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Considerations on the ICC
exercise of jurisdiction in the
light of past International
Criminal Law experience

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Summary

The present study is dedicated to a discussion on the efficiency of exercise of ICC jurisdiction, based on past international criminal law experience. While acknowledging the unprecedented significance of the establishment of a permanent international criminal court, it focuses on the numerous perceived shortcomings in the ICC statute system, likely to constitute major challenges in the court's efforts to exert jurisdiction over those crimes falling within its subject matter competence.

Following an introductory chapter providing an overall sketch of the study methods and scope, the analysis starts with a contextualisation of the adoption of the ICC statute namely by briefly looking back at the steps leading to the adoption of the ICC statute. The creation of IMTs in Nuremberg and Tokyo in the aftermath of the Second World War, and of the *ad hoc* tribunals for the Former Yugoslavia and Rwanda following the conflicts in these two contexts, are looked at as having influenced the adoption of the Rome statute and thus bearing some relevance in an analysis of matters relating to the exercise of the court's jurisdiction. In this respect, relevant hurdles faced by the former in discharging themselves of their respective mandates are highlighted. For this reason, the study analyses the statute's jurisdictional provisions *ratione loci, materiae, temporis and personae* in the light of the statutes, experience and case-law of the *ad hoc* tribunals where the comparison bears some significance (chapter three). The incidence of the ICC exercise of jurisdiction on non-states parties is examined in the light of USA opposition to the court as exemplified by the highly controversial SC resolutions deferring prosecutions of non-states parties involved in UN authorized peacekeeping operations.

The subsequent chapter (chapter four) discusses the three so-called "trigger mechanisms" in the exercise of ICC jurisdiction. Political considerations attached to states' and Security Council's referrals are mentioned and assessed in the light of past international criminal law and human rights experiences. The inherent arbitrariness and pitfalls attached to unchecked prosecutorial discretionary powers in selecting cases for prosecution out of many others equally important and outside any cognisable objective criteria are further discussed and highlighted as constituting potential hurdles in the way of an independent and truly impartial functioning of the court. In either case, the material limits of the court in dealing with situations involving massive criminal participation whereby the court ought to be complemented by national jurisdictions, as it is more likely the case in the currently referred situations, display the limited impact of the court's proposed legal solutions in the most intricate situations.

The interplay between the court's exercise of jurisdiction and the *problématique* of state cooperation and enforcement of its decisions by nation-states is further analysed (chapter five). The relevance of this part

lies in the pointing out the central role of state willingness to cooperate with the court and its exercise of jurisdiction in all phases of the proceedings, from the act of seizure of the court, throughout the trial phase until a judgement is pronounced and enforced. Despite statutory provisions imposing obligations on states to cooperate, residual recourse to state sovereignty still constitute potential bars to state compliance, given the additional fact that the statute lacks a system of sanctions for non-compliance. This question is interrelated with an examination of possible clashes between international and national processes (chapter six). Some post-conflict situations have often pushed for undesirable, but necessary, political compromises offering alternative settlement solutions to criminal prosecutions. Amnesties, truth and reconciliation commissions and other so-called restorative justice mechanisms are not properly addressed in the ICC founding instruments as the interests of justice in article 53 remains an imprecise concept needing further clarification. A short concluding chapter offers an insight on the main issues raised in the discussion and likely to affect the working of the court. Grounding on ICC statutory provisions and comparative experience its *ad hoc* predecessors, the analysis paint a picture of a court whose unchallengeable importance might nonetheless be overshadowed by inherent limitations attached to its mandate and politicisation – despite formal provisions on its independence and prosecutorial discretion - due to its dependence on state cooperation.

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ASP	Assembly of States Parties
CAR	Central African Republic
CSOPNU	Civil Societies Organisations for Peace in Northern Uganda
D. R. C	Democratic Republic of Congo
ECHR	European Convention on Human Rights and Fundamental Freedoms (European Convention for the Protection of Human Rights and Fundamental Freedoms)
FNL	Forces Nationales de Libération
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT (s)	International Military Tribunal (s)
Interahamwe	Rwandan Militia from the Ruling Party during the 1994 Genocide
LRA	Lord's Resistance Army
Res.	Resolution
RPA	Rwandese Patriotic Army
RPE	Rules of Procedure and Evidence
RPF	Rwandese Patriotic Front
SC	Security Council
SOFA(s)	Status of Forces Agreements
UDHR	Universal Declaration of Human Rights
UN	United Nations
(UN)GA	United Nations General Assembly
(UN)SC	United Nations Security Council
UPDF	Uganda Peoples' Defence Forces
SCSL	Special Court for Sierra Leone

1 Introduction

1.1 General considerations on the international criminal court

The adoption of the Rome statute of the International Criminal Court (ICC) has raised many hopes as regards the eradication of impunity at the international level. In addition to the existing state universal jurisdiction such as in the very often-mentioned Belgian example, the creation of an International Criminal Court for prosecution of serious violations of International law is a very positive step in the development of international Law. Read in context, the achievement of the Rome conference was a culmination of nearly a century's efforts in bringing perpetrators of the most serious international crimes to justice. It also supplemented and strengthened other related evolutions in international law over the 20th century aiming at the protection of the individual *vis-à-vis* the state and his/her peers, with the correlated weakening of the previously unshakable principle of state sovereignty. The creation of the International Criminal Court particularly supplemented the human rights law protection by providing for individual criminal accountability, while international human rights institutions are more concerned by violations of human rights norms by states as entities.

However, the above-mentioned innovations of the Rome statute remain theoretical and still reflect the very limited nature of concessions by states of their sovereign powers as far as protection of persons under their jurisdiction is concerned. First, the court has jurisdiction for only those states which would have ratified the Rome statute as regards their nationals or persons from other countries but on their territory. States not parties to the Rome statute will certainly be far from keen to surrender their nationals or even foreign nationals on their territory to the International Criminal Court. The now famous USA efforts through Security Council, bilateral agreements and national legislation to shelter its nationals from appearing before the court are one among many instances of objections by states towards the exercise of the court's jurisdiction.

Second, the international criminal justice system, to the present time, has been much criticized for its victor's justice character as it will be expanded upon later. From the Nuremberg and Tokyo trials to the trials by the *ad hoc* International criminal tribunals for former Yugoslavia and Rwanda (ICTY and ICTR respectively), it appears that only those persons on the defeated or weak side were/are prosecuted by those tribunals, thus hindering their credibility and stressing the more political nature of these international judicial organs. A question therefore arises as to whether the ICC will be easily independent enough to investigate and prosecute all possible crimes

under its jurisdiction regardless of any amalgamation relating to the place of a given state on the international plane.

Moreover, since the court's functioning will depend on state cooperation, a lack of willingness by a given state to cooperate might hinder the court's functioning; putting it under pressure and thereby jeopardizing its independence. The prosecutor v. Barayagwiza case before the ICTR is very eloquent on the problematic of state cooperation and the court's independence.

Thirdly, unlike the two ad hoc tribunals for the Former Yugoslavia and Rwanda, the international criminal court does not have precedence over the national Courts but is seen as complementary to them. In cases of widespread violations with massive participation in the commission of crimes, as in case of the Rwandan genocide or the Balkan conflict, this principle implies that the perpetrators will be tried by either national courts or by the ICC. Even in cases where the court have jurisdiction, there are cases where the court might not be materially in a position to handle all the cases involving committed crimes under its jurisdiction, absent a complementary work by national courts. Paradoxically, in instances where offenders are tried either tried by national courts or the ICC like in the former-Yugoslavia and Rwandan situations, the differential legal avenues opened to offenders lead to what is seen as a situation of double standards whereby, depending on the circumstances of a given country, some will face national laws which are more likely to be tough with severe punishment while others will be tried by the ICC perceived as more generous as far as treatment of offenders is concerned. In such instances, the later might end up handling cases involving presumed masterminders of the crimes, putting them in a more privileged position of benefiting from all due process guarantees than those who just carried out their orders.

Finally, in some transitional societies, peace agreements with non prosecution clauses, amnesty laws, truth and reconciliation commissions as well as popular courts such as Gacaca Courts in Rwanda are considered to be the most effective remedies or lesser evil for the sake of achieving reconciliation and rebuilding a broken society. As it will be discussed in the present analysis, the statute provisions related thereto are not clearly explicit on this rather very sensitive issue.

The entry in force of the ICC statute is with no doubt a timely and unquestionable achievement in international criminal law efforts to bring perpetrators of international crimes to justice. Nonetheless, institutional weaknesses, complex procedural requirements and limitations as well as the limited court's ability to exhaustively and adequately respond to massive criminal participation instead of resorting to a selective adjudication of only those cases involving "big fishes" are among other numerous challenges likely to undermine the court's operation. Furthermore, this limited ability to handle all cases in its jurisdiction combined with the complementarity

principle might easily lead to a political instrumentalisation of the court working.

These are the main issues this thesis proposes to explore. Without neither being a compilation of the various criticisms towards the court, nor a success story of the positive achievement represented by the existence of the court, the analysis purport to assess the possible major challenges the court might face in its activities, in the light of its international predecessors and taking into account the complexity surrounding the currently referred cases, mainly the LRA/Northern Uganda and the Democratic Republic of Congo cases.

1.2 Scope and methodology

1.2.1 Delimitation

The intricacy and interrelatedness of issues at stake in the present analysis does not easily allow for a separate examination of the problematic areas on jurisdictional and admissibility criteria underlying the exercise of jurisdiction. Nonetheless, the present study is not an overall review or literal examination of the Rome statute or other related legal texts such as the Rules of Procedure and Evidence or the Elements of Crimes. Grounding on the assumption that the creation of the ICC does not constitute a hiatus with past international criminal law but a revolutionary step inscribed in several decades' efforts in the domain, this study will focus on matters related to the exercise of jurisdiction, in light of challenges faced by past international judicial endeavours. Foreseeable challenges, loopholes in the founding instruments, and normative limits will be discussed, taking past international criminal law experience into consideration. The study will heavily draw on ICTY and ICTR cases and related situations in discussing possible hurdles that may stand in the path of the court' effective functioning, thereby falling short of the high expectations raised by its creation.

1.2.2 Central question

Making a judgement about the ICC is somehow a hasty task at a time when the latter is just at its initial stage of activities through the investigation in the very first situations submitted to it. Nonetheless, despite being the first ever permanent international criminal institution, the experience of its *ad hoc* predecessors have revealed possible challenges the court might face in the future, some of which are not solved in its founding instruments. This analysis precisely aims at exploring possible problematic areas relating the court's exercise of jurisdiction, based on the experience of *ad hoc* tribunals where applicable and keeping in mind the challenges presented by the currently referred situations, mainly the Northern Uganda, the Democratic Republic of Congo, the Darfur and, to some extent, the Central African Republic situations.

1.2.3 Methods and Materials

An examination of the present question will much more be an academic exercise as the court still needs time to assert its authority. This study will therefore draw inspiration mainly from the wide existing academic literature on the court but also on its *ad hoc* predecessors. Where appropriate, the study will draw inspiration from the working of the latter through their case law and other institutional and procedural relevant information. Furthermore, national processes, general human rights law and international criminal law will illuminate the analysis. Relevant case law by international criminal bodies, human rights institutions and some national courts will be resorted to. A wide range of other relevant materials such as United Nations documents, various electronic sources, NGOs and other reports will also be examined. Last but not least, the study will proceed with an interpretational analysis of the relevant provisions in the Rome statute and Rules of Procedure and Evidence relating to the exercise of jurisdiction. Documentary sources are analysed in accordance with their ordinary meaning while treaty provisions are interpreted in accordance with article 31-33 of the Vienna Convention of the Law of Treaties.

2 THE LONG ROAD TO ROME

2.1 Introduction

The adoption in Rome of the Statute of the International Criminal Court (hereinafter the Rome Statute, the ICC Statute or the Statute) constituted a major step in the global fight against impunity and a commendable development in International Criminal Law. Read in the context, the Statute appears to be a result of developments in international criminal law mainly throughout the 20th century. As rightly pointed out, the Rome Statute “crystallizes the whole body of Law that has gradually emerged over the past fifty years in the international community in this particularly problematic area”¹. However, the statute does not cover all the internationally recognised crimes. Due to some historical and contextual factors, the court’s jurisdiction is limited *ratione materiae, loci, personae* and *temporis*. Most of those limitations are of a nature to likely jeopardise an effective functioning of the court unless the majority of states, in addition to merely becoming party to the Statute, adopt a more progressive attitude towards the court. This chapter aims at providing needed background information leading to the adoption of the ICC statute. It will briefly examine the creation and limits of ICC predecessors before turning to the adoption of the ICC statute in the subsequent chapter.

2.2 From the Nuremberg and Tokyo Legacy to the *ad Hoc* Tribunals for the Former Yugoslavia and Rwanda

The negotiations leading to the adoption of the ICC Statute reveals that the latter was much inspired by previous international efforts to bring the authors of the major international crimes to justice. Even though there are many cases of seemingly international trials over the past centuries², our short historical analysis will start with the efforts by the major allied powers in the Second World War to bring Axis powers criminals to justice.

¹ A. Cassese, ‘From Nuremberg to Rome: International Military Tribunals to the International Criminal Court’, in A. Cassese *et al* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, New York, 2002), p. 3.

² Often mentioned are the trials of Conradin von Hofenstafen in 1268 for waging aggressive war and Governor Peter of Hagenbach in 1474 at Breisach for various crimes including murder, rape, pillage and wanton confiscations. On this see: W. A. Schabas, *An introduction to the International Criminal Court* (Cambridge University Press, Cambridge, 2004), pp. 1 *et seq.* and D. McGoldrick, ‘Criminal Trials before International Tribunals: legality and Legitimacy’, in D. McGoldrick *et al.* (eds.), *The permanent International Criminal Court: Legal and Policy Issues*, (Hart Publishing, Oxford and Portland Oregon, 2004), pp.13 *et seq.*

2.2.1 The Nuremberg and Tokyo International Military Tribunals (IMTs)

Efforts in codifying international criminal law and establishing a system of accountability for the most serious international crimes predate the 20th century and the Nuremberg trials. Apart from the medieval forms of justice mentioned above, the creation of an international criminal court was idealistically contemplated by Gustav Moynier, one of the founders of the Red Cross.³ However, the first real steps towards an international criminal legal system were made through the codification of the laws of war in the 1899 and 1907 Hague Conventions.⁴ By enacting laws and customs of war, The Hague conventions laid legal grounds for accountability for crimes committed in armed hostilities, without providing for institutional implementation framework. Subsequent efforts and lobbying for the establishment of an international criminal court by other various bodies, non-governmental organisations or associations such as the 1920 proposal by the Advisory Committee of Jurists to include international crimes in the jurisdiction of the Permanent Court of International Justice were rejected as being premature.⁵ Thus, the protection offered by these early conventions didn't go further and provide for a system of sanctions.⁶ Consequently, the trial of the German Kaiser Wilhelm of Hohenzollern by a special international tribunal to be established for the 'supreme offence against international morality and sanctity of treaties'⁷ as contemplated in the Versailles Treaty between the parties to the World War One conflict didn't take place since the said tribunal was never established and the Kaiser was shielded by The Netherlands, his host country.⁸

However, persons responsible for the atrocities of the Second World War, on the defeated side, were not as lucky as the Kaiser as far as getting away with the crimes is concerned. The International Military Tribunals at Nuremberg and for the Far East in Tokyo (respectively the Nuremberg and Tokyo Tribunal) were established by the victorious allied powers to try the major Axis Powers criminals.⁹ Given the unique character of trials conducted by those International Military Tribunals and their unprecedented character, their achievement in trying Axis criminals remained symbolic and limited in many regards. The Nuremberg Tribunal indicted only 24 'Major

³ W. A. Schabas, *supra* note 2, p. 2.

⁴ See the Hague Conventions of 1899 and 1907 signed respectively during the first and second Hague Peace conferences and covering the conduct in hostilities and settlement of international disputes.

⁵ A. Cassese, *supra* note 1, p. 4.

⁶ *Ibid.*

⁷ Article 27 of the Treaty of Versailles of 28th June 1919.

⁸ D. McGoldrick et al., *supra* note 2.

⁹ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), 8, August 1945, Annex, (1951) 82 UNTS 279. Later the allied Powers adopted the Charter of the International Military Tribunal for the Far East Known as the Tokyo Charter, Special Proclamation by the Supreme Commander for the Allied Powers, as amended 26 April 1946, T.I.A.S. No. 1589; and W.A. Schabas, *supra* note 2.

War Criminals'. The accused persons were charged for their individual criminal responsibility in the commission of crimes against peace, violations of laws and customs of war, and crimes against humanity.¹⁰ Nonetheless, most of the Nazi (minor) criminals were therefore tried, in accordance with Control Council Law no 10, by military tribunals established by the victorious Powers but also by German Courts.

The Tokyo Tribunal followed a similar development. It classified suspects under 'A' (crimes against peace), 'B' (war crimes) and 'C' (crimes against humanity) categories and prosecuted only 25 persons accused of 'A category' crimes.¹¹ Other prosecutions, namely regarding B and C suspects were left to military courts in different states.¹²

Despite this major achievement of breaking the internationally established culture of impunity for authors of very serious crimes mostly due to, among others, the jurisdictional protective principle of state sovereignty, the two IMTs have been widely criticised and their jurisdiction challenged in many respects. The first major such criticism was that the justice rendered was violation of the principle of legality under international law which the tribunals were meant to apply. As mentioned above, the jurisdiction of the two IMTs covered crimes against peace, war crimes and crimes against humanity. If war crimes could arguably be seen as crimes under customary international law and treaty law such as 1889 and 1907 Hague Conventions and the 1929 Geneva Conventions, the same could not be said of crimes against peace and crimes against humanity. The dubious reasoning by the Nuremberg Tribunal on the legality of its exercise of jurisdiction were at most convincing as to the moral grounds for the prosecutions but could barely stand a thorough analysis of the legality of the conducted trials.

Thus, in the absence of identifiable applicable international laws, the trials conducted with regards to certain crimes - mainly crimes against peace and crimes against humanity - can still be considered as a form of *ex post facto* and in contravention with the *nullum crimen sine lege* principle.¹³ Nonetheless, the retroactive criminalisation character of certain acts is tempered by the fact that the *nullum crimen sine lege* principle's main purpose is to insure that "individuals should not be punished for actions which they could not have reasonably considered to be subject to criminal prohibition"¹⁴. Incriminated acts or omissions by the IMTs were considered criminal in most of the existing legal systems. The highly criticised IMTs precedent is nonetheless considered as having influenced international human rights law and facilitated the establishment of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda.¹⁵ States and individuals could no

¹⁰ Articles 6 of the Nuremberg IMT Charter, *supra* note 9.

¹¹ K. Kittichaisaree, *International Criminal Law* (Oxford University Press, New York, 2002), p. 19.

¹² *Ibid.*

¹³ B. D. Meltzer, "War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia", *30 Val. U. L. Rev.* (1996), pp. 895-912.

¹⁴ D. McGoldrick et al., *supra* note 2, p. 18.

¹⁵ *Ibid.*

longer hide behind sovereignty and non-intervention in internal matters of states in order to escape accountability for serious crimes. With all their imperfections, the Nuremberg and Tokyo tribunals sent the first signal on the possibility of being held accountable for egregious crimes. They have therefore laid the foundation of the current international criminal accountability system and as such indirectly represent the first steps in a long road leading to the adoption of the Rome Statute some half a century later.

In addition to the non-compliance with the legality principle criticism, the IMTs are seen as victors' justice. If it is an undisputed fact that Nazi Germany was guilty of initiating the Second World War hostilities and responsible for the most horrible atrocities committed during the conflict, among which the holocaust, there is no doubt that other numerous crimes falling within the jurisdiction *ratione materiae* of the IMTs - mostly war crimes and crimes against humanity - were committed as well by the allied powers. If the US use of atomic bombs on Hiroshima and Nagasaki is said to have significantly triggered the end of the second world conflict, this consideration should not downplay the criminal character of the action under the existing laws and customs, given the resulting number of innocent civilians casualties. The same can be said of the bombings of German towns as well as other summary executions on different fronts but mostly the Eastern front by the Soviet Union.¹⁶

Nonetheless, the Nuremberg and Tokyo IMTs were set up and run by the main victorious powers with a limited mandate to try only major axis powers criminals. The same powers initiated other proceedings for minor crimes committed by other axis powers nationals in their respective occupied territories and national courts. There were no or few prosecutions of nationals of victorious powers for crimes committed during the conflict and some powers, such as the Soviet Union, did even a good job of trying to put the crimes committed by their own soldiers on the Nazis shoulders.¹⁷ Post conflict national prosecutions are often tainted by this double standard treatment of crimes, mostly when the conflict results into the victory of one of the worrying protagonists. This criticism on lack of objectivity in prosecutions has equally been formulated against the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda as analysed below.

¹⁶ For a more thorough elaboration on the one-sidedness of IMTs, see: C. Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers Inc., Ardsley, 2003), pp. 406-422; K. Kittichaisaree, *supra* note 11, p. 19-20.

¹⁷ C. Bassiouni, *supra* note 16, p.406.

2.2.2 The International Criminal Tribunals for the Former Yugoslavia and Rwanda.

2.2.2.1 Introduction

Even the harshest criticisms over the Nuremberg and Tokyo trials are tempered by the capital role they played in laying the grounds for the current international criminal law system and mostly by enhancing the principle of individual criminal responsibility for serious crimes over the previously sacrosanct state sovereignty shield. Moreover, the tribunals are said to have developed the law of armed conflicts by defining crimes subject to their jurisdiction in a more progressive manner.¹⁸ Unfortunately, the signal sent from Nuremberg and Tokyo remained a dead letter for almost another half century of impunity.

Since the end of the Second World War, the international community has witnessed a relatively high number of bloody conflicts which might had justified its intervention in judging the persons responsible for such crimes on the same patterns as the Nuremberg and Tokyo trials. To name but a few, many decolonisation conflicts in the 1950s and 1960s, the Biafra secessionist conflict in Nigeria, the genocide in Cambodia, the Iran-Iraq conflict with the gazing of Kurds by Saddam Hussein, claimed a large number of human lives. However, given the fact that some of the major powers were somehow, either directly or indirectly, involved in those conflicts and the world community was somehow paralysed by the Cold War, countries passively watched those dramas. Most of the persons involved in the commissions of such atrocities, including many bloody dictators in different parts of the world, enjoyed more or less total immunity. This remained so despite the fact that, unlike in the case of post Second World War trials, the international community disposed of a body of laws - such as the Genocide Convention and the 1949 Geneva Conventions and 1977 Protocols – which expressly criminalised genocide, war crimes and crimes against humanity.

The world waited nearly 50 years before reliving the Nuremberg legacy. The fall of the iron curtain and the conflicts in the Balkans and Rwanda enabled the establishment of the *ad hoc* Tribunals respectively dealing with crimes in both situations and the subsequent adoption of the ICC statute.

2.2.2.2 The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)

An extensive literature is dedicated to the establishment of the ICTY by a United Nations Security Council (UNSC) Resolution under Chapter VII of the United Nations Charter.¹⁹ Most relevant is the discussion on the

¹⁸ Ibid., pp. 408-422.

¹⁹ Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY Statute) adopted by Security Council Resolution 827 of 25th May 1993, UN Doc.

appropriateness of the establishment of a judicial body by the UN Security Council as one of the means of restoring international peace and security contemplated by the UN Charter chapter VII. We will not analyse the complex decision of the ICTY in the *Tadic case* discussing its own jurisdiction and the power of the Security Council in establishing it.²⁰ For the purposes of the present analysis, we will only point out those main features relating to the jurisdiction of the tribunal. As reflected in UNSC Resolution 827, the court's jurisdiction is "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"²¹.

As opposed to the Statute of the International Criminal Tribunal for Rwanda, to be explored in the next section, this more generous temporal jurisdiction of the ICTY constitutes a major advantage the latter has over the former in bringing all the possible suspects for crimes under their respective jurisdiction. The former Yugoslavia conflict is more or less said to have started (as far as the commission of major crimes is concerned) in 1991 and was still going on by the time of the adoption of the ICTY statute. The mandate of the tribunal was not cut off with the signing of the Dayton Peace Agreement as suggested by some interested parties and it continued to cover later cases, including alleged crimes committed in Kosovo in 1998-1999.²² It seems indeed much legitimate for the court's jurisdiction to cover the whole period of the conflict.

Articles 2-8 of the statute confer to the court the power to prosecute persons individually responsible for war crimes, crimes against humanity and genocide as defined as thereby defined. While article 9 of the statute recognises the principle of concurrent jurisdiction by the ICTY and national courts, it however gives primacy to the former over the latter. The primacy of the court over national judicial bodies is of paramount importance as it enables it to "formally request national courts to defer to the competence of the International Tribunal"²³. The primacy of the tribunal over national courts is criticised as constituting an infringement of state sovereignty but "the tribunal, as a [UNSC] chapter VII creation, 'triumphs' sovereignty"²⁴.

S/RES/827 (1993). See among others books: K. Lescuré and F. Trintignac, *The international Justice for the former Yugoslavia: The working of the International Tribunal of the Hague* (Kluwer Law International, The Hague/London/Boston, 1996), R. Kerr, *The International Criminal Tribunal for the former Yugoslavia: an exercise in Law, politics, and diplomacy* (Oxford University Press, New York, 2004); G. Boas, *The International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers, Leiden/Boston, 2003); J.E. Ackerman and E. O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the former Yugoslavia: with selected materials from the International Criminal Tribunal for Rwanda* (Kluwer Law International, The Hague/London/Boston).

²⁰ For More details see: *Prosecutor v. Tadic* (Case No IT-94-1-T) (Appeals Chamber: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), October 2nd, 1995

²¹ Article 1 and 8 of the ICTY Statute.

²² R. Kerr, *supra* note 19, p. 68.

²³ Article 9, paragraph 2 of the ICTY Statute.

²⁴ R. Kerr, *supra* note 19, p. 67.

In most cases, this might be the more appropriate solution when national authorities are unwilling to genuinely prosecute.

The tribunal is composed of three main organs namely the chambers (comprising three Trial Chambers and an Appeals Chamber); a Prosecutor; and a Registry, servicing both the Chambers and the Prosecutor (article 11 of the ICTY Statute). Articles 18 and 21 provide for due process guarantees in favour of the suspects or accused persons while article 22 is dedicated to the protection of victims and witnesses. The different provisions are more elaborated in the court's rules of procedure and evidence which are regularly amended.²⁵ Article 28 of the statute further requires states to cooperate with the International Tribunal in the investigation and prosecution of persons accused of crimes under its jurisdiction.

After more than a decade of activities, the achievements of the ICTY mandate in "restoring international peace and security" in the Balkans remain far from being satisfactory to say the least. Out of the 162 individuals indicted, 126 have appeared in proceedings before the tribunal. Only 55 persons received a judgement 11 of whom are at the appeal stage. If some 44 cases are completed, there is another same number of accused at the pre-trial stage while 9 cases are under trial.²⁶ These figures show the limited ability of the tribunal to deal with a large number of suspects and the paramount importance and likelihood of exercise of concurrent jurisdiction by the ICC and national courts in cases of massive criminal participation. With respect to the ICC, this challenge will be more explored in subsequent analyses of the current situations before the court.

2.2.2.3 The International Criminal Tribunal For Rwanda (ICTR) and limited jurisdiction

Less than one year after the creation of the International Criminal Tribunal for the former Yugoslavia, the armed conflict that had been going on in Rwanda since October 1990 escalated and the government in place started to carry on a genocide labelled as "the fastest, most efficient killing spree of the twentieth century"²⁷ Unlike in the case of the ICTY which was created by the Security Council out of pressure from the international organisations,²⁸ the ICTR was set up by the same organ on request by the newly formed post-genocide Rwandan government, led by the former rebel

²⁵ The first Rules of Procedure and Evidence were adopted on 11 February 1994 and the latest version as of August 2005 was amended on 21 July 2005. For further details see: <www.un.org/icty/legaldoc/index.htm> , consulted on 15 August 2005.

²⁶ This information is as of August 2005: For more information see: key figures of the ICTY at <www.un.org/icty/cases-e/factsheets/procindex-e.htm>, consulted on 15 August 2005.

²⁷ S. Power, *A problem from Hell: America and the age of Genocide* (Basic Books, New York, 2002), p. 334.

²⁸ V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* (Transnational Publishers Inc., Irvington-on Hudson, New York, 1995), p. 21.

movement which eventually took power.²⁹ Notwithstanding some early proposals for extending the mandate of the ICTY to cover crimes committed in Rwanda, the Security Council, out of opposition to the idea,³⁰ decided through Resolution 955 (1994) to establish a separate criminal Tribunal for Rwanda.³¹

Despite being established on similar patterns as the ICTY, the creation of the ICTR raised some concerns worth mentioning. Even if it had some regional implications, the Rwandan conflict was, strictly defined, an internal armed conflict.³² Contrary to the Balkan conflict, reliance by the UNSC on Chapter VII of the UN Charter in establishing the ICTR is less convincing even in the light of the reference by the ICTY to a settled practice of this organ in considering such conflicts as “threat to peace”.³³ Moreover, after requesting its establishment, the Rwandan government, voted against the UNSC Resolution establishing the tribunal for various reasons some of which hold water. Some of the reasons put forward by Rwanda for this negative vote are illustrative of most of the main challenges the court later faced in its functioning and, to some extent, reflect the major shortcoming in international criminal adjudication.

The first reasons given by the Rwandan delegation in the SC meeting for voting against the resolution creating the ICTR was the very limited temporal jurisdiction of the Tribunal.³⁴ Unlike the ICTY which had a generous unlimited jurisdiction *ratione temporis*, the ICTR’s mandate, as it appears in article 1 of the Tribunal’s statute, is limited to the period between 1 January 1994 and 31 December 1994. Nothing explains the SC’s choice for these particular dates. The armed conflict in Rwanda started on October 1st, 1990 and officially ended sometime in July 1994.³⁵ As rightly pointed out by the Rwandan representative in motivating his country’s negative vote, many killings were carried out throughout 1990 to 1994 but some cannot fall into the court’s jurisdiction.³⁶ Therefore, in the ICTR practice,

²⁹ See V. Morris and M.P. Scharf, *The International Criminal Tribunal for Rwanda* (Transnational Publishers Inc., Irvington-on Hudson, New York, Vol.1, 1998), p. 101; and Vol. 2, pp. 298-310.

