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The International Criminal Court
*-Its Jurisdictional Regime and
Relationship with the UN Security
Council-*

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Abbreviations

Dec.	Decision
Doc.	Document
EPIL	Encyclopaedia of Public International Law
GA	General Assembly
GAOR	General Assembly Official Records
HRW	Human Rights Watch
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
LCHR	Lawyer Committee for Human Rights
NGO	Non-Governmental Organisation
Op.	Operative
Para.	Paragraph
Pre.	Preambular
Res.	Resolution
SC	Security Council
SCOR	Security Council Official Records
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNTS	United Nations Treaty Series

1 Introduction

1.1 Background

On the 17 of July 1998, the United Nations Diplomatic Conference in Rome voted to adopt the Statute of an International Criminal Court. The UN Secretary-General, Kofi Annan, closed the ceremony this day by stating that the Statute was a "gift of hope to future generations, and a giant step forward in the march towards universal human rights". For the first time in history there will be a permanent, international judicial body empowered to prosecute and punish the most serious crimes of concern to the international community. In the International Criminal Court we will have a new instrument that will replace a culture of impunity with a culture of accountability. The Statute represents an urgent step to fill the gap of efficient enforcement mechanisms for human rights and humanitarian law. The Statute has been described as a milestone in the efforts to end impunity of the most serious international crimes; by holding individuals accountable the Court can have a deterrent effect on future crimes.

1.2 Purpose and delimitation of the topic

The purpose of this thesis is to assess if the Statute adopted in Rome will found a Court that can realise the above mentioned potentials and that can fulfil the high expectations put on it. In order for the Court to perform its tasks of dispensing justice and acting as a deterrent, it must be credible, independent and effective. In this paper I will address the question whether the Court will have the prospects to live up to those criteria. The credibility, effectiveness and independence of the Court will be determined by a set of interrelated issues; involving its relationship with the UN Security Council, the Court's jurisdiction, the potential for politisation of the Court and the support from the states. These issues are however incompatible to some extent and have to be balanced against each other. One first area of contradiction is the support from the states and the Court's jurisdiction in a broad sense. The credibility of the Court is closely determined by what kind of crimes it is empowered to hear. If the cases that are prosecuted by the Court are arbitrarily and selectively chosen the Court will lose credibility and the states will refuse to refer cases and co-operate in other ways. If the states are given too wide possibilities to refuse the Court's jurisdiction the work of the Court could be paralysed. On one hand the Court should have a wide jurisdiction and should have the possibility to prosecute the crimes under its jurisdiction wherever in the world they are committed. On the other hand the effectiveness of the Court is to a great extent depending on the political will of the states. In fact the Court will not even come into existence if the Statute is not ratified by 60 states or more. The ratification of as many states as possible is important in order for the Court to function

properly. The Court would be the most effective if the Statute received universal ratification. Therefore, there has to be a balance in the Statute so that the rules give the Court enough strength to work effectively, but the rules should not be so strong that they discourage the states from ratifying the Statute.

Another delicate balancing concerns the Court's relationship with the Security Council, the Court's jurisdiction and the fear of politisation of the Court. On one hand, the Court's credibility and judicial independence will be in danger if it is subject to the political influence of the Security Council. On the other hand the Council could support the Court with cases, and extend the Court's jurisdictional reach to the whole world. The question of what role the Council should play in the Court, without questioning its judicial independence, is complicated by the fact that the Council derives its powers from the UN Charter, a document that is overriding the Rome Statute. Since it was not open to the Rome Conference to confer a new power to the Security Council, or to control the exercise of the existing powers, it is important to fully understand what powers the Council have under the UN Charter, before one can assess what role it will play in the Court's future. In this thesis I will address and try to answer the question if the right balance has been struck in these cases and if the fruit of the Conference in Rome has the prospects of becoming an effective, independent and credible Court.

The thesis will only discuss issues that concern the Court's jurisdiction in a broad sense. It will deal with the subject matter jurisdiction, the preconditions to the exercise of jurisdiction and the question of what entities that can trigger the Court's jurisdiction. Also the part on the Court's relationship with the Security Council will concentrate on the role the Council will have in triggering and barring the Courts jurisdiction. Other interesting issues, such as the state parties obligation to co-operate with the Court in its investigation and prosecution of crimes, and the Security Council's role in ensuring compliance with these obligations will be left aside.

1.3 Method and material

In order to answer these questions I have scrutinised the negotiating process from the first Draft Statute, proposed by the International Law Commission in 1994, till the final Statute adopted in Rome. The thesis is mainly based on the material from the different Committees that have been negotiating the Statute on the way to Rome as well as the material from the Rome Conference, where state delegations compromised their different views into the Statute. The different opinions of the delegations, the arguments and counter arguments for different solutions, will be presented and discussed. I have also used material from different human rights organisations and other non-governmental organisations that closely followed the negotiations.

During the negotiating process and after the adoption of the Statute, many articles were written on the subject. A great number of these are written by members of the different delegations in the negotiations. The views forwarded in these articles are however not representing the views of their governments, but should be seen as the writers' personal opinions.

In the descriptive chapter on the Security Council, I have relied on the fundamental literature on the subject, such as Simma's and Benwittch/Martin's commentaries to the UN Charter as well as Kelsen's analysis of the law of the UN. More critical and up-to-date material has however been used in the part concerning the Council's use of powers. Among the material used is Österdahl's critical study of the Council's use, or misuse, of its power to interpret its own jurisdiction, and articles commenting on the Council's action in the most important international crisis.

1.4 Disposition

Since I use this method it is important to understand how the negotiating process has worked. I will therefore begin this thesis with a chapter on the historical background of the Court, which will begin at the time of World War I and the dream of an international criminal court, and continue through the different steps in the negotiating process, up until the adoption of the Rome Statute. In the third chapter I will briefly describe the crimes that are under the Court's jurisdiction and comment on the reasons for choosing these crimes. In chapter four I will more thoroughly analyse the preconditions that have to be met before the Court can exercise its jurisdiction. In chapter five of the thesis the different trigger mechanisms will be discussed. I will present the entities that can trigger the Court's jurisdiction and discuss what implications these powers have for the effectiveness, impartiality and credibility of the Court. The remaining part of the thesis will be devoted to the Court's future relationship with the UN Security Council. The first chapter in this part, chapter 6, will present the powers that the Council has been given through the UN Charter, how the Council has developed these powers in its practise and what the legal and political limitations to these powers are. I will go quite deep into these questions since I think it is important to see how the Council has worked and made use of its powers in the past, in order to establish how the Council will function in relation to the Court in the future. In the 7th chapter I will go deeper into the question of what problems and potentials that will become relevant in the relationship between the Council, as a political entity, and the Court as a judicial organ. The following two chapters will take up the two powers given to the Council in relation to the Court's jurisdiction. Chapter 8 will deal with the Council's power to refer cases to the Court and chapter 9 its power to defer the Court's jurisdiction. In the concluding 10th chapter I hope to give a good picture of what the strengths and weaknesses are in the

Statute and an opinion on whether the Court has the prospects of fulfilling the goals it has been set up to meet.

2 Historical background

2.1 The dream of an international criminal court

The idea of a permanent criminal court is nothing new. The First World War is usually seen as the starting point of the efforts to create such an institution.¹ At the end of World War I, the Allies established a commission to investigate and recommend action on war crimes committed by the defeated Central Powers. After the War, the Treaty of Sevres and the Treaty of Versailles, respectively, provided for the prosecution of Turkish and German war criminals before international tribunals.² However no international tribunals were established for this purpose.³ Despite this experience of failure in the effort to establish war crime tribunals after the First World War, the Allies decided to conduct such trials at the conclusion of World War II. In August 1945, the victorious governments of France, the United Kingdom, the United States and the Soviet Union met in London and concluded an agreement providing for the establishment of the International Military Tribunal at Nuremberg to try the Germans accused of crimes against the peace, war crimes and crimes against humanity.⁴ The indictments were filed on 18 October 1945 and judgements were given on 1 October 1946.⁵ On 19 January 1946 an International Tribunal for the Far East was also established in Tokyo. The Tribunal started its work on 29 April 1946 and judgement was read out 4-12 November 1948.⁶ The Tribunals in Nuremberg and Tokyo has regularly been the object of criticism, the two major reasons being that they were applying victor's justice and *ex post facto* law. Only the acts of the vanquished were judged, although, at least in the field of war crimes, the Allies had regularly committed crimes as well. Furthermore, especially the crime against peace was considered by several critics as not being part of international law, at least not at the time the acts were committed.⁷

¹ There are however examples in the literature of so-called precedents of international criminal courts in much older days. See e.g. V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol.1, 1995, p.1, where reference is made to the trial of Peter von Hagenback in 1474.

² H. von Hebel, *An International Criminal Court - A Historical Perspective*, In: *Reflections on the International Criminal Court*, 1999, p. 13-38, at p.15-16

³ Trials against the Germans were instead held before the German Supreme Court sitting in Leipzig. Of the 896 Germans accused of war crimes only twelve were tried and of those only six were convicted. See C. Bassiouni, V.P Nanda, *A Treatise on International Criminal Law*, 1973, p.566-567

⁴ V. Morris and M.P. Scharf, 1995, p.1

⁵ Of the twenty-two German officials who were tried at Nuremberg, nineteen were found guilty; of those twelve were sentenced to death.

⁶ A total of 28 persons were tried by this Tribunal and all of them were convicted.

⁷ M. K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, In: *Duke Law Journal*, No.3, 1999, p.825-853, at p.827

During and after Nuremberg, many states and non-governmental organisations began to recognise that a permanent international tribunal would be necessary to deal with such outrages in the future.⁸ In 1948, the General Assembly requested the International Law Commission to study the desirability and feasibility of establishing an international penal tribunal⁹ and in 1950 the General Assembly decided to establish a Committee to draft a statute for an international criminal court.¹⁰ The Committee submitted a draft statute in 1951¹¹, which was subsequently modified in 1953.¹² The consideration for this topic was then sidelined for decades by the Cold War.¹³ Serious violations of humanitarian law occurred under the Cold War period, but no international regime existed to punish offenders.

In 1989, with the Cold War coming to a close, the ILC took up its work on a draft statute for an international criminal court. The violations of international humanitarian law in the former Yugoslavia, as well as the genocide in Rwanda, provided dramatic confirmation that an international criminal court was indeed still needed. For the establishment of ad hoc tribunals for these situations see 6.7.4. It is in this context sufficient to state that the creation of these tribunals represented a significant step forward in the prosecution of international crimes. Richard Goldstone, the original chief prosecutor for both tribunals described them as “the first real international attempt to enforce international humanitarian law.”¹⁴ The creation of the Yugoslav Tribunal had a positive influence on the work of the ILC.

2.2 The negotiating process

It was not until 1992 that the ILC undertook a more in depth analysis of the issue of creating an international criminal court. In resolution 47/33 of 25 November 1992¹⁵, the UN General Assembly asked the ILC to continue its work as a matter of priority. A Working Group was set up to elaborate a set of draft articles, including short commentaries, and in 1994 the ILC finished its work and presented its Draft Statute¹⁶ to the General Assembly. The ILC

⁸ Ibid.

⁹ G.A. Resolution 260 B (III) of 9 December 1948

¹⁰ G.A. Resolution 489 (V) of 12 December 1950

¹¹ Draft Statute for an International Criminal Court prepared by the Committee on International Criminal Jurisdiction, UN GAOR, Seventh Session, Supplement No.11, A/2136 (1952)

¹² Revised Draft Statute for an International Criminal Court prepared by the Committee on International Criminal Jurisdiction, UN GAOR, Ninth Session, Supplement No.12, A/2645 (1954)

¹³ H. von Hebel, 1999, p. 22-26

¹⁴ See B. O’Hara-Foster, *Justice Goes Global*, In: Time International, July 27, 1998, p. 46 (quoting Richard Goldstone)

¹⁵ G.A. Resolution 47/33, UN Doc. A/RES/47/33 (1992)

¹⁶ Report of the International Law Commission on the work of its Forty-Sixth Session, 2 May-22 July 1994, Draft Statute for an International Criminal Court, Chapter II.B.I, UN

recommended to the General Assembly “that it convene an international conference of plenipotentiaries to study the Draft Statute and to conclude a convention on the establishment of an International Criminal Court.”¹⁷ The Draft Statute was well received in the Sixth Committee of the General Assembly in autumn 1994. Still, however, a number of states expressed reservations on an International Criminal Court.¹⁸ Most states agreed that some preparatory work was needed before such a Conference could take place. By resolution 49/53 of 9 December 1994¹⁹, the General Assembly created an Ad Hoc Committee on the Establishment of an International Criminal Court, in an attempt to eliminate some of the controversy surrounding the Draft Statute. The Committee was open to all states and had the mandate to review and discuss the Draft Statute and offer recommendations in anticipation of an international conference of plenipotentiaries. The Ad Hoc Committee, in which about 60 delegations participated, met twice in 1995, and managed to fulfil its mandate and to discuss the most important issues.^{20 21} However, it took the Committee considerable time to deal with the question how to proceed. Although some delegations considered that more general discussions were still needed, before a decision could be taken on a possible Diplomatic Conference, other states were of the view that the mandate should be changed into preparing a draft text of the Statute, with a view of holding a Diplomatic Conference in the close future.²² The Ad Hoc Committee finally came to a compromise according to which “issues can be addressed most effectively by combining further discussions with the drafting of texts, with the view to preparing a consolidated text of a convention for an International Criminal Court as the next step towards consideration by a conference of plenipotentiaries.”²³

This suggestion was followed by the General Assembly: a Preparatory Committee was established which had the mandate to “discuss further the major [...] issues arising out of the draft Statute” and to prepare a “widely acceptable consolidated text of a convention for an International Criminal Court”.²⁴ The Prep Com met in 1996, 1997 and March-April 1998. In the beginning of its work, the meetings were public and the discussions are presented in reports.²⁵ In order to promote the negotiations and the

GAOR, Forty-Ninth Session, Supplement No.10/A/49/10 (1994), Hereinafter ILC Draft Statute

¹⁷ ILC Draft Statute, paras. 23-91

¹⁸ Topical Summary of the discussions held in the Sixth Committee of the General Assembly during its Forty-Ninth Session, A/CN.4/464/Add.1 of 22 February, 1995.

¹⁹ G.A. Resolution 49/53, UN Doc. A/RES/49/53 (1995)

²⁰ H. von Hebel, 1999, p.33

²¹ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GOAR, Fiftieth Session, Supplement No.22, A/50/22 (1995), Hereinafter Ad Hoc Committee Report

²² H. von Hebel, 1999, p.33

²³ Ad Hoc Committee Report, para. 259

²⁴ G.A Resolution 50/45, UN Doc. A/RES/50/45 (1995)

²⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996) UN GOAR, Fifty-first Session, Supplement No.22 A/51/22 (1996) and Vol. II

development of compromises, the Prep Com, as of 1997, did not meet anymore in public plenary sessions. Accordingly, no records were made of the meetings and only the outcome of the discussions, in the form of draft articles, were reproduced.²⁶ On 3 April 1998, during its last session, the Prep Com adopted a Draft Statute, which it submitted to the Conference.²⁷

On 15 June, the Diplomatic Conference on an International criminal Court was opened in Rome. 160 states participated in the Conference. The most important organ of the Conference was the Committee of the Whole, it was here the substantive discussions took place. By 16 July, the result of the discussions on all parts of the Statute were collected and the text was sent to the plenary of the Conference. The Statute was adopted on the 17 of July 1998, by 120 in favour, 7 against and 21 abstentions.²⁸

(Compilation of Proposals) UN GOAR, Fifty-first Session, Supplement No.22A, A/51/22 (1996) Hereinafter Prep Com Report, Vol. I and Prep Com Report Vol. II

²⁶ Decisions taken by the Preparatory Committee at its session held from 11 to 21 February, 1997, A/AC.249/1997/L.5 (1997), Decisions taken by the Preparatory Committee at its session held from 4 to 15 August 1997, A/AC.249/1997/L.8/Rev.1 (1997) and Decisions taken by the Preparatory Committee at its session held from 1 to 12 December, 1997, A/AC.249/1997/L.9/Rev.1 (1997)

²⁷ Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference, A/CONF.183/2/Add.1 (14 April 1998)

²⁸ H. von Hebel, 1999, p.37

3 Crimes within the Jurisdiction of the Court

Article 5 of the Statute gives the Court jurisdiction over the most serious crimes in the international community; genocide, crimes against humanity and war crimes. I will not go into the specific definitions of these crimes, but merely touch upon the issues that are of relevance for this paper.

The definition of **genocide** is taken from the 1948 Genocide Convention.²⁹ It covers specifically listed acts, such as killing and causing serious harm, committed with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group.³⁰ The rights of existence, which is the positive side of genocide, is an important human right that will be more effectively protected through the Statute.

Crimes against humanity cover those specifically listed acts, such as murder, extermination, rape, sexual slavery, crime of apartheid, etc., committed as part of a widespread or systematic attack directed against any civilian population.³¹ Crimes against humanity are traditionally seen as the crimes committed in wartime, and that they in a way ‘take over where the human rights leave off’. The Statute does however not mention a connection with armed conflicts, either of international or national character, and thus confirms that crimes against humanity, like the crime of genocide, are as applicable in peacetime as they are in wartime. This convergence or overlapping of humanitarian law and some serious human rights violations gives strength to the human rights since these crimes become criminalised under the Statute.

Under Article 8(1) the ICC has jurisdiction in respect of **war crimes** “in particular when committed as a part of a plan or policy or as a part of a large-scale commission of such crimes”. Article 8(2) provides an extensive list of war crimes “for the purpose of this Statute” It deals in turn with international armed conflicts and non-international armed conflicts. The inclusion of the latter provision was the subject of major controversy at the Rome Conference. A minority of states wanted non-international armed conflicts excluded from the subject matter jurisdiction.³² The war crimes listed in Article 8 cover grave breaches of the Geneva Conventions of 1949 other serious violations committed on a large scale in international armed

²⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

³⁰ Article 6. All Articles in this chapter refer to the Statute of the Court, if nothing else is stated.

³¹ Article 7

³² D. McGoldrick, *The Permanent International Criminal Court: An End to the Culture of Impunity?* In: *The Criminal Law Review*, August 1999, p.627-655, at. p.636

conflicts and some violations committed in non-international armed conflicts.

The reason for limiting the jurisdiction of the Court to these core crimes was the belief that it would provide a broader acceptance of the Statute and that it would enhance the credibility, moral authority and effectiveness of the Court.³³ In addition, it will avoid overloading the Court with cases that can be dealt with adequately by national courts. The selection of crimes was also related to the Court's future role. Limiting the Court's competence to a few core crimes would facilitate designing a coherent and unified approach to the exercise of jurisdiction and state co-operation.³⁴ Including other crimes, such as aggression, drug trafficking and terrorism, could have prevented the Conference from finalising the Statute.³⁵ If the Court becomes effective it is possible that the jurisdiction is extended to other crimes. It is probable that such incorporation will at first-hand be of the so-called "treaty-based" crimes, but it is also possible that more human rights related crimes can be incorporated.

³³ Ad Hoc Committee Report, para. 54

³⁴ M.H. Arsanjani, *The Rome Statute of the International Criminal Court*, In: American Journal of International Law, Vol.93, no.1, January 1999, p. 22-42, at p.25

³⁵ Lawyers Committee for Human Rights, *The Rome Treaty for an International Criminal Court; A Brief Summary of the Main Issues*, International Criminal Court Briefing Series Volume 2, Number 1, August 1998, p.4

4 Preconditions to the Exercise of Jurisdiction

4.1 Automatic jurisdiction or “opt-in/opt-out” regime?

4.1.1 General

An important question concerning the jurisdiction and the effectiveness of the Court is how and when the states give their consent to the Court’s jurisdiction. There were mainly two options that were discussed at the Rome Conference; the so-called “opt-in/opt-out” regime and the approach of automatic jurisdiction.^{36 37} Automatic jurisdiction means that a state automatically accepts the jurisdiction of the Court when it ratifies or accedes the Convention. No additional declaration of acceptance of specific categories of crimes is needed. According to the “opt-in/opt-out” regime, on the other hand, becoming a party to the Statute does not automatically mean that the state accepts the Courts jurisdiction. A state can ratify the treaty establishing the Court and retain the right to choose the crimes for which it will accept the Court's jurisdiction. The state parties to the Statute can selectively accept or reject the competence for specific crimes and for specific period of times.

4.1.2 Arguments in favour of an “opt-in/opt-out” regime

The separation between membership and jurisdiction is the traditional one when it comes to instruments that create a court or a tribunal.³⁸ Traditionally, being a party to such an instrument does not entail acceptance of the jurisdiction of the court or tribunal, but the acceptance of jurisdiction usually requires additional consent.³⁹ This approach was the one chosen by the International Law Commission in its Draft Statute.⁴⁰ According to the Draft Statute the Court would have automatic jurisdiction only over genocide.

³⁶ H. P. Kaul, *Special Note: The Struggle for the International Criminal Court’s Jurisdiction*, In: European Journal of Crime, Criminal Law and Criminal Justice, 1998, No.4, p. 364-376, at p. 366

³⁷ There were a number of more choices presented and discussed at the Rome Conference, among them variants of the automatic jurisdiction approach and a French proposal of “state consent regime”. For the purpose of this paper it is however not necessary to discuss these proposals, but I will only present the main options and their implications for the effectiveness of the Court.

³⁸ See e.g. Article 36 of the ICJ Statute

³⁹ R. S. Lee, *Creating an International Criminal Court - of Procedures and Compromises*, In: Reflections on the International Criminal Court, 1999, p.141-152, at. p.147

⁴⁰ Article 22 of the ILC Draft Statute

With respect to other crimes the International Law Commission advocated the opt-in approach. In these cases the Court would not have been able to act unless its jurisdiction over the crime had been accepted by the state with custody over the suspect and by the state on whose territory the act had occurred. A special declaration would have been required either when the state became a party or subsequently. Such a declaration could have been general, or subject to limitations regarding the crimes involved or the time period covered. Additionally, once a state had opted in, it still would have retained the possibility to opt out. If the acceptance of a state that was not a party to the Statute was required for a particular prosecution, provision was made for that state to lodge a declaration giving its consent on an ad hoc basis. Under this jurisdiction “a la carte” approach⁴¹, states would have been able to submit themselves to the jurisdiction of the ICC through special declarations, specifically for certain or even individual crimes and/or for certain periods of time.

The argument for using this strategy can be found in the ILC commentary to the Draft Statute where it is explained that it would facilitate the acceptance of the Statute as a whole.⁴² The opt-in regime would make the treaty politically easier for states to ratify.⁴³ Some states argued that the automatic jurisdiction would infringe their national jurisdiction. They emphasised the importance of voluntary acceptance of the jurisdiction since the Court’s jurisdiction has implications for the national criminal jurisdiction, which is an essential element of state sovereignty.⁴⁴ At the negotiations of the Preparatory Committee prior to the Rome Conference, it became clear that states concerned with their sovereignty wanted a Court that would only be able to act when the states concerned, or the UN Security Council, allowed it to do so in specific cases.⁴⁵ It was the participation of these states that the ILC wanted to secure with the introduction of the opt-in regime in the Draft Statute.

