads also to a conclusion that advancing and enhancing the uniformity of application of the ICC Statute must too result in founding a clear corpus of *res judicata* or *estoppel* in international criminal law that is still largely underdeveloped, as evidenced through the jurisprudence of the *ad hoc* tribunals. Only then may the ICC Statute begin its emancipation into customary international law.

In summary, the ICC can play a crucial role on three levels. The first, most important one is developing and promoting conditions for further clarification of law by employing consistent legal standards and reasoning; secondly, this consistency should result in strengthening of local law-related institutions that would, as a consequence, enhance conditions for development by promoting the rule of law and thirdly deeper the goal of increasing government's compliance with the law through imposing equal measures against all uncooperative nations. The latter aim is unquestionably the most difficult to achieve as it requires a substantial degree of interventionism on a national level and within a national socio-economic context as well as political attention as long lasting, effective reforms or developments, cannot be reached without a society wide consensus. Promoting the protection of rights of suspects and defendants is strongly linked to 'development', which enhances the conditions for the building the rule of law. Efforts to promote aspects of the rule of law that strengthen the pivotal protection of fundamental rights are both an end in themselves and are a route to the promotion of regional, ultimately international peace and stability through political and economic growth. Education and dissemination of international criminal law as well as humanitarian law at all levels, military and in particular civilian, must form

part of a long-term policy towards greater, global accountability and deterrence.

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