³⁰ *Ibid.* Page 68.

³¹ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other 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, between 1 January 1994 and 31 December 1994, adopted by Security Council Resolution 955 of 8 November 1994, UN Doc. S/RES/955 (1994).

³² *Prosecutor v. Jean-Paul Akayezu*, Case No. ICTR-96-4-T, para. 601-610.

³³ *Prosecutor v. Dusko Tadic*, *supra* note 20, par. 30.

³⁴ V. Morris and M.P. Scharf, *supra* note 29, Vol. 1, p. 308.

³⁵ *Ibid.*

³⁶ U.N.SCOR, 49th Sess., 3453rd mtg at 14-15, U.N.Doc, S/PV.3453 (1994). The representative mentioned the extermination of two Tutsi sub-groups, the Bahima in Mutara in October 1990 and the Bagogwe in Gisenyi and Ruhengeri in 1991; the Bugesera massacre of over 300 Tutsi as well as the massacre of over 400 other Tutsis in Gisenyi in 1993. The ICTR disposes of many related documents which cannot however be used in proving a genocide case for specific crimes committed during this period.

the huge amount of information available on events dated before 1994 is not used as evidence in proving a genocide case but at most as background information or proof of the existence of direct and public incitement to commit genocide as well as conspiracy to commit genocide.³⁷ In this last particular case of conspiracy to commit genocide, one chamber noted that:

“[C]onspiracy is an inchoate offence, and as such has a continuing nature that culminates in the commission of the acts contemplated by the conspiracy. For this reason, acts of conspiracy prior to 1994 that resulted in the commission of genocide in 1994 fall within the temporal jurisdiction of the Tribunal”.³⁸

Rwanda’s second objection on the statute of the tribunal was the fact that it shared the prosecutor and Appeals chamber with the ICTY. In the Rwandan delegation’s view, such a tribunal was meant to “appease the conscience of the international community rather than respond to the expectations of the Rwandese people and the victims of genocide in particular”³⁹. Even if this argument sounds more political and cannot therefore be considered as having any legal relevance, the UN Security Council by its Resolution 1503 amended Article 15 of the ICTR Statute by appointing a Separate prosecutor for the ICTR.⁴⁰ It is worth noting that prior to the splitting of the prosecution departments of both tribunals, the ICTR had been very much criticized for being very slow in its proceedings for various reasons including lack of sufficient attention particularly from the office of the prosecutor.⁴¹ Nearly a decade after it started its activities the tribunal has, as of December 2005, made 72 arrests, and only completed 17 cases most of which were completed recently.⁴²

³⁷ *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Case No. ICTR-99-52-T), 3 December 2003, par.1017 and 1044, at <www.ictor.org/default.htm>, visited on 16 August 2005.

³⁸ *Ibid.* In this particular case, the trial chamber found all the three defendants guilty of conspiracy to commit genocide, mainly on the basis of proof relating to a period prior to the one covered by the temporal jurisdiction of the tribunal (par. 39-313). One might however, wonder whether the tribunal can make a similar finding of conviction for conspiracy to commit genocide in case of persons who committed similar acts but were no longer in the country by the time covered by the tribunal’s mandate. The case of Léon Mugesera is of particular interest here since, in his capacity as vice-President of the MRND presidential party, he made an inflammatory public speech on 22 November 1992 considered as an incitement to commit genocide but fled to Canada in August 1993. He is on the list of Category 1 suspects (genocide “masterminders”) in Rwanda while not indicted by the ICTR. After a long legal process in his host country, the Canadian has ordered his deportation to Rwanda. For further details see: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at <www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc040.wpd.html>, last consulted on 17 August 2005. In this case, one wonders whether he can be convicted by the ICTR for only conspiracy to commit genocide when a conviction for genocide is not possible. If that is the case, will a future prosecution in Rwanda for genocide and other related crimes such as complicity in genocide, incitement to commit genocide, be in contravention with the *ne bis in idem* principle?

³⁹ V. Morris and M.P. Scharf, *supra* note 29, Vol. 2, p. 308 *et seq.*

⁴⁰ S.C. Res. 1503 of 28 August 2003, UN. Doc. S/RES/1503 (2003).

⁴¹ A. E. Tiemessen, ‘After Arusha: Gacaca Justice in Post-Genocide Rwanda’, 8 *African Studies Quarterly* 1 (2004), pp. 57-76.

⁴² For further details see: <www.ictor.org/default.htm>, visited on 06 December 2005.

Other reasons put forward by Rwanda in voting against the resolution establishing the tribunal - namely on the jurisdiction *ratione materiae* of the tribunal, the participation of non neutral countries in the electoral process of the tribunal's judges, the serving of prison sentences outside Rwanda and non application of death penalty – are disputable, at least some of them. However, some of these concerns, such as the imbalances in application of sentences due to the application of the concurrent jurisdiction principle between the tribunal and national courts, will be discussed in a later part of the present analysis.

The last reason pertaining to the seat of the tribunal is controversial as it balances the need for independence and impartiality of the judicial body with the imperatives of having an impact on the national reconciliation process and thus playing the role in “restoring peace” which is the primary reason for its creation.⁴³ In this regard, they are considered more as instruments of international law than *ad hoc* tribunals created as a responses to specific conflicts. Despite their ability to get state cooperation in arresting suspects who are out of reach of national states, less is know about the activities of the tribunals in those countries, even among lawyers. Their impact of peace building and reconciliation process in the concerned societies remains very limited. Among other reasons for such ignorance is the fact that the tribunals operate outside the countries where crimes were committed, and victims do not see a direct impact of the justice being rendered; given also the lack of statutory participation of victims in legal proceeding safe as witnesses.⁴⁴ A number of these objections bear some relevance in the working of the ICTY as well and challenges lying ahead of the ICC functioning depending on given cases.

The discretionary power of the UN Security Council in establishing international criminal tribunals relying on Chapter VII of the UN charter has proven not to be the best available solution of restoring “international peace and security”. There were many other conflicts in the world which could justify the creation of *ad hoc* tribunals, but the Security Council, out of a certain “tribunal fatigue”⁴⁵ didn't satisfy the increasing demands. Thus, in case of the Sierra-Leonean conflict, the UNSC, through resolution 1315⁴⁶, requested the UN Secretary General to negotiate the creation of an independent court with the Government of Sierra Leone.⁴⁷

⁴³ V. Morris and M.P. Scharf, *supra* note 29, Vol. 2, p. 308.

⁴⁴ See among many other references: K. C. Moghalu, ‘International Humanitarian Law From Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda’, *14 Pace International Law Review* (2002), pp. 287 *et seq.*; K. C. Moghalu, ‘Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda’ *26 Fletcher F. World Aff. 21*, (2002).

⁴⁵ D. J. Scheffer, *Challenges Confronting International Justice Issues* (Address to International Law professors of the Boston area), January 14, 1998, at <www.nesl.edu/intljournal/VOL4/SCHEFFER.PDF>, consulted on 17, August, 2005.

⁴⁶ S.C. Res. 1315, UN: Doc. S/RES/1315 (2000), par. 1.

⁴⁷ See: Agreement between the United Nation and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (SCSL) at <www.sc-sl.org/scsl-agreement.html>, consulted on 17 August 2005.

Similarly to the Nuremberg and Tokyo IMTs, the ICTR and ICTY as well as ongoing efforts to establish a climate of accountability for crimes in committed during armed conflicts in Sierra-Leone, Cambodia, East Timor through hybrid national and international criminal institutions, are useful ingredients in a growing international criminal legal system, despite their respective unavoidable criticisms.⁴⁸ More specifically, the ICTY and ICTR statutes and experiences have nurtured the ICC funding documents and remain useful mirrors in analysing possible difficulties the court will face in exercising its jurisdiction.

⁴⁸ For more on these hybrid institutions, see: UN and Cambodia set up office for war crimes court to try former Khmer Rouge leaders, *10 February 2006*, at <www.un.org/apps/news/story.asp?NewsID=17472&Cr=cambodia&Cr1>, visited on 22 May 2006; See also: S. Lenton, 'New Approaches to International Justice in Cambodia and East Timor', *84 IRRC*, No 845 (March 2002), pp. 93-119.

3 PROBLEMATIC ISSUES RELATING TO THE ICC JURISDICTION

3.1 Analytical scope

The present chapter will start with a brief overview of the various steps leading to the adoption of the ICC statute, before turning to an analysis of substantive provisions relating to the court's jurisdiction *ratione loci, personae, materiae and temporis*. As a prelude to the actual examination of trigger mechanisms to be tackled in the next chapter, the present discussion aims at showing the linkage between the court's limited temporal and subject-matter jurisdiction and the actual exercise of that jurisdiction. Furthermore, the chapter will draw on challenges faced by the ICTY and ICTR in their laborious legal determination over, crimes against humanity, war crimes and mostly genocide as indicators of the difficult task awaiting the ICC. The chapter will conclude with a study of the possible incidence of the court on non-state parties.

3.2 Historical context of the establishment of the ICC and main features

The creation and experience of the *ad hoc* tribunals played a significant role in the adoption of the ICC Statute in 1998. Even if, as mentioned above, the idea of creating an international criminal court had previously been contemplated on several occasions and, as such, predates the establishment of the *ad hoc* tribunals, it was often pushed back as premature and not acceptable by states.⁴⁹ Nonetheless, with the establishment of the former Yugoslavia and Rwanda tribunals, "the idea of prosecuting those who commit international crimes acquired a broad-based support in the world public opinion and many governments"⁵⁰

Relying on previous efforts to produce an acceptable legal text reproducing international crimes, the International Law Commission (ILC) "produced a comprehensive text in 1993, which was modified in 1994"⁵¹. The ILC report was subsequently submitted for discussion to an *ad hoc* committee set up by the UN General Assembly (U.N.G.A). Despite the fact that the

⁴⁹ For a more detailed account of earlier efforts to create an international criminal court, see: C. Bassiouni, "Historical survey: 1919-1998" in C. Bassiouni (comp.), *The statute of the International Criminal Court: A Documentary History* (Transnational Publishers Inc., Ardsley, New York, 1998), pp. 1-35)

⁵⁰ A. Cassese, *supra* note 1, p.16; See also K. Kittichaisaree, *supra* note 10, p. 28.

⁵¹ A. Cassese, *supra* note 1, p.16 and Report of the International Law Commission, 46th Sess., 2 May-22 July 1994, UN GAOR, 49th, Sess., Supp. No. 10, UN Doc. A/49/10 (1994).

latter was unable to reach an agreement during its 1995 two sessions, it nonetheless produced a report which served as a basis for setting up a Preparatory Committee for the Establishment of an International Criminal Court by the U.N.G.A in 1996. The preparatory committee produced the final draft statute, which was discussed and adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (Rome conference) of 15 June to 17 July 1998.⁵²

The Statute entered into force on 1 July 2002 in accordance with its article 126 requiring 60 instruments of ratification, acceptance, approval or accession. As of November 2005, the prosecution department of the court was examining four situations referred to the court by state parties (Uganda, Democratic Republic of Congo and Central African Republic) and the United Nations Security Council (Darfur).⁵³

The court comprises four main organs namely the Presidency; the Chambers (pre-trial division, trial division and appeals division), the Office of the Prosecutor and the Registry.⁵⁴ Other major features of the court will be discussed in relevant parts of the present analysis.

The ICC's exercise of jurisdiction is subjected to temporal, territorial, personal and subject matter limitations. Most of the limitations resulted from political compromises made at the Rome conference intended to design a court acceptable by as large number of states as possible. The court has jurisdiction on the most serious international crimes committed after the entry into force of the statute, subject to the territoriality or nationality jurisdictional principles, the Security Council referral or whenever a non-state party voluntarily accepts its jurisdiction for a specific crime under its jurisdiction.

3.3 Jurisdiction Ratione Temporis

The ICC statute limits the court's jurisdiction to crimes committed after the entry into force of the statute. Article 11 of the ICC Statute reads:

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

⁵² Rome Statute of the International Criminal Court (hereinafter Rome Statute, ICC Statute or the statute), adopted at Rome on 17 July 1998, PCNICC/1999/INF/3; For more details on the working of the committees and drafting history of the ICC Statute, see: C. Bassiouni, *supra* note 47, pp. 19-35.

⁵³ For more details on the referred cases, see: Situations and Cases, at <www.icc-cpi.int/cases.html>, visited on 14 December 2005.

⁵⁴ Article 34 of the Statute.

The second paragraph of this provision provides that for states ratifying the statute after its entry in force, the instrument shall enter in force “the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession”⁵⁵ A limitation arises out of operative article 124 allowing states, upon ratification of the statute, to defer the jurisdiction of the court over war crimes for a period of seven years after the entry in force of the statute for that state. If the reading of these provisions combined with the non-retroactivity principle in article 24 is in line with the principle of legality acknowledged by the statute in article 22, there appear to be some situations which might not find clear answers in the statute. Thus, to the question whether crimes committed after the entry in force of the statute but before its ratification by a state can be subjected to the court’s jurisdiction in respect to that state, S. Bourgon suggests - by distinguishing jurisdiction *ratione temporis* and the *nullum crimen sine lege* in article 22 - that nothing prevents states from agreeing to such jurisdiction provided the latter principle is not violated.⁵⁶ This is in line with the provisions of articles 11 (2) and 12 (3) whereby acceptance of jurisdiction in this case is the same as in cases involving non-state parties’ acceptance of jurisdiction for specific crimes.

Nonetheless, the application of these provisions might become not an easy task in situations involving crimes committed on, or by nationals of more than one country with differing dates of entry in force of the statute. In such case, it might be uneasy for the court to apply different temporal jurisdictional standards in an interconnected criminal activity requiring to be dealt with as one single situation. An illustrative case is a possible referral of the case involving the massacres of some 156 Congolese refugees in Burundi in August 2004 to the ICC.⁵⁷ The crime took place nearly one month before the ratification by Burundi of the Rome Statute on 21 September 2004. Their country of origin – the Democratic Republic of Congo – is party to the Rome statute since 11 April 2002. The terms of the D. R. Congo situation referred to the ICC cover “crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute”.⁵⁸ The statute appears not to be precise on the question as to whether the prosecutor is bound by the referring authority’s delineation of the situation but provisions

⁵⁵ Article 126, par. 2 of the Statute.

⁵⁶ S. Bourgon, “*Jurisdiction Ratione temporis*” in A. Cassese et al. (eds), *supra* note 1, pp. 549-550.

⁵⁷ On these crimes and difficulties in their follow up, see: Human Rights Watch (HRW), Burundi: *The Gatumba Massacre: War Crimes and Political Agendas*, pp.13-15, <http://hrw.org/backgrounders/africa/burundi/2004/0904/burundi0904.pdf>, visited on 22 August 2005; *Joint Report of the United Nations Organisation Mission in the Democratic Republic of Congo, the United Nations Operation in Burundi and the Office of the United Nations High Commissioner for Human Rights into the Gatumba Massacres*, UN Doc. S/2004/821, 5 October 2004.

⁵⁸ ‘Prosecutor receives referral of the situation in the Democratic Republic of Congo’, <www.icc-cpi.int/pressrelease_details&id=19.html>, visited on 22 August 2005. The multidimensional nature of the Congolese conflict and possible challenges the court will face in the case are analysed in M.H. Arsanjani and M. Reisman, ‘The-Law-In-Action of the International Criminal Court’, 99 *Am. J. Int’l Law*, (2005), 385-403, pp. 397 *et seq.*

on prosecutorial independence suggest that he/she has a discretionary power to act as far as his/her action is within the purview of the statute.

Hence, as referred by the D. R Congo, the situation obviously excludes crimes committed in the neighbouring countries, even those involving Congolese citizens like the above mentioned massacre in Burundi. Nevertheless, if the acts prove to have been committed not only by the Forces de Libération Nationale (FNL) which claimed the responsibility of the action, and involves a joint action by offenders from Congo (Mai Mai), Burundi (FNL) and Rwanda (Interahamwe) as attested by some testimonies,⁵⁹ the case should better be handled by the ICC, as there is little likelihood of setting up an *ad hoc* tribunal in charge of handling these specific crimes. These testimonies display a connection between the D. R. Congo referred case and the Gatumba massacres. Since an application of the sole territoriality principle places the crimes outside the ICC jurisdiction, Burundi needs to make a declaration of acceptance of jurisdiction provided for in articles 11 (2) and 12 (3) of the Statute in order for the court to be sized by the situation.

More complex is the case of exercise of jurisdiction by the ICC in respect to states non-parties to the statute. Whether through a voluntary declaration accepting the court's jurisdiction for a specific crime provided for in article 12 (3), or through a referral by the UN Security Council, the court remains bound by the date of entry into force of the statute as provided for by its article 11.

Additionally, often mentioned is the case of continuing crimes. Most crimes under the jurisdiction of the court are committed in armed conflicts some of which last for long periods (such as the Northern Uganda Case which has lasted for the last two decades⁶⁰). Exercise of jurisdiction in this case involving continuing crimes (when appreciated at the time of referral), needs to be in line with the above-discussed temporal jurisdictional limitations. The court cannot hear specific crimes committed before the entry in force of the statute without violating the principle of legality.⁶¹ On the other hand, it will be challenging in such a situation to isolate only those crimes committed after the entry in force of the statute. If this happens to be the case, nothing would normally prevent national courts from prosecuting the same persons subjected to ICC jurisdiction for crimes predating the entry in force of the Statute which escaped ICC adjudication. *Ne bis in idem* cannot be invoked here as either court will deal with crimes committed in different periods of time, even if they are interconnected.

One way of circumventing some aspects of temporal limitations to the exercise of jurisdiction might be pushing further the ICTR reasoning mostly

⁵⁹ For references, see *supra*, note 57.

⁶⁰ Civil Societies Organisations for Peace in Northern Uganda (CSOPNU), 'Counting the Costs: Twenty Years of Conflict in Northern Uganda', 30 March 2006, at <www.globalpolicy.org/security/issues/uganda/2006/03cost.pdf>, visited on 22 May 2006.

⁶¹ S. Bourgon, *supra*, note 54, pp. 550-551 and 557.

in “Media Case” judgement, as far as some counts are concerned.⁶² In its findings, the court argues with respect to conspiracy and, direct and public incitement to commit genocide that they constitute inchoate offences that continue in time until the completion of the acts contemplated.⁶³ A parallel can be drawn with other crimes such as crimes against humanity whose widespread and systematic character can be proven by reference to an existing such policy designed prior to the period falling under temporal jurisdiction of the court and progressively implemented. As rightly stated, “[A] common criminal plan may have been agreed upon before the Statute’s entry into force, but executed or completed thereafter”⁶⁴.

Thus, it will be interesting to see in the future how the court will deal with both situations in Democratic Republic of Congo and Northern Uganda referred to it since both conflicts started long before the entry in force of the Statute, as it will be elaborated upon in subsequent parts of the present analysis.⁶⁵

3.4 Jurisdiction *ratione personae* and *ratione loci*

The ICC statute confers jurisdiction to the court over natural persons provided they are not under the age of 18 for crimes committed after the entry in force of the Statute.⁶⁶ The individual criminal responsibility stressed in the relevant provisions of the statute excludes states’, or other juridical persons’, criminal responsibility. However, the principle of individual criminal responsibility does not preclude the court from issuing binding orders against juridical persons such as states.⁶⁷ The statute further requires persons subject to the court’s jurisdiction to either have the nationality of a state party to the statute or have committed their crimes on the territory of a member state. The two principles might also apply to cases of a state that have accepted the jurisdiction of the court under article 12 (3). Only a referral by the UN Security Council under article 13 (b) of the

⁶² *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, *supra* note 36.

⁶³ *Ibid.*

⁶⁴ C. Stahn et al, ‘The International Criminal Court’s *ad Hoc* Jurisdiction Revisited’, 99 *Am. J. Int’l L.* 421 (2005), p 431.

⁶⁵ The conflict in Northern Uganda has been going on since end of 1980’s while the conflict in Congo started in the beginning of the 1990’s, for information relating to the referred case see: <www.icc-cpi.int/cases.html>, consulted on 22 August 2005; Human Rights & Peace Centre, and Liu Institute for Global Issues, ‘The Hidden War: The Forgotten People; war in Ancholiland and its Ramifications for Peace and Security in Uganda’, Report, October 30, 2003, pp.36 *et seq.*, at <www.up.ligi.ubc.ca/_assets/031106uganda_fullreport.pdf>, and Human Rights Watch reports on the conflict at <www.hrw.org/doc/?t=africa_pub&c=uganda>, both visited on 22 August 2005; on the roots of the Congolese conflict, see: ICG, ‘Scramble for the Congo: An Anatomy of an Ugly War’, ICG Africa Report No 26, Nairobi Brussels, 20 December 2000, retrieved at <www.crisisgroup.org/library/documents/report_archive/A400130_20122000.pdf>, on 22 August 2005.

⁶⁶ Articles 1, 24-28 of the Statute

⁶⁷ See ICC statute Chapter 9 on cooperation.

Statute can contravene the territoriality and nationality principles.⁶⁸ The jurisdictional link to nationality or territoriality constituted a failure by the statute to “endorse the principle of universality of jurisdiction”⁶⁹. It results from these limitations that:

“[O]nly individuals who are nationals of state parties or of states who have accepted the jurisdiction of the court, may be tried irrespective of the circumstances in which the crime was allegedly committed, whereas nationals of states who did not accept it can only be prosecuted if charged with the commission of crimes in the territory of a state who accepts the ICC jurisdiction or in a situation which has been deferred to the court by the Security Council under article 13”.⁷⁰

Thus, crimes committed on the territory of a member state can be prosecuted regardless of whether the state of origin of the offender is party to the ICC statute. The court might only be precluded from exercising its jurisdiction if an offender from a non-state party, upon committing his crime, fled to his or any other state not party to the statute and unwilling to surrender him/her to the court.⁷¹ The lack of own enforcement mechanisms might put the court at the mercy of state unwilling to cooperate if the court didn't have incidental or ancillary jurisdiction over states or other legal persons, as it will be expended upon in a later part of this analysis. This power *vis-à-vis* state parties is interpreted as arising from the general obligation on state parties to cooperate with the tribunal in part 9 of the Rome statute.⁷² The shortcomings of territoriality and nationality principles will further be discussed in relation to trigger mechanisms for the exercise of the court's jurisdiction.

3.5 Crimes under the jurisdiction of the International Criminal Court

3.5.1 Relevance

The international criminal court's jurisdiction does not cover all international crimes, but is limited to the “most serious crimes of international concern”⁷³. Article 5 of the statute confers jurisdiction to the court over genocide, crimes against humanity, war crimes and aggression. Genocide, crimes against humanity and war crimes are respectively defined in articles 6, 7 and 8 of the statute. As there was no existing acceptable definition of aggression during the adoption process of the statute, debates at the Rome conference lead to the adoption of article 5 (2) deferring the court's exercise of jurisdiction over this crime until a definition is adopted

⁶⁸ Article 12 (2)

⁶⁹ M. Frulli, ‘*Jurisdiction Ratione personae*’, in A. Cassese et al. (eds.), *supra* note 1, p 535.

⁷⁰ *Ibid.* The author singles the fact that acceptance of the statute by the custodial state does not act as a precondition for the exercise of jurisdiction by the court.

⁷¹ For more details, see S. Bourgon, ‘*Jurisdiction Ratione Loci*’ in A. Cassese et al. (eds.), *supra* note 1, pp. 559-569.

⁷² M. Frulli, *supra* note 69, p. 537.

⁷³ Article 1 of the Rome Statute.

by state parties. An examination of the court's exercise of jurisdiction imperatively passes by an analysis on the difficulties involved in legal determinations over genocide, war crimes and crimes against humanity cases. Without dwelling into the complexities attached to the discussion over the said crimes, the following section will only focus on the difficulties encountered by *ad hoc* tribunals in asserting jurisdiction over the same crimes. Despite the existence of a document detailing the elements of crimes,⁷⁴ determination of concrete cases will not predictably be an easy task, grounding on past international criminal law experience as it appears below.

3.5.2 Genocide

Genocide is a legal term whose deployment carries political, cultural, and moral implications.⁷⁵ Even if a number of cases of genocide are reported to have been committed over the centuries,⁷⁶ the crime forms part of international law since the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in 1948.⁷⁷ The convention didn't provide for an enforcement mechanism but rather imposed an obligation on state parties to punish genocide (article V) and contemplated the creation of an international criminal tribunal with jurisdiction over this crime (article VI).

Despite the criminalisation of genocide after the Second World War atrocities and the "never again" undertaking by states resulting in the creation of the United Nations, international prosecutions and convictions for this crime didn't take place until the establishment of the ICTY and ICTR.⁷⁸ The crime of genocide in the statutes of the *ad hoc* tribunals as well as in the ICC statute has led to conflicting jurisprudential and doctrinal interpretations, reflecting the overall international community's reluctance in determining a given situation of discriminatory mass killing as constitutive of genocide.⁷⁹

⁷⁴ Assembly of States Parties (ASP), Elements of Crimes, First Session, 3-10 September 2002, ICC-ASP/1/3, at <www.amicc.org/docs/Elements_of_Crimes_120704EN.pdf>, visited on 22 Mars 2006.

⁷⁵ T. Ansah, 'Genocide and The Eroticization of Death: Law, Violence, and Moral Purity', *14 S. Cal. Interdisc. L.J.* 181, (Spring 2005), p. 183.

⁷⁶ A. Cassese, 'Genocide', in A. Cassese et al. (eds.), *supra* note 1, pp. 335-336, note 1; For cases of genocides, see also the book by S. Power, *supra* note 27.

⁷⁷ G.A Res. 260 (III), *Convention on the Prevention and Punishment of the Crime of Genocide* (78 UNTS 277).

⁷⁸ "Even at the national level, until the late 1990s, there were very few prosecutions for the crime, the Israeli prosecution of Adolf Eichmann being the most famous and authoritative of these"; S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford University Press, New York, 2001), p. 26.

⁷⁹ Article 6 of the Statute which reproduces *verbatim* article II of the Genocide Convention and articles 4 (2) and 2 (2) of the ICTY and ICTR statutes respectively reads:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

The most complex problem arising from the definition of genocide relates to the proof of the special intent to “destroy, in whole or in part, a national, ethnical, racial or religious group”. A correlated issue relates to the determination of the protected group. If the genocide convention imposes an obligation on state parties to “take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide”⁸⁰, the problematic proof of *dolus specialis* remains one prevailing factor justifying states inaction. For reasons of political convenience, countries tend to use such concepts as “ethnic cleansing” or crimes against humanity for which there is no specific treaty obligation – even without specified state obligations as the Genocide Convention appears - to act except the general obligations arising from the UN charter and human rights treaties.

The humming and hawing by both the ICTY and ICTR in their first genocide convictions are just illustrative of the shortcomings of the crime definition and the lack of international community’s readiness to confront the “crime of crimes”⁸¹ as contemplated by the genocide convention. In the first conviction ever by an international tribunal, the ICTR held that the protection by Genocide Convention “should be interpreted to apply to all ‘stable and permanent’ groups, whether or not the Tutsi could be neatly fit within the scope of the terms “national, ethnical, racial or religious.”⁸²

In this judgement, *Schabas* condemns the reliance on the intent of the Genocide Convention’s drafters, drawn from its *travaux préparatoires*, in determining the protected group rather than sticking on the exhaustive enumeration in the convention.⁸³ In a later judgement, a different Trial Chamber of the same tribunal argued that Tutsi were an ethnic group because defined as such in Rwandan Law.⁸⁴ The case is as well criticised for a different reasons of relying on a subjective criteria – Rwandan Law- in defining genocide.⁸⁵

The discomfort in limiting the protected group to the only four enumerated in the Genocide Convention were acknowledged by the same ICTR in a later judgement in which Trial Chamber I held:

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

⁸⁰ Article VIII of the Genocide convention.

⁸¹ Term first used to refer to genocide by the ICTR in *Prosecutor v. Kambanda* (Case No. ICTR-97-23-S), Judgment of 4 September 1998, par. 15; W. A. Schabas, *supra* note 2, p.37.

⁸² W. A. Schabas, ‘Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda’, 6 ILSA J. Int’l & Comp. L. (2000), p. 376, referring to *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), Judgement of. 2 September 1998, par. 701-702.

⁸³ W. A. Schabas, *supra* note 82, pp.378-383.

⁸⁴ *Prosecutor v. Kayeshema and Ruzindana*, (Case no. ICTR-95-1-T), Judgement of 21 May 1999, par. 522-526.

⁸⁵ W. A. Schabas, *supra*, note 82, pp. 383-384.

“[C]oncepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context”⁸⁶

Nevertheless, ICTR Trial Chamber I, despite stating that “membership of a group is, in essence, a subjective rather than an objective concept”⁸⁷, was cautious enough not to totally overrule the interplay of objective and subjective elements in group determination by affirming that a reading of the Genocide convention’s *travaux préparatoires* suggested that “certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment”⁸⁸

If the nature of the killings in Rwanda, coupled with the guilty plea at the ICTR by *Jean Kambanda*,⁸⁹ the Rwandan Prime Minister during the genocide, could relatively leave little doubt that they were constitutive of genocide, the ICTY hesitated for a while before its first genocide conviction. After acquitting *Jelusic* for genocide because the prosecution couldn’t establish beyond reasonable doubt that genocide was committed in *Brcko*,⁹⁰ the tribunal finally convicted *Krstic* for genocide by setting a good standard in determining the protected group by the Genocide convention.⁹¹

These cases and many other later propositions reflect the hardships involved in assessing a genocide case. The process of the adoption of the Genocide Convention shows that for purposes of making political compromises, other groups than the four mentioned by the Genocide Convention were excluded from the enumeration⁹². It is sad to notice that subsequent instruments criminalising genocide, namely the ICTY, ICTR and ICC statutes, did nothing better than echoing the 1948 definition and elements of the crime. Rather than furthering the definition, the ICC statute made a step backward by failing to expressly endorse the other forms of participation in genocide as enumerated in article III of the Genocide Convention.⁹³

⁸⁶ *Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), Judgement of 6 December 1999, par. 56.

⁸⁷ *Ibid*, par. 56.

⁸⁸ *Ibid*, 57.

⁸⁹ *Prosecutor v. Kambanda* (Case No. ICTR-97-23-S), paras. 3, 10, 14, 16-18 of the 1998 judgment.