At the Rome Conference this approach was supported by a minority of 27 states, including India, China⁴⁶, France, the USA⁴⁷, and many Arab states.⁴⁸ These states wanted some form of consent regime, either opting-in or

⁴¹ H.P. Kaul, 1998, p.367

⁴² ILC Draft Statute, p.81

⁴³ Report of the 29th United Nations Issues Conference: *The UN Security Council and the International Criminal Court: How Should They Relate?* 1998, p.31, Hereinafter Report of the 29th UN Issues Conference

⁴⁴ United Nations Department of Public Information, *Background Information; Analysis of Issues in the Draft Statute*, p.4

⁴⁵ Report of the Prep Com, Vol. I, p.28, para. 119

⁴⁶ For China’s and India’s opinions see explanation of votes addressed to the Plenary Committee of the Conference. “Explanation of vote by India on the adoption of the Statute of the International Criminal Court” Rome, July 17, 1998, and “Explanation of vote by China on the adoption of the Statute of the International Criminal Court” Rome, July 17, 1998.

⁴⁷ See US proposal for an opt in protocol, UN Doc. A/CONF.183/C.1/L.90

⁴⁸ H.P. Kaul, 1998, p.367.

opting-out or consent on individual cases, as opposed to automatic jurisdiction. Some of these 27 states were however aiming at such a regime either only for crimes against humanity and war crimes, or only for war crimes.⁴⁹ France argued for a state consent regime for war crimes and crimes against humanity. France was concerned with the consequences for their peacekeeping and enforcement missions.⁵⁰ The USA argued that automatic jurisdiction, in connection with the alternative acceptance of jurisdiction⁵¹, would enable the Court to exercise jurisdiction over a national of a non-state party. They were worried that the US armed forces operating overseas would be prosecuted by the ICC even if the USA had not agreed to be bound by the Statute.⁵²

4.1.3 Arguments against an “opt-out/opt-in” regime

The argument, previously mentioned, that one has to respect the principle of state sovereignty in order to get as many states as possible to ratify the Statute, seems to speak for an opt-out or opt-in regime. There are however many arguments that speak against this ‘a la carte’ approach and instead speak in favour of automatic jurisdiction. There was substantial criticism of the opt-out/opt-in regime from various delegations at the negotiations of the Pre Com⁵³, and at the Rome Conference a majority of the states voted in favour of the automatic jurisdiction.⁵⁴ Among the states arguing against an opt-in approach were Korea that stated that anything but automatic jurisdiction would “deprive the Court of the predictability of its function by granting states a *de facto* right of veto to determine whether the Court is able to exercise jurisdiction.”⁵⁵ The opt-in approach was also strongly criticised by the NGO community. According to the Human Rights Watch the opt-in approach and the requirement of state consent would seriously have undermined the independence and credibility of the Court.⁵⁶ They argued that when individual states are allowed to select the crimes or types of conduct over which they accept the Court’s jurisdiction, or worse, to choose on a case by case basis, when to allow the Court to proceed and when not to, the Court is open to political manipulation. The Court would be vulnerable to illegitimate interests that recalcitrant states may have had in shielding perpetrators.⁵⁷ The Lawyers Committee for Human Rights were also of the opinion that the ICC could not have operated as an independent and effective international forum if the states had the right to pick and choose

⁴⁹ R. S. Lee, *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, 1999, p.136

⁵⁰ H.P. Kaul, 1998, p.371

⁵¹ See 4.2.4.

⁵² M.H. Arsanjani, 1999, In: AJIL, p.26

⁵³ Report of the Prep Com, Vol. I, p.28-31, paras. 117-131

⁵⁴ R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.133

⁵⁵ A/CONF.183/C.1/L.6, 18 June 1998

⁵⁶ Human Rights Watch, 1998, p. 2

⁵⁷ Ibid. p.46

crimes over which they would grant jurisdiction. They argued that, without automatic jurisdiction the Court would not have been able to perform its primal task of dispensing justice where the national criminal justice system is unavailable or ineffective⁵⁸. The Court would never be able to “determine whether a national system is available and effective because lack of consent to its jurisdiction would prevent it from attempting such an assessment.”⁵⁹ The Lawyers Committee for Human Rights also stated that the different jurisdiction regimes for genocide and the other core crimes, as proposed by the ILC, was undesirable for practical reasons.⁶⁰ The complete freedom of the states would probably have led to chaos, with very different declarations of submissions depending on whether states chose to be open or restrictive towards the Court. The Lawyers Committee for Human Rights did not accept the argument that automatic jurisdiction presented an encroachment on state sovereignty. They emphasised the fact that automatic jurisdiction did not mean exclusive or primary jurisdiction and that, according to principle of complementarity⁶¹, the Court will only be seized of a case when a national procedure is unavailable or ineffective.⁶² Also the Human Rights Watch argued that legitimate state interests, such as the prosecution of crimes within its jurisdiction, are more than adequately protected by the principle of complementarity and that an opt-in system, therefore, is not necessary to see to these interests.^{63 64}

4.1.4 Articles in the Rome Statute

The struggle for jurisdiction ended in a compromise and the Rome Statute does now provide for automatic jurisdiction as the main rule. According to Article 12, a state party accepts jurisdiction over the crimes referred to in Article 5 upon ratification of the Statute. Article 120 strengthens this main rule of no opt-out from the subject matter by stating that no reservations may be made to the Statute. However, Article 124 contains a significant exception to the rule of automatic jurisdiction when it comes to war crimes. This transitional provision will allow state parties to opt out of the ICC’s war crime jurisdiction for an initial period of seven years, when the crime was committed in its territory or by its nationals. This article was introduced as a compromise to obtain agreement from the states, with a record of active

⁵⁸ See 4.3.2.

⁵⁹ Lawyers Committee for Human Rights, *The International Criminal Court Trigger Mechanisms and the Need for an Independent Prosecutor*, In: International Criminal Court Briefing Series, Volume 1, Number 4, July 1997, p.6

⁶⁰ Ibid. p.6

⁶¹ See further 4.3.1.

⁶² Lawyers Committee for Human Rights, July 1997, p.7

⁶³ Human Rights Watch, 1998, p.46

⁶⁴ Also Amnesty International and the International Committee of the Red Cross urged that the Court should have automatic jurisdiction. See Amnesty International, *The International Criminal Court; Making the Right Choices*, Part I - defining the crimes and permissible defences and initiating the prosecution January 1997, p.12-13 and Part V-Recommendations to the Diplomatic Conference, May 1998. See also ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p.3

participation in international peacekeeping and enforcement operations, which feared that their soldiers would be charged in front of the ICC for war crimes.⁶⁵ While this limited clause was considered adequate by France, that voted for the compromise, the USA wanted a broader opt-out regime and voted against the Statute.⁶⁶ If states choose to opt out from the jurisdiction for war crimes, this solution will create a de facto opt-out regime for war crimes, which negates the concept of automatic jurisdiction of the Court.

4.2 Which states need to be parties or give their consent?

4.2.1 General

A closely related, but separate question, is which states need to be parties to the ICC treaty, or need to give their ad hoc consent to the proceedings, as a precondition to the exercise of ICC jurisdiction. This question was the subject of lengthy negotiations during the sessions of the Prep Com and at the Rome Conference. There were many proposals, ranging from the German one that no specific state would have to give its consent for the Court to exercise jurisdiction, to the American proposal⁶⁷ that required the cumulative consent of both the territorial state and the state of nationality of the alleged perpetrator. In between there were different proposals as to which state that had to subject themselves to the jurisdiction of the Court; the state on the territory on which the crime had been committed, the state in the custody of which the suspect was being held, the state of which a national was a victim of the crime, the state of which a national was the suspect, or different combinations of these states.⁶⁸ One constellation that attracted a great deal of interest at the Rome Conference, was the Korean proposal⁶⁹ that allowed the Court to exercise jurisdiction if one of four alternative states were parties to the Statute or had given their consent on an ad hoc basis.⁷⁰

⁶⁵ E. La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction*, In: Netherlands International Law Review, Vol. 46, Issue I, 1999, p 1-25, at p.17

⁶⁶ M. Bergsmo, *The Jurisdictional Regime of the International Criminal Court*, In: European Journal of Crime, Criminal Law and Criminal Justice, Issue 4, 1998, p. 345-363, at p.347

⁶⁷ See A/CONF.183/C.1/L.70, 14 July 1998

⁶⁸ R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.135

⁶⁹ A/CONF.183/C.1/L6, 18 June 1998

⁷⁰ See E. La Haye, 1999, p.6 The four alternative states included the territorial state, the custodial state, the state of the nationality of the accused, and the state of nationality of the victim.

4.2.2 Arguments in favour of universal jurisdiction

The German proposal relied on the principle of “universal jurisdiction”. Under this principle any state can prosecute the perpetrator of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victim or the place where the crime was committed.⁷¹ Germany argued that since the UN member states can exercise universal jurisdiction nationally with regard to these three crimes, they should also be able to transfer this universal jurisdiction to the ICC by ratifying the Statute. If state parties can “individually exercise universal jurisdiction, they can also vest the ICC with similar power. The ICC should be put in the same situation as any state.”⁷² “By ratifying the Statute of the ICC the state parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes.”⁷³

This proposal was supported by various states⁷⁴ and particularly by the International Committee of the Red Cross. The ICRC delegation in Rome stated that the universal jurisdiction over genocide, crimes against humanity and certain categories of war crimes is well established and meant that the universal jurisdiction would in fact be weakened if the Court required agreement of a state to have jurisdiction. They were of the opinion that it would “make it difficult for the Court to function if additional conditions were imposed.”⁷⁵ The universal jurisdiction approach was also strongly supported by other non-governmental organisations, above all Human Rights Watch, Amnesty International, Lawyers Committee for Human Rights and the ‘NGO Coalition for an International Criminal Court’. The Human Rights Watch supported the view that the Court should have jurisdiction over the core crimes on the basis of universal jurisdiction, and be able to prosecute these crimes irrespectively of where and by whom they were committed. “Any other position would result in an ICC, established with the specific role of administering criminal justice when national systems fail, having less jurisdictional ability to fulfil this mandate than any one of the state parties that collectively created it.”⁷⁶ Also Amnesty International pointed at the fact that the Court would have less power than

⁷¹ K.C. Randall, *Universal Jurisdiction under International Law*, Texas Law Review, vol.66, 1998.

⁷² Extract from the German address on jurisdiction to the Committee of the whole, 19 June 1998.

⁷³ UN Doc. A/AC.249/1998/DP.2, 23 March 1998, The Jurisdiction of the International Criminal Court. An informal discussion paper submitted by Germany.

⁷⁴ It received the most support during the first discussion on jurisdiction, but failed to attract general acceptance and was later dropped in a spirit of compromise. During the debate on jurisdiction of 9 July 1998, 23 states expressed their dismay that universal jurisdiction did not appear anymore as a feasible opinion for the jurisdiction of the Court. *See* H.P Kaul, 1998, p.370.

⁷⁵ ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p.3 see also ICRC statement reaffirming that the jurisdiction of the ICC should be based on the principle of universal jurisdiction. A/CONF 183/INF/9, 13 July 1998

⁷⁶ Human Rights Watch, 1998, p.47

the states to bring the suspect to justice. They meant that this could lead to absurd consequences⁷⁷ that ran counter to the purpose of establishing an international criminal court and might render it ineffective.⁷⁸ The Lawyers Committee for Human Rights stated that the ultimate effect of a retreat from the universal jurisdiction would be to “curtail the court’s effectiveness as an independent body for years to come, i.e. until the treaty is universally ratified.”⁷⁹

4.2.3 Arguments against universal jurisdiction

The doctrine of universality was, as mentioned earlier, rejected by some states at the Rome Conference. These states insisted that it should not be given any recognition by the Statute and they argued that the jurisdiction of the Court should be dependent on some sort of state consent instead.⁸⁰ The USA, in particular, spoke out very clearly against the German proposal and strongly and repeatedly demanded that it was only the state of nationality of the suspect that ought to be important.⁸¹ In order for jurisdiction to apply, this country would have to be a party to the Statute or have agreed on the procedure.⁸² In its statement of July 9 1998 the US delegation expressed its fear of the Court’s ability to target citizens of non-state parties. The United states expressed the view that if universal jurisdiction, or some variant of it, was embodied in the Statute, the Statute would have few participants. They argued that the principle of universal jurisdiction “is not a principle accepted in the practice of most governments of the world and, if adopted in this Statute, would erode fundamental principles of treaty law that every government [...] support”⁸³

4.2.4 Articles in the Rome Statute

The option finally adopted represents a compromise, seeking to achieve balance between those who wanted a broad inclusive test, based on universal jurisdiction, and those who wanted a restrictive test, such as the mandatory acceptance of the state of nationality in all cases. Article 12(2) of the Rome Statute states that either the state “on the territory of which the conduct in question occurred” or the state “of which the person accused of the crime is a national” must have become a party to the Statute or accepted the Court’s jurisdiction on an *ad hoc* basis. The text is distinguished from the US

⁷⁷ For examples on these consequences see Amnesty International, 1997, p.17

⁷⁸ Amnesty International, May 1998

⁷⁹ Lawyers Committee for Human Rights, 1998, p.3

⁸⁰ L. Arbour and M. Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, In: Reflections on the International Criminal Court, 1999, p. 129-141, at p.135

⁸¹ It was however not so much the American resistance as the lack of adequate support from other Conference participants which led to the demise of the German proposal. See H.P. Kaul, 1998, p.370

⁸² A/CONF.183/C.1/L.70, 14 July 1998

⁸³ Statement of the United States on 9 July 1998 in the Committee of the whole.

proposal in that it requires the consent of *either* the territorial state, *or* the state of nationality of the accused, whereas the US proposal had required the consent of both states. It also differs from the Korean proposal by requiring one of two, instead of one of four, states to be party to the Statute of the Court, or to accept the jurisdiction of the Court. If either the state of nationality of the accused, or the territorial state is party to the Statute or has consented the jurisdiction, the Court may exercise jurisdiction. It also clearly differs from the German proposal, under which no state would have to subject itself to the Court's jurisdiction. When the case has been referred to the Court by the Security Council, neither the state in whose territory crimes have been committed nor the state of nationality of the accused has to be a party to the Statute in order for the Court to exercise its jurisdiction. This is because referral of a situation by the Security Council is based on the competence under Chapter VII of the UN-Charter, which is binding and legally enforceable in all states.⁸⁴

4.3 Issues of admissibility

4.3.1 Principle of Complementarity

The issue of admissibility is closely connected with the complementary character of the Court. The principle of complementarity⁸⁵, governing the relationship between national jurisdiction and the Court, is one of the key principles of the ICC Statute. In cases of concurrent jurisdiction between national courts and the ICC, the former have priority. The Court is not intended to be a supranational institution replacing national courts, but to operate when national courts are unable or unwilling to operate.⁸⁶ An essential element of the rationale of the complementarity principle is that national authorities shall be given a chance to enforce international humanitarian law and international human rights law in accordance with their international legal obligations. The primary responsibility of enforcing human rights always lies on the states. It is only when the national systems are not able to do so that the international community has to act, in this case the ICC has to investigate and prosecute. For the Court to be as effective as possible the rules have to ensure that it is the primary duty of the state to bring those responsible for grave crimes under international law to justice, but the Court must be able to act as an effective complement to the states which are unable or unwilling to fulfil this duty.

The rules have to balance the conflicting vision from the states that were reluctant to create a body that could impinge national sovereignty, and

⁸⁴ See further 5.3 and chapter 8

⁸⁵ The principle of complementarity can be found in paragraph 10 of the Preamble and in Articles 1, 17 and 18.

⁸⁶ M.H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, In: *Reflections on the International Criminal Court*, 1999, p. 57-76, at p.67

therefore wanted a Court that could only assume jurisdiction where the national system is unable to investigate and prosecute, and other states and non-governmental organisations that held that the Court should have the potential for a greater role. The states supporting the latter view feared the possibility of sham investigations or trials aimed at protecting perpetrators and argued that the Court should intervene when proceedings under the national jurisdiction were ineffective and when a national juridical system was unavailable.⁸⁷ Most human rights groups supported the latter view. The Human Rights Watch argued that it was the primal responsibility of the states to prosecute, but that an unqualified deference to state claims of jurisdiction, without appropriate ICC review, would jeopardise the prospect of justice.⁸⁸

4.3.2 Articles in the Rome Statute

The primacy of national jurisdictions is assured by the rules of admissibility laid down in Article 17 of the Statute. The Article identifies four grounds on which the ICC shall determine that a case is inadmissible. First, that the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is “unwilling or unable genuinely” to investigate and prosecute. Second, that the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless such a decision resulted from the “unwillingness or inability of the state genuinely to prosecute.” Third that the person concerned has already been tried for the conduct in question and a trial by the ICC is not permitted under the rule of *ne bis in idem*⁸⁹. Fourth, that the case is not of sufficient gravity to justify further action by the Court. The first three grounds are subject to specific limitations; that the state is unwilling or unable genuinely to carry out investigations or prosecution⁹⁰, that the national prosecution was conducted for the purpose of shielding the person concerned from criminal responsibility within the ICC jurisdiction⁹¹, or that the national prosecution was not conducted independently or impartially in accordance with the norms of due process recognised by international law and lacked a meaningful intent to bring the person to justice⁹². The burden of proof lies on the Prosecutor and Article 17(2) provides guidelines for the Court on how to determine the “unwillingness” of a state. The Court must in essence consider whether the domestic prosecution has been undertaken for the purpose of shielding the accused from criminal responsibility. The Prosecutor must show that there is a “devious intent contrary to its apparent actions”.⁹³ The Court will have to consider whether there has been undue delay in the state-initiated

⁸⁷ R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.42

⁸⁸ Human Rights Watch, 1998, p.2

⁸⁹ Article 20(3)

⁹⁰ Article 17 (a)

⁹¹ Article 20 (3) (a)

⁹² Article 20 (3) (b)

⁹³ R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.50

prosecution, indicative of a lack of genuine intention to proceed, or whether the domestic case is conducted independently and impartially, consistent with expressed intention to bring the person to justice.⁹⁴ The test of the “willingness” is in effect a test of the good faith of the national authorities. As to determining the inability of a state to prosecute, the guidelines are laid down in article 17(3), and the Court is required to examine whether the state is unable to obtain the accused, or the evidence, or otherwise to carry out the proceedings, due to a total or partial collapse of its national juridical system.

⁹⁴ M.H Arsanjani, 1999, In: Reflections on the International Criminal Court, p.69

5 Exercise of Jurisdiction/ Trigger Mechanisms

5.1 General

Another factor that is of importance for the credibility, independence and effectiveness of the Court, is what mechanisms there are available to trigger the Courts jurisdiction; in other words, what organs that can initiate proceedings. In order for the ICC to be an effective complement to the national courts, the trigger mechanisms should be constructed so that the Court is able to exercise its jurisdiction in any case falling within its jurisdiction when states are unable or unwilling to bring to justice those responsible for the core crimes. The Court should not be prevented from fulfilling its mandate because only a limited number of the cases are brought to the attention of the Prosecutor. To be effective the ICC must also be impartial and independent judicial body guided by legal rather than a political process. The cases that are investigated and prosecuted should be chosen on neutral, non-political criteria.⁹⁵ The impartiality of the Court is of vital importance for the credibility of the Court. The Special Rapporteur on torture, Mr. Nigel S. Rodley, stated that “if such indictments were left to the decision of a political body [...] this could but call into question the impartiality of international justice.”⁹⁶

The Statute provides that proceedings may be initiated by three distinct entities. According to Article 13 of the Statute, a situation, in which one or more of the crimes contained in Article 5 appears to have been committed, can be referred to the Prosecutor by a state party, or by the Security Council acting under Chapter VII of the UN Charter, and the Prosecutor may initiate *proprio motu* an investigation. I will present these three different trigger mechanisms separately to see if they ensure the effectiveness, credibility and independence of the Court.

5.2 State party

A state party to the Statute may refer a “situation” to the Prosecutor who evaluates the information and determines whether there are sufficient grounds for initiating an investigation.⁹⁷ Referrals by state parties were not particularly controversial during the negotiations of the Statute.⁹⁸ Most

⁹⁵ Amnesty International, January 1997, p.93

⁹⁶ Report of the special Rapporteur on torture, Mr. Nigel S.Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38 para.226

⁹⁷ Article 14

⁹⁸ R. S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.127-141

delegations agreed that state parties should have this power. The relevant questions concerning state complaints, that were discussed at the Rome Conference were which states would have the right to lodge a complaint and how to avoid undue political pressure on the Court.

The ILC Draft Statute provided that a complaint may be lodged only by a state party that had accepted the jurisdiction of the Court, in respect of the crime which was the subject of the complaint or, in the case of genocide, was a party to the Genocide Convention.⁹⁹ There was also a proposal at the Rome Conference that only states with an interest in a particular case should have the right to file a complaint.¹⁰⁰ These requirements were however seen to be too strict by many delegates at the Rome Conference and by human rights organisations. They argued that all state parties should have the right to bring a complaint since the crimes under the Court's jurisdiction are crimes under customary international law and all states are interested in repressing the violation of these crimes.¹⁰¹ In accordance with the principle of automatic jurisdiction the final Statute provides that all state parties can lodge complaints alleging that one of the three core crimes has been committed.

Another question discussed at the Conference was how to ensure that the states do not put undue political pressure on the Prosecutor to initiate investigations or prosecution in a particular case. In its recommendations to the Conference, Amnesty International addressed the concern that state complaints could be brought for political reasons against suspects only from unpopular states or against only certain people suspected of a particular crime.¹⁰² To minimise prejudicing the Court by naming individuals, the original proposal was modified so that states are allowed only to refer a "situation", rather than an individual "case", to the Court. The Prosecutor then has the power to determine if there is sufficient evidence to indict an individual for a particular crime arising out of the situation that has been referred.

There were also concerns among many delegations that state complaints would not be a very effective trigger mechanism.¹⁰³ Amnesty International stated that there is a risk that "few states would bring complaints against nationals of other states because such complaints might be viewed as infringing the sovereignty of those states or as interfering with diplomatic relations with those states".¹⁰⁴ State complaints have not been a particularly effective means of enforcing human rights obligations while not many states

⁹⁹ Article 25 of the ILC Draft Statute

¹⁰⁰ Human Rights Watch, 1998, p.63

¹⁰¹ Amnesty International, 1997, p.97, Lawyers Committee for Human Rights, 1997, p.8, and Human Rights Watch, 1998, p.63, Note that Human Rights Watch argued for an extension of the right to complain to non-state parties.

¹⁰² Amnesty International, January 1998, Part 2, and 1997, p.95

¹⁰³ M. Bergsmo, 1998, p.351

¹⁰⁴ Amnesty International, 1997, p.95

have used the state complaints procedure in the human rights treaties¹⁰⁵. No state has used the state complaint in Article 41 of the ICCPR¹⁰⁶, Article 21 of the Convention against Torture¹⁰⁷, Article 45 and 61 of the American Convention on Human Rights¹⁰⁸, or Article 47 of the African Charter on Human and Peoples' Rights¹⁰⁹. The procedure was nevertheless included in the Statute since it was seen to remain a useful complement to powers of the Security Council and the Prosecutor.

5.3 Security Council

According to Article 13(b), the Security Council, acting under Chapter VII of the UN-Charter, may refer a situation to the Prosecutor. The question of Security Council referral will be discussed in greater detail in chapter 8. In this section I will only mention the most important issues in the negotiating process.