⁹⁰ *Prosecutor v. Jelusic* (Case No. IT-95-10-I), Judgement of 19 October 1999, par. 107-108; also A. Cassese, *supra* note 74, pp. 341-342. The Appeals Chamber in its 5 July 2001 judgement confirmed the genocide acquittal.

⁹¹ *Prosecutor v. Krstic* (Case No. IT-98-33-T), Judgment of 2 August 2001, par. 594-599.

The trial chamber determined that the intent to kill all the Bosnian Muslim men of military age in Srebrenica constituted an intent to destroy in part the Bosnian Muslim group identified as the protected group under the statute (par. 598).

⁹² B. Van Schaack, ‘The Crime of Political Genocide: Repairing the Genocide Conventions Blind Spot’ *106 Yale L.J.* 2259 (1996-1997), pp. 2262 *et seq*; W. A. Schabas, ‘Groups Protected by the Genocide Convention’, p. 375 *et seq*.

⁹³ Article III of the Genocide Convention, reproduced *verbatim* by articles 4 (3) and 2 (3) respectively of the ICTY and ICTR reads:

One might expect that, even if the task of the ICC will be much easier as it will be able to build its own case law from the ICTY and ICTR experiences, genocide determinations will still remain conditioned and influenced by other considerations than mere legal findings. A comparative analysis of the international community's debates over the appropriate legal qualification of events in Rwanda in 1994 and Darfur more than ten year later suggests that the world has not much changed more and is far from being well equipped in dealing with alleged genocides.⁹⁴ Accordingly, since legal determinations are by essence *post facto*, other preventable genocides might still occur in the future despite the availability of a comprehensive prohibitive legal arsenal.

A wishful thinking would be that any socially cognisable group should be protected from genocide. But as it seems that there are no legislative moves in amending the Genocide Convention. The ICC needs to interpret it more progressively in order to ensure that the need to protect threatened groups from extermination prevail over legal technicalities.

3.5.3 Crimes against humanity

Unlike the criminalisation of genocide rooted in treaty law, crimes against humanity as part of international crimes are said to have evolved primarily as a product of customary international law prior and during the Nuremberg and Tokyo trials.⁹⁵ However, despite numerous conflicts in which crimes falling under this category were allegedly committed, the inertia of the post Second World War community of state, despite the creation of the UN, was not an enabling climate for the adoption of a binding treaty criminalising crimes against humanity. The creation of the ICTY and ICTR enabled the first prosecutions for crimes against humanity since the Nuremberg and Tokyo trials. The Rome statute subsequently followed suit by providing for an elaborate listing of acts constitutive of crimes against humanity.

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide

⁹⁴ For some angry voices on the debate over legal technicalities on qualification of events in Darfur as constitutive of genocide see: B. v. Schaack, 'Darfur and the rhetoric of genocide', 26 Whittier L. Rev., (2005), pp. 1101 et seq.; K. Gomar, 'Heartbreak in Darfur: When Does Genocide Become Genocide?', 2 Loy. U. Chi. Int'l L. Rev., (2004-2005), pp. 153-168.; J. Jafari, "Never Again", Again: Darfur, the Genocide Convention, and the Duty to Prevent Genocide", 12 NO. 1 Hum. Rts. Brief, 2004, pp. 8 et seq. On similar debates over the Rwandan genocide see among others: S. Power, *supra*, note 27, pp. 325-389.

⁹⁵ S.R. Ratner and J.S. Abrams, *supra* note 76, pp. 46-49; see also A. Cassese, 'Crimes Against Humanity', in A. Cassese et al. (eds.), *supra* note 1, pp. 353 et seq.; I. Bantekas and S. Nash, *International Criminal Law* (Cavendish Publishing, London, 2003), pp. 353 et seq. Reference is made to the condemnation of crimes against humanity and civilisation by the major powers following the massacre of some 1,5 million Armenians by the Ottoman Empire administration and the unsuccessful efforts to include this relatively new concept by then in the Versailles Treaty ending the First World War.

If it was formerly believed during the Nuremberg trials that crimes against humanity could only be committed if they were associated with war crimes or crimes against peace, subsequent developments of the concept cover the commission of the incriminated acts in peacetime.⁹⁶ The definition of the crime requires the committed acts to be ‘part of a widespread or systematic attack directed against any civilian population’. The attack needs to be directed against a civilian population “pursuant to or in furtherance of a State or organizational policy”.⁹⁷ The widespread or systematic character of the crime, coupled with the requirement that crimes be directed against a civilian population constitutes the main difference between crimes against humanity and war crimes. Both elements further differentiate ‘crimes against humanity’ and ‘genocide’, which does not require a civilian status of the victims and a ‘widespread or systematic character’, even if proof of the latter element might help in identifying the required *dolus specialis*.

However, even if the law requires the conduct to be part of a widespread or systematic campaign, a single act can be constitutive of crimes against humanity in so far that it can be linked to the wider context.⁹⁸ The ICTY and ICTR case law with regard to crimes against humanity conditioned a conviction for any of the acts constitutive of crimes against humanity on the knowledge by the offender of the wider context or policy of which the crime is part⁹⁹; or on the discriminatory nature of an act for persecution as crime against humanity.¹⁰⁰ Except in this latter case of persecution as a crime against humanity, the motivations behind the commission of crimes falling in this category are irrelevant in establishing individual criminal responsibility.¹⁰¹

The ICC statute lists 11 acts constitutive of crimes against humanity once they are committed as part of a widespread or systematic attack directed against any civilian population. The statute further defines some key concepts in the listing.¹⁰² If the definition of some concepts allows for a clearer understanding of the elements of the relevant crimes, definitional limitation might hamper any adoption by the court of a more progressive interpretation in dealing with specific acts perceived as constitutive of crimes against humanity.¹⁰³ Most of the acts constitutive of crimes against humanity have been extensively discussed by both ICTY and ICTR. The ICC will have a wide range of case law from which to develop its own jurisprudence.

⁹⁶ W. A. Schabas, *supra* note 2, p.42-43.

⁹⁷ Article 7 (2) (a) of the ICC Statute.

⁹⁸ See W.A. Schabas, *supra* note 2, p. 45.

⁹⁹ Tadic case, *supra* note 20, par. 656 *et seq.*; *Kayishema and Ruzindana Case*, *supra* note 82, par. 133 *et seq.*; Cassese, *supra* note 91.

¹⁰⁰ Tadic case, *supra* note 20, Appeals Chamber Judgement, 15 July 1999, par. 305

¹⁰¹ *Ibid.*, par. 271-272.

¹⁰² Article 7 (1) and (2) of the Rome Statute.

¹⁰³ For a discussion of the acts constitutive of crimes against humanity, see A. Cassese, *supra* note 95.

Nevertheless, the fact that an armed conflict does no longer constitute a prerequisite for the commission of crimes against humanity puts a heavy burden on the court as a global institution in charge of fighting impunity. If the ICTY and ICTR findings relating to crimes against humanity and genocide were simplified by the nature and extent of the conflicts in the territories respectively under their jurisdiction, the lack of precision as to what “widespread or systematic” entails will constitute a handicap that the court needs to overcome, mostly whenever crimes are committed without being linked to an armed conflict. It is not however impossible to imagine possible cases where crimes against humanity can be committed outside any armed conflict. Acts of oppression by a totalitarian, repressive regime against minorities of indigenous peoples might amount to crimes against humanity (namely persecution as provided for in article 7 (g)).¹⁰⁴

3.5.4 War crimes

International criminalisation and prosecutions for war crimes predates the two above-analysed categories of crimes under the jurisdiction of the international criminal court. Article 228 of the 1919 Versailles peace treaty ending the First World War provided for prosecutions of persons responsible for violations of laws and customs of war. As the term used then indicates, the existence of customs of war carries the idea that war crimes constituted a concept derived from customary international law. Subsequently, prosecutions for war crimes by the Nuremberg and Tokyo Tribunals were less challenged vis-à-vis the *nullum crime sine lege* principle.

The first international codification efforts of ‘Laws and Customs of war’ are dated back to the 1863 Lieber code. Subsequent legal process and other intermediate instruments culminated into the adoption of the 1899 and 1907 Hague Conventions.¹⁰⁵ The 1949 Geneva Conventions and 1977 Additional Protocols were also a result of long normative evolutions. The incorporation of war crimes in the ICTY, ICTR and ICC statutes reflects more than a century of the normative evolution of the concept of ‘war crimes’. More particularly, article 8 of the Rome statute represents the most elaborate and recent articulation of the notion of war crimes.¹⁰⁶

If war crimes are defined as violations of international humanitarian law or *jus in bello* leading to the individual criminal responsibility of the offenders,¹⁰⁷ the *nulla poena sine lege* principle requires the primary or substantive rules of international humanitarian law to be translated into

¹⁰⁴ In this respect, the IWGIA provides extensive and frequently updated information from different corners of the globe involving mistreatment of different groups by national authorities as it appears in <www.iwgia.org/sw160.asp>, visited on 22 March 2006.

¹⁰⁵ G. and R. Abi-Saab, ‘Les Crimes de Guerre’, in H. Ascensio et al. (eds.), *Droit International Pénal* (A. Pedone, Paris, 2000), pp. 266-269.

¹⁰⁶ *Ibid*, p.275.

¹⁰⁷ *Ibid*, p.278.

precise incriminations.¹⁰⁸ As the court's jurisdiction is limited to the most serious crimes, the statute limits its jurisdiction to only those war crimes committed 'as part of a plan or policy or as part of a large-scale commission of such crimes'¹⁰⁹. This provision clearly leaves war crimes not linked to a plan, policy or large-scale character outside the court's jurisdiction. This higher threshold, if not interpreted very restrictively, might serve as a shield against numerous possible prosecutions for war crimes due to hardships involved linking the crimes to a plan, policy or large-scale character.

Article 8 (2) makes an extensive listing of incriminated acts with reference to nature of the conflict (international or non international armed conflict) and the applicable humanitarian legal norms (1899 and 1907 Hague Regulations, 1949 Geneva Conventions and 1977 additional protocols). The incriminated acts "must have been perpetrated not just during, but in connection with an armed conflict"¹¹⁰. The ICC statute listing of war crimes withheld the traditional humanitarian law subdivision between international and non-international armed conflicts. The court will therefore need to undergo the complex determination of the nature of the conflict before assessing the applicable norms of humanitarian law incorporated in article 8 of the Rome statute.¹¹¹ Furthermore, another major criticism addressed to the lengthy listing of war crimes in article 8 is that it limits the discretion of the court in deciding whether specific war crimes fall within the jurisdiction of the court. Thus, the detailed aspect of the provision carried both its positive and negative side.¹¹² Despite this normative limitation, the ICC will need to draw inspiration from the ICTY and ICTR case law with their generous interpretation of this category of crimes as well as from the Nuremberg and Tokyo IMT's.

3.5.5 The non-inclusion of other international crimes in the Rome Statute

Discussions in the Rome conference leading to the adoption of the ICC statute were characterised by a couple of political compromises intended to shape a court acceptable by as many states as possible. Thus, the list of crimes under the court's jurisdiction was much shortened, despite the wide range of generally recognised international crimes. As reflected in the ICC statute's preamble, the court's jurisdiction was only limited to "the most serious crimes of concern to the international community".¹¹³

¹⁰⁸ For a more elaborate discussion see: M. Bothe, 'War Crimes', in A. Cassese et al. (eds.), *supra* note 1, pp. 381 *et seq.*

¹⁰⁹ Article 8 (1) of the Rome Statute.

¹¹⁰ See M. Bothe, *supra* note 108, p. 388.

¹¹¹ On the complexity surrounding such determination see: *Prosecutor v. Tadic*, *supra* note 20, par. 66-78.

¹¹² W. A. Schabas, *supra* note 2, pp. 51 *et seq.*; M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Publishers, Antwerpen/Oxford/New York, 2002), pp. 537 *et seq.*

¹¹³ ICC Statute preamble, par. 4

Furthermore, among the listed crimes under the ICC jurisdiction, prosecutions for aggression were conditioned to a future adoption of the crime's definition.¹¹⁴ This laborious task of adoption of a definition of aggression will not take place sooner than in 7 years from the entry in force of the statute, in accordance with articles 121 and 123 relating to amendments of the Rome statute. The lack of agreements on an immediate punishment of aggression upon entry in force of the Rome statute constituted a step back in the development of international criminal law, given the prohibition of the use of force in the UN Charter and the early inclusion of "crimes against peace" in the charters of the Nuremberg and Tokyo IMTs interpreted as covering the current concept of aggression.¹¹⁵

Additionally, besides the listed 'most serious crimes' in the ICC statute, several international treaties and declarations constitute sources from which other international crimes can be inferred.¹¹⁶ Slavery and related practices; torture and related practices; enforced disappearance; drug-trafficking; piracy; 'mercenarism'; terrorism; apartheid; environmental damage; unlawful human experimentation to name but a few are prohibited by specific international treaties or declarations even if they have not all gained global acceptance as crimes and in most cases lack international enforcement mechanisms.¹¹⁷ Some scholarship argues in favour of a distinction, in the international criminal law, between 'crimes', 'delicts' and 'infractions'; along the lines of many domestic criminal law systems.¹¹⁸ Without furthering the discussion, it is worth mentioning that the very limited nature of the ICC's subject matter jurisdiction will still leave a huge gap in the international repressive system. As the court's motion will more likely be triggered in extreme cases of massive violations of human rights, the fight against impunity will still be at jeopardy in instances where the crimes committed do not fit in the strictly limited squares of the Rome statute.

Thus, if some of the above-mentioned crimes such as torture, apartheid, enslavement, enforced disappearance can be subsumed in either crimes

¹¹⁴ Article 5 (2) of the ICC statute.

¹¹⁵ For a more detailed analysis on the crime of aggression, see: G. Gaja, 'The Long Journey Towards Repressing Aggression' in A. Cassese et al. (eds.), *supra* note 1, pp. 427 *et seq.* Several proposals for a definition of aggression were put forward during and after the negotiation process of the Rome statute. They are generally premised on state sovereignty and prohibition of use of force in the UN Charter. Most proposals appear at <www.un.org/law/icc/documents/aggression/aggressiondocs.htm>, visited on 22 March 2006.

¹¹⁶ For purposes of illustration on instruments and processes of global reach see: The United Nations Convention against Transnational Organized Crime and its Protocols at <www.unodc.org/unodc/pt/crime_cicp_convention.html#final>, visited on 22 March 2006; for torture, disappearance, slavery and related practices and other criminalised acts in international instruments and processes, see: <www.ohchr.org/english/issues/index.htm>, visited on 22 March 2006.

¹¹⁷ For further details on other international crimes, see: C. Bassiouni, *supra* note 16, pp. 109 *et seq.*; I. Bantekas and S. Nash, *supra* note 95, pp. 17 *et seq.*; S.R. Ratner and J.S. Abrams, *supra* note 78, pp. 111-124.

¹¹⁸ C. Bassiouni, *supra* note 16, pp.118-133.

against humanity or war crimes whenever the required elements of these crimes are gathered – among others the widespread or systematic, the gravity of the crime or situation of armed conflict – the same crimes will go unpunished once they do not fall within the ICC statute defined margins and absent states willingness to act. Thus, except obvious cases of massive human rights violations mostly linked with an easily cognisable armed conflict, several crimes might remain unpunished even in those cases where crimes against humanity or war crimes might have been withheld, given the difficulty in assessing the widespread or systematic nature of a crime and, alternatively, a state of belligerency.

The subject matter jurisdictional barriers will not be overcome by the powers vested in the Security Council to refer cases to the court. A thorough reading of the Rome statute coupled with the Agreement Between the International Criminal Court and the United Nations,¹¹⁹ suggests that the court's jurisdiction cannot be extended to crimes other than those provided for in the statute. The provisions of the statute relating to the Security Council referral, "while explicitly excluding the applicability of preconditions *ratione loci* and *ratione personarum* to the exercise of the court's jurisdiction...enunciate in absolute terms the other jurisdictional limitations"¹²⁰. Any possible extension of the court's jurisdiction should comply with the amendment provisions in the statute or be in line with a progressive judicial interpretation of its subject matter jurisdiction by the court.

Thus, the ICC appears like a court designed to cope with bloody and tyrannical regimes openly and defiantly engaged in massive human rights violations while being ill-equipped to deal with other more discreet similar violations. As an institution whose purpose is to fight against impunity, the international criminal court should be in a position to act whenever serious crimes are committed and the perpetrators are not held responsible in national fora. The limitations in the statute still leave room for impunity.

3.6 Incidence of ICC jurisdiction on non-state parties

Jurisdictional powers *ratione materiae* of the court as delineated in the Rome statute are conditioned to the ratification of the Rome statute by the territorial state where the crimes are committed or nationality state of the offender. The two exceptions in the statute to this general rule are the acceptance of the court's jurisdiction by a non-state party (article 12, 3 ICC) and the referral by the Security Council (article 13, b ICC). If the former case establishes a voluntary non-state party subjection to the court's

¹¹⁹ Agreement between the International Criminal Court and the United Nations, signed on 4 October 2004, at <http://www.icc-cpi.int/press/pressreleases/47.html>, visited on 06 September 2005.

¹²⁰ L. Condorelli and S. Villalpando, 'Can the Security Council extend the ICC's jurisdiction?', in A. Cassese et al. (eds.), *supra* note 1, p. 574.

jurisdiction, the latter, as well as the territoriality principle might involve prosecution by the court of non-state parties' nationals against the will of their national states.

The fears of prosecution of non-state parties' nationals have generated different reactions from states opposed to the ICC jurisdiction. The mostly voiced opposition is by the United States. Despite its involvement in the preparatory process of establishing the International Criminal Court, the US has frequently voiced its opposition to the court since the adoption of the Rome statute by voting against it. If the rationale behind the establishment of the ICC was to eradicate impunity by punishing perpetrators of the most serious crimes of international concern, the US deems the court, as framed by the statute, to be unacceptable on the ground that the "real (if usually unstated, and far distant) objectives of the ICC's supporters are to assert supremacy of its authority over nation state, and to promote prosecutions over alternative methods for dealing with the worst criminal offences".¹²¹

Thus, the US embarked in a series of measures meant to curtail possible prosecutions of American citizens by the court, mostly its military personnel involved abroad. Such measures include the adoption of a legislative act restricting US cooperation with the ICC and its state parties,¹²² the conclusion of agreements with other states relating to non-surrender of US citizens to the court¹²³ and the adoption of UN Security Council Resolutions 1422 and 1487 under Chapter VII of the UN Charter preventing the court from exercising jurisdiction over non-state parties' nationals involved in UN authorized operations purportedly, in compliance with article 16 of the ICC statute.¹²⁴

¹²¹ J. R. Bolton, 'The Risks and Weaknesses of the International Criminal Court from the America's Perspective', *Law and Contemporary problems*, (Winter 2001), p. 169.

¹²² The American Servicemember's Protection Act of 2002 at <www.amicc.org/docs/ASPA_2002.pdf>, visited on 07 September 2005.

¹²³ For further details on US article 98 agreements, see: http://iccnow.org/documents/USandICC/BIAsByRegion_current.pdf, last consulted on 12 September 2005.

¹²⁴ SC Res. 1422 of 12 July 2002, on United Nations Peacekeeping, UN. Doc. S/RES/1422 (2002); SC Res. 1487 of 12 June 2003, on United Nations Peacekeeping, UN. Doc. S/RES/1487 (2003); SC Res. 1497 (2003) of 1 August 2003, on the Situation in Liberia, UN. Doc. S/RES/1497 (2003) and SC Res. 1593 (2005) of 31 March 2005, Reports of the Secretary-General on the Sudan, UN. Doc. S/RES/1593 (2005). For further details on US effort to avoid ICC jurisdiction over its nationals see: D. Akande, 'The Jurisdiction of the International Criminal Court over National of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice*, (December 2003) , p. 219; C. Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', 14 *EJIL* 1 (2003), pp.85-104; W. Schabas, 'The United States Hostility to the International Criminal Court: It's All About the Security Council', 15 *EJIL* 4 (2004), pp. 701-720; S. Zappala, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN Security Council Resolution 1422 (2002) and article 98 Agreements', *Journal of International Criminal Justice*, (April 2003), pp. 115-134; H. Van der Wilt, 'Bilateral Agreements between the United States and State Parties to the Rome Statute: Are they Compatible with the Object and Purpose of the Statute?' 18 *LJIL*, (2005), pp. 93-111.

A rich literature has been dedicated to the complex legal exercise of assessing the real nature of the ‘threat to peace’, if any, justifying recourse to chapter VII of the UN charter in adopting resolution 1422 and its adverse consequences over the credibility of the International Criminal Law system.¹²⁵ The Resolution didn’t specify the nature of the threat to peace, whether resulting from the inability to send troops in the envisaged area - in this case the extension of the UN mission in Bosnia - absent the resolution, the potential of prosecuting nationals of non-state parties to the ICC or the potential of use by US of its veto powers in preventing the adoption of SC Resolutions authorising UN operations.¹²⁶ Operative paragraph 7 of the Resolution only states that “it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the United Nations Security Council”, leaving unanswered the question whether the threat to peace derives from the existence of a conflict or the inability by state parties not parties to the ICC to send troops; absent a provision for their prosecutorial immunity.¹²⁷

Moreover, even if the reliance of SC Resolution 1422 on article 16 of the Statute carries a certain tribute by the Security Council to the ICC statute, the interpretation given to this provision remains controversial. Based on its drafting history, article 16 of the ICC statute is interpreted as applying to specific situations referred to the court rather than on ‘investigations and prosecutions *in abstracto*’.¹²⁸ The opposition of many ICC state parties to a second extension of SC Resolution 1422 in July 2004 sheds a light on the shortcomings, if not the inconsistency, of the compromise in the said resolution vis-à-vis the object and purpose of article 16 and of the ICC statute. Nonetheless, even if the US consent to refer the Darfur Case to the ICC was widely saluted as a waning of the US intransigent opposition to the court,¹²⁹ UN SC Resolution 1593 (2005) meets US objections by reserving exclusive jurisdiction of non-states parties to the ICC statute over their nationals involved in UN or AU authorised operations, safe in case of waiver of such exclusive jurisdiction.¹³⁰ The same applies to its predecessor and inspiring source, namely, Resolutions 1497 authorising a peacekeeping force in Liberia.¹³¹

Equally controversial is the signing of article immunity agreements for US nationals under article 98 of the Rome statute. Since the mere objection to the ICC statute didn’t provide enough protection to US citizens as article 12

¹²⁵ See articles in note 124 above.

¹²⁶ S. Zappala, *supra* note 124, p. 118.

¹²⁷ *Ibid.* An identical formulation was used in SC Resolution 1487 (2003) extending the previous resolution’s prosecutorial immunity of nationals of non-state parties to the ICC involved in UN authorized peacekeeping operations.

¹²⁸ S. Zappala, *supra* note 124, pp. 119-120.

¹²⁹ See IMICC, “chronology of US opposition to the International Criminal Court: from ‘unsigned’ to Immunity Agreements to Darfur”, at <www.iccnw.org/pressroom/factsheets/FS_AMICC_US_ChronologyJun2005.pdf>, last visited on 15 September 2005.

¹³⁰ Par. 6 of Res. 1593 (2005), *supra*, note 124.

¹³¹ *Supra*, note 124.

jurisdictional grounds cover crimes committed by non-state parties nationals on the territory of ICC state parties, the US engaged in a campaign of signing article 98 agreements with a number of both state parties and non-state parties to the ICC statute.¹³² While the first paragraph of this statute provision embodies the international legal principle of diplomatic immunities, paragraph two reads:

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

The wording of US agreements grounded on article 98 (2) is often criticised for its wide ambit of jurisdictional reach *ratione materiae* and *ratione personae* considered as inconsistent with the object and purpose of the ICC statute, if not for the US which is a non-state party, at least for those state parties involved in the signing of such agreements.¹³³ *Ratione materiae*, the exemption of ICC jurisdiction for acts or omissions by persons acting outside their official capacity, is viewed as not falling within the purview of receiving states’ jurisdictional exemptions in traditional SOFAs. The same applies to the extension of *ratione personae* prosecutorial exemptions to all nationals of the sending state-the US in this case-as opposed to only those serving in any official capacity.¹³⁴ The US stated commitment to prosecution of the most heinous crimes of international concern in the said agreements is not equated to sufficient national prosecution guarantees otherwise underlying the ‘complementarity’ principle enshrined in the Rome statute.

The main grievances of the US against the court pertain to its perception as an unconstitutional, undemocratic institution with unchecked powers and more likely to be subject to politically motivated prosecutions.¹³⁵ Furthermore, the US objections are also connected to, among others, the prosecutorial power to conduct investigations *ex officio* as well as to the

¹³² As of 26 July 2005, the US had signed 100 Agreements under article 98 of the ICC statute. Of the 91 known agreements, 42 Bilateral Immunity Agreements were signed with ICC state parties while other 53 member states to the statute had expressed their opposition in signing these types of agreements, some of them mainly developing countries thereby loosing US aid, as detailed on:
http://iccnw.org/documents/USandICC/BIAByRegion_current.pdf, last consulted on 13 September 2005.

¹³³ The drafting history of article 98 (2) of the ICC statute is not clear as to whether the provision contemplates the existing Status of Forces Agreements (SOFAs) and similar treaties, in which case subsequently signed treaties might be inconsistent with that provision, or whether it leaves room for future treaties. In the absence of explicit prohibition of the latter is considered as not excluding such possibility. For further details see: H. Van der Wilt, *supra* note 124, pp. 99 *et seq.*

¹³⁴ For a more elaborate analysis on SOFAs v. article 98 (2) agreements, see: H. Van der Wilt, *supra* note 124, pp.100 *et seq.*; D. Fleck, “Are foreign military personnel exempt from International Criminal Jurisdiction under Status of Forces Agreements?”, *Journal of International Criminal Justice*, 1, (2003), pp. 654 *et seq.*

¹³⁵ J.R. Bolton, *supra* note 121, pp. 172-175.

inclusion of the crime of aggression not subjected to Security Council referral or prior determination respectively.¹³⁶ They also relate to a possible misuse for political ends of the possibility, under article 12 (3) of the statute, for a non-state party to accept jurisdiction of the court for a specific crime.¹³⁷ The prospect of prosecutions by the ICC of US nationals has led to the enactment in 2002 of the American Servicemembers' Protection Act, supplemented by the Nethercutt Amendment providing for military and aid cut offs for ICC state parties and explicitly enabling the president to take any necessary measures to curb any prosecutions of US citizens by the ICC, including freeing persons detained by the court, which has earned the act the nickname of 'invade The Hague Act'.¹³⁸

If the US stand towards the ICC is the most "mediatized" because of the various steps taken in shielding US nationals from the court's jurisdiction, its fears are shared by a relatively large number of countries equally opposed to the prospect of an unconditional exercise of jurisdiction by the court over crimes committed by their nationals or on their territory. All things considered, despite the ratification of the ICC statute by nearly half of the world's countries,¹³⁹ more than half the world's population remains outside the legal protective mandate of the court. The world's most populous countries like China, India, Indonesia, Pakistan and Russia, to name but few countries, are not yet parties to the ICC Statute and most of them are less likely to join in the near future.¹⁴⁰ If no country can claim to totally be unanswerable to human rights violations and as such, a potential 'client' of the ICC, most of these countries are still cautious or opposed to the ratification of the statute share, at least in theory, a higher likelihood of involvement in armed conflicts or other human rights violations which might trigger the exercise of jurisdiction by the court.

If the need for punishing the most heinous international crimes such as genocide, crimes against humanity and war crimes remains notably unchallenged, some states in political transition or with politically sensitive settings are nonetheless distrustful of an international criminal court whose deterrent effect is untested. Faced with the shortcomings of international peace building and conflict settlement mechanisms, they opt for unilateralism as being the most efficient way out. Subjection in such cases to ICC jurisdiction is viewed as a dangerous weakening of national sovereignty. Such national centric perception of the ICC contrasts with a thorough analysis of jurisdictional provisions in the ICC statute which render the court devoid of any prosecutorial powers whenever states with

¹³⁶ Ibid; see also J. Mayerfeld, 'Who Shall Be Judge? The United States, the International Criminal Court, and the Global enforcement of Human Rights', 25 *Human Rights Quarterly*, (2003), pp. 104-106., J. Goldsmith, 'The Self-Defeating International Criminal Court', 70 *The University of Chicago Law Review*, 1, (Winter 2003), pp. 89-104.

¹³⁷ H. Van der Wilt, *supra* note 124, p. 96.

¹³⁸ See *supra*, note 118; S. Zappala, *supra* note 124, p. 115, note 4.

¹³⁹ As of November 2005, 100 States have ratified the ICC statute as it appears on <www.icc-cpi.int/asp/statesparties.html>, last visited on 09 December 2005.

¹⁴⁰ For further country information on ICC ratifications future ratifications by states see: <www.iccnw.org/countryinfo.html>, last visited on 14 December 2005.

primary jurisdiction are committed to exercising it, as further explained in the following chapters.

4 TRIGGER MECHANISMS TO THE ICC JURISDICTION

4.1 Introduction

The Rome statute provides for the exercise of jurisdiction by the court when a situation involving crimes within its jurisdiction is referred by a state party (1), the Security Council acting under chapter VII of the UN Charter (2), or the prosecutor acting *proprio motu* (3). Statute provisions relating to these three modes of initiation of proceedings with the possible loopholes or challenges constitute the focal point of this chapter. The three different modes of initiation of the court's jurisdiction and possible challenges will here again be explored taking existing experience from the ICC related institutions.

4.2 Initiation of proceeding by state parties to the ICC statute

The right of state parties to lodge complaints before the International Criminal Court involving the commission of crimes under its jurisdiction is the least disputed and as such not subjected to any complex screening procedures. The international and horrendous nature of crimes under the court's jurisdiction justifies an action by any state without being required to prove any particular interest in the referred situation. The relevant provisions of the statute require the referring state to submit a situation - with supporting information and documentation - to the prosecutor for investigation. The very flexible nature of the complementary regime under the Rome statute requires the prosecutor to proceed with investigations in the referred situation only after informing state parties and other interested states of his decision and making a challengeable assessment of the state's inability or unwillingness to genuinely carry out investigations.¹⁴¹

This mechanism appears virtually unproblematic as the referring state's action serves the primary objective of putting in motion legal proceedings in a situation by attracting the prosecutor's attention to a given crime or set of crimes committed or being committed. Nonetheless, the practice in international criminal law and in the human rights field has revealed, as it appears below, that the recourse to this mechanism is rather uncommon. The referral by states of 'situations' rather than specific cases calls for a parallel between this procedure and the interstate complaint mechanisms under human rights treaties. More specifically, a parallel can be made with the normative interstate complaint mechanism available in most universal and regional human rights systems. Without pointing to specific cases and

¹⁴¹ Articles 13, 14, 18 and 53 of the Rome statute.

determining individual involvement in the commission of crimes, referrals will attract the prosecutor's attention to violations of human rights likely to constitute crimes under the court's jurisdiction in a given country or specific area within a country.