The question of Security Council referrals was more controversial during the negotiations than state party referrals. The states in favour of giving the Council this power to trigger the Court's jurisdiction argued that it would remove the need for the Council to create ad hoc tribunals.¹¹⁰ Another argument in favour was that it would provide political support for the prosecution. "By referring a situation, the Security Council would shoulder part of the political pressure of pursuing sensitive investigations and prosecutions springing from that referral."¹¹¹ The Council would be signalling its political support and a subsequent indictment would carry more political weight than would an indictment resulting from a situation referred merely by one or more states. A third positive factor is that such a referral by the Council would do away with the requirement in Article 12. Since the referral of a situation by the Security Council is based on its competence under Chapter VII, which is binding and legally enforceable in all states, the exercise of the Court's jurisdiction is part of the Council's authority under international law. As such, jurisdiction is binding on all the states concerned even when neither the state in whose territory crimes have been committed, nor the state of nationality of the accused is a Party to the Statute. In other words, in cases of referral by the Security Council, the Court will be able to exercise its jurisdiction irrespective of whether or not the states concerned are parties to the Statute.¹¹²

¹⁰⁵ S. Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?* In: *Human Rights Quarterly*, vol.20, 1998, p.249-303, at p.302

¹⁰⁶ International Covenant on Civil and Political Rights, 16 December, 1966, UNTS 171

¹⁰⁷ Convention against Torture and other Cruel, Inhuman or Degrading Treatment, 10 December 1984, 23 ILM 1027

¹⁰⁸ American Convention on Human Rights, 22 November 1969, 9 ILM 673

¹⁰⁹ African Charter on Human and Peoples' Rights, 27 June, 1981, 21 ILM 59

¹¹⁰ Report of the 29th UN Issues Conference, 1998, p.21

¹¹¹ *Ibid.* p.21

¹¹² This question will be explained in greater detail under chapter 8

The states that argued against giving a power of referral to the Council meant that such a role would reduce the credibility and moral authority of the Court, undermine its independence and impartiality and open the possibility for exerting political influence on the Court.¹¹³ Some felt that such a provision was inequitable in that this specific trigger would only be used against states other than the permanent members of the Council since the latter could use their power of veto to prevent referrals which impinged on their interests.¹¹⁴

5.4 Prosecutor

Under the ILC Draft Statute, only state parties and the Security Council would be able to initiate proceedings before the Court.¹¹⁵ The Prosecutor would have no authority to target a situation on his or her own initiative and to *ex officio* initiate an investigation. A number of delegations expressed the concerns that the role of the Prosecutor under the ILC Draft was too restrictive and they put forward suggestions that would grant the Prosecutor the power to initiate proceedings on his or her own motion on the basis of information provided, not only by Governments or the Security Council, but also by other sources, including individuals and non-governmental organisations.¹¹⁶ These delegations argued that an independent prosecutor would be useful in situations where, for political reasons, neither the Security Council, nor state parties, refer a situation to the ICC, “even though it may be manifestly clear to the international community that an investigation is warranted”.¹¹⁷ Many states also believed that the *proprio motu* role of the Prosecutor was the key feature to an effective criminal court and that it was essential to grant the Prosecutor *ex officio* powers for triggering the jurisdiction of the Court, provided that those powers would be subject to certain safeguards.¹¹⁸ They meant that an expanded role for the Prosecutor would enhance not only his or her autonomy and independence, but also the independence and the credibility of the Court as a whole, which would be able to function on behalf of the international community rather than on behalf of particular complaints by a state or by the Security Council.

Non-governmental organisations saw the independence of the Prosecutor as an essential feature of an independent, credible Court and they led a strong campaign in favour of conferring *proprio motu* powers to the Prosecutor. The Lawyers Committee for Human Rights argued that the Court’s ultimate independence and effectiveness would hinge on whether the ICC Prosecutor

¹¹³ R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.146

¹¹⁴ See Prep Com Report, Vol.1, p.30-33

¹¹⁵ Article 25 and Article 23(1) of the ILC Draft Statute

¹¹⁶ See Ad Hoc Committee Report, paras.25, 113 and 114

¹¹⁷ Report of the 29th UN Issues Conference, 1998,p.27

¹¹⁸ R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.176

had the authority to initiate investigations *proprio motu*, rather than having to depend on Security Council or state party referrals. They were concerned that state parties and the Security Council would not always have the information, resources and political will to monitor and react to cases of serious human rights abuses. They thought that this would be particularly true for cases in countries outside the political and media spotlights.¹¹⁹ Also Amnesty International emphasised the inadequacy of state complaints and Security Council referrals as sole trigger mechanisms. They stated that the Security Council could be paralysed by the veto by the permanent members, and that states historically are known not to make use of the inter-state complaint mechanisms¹²⁰, and that these methods therefore would lead to only a limited number of cases being investigated or prosecuted. They concluded that if these two methods were not supplemented by independent investigations and prosecutions by the Prosecutor, the Court could be crippled at birth.¹²¹ The Human Rights Watch stressed the importance of the fact that the Prosecutor could base its investigations on information from victims. They also expressed concern of the risk that, if only states and the Security Council could trigger prosecutorial investigations, “only individuals or nationals of states that have fallen out of favour will be prosecuted”, since the proper functioning of the Court then would be dependent on the political motivations of these entities.¹²²

Some participating states of the Rome Conference strongly objected to this power of the Prosecutor on the ground that the Prosecutor might be overwhelmed with frivolous complaints and would have to waste limited resources to attend to them. They were also concerned with the risk of politisation of the Court, but came to exactly the opposite conclusion than the parties in favour of an independent Prosecutor, on how to insulate the Court from this risk. They argued that the “Prosecutor might be politically pressured to bring a complaint even if it were not justifiable or helpful in a particular political context”¹²³, and therefore opposed to granting the Prosecutor this authority. The United States delegation expressed concern for the “considerable political pressure that organisations will bring to bear on the Prosecutor in advocating that he or she takes on the causes which they champion.”¹²⁴ A few participants argued that the Prosecutor would need the firm political backing that could only come from the Security Council or a state party referral.¹²⁵

Article 15 of the Statute provides that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the

¹¹⁹ Lawyers Committee for Human Rights, 1997, p.10-11, and 1998, p.4

¹²⁰ See 5.2.

¹²¹ Amnesty International, 1997, p.94

¹²² Human Rights Watch, 1998, p.64-67

¹²³ M.H. Arsanjani, In: Reflections on the International Criminal Court, 1999, p.65

¹²⁴ The concerns of the United States regarding the proposal for a *proprio motu* prosecutor, 22 June 1998, p.1

¹²⁵ Report of the 29th UN Issues Conference, 1998, p.27

jurisdiction of the Court. The Prosecutor shall analyse the seriousness of the information received and may, to this end, “seek additional information from states, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and receive written or oral testimony at the seat of the Court.”¹²⁶ The Prosecutor is however subject to checks and balances, in order to prevent frivolous prosecutions. The *proprio motu* power of the Prosecutor is coupled with a decision by a pre-trial chamber to authorise such investigation. Once the prosecutor “concludes that there is a reasonable basis to proceed with an investigation, he shall submit to the pre-trial chamber a request for authorisation of an investigation.”¹²⁷ Further “if the pre-trial chamber considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation.”¹²⁸ The Prosecutor has a right to initiate, and not actually start, investigations.

¹²⁶ Article 15(2)

¹²⁷ Article 15(3)

¹²⁸ Article 15(4)

6 The United Nations Security Council

6.1 General

The remaining parts of this thesis will be devoted to the question of what relationship the ICC and the UN Security Council will come to have in the future. Before going deeper into this question it is important to note the relevance of Article 103 of the UN Charter¹²⁹ in this context. This Article states that all obligations under the UN Charter supersede all other treaty obligations. Since the ICC is a treaty based institution, the negotiators in Rome were bound by the powers given to the Security Council in the UN Charter. It was not open to the Rome Conference, or to the Statute as a legal instrument, to confer new powers on the Security Council, or indeed control the exercise of its existing powers. It is therefore of great importance to assess what powers the Council has been given according to the Charter, before I can scrutinise the negotiations in Rome and the future relationship between the ICC and the UN Security Council. In this chapter I will therefore take a close look at the powers of the Security Council. Only after this chapter will it be interesting to look from the ICC perspective on how to solve the problem of Council interference, or how to take advantage of Council co-operation.

Before looking at the Council's powers, some basic facts about the composition of the Council, its voting procedure and its main duties will however be given. The examination of the Council's powers will begin with a description of the specific powers it has been given under the UN Charter. I will then turn to the fact that the UN Charter has been interpreted as to give the Council broader powers than the actual letter of the Charter suggest. I will also state what legal and political limitations that exist to the powers. To give the full picture of the Council's powers, the final part will give examples of how the Council has used its powers in practise. The knowledge from the earlier parts of this chapter will be applied, as to see how the powers have been broadened by implied powers, and limited by political and legal limitations. In doing this I will see how the powers have evolved since the drafting of the UN Charter and up till now. Only by looking into the past, how the Council has worked and interpreted its powers before, can I try to get a picture of how it can come to work in the future. This will be of great importance in order to understand what role it can come to play in relation to the ICC in the future.

¹²⁹ All Articles in this chapter refer to the UN Charter if nothing else is stated.

6.2 Composition of the Security Council

The Security Council is one of the six principal organs of the UN. It consists of fifteen member states, of which China, France, Russia, the United Kingdom and the United States are permanent members. The other ten members are non-permanent, elected for two years by the General Assembly. In their election due regard is to be specially paid, in the first instance, to the contribution of members of the UN to the maintenance of peace and security and to the other purposes of the organisation, and also to equitable geographical distribution.¹³⁰ The current practise is that five of the non-permanent places are filled by African and Asian states, two by Latin American states, one by an Eastern European state and two by Western European and other states.¹³¹

6.3 Voting procedure in the Security Council

Due to the specific voting procedure, the five permanent members have a very strong position in the Security Council. The procedure is outlined in Article 27 and confirms the so-called veto power. The first paragraph of the Article states that each member of the Security Council shall have one vote. Paragraph 2 says that “decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members”, and paragraph 3 provides that “decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members, including the concurring votes of the five permanent members.” It is in this third paragraph that the veto operates, as if a permanent member does not vote in favour of a particular decision, that decision is blocked or “vetoed”, and fails to legally come into existence.¹³²

According to the wording of Article 27(3), the validity of a non-procedural decision of the Council requires the affirmative votes of all five permanent members. Therefore, even the mere abstention of a permanent member is to be considered a veto and is able to paralyse the Council’s activity in a particular case. Despite the clear words of Article 27(3) UN practise has, since its early years, tended to acknowledge the validity of decisions made with the abstention of one or more permanent members.¹³³

After having established that non-procedural decisions of the Security Council are to be taken by an affirmative vote of nine members and having

¹³⁰ Article 23(1) UN Charter.

¹³¹ F. Danelius, *FN's säkerhetsråd*, 1993, p.3

¹³² The central theory behind the right of veto is that since the permanent members “as Great Powers naturally bear the main burden of responsibility for maintaining peace and security, no one permanent member should be compelled by a vote of the Security Council to follow a course of action with which it disagrees.” B. Simma/S. Brunner, Article 27, In: B. Simma, *The Charter of the United Nations, a Commentary*, 1994, p.435

¹³³ S.D Bailey, *Voting Procedure in the Security Council*, 1969, p.69-73

attributed the right of the veto to the permanent members, Article 27(3), adds that a member state of the Council, which is party to a dispute, shall abstain from voting in the decision under Chapter VI and under Article 52(3). The latter Article is concerned with a rather specific case, namely, the relations between the Security Council and international organisations of a regional character. Chapter VI is much more important since it, as we shall see, authorises the Council to investigate disputes likely to endanger the peace, to recommend the parties to such disputes to seek settlement by peaceful means, and to deal itself with the merits of a dispute in order to indicate a solution. Decisions under Chapter VII are however excluded from the application of this *nemo iudex in re sua* principle. This means that when the Council is about to take a resolution concerning action in the event of threat or breach of the peace, and of act of aggression the party to the dispute does not have to abstain from voting and can make full use of its veto power. In these cases it is therefore impossible for the Council to take action against a permanent member. I will return to this problem under 6.6.2, where I will present the veto as a political limitation on the Councils powers.

6.4 Duties of the Security Council

Article 24(1) confers the primary responsibility for the maintenance of international peace and security on the Security Council.¹³⁴ It reads:

"In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

With this phrasing of Article 24(1), the intentions of the authors of the UN-Charter are expressly emphasised. Charging the Security Council with the primary responsibility for the maintenance of peace is intended "to ensure prompt and effective action by the UN".¹³⁵ The Council, being a smaller executive body with a permanent core of membership of the Great Powers, continuously functioning, being able to assemble on short notice, was seen as the body best able to take efficient decisions and intervene with enforcement measures. Although the Security Council has primary responsibility for maintaining peace and security, this responsibility is not exclusive. Limited powers have been given to other UN-organs. The General Assembly, for example, has powers of discussion and

¹³⁴ Besides the primary responsibility of maintaining the peace and security the Council has some scattered powers, the most importance of which are; the admission, suspension and expulsion of UN members; decisions of amendments to the Charter and the election, in conjunction with the General Assembly, of the judges of the International Court of Justice. See F. Danelius, 1993, p.28-29

¹³⁵ J. Delbrück, Article 24, in B. Simma, 1994, p.401

recommendation in regard to the subject. The priority of the Security Council in this field is however underlined in Article 12, which states that “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.” The UN member states have also kept some of the responsibility. The division of responsibility between the Security Council and the states involved in a conflict is treated differently by the Charter depending on how serious the conflict is. The more serious a conflict is the more powers are given to the Council. What powers the Council has in different situations will be discussed in the following.

6.5 Powers of the Security Council

6.5.1 Specific Powers

6.5.1.1 General

The specific powers granted to the Security Council for the discharge of the duty of maintaining the peace, are the powers that are specifically mentioned in the UN Charter. According to Article 24(2) these powers are laid down in Chapters VI, VII, VIII, XII of the Charter. *Chapter VI* concerns disputes or situation which are “likely to endanger the maintenance of international peace and security”¹³⁶ and the pacific settlements of these. In these types of conflicts or situations, which only potentially could disturb the peace, the parties to the dispute, or the states involved in a situation keep the first hand responsibility of seeking a peaceful solution.¹³⁷ The powers of the Council under this Chapter are restricted to supporting the parties to a dispute in their endeavours to settle their disputes through appropriate measures. *Chapter VII* regulates the Council’s “action” for the maintenance of peace. The Chapter concerns international crises that are underway, and not only potentially could disturb the peace. In these cases the main role belongs to the Security Council. The Council can decide to make recommendations or decide what enforcement measures are to be taken to maintain or restore the peace¹³⁸, and it may call on the parties involved to comply with provisional measures.¹³⁹ There are two kinds of enforcement action that can be decided by the Security Council: measures involving and measures not involving the use of force.¹⁴⁰ *Chapter VIII*, that deals with regional arrangements for managing international peace and security, and *Chapter XII*, on the international trusteeship system, are not relevant for this thesis and will therefore be left aside.

¹³⁶ Article 33

¹³⁷ see Articles 2(4) and 33(1).

¹³⁸ Article 39

¹³⁹ Article 40

¹⁴⁰ Article 41 and Article 42

6.5.1.2 Binding power of Security Council decisions

Before going into Chapter VI and VII in detail, it is worth to mention a few words about the binding power of the Security Council's decisions. According to Article 25 of the Charter, the Council has the power to take decisions which the member states are obliged to abide by and carry out. This is a direct consequence of the fact that the states have conferred the primary responsibility for the maintenance of international peace and security under Article 24.¹⁴¹ It has often been suggested that Article 25 only declare decisions taken under Chapter VII to be binding.¹⁴² When acting under Chapter VI the Security Council is generally confined to measures of non-coercive nature which possesses no legally binding character for the parties to the dispute.¹⁴³ The word "recommendations" is used instead of "decision", and it was made clear at the Conference establishing the UN that such recommendations have no binding force.¹⁴⁴ When the Council is exercising its authority under Chapter VII, on the other hand, it can make decisions that the members are obligated to accept and carry out.

This is however a simplified view. In fact, the binding nature of resolutions can not be determined by whether they have been taken under Chapter VI or Chapter VII.¹⁴⁵ The binding nature of resolutions is instead to be decided by whether they are intended to bind all member states or not. There is therefore room for arguments that there are decisions that the Council may take in the field of pacific settlement, and there have been suggestions that the Council has the power to impose mandatory settlement by a combination of Article 25 and Chapter VI.¹⁴⁶ It is also clear that the resolutions taken under Chapter VII do not always have to bind the members, but can be merely recommendatory. The question of the possibility to make binding decisions and non-binding recommendations under an Article will be discussed in the end of each following section.

6.5.1.3 Specific powers under Chapter VI

6.5.1.3.1 Supervision of the obligation to settle peacefully

As mentioned earlier, the responsibility to settle disputes, "likely to endanger the maintenance of peace and security", under Chapter VI, remains

¹⁴¹ L. M. Goodrich, E. Hambro, A.P. Simons, *Charter of the United Nations, Commentary and Documents*, 1969, p.207

¹⁴² J. Delbrück, Article 25, In: B. Simma, 1994, p.410

¹⁴³ O. Bring, *FN-stadgans folkrätt*, 1992, p.302,

¹⁴⁴ L. M. Goodrich, E. Hambro, A.P. Simons, 1969, p.207

¹⁴⁵ See for example Rosalyn Higgins, who offers no support for the view that Article 25 applies only to measures under Chapter VII, but rather applies to "all decisions of the Security Council adopted in accordance with the Charter." R. Higgins, *The Advisory Opinion on Namibia: Which Resolutions are Binding under Article 25 of the Charter?* In: *International and Comparative Law Quarterly*, Vol 21, p.280

¹⁴⁶ See N.D. White, *Keeping the Peace, The United Nations and the Maintenance of International Peace and Security*, 1993, p.83

with the parties to the dispute. **Article 33(1)**, which opens Chapter VI, obligates the states parties to a dispute to seek a solution by peaceful means, and indicates, by way of example, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.¹⁴⁷ **Article 33(2)**, on the other hand, sets forth one of the Council's powers. It states that "the Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means" as contained in paragraph (1). Of all possible responses to a dispute on its agenda, Article 33(2) defines the one which least effect the sovereignty of the states concerned. By appealing to the parties to do what they in any event are bound to do, the Security Council refers responsibility back to them. When acting under Article 33(2) the Council refrains from taking a stand on the substance of the matter. Its role is merely one of supervision of the obligation to settle placed on states. The effective use of this power can act as a reminder to states of their duties under the Charter, but also as a warning of future Council action under the other provisions of Chapter VI or of Chapter VII.¹⁴⁸ In principle such an appeal to the states is merely recommendatory, and does not have a binding effect.¹⁴⁹

6.5.1.3.2 Investigation

Article 34 provides that "the Security Council may investigate any dispute or any situation in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security". Article 34 does not provide for a general competence for the Security Council to investigate. According to the wording of the Article the Council is only competent to investigate the specific matters, disputes and situations, for the specific purpose of determining if they are likely to endanger the maintenance of international peace and security. Given this wording one can conclude that "the powers are confined to ascertaining whether the dispute or situation come within the parameters of Chapter VI"¹⁵⁰, in other words, that the aim of the investigation must be to decide whether or not to exercise the conciliation function under this Chapter. As we shall see under 6.7.3.1.2 the provision has however been interpreted in a broader sense, as attributing a general and all-encompassing power of investigation. A decision made under Article 34 has a binding effect under Article 25, although the Article is placed in Chapter VI.¹⁵¹ When a decision

¹⁴⁷ Most authors hold that Article 33(1) constitutes no more than a detailed elaboration of Article 2(3), which reads: "All states shall settle their international disputes by peaceful means in such a way that international peace and security, and justice, are not endangered". See H. Kelsen, *The Law of the United Nations, A Critical Analysis of Its Fundamental Problems*, 1951, p.363, C. Tomuschat, art 33, In: B. Simma, 1994, p.506

¹⁴⁸ Danelius, 1993, p.12, For examples of when this power has been used as such a reminder see 6.7.3.1.1

¹⁴⁹ C. Tomuschat, Article 33, In: B. Simma, 1994, p.514

¹⁵⁰ N.D White, *Keeping the Peace, The United Nations and the Maintenance of International Peace and Security*, 1993, p.74

¹⁵¹ E.L. Kerely, *The Power to Investigate of the United Nations Security Council*. In: American Journal of International Law, 55, 1961, p.882-918, at p.897

is made on the basis of Article 34, the states concerned are therefore under a legal obligation to carry out this decision.¹⁵²

6.5.1.3.3 The settlement of disputes

Article 36(1) of the Charter states that “the Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.” The Council may intervene at any point, without waiting for a prior attempt by the parties to settle the dispute in the sense of Article 33(1).¹⁵³ The difference between Article 36 and Article 33(2) is that according to the former the Security Council may recommend specific means of dispute settlement, whereas according to the latter it may only call upon the parties to settle the dispute peacefully, thus simply reinforcing their obligation under Article 33(1). While Article 33(1) refers to a *general* request by the Council, Article 36 provides that the Council may indicate what *specific* means that are appropriate for a given question. The Council may recommend a procedure or method found in Article 33(1), or other means of a similar nature.¹⁵⁴ The Security Council can give a recommendation of the procedure or method to follow or it can itself provide for such a procedure or method. The Council does not, however, have the power to make recommendations on the merits of the question.¹⁵⁵

Article 37 provides the Council with the power to recommend solutions on the merits. Under this Article the Council can recommend “terms to settle”, that is, suggesting to the states how to settle a given dispute. According to the wording of the Article, this power can only be exercised in the presence of special and more rigid conditions. First of all Article 37(1) presupposes a dispute in the sense of Article 33(1), that is a dispute likely to endanger the maintenance of international peace and security. A second pre-condition is that the dispute has to be referred to the Security Council by at least one state party to the dispute. Paragraph 1 of the Article puts an obligation on the states to refer the dispute to the Council when they are not able to settle the dispute by means indicated in Article 33(1). This obligation only arises when the possibility of an agreement between the parties proves to be unrealisable.¹⁵⁶ It is for the parties to a dispute alone to decide whether settlement has failed.¹⁵⁷

Article 38 provides that the Council “may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific

¹⁵² The binding effect of Article 34 has however been challenged. See T. Schweisfurth, Article 34, In: B. Simma, 1994, p. 525

¹⁵³ H. Kelsen, 1951, p.403

¹⁵⁴ B. Conforti, *The Law and Practise of the United Nations*, 2nd edition, 2000, p. 166-167

¹⁵⁵ The question of what the Council can and can not do, as well as what it has and has not done under Article 36 will be further discussed in 6.7.3.1.3

¹⁵⁶ For more information on how the failure of peaceful settlement is established see T. Stein/S. Richter, Article 37, In: B. Simma, 1994, p.549-550

¹⁵⁷ T. Stein/S. Richter, Article 37, In: B. Simma, p.550

settlement of the dispute”. Unlike Article 34, 36 and 37, it does not refer to Article 33 and the definition of a dispute found there. From this the conclusion can be drawn that there are no specific requirements as to the dispute itself under this provision; in particular it is not necessary that the continuance of a dispute is likely to endanger the maintenance of international peace and security.¹⁵⁸ The consequence of this is that the peaceful settlement function may also have as its subject disputes¹⁵⁹ that do not endanger the peace, provided that all the parties agree in bringing the matter before the Council. The fact that the dispute does not have to cross the threshold in Article 33 does not mean that the parties can not refer disputes that fall under the definition. On the contrary, Article 38 also extends to those disputes that the states are obliged to settle peacefully under Article 33. By means of this provision the Council can therefore, at the parties’ request, involve itself in any kind of dispute as a mediator or conciliator.