During more than half a century of evolution of the current human rights promotion and protection mechanisms, this particular type of complaint procedure has barely been used in all systems despite the very often simplified procedural requirements for initiation of proceedings as opposed to individual or non-governmental organisations petitions, where applicable. Normatively existent in some of the UN treaty-based quasi-judicial mechanisms in addition to the reporting system common to them, interstate complaint mechanisms are barely resorted to.¹⁴² Furthermore, despite the less complex admissibility criteria for interstate complaint procedures in two of the three regional human rights mechanisms as opposed to individual complaints, they have only been used in limited cases which, taken in context, reveal to be politically driven cases than merely grounded on legal and philanthropic concerns over human rights violations. As of September 2005, only three cases were recorded in the European Human Rights system,¹⁴³ one communication in the African system¹⁴⁴ and none in the Inter-American System whereby at the commission level, only individual petitions before the commission are unconditional while interstate complaints are subjected to a state declaration of acceptance of jurisdiction.¹⁴⁵ In the latter case, since the commission acts in the first instance in examining a case, the possibility opened to both the commission and state parties to lodge complaints before the court becomes complex since actions by states parties are more likely to take the form of appeals rather than interstate complaints.¹⁴⁶

Limited recourse to interstate complaint mechanisms mirrors states apprehension and uneasiness with holding their peers responsible for human rights violations for reasons of political correctness and avoidance of potentially reciprocated accusations. Even the world's so-called most "liberal democracies" have, over the past, proved to be bystanders of the most horrendous atrocities without either denouncing them or taking any action, including legal action, in spite of the wide range of accessible legal mechanisms. Often mentioned is the fact that the Rwandan UN

¹⁴² Articles 11 of CERD, 21 of CAT and 41 of the ICCPR, 76 of CMW provide for optional interstate complaint mechanisms.

¹⁴³ <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3881662&skin=hudoc-en&action=request>, Ireland v. the United Kingdom, 18 January 1978; Denmark v. Turkey, (*Application no. 34382/97*), 5 April 2000; Cyprus v. Turkey, (*Application no. 25781/94*), 10 May 2001;

¹⁴⁴ Communication 227/99, Democratic Republic of Congo v. Burundi, Rwanda and Uganda. Exclude Libya v. USA in F. Uguergouz, " *The African Charter on Human and Peoples' Rights: A comprehensive agenda for Human dignity and sustainable democracy in Africa*" (Martinus Nijhoff Publishers, 2003), p. 558.

¹⁴⁵ Articles 44 and 45 of the American Convention on Human Rights (ACHR), entered into force 18 July 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

¹⁴⁶ IACHR published cases at: <www.cidh.org/casos.eng.htm>, visited on 11 November, 2005.

representative continued to participate in Security Council's meetings throughout the 1994 genocide without being suspended and with limited, if any, condemnation from other members of the ongoing crime carried out by, or under the instructions of, the government he was representing.¹⁴⁷ In addition to the positive state parties' obligation arising from the Genocide Convention to confront the crime, Rwanda was party to most of the major human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR); instruments which, in most cases, open room for legal action by state parties. The late international response through, among others, the establishment of the ICTR justifies, to a greater extent, the continuous scepticism by a large portion of Rwandans towards a tribunal perceived as having been established for more apologetic reasons and because of the ICTY precedent than for a genuine concerns of adequately responding to the Rwandan tragedy.¹⁴⁸ The Rwandan case is one among many where lack of state action revealed to be detrimental and had devastating consequences as it was interpreted as toleration, if not approval, of the criminal conduct by the community of states.

As mentioned above, the few times that interstate complaint procedures were used indicate that relevant cases were more politically motivated petitions/communications than altruistic, genuine and unbiased concerns for human rights violations. If the above analysis is mainly grounded on human rights mechanisms which can be viewed as procedurally and substantively less constraining than international criminal law, nothing indicates a change in state attitude towards the use of this particular mechanism for crimes under the ICC jurisdiction. Country selfish interests and power relations among states prevail over philanthropic motivations in face of otherwise inexcusable crimes. In this regard, the apprehension of the ICC by opposing states, with the United States in the forefront, appears to some extent relevant. Nonetheless, past experience of human rights bodies and international criminal law system shows that it is more likely that this mechanism might be less exploited, despite the numerous procedural guaranties embodied in the ICC statute limiting possible misuses. Moreover, the direct attribution of responsibility to states in human rights mechanisms as opposed to individuals by the ICC might prove less embarrassing for states in the latter case since assessment of state responsibility is not the primary purpose of the proceedings.

Against this backdrop, the scepticism over state submission of cases to the ICC seems theoretically defeated by the current status of situations before the court. Out of the four situations brought to the attention of the court, three were referred by state parties under article 13 (a) of the statute

¹⁴⁷ Human Rights Watch (HRW) and Fédération Internationale des Ligues des Droits de l'Homme (FILDH), *Leave none to tell the story* (Human Rights Watch Press, New York/Washington/London/Brussels, 2002), p.25.

¹⁴⁸ *Ibid.*, pp. 745-747.

(Uganda, Democratic Republic of Congo and Central African Republic).¹⁴⁹ Only the Darfur case was referred to the court by the Security Council.¹⁵⁰ The Ugandan Lord Resistance Army (LRA) and Democratic Republic of Congo (DRC) cases under the court's investigations are of particular interest for our analysis as the court has not yet initiated investigations in the Central African Republic (CAR) case at the time of the writing of these lines.

The Ugandan government referred the situation concerning the Lord's Resistance army to the Court on December 16, 2003.¹⁵¹ The LRA armed conflict is dated back to 1986 when President Yoweri Museveni seized power through armed rebellion.¹⁵² The numerous atrocities committed by this movement can be traced back to this period as it has ever since strived for ousting President Museveni's regime out of power. If it is generally agreed that "there is little doubt that as a purely legal matter, the LRA atrocities qualify as crimes within the court's subject-matter jurisdiction",¹⁵³ the referral nevertheless raises a couple of issues: 1) whether a state with a judicial system that is both willing and able to conduct a prosecution can voluntarily relinquish jurisdiction in favour of the ICC; 2) whether prosecutions are in the "interests of justice" given the negotiations and reconciliation imperatives;¹⁵⁴ 3) whether in referring a situation, a state disposes of a discretion power to isolate an aspect of the conflict from a bigger context and; 4) the possibility of conducting national prosecutions against persons tried by the court for crimes predating the entry into force of the statute.

First, the Ugandan government's initiative was interpreted as basically rooted in political motivations. By referring the LRA case to the ICC, Uganda successfully forced the international community to take action against LRA leadership.¹⁵⁵ The strategy proved a positive political calculation as it forced the community of states out of its characteristic indifference towards the fate of thousands of Northern Ugandans, the majority of whom are internally displaced due to LRA atrocities and

¹⁴⁹ For the link to the referred cases *supra*, note 53.

¹⁵⁰ *Ibid.*

¹⁵¹ ICC Press Release "President of Uganda Refers Situation concerning the Lord's Resistance Army to the ICC, at <www.icc-cpi.int>, last visited on October 24th, 2005.

¹⁵² CSOPNU, *supra* note 60.

¹⁵³ P. Akhavan, 'The Lord's Resistance Army case: Uganda's Submission of the First State Referral to the International Criminal Court', *99 Am. J. Int'l L.*, (April 2005), p. 404. The atrocities characterising the movement's methods of warfare include but are not limited to murder, enslavement consecutive to abduction of children and turned into combatants or sexual slaves, torture, rape, attacks on civilian populations... With Sudanese government backing of the LRA, the various actions and initiatives by the Ugandan leadership to curtail the movement prior to the entry into force of the ICC statute - including military operations, negotiations, and the offer for amnesty in case of voluntary surrender to Ugandan authorities - remained unsuccessful.

¹⁵⁴ *Ibid.* The author's central question pertains to the voluntary surrender of a case by a state to the court despite the willingness and ability to prosecute. He downplays the impact the limited nature and possibly scope of the referral might have on the case.

¹⁵⁵ P. Akhavan, *supra* note 153, p. 404.

military operations.¹⁵⁶ There little doubt that ICC's exercise of jurisdiction complies with the relevant statute provisions and the objects and purposes of the statute.¹⁵⁷ It needs however to be read in the light of article 17 of the statute which requires the court to "consider, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".¹⁵⁸ Even if willing and disposing of working judicial institutions, Uganda's inability to achieve cooperation in apprehending LRA leadership accused of atrocities, and bringing them to justice paralyzes its legal ability to exert jurisdiction. It illustrates the unavoidable linkage between inability and unwillingness to prosecute on the one hand and the inability to exercise jurisdiction due to, among other, lack of cooperation of states hosting the suspects.

This case displays the unnecessary nature of the limitations in article 17 (3) of the 'inability' to those cases of collapse or unavailability of national judicial systems. It ignores the many instances whereby lack of sheltering-states' cooperation – which can easily be achieved by an international legal institution than a state - constitutes one of the predominant causes of impunity. Even if the LRA case can be considered as grounded on the 'unavailability' of Uganda's judicial system due to lack of cooperation by neighbouring countries,¹⁵⁹ there might be other complex cases where international justice is the most suitable forum of prosecution, despite the availability, willingness and ability of national judicial systems to prosecute due to, among other, political sensitivities.¹⁶⁰ The ICC prosecution's interpretation of certain submissions to the court's jurisdiction seems to caution this view that certain cases might not necessarily fall under the purview of admissibility prerequisites in article 17 of the statute.¹⁶¹ Thus, it is noteworthy to recall that of the three cases under the court's prosecution scrutiny, three were referred to the court by state parties concerning alleged crimes committed on their own territories and mainly involving their nationals. The willingness of those states to prosecute is thereby unquestionable. Given the large-scale character of crimes committed in those countries, it doesn't take much to predict that genuine justice efforts require additional prosecutions at national level as the ICC might not exhaustively prosecute a more likely huge number of foreseeable offenders. Thus, in these very cases, the statutory premises under which the court

¹⁵⁶ Ibid.

¹⁵⁷ Among others: articles 13 (a), 14 and 53 of the statute.

¹⁵⁸ Article 17 (3) of the Statute.

¹⁵⁹ See P. Akhavan, *supra* note 153, p. 415.

¹⁶⁰ Ibid., pp. 414 – 415. In this respect, the judicial saga surrounding the arrest of former Liberian President Charles Taylor offers an interesting example of criminal prosecutions challenges in sensitive cases. For more details see: R. D. Sieh, 'Taylor's Trial Dilemma: Freetown or The Hague?', *Liberian Times*, March 31, 2006, at <www.globalpolicy.org/intljustice/tribunals/sierra/2006/0331dilemma.htm>, visited on 20 December 2005.

¹⁶¹ ICC-OTP, "Paper on some policy issues before the Office of the Prosecutor", September 2003, at <www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf>, visited on 20 December 2005.

assumes jurisdiction (unwillingness and inability to prosecute) remain questionable; regardless the court's flexible in receiving the cases.

Secondly, the horrendous nature of the crimes committed dictates that the prosecution of, at least, the LRA leadership is in the interests of justice not only for the victims but also for general societal interests and thus preferable to other means of settlement of the conflict.¹⁶² If truth and reconciliation commissions are, in some instances, preferred to judicial prosecutions, their application in cases like this having recorded numerous thousands of victims might have the reverse effect.¹⁶³

Thirdly, the limitation of the referred cases to LRA atrocities attracted some criticisms relating to the one-sided nature of the referral.¹⁶⁴ If numerous atrocities constitutive of crimes under the court's jurisdiction were committed by the LRA as method of warfare, the Ugandan army can hardly claim to have clean hands in the bloody conflict.¹⁶⁵ Despite the fact that the latter cannot strictly speaking claim victory in the conflict, a balance of power variant of 'victor's justice' criticism might be invoked in this case as the terms of the referral can be interpreted as sheltering those members of the Ugandan army who might be accused of crimes under the court's jurisdiction. Even if the ICC is not bound by Ugandan government's jurisdictional limitations *ratione personae*, and the latter has formally pledged to cooperate with the court or conduct legal proceedings for possible violations by the Ugandan army,¹⁶⁶ the restrictions underlying the terms of the referral entail a certain politicisation of the case. Besides, it is to be expected that the Ugandan government will not easily let the court freely investigate in its military backyards. Reference to the referral as the "Lord's Resistance Army situation" as opposed to "the Northern Ugandan situation" or simply "Ugandan situation" – even if the difference might sound merely semantic - undermines any neutrality with regards to crimes committed in the area. Regardless of whether the result might be the same with the court

¹⁶² International Crisis Group (ICG), 'Peace in Northern Uganda: Decisive Weeks Ahead', *Policy/Africa Briefing No 22*, 21 February 2005, at <www.globalpolicy.org/security/issues/uganda/2005/0221peacehope.pdf>, visited on 20 December 2005.

¹⁶³ CSOPNU, *supra* note 60.

¹⁶⁴ See P. Akhavan, *supra* note 153, p.410; See also: HRW, "Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda", September 2005, Vol. 17, N° 12 (A), at <<http://hrw.org/reports/2005/uganda0905/uganda0905.pdf>>, visited on 12 December 2005.

¹⁶⁵ *Ibid.*

¹⁶⁶ On the abuses by the Ugandan governmental forces (Uganda Peoples' Defence Forces - UPDF), see: HRW, *supra*, note 164, pp. 24-35. A formal statement of a willingness to cooperate with the court on the atrocities by the governmental side is attributed to the Ugandan president who referred the case to the court. On this see P. Akhavan, *supra* note 153, p. 411. The quoted statement: "I am ready to be investigated for war crimes ... and if any of our people were involved in any crimes, we will give him up to be tried by the ICC And in any case, if such cases are brought to our attention, we will try them ourselves" suggests for anyone familiar with the Ugandan political landscape that, depending on the possibly indicted figures, it is not guaranteed that they might easily be handed to the court. It is likely that given the fact that the court doesn't have primacy over national courts, they will express a willingness to try governmental forces indicted officials.

possibly prosecuting solely the LRA's leadership subscribing to the principle of prioritising 'big fish' cases due to the limited material capacity to handle all cases, the institutional likelihood of investigating and prosecuting all cases might prove less controversial. In this vein, the ICTR experience is inspiring as to the difficulties involved and the interplay between law and politics.

It is a well known fact that the ICTR prosecution has, so far, tried unsuccessfully to nail some members of the now-in-power RPF accused for, if certainly not genocide, war crimes or possible crimes against humanity.¹⁶⁷ If the last two categories are not excluded, the main unstated prosecutorial purpose is to politically balance the "victor's justice" image often attributed to the tribunal than to comply with the tribunal's statute provisions which, indeed, cover crimes committed by both sides. This reasoning is grounded on the fact that: 1) Rwanda affirms that it has prosecuted in the past such crimes and expressed its willingness to prosecute possible members of the RPF involved in crimes under the ICTR jurisdiction if the relevant information is available; 2) Despite its primacy over national courts, the ICTR has never requested Rwanda to surrender any suspect – including some big fishes - accused of genocide to the court and as such the country argues that there are no real grounds to do so with RPF members suspected of other crimes viewed by the Rwandan government as of a lesser gravity than genocide; 3) ICTR caseload is limited and the tribunal is in the process of handing some of its cases to national courts, including Rwandan courts. Accordingly, it is argued that the tribunal cannot defer some cases to a government and initiate others possibly against some of its members.¹⁶⁸ The ICTR case demonstrates the hardships resulting from selective criminal prosecutions in situations involving a massive number of criminal participants whereby supranational criminal proceedings need to be supplemented by national jurisdictions.

The ICC will more likely face the same hurdles with regard to the LRA case. The difficulties also pertain to the limited temporal mandate of the court to crimes committed after the entry into force of the statute. As previously mentioned,¹⁶⁹ many crimes were committed by the LRA prior to this period, national courts will be justified in prosecuting the same

¹⁶⁷ For more details see: Hironelle "ICTR/Prosecutor - Interview with Carla Del Ponte "If I had had the choice, I would have remained prosecutor of the ICTR" at <www.hironelle.org/arusha.nsf/English?OpenFrameSetL>., visited on 18 November 2005; also L. Reydam, 'The ICTR Ten Years On: Back to the Nuremberg Paradigm?', 3 *Journal of International Criminal Justice* 4, pp. 977 *et seq.*; E. Zorbas, 'Reconciliation in Post-Genocide Rwanda', 1 *AJLS* (2004), pp. 29-52, at <www.africalawinstitute.org/ajls/vol1/no1/zorbas.pdf>, visited on 22 December 2005. The prosecution department's current position, as reiterated in Security Council resolutions, is that the case is not yet concluded and possible future prosecutions are not ruled out. On this see S.C. Res. 1503, UN. Doc. S/RES/1503 (2003), *supra* note 40, para. 3.

¹⁶⁸ International Crisis Group, (ICG) 'Tribunal Pénal International pour le Rwanda: Pragmatisme de Rigueur', *ICG Rapport Afrique N° 69*, pp. 7 *et seq.*; J- M., 'From the ICTR to the ICC: Learning from the ICTR Experience in Bringing Justice to Rwandan', 12 *New Eng. J. Int'l and Comp. L.* 1, (2005), pp. 89-103, at 100-1002.

¹⁶⁹ S. Bourgon, *supra* note 56, pp. 550-551.

offenders prosecuted, and eventually convicted, by the ICC for crimes not falling within its temporal (and possibly subject matter) jurisdiction. If, in theory, nothing prevents such prosecutions to be initiated, the practice might prove more complex as the court might be requested to cooperate with national jurisdictions to surrender suspects under its custody or who have completed the sentences inflicted by the court.

The same difficulty will be faced by the court with regard to the Democratic Republic of Congo case. The current Congolese crisis started in 1996 but the court's jurisdiction covers only those crimes committed after the entry into force of the ICC statute.¹⁷⁰ Additionally, as it is estimated that the conflict has – directly or indirectly - generated between 3 to 4 millions casualties, the inevitable selection of cases to be prosecuted by the court will certainly have some impact on the fragile ongoing political and social reconciliatory processes.¹⁷¹ As crimes falling within the court's jurisdiction were purportedly committed by all former warring factions,¹⁷² the court's credibility will be assessed in the light of its neutrality and prosecutorial strategy. The possible involvement of foreign troops in the commission of crimes under the court's jurisdiction – which arguably might be the reason underlying the Congolese government referral – adds an extra multifaceted dimension of the conflict which will be far from simplifying the court's task.¹⁷³

¹⁷⁰ For an extensive literature on the Congolese conflict, see: A. M.B. Mangu, 'Conflict in the Democratic Republic of Congo: An International Legal Perspective', 28 *South African Year Book of International Law*, (2003), pp. 82 *et seq.*; R. Edgerton, *The Troubled Heart of Africa: A History of the Congo*, (St. Martin's Press, New York, 2002).

¹⁷¹ The figure between 3 and 4 millions casualties in the conflict results mainly from NGOs' estimates but and is less credible as in an almost chaotic situation in a country which does not even have a credible recent census of its population, there is no means of getting accurate figures. Amnesty International goes even further by positing that the conflict engendered nearly 4 millions lives. On this see: HRW, 'ICC's First-Ever Probe Must Be Effective', June 23, 2004, at <<http://hrw.org/english/docs/2004/06/23/congo8936.htm>>, visited on 15 December 2005; M. Clough and N. Galletti 'The Africa Agenda', *The Baltimore Sun*, January 21, 2005, in HRW at <http://hrw.org/english/docs/2005/01/21/africa10054.htm>, visited on 15 December 2005; J. Graff, "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo", 11 *Hum. Rts. Brief* 2, (2004), pp.23-26. M. Clough and N. Galletti estimate the number of victims to be 3,3 millions as of January 2005; Amnesty International, "Democratic Republic of Congo: arming the East", AFR 62/006/2005, 5 July 2005, at <<http://web.amnesty.org/library/Index/ENGAFR620062005?open&of=ENG-COD>>, visited on 16 December 2005.

¹⁷² The details on various atrocities committed in the country can be found in the various periodic reports to the Security Council by the Secretary General on the United Nations Organization Mission in the Democratic Republic of Congo since 1999 at <www.un.org/documents/repsec.htm>, visited on 16 December 2005.

¹⁷³ For the complexity surrounding the referral, the foreseeable limited impact of ICC prosecutorial involvement in the D. R. Congo crisis and a call for alternative national processes, see: P. Kambale & A. Rotman, 'The International Criminal Court and Congo: Examining the Possibilities', *Crimes of War Project*, (October 2004), at <www.globalpolicy.org/intljustice/icc/2004/1004examine.htm>, visited on 22 March 2006; ICG, 'A Congo Action plan', Policy/Africa Briefing No 34, 19 October 2005, at <www.crisisgroup.org/library/documents/africa/central_africa/b034_congo_action_plan.pdf>, visited on 23 March 2006;

Thus, the solutions to be adopted by the court in the two very politically sensitive cases will be of particular interest and determinant not only for future voluntary state submissions to the court's jurisdiction but also for the court's credibility. They will further have significant impacts on national processes of peace-building. Hence, the court faces high expectations in both cases. While the LRA referral is considered as the first major international more or less successful involvement in the crisis,¹⁷⁴ the ICC role in the DRC case will be determinant on the political landscape of a country under a process of regaining territorial unity after being torn apart by years of civil wars.¹⁷⁵

The above analysis leads to the conclusion that if the end of the cold war provided for an enabling environment for setting up the two *ad hoc* tribunals for the former Yugoslavia and Rwanda and the subsequent adoption of the ICC statute, power relations and interests-driven state actions in a more interdependent and globalising world do not, *a priori*, point towards the possibility of many future philanthropic driven actions by ICC state parties against their peers. Even state voluntary submission to ICC jurisdiction will always entail or carry some political implications such as reflected the three state parties cases submitted to the court for crimes committed on their own territories. If motivations matter less and the court's mandate can still equally be achieved in politically motivated referrals such as the two cases analysed above, the court needs to be more than prudent in shaping its prosecutorial policy. Otherwise, absent states' actions, it might be brought to heavily rely on the other two trigger mechanisms, namely the action by the Security Council, and by the prosecutor acting *proprio motu*.

4.3 Referral and deferral powers of the UN Security Council

The negotiation history of the ICC statute reveals that one of the most heated areas of debates related to the power to be conferred to the UN Security Council. The proponents of an independent court argued for a limited involvement of the UN political organ in the court's functioning. Conversely, states opposed to the court, with the United States in the lead, suggested a determinant role of the Security Council in initiating proceedings and the working of the court. The resulting compromise reflect a balance between both positions whereby the ICC statute empowers the

¹⁷⁴ P. Akhavan, *supra* note 153, p.415 *et seq.*

¹⁷⁵ In this regard, many expectations but also some scepticism accompanies the referral. Due to their different mandates, it is expected that the ICC has momentum to correct the wrongs resulting in the negative decision by the other Hague Court –the ICJ-in the Arrest warrant case) withholding immunity of a Foreign Minister accused of war crimes and crimes against humanity. For more on this case see: *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ, Judgement of 14 February 2002, at <www.icj-cij.org/icjwww/idocket/icoBE/icobejudgment/icobe_ijjudgment_20020214.PDF>, visited on 16 December 2005. On the other hand, it is feared that the court will not dig deep into sensitive cases involving high level officials personally involved in the commission of crimes through the former belligerent factions.

Security Council to refer cases under its jurisdiction to the court and to defer ongoing proceedings under specific, limited circumstances.¹⁷⁶

4.3.1 Security Council referral

The power of the Security Council to refer cases to the ICC is regulated by article 13 (b) of the statute. This provision being the sole statute disposition specifically related thereto contrarily to the two other trigger mechanisms, the regulation of the referral “shall then be inferred from an interpretation of the statute read as a whole and from the relevant provisions of the UN Charter”.¹⁷⁷ The subjection of the Security Council referral to a Chapter VII determination reinforces the idea that the Council’s margin of action will be inferred from the relevant provisions of the UN Charter.

A link is often made in academic literature between the power of the Security Council under article 13 (b) and the ICTY Appeals chamber determination on the legality of the establishment of the tribunal and the questioning of the SC’s power in that respect.¹⁷⁸ Nonetheless, parallelism in this case might prove misleading since, despite its efforts to thoroughly make a convincing legal case in determining its jurisdiction; it remains hard to imagine that the ICTY could have reached an opposite finding of irregularity of its establishment, thereby defeating its own jurisdictional grounds. Whenever faced with serious criminal prosecution challenges threatening to paralyse any concerted international response, the Nuremberg precedent and the above mentioned ICTY Appeal’s chamber judgement have displayed international criminal lawyers’ inventiveness in bending existing international norms and shaping them through interpretational rules to meet the requirements of the moment. The resultant is a situation whereby differentiation of legal norms *de lege lata* as opposed to *de lege ferenda* is virtually blurred since the genius underpinning this type of legal interpretation lies in crystallising the latter as being the former.

As exemplified in the recent history of the UN political organ, the discretionary nature underlying the Council’s recourse to Chapter VII determination and adopted responses is both encouraging and frustrating. As expended upon in previous analyses, confronted with armed conflicts of both international and, non-international nature (even if in the case of Rwanda the determination of the conflict as non-international contrasted with factual realities and remains arguable),¹⁷⁹ the Council responded by setting up the ICTY and ICTR as appropriate responses falling within the ambit of UN Chapter VII. Despite the aforementioned less convincing ICTY reasoning as to the legality of the creation of the tribunal as a Chapter VII measure, the Council has the merit of having found a way out of the legal

¹⁷⁶ L. Condorelli and S. Villalpando, ‘Can the Security Council extend the ICC Jurisdiction’ in A. Cassese et al. (eds.), *supra* note 1, p. pp. 571-582; L. Condorelli and S. Villalpando, ‘Referral and deferral by the Security Council’, in A. Cassese et al. (eds.), *supra* note 1

¹⁷⁷ *Ibid.*, p. 629.

¹⁷⁸ *Ibid.* p. 630 and *Prosecutor v. Tadic*, *supra*, note 20.

¹⁷⁹ *Prosecutor v. Jean-Paul Akayezu*, Case No. ICTR-96-4-T, par. 601-610.

vacuum and deadlock. All things considered and without entering deeper into this complex debate, the compelling commitment to respond to and possibly prevent further massive human rights violations call for flexibility in legal interpretations. On those grounds, the Appeals' Chamber decision was rather a positive and commendable accomplishment as it served to revive and nurture international criminal accountability initiated through Nuremberg and Tokyo trials, but which remained dormant for decades.

Nonetheless, the wide range of situations construed by the SC as threatening international peace and security has emptied the concept of any literal meaning. Thus, if international humanitarian law still withholds the traditional distinction between international and non-international armed conflicts with different sets of applicable rules, the nature of given conflicts does not prevent the SC to resort to the "threat to, or breach of international peace and security or act of aggression" all-encompassing formula. If some non-international armed conflicts have international implications and can accordingly be constitutive of threat to or breach of international peace and security, it remains possible to imagine other conflicts of a purely internal nature and hardly linked to any - strictly construed - threat to, or breach of international peace. Unless all conflicts whereby crimes under the court's jurisdiction are committed should be construed as threatening international peace and security - as suggested by the preamble of the ICC statute¹⁸⁰ - it would be challenging for the SC to refer cases to the court, involving crimes by authoritarian regimes against their citizens without direct external implications or repercussions.

All in all, the need for a parallel between the ICTY jurisdictional grounds determination on the one hand and the UN Charter and ICC Statute based referral prerogatives of the Security Council on the other hand does not arise as in the latter case they are statutory. The ICC statute restricts the Security Council seizure of the court to a prior determination that the situation involving crimes under its jurisdiction constitutes a threat to, breach of international peace and security, or act of aggression.¹⁸¹ The referral should then be interpreted as a means of restoring international peace and security. In any case, the political nature of the Security Council with discretionary powers in deciding upon its modalities of intervention means that, without any objective criteria, its determinations will, to a greater extent, remain subordinated to the will of its powerful and influential members to act. Lack of predetermined rules governing its intervention might prove detrimental to the court's credibility given the far-reaching powers of the SC to extend the referral to those crimes primarily under the jurisdiction of states not parties to the ICC statute.

Thus, the SC could theoretically justify its inaction by the inappropriateness of legal prosecutions in a given case as a means of restoring peace and Security. Taking past experience into consideration, it is even to be expected that it will much more favour political means of settlement to criminal

¹⁸⁰ Preamble of the ICC Statute, par. 3

¹⁸¹ Combined reading of articles 13 (b) of the ICC Statute and 39 of the UN Charter.

prosecutions, thereby jeopardizing the rights of victims and other functions of criminal justice wherever other avenues – such as effective national prosecution - are not feasible.

Nonetheless, this apparent scepticism seems defeated by the recent SC referral of the Darfur case to the ICC, as it sets a rather encouraging precedent.¹⁸² Despite the late and shy international involvement in this post ICC statute adoption crisis and the obvious *prima facie* indication that crimes within the court's jurisdiction were being committed, the SC overcame US and other objections by referring the case to the court.¹⁸³ The referring resolution characterised by, among others, US and Chinese abstentions remains however crippled with the usual proviso granting immunity to non-state parties nationals involved in UN authorised mission in Sudan.¹⁸⁴ The resolution thus grants jurisdictional immunity not only to nationals from contributing state parties participating in UN authorized missions in Sudan but also for missions authorized by the African Union. The “overall scant coherency of Res. 1593 (2005)”¹⁸⁵ reflects the politics underlying SC modes of intervention and its accommodation of involved parties' interests at the expense of legal consistency. The resolution echoes the resolve of states opposed to the ICC not to be bound under the statute but solely under the UN Charter. Financial waiver, weak cooperation requirements for states not parties to the ICC statute and exclusive prosecutorial jurisdiction of the sending state for crimes committed by nationals from states not parties to the statute reflected in the resolution are in contravention with harmonious complementarity between the court and the UN upon which the SC intervention in the functioning of the court is premised in the statute.¹⁸⁶ Even if the court might still achieve its goal with regards to the main offenders in the Darfur case, the politics involved in the referral undermine its independent motion and limit its modalities of action.

¹⁸² S. C. res. 1593, 31 March 2005, UN Doc. S/RES 1593 (2005).

¹⁸³ For literature relating to the controversies surrounding the referral, see: L. Condorelli and A. Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' 3 *Journal of International Criminal Justice* (2005) pp. 590-599; C. Kress, 'The Darfur report and Genocidal intent' 3 *Journal of International Criminal Justice* (2005) pp. 562-578; G. P. Fletcher and J. D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' 3 *Journal of International Criminal Justice* (2005), pp. 539-561. The US acquiesced to the referral during political negotiations but tactfully abstained during the vote on the Resolution (1593) referring the case to the ICC as a sign of non-recognition of the court's jurisdiction. The resolution was passed by the SC vote of 11 in favour and 4 abstentions (Algeria, Brazil, China, and United States).

¹⁸⁴ Paragraph 6 of SC Resolution 1593 (2005) reads: 'Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a 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 arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State'.

¹⁸⁵ L. Condorelli and A. Ciampi, *supra* note 183, p. 593.

¹⁸⁶ Contrast with articles 86 and 87 (5) of the Rome statute on cooperation and, article 115 and 116 on financing .

4.3.2 Deferral prerogatives of the Security Council

The power vested in the Security Council by article 16 of the ICC statute to defer investigations or prosecutions for a 12 month renewable period has been critically assessed in previous developments relating to the incidence of ICC jurisdiction on non-state parties. As reflected by the controversies surrounding the adoption of resolution 1422 and subsequent resolutions subtracting some categories of persons from the ICC jurisdictional reaches, abusive resorts to Chapter VII by the SC might prove dangerous and threaten to paralyse any contemplated international action in responding to given crises. The erosion of the real meaning attached to Chapter VII provisions through improper recourse thereto without meeting the strictly required determination and pointing at specific relevant provisions – either article 41 or article 42 as stipulated in article 39 – undermines legal stability with regards to ICC referral and deferral prerogatives.¹⁸⁷

As previously elaborated upon, a genuine interpretation of article 16 of the ICC statute limits the Security Council's intervention to instituted investigations or prosecutions.¹⁸⁸ It does not extend to cases considered *in abstracto*. Even though the Security Council is not bound by the Rome statute and can theoretically act contrarily to the statute as far as its action remains within the squares of the UN Charter, the needed complementarity between the court and the United Nations organs - as acknowledged by the statute and the agreement between both bodies¹⁸⁹ - requires good faith of the Council in discharging itself from UN Charter based duties.¹⁹⁰ Lack of second extension of the Resolution 1422 revealed its irregularity and inconsistency with both the UN Charter and the ICC statute. The involved unanswered questions posed by the resolution as to its compliance with Chapter VII of the UN Charter, the objects and purposes of the Rome statute and its article 16 in particular, revealed that article 16 constitutes an open gate for politicized interventions in the working of the court.

The “unconstitutionality” of Resolutions 1422 and 1487 - premised on the impossibility of evoking directly any of the Charter's provision as a basis for an action under Chapter VII¹⁹¹ - as well as the insertion of immunity provisions in “constitutionally” valid resolutions whereby a prior determination under article 39 of the Charter is made, remain problematic. Faced with growing international criticism over previous deferral resolutions, states opposed to subjection of their nationals to the ICC fought

¹⁸⁷ R. Laval, ‘A vicious storm in a teacup: The action by the United Nations Security Council to narrow the jurisdiction of the International Criminal Court’, *14 Criminal Law Forum*, (2003) pp. 207 *et seq.*

¹⁸⁸ *Ibid.*, p. 211.

¹⁸⁹ Relationship Agreement between the ICC and the United Nations, at <www.un.org/law/icc/asp/1stsession/report/english/part_ii_g_e.pdf>; and www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf, visited on 17 January 2006.

¹⁹⁰ R. Laval, *supra*, note 187, pp. 200 *et seq.*

¹⁹¹ *Ibid.*

and won their way out by inserting immunity provisions in resolutions authorising peacekeeping operations. If such resolutions examined as a comprehensive package of measures under Chapter VII can, arguably, be in compliance with the latter, they do not comply with article 16 of the ICC statute which refers to deferral of investigations or prosecutions. Furthermore, some even argue that these later cases of exemption are even more challenging to ICC jurisdiction since – contrarily to resolutions 1422 and 1487 providing for prosecutorial immunity to a limited time frame – resolutions 1497 and 1593 provide for total prosecutorial immunity, save in cases of contributing state’s voluntary waiver.¹⁹² Moreover, the latter resolutions, drawing experience from some of the ambiguities underlying Resolution 1422, avoided any reference to article 16 of the ICC statute. By thereby implicitly affirming the primacy of the UN Charter and, *mutatis mutandis*, of Security Council Charter based decisions over obligations arising from other treaties,¹⁹³ these resolutions displayed the persisting clashes arising from divergent interpretations of the UN Charter and of the ICC statute. Thus, the debate shifts from the deferral powers under article 16 of the Statute to a system whereby the ICC is prevented from acting by the Security Council outside the regime predicted in this provision.

Without a needed harmonisation in their respective modes of action through cognisable pre-established criteria, the ICC and the United Nations, through the Security Council in particular, might prove ineffective in responding to situations of mutual concern. The frictions between the ICC and Security Council are but one illustration of the highly criticised dysfunction of the current global legal framework due to fragmentation of international law and lack of coordination between international bodies with crosscutting mandates.¹⁹⁴ Even if the ICC is a treaty body and not an organ of the UN, membership of all ICC state parties with the UN should constitute an incentive for better coordination with its organs and insure complementary mandates rather than conflicts.

¹⁹² A. Abass, ‘The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court’ *40 tex. Int’l L. J.*, (2005) p. 266.

¹⁹³ Article 103 of the UN charter provides for primacy obligations arising from the charter over any other treaty obligation.

¹⁹⁴ For the most vocal criticisms of the fragmentation of international law, see: M. Koskenniemi, ‘Hague International Tribunals-International Court of Justice: Fragmentation of International Law? Postmodern Anxieties’ *15 Leiden Journal of International Law* (2002), pp. 553-579; M. Koskenniemi, ‘The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge University Press, 2001/2004); P.S. Rao, ‘Multiple International Judicial Forums: A Reflection on the Growing Strength of International Law or its Fragmentation’ *25 Mich. J. Int’l L.* (2004), pp. 929 -961; P-M. Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ *31 N.Y.U. J. Int’l L. & Pol.*, (1999), pp. 791-807.

4.4 *Ex officio* initiation of proceedings by the prosecutor and the independence of the Court

The Rome statute contains a number of provisions relating to the power of the ICC prosecutor to initiate and conduct investigations and prosecutions. Prosecutorial discretion to initiate criminal proceeding before the international criminal court was lauded as one of the most precious victories in the negotiating process of the Rome statute.¹⁹⁵ The limited scope of this study does not allow for an extensive analysis of the relevant provisions but will focus on the normative loopholes and shortcomings of the system in combating global impunity for crimes under the court's jurisdiction. Additionally, even as too theoretical as any judgement on the independence of the prosecutor might seem at this very initial stage of the court's motion, the experience of *ad hoc* tribunals will enlighten our analysis of the possible hurdles the prosecutor will have to overcome.

4.4.1 Prosecutor's statutory powers under the Rome statute

The two previously analysed “trigger mechanisms”- state parties and Security Council referrals – involve a submission of a given situation to the prosecutor for possible investigations and prosecutions. Once a situation is referred to him, the prosecutor exerts a discretionary power in discharging himself/herself from this task, save for the limitations thereto provided for in the statute and Rules of Procedure and Evidence (RPE).¹⁹⁶ Given the aforementioned persistent states' reluctance to institute legal proceedings against their peers for human rights violations in existing adjudicative fora, and keeping in mind the highly politicised *modus operandi* of the Security Council which, by its nature, is a political body, the ability for the prosecutor to initiate proceedings *proprio motu* constitutes an open gate to overcome the foreseeable limited resort to the other trigger mechanisms. It also “would provide international criminal law with an opportunity to strengthen the rule of law and distance itself from the haunting legacies of victor's justice and impunity”¹⁹⁷.

Being a key actor in the ICC statute regime, the prosecutor enjoys a discretionary power in initiating criminal proceedings, conducting investigations and prosecuting cases before the court. For this purpose, the prosecutor may receive information from any sources, provided they relate

¹⁹⁵ For some relevant literature see: C. K. Hall, ‘The powers and role of the Prosecutor of the International Criminal Court in the global fight against impunity’, 17 *LJIL* (2004), pp. 121-139; P. Kirsch et al. ‘Initiation of proceedings by the Prosecutor’, in A. Cassese et al. (eds.) *supra* note 1, pp. 657-664.

¹⁹⁶ Articles 18 and 53 of the statute and rules 54-57 of RPE.

¹⁹⁷ M. R. Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’, *Journal of International Criminal Justice*, (2004), pp. 71-72.

to crimes under the court's jurisdiction.¹⁹⁸ Without elaborating on the historical narrative of the adoption of the Rome statute with regards to prosecutorial discretion and *ex officio* powers to initiate proceedings, it is noteworthy to mention the resulting narrowing of his/her statutory powers, and consequently his/her discretion, as a result of tensions between liberalists' and realists' opposed views.¹⁹⁹ The initiation of proceedings by the prosecutor acting *proprio motu* is subjected to Pre-Trial Chamber authorisation.²⁰⁰ This procedural screening and judicial approval not required in the two other previously analysed "trigger mechanisms" will prove burdensome to the limited court's ability to deal with the foreseeable enormous caseload. The *ad hoc* tribunals for the former Yugoslavia and Rwanda have been widely criticised for their bureaucratic functioning, limiting their capacity to handle as many cases as possible.²⁰¹ Even if international criminal justice is not meant to replace national jurisdictions,²⁰² the relatively very limited number of indictments issued and cases prosecuted by both tribunals due to, among others, lengthy proceedings, restricts the impact of their work to a rather symbolic role with regards to national peace-building and reconciliation processes,²⁰³ when contrasted with the numerous cases dealt with by national courts.²⁰⁴ Keeping the experience of *ad hoc* tribunals in mind, it is to be expected that in situations of massive participation in a criminal enterprise, the ICC will have to be even more selective in its prosecutorial policy, given the wide jurisdictional coverage and the foreseeable huge number of cases. The requirement of a Pre-Trial Chamber authorisation, rooted in a worry for politically-motivated prosecutions by an overzealous or manipulated prosecutor, will more likely render the procedures even heavier and longer.

In addition to initiating proceedings, the prosecutor remains responsible for furthering referred cases or *proprio motu* initiated proceedings into the

¹⁹⁸ Rules 46, 54-57 of RPE.

¹⁹⁹ M. R. Brubacher, *supra* note 197, pp. 72-75.

²⁰⁰ Articles 13 (c) and 15 of the Rome statute.

²⁰¹ For more on these criticisms see: R. Zacklin, 'The Failings of ad hoc International Tribunals', 2 *J. Int'l Crim. Just.* (2004), pp. 541 *et seq.*; I. Nizich, 'International Tribunals and their ability to Provide adequate Justice: Lessons from the Yugoslav Tribunal', *ILSA J. Int'l & Comp. L.*, (2001), pp. 353.

²⁰² The Board of Editors, 'The Rome Statute: A Tentative Assessment', in A. Cassese et al., *supra*, note 1, p. 1906.

²⁰³ International criminal prosecutions, as expressly pointed out in the ICC statute targets most senior criminals commonly referred to as "big fish". Nevertheless, there are situations where there possibly are so many other "big fish" not subjected to the courts' jurisdiction that the impact of their work appears very limited, despite setting precedent as it seems to be the case with the controversies surrounding ICTR prosecutions. For further details on the selective nature of prosecutions see: K. C. Moghalu, 'International Humanitarian Law From Nuremberg to Rome', pp.287 *et seq.*

²⁰⁴ With some 1062 functionaries as of 15 April 2005, ICTY records indicate that only 161 persons have been indicted by the tribunal, among whom only 131 accused appeared in proceedings after more than a decade of functioning. For details see: <www.un.org/icty/glance/index.htm>, visited on 25 November 2005. Many other crimes are prosecuted by national courts, mainly in the former Yugoslav republics. Similarly, the low number of completed cases is reflected in the workload of the ICTR as discussed *supra* note 41.

investigation and prosecution stage. In this respect, the Office of the prosecutor (OTP) disposes of a discretionary power to proceed, after evaluating the received information and making preliminary rulings on admissibility.²⁰⁵ Before proceeding to the investigation phase – subject to Pre-Trial Chamber authorization for OTP initiated cases – the office is under the duty to inform interested states, including all state parties.²⁰⁶ This primary examination will assess, among others, jurisdictional issues, keeping in mind the imperatives of the complementarity principle. Thus, the prosecutor’s discretion remains nevertheless challengeable on jurisdictional and admissibility grounds under articles 17, 18, 19 and 53 of the Rome statute. Under a combined reading of these provisions, the prosecution should “give deference to national legal systems where a state that normally exercises jurisdiction for the alleged crime is in the process of investigating or prosecuting that crime; or the crime has already been investigated but a decision was made by national authorities not to prosecute”²⁰⁷. The possibility offered to different parties to challenge the court’s jurisdiction leads to the prediction that “the Court will be spending a great deal of time on motions relating to admissibility and jurisdiction”.²⁰⁸

Lack of primacy over national courts as enjoyed by the *ad hoc* tribunals for the Former Yugoslavia and Rwanda will affect the exercise of the court’s jurisdiction or hamper its swift handling of cases, as the burden lies with the prosecutor to prove the “unwillingness or inability of the state genuinely to prosecute”.²⁰⁹ The latter’s establishment of criteria in making the difficult determination of the inability, and mostly unwillingness of the state with jurisdiction to prosecute will have an impact of his/her independence. Despite some indications in article 17 (2) and (3) of the statute on factors to be taken into consideration, further reference to the requirement for the claiming state to prove that it meets “internationally recognized norms and standards for the independent and impartial prosecution of similar conduct” in Rule 51 of the court’s RPE remains a quite general concept, failing to enlighten an assessment of state’s unwillingness. Furthermore, the inability in article 17 (3), not elaborated in the RPE, does not offer any precision as to what it exactly entails.

The correlation between the inability and unwillingness needs also to be tested mostly in cases where a state might be said to be willing but unable to genuinely prosecute. Article 17 (3) is not clear whether reference to situations where the state is “otherwise unable to carry out its proceedings”²¹⁰ involves failure to prosecute due to impossibility to physically apprehend the accused. If the ICTY can be seen as having served

²⁰⁵ Articles 18 and 53 of the statute.

²⁰⁶ Article 18 (1) of the statute.

²⁰⁷ M. R. Brubacher, *supra* note 197, p. 78.

²⁰⁸ L. N. Sadat and S. R. Carden, ‘The New International Criminal Court: An Uneasy Revolution’, *88 Geo. L.J.*, (2000), p. 417.

²⁰⁹ Articles 9 (2) and 8 (2) respectively of the ICTY and ICTR statutes confer primary jurisdiction of the tribunals over national courts, whose concurrent jurisdiction is acknowledged by the first paragraphs in both articles.

²¹⁰ Article 17 (3) *in fine*.

a more neutral ground for prosecutions of authors of crimes committed in the former Yugoslavia after the disintegration of the latter into different independent countries, the primary functional merit of the ICTR is to have been able to gain cooperation in apprehending suspects who had fled throughout the globe.²¹¹ This cooperation which was lacking to the new government was one of the main reasons behind the latter's request to UN Security Council for the establishment of the tribunal. If the whole *problématique* of cooperation with the ICC falls within the ambit of Part 9 of the statute for state parties (to be explored in a later in this study) and, considered *strictu sensu*, a technically different problem than exercise of jurisdiction, a major problem might arise with regards to suspects under the custody of non-state parties, absent any involvement of the UN Security Council requesting those states to cooperate.

The right to challenge jurisdiction and admissibility is open to states, the prosecutor and persons targeted by the court's investigations or prosecutions under articles 18 and 19 of the statute. The RPE specify that the court "shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility".²¹² Challenges on admissibility are made under article 17 grounds while jurisdiction is to be assessed on the ground of relevant statute provisions.²¹³ The Pre-Trial Chamber's or Trial Chamber's decision on jurisdiction or admissibility is subject to appeal by either party.²¹⁴ At the request of a state with jurisdiction over the crimes targeted by prosecutorial investigation, the prosecutor is required to defer to that state's investigation "unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation"²¹⁵. By providing that the Pre-Trial Chamber "shall consider the factors in article 17 in deciding whether to authorize an investigation", Rule 55 suggests that the chamber's decision ought to be in line with the requirement of a prior complex determination of state inability or unwillingness to genuinely investigate and prosecute. Conversely, in case of deferral to state prosecution, the statute institutes a kind of monitoring mechanism of state action by the ICC.²¹⁶ If this prerogative is in line with statutory state parties' obligations to cooperate with the tribunal, it does not necessarily imply compliance with this obligation by non-state parties for which a deferral was granted.

These procedural guarantees forming an integral part of due process imperatives might nonetheless easily be misused by states and targeted or

²¹¹ For considerations relating to the roles played by the ICTY and the ICTR, see: J.T. Holmes, 'Complementarity: National Courts *versus* the ICC', in A. Cassese et al. (eds.), *supra* note 1, pp. 668-669; D. Tolbert, 'The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings', 26 *Fletcher Forum of World Affairs* (2002), pp. 7 *et seq.*; K.C. Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda', 26 *Fletcher Forum of World Affairs* (2002), pp. 28 *et seq.*

²¹² Rule 58 (4) of the RPE.

²¹³ Article 19 of the statute and 58-62 of the RPE.

²¹⁴ Articles 19 (4) and (6) of the statute

²¹⁵ Article 18 par. 2 *in fine*.

²¹⁶ Article 18 (3).

indicted persons for dilatory ends even in obvious cases where the court has jurisdiction.

The four cases under examination by the court as of December 2005 do not provide guidance as to the possible challenges awaiting the prosecutor since - as previously mentioned - three emanate from states possessing primary jurisdiction over purported crimes while only one - the Darfur case - emanates from the Security Council.²¹⁷ It appears that in most of these cases, depending on who will be indicted, the main predictable challenge might be physical apprehension of suspects rather than state cooperation. In a huge country like Congo whose vast, natural equatorial forests provide safe heavens to all sorts of criminal and rebel forces operating in the Great Lakes Region, putting names behind crimes and physically apprehending persons indicted might prove to be a titanic task. One expects that the exercise of jurisdiction by the court mostly in potential cases referred to the court by state parties for crimes committed by their peers and those initiated by the prosecution *proprio motu* might be hampered by the impossibility to avail the suspect to the court. The absence of institutional and legal structures mirroring democratic states' division of powers into independent and complementary legislative, executive and judiciary bodies limits legal certainty and efficiency in international "constitutionalism".

Once persuaded that crimes under the court's jurisdiction have been or are being committed and that the case is admissible under article 17 of the statute, the ICC statute imposes an obligation on the prosecutor to carry on with an investigation only after determining that: "[t]aking 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".²¹⁸ The "interests of justice" concept in the statute remains imprecise as it will be elaborated upon below. If this provision provides a guarantee that criminal prosecutions do not jeopardize other interests at stake, it also presents a potential for selective type of justice; given the underlying discretion likely to adversely affect the prosecutorial impartiality.

4.4.2 Prosecutorial independence and discretion

The power of the prosecutor to initiate proceedings *proprio motu* under the Rome statute offers a possibility to overcome various critics pertaining to lack of impartiality of international criminal institutions preceding the establishment of the ICC. As formulated and complemented by the RPE, statute provisions bestow competence to the court to try all crimes under its jurisdictional reaches, *ratione materiae, loci, personae* and *temporis*. The existent, but often overly exaggerated, potential for politically motivated prosecutions by a court with unchecked powers - as advocated during the

²¹⁷ See *supra* note 53 on referred situations.

²¹⁸ Article 53 (1) (c) of the statute.

negotiation process and after the adoption of the Rome statute by opponents to an independent court-²¹⁹ does not account for the various normative procedural guarantees incorporated into the statute.

Nonetheless, the court runs the risk of being one additional “democratizing” institution focusing solely on crimes committed on territories or by nationals of “non-powerful states” or “authoritarian” governments. Generally, leading human rights debates point their spotlights on violations committed by “undemocratic” or authoritarian regimes, leaving aside similar or correlated crimes committed or tolerated by democratic or developed countries within or outside their borders. If it is a common knowledge fact that most serious crimes of international concern falling within the court’s jurisdiction are often committed or more likely to be committed in the first category of states, the cold war era, corporations’ involvement in unstable areas and, the ongoing “war on terror” have revealed that democratic states cannot always claim to have clean hands.²²⁰ As previously mentioned,²²¹ the ICC statute as well as the experience of *ad hoc* tribunals suggests that the court will have to select cases for investigation and prosecution from a multitude of others, possibly falling under the same patterns. The selective nature of prosecutions by the international court – mainly focusing on high-ranking perpetrators – has been acknowledged in the 2003 prosecutor’s paper on some policy issues.²²² It has rightly been acknowledged that the screening decisions “will shape the content of the cases heard by the ICC and will determine the overall direction of the institution”.²²³ The requirements for and hardships involved in a selective prosecutorial policy were acknowledged by the former ICTY and ICTR prosecutor in an address to the Security Council when she stated: “From the many thousands of significant targets, we have selected under 200 in each Tribunal, and we do not expect to prosecute even all of those...many important crimes have therefore been left to be dealt with by national jurisdictions”.²²⁴

²¹⁹ For an analysis of US objections, see: M. Du Plessi, ‘Seeking an International International Criminal Court - Some Reflections on the United States Opposition to the ICC’ *15 S. Afr. J. Crim. Just.* 301 (2002), pp. 305 *et seq.*

²²⁰ For some references on links between multinational corporations and human rights violations see: S. Deva, ‘Human Rights Violations by Multinational Corporations and International Law: Where from Here?’, *19, Conn. J. Int’l L.*, 2003-2004, pp. 1-57; S. Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should “Bell the Cat?”’, *5, Melb. J. Int’l L.* (2004), pp. 38-65.

²²¹ See Section 4.1 on state parties’ referrals, in developments relating to the LRA referral. Thus, on 13 October 2005, the Pre-Trial Chamber II unsealed arrest warrants against 5 senior leaders of the LRA as it appears in an ICC press Release: “Warrant of Arrest unsealed against five LRA Commanders”, ICC-20051014-110-En, The Hague, 14 October 2005, at <www.icc-cpi.int/press/pressreleases/114.html>, visited on 14 December 2005.

²²² D. McGoldrick et al, *supra*, note 14 .p. 3. In the same paper, the prosecutor envisages to include in the ambit of investigations “financial links with crimes”, suggesting that the responsibility of behind the scene actors will not be overlooked like in the past prosecutions. For more on this, see: ICC-OTP, *supra* note 157.

²²³ A. M. Danner, “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court”, *97 Am. J. Int’l L.*, 2003, , p. 520.

²²⁴ ICTY Press Release, ‘Address by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Carla del Ponte, to the UN Security Council’, The Hague, 27

The danger of selectivity by international criminal courts with regards to situations and cases to investigate and prosecute lies in the avoidance of politically sensitive cases, thereby limiting the scope of assessment of all involved responsibilities. Illustratively, if it is untenable to argue that the Darfur tragedy should escape the court's scrutiny, justice requirements should equally offer the same legal guarantees and entitlement to justice for victims of a conflict grounded on US presence in Iraq. Nonetheless, such consideration seems to be a mere dream as the current international state of affairs appears to caution the idea that some states –or states' nationals - are above international law reaches. Both Sudan and the US are not parties to the ICC statute. The same goes for Iraq. If, *prima facie*, crimes against humanity, war crimes and possibly genocide were undeniably committed in Darfur, possible war crimes and crimes against humanity were and are probably still being committed in Iraq not only by the so-called “terrorist” insurgents but also coalition forces.²²⁵ No need to mention that the contextual determination of crimes remains arguable due to, *inter alia*, such porous international legal notions as lawful or unlawful combatants, non-combatants and prisoners of war. The US was commendably instrumental in calling for criminal prosecutions in the Darfur situation, safe for the complex but later sorted out question of the venue. Both the US and Iraq being non-state parties to the ICC statute, the only statutory source for possible prosecution of crimes committed in the latter country should be a Security Council referral which cannot even be envisaged in the case due to a foreseeable use of veto powers by the US. It is equally foreseeable that even in a hypothetical case where Iraq was a party to the statute, exercise of jurisdiction on territorial basis would still be prevented by US through the signing of the purported article 98 (2) agreements.

Statute's provisions are premised on the principle of sovereign equality between state parties and opt-out clauses were limited to the minimum in the negotiating process of the ICC.²²⁶ Nonetheless, established military, economic and political power-based considerations are far from being absent in the legal sphere and might come in play in the selection process of cases for prosecution. In most cases, they might be hidden behind the advocated credibility of national judicial systems of most powerful nations as they are purported to be as well the most institutionally advanced. The ending result might be a situation whereby the US-feared “politicization” of

November 2001, GR/P.I.S./642-e at: <www.un.org/icty/latest-e/index.htm>, visited on 6 November 2005; see also: A. M. Danner, *supra*, note 223, pp. 518 *et seq.*

²²⁵ Some sources put estimates of Iraqi civilian casualties due to the armed intervention in the country between 27115 and 30 559 persons as of end of December 2005. For further, updated details, see: <www.iraqbodycount.org/database/>, visited on 30 November 2005. See also S. Sewall, ‘What's the Story Behind the 30,000 Iraqi Deaths?’, *The Washington Post*, December 18, 2005, at

<www.ksg.harvard.edu/ksgnews/Features/opeds/121805_sewall.htm>, visited on 4 January 2006.

²²⁶ M. K. Marler, ‘The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute’, *49 Duke L. J.* (1999-2000), pp. 825-853, at 833-834.

the ICC might yield into a prosecutorial policy targeting only those states considered as politically “manageable”.

This conceptually vitiated legal perception endangers the court’s required prosecutorial neutrality *vis-à-vis* dominant political discourse. It is grounded in and reminiscent of justifications for past or ongoing international prosecutions. A simplistic summing up of the rightly heralded precedent-setting Nuremberg, Tokyo, ICTY and ICTR prosecutions –as far as the inclusiveness aspect is concerned – might be that they solely or mainly focused/focus on the defeated or the “*fauteurs de guerre*” sides, hence the aforementioned victor’s justice criticism.²²⁷ Opposite sides’ or accomplices crimes were/are, if not absolved, at least overlooked or ignored, even when accounted for and documented.

In this regards, ICTY and ICTR prosecutions are once more eloquent. If the Yugoslav conflict offers cases of prosecutions of crimes committed by the various belligerents, complaints were heard in the past about the tribunal’s focus on crimes committed by Serbs and less on those by other sides in the conflict.²²⁸ Moreover, an assessment of any possible NATO responsibility for crimes within ICTY jurisdiction during the bombing campaign of the Federal Republic of Yugoslavia was examined under Louise Arbour as prosecutor through an established internal committee but later on “thwarted” through the resulting report under Prosecutor Carla Del Ponte.²²⁹ The main reasons advanced for non-prosecution related to the lack of clarity in applicable rules – such as the proportionality requirement in targeting – and the tribunal’s established prosecutorial policy of focusing on perpetrators of the most heinous crimes.²³⁰ Non prosecution in this case has been criticised for the underlying political considerations.²³¹

Paradoxically, the same prosecutor Carla Del Ponte has nonetheless been very active in campaigning for what she viewed as more balanced prosecutions through investigation of alleged crimes committed by members of the former RPA/RPF as hinted upon in previous analyses.²³² If some fundamental differences between NATO (a multinational force intervening in the former Yugoslavia to end the conflict) and the RPF (as one of the belligerents which eventually stopped the genocide) are noticeable, they

²²⁷ L. Reydam, and related links in *supra*, note 167.

²²⁸ M. Boot, *supra* note 112, p. 537.

²²⁹ A. M. Danner, *supra*, note 223, pp. 538-540; ICTY-OTP, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, PR/P.I.S./510-E, 13 June 2000, at

<www.un.org/icty/pressreal/nato061300.htm>, visited on 20 December 2005. For comments on the report, see: P. Benvenuti, ‘The ICTY and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia’, *12 EJIL*, (2001), pp. 503 *et seq.*, M. Bothe, ‘The Protection of the Civilian Population and NATO Bombing of Yugoslavia: Comments on a Report to the Prosecutor of the ICTY’, *12 EJIL*, 2001, pp. 531-535.

²³⁰ *Ibid.*

²³¹ A. M. Danner, *supra* note 223, pp. 538-540.

²³² The main sources on those alleged crimes were rightly summarized in: L. Reydam, *supra* note 167, pp. 981 *et seq.*; also see ICG, *supra* note 164, and J- M. Kamatali, *supra* note 164.

lack any objective criteria as far as prosecution of committed crimes by international institutions with limited mandates and resources is concerned. Prosecutor Del Ponte's prosecutorial policy is said to have been at the heart of the splitting of the formerly shared ICTY and ICTR OTP offices,²³³ despite the official reasons advanced, among others, in SC Resolution 1503 (2003)²³⁴ and formal mention therein of possible investigations of crimes committed by the RPA.²³⁵ Furthermore, in spite of these admittedly legitimate concerns for prosecutorial policy covering all aspects of the Rwandan conflict, few voices have been raised in favour of inquiring into highly documented controversial French involvement in the conflict on the side of the genocidal regime.²³⁶ None of the prosecutors – including Del Ponte - has so far pledged or envisaged to take action. Any claims to that effect are often brushed away as being biased and politically motivated; as any possible involvement of democratic France – country of “Liberty, Equality and Fraternity” and, what is more, permanent member of the UN Security Council– into one of the most horrendous crimes of the 20th century remains for many minds just unthinkable.²³⁷

Prosecutorial discretion and independence involves a decision-making process with some political implications. Nevertheless, if prosecutorial discretionary power is seen as a guarantee for independence, lack of general, binding guiding principles in exercising this power – such as hierarchy of crimes due to a perceived severity, possible mitigating or aggravating circumstances – renders the prosecutor's task more complex, putting him/her at the mercy of political manipulations. In spite of the prosecutor's undertaking to come up with more guidelines with regards to the rightful interpretational squares of the complementarity principle in the statute, the aforementioned 2003 paper on policy issues fails short of expectations as it

²³³ For some related sources, see: M. Simons, ‘Rwanda is Said to Seek New Prosecutor for War Crimes Court’, New York Times, July 28, 2003, at <www.globalpolicy.org/intljustice/tribunals/rwanda/2003/0728delponte.htm>, visited on 19 December 2005; S. Edwards, ‘Del Ponte says UN caved to Rwandan Pressure’, National Post, September 17, 2003, at <www.globalpolicy.org/intljustice/tribunals/rwanda/2003/0918sponte.htm>, visited on 19 December 2005.