Recommendations made by the Council under Articles 36, 37 and 38 do not bind states to follow the recommended course of conduct. This follows from the word ‘recommendation’ rather than the word ‘decision’, and from the drafting history of the Articles.^{160 161}

6.5.1.3.4 Reference to the International Court of Justice

Article 36(3) states that “in making recommendations under [Article 36] the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice.” This provision is not an extension of the Council’s powers but, on the contrary, limits its discretion when making a decision. The Security Council is not prevented from dealing with a dispute even if this dispute is already pending before the ICJ. Neither the fact that the dispute is pending, nor a provision like Article 12(1) of the UN Charter¹⁶² contradict this result. Parallel actions by the Security Council and the ICJ are therefore generally considered to be acceptable in order to achieve a settlement of the dispute by simultaneous legal and political decisions.^{163 164}

¹⁵⁸ N. Bentwich/A. Martin, *A Commentary on the Charter*, 1951, p.86

¹⁵⁹ Note that Article 38 does not apply to situations. This follows from the wording of the provision as such and from the fact that Article 38 is among the classic means of dispute settlement. See T. Stein/S. Richter, Article 38, In: B. Simma, p.562

¹⁶⁰ Stein/Richter, Article 36, In: B. Simma, 1994, p.546, Stein/Richter, Article 37, In: B. Simma, 1994, p 560, Stein/Richter, Article 38, In: B. Simma, 1994, p. 564

¹⁶¹ Although the provisions do not allow for the Council to impose a mandatory settlement, it is able to use a combination of powers under Chapter VI and VII to the same effect if it determines that the situation or conflict is a threat to or breach of the peace. See N. D. White, 1993, p.84

¹⁶² See 6.4 for the meaning of this Article

¹⁶³ T. Stein/S. Richter, Article 36, In: B. Simma, 1994, p.545

¹⁶⁴ Compare with the Council’s relationship with the ICC, in which the Council can defer proceedings when they impede the Council’s work in the field of international peace and security. See chapter 9.

A recommendation does not in itself establish the jurisdiction of the ICJ. This follows from the fact that the recommendations of the Security Council under Article 36 are not binding, and that Article 36(3) does not extend the powers of the Security Council, but on the contrary, limits its discretion when making a decision. The Council can only recommend, but not oblige, states to submit their disputes to judicial settlement.^{165 166}

6.5.1.4 Specific powers under Chapter VII

6.5.1.4.1 Recommendations under Article 39

Article 39 is of great interest since it is the key to the powers laid down in Chapter VII. Through this Article the Security Council is empowered to determine the existence of a “threat to the peace, breach of the peace, or act of aggression”, and only when these prerequisites are met can the Council proceed to the measures in the Chapter. This power of the Council to make an Article 39 determination will not be discussed here, but under 6.7.2.2. In this section I will instead examine the Council’s power to make recommendations under the Article. According to Article 39, the Security Council can make recommendations for the maintenance or restoration of international peace and security. As can be clearly deduced from the preparatory works, these recommendations may be identical to the recommendations under Chapter VI.¹⁶⁷ In other words, the intention in Article 39 is to confirm that, also in situations coming under Chapter VII, the Council may exercise its peaceful settlement function, indicating to the states concerned procedures and methods of settlement, or terms of settlement. The difference between the peaceful settlement function in Chapter VI and the one under Article 39 is procedural, in that only in the first case does the obligation exist that a directly concerned Council member must abstain to vote.¹⁶⁸ Within the framework of Article 39, recommendations can be a preliminary stage for further measures, in particular enforcement measures under article 41 and 42. According to the wording of the provision, the Council can however not recommend the enforcement measures laid down in these Articles. Article 39 makes a clear distinction between the non-binding recommendations on the one hand and decisions on measures under Articles 41 and 42 on the other.¹⁶⁹

¹⁶⁵ See Albanian response to the British application in the Corfu Channel case: “There can, however, be no doubt that Article 25 [of the Charter...] does not apply to recommendations made by the Council with reference to the pacific settlement of disputes, since such recommendations are not binding and consequently cannot afford an indirect basis for the compulsory jurisdiction of the Court, a jurisdiction which can only ensue from explicit declarations made by the parties to the Statute of the Court”. ICJ Pleadings, 1950, Vol. II p.25.

¹⁶⁶ Compare however the ‘compulsory jurisdiction’ created when the Council refers a situation to the ICC. See chapter 8.

¹⁶⁷ UNCIO, 1945, vol.11 p. 19 and vol.12 p.507

¹⁶⁸ See Article 27(3) and 6.3

¹⁶⁹ As we shall see under 6.7.3.2.1, the Security Council has however in its practise maintained that non-binding recommendations according to Article 39 also can encompass enforcement measures under Article 41 and 42.

6.5.1.4.2 Provisional measures

Article 40 gives the Council the power to call upon the parties concerned to comply with provisional measures, as it deems desirable. The object of the measures should be to prevent an aggravation of the situation. The provisional measures are meant to be emergency measures preliminary to any other resolution adopted on the basis of Chapter VII.¹⁷⁰ The drafters of the Charter inserted the provisional measures provision as an optional stopgap before the application of enforcement measures under article 40 and 41.¹⁷¹ In order to take provisional measures the Council still has to determine that there, at least, exists a threat to the peace in the sense of Article 39.¹⁷² The second sentence of the Article states that “such provisional measures shall be without prejudice, to the right, claim or positions of the parties concerned.” The measures may only have provisional character and leave unaffected the legal position of the states concerned, particularly of any parties to the conflict. The Article is specifically intended to give the Security Council an opportunity for intervening to end hostilities before deciding, for example, who the aggressor is.¹⁷³ It is not clearly stated in Article 40 that the provisional measures have a binding effect. It is however largely assumed in literature that the Council could make both binding decision and mere recommendations under the Article.¹⁷⁴

6.5.1.4.3 Measures not involving the use of force

Article 41 is the legal basis for non-military enforcement measures. The powers contained in this Article are intended to allow for the imposition of mandatory enforcement measures following a finding of a threat or a breach of the peace, under article 39. In the second sentence of the Article examples of such measures are given. The most important of these boycott measures is the complete or partial interruption of economical relations. Other measures mentioned in the article are “complete or partial interruption of rail, sea, air postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.” Besides these typical measures mentioned in the Article itself, the Article has been interpreted as to give the Council the power to impose other measure whose purpose are to provide a sanction and which does not involve the use of armed force. These “atypical” measures will be discussed in 6.7.3.2.3.

The first sentence of the Article states that the Council can decide what measures to employ and that it may call upon the members of the United

¹⁷⁰ N.D. White, 1993, p.92

¹⁷¹ The Article states that the Council can resort to provisional measures “before making the recommendations or deciding upon the measures provided for in Article 39”.

¹⁷² J. Frowein, Article 40, In: B. Simma, 1994, p.618

¹⁷³ Ibid. p.620

¹⁷⁴ E.g. Kelsen, 1951, pp.740-742, N.D. White, 1993, p.90, J. Frowein, Article 40, In: B. Simma, 1994, p.620, See however p.183 Benedetto Conforti, who is of the opinion that provisional measures under Article 40 can not be of a binding nature, but merely serve as recommendations. B. Conforti, 2000, p.183

Nations to apply such measures. The measures under Article 41 are not carried out by the Council itself, but adopted by the member states of the UN at the request of the Council. Under Article 48 the member states are under an obligation to carry out the Council's decisions and to implement the measures decided upon. The states are thus obliged by the UN-Charter to carry out decisions regarding measures not involving the use of force. The Council is however free, when it does not want to make binding decisions, to only recommend measures under Article 41.¹⁷⁵ The states are then free to adopt the measures or not.

6.5.1.4.4 Measures involving the use of force

Article 42 and the following articles concern the Security Council's power to use force against a state responsible for aggression, or responsible for a threat to the peace or breach of the peace. Article 42 states that the Council may take such action by air, sea, or land forces, as it deems necessary to maintain and restore international peace and security. The Article does not only contemplate operations involving combat against armed forces, but also demonstrations and blockades are expressly mentioned. A prerequisite to the application of article 42 is the opinion of the Council that measures provided for in Article 41 would be inadequate or that they have proven to be inadequate. It is not necessary that measures have previously been ordered and implemented under Article 41. Rather, it is sufficient that the Council opts immediately for Article 42 on the basis of a prognosis of the possible ineffectiveness of the procedures of measures under Article 41.¹⁷⁶

According to Article 42 action may be decided upon and implemented by the Security Council itself. The Council does not have to order or recommend something to the states, but acts directly. This presupposes that armed forces are made available to it by the member states. Article 43 contains the relevant regulations for this purpose and details the mechanism whereby armed forces are to be made available. The member states are obliged to enter into "special agreements" with the Council and to place troops at the disposal of the Council.¹⁷⁷ Under Articles 46 and 47, the actual use of the various national contingents is to be decided by a Military Staff Committee, composed of the Chiefs of Staff of the five permanent members, and under the authority of the Council. As we shall see under 6.7.3.2.4, Articles 43 and following articles have never, from 1945 until today, been applied.

6.5.2 Implied powers

The powers of the Security Council are not limited to these specifically expressed powers mentioned in Articles 24(2) and elaborated in Chapter VI,

¹⁷⁵ J. Frowein, Article 42, In: B. Simma, 1994, p.627

¹⁷⁶ F. Danelius, 1993, p.22

¹⁷⁷ Article 43,44,45

VII, VIII and XII. The UN Charter has been interpreted to mean that the Council, in addition to these ‘specific’ powers granted, has ‘general’ powers, not expressly mentioned in the Charter, but necessary for the proper discharge of its functions.^{178 179} The doctrine of implied powers was expressed by the International Court of Justice in the Reparation case of 1949¹⁸⁰, where it stated that “the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practise.”¹⁸¹ In the Namibia Advisory Opinion from 1971¹⁸², the International Court of Justice commented on the powers of the Security Council, and stated that “[t]he reference in paragraph 2 of this Article [Article 24] to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred to it in paragraph 1.” The ICJ referred to an earlier statement of the Secretary-General in 1947 that the Council’s powers are not restricted to those specifically referred to in paragraph 2, but are “commensurate with its responsibility for the maintenance of peace and security.”¹⁸³ A restrictive interpretation of 24(2), in the sense of a final listing of the powers conferred on the Council, is not compatible with the fact that the Council is charged with the primary responsibility for maintenance of peace and security. For, “if the Security Council, as the primarily responsible political organ, is to live up to its mandate to take prompt and effective measures for the maintenance of peace, it must be accorded the widest possible discretion as to the kind of measures to be taken.”¹⁸⁴ Article 24 therefore serves as the basis for comprehensive powers for the Council, going beyond the enumeration in paragraph 2 and thereby fulfilling the function of closing any gaps in the provisions of powers for the Council which might otherwise exist. Where the Charter leaves gaps in providing for specific authority for the Council to take measures necessary to carry out its primary function of maintaining the peace, it may be presumed to have those powers necessary

¹⁷⁸ J. Delbrück, art 24, In: B. Simma, 1994, p.401

¹⁷⁹ The notion of necessary implied powers in relation to the Security Council was, however, challenged by Hans Kelsen, based on the reference to specific powers in Article 24 of the Charter. In this regard Kelsen stated that: “It is impossible to interpret Article 24 to mean that it confers upon the Council powers not conferred upon it in other Articles of the Charter.” H. Kelsen, 1951, p.284

¹⁸⁰ Reparation for Injuries Suffered in the Service of the United Nations, ICJ Report, 1949, 174, at. 198

¹⁸¹ There is a presumption in international law that a teleological interpretation should be used on treaties setting up international organisations, such as the UN. An important aspect of the teleological interpretation is the determination of implied powers, according the organisation the authorities that are essential for the performance and the execution of the functions. When a treaty is conferring jurisdiction on international tribunals, such as the International Criminal Court, the presumption is however reversed. These treaties should instead be restrictively interpreted so as not to limit the sovereignty of the states. *See* G. Ress, Interpretation, In: B. Simma, 1994, p.26-43.

¹⁸² Legal Consequences for States of the Continued Presence of South Africa in Namibia (South west Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Advisory Opinion, ICJ reports 1971, 16

¹⁸³ Secretary-General statement, 10 January 1947, SCOR/2nd Yr/91stmtg/ p.44

¹⁸⁴ J. Delbrück, Article 24, In: B. Simma, 1994, p.403-404

to prevent the frustration of one of the fundamental objects or purposes of the Charter.¹⁸⁵ However, given the fact that the range of powers of the Security Council is open in principle, the discretion of the Council in taking action is not completely unlimited. The only express limitations are that the powers must be exercised in conformity with the fundamental purposes and principles found in Chapter I of the Charter. There are however other, political, limitations to the Council's power that will be discussed in the following Chapter. In 6.7 I will examine how the Council has used its, specific and implied, powers.

6.6 Limitations on the powers of the Security Council

6.6.1 Legal limitations

In discharging its duties, the Security Council shall, according to Article 24(2), act in accordance with the purposes and principles of the UN. These are the only express limits to the power of the Council under the Charter. The purposes and principles of the UN are laid down in Article 1 and 2. They are extremely broad in scope and are defined in very wide terms. I will in the following present the purposes and principles that are of interest for the scope of this thesis.

Paragraph 1 of Article 1 states that the primary aim of the UN is to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” We here see that a distinction is made between the dispute settling powers under Chapter VI and the enforcement powers under Chapter VII. The former powers are to be exercised “by peaceful means, and in conformity with the principles of justice and international law”. These criteria, especially that of conformity with international law, are not expressed in relation to the “suppression of threats to the peace, breaches of the peace, and acts of aggression”. This means that in carrying out its functions in the context of the peaceful settlement or adjustment of disputes the Council has no powers to override or restrict the rights of the states under international law. In contrast, when the Council is acting in the context of maintaining or restoring international peace and security in Chapter VII, it is not bound by legal considerations. The Council is not bound by international law when it makes a determination under article 39, and it has the power to take enforcement measures that infringe upon, restrict or suspend the rights that

¹⁸⁵ M. Akehurst, 1997, p.367-368

states normally are entitled to exercise both under customary and conventional international law.¹⁸⁶ This does not mean that the Council is above the law or that legal considerations play no part in the Council's work. It means, however, that the Council does not need to base its determinations upon considerations of international law, or even that such considerations must necessarily be taken into account in determining that enforcement measures are warranted in relation to a particular situation.¹⁸⁷ The Council is a political organ and although they take legal factors into account, the political consideration often overshadow legal considerations.¹⁸⁸ The Council must balance legal consideration, against what is politically suitable, possible and desirable in each particular case.¹⁸⁹ Even though the Council is not bound by international law in its exercise of enforcement measures, it still must follow the purposes and principles of the UN.

Paragraph 2 of Article 1 talks of respect for the principle of equal rights and self-determination of peoples and **paragraph 3** talks of promoting and encouraging respect for human rights and fundamental freedoms. This poses a limitation on the Council's enforcement powers, in that it precludes the imposition of any form of government by the UN on the population of a state or other entity. The Security Council can not, by means of invoking the enforcement powers, impose a particular form of government upon a majority or significant segment of a population of any state or non-self governing territory.¹⁹⁰ This limitation on the Council to impose a particular political system or constitutional arrangement upon a population is based upon the fundamental principles of the independence of states and of respect for the self-determination of peoples. However, "there is no reason why the Security Council could not determine that particular members of a government which are suspected of committing grave international crimes, such as the perpetration of aggression or genocide, could not be divested of governmental authority, arrested and placed on trial for their actions."¹⁹¹ It is even conceivable that a particular political party or movement which has committed such crimes or which propagated such crimes as part of its objectives or "program" could be deemed organisations which posed a threat to international peace and security.¹⁹² The duty of the Security Council to respect human rights and humanitarian law was referred to the International Court of Justice in the Namibia Advisory Opinion¹⁹³, and has been recognised by the UN in the imposition and implementation of both non-military and military enforcement measures. This means that the Council

¹⁸⁶ T.D Gill, *Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, In: Netherlands Yearbook of International Law Volume XXVI 1995, p.33-138, at. p.61-62

¹⁸⁷ *Ibid.* p.62

¹⁸⁸ M. Akehurst, 1997, p.387

¹⁸⁹ F. Danelius, 1993,p.169

¹⁹⁰ T.D. Gill, 1995, p.75

¹⁹¹ T.D. Gill,1995, p.76

¹⁹² *Ibid.*

¹⁹³ ICJ Advisory Opinion, ICJ Reports 1971, 16. *Supra* footnote 182

must take account of the impact of sanctions upon the population of target countries and ensure that UN civil and military personnel observe human rights standards in the conduct of their operations.

Of the principles of the UN, **paragraph 7 of article 2**, could have been a serious limitation on the powers of the Council. This so-called limit of domestic jurisdiction states that: “Nothing contained in the present Charter authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

The limit of the domestic jurisdiction has been much discussed in practise and in the literature, and the interpretation is still uncertain.¹⁹⁴ It has been argued that the limitation was intended to exclude all Security Council review, whether discussion or resolution, either under Chapter VI or by its recommendatory powers under Chapter VII, when the situation it is faced with is essentially internal.¹⁹⁵ In practice, the Security Council has developed its own interpretation as to what constitutes intervention and domestic jurisdiction. The practice is to interpret domestic jurisdiction narrowly - the opposite of what was intended by the drafters of the Charter.¹⁹⁶ The very abundant UN practice indicates that the Council has always, or nearly always, said that it could discuss and decide, despite protests by the individual state or individual states addressed by the resolution.¹⁹⁷ The Council has adopted the view that the questions will cease to be essentially matters of domestic jurisdiction if in its opinion they raise issues of international concern transcending state boundaries.¹⁹⁸ The areas in which this has occurred are those of liberation of peoples under a colonial regime, the protection of human rights and the struggle against governments imposed by force or against governments considered oppressive. In each of these areas the activity of the Council has ultimately unfolded in a direction contrary to Article 2(7). The protection of human rights is to be seen in a broad sense, so that “any situation within a given state which is injurious to human dignity - from mistreatment of minorities and gross violation of human rights, like genocide, ethnic cleansing, massive deportations and so on, to the adoption of economic and social policies detrimental to the population, to suffering imposed on the civil population by civil wars - is now the subject of UN action, whether or not it constitutes the violation of a specific international obligation.”¹⁹⁹ Aside from human rights defined in this broad sense, and aside from de-colonisation matters, the domestic

¹⁹⁴ See F. Ermacora, Article 2(7), In: B. Simma, 1994, p.149-153,

¹⁹⁵ D.R Gilmor, *The Meaning of Intervene within Article 2(7) of the United Nations Charter*, In: International and Comparative Law Quarterly, 16, 1967, 330-, at p.349.

¹⁹⁶ M. Akehurst, 1997, p.369

¹⁹⁷ N.D. White, 1993, p.59

¹⁹⁸ This involves essentially a political judgement on the part of the Security Council.

¹⁹⁹ B. Conforti, 2000, p.144

jurisdictional clause may still be and still is, invoked for those sectors which international law in principle leaves to the discretion of the individual state.

6.6.2 Political limitations

The most important political limitation to the Council's power is the veto power. This power allows the permanent states to block a Council decision and hinder it to come into existence. This rule weakens the capability of the Council in that its power to a large degree depends on the consent of the permanent members. As we have seen the rules concerning the voting procedure and the veto are laid down in Article 27 of the Charter, and in this sense it is a legal limitation. The rule has however been used, and misused, for political motives, and is therefore to be treated as a political limitation. The veto has often been used in contradiction to the literal terms of the Charter. The power of the veto has been exercised according to considerations of interest rather than in accordance with the letter of the Charter.²⁰⁰ This was especially true during the Cold War between the United States and the Soviet Union. The permanent members, particularly the superpowers, interest and influences became so persuasive in the Cold War that the veto effectively debarred the Security Council from taking action or recommending measures of any sort in many areas of the world. The veto undermined the role of the Council in armed conflicts in which the permanent members were directly involved and prevented it from acting in many of the armed conflicts in which the permanent members were indirectly involved or had an interest. From 1946 to 1986 the actual use of veto was as follows: Soviet Union 121; USA 57; United Kingdom 26; France, 16, China 22.²⁰¹

With the end of the Cold War in the late 1980s, the number of vetoes has decreased dramatically, for instance in 1991 no vetoes were cast by the permanent members.²⁰² Free of these powerful limiting factors, the Security Council has been able to use the range of powers provided for in the Charter more readily. The Council is however still conditioned by political considerations. The significance of the veto will be shown in the following Chapter on the use of the Council's power.

Another political limitation can implicitly be found in Article 24(1), which provides that the Security Council acts "in the name" of all UN members. According to Benedetto Conforti the conduct of a state cannot therefore be the subject of enforcement measures, "when the condemnation is not shared by the opinion of most of the states and their peoples".²⁰³ This limitation implies that the Council has to be guided by the opinions in the international community. Not only the opinion of the members in the Council is of

²⁰⁰ N.D. White, 1993, p.9

²⁰¹ S.D Bailey, *The Procedure of the UN Security Council*, 2nd edition, 1988, p.209

²⁰² N.D. White, 1993, p.12

²⁰³ B. Conforti, 2000, p.178

importance, but also the other UN member states. The Council will not adopt a resolution that they know will be unfavourably received by the UN member states.

6.7 Development and use of powers within limitations

6.7.1 General

In this part, I will take a closer look at how the Council has used its powers in practise. I will give examples ranging from the earliest year of the Council's existence and up until today. In this way I will show how the powers have been broadened beyond a literal interpretation of the UN Charter, and how the political and legal limitations have restrained and directed the work of the Council. Although the Council does not always indicate on what Article, or even what Chapter, it adopts a resolution, I will, for the clarity of the presentation, use the same grouping under the Articles as in 6.5.1. In the division between the different Articles I will take guidance from the wording of the resolutions as well as from the opinion of legal authors.

Since the Council's use of powers is closely connected with how the Council has interpreted its own jurisdiction, I will begin with a look at this question, before I go into the actual acting of the Council. As mentioned before, the prerequisite for the Council's jurisdiction in Chapter VII is that it has made a determination that there exist a threat or breach of the peace, or an act of aggression. The most interesting point of the Council's jurisdiction is how the line is drawn between Chapter VI and Chapter VII; in other words how the Council has interpreted the notion of 'threat to the peace'. In the Council's relationship with the ICC this distinction will be of great importance, and I will therefore devote some pages to this topic.

6.7.2 Jurisdiction

6.7.2.1 Chapter VI jurisdiction

As noticed in the previous, the peaceful settlement function in Chapter VI is limited to disputes and situations "the continuance of which is likely to endanger the maintenance of international peace and security".²⁰⁴ This means that a matter must have a certain gravity in order for the Council to have Chapter VI jurisdiction over it. The gravity may depend either on the matter being disputed or the means and intensity with which the states directly concerned claim to have their respective interests or points of view prevail.²⁰⁵ In any case, the Council enjoys broad discretionary power in

²⁰⁴ Article 33

²⁰⁵ C. Tomuschat, Article 33, In: B. Simma, 1994, p.5005-508

deciding whether a question actually may endanger the peace and therefore deserves to be dealt with. The Council considers itself empowered to deal with a conflict even when that conflict does not endanger international peace and security. In the Eichmann case, for example, the Council pronounced itself when Adolf Eichmann was abducted from Argentina, although quite obviously this violation of Argentinian territorial sovereignty in no way constituted a threat to world peace.²⁰⁶ The only limit is the fact that some kind of difference, whatever it may be, exists between the states.²⁰⁷

The line between Chapter VI and Chapter VII jurisdiction has in the Council's practise not always been based on the nature of the conflict or situation. In fact there are no substantive factual distinction between the notion "danger to international peace" in Chapter VI, and "threat to the peace", which is the lowest prerequisite for Chapter VII jurisdiction.²⁰⁸ Instead political factors, including the need for consensus, has dictated which Chapter a resolution has been based on. The use of the two different notions often depend on what type of action the Council is ready to take, and they are in effect, "merely 'labels' put into the resolutions to indicate the political climate in the Council."²⁰⁹

In the development of the Council's actions in **South Africa** we can see that the difference between "threat to the peace" and "danger to the peace" is not an increase in the level of violence of a dispute or conflict, but the motives and interest of the members of the Council. The Western permanent members saw the protection of their economical interest in South Africa as vital, and therefore their general aim was the prevention of a mandatory set of sanctions being imposed against the government. Nevertheless, the international pressure on South Africa and consequently on Western governments forced them to grant some concession and to label the situation as a threat to the peace.²¹⁰ In the following section the determination that the apartheid system in South Africa constituted a threat to the peace will be discussed further. It is in this context sufficient to state that changing political factors often affect the Council's jurisdictional findings to a greater extent than any legal criteria.