²³⁴ S.C. Res. 1503, UN. Doc. S/RES/1503 (2003), *supra*, note 40. This Resolution was reiterated by S. C. Res. 1534 of 26 March 2004, UN. Doc. S/RES/1534 (2004).

²³⁵ Par.3 of the resolution, *supra* note 40.

²³⁶ For general references related thereto read: P. de Saint-Exupéry, *L'Inavouable : La France au Rwanda*, (Les arènes, Paris, 2004); J. P. Gouteux, *La nuit rwandaise: L'implication française dans le dernier génocide du siècle*, (L'Esprit Frappeur, Paris, 2002); HRW and FILDH, *supra* note 143; R. Dallaire, *Shake Hands with the Devil : The Failure of Humanity in Rwanda*, (Carroll & Graf Publishers, 2004).

²³⁷ This is the case despite the fact that the ICTR statute entrusts the tribunal with the mandate of prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994”, a formulation which covers crimes committed by any person regardless of the nationality for crimes committed in Rwanda (Article 1 of the ICTR statute).

only answers few of the practical questions raised by selection of cases for prosecution.²³⁸

The “behind-the-scene pulls and pushes” surrounding ICTR cases are well highlighted by the court’s lack of consistency since, at a time when the court is under pressure to close its proceedings by 2010,²³⁹ and in doing so has started handing some files under its prosecutorial investigations to national courts including Rwandan national courts,²⁴⁰ pressure still remains to prosecute violation by the RPF.²⁴¹ One needs to recall that if all crimes falling under the tribunal’s jurisdiction should equally be prosecuted, the often unstated rationale behind this pressure lies in a perception of lack of ethnic prosecutorial balance whereby only Hutus are prosecuted while no single Tutsi has been subjected to the court’s jurisdiction. In the eyes of supporters of an ethnic equilibrium, prosecutions thus appear to lack some political correctness, and carry some vestiges of victor’s justice with the correlated good and bad side etiquettes.²⁴² This case proves the difficult balance in exercising prosecutorial discretion by a court with limited ability to exhaustively prosecute all committed crimes under its jurisdiction.

Lack of pre-established selection criteria in countering victor’s justice versus severity of crimes claims can prove not to be an easy task, taking into consideration the intricate political interests and sensitivities surrounding many cases. The statutory discretionary powers of the prosecutor appear not sufficiently detailed to counter possible future impartiality claims. The difficulty materializes even more in assessing recourse to the “interests of justice” consideration in the statute and the related possibility to challenge recourse thereto by the Pre-Trial Chamber.

²³⁸ Given the complex possible levels of responsibility as illustrated by the Rwandan and former Yugoslavia cases whereby, in addition to the belligerents, responsibility of other indirectly involved parties - such as NATO in the Yugoslav case, arms suppliers (corporations, or third countries) - might come into play, prioritising the prosecution of most heinous crimes and high-ranking perpetrators – as advocated in the policy paper – does not settle the challenged faced by the two *ad hoc* tribunals. See ICC-OTP, *supra* note 161, pp. 3 *et seq.*

²³⁹ S.C. Res. 1503, UN. Doc. S/RES/1503 (2003), *supra*, note 39; preambular paragraphs 7 and 8; and par. 7; SC Res. 1534, *supra*, note 226, par. 3 of the preamble and of the Resolution; F.X. Nsanzuwera, “The ICTR contribution to national reconciliation”, 3 *J. Int’l Crim. Just.*, 2005, p. 945.

²⁴⁰ Arusha Hironelle News Agency, ‘Rwanda/ICTR - UN Court hands over more genocide cases to Rwanda’, 29 November 2005, at <http://www.hironelle.org/arusha.nsf/English?OpenFrameSet>, visited on December 6, 2005.

²⁴¹ S.C. Res. 1503, UN. Doc. S/RES/1503 (2003), *supra*, note 40; E. Møse, ‘Main Achievements of the ICTR’, 3 *J. Int’l Crim. Just.*, (2005), pp. 933-934.

²⁴² Some references thereto can be found in: E. Møse, *supra* note 241, pp. 933-934; L. Reydam, *supra*, note 167, pp. 981 *et seq.*

4.4.3 Prerequisites for prosecutorial initiation of investigation and prosecution under article 53 of the ICC statute and the Pre-Trial Chamber judicial control

The complex jurisdictional and admissibility requirements in articles 17, 18 and 19 of the statute are supplemented by article 53 (3) imposing an obligation on the prosecutor to initiate an investigation only after considering whether: “[t]aking 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”. This formulation remains ambiguous in mainly respects. First, it is noteworthy to recall that the court has jurisdiction over “the most serious crimes of concern to the international community”.²⁴³ Since the statute does not establish any hierarchy of crimes whose constitutive elements further require a higher level of criminal responsibility, any prosecutorial selection or, more importantly, rejection of a case, based on the “gravity of the crime” concept seems practically to be not an easy task, unless the court departs from ICTY and ICTR precedents. The latter tribunals have constantly avoided making any hierarchy between crimes under their jurisdiction. Even if they mostly prosecuted those perceived as “big fishes”, the gravity of the crime was only taken into consideration in sentence determination, not as determining factor in taking prosecutorial steps.²⁴⁴

Our previous analysis indicated that the court’s subject matter jurisdiction in the statute is premised on the gravity of the committed international crimes:²⁴⁵ genocide has been characterized by the ad hoc tribunals as “the crime of crimes”,²⁴⁶ crimes against humanity suppose a widespread or systematic attack directed against any civilian population²⁴⁷, while war crimes under the Rome statute will be particularly prosecuted when they are committed “as part of a plan or policy or as part of a large-scale commission of such crimes”.²⁴⁸ Only article 8 on war crimes seems to provide room for accommodation of the notion of less serious crimes within the court’s jurisdictional reaches by implying that the court might overlook minor war crimes to focus on those committed as part of a plan or policy or as part of a large-scale commission of such crimes. Despite an indication in the prosecutor’s policy paper that “[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission”,²⁴⁹ the precision has the merit of

²⁴³ Par. 4 of the ICC statute preamble.

²⁴⁴ A.M.L.M de Brouwer, *Supranational Criminal Prosecution of Sexual violence: The ICC and the Practice of the ICTY and the ICTR*, (Intersentia, 2005), pp. 358-362.

²⁴⁵ See *supra*, Section 3.4.

²⁴⁶ *Prosecutor v. Kambanda*, *supra* note 81, par. 15.

²⁴⁷ Article 7 of the Rome statute.

²⁴⁸ Article 8 of the Rome statute.

²⁴⁹ ICC-OTP, *supra* note 161, p. 7.

highlighting possible circumstances that might surround the commission of a crime without affecting the constituting elements.

Against this background, whenever the jurisdictional and admissibility criteria in articles 17, 18 and 19 are met, it will not be an easy task to select among the committed “most serious crimes of concern to the international community” on “gravity” basis. Thus, even if circumstances surrounding the commission of a given crime will necessarily come into play, a strict reading of the statute calls for prosecution of offenders whenever any crime within the court’s jurisdiction is committed. Since the examination of a case at this stage implies a *prima facie* indirect ruling on its merits, some meritorious cases for court adjudication might easily be brushed aside before an in-depth investigation on the ground of lack of “gravity” of the alleged crimes. The various procedural appeals guarantees in the statute, in addition to being burdensome on the system, might prove inefficient depending on the determination of the person or institution challenging the ruling. Since only a court judgment can exhaust a contention as to whether crimes within the court’s jurisdiction were committed, it is to be feared that investigative steps for claims against institutions in similar posture as the NATO *vis-à-vis* the ICTY or powerful states, might easily be ruled out on grounds of not fulfilling the required gravity criterion.

Secondly, the “interests of the victims” in the provision constitutes another statute construction which will need further elaboration. It is already a commendable achievement for the ICC statute to provide for participation of victims in the proceedings, given the ICTY and ICTR shortcomings in this regard. Both *ad hoc* tribunals have been criticized for the partial nature of justice rendered as they don’t offer any possibility for victims of the crimes to participate in the proceedings in their own capacity, safe as witnesses.²⁵⁰ Furthermore, victims, including those appearing before the tribunals, are not entitled to receive reparations or compensation for damages suffered out of the atrocities subject to criminal prosecutions, despite being instrumental to the criminal prosecutions as witnesses.²⁵¹ The tribunals’ primary focus is on retributive rather than the restorative function of criminal justice.²⁵² Consequently, state’s prerogatives in administering criminal justice - as represented by the prosecutor - and the rights of the accused are the main normative and procedural safeguards in ICTY and ICTR proceedings.²⁵³

²⁵⁰ A.M.L.M de Brouwer, *supra*, note 244, pp. 283 *et seq.*; for more on participation rights of the victims, see: I. Bottigliero, *Redress for Victims of Crimes under International Law*, Brill Academic Publishers, 2004; J. Sarkin, ‘Reparations for Gross Human Rights Violations as an Outcome of Criminal versus Civil Court Proceedings’ in K. de Feyter et al. (eds.), *Out of Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, (Intersentia, 2005), pp. 176 *et seq.*

²⁵¹ G.J. Mekjian and M.C. Varughese, ‘Hearing the Victim’s Voice: Analysis of Victims’ Advocate Participation in the Trial Proceeding of the International Criminal Court’, *17 Pace Int’l L. Rev.* (2005), pp. 10 *et seq.*

²⁵² A.M.L.M de Brouwer, *supra*, note 244, pp. 283 *et seq.*

²⁵³ *Ibid.*

The ICC normative texts corrected this anomaly by providing for involvement of victims/their representatives in the initiation of proceeding, the admissibility and jurisdictional assessment stages and throughout the trial. Furthermore, their interests are to be taken into consideration by the prosecutor in deciding to taken investigative and prosecutorial steps. Institutional arrangements provide for setting up a “Victims and Witnesses Unit” within the registry in charge of providing assistance and protection to victims and witnesses appearing before the court.²⁵⁴ Participation rights of victims in ICC proceedings are stipulated in articles 15 (3), 19 (3), 68 (3) of the statute and corresponding RPE while various other provisions such as articles 53 (1) (c), (2) (c); 54 (1) (b), (3) (b) explicitly or implicitly erect the interests of victims into a primary consideration throughout the proceedings. Challenges attached to victims’ participation rights in international proceedings, intricately connected to national processes, will be examined in chapter 6.

For the sake of the present analysis, the “interests of the victims” as well as the “gravity of the crime”, “the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”, are the main factors to be taken into consideration by the prosecutor before taking any decision not to prosecute. A literal reading of the two relevant paragraphs of article 53,²⁵⁵ suggests that these factors are the major yardsticks in deciding whether a given contemplated prosecution is not in the interests of justice. It remains however not easy, even if not impossible, to imagine cases where the prosecution of alleged perpetrators of genocide, war crimes and crimes against humanity would be deemed as not serving the interests of the victims and consequently, not in the interests of justice.²⁵⁶ Procedural involvement of victims at all stages of proceedings is calculated to ensure that their rights are properly accommodated. A clear balance will need to be drawn between imperative of prosecuting international crimes - seen as imposing obligations *erga omnes* on states²⁵⁷ - and possible conflicting victims’, or general societal interests demanding for alternative measures.

Thirdly, the possible interpretational reaches attributable to the vague “interests of justice” concept in article 53 of the statute have been amply

²⁵⁴ Article 43 (6) of the statute.

²⁵⁵ Paragraphs (1) (c) and (2) (c) of article 53 of the statute and Rule 105 (4) of RPE.

²⁵⁶ The complexity surrounding the Rwandan genocide whereby some perpetrators turned their wrath against their own spouses or children born of mixed marriages makes it possible to imagine cases whereby, for the sake of preserving family unity, victims might not be keen to see criminal prosecutions instituted against the offenders. Another possibility is a situation whereby the prosecutor is operating in an ongoing conflict and criminal prosecutions are not the only avenue, and might even jeopardize the security of victims/witnesses. For the later example, see: H-P. Kaul, ‘Construction site for more justice: The International Criminal Court after two years’, *99 Am. J. Int’l L.* (2005), p.375.

²⁵⁷ See among others: HRW, ‘The meaning of ‘interests of justice’ in article 53 of the Rome statute’, *June 2005*, pp. 9-11, at <http://hrw.org/campaigns/icc/docs/ij070505.pdf>, visited on 21 December 2005; T. H. Clark, ‘The prosecutor of the International Criminal Court, Amnesties, and the ‘Interests of Justice’: Striking a Delicate Balance’, *4 Wash. U Global Stud. L. Rev.*(2005), pp. 389 *et seq.*;

covered by academic and related discourses.²⁵⁸ This concept will further be elaborated in a later part of the study with regards to possible clashes between ICC exercise of jurisdiction and national processes. At this juncture, it is worth noting that the imprecise notion in the statute is often associated with peace and security concerns whereby criminal investigations and prosecutions might be ruled out for the sake of preserving fragile political or social settings.²⁵⁹ Criminal investigations and prosecutions are thereby opposed to such alternatives as truth and reconciliation commissions or amnesty-granting. The ongoing debate is centred on whether these alternative procedures fall under the coverage of the “interests of justice” concept in the statute and whether they are acceptable for crimes such as those under the court’s jurisdiction, taking into account the objects and purpose of the statute.²⁶⁰ Without concluding this controversial interpretational debate on the “interests of justice” to be further explored in chapter 6, one should only point out that, in respect of exercise of court’s jurisdiction and, absent clear interpretational guidelines, the concept can be used to cover failure of taking appropriate prosecutorial steps in given sensitive cases. The efficiency of the judicial control mechanism of the prosecutor’s decision remains to be tested.

Indeed, article 53 (3) provides for judicial control of the prosecutor’s decision not to prosecute. The referring state or the Security Council, depending on the author of the referral, may petition to the Pre-Trial Chamber to review a decision of the prosecutor not to proceed with an investigation.²⁶¹ It is important to note that in this case, the Pre-Trial Chamber can only *request* the prosecutor to reconsider his or her decision.²⁶² This formulation supplemented by the rules of procedure suggests that the Pre-Trial Chamber does not have any injunction on the prosecutor.²⁶³ The latter withholds the last word on the matter of deciding to investigate and eventually prosecute or not to do so. Conversely, most remarkable is article 53 (3) (b) providing that the Pre-Trial Chamber may, “on its own initiative, review a decision of the prosecutor not to proceed if it is solely based on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber”. Unlike in the former case, this provision makes it clear that the prosecutor’s decision will need Pre-Trial Chamber’s approval. The resultant is a situation

²⁵⁸ For some existing literature on the topic see among many others: HRW, *supra*, note 257; T. H. Clark, *supra* note 257, pp.398 *et seq.*; A. M. Danner, *supra* note 223, pp. 543 *et seq.*; R.J. Goldstone and N. Fritz, ‘In the Interests of Justice and Independent Referral: The ICC Prosecutor’s Unprecedented Powers’, 13, *LJIL*, (2000), pp. 655-667;

²⁵⁹ This is illustrated by and in, among other sources enunciated above, the article by D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, 14 *EJIL*, 3,(2003).

²⁶⁰ T. H. Clark, *supra* note 257, pp. 398 *et seq.*

²⁶¹ Article 53 (3) (a) of the statute.

²⁶² D. Robinson, *supra* note 259, p. 487.

²⁶³ Rule 108 of the ICC RPE makes it clear that the last conclusion is to be taken by the prosecutor who will notify it to the parties participating in the review.

whereby “the Pre-Trial Chamber can oblige the prosecutor to continue with the investigation or prosecution”,²⁶⁴ against his/her own belief.

Thus, an optimistic analysis of the ICC mechanism should lead to the conclusion that no matter the ambiguities surrounding the “interests of justice” notion and its determining factors in article 53, the subjecting of the recourse thereto by the prosecutor to the scrutiny of Pre-Trial Chamber minimizes cases of abuses. Nonetheless, as aforementioned, the system remains to be tested and the meaning of the concepts elucidated through practice or general guidelines in order to ascertain its workability and minimize possible abuses. Despite the affirmation that prosecution of international crimes is evolving into customary international law or an *erga omnes* obligation,²⁶⁵ the shortcomings of international criminal justice and the imperatives of the complementarity principle might dictate – as will be discussed further and depending on factual circumstances – alternative solutions.²⁶⁶ This being the case, considerations based on factual circumstances should not lead to recourse to the “interests of justice” in order to avoid adjudication of sensitive cases. As displayed in the previously referred to conclusions of the ICTY prosecutor’s report on possibility of prosecuting NATO officials for possible crimes committed during the bombing campaign against Federal Republic of Yugoslavia in 1999 before the ICTY,²⁶⁷ the likelihood of lack of cooperation might determine prosecutorial policy to investigate and prosecute a given case.

²⁶⁴ D. Robinson, *supra* note 259, p. 488. See also Rule 110 (2) of the ICC RPE.

²⁶⁵ D. G. Newman, ‘The Rome Statute: Some Reservations Concerning Amnesties, and a Distributive Problem’, *20 Am. U. Int’l L. Rev.* (2004-2005), pp. 293-357, at 306 *et seq.*

²⁶⁶ Here again it is noteworthy to mention that if international criminal law scholarship and advocacy insists on prosecuting the most responsible perpetrators of international crimes, they remain aware of the limits of international institutions habilitated to do so (ICTY, ICTR, Special Court for Sierra Leone, ICC...). Experiences of transitional post-conflict societies such as Rwanda, Cambodia and the likes displayed situations where there might be as many “most responsible perpetrators” than international courts can handle. See among others: W. A. Schabas, ‘Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems’, *7 Criminal Law Forum* (1996), pp. 523 *et seq.*; T. Klosterman, ‘The Feasibility and Propriety of a Truth Commission in Cambodia: Too little? Too late?’, *15 Ariz. J. Int’l & Comp. L.*(1998), pp. 833 *et seq.* Moreover, prosecution of all suspects through classical judicial mechanisms can at times just be impossible regardless of the country’s human or material resources. Singling out once more the Rwandan example, if academic literature is filled with extensive literature on lack of judicial guarantees in adopted legal responses, few come up with credible alternative solutions in dealing with over 115.000 detained suspects (plus many others still at large) than total amnesty or truth and reconciliation commission, which might amount to nothing but impunity for perpetrators of one of the most odious crimes of last century. On the number of suspects see: <www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm>, visited on 2 January 2006.

²⁶⁷ ICTY-OTP, *supra* note 229, par. 90-91.

5 State cooperation and enforcement of ICC rulings

5.1 Introduction

Although a separate issue from the exercise of jurisdiction, state cooperation and enforcement of court's decisions might have a decisive impact on its exercise of jurisdiction. A number of provisions in the Rome statute are dedicated to organizing a system of cooperation between the court and various other insurmountable actors. The most relevant provisions are briefly analysed in the first part of this chapter (5.2). The possible incidence of state and other non-state actors' non-cooperation on the court's exercise of jurisdiction will further be examined (5.3) before turning to the *problématique* of enforcement of the court's decisions (5.4), assuming that some cases will bypass the foreseeable hurdles in previously analysed complex phases. In either case, ICTY and ICTR normative framework and experience will enrich the otherwise still theoretical assessment of challenges awaiting ICC organs.

5.2 The obligation to cooperate under the Rome statute: a theoretical outline

Cooperation with the ICC is a requirement of paramount importance in bringing the suspects to justice. A wide range of actors will be called upon in assisting the tribunal to discharge itself from its statutory functions as it does not possess institutional and legal authority to directly act on its own within sovereign states. The significance attached to cooperation by the drafters of the Rome statute, as enriched by the experience of the *ad hoc* tribunals, is materialized by the extensive and lengthy provisions dedicated thereto in part 9 of the statute, notwithstanding other relevant provisions in the statute. Instituting a treaty body, the ICC statute primarily imposes an obligation to cooperate on state parties.²⁶⁸ The underlying limitation represents the first major difference between the court and *ad hoc* tribunals whose UN Security Council derived powers endowed them with statutory powers to request cooperation of any UN member state.²⁶⁹ Under this far-

²⁶⁸ Article 86 and subsequent provisions of the Rome statute.

²⁶⁹ See: Resolution 827 (ICTY), *supra*, note 19, par. 4; Resolution 955 (ICTR), *supra*, note 31, par. 2. These paragraphs which are almost identical in both resolutions read, in Res. 827 as follows:

“Acting under Chapter VII of the Charter of the United Nations, ...

4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute,

reaching obligation, the duty to cooperate with the tribunals extended the limits of the countries constituting the scenes of the committed crimes (namely independent former Yugoslav Republics and Rwanda) to include all member states of the UN. It is not therefore surprising to notice that persons brought before the ICTY and the ICTR respectively were arrested in various corners of the world.²⁷⁰ The resolutions went even further by urging intergovernmental and non-governmental organization to assist and/or participate in the tribunals' activities.²⁷¹ It flows from the statute - as reflective of rules of international treaty law - that, in principle, non-state parties are not bound by statute provisions, including those pertaining to cooperation with the court.²⁷² The only statutory exceptions to the rule - also grounded in international legal norms governing treaties and the statute - are (1) a case of a non-state party acceptance of jurisdiction in respect to a given crime under article 12 (2)(3) and, (2) Security Council referral under article 13 (b).²⁷³ In the former instance, the obligation derives from a state voluntary submission to the court's jurisdiction and is limited to the crime subject to the acceptance of jurisdiction.²⁷⁴

Beyond these two cases, non-state parties are not under any obligation to cooperate with the court. The only other instances non-state parties might be brought or obliged to cooperate with the court outside the aforementioned cases are: (1) through a probable UN Security Council adopted resolution under Chapter VII requesting a given state to cooperate with the court in respect of cases initiated by a state party or the prosecutor *proprio motu*, or (2) through *ad hoc* arrangements with non-state parties as provided for in article 87 (5) and international organisations under article 87 (6).²⁷⁵

Claims of existing obligation to cooperate in international prosecution of certain crimes as a matter of customary international legal norms (namely indirectly deriving from the 1949 Geneva Conventions and the 1948 Genocide Convention) might be legitimate but not yet accompanied by

including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute".

²⁷⁰ Unlike in the ICTY case where most of the 132 "indictées" having appeared in proceeding before the tribunal as of 21 December 2005, either surrendered or were arrested in one of the former Yugoslav Republics, some by the multinational forces present in the region, as it appears at <www.un.org/icty/glance/index.htm>, visited on 4 January 2006; of all 72 persons brought before ICTR proceedings as of 13 December 2005, none was arrested in Rwanda as it appears at <<http://65.18.216.88/ENGLISH/factsheets/detainee.htm>>, visited on 4 January 2006. This consideration highlights the paramount importance of state cooperation with international tribunals in eradicating impunity for perpetrators of international crimes.

²⁷¹ Resolution 827 (ICTY), *supra*, note 19, par. 5; Resolution 955 (ICTR), *supra*, note 31, par. 4. See also articles 29 and 28 of the ICTY and ICTR respectively.

²⁷² Interpretation deriving from article 26 of the Vienna Convention on the Law of Treaties, 1969, Entered into force on 27 January 1980, UNTS, vol. 1155, p. 331.

²⁷³ A. Ciampi, "The obligation to cooperate", in A. Cassese, *supra*, note 1, pp. 1608 *et seq.*

²⁷⁴ *Ibid.*, p. 1616.

²⁷⁵ *Ibid.*, pp. 1611 *et seq.*

sufficient state practice.²⁷⁶ The court will therefore rely on the obligation to cooperate imposed on state parties to the statute, absent Security Council involvement in the situation at hand or state voluntary subjection to the court's jurisdiction or signing of *ad hoc* arrangements. It follows from the statute that the ICC is normatively in a less privileged position, as far as cooperation is concerned, than its *ad hoc* predecessors. Even with regards to state parties, the statute leaves to domestic legislatures to enact implementation legislation of the obligation to cooperate with the court.²⁷⁷ Given similar obligation imposed on UN member states by the ICTY and ICTR statutes,²⁷⁸ their experience have recorded cases of non compliance or questionable limitations in implementation legislations.²⁷⁹ The nature and limits imposed by the statute and general international obligations on state discretion in enacting these legislations remain, to say the least, problematic and conducive to lengthy procedures before surrender in host states.²⁸⁰ Thus, juxtaposition of complex national procedures before surrender, to the foreseeable, previously alluded to heavy ICC procedures, might lead to situations where many suspects will have to wait several years before seeing their cases adjudicated by the court. If these procedures are meant to comply with some requirements of due process guarantees, they certainly constitute an infringement of the suspect's right to expeditiously have his/her case heard by a court of law under general human rights law.²⁸¹

The Statute and Rules of Procedure and Evidence refer to various forms of state cooperation with the court. The needed cooperation covers all steps; from initial information-gathering to other needed actions with regards to criminal investigations and prosecution but also in the area of execution of the court's decisions. It encompasses documentary and information sharing, testimonies and any other needed facilitation in identifying and bringing suspects before the court.²⁸² Among other obligations, the arrest and surrender of suspects appears at the forefront, given the extensive number of provisions dedicated thereto.²⁸³ The numerous impediments linked to the fulfilment of this obligation have been thoroughly expanded upon in

²⁷⁶ Ibid.

²⁷⁷ Article 88 of the statute.

²⁷⁸ Res. 827 (ICTY), *supra*, note 19 and Res. 955 (ICTR *supra*, note 31.

²⁷⁹ A. Ciampi, *supra*, note 273, pp. 1622-1624.

²⁸⁰ V. Oosterveld, M. Perry and J. McManus, 'The Cooperation of States with the International Criminal Court', 25 *Fordham Int'l L.J.* (2002), pp. 767 *et seq.*

²⁸¹ Most instruments provide for procedural guarantees for suspects/accused while requiring the trial to take place in a reasonable time. On this see: Article 55 of the ICC statute; articles 9-11 of the Universal Declaration of Human Rights (UDHR), G. A. Res.217 A (III) of 10 December 1948; articles 9, 10, 14, 15 of the ICCPR; articles 5-7 of the Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights (ECHR), CETS N° 005 entry into force 3 September 1953.; articles 6 and 7 of the African Charter on Human and Peoples' Rights (ACHPR) entered into force on 21 October 1986; OAU Doc. CAB/LEG/67/3 rev. 5. I.L.M. 58 (1982); articles 7-10 of ACHR.

²⁸² Articles 72, 73, 90-93, of the statute. For details on these and other relevant provisions see: A. Ciampi, *supra* note 273, pp. 1630 *et seq.*

²⁸³ Articles 89-92, 101-102 but also 57-59 of the statute. For more details on this see: B. Swart, 'Arrest and surrender', in A. Cassese, *supra*, note 1, pp. 1639 *et seq.*

academic literature consecutive to the adoption of the ICC statute.²⁸⁴ Most relevant for the present analysis is the conclusion that there is non-settled state practice (*opinions juris*) as to the obligation to extradite suspects of international crimes, given their other involved legal and procedural entitlements.²⁸⁵ If states parties to the ICC statute are under statutory obligation to cooperate with the court, this area is mostly important for non-state parties for which the *aut dedere aut judicare* principle remains tributary to extradition treaties between states or to their free will to positively respond to a request, absent treaty agreement.²⁸⁶ As this aspect of cooperation “to arrest and surrender” suspects to the court covers most of the foreseeable challenges the court might face, it will be elaborated upon in subsequent section of this study; in the light of ICTY and ICTR experiences. For other forms of cooperation than arrest and surrender, the statute acknowledges the possibility of conflicting interests whereby states might refrain from cooperating with the court.²⁸⁷

5.3 Incidence of non-cooperation on the court’s exercise of jurisdiction

Previous analyses have referred to the needed states’ cooperation in bringing about court’s investigation and prosecutions. The whole statute system remains tributary to this cooperation without which the court cannot proceed with its proceedings. Nonetheless, despite the often praised post-cold war era positive moves towards democratic rule and accountability for human rights violations, previous developments have highlighted the persistent resort to national sovereignty mostly whenever governmental policies leading to human rights violations are questioned. Besides, it matters less whether the protective states are from developing or developed countries, more or less democratic. Preceding illustrations have underlined the fact that the USA remains the main vocal opponent to subjection of its own citizens to the courts’ jurisdiction but also some other big or small, developed or developing countries are still reluctant to become parties to the statute. Furthermore, ratification of the statute implies an obligation to cooperate but does not provide guarantees for state compliance. The ICC statute envisages measure to be taken in cases of lack of state cooperation within the limits imposed by the overall statute. Article 87 (7) reads:

“Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council”.

²⁸⁴ For further elaboration on the topic, see: B. Swart, *supra* note 283.

²⁸⁵ *Ibid.*, pp. 1655-163;

²⁸⁶ *Ibid.*

²⁸⁷ Articles 72, 73, 90-93 of the ICC statute. The statute specifically mentions specifically recourse by a state national security justification as a basis for renegotiating cooperation terms with the court. This opening might easily be used by states as a pretext for non-cooperation with the court.

The court is also required under article 87 (5) (b) to inform the Assembly of States Parties or, the Security Council where the latter submitted the situation to the court, of instances of non-cooperation by states not parties to the statute. The wording of these provisions clearly shows that the court will heavily rely on states' willingness to cooperate. Neither the statute, nor the RPE provide for precisions on the exact measures to be taken by either state parties or the Security Council.