6.7.2.2 Chapter VII jurisdiction

6.7.2.2.1 Threat to the peace

The concept "threat to the peace" is the broadest and most indistinct concept of Article 39. It is especially in regard to this concept that the Council's discretionary power is exercised. The term is very broad and elastic and, unlike aggression and breach of the peace, it is not necessarily characterised

²⁰⁶ See M. Akehurst, 1997, p.110 and p. 113 on the Eichmann case.

²⁰⁷ B. Conforti, 2000, p.165

²⁰⁸ N.D White, 1993, p.38

²⁰⁹ Ibid.

²¹⁰ M. Akehurst, 1997, p.390-391

by military operations or operations involving the use of armed violence.²¹¹ At the time of the drafting of the UN Charter, what was considered to constitute “threat to the peace”, was military threats to international peace.²¹² In its practise since 1945, the Security Council has exercised its discretion in determining what poses a threat to the peace in a wide variety of situations and thereby widened the term.²¹³ I will here present some cases in which the Council has found a breach of the peace to exist, and I will hereby see how the Council in its practice has defined and widened the concept, not only to cover the traditional inter-state disputes, but also intra-state situations and conflicts.

The wide interpretation of “threat to the peace” came into full bloom in the early 1990s with the end of the Cold War and the ensuing end of the deadlock in the Security Council due to the loosening tension between the Soviet Union and the United States.²¹⁴ As early as in the 1960s however, the Security Council had determined that the racist regime in Rhodesia constituted a threat to international peace, and , as mentioned, in the 1970s that the racial discrimination and the system of apartheid in South Africa constituted a threat to the peace. When **Rhodesia** unilaterally declared its independence from the United Kingdom in 1965, the Council condemned the illegal racist regime.²¹⁵ On November 20, 1965, the Council determined that a continuation of the regime would be a threat to the peace²¹⁶, and on April 9, 1966 it was expressly formulated that the prevailing situation represented a threat to the peace.²¹⁷ In the case of **South Africa** the Council has not made a finding in general terms that the apartheid system constitutes a threat to the peace. The resolutions passed in condemnation of the system have however entailed that the whole situation of “denying the South Africans the right to self-determination” comes within the concept threat to the peace.²¹⁸

The members of the Council were apparently convinced that the danger of armed conflicts in Rhodesia and South Africa would be brought about by the racist regimes.²¹⁹ On this basis, one can assume that internal conditions within a state alone, such as massive violations of human rights, can be seen

²¹¹ I. Österdahl, *Threat to the Peace, the Interpretation by the Security Council of Article 39 of the UN Charter*, 1998, p.43,

²¹² H. Kelsen, 1951, p.930

²¹³ T.D. Gill, 1995, p.41

²¹⁴ See 6.6.2

²¹⁵ The white population of the British colony Rhodesia declared it independent on November 11, 1965 and formed a government, without reference to the Africans who formed 94 % of the population in Rhodesia

²¹⁶ Resolution 217, 20 of November, 1965. All resolutions mentioned in this section are Security Council resolutions, if nothing else is stated.

²¹⁷ Resolution 221, 9 of April, 1966

²¹⁸ See for example resolution 473, 13 of June, 1978

²¹⁹ N.D. White, 1993, p.37, The representative for Jordan for example, meant that the primary reason for the situation being a threat to the peace in Rhodesia was the denial of the right to self-determination of the people. See Security Council 1340 meeting, 21 UN SCOR 4 (1966)

as a threat to the peace. The Council appears to have developed the term “threat to the peace” not only to cover situations of traditional international violence, in which the main danger to international peace is a conflict between two or more states, but also situations where the danger instead arises primarily from the internal events in one state, which in the case of Rhodesia and South Africa was the denial of self-determination by racist regimes. Jochen Frowein is however doubtful to the assumption that the Council’s action in the case of Rhodesia and South Africa means that internal conditions within a state alone can be seen as threat to the peace. He means that one should look at the particular situation in southern Africa, “including the danger of violent involvement with neighbouring states.”²²⁰ Another important factor in the Council’s determination of a threat to the peace in the Rhodesia situation is, according to Frowein, the fact that the United Kingdom, that under international law was still seen as the state being responsible for Rhodesia, voted for the resolution.²²¹ The cases show, however, that the concept of a threat to the peace can be understood in an extraordinary broad manner when there is unanimity within the Council. According to Inger Österdahl, the resolutions issued in the Rhodesia and South Africa question were “such isolated and exceptional events” in the context of decolonisation and that there was no risk at this time that “the broad construction of threat of the peace would spread”.²²² The new trend of the Council’s interpretation of a “threat to the peace” was instead set in the beginning of the 1990s.

With the end of the Cold War the opportunities open to the Council under Article 39 became much greater. The civil wars in Iraq, Yugoslavia and Somalia were all designated threats to the peace within 1991-1992, not only because of the massive scale of destruction in each of these conflicts but also because of their adverse effects on neighbouring states. In the case of the **Kurds and Shiite Muslims in Iraq** 1991, the repression of the civilian population resulting in a massive transfrontier flow of refugees was considered to threaten international peace and security in the region.²²³ In the **former Yugoslavia** in 1991, the then civil war between Croatia, who wanted to break away from the Socialist Federal Republic of Yugoslavia, and the Serb dominated central Yugoslavian authorities, was considered by the Security Council to constitute a threat to international peace and security.²²⁴ The Council must have assumed that fighting on a considerable scale with the possibility of outside intervention can always be considered to be a threat to the peace.^{225 226} Within the framework of Security Council

²²⁰ J. Frowein, Article 39, In: B, Simma, 1994, p. 612

²²¹ Ibid.

²²² I. Österdahl, 1998, p.44-45

²²³ Resolution 688 of 5 April, 1991. No enforcement measures were recommended or decided upon by the Security Council as a follow-up to its determination that the repression of Iraqi civilians and its consequences threatened international peace and security, and this situation will therefore not be mentioned again.

²²⁴ Resolution 713, of 25 September, 1991. The measures that were imposed in this conflict will be further discussed under 6.7.3.2.3 and 6.7.3.2.4.

²²⁵ Österdahl, p.47.

action in the former Yugoslavia, the Council also found that crimes against international humanitarian law constitute a threat to international peace.²²⁷ In order to reach this conclusion the Council referred back to its first resolution in the case of Yugoslavia and “all subsequent relevant resolutions”²²⁸ and expressed “its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings, massive, organised and systematic detention and rape of women, and the continuance of the practice of ‘ethnic cleansing’, including for the acquisition and holding of territory.”²²⁹ All in all, according to the Council, this situation continued to constitute a threat to international peace and security.²³⁰ This was the first time in its history that the Security Council determined that crimes against humanitarian law constituted a threat to international peace and it was in this context that the Council established the ad hoc International Tribunal for the Former Yugoslavia in order for the perpetrators of the crimes to be brought to justice.²³¹ In the case of **Somalia**, a civil war and its consequences were again considered by the Security Council to constitute a threat to the peace. The Council stated in the beginning of 1992 that it was “gravely alarmed at the rapid deterioration of the situation in Somalia and the heavy loss of human life and widespread material damage resulting from the conflict in the country” and “aware of the consequences on the stability and the peace in the region” it adopted resolution 733 of 23 January 1992.²³² The Council was concerned that the continuation of the situation would constitute a threat to international peace and security.²³³

Even though the situation in Somalia was carefully conditioned on the existence of “specific circumstances” and was not to be seen as constituting a precedent,²³⁴ these three above mentioned cases show how the Council has determined a threat to the peace to exist in civil war situations which have been combined with serious human suffering in different forms. It now seems to be accepted that extreme violence within a state generally can be

²²⁶ When Bosnia-Herzegovina had become an independent state in March/April 1992 and fighting broke out between the Bosnian, the Croat and the Serb communities within Bosnia, with outside support from the Serb dominated Yugoslav People’s and the Croatian army, the Council adopted resolution 752 of 15 May 1992, that determined the situation to constitute a threat to international peace and security. Since Bosnia- Herzegovina by then had become an independent state and since there was military interference from outside, this was a more clear-cut case of threat to the peace along traditional lines, with one state against another state, than the Croatian and Iraqi civilian case.

²²⁷ Resolution 808 of 22 February, 1993

²²⁸ *Ibid.*, pre. para. 1.

²²⁹ *Ibid.*, pre. para. 3

²³⁰ *Ibid.*, pre. para. 4

²³¹ The establishment of the ad hoc Court will be discussed further under 6.7.4

²³² Resolution 733 of 23 January 1992, pre. para. 3

²³³ *Ibid.*, pre. para. 4

²³⁴ See S/PV 3145 of 3 December 1992 relating to the situation in Somalia, in which numerous delegates refer to the unique circumstances calling for exceptional measures from which no precedents were to be construed.

qualified as a threat to the peace.²³⁵ ²³⁶ From these cases we can draw the conclusion that the Council is willing to determine civil wars as threat to the peace, and thereby being able to use its powers under Chapter VII, under the requirement that the situation has consequences for international peace. This is fulfilled when the conflict threatens to destabilise neighbouring states or to engage outside powers.²³⁷

The most far-reaching use of the concept “breach of the peace” was made in resolution 748 of March 31, 1992 concerning **Libya**. This resolution represents a new development of the concept to cover aspects of terrorism. The Council stated in an earlier resolution that international terrorism, in this case the placing of a bomb on an aircraft that was destroyed over Lockerbie in Scotland in 1988, constituted a threat to international peace and security.²³⁸ The Council further stated that investigations implicated officials of the Libyan Government in the destruction of the aircraft and requested Libya to extradite the suspected terrorists.²³⁹ When Libya refused to comply with the resolution, the Security Council determined that the continued failure by the Libyan Government to respond to the request to extradite the suspected terrorists constituted a threat to international peace and security.²⁴⁰

²⁴¹

What we can see in these cases is that the Council’s discretion to determine the existence of a threat to the peace is virtually unlimited. The Council has taken a very broad view on what can constitute a threat to the peace. In 1992 the President of the Security Council made a statement concerning the Council’s use of the term. Since this statement is very expressive as to how the term has been interpreted by the Council, I will here quote a part of it as a conclusion of this section. “The absence of war and military conflicts [...] does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The Council has the power to characterise situations relating to internal disturbances, human rights violations, civil conflicts or the acquisitions by a state of nuclear or other weapons of mass destruction, as threats to the peace. Even the refusal of a government or opposition group to accept the result of an election can be deemed to constitute a threat to the peace, at least when it involves the outbreak of hostilities between contending fractions or causes some aggravation of international tensions, significant refugee flows or other

²³⁵ J. Frowein, Article 39, In: B. Simma, 1994, p.611

²³⁶ The Council has also made a finding of a threat to the peace in the civil war in Liberia (resolution 788 of 19 November 1992), the civil war in Angola (resolution 864 of 15 September 1993), and the civil war in Albania (resolution 1101 of 28 March 1997).

²³⁷ This requirement, that additional consequences are needed, can however be used by the permanent members of the Council to limit the usage of the concept threat to the peace, to situations which do not affect their interest.

²³⁸ Resolution 731 of 21 January 1992, pre. para. 3

²³⁹ Ibid., pre. para. 7 and op. para. 3

²⁴⁰ Resolution 748 of 31 March 1992, op. para 8

²⁴¹ For measures imposed in this situation 6.7.3.2.3.

(potential) cross-border effects. There seems to be some kind of consequences requirement that an internal conflict poses a threat to neighbouring states or threatens to draw in outside powers. If the Council agree it can however determine a threat to the peace to exist also in a situation which emanates from within one country only, and which does not really threaten anything more than the domestic peace in the country. We see how the Council has developed the concept to include even national conflicts, but we also see that the Court has started to define crimes against human rights as “threats to the peace”. The origins of the domestic disturbances so far labelled “threats to the peace” have always been serious violations of fundamental human rights either by the authorities or by independent militias.”²⁴²

6.7.2.2 Breach of the peace

The term “breach of the peace” appears to be more straightforward than “threat to the peace”. A breach of the peace exists when armed units of two states are engaged in hostilities, and the majority of the members of the Council deems the hostilities serious enough to invoke Article 39, but not so serious as to constitute an act of aggression. It is generally accepted that the determination of a breach of the peace is less serious than a finding of aggression, but more serious than a determination of a threat to the peace.²⁴³ A breach of the peace can relate to any type of hostilities ranging from the violation by one or both sides of a cease-fire agreement, a large scale border incident, or act of terrorism, to full scale warfare by two or more states.²⁴⁴ “Various kinds of acts could be considered as constituting breaches of the peace. It would seem logical that any resort to armed force would come within the meaning of the phrase.”²⁴⁵

The Council has however only made a finding of breach to the peace on four occasions; in relation to the North Korean invasion of South **Korea**²⁴⁶, the Argentinian invasion of the **Falklands**²⁴⁷, the war between **Iran and Iraq**²⁴⁸ and the Iraqi invasions and occupation of **Kuwait**^{249, 250}. All of these cases concern large-scale invasions by one state of another. In the case of Korea, the Falklands and the invasion of Kuwait the more condemnatory term “aggression” appears to be more suitable. In these cases the Council chose not to label the attacks as acts of aggressions since the greater seriousness of such a charge might have caused undue delay.²⁵¹ In many cases of obvious

²⁴² Note by the President of the Security Council, UN SC Doc. S/23500 of 31 January 1992

²⁴³ L.M. Goodrich, E. Hambro and P.S Simons, 1969, p.298

²⁴⁴ J. Frowein, Article 39, In: B. Simma, 1994, p.608

²⁴⁴ T.D Gill, 1995, p.43

²⁴⁵ L.M. Goodrich, E. Hambro and P.S Simons, 1969, p.297

²⁴⁶ Resolution 82, 25 June, 1950.

²⁴⁷ Resolution 502, 3 April, 1982

²⁴⁸ Resolution 598, 20 July, 1987

²⁴⁹ Resolution 660, 2 August, 1990

²⁵⁰ All of these case will be discussed under 6.7.3

²⁵¹ In the case of Korea, the United States took the view that the North Korean attack was “an act of aggression”. The Council opted for the more neutral concept “breach of the

breaches of international peace the Council has failed to make a determination under Article 39, and some cases were not even discussed.²⁵² In cases where the permanent members or its allies are involved the Council is prevented from taking action because of the threatened use or the actual use of the veto.²⁵³

6.7.2.2.3 Act of aggression

Aggression presumes the direct or indirect application of the use of force. It is thus a special form of a breach of the peace. The particular designation is justified in that with the determination of aggression, the party which has caused a breach of the peace is established. Where an act of aggression exists, there is an aggressor and when the Council makes such a finding it labels or condemns one of the states as the guilty party. As with the terms “threat to the peace” and “breach of the peace”, “act of aggression” is not defined in the Charter. In the final stage of making the Charter, at the San Francisco Conference in 1945²⁵⁴, many delegations proposed the inclusion of a definition of aggression in the Charter.²⁵⁵ The committee concerned rejected the idea and meant that the determination should be made by the Security Council. They meant that any definition might hamper the Council’s freedom of action by forcing premature application of sanctions or by establishing standards that might not be easily applied in a particular case. Despite these objections, the United Nations struggled for years to find an acceptable definition to aggression, and in 1974 a Declaration of Principles on the Definition of Aggression was adopted by the General Assembly.²⁵⁶ The Declaration lists a series of cases of aggression, that range from military invasion or occupation, to bombardment of land, sea or air forces, to the blockade of ports or coasts, to the sending of bands of mercenaries or to a state allowing its territory to be used for attacks against another state’s territory and so on. This list does not however bind the Security Council and does not effect Article 39 and the powers of the Council. Nevertheless the Council can rely on the resolution in determining aggression.

peace” as sufficient for it to proceed to take military enforcement action in order not to delay its acting. The resolution in the Falkland question did not condemn the Argentinian attack as aggression, as such a finding might have incurred the veto of the Soviet Union. In the Gulf war the determination “breach of the peace” was chosen in order not to make the Iraqis more intransigent, when in the days following the invasion, there appeared to be the possibility of the Iraqi’s withdrawing voluntarily. *See* N.D. White, 1993, p.41-43, L.M. Goodrich, E. Hambro and P.S Simons, 1969, p.297-298

²⁵² Some examples of direct inter-state armed conflict, when the Security Council failed to make a Article 39 determination are; the conflicts between Ethiopia and Somalia in 1977, India and Pakistan between 1947-49, China and the Soviet Union in 1969, India and China in 1962, the Israeli invasion of Lebanon in 1978 and 1982, the United States’ incursion into Guatemala 1954, the Dominican Republic 1965, Grenade 1983 and Panama 1989.

²⁵³ L.M. Goodrich, E. Hambro and P.S Simons, 1969, p. 297-298

²⁵⁴ UNCIO, vol.12, doc.505

²⁵⁵ L.M. Goodrich, E. Hambro and P.S Simons, 1969, p.298

²⁵⁶ Definition of Aggression, adopted at New York, 14 December 1974, UN. G.A. Res. 3314 (XXIX) 29 UN GAOR, UN Doc. A/9631 (1974) G.A Resolution 3314/1974

The term aggression is used quite frequently by individual states in the course of the Council debates.²⁵⁷ The Council as a whole is however unlikely to agree to use it on a regulatory basis. The potential consequences of a finding of aggression at the initial stage of a conflict, and the fact that such a determination will not encourage the accused state to withdraw, signify that there has been very limited Council practise on the term “act of aggression”.²⁵⁸ Indeed before the adoption of the Definition of Aggression, there has been no formal findings of aggression.²⁵⁹ Since 1974 the Council has in many cases qualified short-term military actions by South Africa²⁶⁰ and Israel²⁶¹ as acts of aggression. The condemnations so far relate to quite limited acts of aggression and not to wider wars of aggression.²⁶²

Although the use of the term aggression in Council resolutions has increased since 1974, the definition has not resulted in a consistent and objective use of the term. The findings are mainly motivated by selective, discretionary and political factors.²⁶³ Western states are still cautious about allowing a finding of aggression against two friendly states. In the last few years, there have been fewer incidents and no condemnations in terms of aggression from the Council, reflecting the political mood of the Council towards conciliation rather than confrontation.

6.7.3 Use of powers

6.7.3.1 Use of powers under Chapter VI

6.7.3.1.1 Supervision of the obligation to settle peacefully

The power under Article 33(2), to call parties to settle their disputes by peaceful means, is the weakest form of Security Council response. An appeal like this can be made as a first step in the Council’s dealings with a conflict and work as a reminder to the states of their duties under the Charter.²⁶⁴ Although the responsibility of the parties to settle their disputes peacefully continues to exist even after armed activities have begun between

²⁵⁷ T. D. Gill, 1995, p.45

²⁵⁸ see 6.7.2.2.2 for cases where the term “breach of the peace” has been used, although “act of aggression” seemed more appropriate.

²⁵⁹ J. Frowien Art 39, In: B. Simma, 1994, p.610

²⁶⁰ e.g. resolution 577 of December 6, 1985 regarding acts of aggression against Angola.

²⁶¹ e.g. resolution 573 of October 5, 1985, regarding act of aggression on Tunisia.

²⁶² War of aggression is a crime against international peace giving rise to individual responsibility as well as state responsibility, while acts of aggression simply give rise to state responsibility. As stated by N. D. White, this difference would “tend to inhibit a collective finding of ‘war of aggression’ because of more onerous consequences.” N. D. White, 1993, p.53

²⁶³ J.I. Garvey, *The UN Definition of Aggression; Law and Illusion in the Context of Collective Security*. In: Virginia Journal of International Law, 1977, p.177

²⁶⁴ F. Danelius, 1993, p.12

them²⁶⁵, a reminder of this duty is going to be ignored after the outbreak of hostilities.²⁶⁶ To be effective the call should be followed by more far-reaching actions if the conflict is continued. The possibility of future Council actions under other provisions in Chapter VI and Chapter VII can act as a warning to the concerned states.²⁶⁷ During the Cold War however, the use of Article 33(2) was sometimes the only measure available to the Council. Due to the fear that the permanent members would use its veto power and block more far-reaching resolutions, the Council adopted minimal measure resolutions aimed at securing the support of the permanent members. An example of this attitude can be found in the **Gulf War** between Iran and Iraq. In 1980 the Council made an initial call to Iran and Iraq under Article 33(2).²⁶⁸ ²⁶⁹ It then took seven years of bloody conflict before the necessary consensus could be achieved to enable the Council to adopt unanimously a resolution which contained a mandatory demand for cease-fire within terms of Chapter VII.²⁷⁰

With the end of the Cold War procrastination like this have ceased. The Security Council has been able to use the power of supervision in the first stage of conflict, recommending the belligerents to settle their dispute by peaceful means *before* the outbreak of hostilities. The recommendation can then act as a warning to states not to use force, which may be particularly powerful with the co-operation between permanent members, which more readily indicate that the call will be followed by enforcement mechanisms. An example of when a reminder under Article 33(2) worked as a warning of future action is the dispute between Argentina and the UK concerning the **Falklands**.²⁷¹ In 1982, with an Argentinians invasion of the Falklands imminent, the President of the Council made a statement and called on Britain and Argentina “to exercise the utmost restraint at this time and in particular to refrain from the use or threat of force in the region and to continue to search for a ‘diplomatic solution’.”²⁷² Although a “balanced reminder”, the statement was a warning to Argentina not to invade. The Argentinians needed a fair degree of international support if they were to maintain their hold on the island, but the statement reflected unanimous Council opposition to invasion. The Argentinians misread the signs and carried out their threat to the almost unanimous condemnation of the Council.²⁷³ The Council then found a breach of the peace and demanded

²⁶⁵ A. C. Arend, *The Obligation to Pursue Peaceful Settlement of International Dispute During Hostilities*, Vanderbilt Journal of Transnational Law, 1984, p 97-123

²⁶⁶ N.D. White, 1993, p.73

²⁶⁷ *Ibid.*, p.72-73

²⁶⁸ Resolution 479 of 28 September, 1980, reads “Deeply concerned about the developing situation between Iran and Iraq, 1. *Calls upon* Iran and Iraq to refrain[...] and to settle their dispute by peaceful means.”

²⁶⁹ This initial resolution was later supplemented by recommendatory resolutions, see for example resolution 582 of 24 February, 1986.

²⁷⁰ Resolution 598 of 20 July, 1987.

²⁷¹ This example is however from the time before the thaw.

²⁷² Presidential statement SC 2345 mtg, 37 UN SCOR (1982)

²⁷³ SC 2349 mtg

withdrawal²⁷⁴, which although not complied with effectively put Argentina in the wrong, helped to isolate it internationally, and contributed to Argentina's defeat in that it tacitly supported the British stance in support of principles of international law.²⁷⁵

All observers agree that the Security Council has achieved only modest results in implementing Article 33(2).²⁷⁶ Apparently the institutional pressure exerted upon the parties to a dispute in accordance with Chapter VI are somewhat lacking in persuasive impact.

6.7.3.1.2 Investigation

Under 6.5.1.3.2, we saw that a literal interpretation of Article 34 would only give the Security Council the power to investigate disputes and situations for the specific purpose of determining if they are likely to endanger the maintenance of international peace and security. Already under the early years of the Council's practice it was realised that it needed broader investigatory powers in order to fulfil its functions.²⁷⁷ The Security Council therefore also possesses implied powers to acquire information by means of investigations, for other purposes than those under Article 34.²⁷⁸ Thus the Security Council has at its disposal a general and all-encompassing competence to make investigations.²⁷⁹ On this basis the Security Council can, for example, order an investigation under Article 39 in order to establish whether there exist a threat to or breach of the peace, or act of aggression.²⁸⁰ The rationale of Article 34 is to enable the Council to acquire all the necessary factual elements regarding an international situation in order to determine its potential danger. Such an investigation may indistinctly constitute the premise for the exercise of any one of the powers of the Council regarding maintenance of peace, and therefore also the powers envisaged in Chapter VII.²⁸¹

²⁷⁴ Resolution 502 of June 5, 1982

²⁷⁵ M. Akehurst, 1997, p.391

²⁷⁶ see T. Schweisfurth, Article 34, In: B. Simma, 1994, p.514

²⁷⁷ The Council showed its willingness to go beyond a strict interpretation of Article 34 when it, in 1946, established a Commission of Investigation to examine certain frontier incidents on the Greek borders. The Commission not only ascertained the facts but made several wide ranging recommendations. See SC Res. 15 of December 19, 1946 and UN doc. S/360/Rev 1 (1947).

²⁷⁸ There are different views in the literature on whether these implied powers fall under Article 34 or not. Benedetto Conforti seems to be of the opinion that Article 34 is interpreted in a broad sense as to encompass the implied powers. T. Schweisfurth, E.L. Kerley and N.D. White, seem to mean that Article 34 should be narrowly interpreted according to the wording of the Article. They mean that investigations of the Security Council aimed at other purposes than designated in Article 34 cannot be based on this provision of the UN Charter. These investigations are instead based on the Council's general power of making inquiries.

²⁷⁹ W.L. Shore, *Fact-Finding in the Maintenance of International Peace*, 1970, p.84

²⁸⁰ N.D. White, 1993, p.74

²⁸¹ B. Conforti, 2000, p. 158

The Council may carry out investigations either directly or, as usually occurs, by creating an *ad hoc* subsidiary organ under Article 29.²⁸² According to Rule 39 of the Provisional Rules of Procedure, the Council may invite other persons to supply it with information or to give assistance in examining matters within its competence.²⁸³ The functions of such investigatory bodies often go beyond mere fact finding and enter into the realm of good offices and peacekeeping.²⁸⁴

The fact that the Security Council has a general and all-encompassing power also means that the organ is free either to purely and simply decide for an investigation, or instead, to link the investigation to a certain function. It can then decide, for example, that investigations are to serve only to ascertain whether conditions exist for exercising the conciliation function, or for an action to restore peace, and so on. Although there are some examples of “restricted” investigations in the practice, the resolutions mostly have a general nature.²⁸⁵ This shows the clear intention of the Council not to link the power of investigation to one or other of its functions.

The power of investigation may also be exercised with regard to situations and disputes in which the Security Council has already intervened in exercising its functions in maintenance of the peace, but where it intends to follow future developments with a view to further interventions.²⁸⁶ It can establish subsidiary organs; such as truce commission, observation troops, to oversee respect for truces and armistices in international and internal wars or to monitor, to avoid or to investigate into violations of human rights.²⁸⁷ The investigatory powers also furnish the framework for the creation of subsidiary organs such as Commissions of good office, of mediation and so on, which the Council may assign, besides their conciliation functions in

²⁸² T. Schweisfurth, article 34, In: B. Simma, 1994, p.519

²⁸³ E. L. Kerley, 1961, p.905 H. Kelsen, 1951, p.391.

²⁸⁴ N.D. White, 1993, p.74

²⁸⁵ An example of a general resolution regards the already mentioned “Greek Frontier Incidents Questions”. (This is also one of the few cases where the Council has ordered an investigation by referring expressly to Article 34.) Resolution 15 of December 19, 1946 reads; “Whereas there have been presented to the Security Council oral and written statements [...] relating to disturbed conditions in northern Greece...which conditions [...] should be investigated *before* the Council attempts to reach *any conclusions*...the Security Council resolves that [...] the Security Council under Article 34 of the Charter establish a Commission of Investigation to ascertain the facts relating to the alleged border violations [...] between Greece on the one hand and Albania, Bulgaria and Yugoslavia on the other.” An other example is the “Spanish Question” case in which the Security Council appointed a subcommittee by resolution 4 of April 29, 1946. The subcommittee was instructed to conduct “inquiries it may deem necessary [...] to establish whether the fascist regime in Spain could “lead to international friction” and “endanger international peace and security”.

²⁸⁶ T. Schweisfurth, Article 34, In: B. Simma, 1994, p.526. According to the author this ‘continuation of the investigation after a determination’ do not fall under Article 34, but under the general power to make enquires.

²⁸⁷ B. Conforti, 2000, p.159. According to this author these measures, which pertain either into Chapter VII or the matter of human rights in a broad sense, are covered by Article 34

accordance with art 36 and Article 39, also functions as investigation.²⁸⁸ Examples of truce commissions, observers, commissions of good offices and of mediation with function of investigation are abundant in practise.

*In resolution 39 of January 20, 1948, a Commission was appointed with the task of investigating and mediating the **Indo-Pakistan** question. Resolution 619 of August 9, 1988, set up a group of military observers for supervising the cease-fire **between Iran and Iraq**. Resolution 689 of April 9 1991, set up a group of observers for the respect of the demilitarised zone between Iraq and Kuwait after the **Gulf War**. Resolution 1161 of April 9, 1998, reactivated the International Commission of Inquiry in order to collect information and reports relating to the sale and supply of arms to the former **Rwandan** Government forces.*

6.7.3.1.3 The settlement of disputes

The simplest kind of intervention under Article 36 is to make a mere indication of procedure or method to follow to reach a settlement. The Council can make an invitation to the interested states to, depending on the case, seek a solution by mediation, submit the dispute to arbitration, and so on. As mentioned under 6.5.1.3.3 the Council may recommend a procedure or method found in Article 33(1), or other means of a similar nature. To get a picture of how the Security Council has used this power I will mention some resolutions where the Council has suggested different types of procedures and methods.²⁸⁹

*In resolution 1073, paragraph 3, of September 28, 1996, the Council called for the immediate resumption of **negotiations** within the Middle East peace process. In the already mentioned Gulf War, Iran and Iraq were requested by resolution 479 of 28 September, 1980, and 582 of 24 February, 1986, to accept **mediation, conciliation, or other forms of peaceful settlement**. In resolution 530 of March 19, 1983, which, having expressed concern about the danger of a military clash between Nicaragua and Honduras, recommended that they resolve their dispute through the **mediation** of the Contadora group²⁹⁰. Examples of cases where the Council has recommended involving the ICJ will be mentioned in next chapter.*

A second kind of intervention that can come within the framework of Article 36 is when the Council does not only invite the states to have recourse to a certain procedure or method, but itself provides for such procedure or method. This is the reason for the Council's creation of subsidiary organs that may assist the parties in settling disputes or situations.²⁹¹ These organs can be composed in different ways, for example,

²⁸⁸ N.D. White, 1993, p.74. This author is of the opinion that these committees have different constitutional basis than Article 34.

²⁸⁹ The Council has not always specifically mentioned Article 36 as the legal ground for these resolutions. As mentioned, more often than not, the legal basis for a resolution is not indicated. See N.D. White, 1993, p.77. When the Council makes a recommendation for settlement it does not state which provision in the Charter it is using and so one must assume that, in practise, the Council's powers as regards settlement have been amalgamated. By the language used in the resolution I have however drawn the conclusion that the Council refers to Article 36.

²⁹⁰ Consisting of Colombia, Mexico, Panama and Venezuela

²⁹¹ As noted in 6.7.3.1.2 these organs can also have investigatory functions.

by members of the organ, by Secretariat officials, by UN member states. Examples of Commissions of good offices, of mediation, of conciliation are numerous in practise.

Resolution 242 of November 22, 1967, adopted several months after the Israeli Six-Day War including a request addressed to the Secretary-General to send his own special representative to the Middle East to favour the pacific settlement of the question. Resolution 367, paragraph 6, of March 12, 1975, invited the Secretary-General to exercise his good-offices in order to reach a solution to the Cyprus question. Resolution 693 of May 20, 1991, establishing an UN observation mission in El Salvador. See also 6.7.3.1.2 concerning the groups of observers with functions both of mediation and investigation.

Aside from the above-mentioned cases, any recommendation whose purpose is to facilitate agreement among the states directly concerned can come within the scope of Article 36. The only thing that the Council cannot do, on the basis of Article 36, is to enter into the merits of the question.

As stated before, the Council has the power to enter into the merits of a question under **Article 37**. This means that the Council can recommend how to resolve a given difference, deciding who is wrong and who is right, express condemnation of a given state conduct, and then require that it ends. According to the Article, this power is subject to preconditions, such as the referral by at least one party to the dispute. Very early in the case law however, the view prevailed that the Security Council might also make recommendations with the regard to the substance of the dispute in the absence of a corresponding referral. The Security Council's attitude towards this matter was summarised by the representative from Peru as follows: "the Council can be the judge of its own competence and can assume the powers provided in Article 37."²⁹² It is possible to say that, owing to custom, the power to initiate terms of settlement under Article 37 exists within the same broad limits with which Article 33(2) and Article 36 grant the power to recommend and to initiate procedures or methods of settlement.²⁹³ The Council, then, is completely free, when faced with a dispute or situation that can endanger the peace, both to indicate procedures and methods of settlement and to recommend solutions on the merits.

The role of the Security Council under Article 37(2) is sometimes described as being like that of a Court.²⁹⁴ But this comparison is only appropriate in so far as the Council deals with the substance of a dispute. Important characteristics of judicial decision are however absent; the members of the Council are not independent, the Security Council does not have to decide on the basis of applicable law²⁹⁵, and its recommendations are not binding

²⁹² SCOR (11) 737th mtg., Oct 8, 1956, p.3, para.8

²⁹³T. Stein/ S. Richter, Article 37, In: B. Simma, 1994, p. 553-560

²⁹⁴ See D.W Bowett, *The United Nations and Peaceful Settlement*, In: International Disputes; the Legal Aspects, 1972, p. 179-209, at p.183

²⁹⁵ T. Stein/ S. Richter, Article 37, In: B. Simma, p.557-559

on the parties²⁹⁶. The role of the Council is, therefore, much more that of a mediator.

Article 38 provides that the Council “may, if all the parties to any dispute so request, make recommendation to the parties with a view to a pacific settlement of the dispute”. As we saw under 6.5.1.3.3, the dispute does not have to cross the threshold of being a danger to international peace and security. Despite the fact that the Council, by means of this provision, could involve itself in any kind of dispute as a mediator or conciliator, at the parties’ request, it has not been used in this way.²⁹⁷

6.7.3.1.4 Reference to the International Court of Justice

The practise of the Security Council contains only one example of a recommendation which was made by the reference to the wording of Article 36(3).²⁹⁸ In resolution 22 of April 9, 1947, the Security Council recommended “that the United Kingdom and Albanian governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Court” in the context of the Corfu Channel case. The only other use of Article 36(3) by the Council occurred in 1976 when Greece complained of “flagrant violations by Turkey of the sovereign rights of Greece on its continental shelf in the Aegean”.²⁹⁹ In this case the Council did not make an express reference to Article 36(3), but merely said that “the Security Council [...] invites the Governments of Greece and Turkey in this respect to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connection with their present dispute.”³⁰⁰

6.7.3.2 Use of powers under Chapter VII

6.7.3.2.1. Recommendations under Article 39

According to Article 39 the Security Council has the power to make recommendations in situations coming under Chapter VII. The Council can thus exercise its peaceful settlement function also in situations that objectively qualify as threat to the peace or breach of the peace. Article 39 covers decisions with which the Council has condemned acts of armed reprisals or actual invasions, inviting the states responsible not to repeat them and threatening, but then not implementing, enforcement measures in case of repeated offences.

*One example of this type of recommendation is resolution 384 of December 22, 1975 and 389 of April 22, 1976, containing the invitation to **Indonesia** to withdraw its armed forces*

²⁹⁶ Ibid, p.560

²⁹⁷ T. Stein/ S. Richter, Article 38, In: B. Simma, 1994, p.562

²⁹⁸ T. Stein/ S. Richter, Article 36, In: B. Simma, 1994, p.545

²⁹⁹ UN doc. S/12167 /1978)

³⁰⁰ Resolution 395 of august 25, 1976

which has invaded East Timor. There have also been great many resolutions of this kind adopted against **Israel**, for example, resolution 171 of April 9, 1962, and resolution 256, of August 16, 1968.

Article 39 also comprises those resolutions that, in indicating procedural terms of settlement, simultaneously adopt one of the other measures contemplated by Chapter VII.

*See for example resolution 502 of April 3, 1982, relating to the **Falklands War**, which “demanded” an end to hostilities and “asked” Argentina and the United Kingdom to seek diplomatic solution to their dispute. See also resolution 1160 of March 31, 1998 and 1199 of September 23, 1998 on the achievement of a political solution of the **Kosovo crisis**.*

According to the wording of the Article the Council does not have the power to recommend enforcement measures. It has however been maintained in legal doctrine and in the practise that Article 39 authorises the Council also to recommend enforcement measures like those regulated by Article 41 and 42.³⁰¹ One example of such recommendation is resolution 569 of July 26, 1985, in which the Council recommended embargo measures in regard to South Africa.³⁰²

6.7.3.2.2 Provisional matters

According to Article 40, the Council can call on the parties to comply with provisional matter before making recommendations or deciding upon the measures provided for in article 39. Provisional measures were meant to be emergency measures preliminary to any other measures adopted under Chapter VII. The Council has not however been rigidly bound from a chronological point of view.³⁰³ An international crisis that can be qualified as a threat to the peace, breach of the peace or act of aggression can develop over long periods of time, and with altering turns of events, so that interventions of different intensity may be necessary at different times. The Council has therefore adopted several measures at the same time, and again taken up provisional measures after having adopted other resolutions on the basis of Chapter VII, for example, after having recommended settlement procedures on the basis of Article 39 or after having decided upon enforcement measures.³⁰⁴

A typical provisional measure under Article 40 is the cease-fire requested by the Council during international or civil wars.

³⁰¹ see J. Frowein, Article 39, In: B. Simma, 1994, p. 615 E. Stein, p.60 *Collective Enforcement of International Obligations*, In: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 47, 1987, 56-66, B. Conforti, 2000, p.182

³⁰² It can also be argued, as is done by Frowien, that a recommendation of enforcement measures like this, is not base on Article 39, but rather issued under Chapter VI. *See J. Frowein, Article 39, In: B. Simma, p.615*

³⁰³ N.D. White, 1993, p.90-93

³⁰⁴ J. Frowein, Article 40, In: B. Simma, p.619

Example of this can be found in resolution 27 of August 1, 1947 on **the Indonesian war of independence** and in resolutions 233, 234 and 235 of June 6, 7 and 9, 1967 on the **Israeli Six-Day War**. Another example is resolution 514 of July 12, 1982, in which the Council finally adopted a mandatory demand for a cease-fire between **Iran and Iraq**. More recent examples can be found in resolutions 713, para. 2, of September 25, 1991, 724, para. 8, of December 15, 1991, and others on the war in **former Yugoslavia**, resolution 733, para. 4, of January 23, 1992 on the civil war in **Somalia** and resolution 1199 of September 23, 1998 on the civil war in **Kosovo**.

Besides from cease-fire, the Council has used provisional measures when it has urged the liberation of political prisoners in civil wars and wars of independence³⁰⁵, and when it has invited states not involved in an international or domestic conflict not to support the parties in conflict and not to furnish them with armed troops or war materials.³⁰⁶ Other examples of provisional measures are the request of the withdrawal of foreign troops from territories in a state of civil war³⁰⁷, and the request that one of the states involved in a war withdraws its own troops to certain positions³⁰⁸.

With the adoption of resolution 598, of July 20, 1987, on the Iran-Iraq conflict, the view of the permanent member of the Council became quite clear that orders on the basis of Art 40 may be formally binding.

6.7.3.2.3 Measures not involving the use of force

Under Article 41, the Security Council has the power to impose measures, not involving the use of force, against a state which, in the judgement of the Council, has broken or threatened the peace or is to be considered an aggressor. The Article mentions several examples of different boycott measures of which complete or partial interruption of economical relations is the most important. In the first part of this section, I will deal with the use of the measures expressly mentioned in the Article, the so-called “typical measures”. In the second part, I will discuss the “atypical measures”, that are not specifically mentioned in Article 41, but still are considered to fall under the Article.

During the Cold War period, there were not many decisions made by the Council under Article 41. In fact, there were only two cases that came within the framework of Article 41 as binding decisions. In the case of **Rhodesia**, the Council ordered the complete interruption of economic relations as a response to the racist regime in the country.³⁰⁹ The resolutions imposed a series of measures, such as prevention of import and export, interruption of

³⁰⁵ See e.g. resolution 63 of December 24, 1948, on the war in Indonesia.

³⁰⁶ See e.g. resolution 50 of May 29, 1948, on the Middle East, resolution 169 of November 24, 1961, on the domestic situation in the Congo inviting the states not to send mercenaries and not to introduce weapons in Congolese territory.

³⁰⁷ See e.g. resolution 143 of July 14, 1960, with a request to the Belgian Government to withdraw its troops from the Congo.

³⁰⁸ See e.g. resolution 660 of August 2, 1990, which demanded that Iraq withdraw immediately and unconditionally all its forces to the position in which they were located on August 1, 1990.

³⁰⁹ For the situation in Rhodesia see 6.7.2.2.1

air services, closing of borders to Rhodesian citizens or to residents in Rhodesia, that aimed at total isolation of the Rhodesian Government at the time.³¹⁰ In the case of the apartheid system in **South Africa** the binding measures on the basis of Article 41 were restricted to an embargo on any supplying of weapons to the South African Government.³¹¹

After the end of the Cold War, Council resolutions coming under Article 41 have proliferated. The Council, freed from the reciprocal vetoes of the two blocks, has intervened with measures not involving the use of force in the most important international and domestic crisis that have occurred in recent times.³¹² On August 6, 1990, after the invasion of Kuwait, the Security Council adopted resolution 661, concerning **Iraq**. This resolution obliged all states to break off all economic relations with Iraq, and, in particular, placed an embargo on imports and exports from and toward this country and prohibited all financial operations with the Iraq Government and with firms under its control.³¹³ With regard to the crisis in **Yugoslavia**, the first resolution 713 of September 25, 1991, adopted when the civil war still seemed to be a war of secession, was restricted to providing an embargo on weapons intended for Yugoslavia. On the 31 of March 1992, when Yugoslavia was reduced to Serbia and Montenegro, the Council adopted resolution 752, that bound all states to adopt a series of economic sanctions against Serbia-Montenegro. These sanctions included an embargo on imports and exports, blocking of financial operations, suspension of all co-operation in scientific and technical fields. The economical sanctions against the Serbia-Montenegro were terminated by resolution 1074 of October 1, 1996. During the **Kosovo** crisis, in 1998-1999, the Security Council was unable to take any decisions against this country, with the exception of an embargo on arms and related materials.³¹⁴ In the case of the crisis in **Somalia**, another crisis which saw the Council take measures mainly involving the use of force, resolution 733 of January 23, 1992, prohibited the export of arms to Somalia.³¹⁵ The Council has also imposed sanction regimes against **Libya**. In resolution 748 of 31 March 1992, the Council imposed a mandatory arms and air embargo against Libya, in order to make it comply with an earlier resolution³¹⁶. In this resolution, Libya had been

³¹⁰ See Resolutions 232 of December 16, 1966 and 253 of May 29, 1968 (confirmed by subsequent decisions; resolutions 277 of March 18, 1970, 314 of February 28, 1972, 320 of September 29, 1972, 333 of May 22, 1973, 388 of April 6, 1976, 409 of March 27, 1977.)

³¹¹ See Resolution 418 of November 4, 1977, (confirmed and extensively interpreted in subsequent resolutions, particularly resolution 591 of November 28, 1986.

³¹² N.D. White, 1993, p.94

³¹³ Worth mentioning are also, among the many resolutions that are linked to resolution 661, resolution 670 of September 25, 1990, binding the states to the so-called air blockade and resolution 687 of April 3, 1991, which established that the measures provided by resolution 661 should be maintained until Iraq had carried out what had been required by the resolutions, such as payment of compensation, elimination of military arsenals and so on.

³¹⁴ Resolution 1160 of March 31, 1998.

³¹⁵ See 6.7.2.2.1

³¹⁶ Resolution 731 of January 21, 1992

requested to extradite two Libyan citizens accused of the destruction of an aircraft over the Scottish village Lockerbie in 1988.³¹⁷

As noted earlier, the list of measures in Article 41 is not exhaustive. Therefore, any decision or recommendation of the Security Council which calls upon the state, explicitly or implicitly, to take actions which have the outward character of sanctions with regard to a certain states, come within the framework of this Article. Thus, the Council can mandatorily instruct the member states not to recognise certain legal actions of a state identified as a disturber of the peace. This is the case, for example, in resolution 252 of May 21, 1968, adopted against **Israel**. The resolution stated that the Council “considers that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the status of Jerusalem, are invalid...”. Another example of such an atypical measure, is resolution 662 of August 9, 1990, which declared **Iraq**’s proclaimed annexation of Kuwait “null and void”.³¹⁸

The most far-reaching use of Article 41 ordering measures not listed, was made by resolutions 827 of May 25 1993, and 935 of July 1 1994, setting up the two **international tribunals** to judge individual crimes committed against the peace and security of humanity in the territory of the former Yugoslavia and in Rwanda. The Security Council expressed the view that these measures could contribute to the restoration of peace and to the halting of these violations. Since this is of special importance for the Council’s relationship with the ICC it will be further discussed in section 6.4.

As stated before, the decisions of the Security Council under Article 41 bind a state in international law on the basis of UN law. The member states are obliged by the UN Charter to carry out decisions regarding measures not involving the use of force. The Council has however developed a power to make non-binding recommendations under Article 41.³¹⁹ They then leave the states free to adopt the measures or not. The evolution of such a power lies in political compromise. In almost every case in which voluntary measures have been called for, the Western powers have objected to a finding under Article 39 combined with mandatory sanctions.³²⁰ Examples of voluntary measures within the framework of Article 41 are seen mainly, but not exclusively, in the practise relating to the Cold War era.

In resolution 569 of July 26 1985, the Council recommended a voluntary boycott against **South Africa** that went far beyond the military arms embargo. In the **Rhodesian** situation a voluntary call for an arms, oil and petroleum embargo, was made by the Council only days after the unilateral

³¹⁷ See 6.7.2.2.1

³¹⁸ In the Friendly Relations Declaration of the General Assembly, the principle is established that “no territorial acquisition resulting from the threat or use of force shall be recognised as legal.” Resolution 2625 (XXV) of October 24, 1970

³¹⁹ J. Frowein, Article 41, In: B. Simma, 1994, p. 627

³²⁰ N.D. White, 1993, p.93

declaration of independence.³²¹ ³²²An example from recent practise is resolution 1227 of February 10, 1999, urging all states to end immediately all sales of arms and munitions to **Ethiopia and Eritrea**.