Most provisions in part nine of the statute are centred on organising a system of cooperation premised perhaps on a rather optimistic expectation that state will discharge their statutory obligations. Nonetheless, depending of the subject matter of cooperation and owing to the fact that there might be cases with political implications; cooperation of both state parties and not parties should not be taken as granted. The previously mentioned complementarity requirements will always provide room for states to subtract sensitive cases to the court's jurisdiction by purporting to exert primary jurisdiction. It is to be expected that whenever a state with jurisdiction expresses its commitment to prosecute, the power vested in the court to review the genuineness of state's willingness and ability to prosecute will not be an easy task due to implied determinations on, among other issues, the appropriateness of national judicial institutions.²⁸⁸

The dilemma will even be greater when the latter are called upon to try the rest, if not the great majority, of offenders in situations reflecting most likely massive participation. As the court's normative texts are rather silent on the issue, an insight into the *ad hoc* tribunals' experience is instructive as to what measures might be required in bringing states to cooperate.²⁸⁹ Foreseeable coercive measures to induce compliance by either the Security Council or the ASP might range from UN Charter chapter VII types of sanctions (economic, diplomatic, military ...), to any other appropriate (coercive or non-coercive) measure.²⁹⁰ Other approaches by regional organisations (such as the European Union) or single countries as used at variance in ensuing cooperation by some of the Former Yugoslav republics,²⁹¹ is relevant as far as the end result is concerned but fails to translate into cognisable standards of general application.²⁹² If coercion of recalcitrant states to comply with their obligation to cooperate can, at times, prove fruitful, some governments are ready to do all it takes, at all costs, to

²⁸⁸ Articles 18 and 19 of the statute.

²⁸⁹ M. R. Brubacher, *supra*, note 197, pp. 91-93.

²⁹⁰ *Ibid.*

²⁹¹ A. Wartanian, 'The ICC Prosecutor's Battlefield: Combating Atrocities while Fighting for States' Cooperation; Lessons from the UN Tribunals Applied to the Case of Uganda', 36, *Geo. J. Int'l L.*, (2005), pp. 1303-1310.

²⁹² Taking the Balkans example into consideration, even if pressures on either Serbia or Croatia by either the EU or the USA produced in many cases positive results for arrest of ICTY indictees, the practice is more contextual and political, and can hardly translate into law as some of the lesson givers such as the USA are criticised for their own human rights violations in other parts of the world which might amount to crimes under the court's jurisdiction... On violations of international law by the USA likely amounting to crimes under the court's jurisdiction, see for instance see: <www.iraqbodycount.org/database/>, visited on 10 January 2005 and S. Sewall, *supra* note 217.

shield their officials from international prosecutions. In these regards, a follow-up of the Darfur situation before the ICC is necessary owing to the governmental side's defiant opposition to international criminal court's investigations and prosecutions.²⁹³

The court's normative texts provide for different areas of cooperation. Nonetheless, considering the limited scope of this study, it will particularly focus on the obligation to arrest and surrender suspects to the court, owing to the fact that its fulfilment conditions the continuation of court's proceedings and that article 63 provides for the presence of the accused during the trial. In this respect, the experience of the ICTY and ICTR are instructive on the possible future challenges. The first years of the working of both tribunals revealed that states were only willing to cooperate with them when it was in their own interests to do so.²⁹⁴ Furthermore, other cases of states non-cooperation or suspension of cooperation were recorded for various reasons. For illustrative purposes, few of them will be mentioned below, as reflective of conflicting interests of involved actors namely the international prosecutor, the accused, victims, the state of origin of the accused or of the victim.

The *Todorovic case* before the ICTY offers a first insight into the problem of cooperation between the tribunal's OTP and NATO member states involved in peacekeeping mission in the region.²⁹⁵ A Bosnian Serb appointed Chief of Police in Bosanski Samac in the north-eastern part of Bosnia and Herzegovina, after Serbian occupation of the area in 1992; he was accused in the amended indictment of 27 counts by the ICTY. Those counts included: persecutions on political, racial and religious grounds, deportation, murder, inhumane acts, rape and torture (crimes against humanity); unlawful deportation or transfer, wilful killing, wilfully causing great suffering and torture or inhuman treatment (grave breaches of the Geneva Conventions); and murder, cruel treatment, humiliating and degrading treatment and torture (violations of the laws or customs of war), committed between April 1992 and December 1993.²⁹⁶ Initially pleading not guilty and seeking immediate release due to the allegedly illegality of his arrest in 1998 by NATO's multinational forces (he purported to have been abducted), he ended up entering a guilty plea agreement with the prosecutor under which he admitted crimes under count 1 of the agreement

²⁹³ Mark Oliver, *Sudan Rejects ICC Extradition Calls*, *Guardian*, June 29, 2005, <www.globalpolicy.org/intljustice/icc/2005/0629reject.htm>, visited on 20 January 2006; 'Sudan Reiterates Opposition to Try Darfur Suspects Before ICC', *Sudan Tribune*, October 18, 2005, at <www.globalpolicy.org/intljustice/icc/2005/1018opposition.htm>, visited on 20 January 2006.

²⁹⁴ M. R. Brubacher, *supra* note 197, pp. 88-89.

²⁹⁵ *Prosecutor v. Stevan Todorovic*, (Case N° IT-95-9/1), 'Decision on Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions', 26 February 2001; *Prosecutor v. Stevan Todorovic*, (Case N° IT-95-9/1), Judgement 31 July 2001.

²⁹⁶ *Ibid*, Judgement of 31 July 2001, par. 1-6; See also: A. Wartanian, *supra* note 291, pp. 1299-1300.

while the prosecutor dropped the remaining 26 counts.²⁹⁷ Despite the gravity of crimes initially charged with and position of authority constituting an aggravating circumstance,²⁹⁸ he was subsequently sentenced to ten years imprisonment, mainly due to his guilty plea and undertaking to cooperate with the OTP.²⁹⁹ What both the prosecution motion and the judgement fail to reveal is the exact circumstances leading to the guilty plea agreement.

In fact, the plea intervened after long altercations between the office of the prosecutor, the trial chamber, defence council and NATO member countries whereby, upon receipt of the defendant's motion, the trial chamber requested the office of the prosecutor to call on the bar NATO commanders responsible for the arrest of the suspect.³⁰⁰ The guilty plea came as a relief for all involved parties but mostly the office of the prosecutor which could not easily bring the persons responsible for the arrest to testify. It reflected the difficulty faced by the tribunal in trying to request NATO as an international organization and, *mutatis mutandis*, individuals to comply with its orders to provide requested information.³⁰¹ Nonetheless, notwithstanding the independence of the tribunal, one needs to revisit the functions of criminal justice - mainly retribution – in assessing whether the sentences were appropriate, taking into consideration the interest of the victims and the crimes subject to the initial indictment.

A second reflection of difficulties of cooperation with the ICTY is deducted from the inability by the tribunal for over a decade to secure the arrest and surrender of such outstanding indicted figures including Radovan Karadzic and Ratko Mladic respectively former Bosnian Serb leader and military commander. Despite being indicted at the very initial stage of the tribunal's activities,³⁰² the tribunal still wrestles with countries suspected of

²⁹⁷ *Prosecutor v. Stevan Todorovic*, (Case N° IT-95-9/1), 'Decision on the Prosecution Motion', *supra* note 295, par. 1. The circumstances surrounding the arrest of ICTY indictees remain also to be clarified. Similarly to *Todorovic* claims, *Dragan Nikolic*, a Bosnian Serb prison commander was allegedly kidnapped by Serbian hunters before being arrested by NATO troops in April 2000. For details see M. Kalinauskas, 'The Use of International Military Force in Arresting War Criminals: The Lessons of the International Criminal Tribunal for the former Yugoslavia', 50 *U. Kan. L. Rev.* (2001-2002), pp. 403-404.

²⁹⁸ A.M.L.M de Brouwer, *supra* note 244, p. 368.

²⁹⁹ *Prosecutor v. Stevan Todorovic*, (Case N° IT-95-9/1), judgement, *supra*, note 295, par. 68-107; 114-115.

³⁰⁰ Philip Blenkinsop, *UN court orders NATO force to reveal 'kidnap details*, Reuters, October 20, 2000, at <www.balkanpeace.org/hed/archive/oct00/hed968.shtml>, visited on 24 January 2006; Jerome Socolovsky, 'Hearing set on U.S. appeal of Gen. Shinseki subpoena', *The Associated Press*, 7 December 2000, at <www.pstrips.com/dec00/ed120700a.html>, visited on 24 January 2006; also: A. Wartanian, *supra* note 291.

³⁰¹ On the problematic power of the *ad hoc* tribunals to issue binding orders on non-state actors, see: A. Ciampi, 'Other forms of Cooperation', in A. Cassese *et al*, *supra*, note 1, pp. 1715 *et seq.*

³⁰² Radovan Karadzic and Ratko Mladic were initially indicted on 14 November 1995 as it appears on: <www.un.org/icty/indictment/english/kar-ii951116e.htm>, visited on 20 February 2006.

harbouring the suspects, namely Serbia-Montenegro and, Bosnia and Herzegovina.³⁰³ The failure to arrest both suspects as well as other indicted persons at large,³⁰⁴ despite the presence of a strong multinational force in the region (NATO) for more than a decade allows for an extrapolation on possible hardships or delays the ICC might face in securing surrender of outstanding suspects to the court and, consequently, exercising its jurisdiction.

The controversies surrounding the prosecution of *Jean Bosco Barayagwiza* before the ICTR provide a third instance of subordination of exercise of jurisdiction to state cooperation and raises the question of the extent of prosecutorial independence *vis-à-vis* states' threats of non-cooperation. Arrested on 26 March 1996 in Cameroon and held in detention under circumstances which turned out to be in contravention with the tribunal's procedural guarantees, the suspect was eventually transferred more than two years later to Arusha, the tribunal's headquarters on 19 November 1997 where he pursued his appeal against the legality of his arrest and detention.³⁰⁵ He appealed a 17 November 1998 Trial Chamber decision dismissing an "Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect". Finding violations of the appellant's due process rights through "the combination of delays that seemed to occur at virtually every stage of the appellant's case",³⁰⁶ the Appeals Chamber ordered his immediate release, noting that "to proceed with the appellant's trial when such violations have

³⁰³ As reflected by NATO pressure on the mentioned countries, "Karadzic is widely believed to be hiding in the eastern, Serb-controlled parts of BiH, while Mladic is said to be in Serbia"; on this see: *NATO chief hopes to see Karadzic, Mladic arrested by end-2006*, Reuters, Beta - 09/01/06; Reuters - 03/01/06; AP, Washington File - 30/12/05, <www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2006/01/10/feature-01>, visited on 20 February 2006.

³⁰⁴ As of 8 December 2005, the ICTY web page listed 4 additional names of indicted persons at large: Vlastimir Djordjevic, Goran Hadzic, Zdravko Tolimir and Stojan Zupljanin. For details see: *Persons Publicly Indicted by the ICTY for War Crimes: Warrants of Arrest Are Issued on behalf of the International Criminal Tribunal for the former Yugoslavia*, <www.un.org/icty/cases-e/index-e.htm>, visited on 20 February 2006.

³⁰⁵ For more details on the case, see: M. Momeni, 'Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics', 7 *ILSA J. Int'l & Comp. L.*, (2001), pp. 315 *et seq.*, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, *supra*, note 37, S. Bertodano, 'Judicial Independence in the International Criminal Court', 15 *LJIL.* (2002), pp. 415 *et seq.* Between the time of arrest and transfer more than two years later, different proceedings took place. The suspect was initially arrested under a Rwandan government arrest warrant but, upon rejection by Cameroonian courts of the Rwandan extradition request on 21 February 1997 and issuance of an order for his immediate release, the ICTR OTP requested Cameroonian authorities to "re-arrest" him. The judgement mentions that he was rearrested three days later – on 24 February 1997 and an order for his transfer to the Tribunal Detention Facility was issued only on 3 March 1997. On 2 October 1997 his council "filed a motion seeking a habeas corpus order and immediate release from detention in Cameroon, by reason of his lengthy detention without an indictment being brought against him" (Judgement, *supra*, note 36 par. 14).

³⁰⁶ *Jean-Bosco Barayagwiza v. The Prosecutor* (Case No. ICTR-97-19-AR72), The Appeals Chamber, Decision of 3 November 1999, par. 109; M. Momeni, *supra*, note 305, p. 318.

been committed, would cause irreparable damage to the integrity of the judicial process”³⁰⁷.

The Appeals Chamber ordered his return to Cameroon.³⁰⁸ As rightly observed, “the interpretation in Kigali, Rwanda’s capital was that one of the major suspects of genocide was escaping trial due to technicalities”³⁰⁹. Thus, the government of Rwanda and many other international actors including NGOs voiced their opposition to the Appeals chamber ruling, with the former taking steps in severing its cooperation with the tribunal. Before the implementation of the release order and alleging the discovery of “new facts”, the prosecutor introduced a “Motion for Review or Reconsideration of the Appeals Chamber’s Decision Rendered on 3 November 1999, in *Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution*”, whose decision intervened on 31 March 2000.³¹⁰ The new facts mainly pertained to the “politics of the transfer process from Cameroon to Arusha”.³¹¹ As reflected in the statement by the then Prosecutor, Carla Del Ponte, in her oral hearing of 22 February 2000, the steps taken by the Rwandan government in severing cooperation with the tribunal played a significant, even though only indirectly acknowledged, role in triggering the application for review.³¹² Upon submission of the Prosecutor’s motion for

³⁰⁷ Ibid., par. 108.

³⁰⁸ Ibid., par. 113.4.

³⁰⁹ S. Bertodano, *supra* note 305.

³¹⁰ *Jean-Bosco Barayagwiza v. The Prosecutor* (Case No. ICTR-97-19-AR72), Prosecutor’s Motion for Review or Reconsideration, Decision, 31 March 2000.

³¹¹ M. Momeni, *supra* note 305, p. 319.

³¹² For more details on the prosecutor’s statement see the following abstract in: *supra* note 301, Declaration of Judge Rafael Nieto-Navia, par. 2. It is worth quoting the lengthy quoted abstract from the prosecutor’s statement, reflective of the overall problem of cooperation:

“Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable. It can only be understood if one is cognisant with the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who was unable to go to her office in Kigali. It was the Prosecutor who could not be received by the Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the office of the Prosecutor. In other words, justice, as dispensed by this Tribunal was paralysed. It was the trial of Baglishima which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this Court. In other words, they were not allowed to leave the territory of Rwanda. Fortunately, things have improved currently, and we again enjoy the support of the government. Why? Because we were able to show our good will, our willingness to continue with our work based on the mandate entrusted to us. However, your Honours, due account has to be taken of that fact. Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depends on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, *judex naturalis*. Otherwise I am afraid, as we say in Italian, possiamo chiudere la baracca. In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner”

Review, the Government of Rwanda filed a brief and appeared at the hearings on the Prosecutor's motion as *amicus curiae*. Taking into account this prosecutor's declaration and despite the clear-cut language in the previous order for release of the suspect owing to the impossibility to carry on the trial of the suspect without jeopardizing "the integrity of the judicial process",³¹³ the compromise underlying the Appeals Chamber decision came without surprise. In its ruling on the motion, the Appeals Chamber - while reiterating the violations of the suspect's rights - reversed its previous decision, sending the case to the trial phase under the qualification that any decision on the merits should provide remedy for his violated rights.³¹⁴ Reliance on new facts in overturning the previous Appeals Chamber decision does not account for the whole truth as reflected in the separate opinion by Judge Rafael Nieto-Navia's Declaration appended to the decision.³¹⁵ Thus, if an economically dependent, and thus, less influential country like Rwanda can afford, against all odds, not to cooperate with a tribunal specifically instituted for crimes committed on its territory for purposes of furthering its interests, it is even to be feared that the ICC, whose institutional nature does not necessarily involve the UN Security Council, will face more challenges in instances of states unwillingness to cooperate.

Furthermore, the last example showed that cooperation is not limited to state levels but also is required from individuals, private institutions, organizations or associations remains vital for a proper working of the court. The controversy surrounding the treatment of witnesses in the ICTR in one instance commonly known as the "laughing judges" crisis,³¹⁶ offers a

³¹³ *Jean-Bosco Barayagwiza v. The Prosecutor*, *supra* note 306.

³¹⁴ *Jean-Bosco Barayagwiza v. The Prosecutor*, *supra* note 310. The decision specified in paragraph 75 that: "...for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgment at first instance, as follows:

a) If the Appellant is found not guilty, he shall receive financial compensation;

b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights".

³¹⁵ Thus, in his above mentioned declaration (see *supra*, note 301), judge Rafael Nieto-Navia contrasted what he considers as an "absolute" obligation of the Rwandan government to cooperate as derived from the Tribunal's normative texts (par. 5-6) with political considerations which, he argues, should not come into play in reaching the court's decisions. He thus, proposed making judicial finding of states' lack of cooperation and referring the matter to the Security Council rather than compromise under any other than legal grounds in reaching its decisions. While concluding that the decision was solely based on the presented new facts, the declaration sounds more as an apology for the decision reached than a convincing elaboration on their appropriateness in the circumstances. It goes without saying that the search for new facts was triggered by the suspension of cooperation (inferred from the prosecutor's declaration *supra* note 301) and consequently, the cooperation crisis played a role in the whole revision process, to say the least.

³¹⁶ Hirondelle, *The Perennial "Bumpy" Relationship Between Kigali and Arusha*, 1 April 2004, at

preview of possible situations where the working of the court might be jeopardized by suspension of voluntary participation of individuals in the activities of an international criminal institution in this case mostly as witnesses. The press reported in November 2001 that a witness, testifying as a victim of rape during the Rwandan genocide, had been mistreated, including by the trial chamber judges who laughed at her while describing her ordeal.³¹⁷ The Rwandan Genocide survivors' Association IBUKA announced the suspension of its cooperation with the tribunal (consisting mostly of supplying witnesses most of whom are survivors and members of the said association) as a result of alleged mistreatment of witnesses and mostly its lack of taking into consideration cultural sensitivities, taboos and stigma surrounding victims of rape.³¹⁸ Despite the court's protest and explanations on the reasons for the judges' laughter,³¹⁹ the prevailing feeling, including by the witness herself was one of incomprehension, neglect and lack of incorporation of cultural sensitivities in legal proceedings.³²⁰ Legal proceedings cannot just conform to blind, emotionless procedures. Procedural law must take into account not only the evolving norms regarding witness protection but also cultural sensitivities and contexts of the various actors in the proceedings where appropriate. Otherwise, depending on situations, the court might end up facing hardships in those instances where an effective exercise of jurisdiction by the court is conditioned to the participation of actors other than contracting parties as contemplated by some statute provisions.³²¹ The reaction of IBUKA - a genocide survivors' umbrella organization assisting its members in dealing with tragedy's aftermath through, among others, judicial means - in

<www.hirondelle.org/hirondelle.nsf/0/2ff1b682927fb6a6c1256e69004c224b?OpenDocument>, visited on 23 January 2006;

³¹⁷ Ibid., see also: Coalition for Women's Human Rights in Conflicts Situations, 'Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR): From November 1995 to November 2002', at <www.womensrightscoalition.org/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php>, visited on 23 January 2006; UN Judges Laugh At Rape Victim, *The Monitor*, December 3, 2001, <www.globalpolicy.org/intljustice/tribunals/2001/0512rwa.htm>, visited on 22 February 2006.

³¹⁸ H. S. Nichols, 'U.N. court makes legal mischief: plagued by charges of inefficiency, incompetence and corruption, the International Criminal Tribunal for Rwanda tries to write a first draft of international law' - *The world: Africa, January 7, 2003*, at <www.findarticles.com/p/articles/mi_m1571/is_2_19/ai_96238186/pg_2>, visited on 22 February 2006; B. Nowrojee, "Your Justice is too Slow": Will the ICTR Fail Rwanda's Rape Victims?, United Nations Research Institute for Social Development, Occasional Paper 10, November 2005, p. 23 ,

<[www.unrisd.org/unrisd/website/document.nsf/ab82a6805797760f80256b4f005da1ab/56fe32d5c0f6dce9c125710f0045d89f/\\$FILE/OP10%20Web.pdf](http://www.unrisd.org/unrisd/website/document.nsf/ab82a6805797760f80256b4f005da1ab/56fe32d5c0f6dce9c125710f0045d89f/$FILE/OP10%20Web.pdf)>, visited on 22 February 2006.

³¹⁹ *Statement of Judge Pillay, President of the Tribunal*, ICTR Bulletin, Vol. 3 February 2002, p.2, < <http://65.18.216.88/ENGLISH/bulletin/feb02/feb02.doc>>, visited on 22 February 2006.

³²⁰ B. Nowrojee, *supra* note 318, p.23 *et seq.* The Author, who is an ICTR prosecution expert witness on sexual violence, expressed the view, after encounters with some witnesses including the one subject to the "laughing judges crisis", that some witnesses leave the stand feeling like violated for the second time due to the nature of the question.

³²¹ Articles 87 (6) and 93 (9) (b) refer to the involvement of non-state parties actors in the working of the court.

suspending cooperation with the ICTR due to the 2001 “laughing judges” crisis reveals the imperatives of accommodating the concerns of different participants in the judicial process.

5.4 Enforcement of ICC decisions and Judgements

The *problématique* of enforcement of the court’s decisions or judgements is not, strictly construed, linked with exercise of jurisdiction. It can even, in a narrow sense, be perceived as justifying a rather successful exercise of jurisdiction since the problem will mostly be raised consecutively to the investigation and prosecution phases; the person having been availed to the court’s jurisdiction. Nonetheless, likewise in preceding section, improper and ineffective enforcement of the court’s decision might adversely affect future cases and, consequently, the court’s jurisdiction. Thus, without providing for a normative analysis of ICC related provisions in the light of jurisprudential and doctrinal theories, this section will shortly focus on possible adverse effect of enforcement of the court’s decisions and judgements on its future exercise of jurisdiction. Other main issues raised by the implementation of the court’s rulings as contrasted with national proceedings will be tackled in the next chapter.

Likewise in matters relating to investigation and prosecution, the ICC relies on states parties in enforcing its decisions and judgements as expressly acknowledged in part ten of the statute.³²² Once a sentence is pronounced in accordance with articles 77 to 80 of the statute, it has to be served in willing states parties under the court’s supervision.³²³ The place of the crime and the nationality of the criminal are not determining factors under these provisions.³²⁴ Nonetheless, the practice of the *ad hoc* tribunals for former Yugoslavia and Rwanda as well as article 103 (3), (b) require the custodial regime of the willing states to meet some (internationally) acceptable standards.³²⁵ The statute procedure provides that in case of differing states

³²² Articles 103 to 111 of the statute are dedicated to regulating the system of enforcement of ICC judgements.

³²³ Combined reading of articles 103 and 106.

³²⁴ See also on this: K. Kreß, ‘Penalties, Enforcement and cooperation in the International Criminal Court Statute (Parts VII, IX, X)’, 6 *European Journal of Crime, Criminal Law and Criminal Justice* 4 (1998), p. 131.

³²⁵ Article 106 of the statute; among others, custodial institutions must comply with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173 of 9 December 1988 at <www.un.org/Depts/dhl/res/resa43.htm>, visited on 18 March 2006; the United Nations minimum standards of detention as reflected, among others, in the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), G. A. Res. 45/110 of 14 December 1990, notably paragraph 9; the Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111 of 14 December 1990; documents visited at <www.un.org/Depts/dhl/res/resa45.htm>, on 18 March 2006. For more on the requirement, see: A. Dieng, ‘Africa and the Globalization of Justice: Contributions and Lessons from the International Criminal Tribunal for Rwanda’, *Unpublished Paper presented at the Conference on “Justice in Africa”*, Wilton Park, Sussex, England, 30 July – 2 August 2001 at <<http://65.18.216.88/ENGLISH/speeches/adwiltonpark300701.htm>>, visited on 12

practices which might materially affect the terms or extent of the imprisonment sentences, the court might decide to transfer the sentenced person to a prison of another state.³²⁶ The court's exclusive power to rule on the reduction of sentence is a positive element in the statute in avoiding anarchy resulting from varying state practices related thereon.³²⁷ The supervisory powers of the court mainly with regards to imprisonment sentences will not however be an easy task. Despite provision for participation rights of the victims of the crimes in the proceedings, constituting an innovative step by the ICC statute as opposed to the statutes of the *ad hoc* tribunals,³²⁸ the impact of the judicial process remains to be seen at national levels of the mainly concerned states. Not only will the suspects more likely be tried in a place other than where the crimes were committed but also it is not so certain that he/she will serve the sentence there, notwithstanding the alternative solutions offered by the complementarity principle.³²⁹ Indirect victims, such as the inhabitants of the place of commission of the crimes, not participating in the proceedings, will not actually 'see justice rendered' either through the trial or the serving of sentence by the convict.³³⁰ In this regard, it is necessary to bear in mind the critics pertaining to the limited impact of the two *ad hoc* tribunals in the internal processes of the countries for which they were established.³³¹

Thus, there are two possible adverse consequences of the enforcement system of ICC imprisonment sentences: possible isolation of the sentenced person from his base against his/her will and disconnection of the whole judicial process from the place of the crime (s).³³² As the nationality link and views of the sentenced persons are but some among other factors to be taken into consideration in deciding the place where the sentence will be served,³³³ the court will need to be imaginative enough in establishing its

March 2006. As reflected in K. Kreß, *supra* note 324, pp.131-132, quoting Bassiouni's, reference to acceptable treaty standards was preferred to the "internationally recognized standards governing treatment of prisoners" formulation deemed unacceptable by many delegations.

³²⁶ Combined reading of articles 103 (2), (a) and 104 (1); also see: K. Kreß, *supra* note 324, p. 131.

³²⁷ K. Kreß, *supra* note 324, pp.131-132.

³²⁸ See articles 68 and 75 of the statute among other provisions. One needs to recall here that both ICTY and ICTR statutes do not provide for reparation of victims of the crimes committed by the defendants.

³²⁹ One needs to recall that different reasons might command the subjection of a situation to the court as illustrated by the Northern Uganda Case, *supra* notes 51 & 58.

³³⁰ It is to be recalled that the seat of the court and place of execution of sentences constituted one of the previously mentioned ground put forward by Rwanda in voting against a tribunal it requested the establishment (V. Morris and M.P. Scharf, *supra* note 28, Vol. 2, p. 308 *et seq.*).

³³¹ Sceptical comments on the impact the tribunals exert on national processes can be found among others in P. Akhavan, 'Beyond Impunity: Can International Criminal Justice prevent Future Atrocities?', *Am. J. Int'l Law*, Vol. 95, No 1 (2001) pp.7-31; R. Zacklin, *supra* note 201, pp. 541-545.

³³² M. M. Penrose, 'Lest we fail: The importance of Enforcement of International Criminal Law', *15 Am. U.Int'l L. Rev.* (1999), p. 387 *et seq.*

³³³ Article 103 (3) (c) and (d) of the statute. See also *Prosecutor v. D. Erdemovic (IT-96-22)*, Trial Chamber Judgement, 29 November 1996, par. 75, at

legitimacy *vis-à-vis* the place of commission of the crimes, an enterprise which has remained of limited success through ICTY and ICTR outreach programmes.³³⁴ If crimes within the court's jurisdiction are deemed committed against the entire mankind as reflected in various parts of the statute, there is nevertheless a hierarchy of victims in a broader sense going from the direct victims, their relatives, the regional and national communities and the entire international community. Persons mostly affected by the crimes should be the ones more involved in the judicial process. This conclusion flows from the traditionally asserted functions of criminal justice namely accountability/deterrence, retribution and rehabilitation.³³⁵ They can more effectively be served when not only justice is done through the punishment of the offender but also when the victims are directly involved in the process.³³⁶ It is to be expected that the level of involvement of the persons mostly affected by the crimes throughout the proceedings of the court will have a significant impact on its authority, legitimacy and credibility.

<www.un.org/icty/erdemovic/trialc/judgement/erd-tsj961129e.htm#37>, visited on 18 March 2006.

³³⁴ See references in *supra* note 331. One of the most critical appraisals of the impact of the ad hoc tribunals is offered by M. M. Penrose; *supra* note 323, pp. 391-392, whereby she concludes that: "International criminal law, as exemplified by the two *ad hoc* Tribunals, has proven itself lamentably deliberate and incapable of single-handedly restoring peace or justice to either region". This somehow extremely negative but not unfounded perception of the tribunals work can only otherwise mean that they failed the mission entrusted in them as rooted in the UN Charter Chapter VII; see also on the need for outreach programmes: G.K. McDonald, 'Problems, Obstacles and Achievements of the ICTY', 2 *J. Int'l Crim. Just.* (2004), pp. 568 *et seq.*

³³⁵ R. Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes', 35 *Vand. J. Transnat'l L.* (2002).

³³⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN. Doc. G.A. Res. 40/34 of 29 November 1985, mostly par. 5.

6 Possible clashes between the exercise of ICC jurisdiction and national processes

6.1 Introduction

This chapter intends to contrast international prosecutions of crimes within the ICC jurisdiction with national proceedings. If the ICC statute regime gives precedence to genuine national prosecutions, previous analyses of the currently referred cases have critically pointed out some of the reasons that might justify recourse to international prosecutions. Nonetheless, once a situation is referred to the court's jurisdiction and some cases subjected to its proceedings, the differences between international and national prosecutions or other proceedings surface. If the statute embodies standards considered as mostly acceptable internationally, the court has limited ability to handle many cases and will still rely on a complementary work by national institutions in cases of massive participation. Inevitably, conflicts will certainly arise as a result of subjection of connected cases to different legal regimes and enforcements. Once more, the limited nature of the present study does not provide room for an extensive examination of the appropriateness, legality and conformity of national proceedings to international norms. The various forms taken by such proceedings as instructed from past experience of post conflict societies (criminal prosecutions, amnesties, truth commissions, immunities, hybrid institutions such as Gacaca types of Courts, etc) can only be exhaustively analysed in a different treatise. The chapter will rather focus on national proceedings in so far that they bear some incidence on the exercise of jurisdiction by the court. It will further underscore the main challenges resulting from the parallel proceedings and possible lack of harmonization.

6.2 The “prosecute or not prosecute” dilemma

Revived efforts in the post-cold war era to revitalize international criminal law have translated into a reaffirmation of accountability for gross human rights violations for purposes of eradicating impunity as expanded upon in previous developments.³³⁷ Nevertheless, notwithstanding the setting up of the ICTY, the ICTR, the SCSL and, as reflected in the ICC statute;³³⁸ current treaty and customary international criminal law imposes a primary obligation on national authorities to prosecute.³³⁹ More specifically,

³³⁷ See *supra* section 2.2.2.

³³⁸ Articles 17 and 17 of the statute.