6.7.3.2.4 Measures involving the use of force

Article 42 provides that the Security Council can implement the military measures necessary to maintain or restore international peace and security. The following Articles lay down the ways in which the Council can take such action. Article 43 and the following establishes that states are required to enter into special agreements with the Council in order to establish the armed forces to be utilised, and Article 47 states that the actual use of the national contingents is to be decided by a Military Staff Committee. Member states have however never made any of the special agreements envisaged in Article 43 and the Military Staff Committee established under Article 47 has remained a dead body which only holds regular ritual meetings.³²³ When the Council has taken military measures it has been in other forms than those prescribed in article 43 and following Articles. Instead of acting directly, as described in Article 42, the Council has authorised or recommended member states to use force against a state or within a state, and placed the command and the supervision of military operations in their hands. It is generally agreed that the absence of special agreements with the Security Council, in the sense of Article 43, does not preclude member states from placing troops ad hoc at the disposal of the Council.³²⁴ The Council can use the power granted to it in Article 42 “without the mechanisms that were designed to make the imposition of military coercion a practical option”.³²⁵ ³²⁶ There are however different views in the literature on how far the Council can go in delegating the power to use force, and the question has been the subject of an extensive debate.³²⁷ . Although agreements under Article 43 are not necessary to make the Council’s military option under Article a 42 practicality, the Charter does strongly indicate that UN control of such military operations is an essential prerequisite for the legality of military actions by the Security Council. I will deal with the most important situation in which the Council has taken military measures. Some authors hold that these are taken under Article 42, some claim that there are other legal grounds. Most authors agree that the Council can not order a state to take part in military enforcement action in the same way that it can order a state to take part in a non-military

³²¹ Resolution 217, of November 20, 1965

³²² The Western powers viewed this as a voluntary call, although others thought that it was a binding decision. *See* Security Council 1265 meeting, 20 UN SCOR 15 (US) 16 (UK) 6 (Ivory Coast) (1965). With at least two of the permanent members regarding the call as voluntary, the resolution must be regarded as recommendatory.

³²³ D.W. Bowett, *International Military Force*, in; *Encyclopedia of Public International Law*, 4, 1982, p.253

³²⁴ J. Frowein, Article 42, In: B. Simma, 1994, p.633

³²⁵ *Ibid.* p.131

³²⁶ *See* N.D, White, 1993, p.102 for arguments pro and con the Council having the power of military measures in the absence of agreements reached under Article 43.

³²⁷ B. Conforti, 2000, p.203

enforcement action. This is so because a state is not obliged to take part in military operations under Article 42 unless it has concluded a special agreement under Article 43.³²⁸

In the **Korean War** the Council for the first time authorised the full-scale use of force against an aggressor. When North Korea invaded South Korea in June 1950, the Security Council passed a resolution recommending member states to “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace”.³²⁹ The Council later passed another resolution that recommended “that all Members providing military forces [...] make such forces available to a unified command under the United States of America.”³³⁰ The resolution also authorised the use of the UN flag and requested the United States to provide the Council with regular reports “on the course of action taken by the unified command”. It is questionable whether these resolutions can be said to be taken under Article 42. Resolution 84 appears simply to delegate responsibility to the United States, which applied 90 per cent of the force. All the decisions concerning the operations of the forces were taken by the United States, not the United Nations.³³¹ It seems more accurate to see Article 51 of the Charter, which guarantees the right of collective self-defence, as the legal basis.³³²

A second case where the Council has given authorisation to a full-fledged war is the **second Gulf War**. After having adopted a number of resolutions under Article 41, as a reaction to the Iraq invasion on Kuwait the Council adopted resolution 678 on the 29 of November 1990. This resolution authorised member states, if Iraq were not to have retreated within January 15, 1991, to “use all necessary means to uphold and implement [...] relevant resolutions and to restore international peace and security.” There is no doubt that the wording in the resolution was an authorisation to use armed force. The US led Coalition of forces, operating under the umbrella of UN, but not on this occasion using its flag, started its campaign against Iraq on 16 January 1991, soon after the deadline in resolution 678 ran out. Article 42 is frequently seen as the basis of this action,³³³ but there are different views in the literature.³³⁴

³²⁸ J. Frowein, Article 42, In: B. Simma, 1994, p.633, N.D White, 1993, p.102

³²⁹ Resolution 83 of 27 June, 1950

³³⁰ Resolution 84 of July 7, 1950

³³¹ N.D White, 1993, p.107

³³² See M. Akehurst, 1997, p. 392, B. Conforti, 2000, p.204, J. Stone, *Legal Controls of International Conflict*, 1945, p. 234-236, J. Frowein, Article 42, In: B. Simma, 1994, See also for a different view, N. D. White, 1993, p.107-108, O. Schachter, *The Place of Law in the United Nations*, In: Annual Review of UN Affairs, 1950, p.203-230, at p.219-221

³³³ T.M. Franck, F. Patel, *The Gulf Crisis in International and Foreign Relations Law*, In: American Journal of International Law, Vol. 85,1991, p.67-79, at p.73-74

³³⁴ E.W Rostov , *The Gulf Crisis in International and Foreign Relations Law, Continued*, In: American Journal of International Law Vol. 85, 1991, p. 506-516, O. Schachter, *United Nations Law in the Gulf Crisis*, In; American Journal of International Law Vol. 85, 1991, p.452-473

Measures short of war, but still definable as measures involving the use of force, have also been authorised or recommended to member states. Among these are the establishments of naval blockades, which are designated to prevent trade by ships of any nationality with certain ports. An example of this can be found in resolution 221 of April 9 1966 concerning the **Rhodesian** case.³³⁵ In order to strengthen the prohibition on the sale of oil to Rhodesia the Council called upon Great Britain to prevent “by the use of force if necessary” the arrival of oil in the port of Beira³³⁶, which was intended to continue by land for Rhodesia.³³⁷ Much larger naval blockades have been set up more recently, during the **second Gulf War** and during the **Yugoslav crisis**. In the first case, resolution 665 of August 25 1990, called upon the member states to prevent any ship coming from or directed towards the coasts of Iraq and occupied Kuwait from violating the embargo established by resolution 661. In the case of the Yugoslav crisis similar measures were ordered against Serbia-Montenegro with resolution 787 para. 12 of November 16, 1992.

As a concluding remark on this Article I would like to say that although Articles 43 and the following have never been applied until today, this does not mean that they are completely dead letters. The revitalisation of the Council after the end of the Cold War entails that a “revival” of these articles can not be excluded. In the “Agenda for Peace” Report, presented by Secretary-General B. Boutros Ghali in June 1992³³⁸, it is indicated that the agreements under Article 43 may be concluded in the future.

6.7.4 Powers in the field of criminal responsibility

The Councils power to take action in the field of criminal responsibility is not expressly mentioned in the Charter. There is however nothing in Charter law to prevent the Council itself from acting in this field. The language of the Charter does not rule out individual responsibility or the penal consequences thereof.³³⁹ Action against individuals must be seen as an implied power, not expressly mentioned in the Charter, but necessary for the Council to fulfil its primary responsibility for the maintenance of international peace and security. The Council has at various times touched on the issue of criminal responsibility. In the crisis in Rhodesia in the 1960's there were discussions surrounding the guilt of the local leader Ian Smith in his individual capacity. In resolution 837, of 6 June, 1993, the Council called for the prosecution of General Aideed, who led the United Somali

³³⁵ See 6.7.3.2.3

³³⁶ Mozambique

³³⁷ See J. Frowein, Article 42, In: B. Simma, p.633-634, concerning the question if Article 42 can be seen as the legal basis for this action.

³³⁸ *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General, ILM, 1992 p.956 ff.

³³⁹ See e.g. L. Oppenheim, *International Law*, 7th edition, 1952, p. 160-161

Congress in Somalia.³⁴⁰ The Council also came close, in the Iraq-Kuwait crisis, to imputing responsibility to individuals³⁴¹, although ultimately opted for state responsibility.³⁴²

With Resolution 827 of May 25, 1993, establishing the independent Tribunal for the prosecution of crimes against humanity committed by individuals in the former Yugoslavia, the Council took a big step in the field of criminal responsibility and for the first time created a court with criminal jurisdiction. A similar Tribunal was, by resolution 935 of July 1, 1994, established to judge the crimes against humanity in Rwanda. The Tribunals were established as enforcement measures under Chapter VII of the Charter. Most authors hold that the Council's decisions to establish the Tribunals qualify as measures short of the use of armed force under article 41 of the Charter.³⁴³ As mentioned in 6.5.1.4.3, the list of measures in Article 41 is not exhaustive and the Council can decide on atypical measures not mentioned in the Article. As we have seen, the Council's implied powers are limited by the purposes and principles of the UN. The establishment of international tribunals to try and punish persons responsible for war crimes and crimes against humanity would be consistent with the purposes of the UN, with respect to maintaining international peace and security, resolving threatening situations in conformity with principle of justice and international law and promoting respect for human rights and fundamental freedoms without the distinction as to sex, language, or religion.

As mentioned in 6.7.3.2.3, the Council had already determined that the widespread violations of international humanitarian law in the former Yugoslavia constituted a threat to international peace and security, which, as we know, is a prerequisite for such a measure under Article 41.³⁴⁴ Furthermore, in the case of Yugoslavia, the Security Council clearly expressed its view that the establishment of the tribunal would make it possible to bring to justice the persons responsible for ethnic cleansing and other violations of international humanitarian law and would thereby

³⁴⁰ The hunt for general Aideed turned out unsuccessful and the Security Council suspended arrest actions later the same year. *See* resolution, 85 of 16 November 1993, para 8

³⁴¹ Resolution 670 of September 25, 1990

³⁴² Resolution 686 of March 2, 1991

³⁴³ V. Morris, M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, 1995, p.42, J. Frowein, article 41, in: B. Simma, 1994, p.626, I. Österdahl, 1998, p.51, *See* however B. Conforti who is of the view that "the creation of the Tribunal must more appropriately be brought within the framework of Article 42." He argues that "the creation of the Tribunal is part of the entire action of the United Nations in the former Yugoslavia" and since "such an action may be defined as an action involving the use of force" also the creation of the Tribunal should fall under Article 42. B. Conforti, 2000, p.210

³⁴⁴ In the case of Rwanda the Council had, in resolutions preceding the resolution establishing the Tribunal, only determined that "the magnitude of the humanitarian crisis in Rwanda" constituted a "threat to peace and security *in the region*." Resolution 929 of 22 June, 1994, pre. para. 10. It was not until the resolution establishing the Tribunal that the Council made the determination that the large killings of civilians constituted a threat to *international peace and security*.

“contribute to the restoration and maintenance of international peace”.³⁴⁵ The effective prosecution of such persons by a neutral international body would deter further atrocities and break the cycle of violence and retribution by providing a credible threat of punishment. In the case of Rwanda, the large scale of killings of civilians had more or less ceased when the resolution on the tribunal was adopted.³⁴⁶ The Council however points out that the prosecution in Rwanda, of persons responsible for serious violations of international humanitarian law, would contribute not only to stopping killings and thereby to the restoration of peace, but also to the process of national reconciliation and thus to the maintenance of peace.³⁴⁷ Thus, the establishments of the tribunals were clearly justified in the context of the Council’s broader efforts to restore peace and security in the regions.

The legal basis for the establishment of the Yugoslavia Tribunal Council was questioned by the defence in the Tadic case.³⁴⁸ The defence argued that “it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal.”³⁴⁹ It was further argued that the Council could only deal with threats to the peace, and since only states can threaten international peace and security, the Council could not create criminal liability or prosecute physical persons.³⁵⁰ The Tribunal however upheld that it had been established under Article 41 as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia. It meant that since the Tribunal was intended to contribute to the restoration and maintenance of peace, the course the Council took in establishing it “was novel only in the means adopted but not in the object sought to be attained.”³⁵¹ The Tribunal held that the measures listed under Article 41 were not exhaustive and that no good reasons had been advanced “why Article 41 should be read as excluding the step [...] of creating the International Tribunal to deal with the notorious situation existing in the former Yugoslavia.”³⁵² The Tribunal also held that no basis had “been established for denying to the Security Council the power of indirect imposition of criminal liability upon individuals through the creation of a tribunal having criminal jurisdiction. On the contrary, given that the Security Council found that the threat to the peace, posed by the conflict in the former Yugoslavia, arose because of large scale violations of international humanitarian law committed by individuals, it was both

³⁴⁵ Resolution 827 of 25 May, 1993, pre. para. 6

³⁴⁶ I. Österdahl, 1998, p.61

³⁴⁷ Resolution 955 of 8 November 1994, pre. para. 7

³⁴⁸ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *The Prosecutor v. Tadic a/k/a “Dule”*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, IT-94-1-T

³⁴⁹ Tadic-case, para.2

³⁵⁰ Ibid.

³⁵¹ Ibid., para.22

³⁵² Ibid., para. 27

appropriate and necessary for the Security Council, through the International Tribunal, to act on individuals in order to address the threat to the peace.”³⁵³ The validity of the creation of the ICTY was upheld in the Appeals Chamber of the Tribunal for former Yugoslavia.³⁵⁴ The validity of the ICTR was upheld in the Kanyabashi case of 18 June 1997.³⁵⁵

The establishment of the international criminal court should eliminate the need for the Security Council to establish ad hoc tribunals in the future. Even though one of the ideas behind the creation of the ICC was to remove the need for ad hoc tribunals, the Security Council keeps this power to create ad hoc tribunals even after the coming into force of the International Criminal Court.

³⁵³ Ibid., para.36

³⁵⁴ *The Prosecutor v. Tadic*, IT-94-1Ar72 of October 1995, in particular paras. 32-40.

³⁵⁵ Unpublished Decision of 18 June 1997, *The Prosecutor v. J. Kanyabashi*, ICTR-96-15-T, 5 et sec.

7 Relationship between the ICC and the Security Council

In the first chapters of this thesis we have seen that the essential function of the ICC will be to assume jurisdiction over the most serious crimes of concern to the international community. The ICC is intended as a permanent, universal, judicial and therefore impartial and independent body, drawing its powers from the Rome Treaty. As a judicial body, the ICC will be concerned only with the criminal responsibility of the individuals who allegedly have committed the most serious crimes, and to create international justice. The Security Council on the other hand, is there to act in response to an ongoing crisis; it draws its competence and powers directly from the Charter, which gives it the primary responsibility for the maintenance of international peace and security. As a political body with broad discretionary powers, it is legally entitled to base its arguments on political consideration, while remaining bound by the rules and purpose of the Charter.³⁵⁶ At this stage we can conclude that the functions of the two entities are fundamentally different; the judicial functions of the Court are quite separate from the political functions of the Council.

Looking at the kind of situations in which the Court will, and the Council already does work, we however see that, though not identical, they overlap. The situations that would give rise to crimes of genocide, crimes against humanity and war crimes³⁵⁷, will most likely impact upon the international peace and security and therefore be dealt with by the Security Council.³⁵⁸ As seen from the Council's past practise it has interpreted its own jurisdiction very broadly. The Council's concept of "threat to the peace" rangers over all, or most, of the core crimes included in Article 5 of the Rome Statute. The two bodies will therefore operate in different spheres, acting on the basis of their own independent procedures, but they will in fact be acting in the same situations. As a result it will be imperative to strike a proper balance between the role of the Security Council and the role of the ICC. From the Council's viewpoint the new institution can play a critical role in helping to maintain the peace, in the way that prosecution deters criminal behaviour and to the extent justice enables the peace.³⁵⁹ The work of the ICC can however also frustrate the work of the Council, in the way that external judicial intervention has the potential to "compromise peace and

³⁵⁶ See 6.6.1

³⁵⁷ See Article 5 of the Rome Statute

³⁵⁸ See however Andreas Zimmermann, who is of the opinion that " the fact that the ICC is dealing with one of these crimes [in Article 5] would only in exceptional circumstances simultaneously conflict with the competence of the Security Council under Chapter VII" A. Zimmermann, *The Creation of an Intentional Criminal Court*, In: Max Planck Yearbook of United Nations Law, Volume 2, 1998, p.169-238, at p.219

³⁵⁹ The Security Council's creation of the ad hoc tribunals for the former Yugoslavia and Rwanda illustrates this.

national reconciliation”.³⁶⁰ The investigation or prosecution in a particular case by the Court could, for example, interfere with the diplomatic resolution of an on going conflict by the Council.³⁶¹

In the following, I will look at the relationship between the Security Council and the International Criminal Court from the viewpoint of the Court. From the Court’s perspective, its future relationship with the Council is of a double nature. On one hand the Court should have a close relationship with the Council. The Council can provide political backing and the Council’s referral of cases to the Court will probably be of the outmost importance, since they do away with the requirement discussed in chapter 4. In practise, sustained co-operation between the Council and the Court will be needed for the Court to remain effective. On the other hand the independence and impartiality of the Court is essential. The Court must be beyond the political influence of the Council in order to be a credible judicial institution. The concern of many states and legal writers is that if the Court is subject to the political influence of the Council, this will undermine its judicial independence and credibility.³⁶² Legal purists have strongly voiced a desire for a Court that would function in an apolitical manner.³⁶³ As seen in chapter 6 the Council, although it takes legal factor into account, often make its decisions on political considerations. A judicial organ must, as noted by the Secretary-General, “perform its functions independently of political considerations” and cannot “be subject to the authority or control of the Security Council with regard to its judicial functions.”³⁶⁴ The Court should pursue justice based on recognised standards of international law and avoid, as much as possible, situations that allow political considerations to intermingle in the functions of the Court. It was argued among the legal purist that the Court could only function effectively if it carried out “blind justice”.³⁶⁵ The question how to find a balance between these two objectives and, in other words, what role the Council will play in relation to the Court will be addressed in the following.

In the following chapters I will take the ILC Draft Article 23 as a starting point. According to this Article the Council would be given three powers concerning the Court’s jurisdiction. The first one, laid down in Article 23(1), can from the Court’s perspective be called a “positive power” and concerns the Council’s ability to refer cases to the Court and thereby extending the Court’s jurisdiction. This power will be discussed in chapter 8. The second power, in Article 23(3), can be called a ‘negative power’,

³⁶⁰ See Report of the 29th UN Issues Conference, 1998, p.18

³⁶¹ M.H Arsanjani, In: Reflections on the International Criminal Court, p.71-72

³⁶² V. P. Nanda, *The Establishment of a Permanent International Criminal Court: Challenges Ahead*. In: Human Rights Quarterly, Vol.. 20, no.1, 1998, p.413-428, at p.423

³⁶³ G.M. Gallarotti, *Towards Universal Human Rights and the Rule of Law; the Permanent International Criminal Court*, In: Australian Journal of International Affairs, Vol.53, Issue 1, 1999, p.95-112, at p.103

³⁶⁴ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, Corr. 1 and Add.1.

³⁶⁵ G.M Galarotti, 1998, p.101

since it concerns the Council's competence to defer the proceeding, and thereby limiting the jurisdiction of the Court. This will be discussed in chapter 9. The third and "neutral power" appointed to the Council by the ILC, was the power to determine that an act of aggression had occurred. This will not be further discussed since no agreement was made on the matter and it therefore did not make its way into the final Statute.

8 Security Council referral

8.1 General

The first role envisaged for the Council is connected with the trigger mechanism of the Court. In chapter 5 it was noted that three entities have the power to trigger the Court's jurisdiction, namely the state parties, the Prosecutor and the Security Council. In this chapter I will take a closer look at what role the Council will play in triggering the Courts jurisdiction. The questions of the Council's power to initiate proceedings before the Court turned into a matter of substantial controversy in the negotiating process, especially in the negotiations before the Rome Conference.³⁶⁶ In order to get a good understanding of these negotiations I will first take a look at the provision as it was proposed in the ILC Draft and the arguments for and against the proposal that were presented by the different delegations at the preparatory negotiations. I will then present the different questions regarding Council referral that were negotiated at the Rome Conference. The last part of the chapter will be addressed to the final Article in the Statute and the questions surrounding the wording of this Article.

8.2 ILC Draft Statute

8.2.1 Contents of ILC Draft Article 23(1)

Article 23(1) of the ILC Draft³⁶⁷ gives the Security Council the power to refer matters to the Prosecutor involving threats to, or breaches of international peace and security within the meaning of Chapter VII of the UN Charter. The Article reads:

“Notwithstanding article 21, the Court has jurisdiction in accordance with the Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.”

First of all it can be noted that the ILC, by referring to the list of crimes in Article 20 of the Draft, meant that the Council should have the power to trigger the prosecution of the same kind of crimes as the states and the Prosecutor.³⁶⁸ An important difference from a state referral, or an initiation

³⁶⁶ F. Berman, *The Relationship between the International Criminal Court and the Security Council*, In: Reflections on the International Criminal Court, 1999, p.174

³⁶⁷ ILC Draft Statute, at footnote 16

³⁶⁸ See ILC Draft Statute, p.85, para. 1. “Paragraph 1 of article 23 does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which the Court may deal with (jurisdiction materiae.)”

of proceeding by the Prosecutor, is however that the preconditions for the exercise of jurisdiction in Article 21 of the Draft are left aside when the Council is triggering the jurisdiction. Article 21 stipulated two conditions. Firstly, the Court's jurisdiction had to be triggered by a state that had accepted the jurisdiction of the Court. Secondly, the jurisdiction of the Court with respect to the crime which was the subject to the complaint had to be accepted by the custodial state and the state in the territory of which the crime had occurred.³⁶⁹ By inserting the phrase "notwithstanding Article 21" the ILC dispends with the two requirements and thus enables the Court to act in the absence of referral or consent to jurisdiction by a state. The ILC felt that such a provision was necessary in order to enable the Security Council to make use of the Court.³⁷⁰

The commentary to the ILC Draft states that Article 23 was not intended in any way to add to or increase the powers of the Council as defined in the UN Charter.³⁷¹ It was understood that this would have been neither legally nor politically possible.³⁷² Instead, the provision makes available to the Council the jurisdictional mechanism created by the Statute. The ILC thus stipulates that the powers of the Court are brought into play when the Security Council makes a reference to it, in other words, it empowers the Court, not the Council.³⁷³

8.2.2 Arguments in favour of ILC Draft Article 23(1)

8.2.2.1 General

At the Ad Hoc Committee several delegations were of the view that the Security Council should be authorised to refer matters to the Court³⁷⁴, and at the Prep Com most delegations favoured retaining the Article.³⁷⁵ There were mainly three arguments presented in favour of giving the Council the power to trigger the Court's jurisdiction. Firstly, this would remove the need for the Council to create ad hoc tribunals and secondly it would provide political support to the Court's actions. A third argument concerned the fact that Council referrals would do away with the requirement of state acceptance of jurisdiction.

8.2.2.2 Remove the need for ad hoc tribunals

During the preparatory process, delegations supporting the inclusion of the Council among the entities having the power to initiate proceedings before

³⁶⁹ Compare Article 12(2) in final Statute. See chapter 4.

³⁷⁰ ILC Draft Statute, p.85, para. 1

³⁷¹ Ibid.

³⁷² F. Berman, 1999, p.174

³⁷³ ILC Draft Statute, p.85, para. 1

³⁷⁴ Ad Hoc Committee Report, p.27, para.120

³⁷⁵ C. K. Hall, *The Third and Forth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court* In: American Journal of International Law, Vol. 92 No.1 1998, p.124-133, at p. 131.

the Court, pointed to the fact that this would remove the need for the creation of ad hoc tribunals in the future. As noted in 6.7.4 the Council has on two occasions created ad hoc tribunals; the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The legality of these creations have been upheld by the ICTY in the Tadic case³⁷⁶ and by ICTR in the Kanyabashi case³⁷⁷. It was here recognised that that the Security Council can establish a judicial organ “in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security”³⁷⁸.