³³⁹ T. H. Clark, *supra* note 249, pp. 398-400; The Board of Editors, *supra* note 196, pp. 1916-1923.

academic scholarship holds that there exists an *obligatio erga omnes* imposed on states to prosecute or extradite persons suspected genocide and “grave breaches”.³⁴⁰ These are the very same crimes subject to ICC jurisdiction.³⁴¹ Even states not parties to the ICC statute are therefore deemed under the obligation to prosecute or extradite for prosecution persons indicted for the said crimes, the only difference with state parties being the source of the obligation to be found arguably in customary international law in both cases and additionally in the ICC statute for state parties.³⁴² The main unsolved difficulty arising from these norms, similarly to some other claims of customary international rules, is lack of mechanisms designed to ensure uniform states compliance with the underlying obligation.³⁴³

The limited prosecutorial capability of international criminal institutions in situations involving massive participation ascribes to the latter a rather strategic but symbolic role.³⁴⁴ The resultant paradox of international criminal law is to state praiseworthy principles without providing for practical means of implementing them in all circumstances, thereby relegating them at times to mere aspirations. Thus, in such situations involving massive participation, classical criminal prosecution of all persons suspected on crimes subject to the above mentioned *erga omnes* obligation has proven to be sometimes impracticable.³⁴⁵ This is first materialized by the selectivity of targets among many suspects by the ICTY and ICTR and devolution of the remaining cases to national courts which, themselves, still struggle for appropriate legal solutions.³⁴⁶ The complementary role of the ICC to be exercised in instances of state inability or unwillingness to genuinely prosecute can only be achieved in cases involving a limited number of suspects.³⁴⁷

Besides, some post-conflicts societies have deemed criminal prosecution not to be the most appropriate solution for the highly needed healing process of national reconciliation, and thereby resorted to amnesties, truth commission

³⁴⁰ Ibid.; Also see for further details *supra* section 3.4.

³⁴¹ T. H. Clark, *supra* note 249, p. 398,

³⁴² Ibid. Also preambular paragraph 6 of the Rome statute.

³⁴³ H. Thirlway, ‘The Sources of International Law’, in M. D. Evans, *International Law*, Oxford University Press, 2003, pp. 124–130.

³⁴⁴ J. K. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *J. Int’l Crim. Just.* (2003), p.93; D. Robinson, *supra* note 251, p. 482.

³⁴⁵ W. A. Schabas, ‘Genocide Trials and Gacaca Courts’, 3 *J. Int’l Crim. Just.* 3 (2005) pp. 879-895; W. A. Schabas, *supra* note 258. W. A. Schabas, ‘The Rwanda Case: Sometimes it is impossible’, in C. Bassiouni, *Post Conflict Justice*, (Transnational Publishers, 2002), pp. 499-520.

³⁴⁶ See former ICTY and ICTR and now only ICTY prosecutor’s statement, *supra* note 216.

³⁴⁷ Thus conclusion flows from ICTY and ICTR experiences whereby either of the courts, despite the tremendous means at their disposal, has only succeeded in instituting proceedings against less than one hundred and fifty (150) suspects each (nearly the half for the ICTR), despite the massive number of suspects in either case.

or hybrid institutions in dealing with the past.³⁴⁸ The predominant perception of amnesties or truth and reconciliations commissions identifies them with unlawful and imposed political manoeuvres aimed at shielding criminals from prosecution at the expense of victims' rights.³⁴⁹ Under this perception, they are considered as incompatible with the above mentioned obligation to prosecute authors of international crimes. Nonetheless, put in contexts of post conflict situations, they are at times viewed as the "lesser-evil" type of solution dictated by pragmatic considerations aimed at ensuring societal stability.³⁵⁰

Thus, notwithstanding the concept of "interests of justice" and deferral powers of the Security Council respectively in articles 53 and 16 of the statute, it remains peculiar but not surprising to notice that the statute deliberately omitted any mention related thereon "despite the fact that more than 20 truth commissions had been held at the time at which the ICC statute was drafted."³⁵¹ In the face of difficulties in foreseeing all possible cases that might occur, the appropriateness of recourse to criminal prosecutions or alternative measures is to be assessed on a case by case basis, taking into account the particular circumstances of a given conflict and those instances whereby criminal prosecutions might prove to be impracticable, despite the willingness and availability of national judicial systems.

One needs to mention that the inability as envisioned by article 17 (3) does not specifically take into consideration instances whereby, due to a large number of accused, state classical jurisdictions are not in a position to exhaustively investigate and prosecute all cases.³⁵² The aftermath of the Rwandan genocide is once more reflective of this last instance whereby, despite the state authorities' determination to carry on investigations and prosecutions in accordance with the state's international obligation to do so; but also in spite of the setting up of an *ad hoc* international criminal tribunal for the country's tragedy, these steps haven't so far yielded into answers to the currently estimated more or less one million possible suspects.³⁵³

³⁴⁸ Mostly cited instances where truth commission or bodies with similar mandated are to be found in Latin American post-dictatorial regimes (Argentina, Chile, Guatemala, El Salvador and in Post Apartheid South Africa. For more details see: D. Roche, 'Truth Commissions, Amnesties and the International Criminal Court', 45 *Brit. J. Criminology* (2005), pp. 566-567.

³⁴⁹ Human Rights Watch argues that these processes contravene international law (HRW, *supra* note 249 p. 14); see also T. H. Clark, *supra* note 249, p. 408.

³⁵⁰ D. Robinson, *supra* note 251, pp. 483 *et seq.*; T. H. Clark, *supra* note 249, pp. 402 *et seq.*

³⁵¹ D. Roche, *supra* note 339, p. 567. According to J. Dugard ('Possible Conflicts of Jurisdiction with Truth Commissions' in A. Cassese et al. (eds), *supra* note 1, p. 700 *et seq.*), reference thereon was avoided during the negotiating process when it was clear that there was no agreement on how amnesties (and truth commissions) should be dealt with. See also on the omission of a related provision: D. Robinson, *supra* note 251, pp. 482-484.

³⁵² *Supra* note 338; See also J. K. Kleffner, *supra* note 335, pp. 88-89 whereby the author states that "the administrative burden connected to a large number of cases, are understood not to be covered since the ICC is not envisioned as an adjunct to national systems".

³⁵³ W. A. Schabas, 'Genocide trials', *supra* note 336, p. 894.

Since there is not so far any recorded instances where international criminal institutions had to deal with amnesties, truth and reconciliation commissions or other similar institutions deemed as falling short of internationally recognized standards, the ICC will have to take a position in the future as to their compliance with international law.³⁵⁴ Equally debatable is the way the court might deal with instances of pardons and paroles which might be granted subsequent to criminal prosecutions and convictions by domestic courts. Non-inclusion in the statute of a provision related thereto has been considered as one of the strongest weaknesses in the statute.³⁵⁵

The inclusion of amnesties and of truth and reconciliation commissions, Gacaca courts or any other related institution into the legal coverage of the “interests of justice” in the statute remains arguable but will have to be determined in the future by the court.³⁵⁶ The latter will have to take into consideration instances where post conflict governments face complex situations whereby criminal prosecutions do not constitute the most viable option. Moreover, given the strongly affirmed determination expressed in the statute to prosecute persons suspected of committing international crimes, it remains to be seen, in case the court admits the compliance of these processes with the statute, how they will be dealt with under the complementary principle premised on involvement of the court in instances of national authorities’ inability or unwillingness to prosecute. Finally, the solemn affirmation of irrelevance of official capacity and immunities attached to the status of the offender in article 27 of the statute was contradicted by the International Court of Justice ruling in the 2002 Arrest Warrant case as far as a serving official is concerned.³⁵⁷ Given the fact that the provision doesn’t seem to establish any difference between officials still in exercise of their duties or those no longer serving (like in the Pinochet case before the British House of Lords)³⁵⁸, it remains to be seen how the court will independently and impartially discharge itself with this challenging task .

³⁵⁴ Dugard *supra* note 342, p. 693.

³⁵⁵ Bertodano, *supra* note 296.

³⁵⁶ Article 53 (1) (c) and (2) (c). For a discussion of compatibility of truth commission, amnesties and similar processes with the Rome statute, see D. Robinson, *supra* note 251, pp. 486 *et seq.*

³⁵⁷ *Case concerning the Arrest Warrant*, *supra* note 171.

³⁵⁸ House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other (Appellants), Ex Parte Pinochet (Respondent)(On Appeal from a Divisional Court of the Queen's Bench Division); Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3)*, Judgment of 24 March 1999, at <www.parliament.the-stationery-office.co.uk>, visited on 14 April 2006; S. Jonas, ‘The Ripple Effect of the Pinochet Case’, 11 *Human Rights Brief* 3, pgs. 36-38, *American University Washington College of Law*, May 2004, at <www.globalpolicy.org/intljustice/universal/2004/0524ripple.htm>, visited on 14 April 2006.

6.3 Areas of conflict between national and international proceedings

Besides amnesties, truth and reconciliation commission and similar processes (including the Gacaca courts), there are other difficulties raised by concurrent (ICTY and ICTR) or complementary (ICC) criminal jurisdiction between national and international courts.³⁵⁹ The principle implies compliance, by either forum, with the *ne bis in idem* rule as specifically provided for, and under the limits set by article 20 of the statute.³⁶⁰ Despite the numerous benefits presented by international criminal institutions, mostly their ability to secure host states cooperation in arrest and surrender of suspects out of reach of national authorities of states with primary jurisdiction, the exercise of jurisdiction by both national courts and the International Criminal Court over crimes falling in one single context presents a number of challenges and paradoxes which seem generally to be overlooked or ignored in dominant literature in international criminal law:

The first paradox is a situation where the most responsible offenders enjoy favourable treatment before international criminal institutions than persons prosecuted before national court in those instances of complementary prosecutions by both *fora*. Due to many factors including resources at their disposal, international criminal institutions do their best to comply with due process requirements that are not always met by many national courts.³⁶¹ Nonetheless, owing to the former's practice initiated since Nuremberg and Tokyo tribunals favouring their prosecution of the most outstanding suspects (labelled as "big fish" by ICTY and ICTR prosecutions),³⁶² persons considered as most accountable for committed crimes end up benefiting from more favourable treatment throughout the judicial process than subordinate offenders, notwithstanding some shortcomings in international processes.³⁶³ As stated by the Rwandan president with regards to the ICTR, prisoners held by the tribunal enjoy better living conditions than most Rwandans in the country, not only detainees in national jails, hence the persistent scepticism and resentment in the country about the role of the

³⁵⁹ Concurrent jurisdiction, mostly with regards to national jurisdictions and ad hoc tribunals for the Former Yugoslavia and Rwanda were alluded to in sections 2.2.2.2 and 2.2.2.3.

³⁶⁰ J.T. Holmes, *supra* note 205, pp. 671 et seq.

³⁶¹ See for an allusion thereon the hypothetical case by T. H. Clark, *supra* note 249, p. 411.

³⁶² Sufficient Resources Required for Yugoslav, Rwanda Tribunals to Complete Work on Schedule, General Assembly Told, *Fifty-ninth General Assembly*, Press Release, GA/10297 at <www.un.org/News/Press/docs/2004/ga10297.doc.htm>, visited on 01 April 2006; J. Vogel, 'How to Determine Individual Criminal Responsibility in Cases of Systemic Contexts: Twelve Models', p. 5, at <www.defensesociale.org/02/16.pdf>, visited on 01 April 2006.

³⁶³ C. Ryngaert, 'Universal Jurisdiction in an ICC Era: A Role to Play in EU Member States with Support of the European Union', *Institute for International Law, Working Paper No 87, September 2004*, p. 14 et seq., at <www.law.kuleuven.ac.be/iir/nl/wp/WP/WP87e.pdf>, visited on 01 April 2006.

tribunal.³⁶⁴ These advantages are noticeable from arrest, throughout the whole judicial procedure, including sentences and favourable conditions in serving imprisonment sentences. If compliance with due process requirements is a pillar of the judicial process to be complied with by both national and international criminal institutions, imbalances engendered by unequal levels of compliance due to many factors, including resources at the disposal of given institutions, certainly have an impact on the process as far as victims and general public are concerned.

As far as sentences are concerned, the paradox faced by *ad hoc* tribunals was well pictured by Ferencz when he writes: “Security Council statutes for both *ad hoc* tribunals – following European human rights conventions – outlawed the death penalty. Lesser criminals might face death imposed by summary national courts in Rwanda while the ‘big fish’ under arrest in The Hague for planning the genocide might escape with only imprisonment”.³⁶⁵

It is worth noting here that the problem is not only about death penalty – as advocating its application by an international criminal organ is currently untenable – but the whole sentencing system whereby whenever there are genuine prosecutions and depending on given situations, national courts are more likely to pronounce harsher punishments.³⁶⁶ While an extensive literature is dedicated to implementation of the ICC statute in national legal orders, and at the international plane, differential treatment of offenders is overlooked.

Furthermore, under the completion strategy resulting in handing over of some cases to national courts, the *ad hoc* tribunals for Rwanda and former Yugoslavia are pushing some states (namely those where crimes were committed) to institutionalize differential treatment of suspects in domestic judicial order.³⁶⁷ In transferring cases to Rwanda, the ICTR sought assurance that death penalty will not be applied to those persons whose files were submitted to Rwanda by the ICTR and co-financed a detention facility responding to international norms to host them.³⁶⁸ Despite the benefits of judging suspects in the country where crimes were committed, this institutionalised preferential treatment inside Rwanda of offenders subjected

³⁶⁴ P. Kagamé ‘Je n’ai pas de temps à perdre’, *Jeune Afrique l’Intelligent*, N. 2351, Du 29 Janvier au 4 Février 2006, p. 39.

³⁶⁵ B. B. Ferencz, ‘From Nuremberg to Rome: A personal Account’, in M. Lattimer and P. Sands (eds.), *Justice for Crimes against Humanity*, at <http://www.benferencz.org/arts/76.html>, visited on 29 March 2006.

³⁶⁶ For a discussion on incidence of national factors in judicial decision making, see: J. Meernik et al., ‘Judicial Decision Making and International Tribunals: Assessing the Impact of Individuals, National, and International Factors’, 86 *Social Science Quarterly* 3 (September 2005), pp. 687 *et seq.*

³⁶⁷ ‘Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR to the United Nations Security Council’, 15 December 2005, at <<http://65.18.216.88/ENGLISH/speeches/jallow151205.htm>>, visited on 01 April 2005.

³⁶⁸ Arusha Hironnelle News Agency, ‘ICTR/Prisons - One Death and an Attempted Suicide Registered at the ICTR Detention Centre in Ten Years’, 14 March 2006, at <www.hironnelle.org/arusha.nsf/LookupUrlEnglish/2CCD42AECEBBBEF84325713100325A2D?OpenDocument>, visited on 01 April 2006.

to ICTR proceedings constitutes an additional source of resentment against the court in the country. Similar criticisms are levelled against the ICTY completion strategy resulting in transfer of cases to former Yugoslav republics.³⁶⁹ Proceedings in former Yugoslav Republics (mainly Serbia and Montenegro, Croatia and, Bosnia and Herzegovina) have been criticised for ineffectiveness and ethnic bias.³⁷⁰ In its completion strategy as endorsed by the Security Council Resolutions 1503 (August 2003) and 1534 (March 2004),³⁷¹ the ICTY vowed to “concentrate on the prosecution and trial of the most senior leaders while referring a small number of cases involving intermediate and lower-rank accused to national courts”.³⁷² In this respect, it used all its weight in influencing the establishment of the War Crimes Court in Bosnia and Herzegovina were most of the crimes in the former Yugoslavia were purportedly committed.³⁷³ As in the Rwandan case, the court contemplates assisting national courts in trying persons subjected to ICTY investigation, which suggests that they will also be subjected to a preferential procedural and imprisonment treatment in comparison with cases entirely handled by national courts.³⁷⁴ Thus, some sceptical voices have argued that the tribunal has failed to fulfil the stated goal for its establishment.³⁷⁵

The second challenge the ICC will face is the harmonization between international proceedings and national processes in those areas where they intersect or conflict. The application of jurisdiction provisions in the ICC statute, as previously analysed,³⁷⁶ leaves some grey zones as far as bringing perpetrators of international crimes to justice is concerned. In addition to temporal limitations which, as previously alluded to, will certainly affect exhaustive and contextual prosecution of crimes committed in at least two of the currently referred situations,³⁷⁷ differences in subject-matter jurisdiction between national and international processes will most likely emerge. Even where it is optimistically assumed that states parties to the ICC statute will integrate the latter into their domestic legal order, thereby

³⁶⁹ M. Bohlander, ‘The Transfer of cases from International Tribunals to National Courts’, p. 2 et seq., at <<http://65.18.216.88/ENGLISH/colloquium04/bohlander/Bohlander.pdf>>, visited on 04 April 2006.

³⁷⁰ HRW, ‘A Chance for Justice? War Crime prosecutions in Bosnia’s Serb republic’, Vol. 18, No 3 (D), March 2006, pp. 3 et seq., at <www.hrw.org/reports/2006/bosnia0306/bosnia0306webwcover.pdf>, visited on 04 April 2006.

³⁷¹ For Resolutions 1503 (August 2003) and 1534 (March 2004), see *supra* note 39 and 202 respectively.

³⁷² ICTY, ‘Partnership and Transition between the ICTY and National Courts’ at <www.minugua.guate.net.gt/icty/cases-e/factsheets/partnership-e.htm>, visited on 04 April 2006.

³⁷³ M. Bohlander *supra* note 360.

³⁷⁴ *Ibid.*, see also: ICTY, *supra* note 363.

³⁷⁵ E. S. Herman, ‘The Hague Tribunal: The political Economy of Sham Justice’, *Center for Research on Globalization*, 20 November 2005, at <www.globalpolicy.org/intljustice/tribunals/yugo/2005/1120sham.htm>, visited on 29 March, 2006.

³⁷⁶ See *supra*, chapters 3 and 4.

³⁷⁷ Ugandan and D. R. Congo situations see: *supra* section 3.2, note 56.

avoiding possible normative differences,³⁷⁸ there might remain areas where, due to the gravity of crimes prerequisite for ICC exercise of jurisdiction, prosecutions by the latter will fall short of rendering justice as sought by the victims.

It is worth recalling that the court primarily exercises jurisdiction over the most serious crimes of international concern as detailed in the statute and rules of procedure. Nonetheless, situations of armed conflicts have revealed that other so-called minor connected crimes are committed in the same course of criminal action.³⁷⁹ The most cited cases are related to property crimes (not falling under the purview of, or reaching the threshold set by article 8) committed in connection with crimes under ICC jurisdiction.³⁸⁰ In case the exercise of jurisdiction by the court results into partial justice for the victims due to the exclusion of those crimes not falling under the statute for lack of gravity, national courts will not be precluded from exercising jurisdiction over those crimes subsequently to the ICC processes as they fall outside the ambit of the *ne bis in idem* prohibition.³⁸¹ Such contrast in crimes definitions is once more illustrated by the Rwandan context whereby, under the categorisation system of crimes committed during the 1994 genocide, crimes against property committed under the same motivations as the genocide, are classified in category 4.³⁸² In such cases of discrepancies in criminal prosecutions by the ICC and national courts, many problems might arise in availing an ICC convicted or acquitted person to national jurisdictions for possible prosecution for crimes not addressed by the court.³⁸³ The same applies to crimes committed before the entry into force of the ICC statute which will consequently be excluded from the ICC temporal jurisdiction. The D. R. Congo and Uganda situations before the court offer future challenges to the latter in this respect as both conflicts started long before the adoption and entry into force of the statute.

³⁷⁸ For a discussion on the need for national implementation of the Rome statute, see: V. Oosterveld, M. Perry and J. McManus, *supra* note 271, pp. 767 *et seq* (relating mainly to specific obligations related to cooperation...); J. K. Kleffner, *supra* note 309, pp. 86 *et seq*. This leaves apart the discussion of possible differing and even contradicting definitions of crimes (ordinary crimes versus most serious crimes of international concern in the statute) between domestic laws and the ICC statute.

³⁷⁹ J. K. Kleffner, *supra* note 309, pp. 89-100.

³⁸⁰ *Ibid.*, pp. 96-97.

³⁸¹ *Ibid.*

³⁸² Article Organic Law N° 16/2004 of 19/06/2004 Establishing the organization, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide or and other crimes against humanity committed between October 1, 1990 and December 31, 1994, modifying and completing Organic Law N° 40/2000 of January 26, 2001, accessed at <www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf>, on 14 April 2006.

³⁸³ Depending on the rights granted to the detainee in the host country (in case the person subject to a request for a new trial was handed an imprisonment sentence by the ICC) and subject to the provisions of article 108 of the ICC statute, difficulties might arise in availing the person to national jurisdictions (refrain from extraditing a person to places where he/she purportedly faces death penalty or other grave violations of internationally guaranteed rights).

Difficulties will likely arise if national courts are willing to try suspects for crimes committed during this prior period.³⁸⁴

In the same vein, inclusion of participation rights of victims in the ICC statute is not a panacea in ensuring inclusiveness in the proceedings. Provision in the statute for participation of and reparations to victims of crimes mainly by articles 68 and 75 respectively, as supplemented in details in corresponding rules of procedure,³⁸⁵ and the correlated instauration of a trust fund in article 79, have rightfully been lauded as a significant innovative step in international criminal law, in contrast to past *ad hoc* tribunals statutes.³⁸⁶ The benefits of inclusion of victims in the criminal process are multiple and their analysis goes beyond this study. Nonetheless, the exercise of this right will not go without some difficulties related to possibility of participation of all victims in the proceedings. The definition of victims in rule 85 to include natural persons but also organisations or institutions having suffered (direct) harm as a result of the commission of any crime within the jurisdiction of the court opens a wide gate which might prove burdensome to the institution, depending on factual circumstances of a given situation.³⁸⁷ In post-conflict situations where numerous crimes are committed and some high profile incriminated persons are prosecuted not only for their possible direct participation in the commission of crimes but also for their indirect role as leaders in the planning, conspiracy and incitement to commit them (command responsibility), it is challenging to assess selectively who qualifies as victim of the committed crimes, and thus, disposes of participation rights in such cases.

Taking *ad hoc* tribunals' cases as examples, it is not an easy task to set objective criteria as to who are the victims of crimes for which defendants or indicted persons Prosecutor v. in Milosevic, Karadzic, Mladic, before the ICTY and Kambanda, Gov. I and II, and Media cases before the ICTR.³⁸⁸ The common ground for those cases is the criminal enterprise affecting the conflict as a whole.

Furthermore, in those intricate situations, interconnectedness of cases prosecuted separately by the ICC and national courts will render reparation exercises more complicated than if cases were heard by a single court. Reparation could therefore be successful in situations of limited complexity, with a limited number of victims. The nature of crimes under the court's jurisdiction just predicts the contrary.

³⁸⁴ For more on both conflicts, see: *supra* note 56.

³⁸⁵ Rules 85-99 of the ICC Rules of Procedure and Evidence.

³⁸⁶ For literature thereon, see *supra* note 242; G.J. Mekjian and M.C. Varughese, *supra* note 243, pp. 7 *et seq.*

³⁸⁷ R. Aldana-Pindell, *supra* note 326, pp. 1428 *et seq.*

³⁸⁸ *Prosecutor V. J. Kambanda* (Case no.: ICTR 97-23-S), Judgement 4 September 1998; *Prosecutor v. Ferdinand Nahimana...*, *supra* note 33; at <<http://69.94.11.53/ENGLISH/cases/status.htm>, >, visited on 15 April 2006.

7 Conclusion

The entry into force of the Rome statute of the international criminal court undoubtedly signalled a new breath in efforts to combat impunity beyond national borders. It concretised numerous efforts for over a century to assert accountability at the international plane for those crimes perceived, by their nature, as shocking the consciousness of mankind. The international legal order was thus enriched by a normative arsenal enabling for international criminal prosecution of persons suspected of genocide, crimes against humanity, some war crimes and in the future the crimes of aggression, absent national effort to ensure accountability. The statute represents the hope that persons falling under territorial, temporal and personal jurisdiction of the court will not longer enjoy impunity.

Drawing on the pitfalls of past international criminal law experience, the drafters of the Rome statute of the International Criminal Court enriched the latter with unprecedented provisions aimed at ensuring an independent and impartial justice, mindful of the interests of all parties involved, including the victims. Analysed under this perspective, the adoption of the Rome statute of the International Criminal Court inscribed an additional chapter in an enterprise initiated since the end of the Second World War, mainly through the development of international human rights law, aimed at curbing the previously prevailing sacrosanct principle of state sovereignty as enshrined in the UN Charter. Since the said principle erected for many years an insuperable obstacle to the protection of individuals against gross violations of their fundamental rights by or with toleration of their governments, the statute offers a possibility of accountability, under specified circumstances and within its limits, for the most horrendous crimes.

Nonetheless, despite this undisputable positive step in international law, numerous shortcomings in the statute, as assessed through the lenses of the experience for the *ad hoc* tribunals for the former Yugoslavia and Rwanda, push for more prudent excitement about the achievement represented by the Rome statute. Thus, without constituting an additional pamphlet on the positive advances represented by the adoption of the Rome statute, this study focused on the remaining loopholes in the statute likely to hamper its proper functioning, notably independence and impartiality. Bearing in mind the complexity surrounding the currently referred cases before the International Criminal Court and based on several challenges encountered by both the ICTY and the ICTR, the study debated the difficulties the court might likely face in the future.

The limited subject matter temporal and territorial jurisdiction of the international criminal court will certainly adversely affect its functioning. Being instituted by a treaty, there is still room for deploring its non-global coverage, despite the growing number of states having signed or adhered to

the statute of the court. Impunity for authors of crimes within the jurisdiction of the court remains a possibility in instances where they are committed in non-states parties, or by persons present on non-state parties' territories, unwilling to act or surrender them to the court; and absent an intervention by the UN Security Council which remains very much subjected to political preconditions and; is less likely to act in cases involving powerful states. The nature of crimes within the court's jurisdiction, temporal and territorial limitations, combined with the statute provisions on the exercise of jurisdiction will certainly make it very difficult for the court to properly and independently initiate proceedings outside political interferences. In those cases where the court has leverage to act, the experience of the ICTY and the ICTR have revealed multiple intricacies involved in proving cases involving genocide and, to some extent, some war crimes and crimes against humanity. Despite the currently rich related case-law thanks to both *ad hoc* tribunals and, to some extent, to the Nuremberg and Tokyo tribunals, there subsist many difficulties in proving a genocidal intent or a widespread and systematic character attached to the commission of crimes as required by the statute. Even if it is premature to make predictions on the Northern Uganda, D. R. Congo and Darfur situations before the court at this very early stage in the proceedings, it is less exaggerated to state that these situations are reflective of most of foreseeable legal technical challenges the court will face in the future, given the complexity and length of these conflicts as well as the widespread character of the crimes committed implying a more likely massive criminal participation.

The complementarity principle in the statute paradoxically constitutes both the force and the weakness in the ICC system. The wide geographical coverage and limited recourses of the court, making it unable to respond to all foreseeable cases involving the commission of crimes in the court's jurisdiction calls for its intervention only in those where states with jurisdiction over the crimes are unable or unwilling to act. The principle lessens the court's burden. Nonetheless, despite provisions in the statute and rules of procedure to that effect, assessment of the "inability" or "unwillingness" is far from being an easy task. Since most instances of crimes in question are generally committed by or with toleration of state apparatuses, the ICTY and ICTR experiences have revealed difficulties involved in availing suspects to the court with national authorities pledging – whether genuinely or not - to act.

On the other hand, the Northern Uganda case has revealed how governments are keen to subject persons "on the other side" to international adjudication, more out of political calculations –securing international cooperation in tracking the suspects in the latter case - than genuine interest in the judicial process. In this respect, the question of ability and willingness to prosecute are interlinked even if on a more technical legal note they are separate. As it has been rightly argued, Ugandan move to submit the Northern Uganda case to the ICC was first and foremost motivated by a political calculation aimed at attracting the attention of an indifferent international community to a

bloody conflict that had been going on for two decades. The move intended to seek the latter's cooperation in putting an end to the conflict and bringing the offenders to justice where functioning national courts were incapacitated to act by the impossibility of apprehending the suspects than lack of willingness or any collapse of the judicial system.

Thus, despite the salutary option presented by the ICC in the Ugandan and the other cases currently under its examination, the court's temporal limitations will hamper an effective prosecution of crimes which are otherwise said not to be subject of statutes of limitation. Moreover, state cooperation remains a key issue in eradicating impunity for authors of crimes within the court's jurisdiction. But reliance by the latter on this cooperation in those cases where state officials asked to cooperate might be suspects, calls for caution in the viability of the system. The alternative is to hope for international community's pressure but the latter is only possible against developing states and thus open for politicisation.

An equally complex problem involved in the working of the international criminal institutions is the arbitrariness – and at times opportunism - attached to prosecutorial discretion in selecting cases for prosecution among many others highly important as it has been acknowledged by ICTY and ICTR prosecutions. Despite adoption of prosecutorial guidelines, it remains difficult to set criteria in selecting cases where the statute does not adopt a hierarchy of crimes considered by their very nature as being “the most serious crimes of concern to the international community”. This discretion not subjected to any objective criteria is very much opened to politicisation. Hence, in those conflicts involving inter-(ethnic) group violence, lack of objective criteria will always leave room for questioning prosecutorial motivation in choosing cases: gravity of crimes committed or search for ethnic balancing. The court needs to depart from its predecessors' often perceived image justice of the strong by making sure there is room for prosecuting any person, despite his/her status, country of origin, as far as other jurisdictional grounds are fulfilled.

The positive innovation in the statute on participation and reparation rights for victims will add more complex procedural and selectivity procedure on processes renowned for dragging on for years. In this and other instances, the *problématique* of harmonization between national and international processes will present further challenges. Finally, despite considerations on interests of justice in the statute, lack of clear and express provisions on amnesties, pardons, truth and reconciliation commission might in the future lead to conflicting prioritization –justice for victims by the court and peace and security for states – and thus to collision between different perceptions of interests involved.

Thus, one of the main challenges awaiting the first permanent international criminal institution will be an unhindered independent exercise of jurisdiction without interference of (geo)political considerations. The court needs to go beyond the formal recognition of equality between states and act

whenever crimes in its jurisdiction are committed, regardless of whether they are committed on territories or by nationals of developed/rich or developing/poor nations. Otherwise it will end up being one additional instrument of the establishment in the international relations.

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