The states in favour of keeping Article 23(1) meant that it was a better solution to let the Council have the ability to refer situations to the Court than force the Council to create other ad hoc tribunals. They argued that if the Council was authorised to refer matters this would remove the need for creating additional ad hoc tribunals.³⁷⁹ At the Prep Com some delegations held that one of the purposes of the Court was to obviate the creation of ad hoc tribunals, and they meant that it would be absurd to create a Court that was not available to the Council.³⁸⁰ To compel the Council to “continue in future to pursue the ad hoc route would have been impractical and wasteful.”³⁸¹ It was also argued that the Council would have more control in these ad hoc tribunals since it could decide who was to be prosecuted, and that the referral to the permanent Court therefore was to be preferred.³⁸²

These kinds of arguments were also forwarded by the human rights organisations. The Lawyers Committee for Human Rights stated that “given the authority to establish ad hoc tribunals as an enforcement measure under Chapter VII, it is difficult to see why the Council should be barred from recourse to the ICC when it perceives judicial intervention in a given situation would be beneficial.”³⁸³ The LCHR underlined that the Council would still keep its power to establish new ad hoc tribunals, and refers to Article 23(1) as “an alternative” to such establishment in the future. The Human Rights Watch argued that the only way that the establishment of the ICC would eliminate the need for the Council to establish ad hoc tribunals in the future was if “the ICC is capable of fulfilling the function that such tribunals might fulfil”.³⁸⁴ By this they meant that the Council should be able to initiate proceedings before the Court, and thereby confer its powers on the Court, in order to obviate the need for further ad hoc tribunals.

³⁷⁶ The Prosecutor v. Tadic, at footnote 346

³⁷⁷ The Prosecutor v. j. Kanyabashi, at footnote 347

³⁷⁸ Tadic case para.38

³⁷⁹ Ad Hoc Committee Report, p.27 para. 120

³⁸⁰ Prep Com Report, Vol. I, p.31 para 133

³⁸¹ F. Berman, 1999, p.175

³⁸² Report of the 29th UN Issues Conference, 1998, p.22

³⁸³ LCHR, 1997, p.9

³⁸⁴ HRW, 1998, p.58

8.2.2.3 Provide political support

Another reason forwarded in favour of keeping Article 23(1) in the Statute, was that it would provide political support for the prosecution. “By referring a situation to the Court, the Council would shoulder part of the political pressure of pursuing sensitive investigations and prosecutions springing from the referral.”³⁸⁵ The Council would be signalling to the Court and the international community its political support for that investigation and potential prosecution. It was argued that any subsequent indictment would carry more political weight than an indictment resulting from a situation referred merely by one or more state parties.³⁸⁶ Not to give a power of referral to the Council would therefore most likely have diminished the authority and standing of the Court.

8.2.2.4 Provide the Prosecutor with cases

A third argument forwarded was that, since referrals by the Council would carry no jurisdictional acceptance requirements, Council referrals would be an important source of work for the prosecutor. As mentioned earlier, in the case of state referral and initiation of proceedings by the Prosecutor, the preconditions in Article 21 of the Draft had to be met. An Article 23(1) referral by the Council would however “allow the ICC to bypass the elaborate state party consent requirements”³⁸⁷, where jurisdiction over a person could be exercised only if the ICC received consent of both the state that had custody of the suspect and the state on whose territory the crime was committed. A Security Council referral would in this way “activate a mandatory jurisdiction” and the jurisdictional reach of the Court would be extended to the whole world.³⁸⁸ Article 23(1) has also been explained as to introduce a form of “compulsory jurisdiction”.³⁸⁹ This, it was argued, would be highly significant for the Court’s effectiveness since it would provide the Prosecutor with many cases that would otherwise have been outside the scope of the Court’s jurisdiction.³⁹⁰

8.2.3 Argument against ILC Draft Article 23(1)

8.2.3.1 General

As mentioned before, Security Council referrals were controversial during the negotiations. Some state delegations argued throughout the negotiation process that the Council should not be able to play any role at all in the work of the Court and opposed to giving the Council the power to initiate proceedings. The grounds for objection can be ordered into three different

³⁸⁵ Report of the 29th UN Issues Conference, 1998, p.21

³⁸⁶ Ibid.

³⁸⁷ Ibid., p.22

³⁸⁸ Prep Com Report, p.30, para.31

³⁸⁹ V. Gowlland-Debbas, *The Relationship between the Security Council and the Projected International Criminal Court*, In: *Journal of Armed Conflict*, Volume 3, Number 1, June 1998, 97-119, at p.101

³⁹⁰ H. P Kaul, 1998, p.365

categories. The first category concerns the fact that there should be no political intervention in what was intended to be a wholly independent judicial process. The argumentation in the second group stressed the fact that the provision would lead to inequality between the permanent members of the Security Council and the other states. The third category of objections were raised on the basis that the Council had no legal competence, under the UN Charter, to refer matters for criminal prosecution by an international tribunal.

8.2.3.2 Politisation of the Court

During the preparatory negotiations some delegations opposed to giving the Council any power to initiate the proceedings on the ground that this would subject the functioning of the Court to the decisions of a political body and therefore undermine the Court's independence and credibility.

Already in the International Law Commission did some members voice the concern that Security Council involvement might lead to politisation of the Court. They were concerned that Article 23(1) "might be read as endorsing detailed involvement by the Security Council in the prosecution of individuals for crimes", something which in their view should never be a matter for the Council.³⁹¹ At the debate on the ILC Draft Statute in the Sixth Committee of the General Assembly, several speakers held that such a provision was unsuitable and should not be part of the Statute of the Court, because the Security Council was a political body and should under no circumstances be involved in the prosecution of individuals.³⁹²

Several delegations at the Ad Hoc Committee expressed serious reservations or opposition to the role envisaged for the Security Council, which, in their view, would "reduce the credibility and moral authority of the Court; excessively limit its role; undermine its independence, impartiality and autonomy; [and] introduce an inappropriate political influence over the functioning of the institution".³⁹³ Some delegations at the Prep Com requested the deletion of the Article on the basis that it would "effect the independence of the Court in the administration of justice."³⁹⁴ Delegations holding this view believed that a political body should not determine whether a judicial body should act. In their view, the Security Council was a political organ whose primary concern was the maintenance of peace and security, resolving disputes between states and having sufficient effective power to implement its decisions. According to these delegations, the Council made its decisions taking into account political considerations. The Court, in contrast, was a judicial body, concerned only with the criminal

³⁹¹ ILC Draft, p.85 para.3

³⁹² UN Doc. A/C.6/49/SR.20, at 6

³⁹³ Ad Hoc Committee Report, p.27, para 121

³⁹⁴ Prep Com Report, p.31, para. 132

responsibility of individuals who committed serious crimes deeply offensive to any moral sense.^{395 396}

8.2.3.3 Unequality between permanent members and other states

A second argument forwarded was that a provision such as the one in Article 23(1) is inequitable in that this specific trigger would only be used against states other than the permanent members of the Council since the latter could use their power of veto to prevent referrals which impinged on their interests. The allegations were that this power put the permanent members of the Security Council into an unduly privileged position by guaranteeing them from future jeopardy. The delegations forwarding this view meant that the permanent members would unlikely agree to refer to the Court a situation involving themselves.³⁹⁷ The jurisdictional reach of the Court would thereby cover the whole world, including non-parties to the statute, except the permanent members of the Council that were non-members to the statute. Some delegations argued that the permanent members thereby could impose obligation on non-states parties, while they themselves were shielded from prosecution.³⁹⁸

8.2.3.4 Objection that the Security Council lacks the legal competence of referral

Objections were also raised on the basis that the Council had no legal competence under the Charter to refer matters for criminal prosecution to an international tribunal. As mentioned, the Appeals Chamber of the Tribunal for the former Yugoslavia in 1995 upheld the validity of the creation by the Security Council of the Tribunal pursuant to its powers under Chapter VII of the Charter.³⁹⁹ After this case no serious doubt seemed to exist that the Security Council had the competence to establish ad hoc tribunals if the Council considers it to be necessary for the maintenance of international peace and security.⁴⁰⁰ At the negotiation it was argued that the ICTY's line of reasoning in the Tadic case must be valid not only when the Council wants to create a new ad hoc tribunal, but also when it would solely confer certain competence's upon an already existing criminal court.⁴⁰¹ The objection that the Council lacked legal competence of referral was therefore dropped quite early in the negotiating process and was not forwarded at the negotiations in Rome.

³⁹⁵ Prep Com Report, Vol. I, p.31, para.132

³⁹⁶ In the end of the preparatory negotiations the proposal that the Council could refer "cases" was dropped, leaving the argument of potential politisation less relevant. This can be seen in the negotiations at the Rome Conference where this argument was forwarded by only a small minority of states. See 8.3

³⁹⁷ Prep Com Report, Vol. I, p.31, para.132

³⁹⁸ E. La Haye, 1999, p.12,

³⁹⁹ The Prosecutor v. Tadic, at footnote 346, , in particular paras. 32-40. See 6.7.4 and 8.2.2.2

⁴⁰⁰ F. Berman, 1999, p.174-175

⁴⁰¹ A. Zimmerman, 1998, p.216

8.3 Negotiations at the Rome Conference

8.3.1 General

Quite soon at the Rome Conference it became apparent that the possibility for the Security Council to refer particular situations to the Court pursuant to Chapter VII, as envisaged by the ILC, was practically undisputed.⁴⁰² It was clear to the great majority of delegations at an early stage that the right of the Security Council to activate the Court would become an important part of the Court's jurisdiction. There was however a few states that argued for an exclusion of such a provision. Since this opinion was held by only a very small minority group, the discussions at the Rome Conference were not centred on the question of whether to give the Council a right of referral or not. Among the delegations supporting referrals by the Council there were however discussions on whether the Council should refer "matters", "cases" or "situations". Another question discussed at the Conference was the Charter basis for Council referral; should the Council only be able to refer situations under Chapter VII of the UN Charter, or should the power of referral be widened as to enable the Council to refer matters pursuant to Chapter VI as well. Each of these questions will be discussed in their proper sections.

8.3.2 Remaining arguments against Security Council referral

Only a few states, such as Mexico⁴⁰³, and in particular India, did not want to allow the Security Council to have any role in connection with the Court's activities. India formally moved to have the Article on Security Council referral deleted during the closing meeting of the Conference in Rome.⁴⁰⁴ In its explanation of the vote in the final session of the Plenary of the Conference the Indian delegation proceeded to make the following statement: "[t]he power to refer is now unnecessary. The Security Council set up ad hoc tribunals because no judicial mechanism then existed to try the extraordinary crimes committed in the former Yugoslavia and in Rwanda. Now, however, the ICC would exist and the states parties would have the right to refer cases to it."⁴⁰⁵ The head of the Indian delegation went on to state that to give the power of referral to the Council would "imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the statute, but want a privilege to refer cases to it."⁴⁰⁶

⁴⁰² H.P Kaul, 1998, p.370

⁴⁰³ A/CONF.183/C.1/L.81, 15 July 1998

⁴⁰⁴ UN Doc. A/CONF. 183/C.1/ L.95, 17 July 1998.

⁴⁰⁵ Explanation of vote by India on the adoption of the Statute of the International Criminal Court. Rome, July 17, 1998

⁴⁰⁶ Ibid. This reasoning does not however stand the test in situations of serious violations of international humanitarian law committed on the territory and by citizens of states that have not accepted the jurisdiction of the Court. In 4.2.4 we saw that according to Article 12(2)

8.3.3 Referral of “matters”, “cases” or “situations”

Even if India, among others, criticised the right of referral, the immense majority of states admitted that such a right to refer situations to the Court was an application of the primary responsibility of the Security Council over matters concerning peace and security under Article 24 and Chapter VII of the UN Charter.⁴⁰⁷ Among those delegations supporting referrals by the Council, there was a division as to whether the Council should refer “matters”, “cases” or “situations”. This discussion had in fact been going on throughout the prenegotiations, but no solution had been reached, and the negotiations therefore continued at the Rome Conference. Both at the pre negotiations⁴⁰⁸ and at the Rome Conference many delegations felt that the Council should only be empowered to refer a general matter or situation rather than a specific case to the Court, in order to preserve the Court’s independence in the exercise of its jurisdiction.⁴⁰⁹ If the Council had the power to refer “cases” it could refer a particular crime or a case against a particular accused. If the Court was empowered to refer “situations” or “matters”, the bringing of individual prosecution would instead be a matter within the discretion of the Court, based on investigations that it had carried out pursuant to the referral. The delegations in favour of the latter choice, meant that by choosing the word “situation” or “matter” instead of “cases” the prejudicing of the Court would be minimised and it would “preserve the independence and autonomy of the Court in the exercise of its investigative, prosecutorial and judicial functions.”⁴¹⁰ On the other hand, states which favoured the use of the term “case”, argued that a referral by the Council should be put on par with referrals by states, as was the case in the ILC Draft.⁴¹¹ The Draft was however changed to the effect that the states have the power to refer “situations” and not “cases”.⁴¹² This argument presented at the preparatory negotiations therefore became irrelevant.

By the end of the preparatory negotiations, the possibility of referring “cases” had been rejected and the text which was submitted to the Diplomatic Conference in Rome contained only two options: the narrower concept of “matter” and the wider one of a “situation”.⁴¹³ As between those two terms, those who preferred “situations” argued that the referral of “matters” by the Council was still too specific for the independent

the Court would not have jurisdiction in those situations unless the Council could make use of the power to refer cases.

⁴⁰⁷ E. La Haye, 1999, p.12

⁴⁰⁸ Ad Hoc Committee Report, p.27, paras 120-121 and Prep Com Report, Vol. I, p.31-32, paras. 132-136

⁴⁰⁹ S. Suikkari, *Debate in the United Nations on the International Law Commission’s Draft Statute for an International Criminal Court*, In: Nordic Journal of International Law, No.1 1995, p.205-22, at.p.213

⁴¹⁰ M.H. Arsanjani, In: Reflections on the International Criminal Court, 1999, p.65

⁴¹¹ See Article 25(1) and (2) of the ILC Draft

⁴¹² See 5.2

⁴¹³ See Article 10(1), Draft Statute of the International Criminal Court, Report of the Preparatory Committee, at footnote 27

functioning of the Court. It was also argued that the term “situation” would be closer to the terminology of Chapter VII.⁴¹⁴

8.3.4 Charter basis for referral

Although a clear majority supported a provision of Council referral, there were different views at the Conference as to what the UN Charter basis for such a referral should be. The ILC Draft required that the referral was based exclusively on the Council’s Chapter VII authority.⁴¹⁵ This provision meant that, before referring a matter to the Court, the Council would have had to have made a determination under Article 39 of the UN Charter, that there had been a threat to the peace, breach of the peace or act of aggression. Already in the preparatory negotiations there were however suggestions made that the power of referral should be widened as to enable the Council to refer matters pursuant to Chapter VI of the Charter as well.⁴¹⁶ This would imply that the Council could refer situations “the continuance of which [are] likely to endanger the maintenance of international peace and security,”⁴¹⁷ as well.⁴¹⁸ At the Prep Com Articles 33 and 36 of the UN Charter were mentioned as Articles appropriate as a base for Council referral.⁴¹⁹ As mentioned in 6.5.1.3 these articles give the Security Council the power to encourage the states to find a peaceful solution to their disputes, and to recommend the “appropriate procedures” of dispute settlement. It was noted at the Prep Com that one of these “appropriate procedures” mentioned in Article 36 was “judicial settlement”.⁴²⁰ Those pressing this point suggested deleting “Chapter VII” from the ILC Draft so that Chapter VI actions would also be covered. This option was presented to the Rome Conference for discussion in Article 10(3) of the Prep Com Draft Statute.⁴²¹

The states that supported this latter option at the Rome Conference argued that it would be inappropriate, if not a violation of the UN Charter, for the Court to restrict the basis upon which the Council makes referrals. Moreover they meant that there was “no legal reason dictating that referrals be made only under Chapter VII.”⁴²² The delegations in favour of the wording in the ILC Draft, that only Chapter VII situations could be referred, argued that Chapter VII “makes it a more powerful referral, as the Council would be more likely to enforce rulings.”⁴²³

⁴¹⁴ See Report of Inter-Sessional Meeting, UN Doc.A/AC.249/1998/L.13

⁴¹⁵ ILC Draft Statute, Article 23(1)

⁴¹⁶ This proposal was put forward by Chile and Brazil. See E. La Haye, 1999, p.11-12

⁴¹⁷ Article 33 of the UN Charter

⁴¹⁸ For the dividing-line between Chapter VI and Chapter VII see 6.7.2

⁴¹⁹ Prep Com Report, Vol. I, p.32, para.134

⁴²⁰ Ibid.

⁴²¹ Prep Com Draft Statute

⁴²² R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.149

⁴²³ Ibid.

In the legal literature it has been argued that the Council's referral of situations under Chapter VI would clash with the "compulsory jurisdiction" that a Council referral would imply.⁴²⁴ This line of arguing is based on the assumption that only resolutions under Chapter VII are binding according to Article 25 of the UN Charter. As concluded before the "compulsory jurisdiction" is a consequence of the fact that Council referrals enable the Court to act in the absence of a referral or consent to jurisdiction by a state. Vera Gowlland-Debbas states that if the Council could refer situation under Chapter VI the Council could "initiate proceedings leading to the prosecution of individuals who are in the custody, or have committed a crime in the territory, of a state which has *not* accepted the jurisdiction of the Court, on the basis of a non-binding resolution which is not regulated by Article 25 of the Charter."⁴²⁵ She notices further that Article 36(3) of the UN Charter, which mentions that the Council in its recommendations shall take into consideration that legal disputes should be referred to the International Court of Justice, can only recommend but not oblige states to submit their disputes to judicial settlement.⁴²⁶ In the case of the International Criminal Court the Council would however, according to the relevant proposal, be able to impose compulsory jurisdiction in a non-binding, Article 36, resolution.

The Human Rights Watch however came to another conclusion in this question. The HRW were also of the opinion that the member states should be bound, to give effect to the Court's decisions, when the Council had referred a matter to the Court. They argued, however, that the binding nature of decisions is not determined by whether they are taken under Chapter VI or Chapter VII, but whether they are intended to bind all member states.⁴²⁷ They meant that when the Council was dealing with a matter, whether under Chapter VI or Chapter VII, and it is brought to its attention that a crime within the jurisdiction of the Court might have been committed, it should be able to refer that matter to the Court under either Chapter.⁴²⁸ The HRW stated that the commission of such grave crimes as those within the jurisdiction of the Court almost always constitute a threat to the peace, [or a] breach of the peace, as envisaged in Chapter VII and therefore concluded that the decisions to refer matters to the Court should, in general, be taken under that Chapter. They were however of the view that the Council should not be precluded from referring a situation to the Court when the "commission of a crime within the Court's jurisdiction comes to the attention of the Council in circumstances which are not deemed to constitute a threat to international peace and security". They argued that what was essential was that the binding nature of the Security Council decision was clear.⁴²⁹

⁴²⁴ See V. Gowlland-Debbas, 1998, p.102

⁴²⁵ Ibid.

⁴²⁶ See Articles 37(2) and Article 38 of the UN Charter and 6.5.1.3.4

⁴²⁷ See 6.5.1.2

⁴²⁸ HRW, 1998, p.59

⁴²⁹ Ibid., p.59-60

8.4 Article in the Rome Statute

8.4.1 General

The final text was adopted in Article 13(b). The relevant parts of Article 13 reads:

“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provision of the Statute if:

...

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”.

From this text it can be concluded that the negotiations at the Rome Conference resulted in a provision that allows the Council the power to refer a “situation” instead of a “matter” to the Court. The power is pursuant only to Chapter VII and not Chapter VI of the UN Charter and no additional formal requirements are imposed. Since all these features have been discussed in the previous sections, I will here only mention a few words about each.

8.4.2 Referral of “situations”

As previously mentioned, the fact that the Council can only refer “situations” and not “cases” or “matters”, makes it possible to maintain the proper separation between the action of the Security Council in the political sphere and the unique attribute of the Court to determine guilt or innocence. The Council can not refer a particular crime or case against a particular accused, but it remains the exclusive responsibility of the prosecutor to determine which individuals should be charged with crimes. With this wording of the provision, the arguments forwarded against the ILC Draft becomes less relevant. There is not a great risk for politisation of the Court since, although the Council’s decisions are based on political considerations, these considerations will not determine the actual bringing of individual prosecution. Also the argument of inequality between the permanent members and other states carries less weight under the final Statute, since the Council will not have the power to “engineer a reference ‘against’ whatever state they chose.”⁴³⁰ It is however still true that the permanent members, that are not parties to the Statute, can shield themselves from prosecution by using their veto power.

⁴³⁰ F. Berman, 1999, p.175

8.4.3 Meaning of the phrase “acting under Chapter VII”

As mentioned earlier, the term “acting under Chapter VII” seems to mean that the Council must have made a determination under Article 39 of the UN Charter that there has been a threat to the peace, breach of the peace or act of aggression. The question has however been put in the literature whether the Council has to take positive action under the Chapter. It has previously been noted in that the Council, after making such determination, is not automatically required to proceed to enforcement action binding on member states under Article 25 of the Charter. The Council can merely resort to making a recommendation under Articles 39 or 40, or indeed decide not to act at all. The question if the Council has to take binding enforcement action in order to be able to refer a situation to the Council is usually answered in the negative in the literature.⁴³¹ Gabriël H.Oosthuizen⁴³² states that it is possible that the word “acting” signifies more than a mere decision in terms of Article 39. He is however of the opinion that the term “acting” does “not need to be interpreted as meaning that the [Security Council] would also have to decide on Article 41 or Article 42 measures in order to make such a referral.”⁴³³ The meaning of the phrase “acting under Chapter VII” will remain an open question until the Court has been established.

8.4.4 No additional formal requirement

Just as in the ILC Draft, no additional requirements are imposed on a Council referral. When the Council adopts a binding decision to that effect, it overrides the requirement for state consent that would otherwise apply under the Statute before the Court could exercise jurisdiction.⁴³⁴ This arises by implication out of the fact that Article 12 lays down state consent as a precondition only in the case of references by a state party or action by the prosecutor *proprio motu* under Article 13, but not for the case of Chapter VII referrals by the Security Council.⁴³⁵ This means that the Court can exercise jurisdiction over a case referred to it by the Council where the alleged crimes were committed in a non-state party to the Statute. Whether the state on whose territory the alleged crime was committed, the state of nationality of the alleged perpetrator or the custodial state is a party to the statute or not, does not make a difference. This will be particularly helpful in securing jurisdiction in situations which would not otherwise fall within the competence of the Court. The provision will therefore probably be highly significant for the Court’s effectiveness.

⁴³¹ See e.g. V. Gowlland-Debbas, 1998, p.101-102 and G.H Oosthuizen, *Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council*, In: Netherlands International Law Review, Vol. XLVI, Issue 3, 1999, p.313-342, at. p.368-372

⁴³² Associate Legal Officer at the United Nations International Criminal Tribunal for the former Yugoslavia.

⁴³³ G.H Oosthuizen, 1999, p.370

⁴³⁴ See 4.2.4 for the preconditions otherwise applicable

⁴³⁵ Compare with the ILC Draft that had the same effect.

9 Security Council deferral

9.1 General

A second and more controversial role for the Security Council, in the jurisdiction of the Court, is its power to defer the Court's proceedings. While the Council's power to refer cases, discussed in the previous chapter, serves to expand the Court's jurisdiction, enabling the Court to exercise its jurisdiction irrespectively of whether the states concerned are parties to the Statute, the power to defer prosecution would shrink the Court's jurisdiction. The question in what situations and under which conditions the Council should have this power was the centre of numerous debates at nearly all levels of the negotiating process leading up to Rome. I will first present the provision as it was proposed by the ILC and the arguments pro and con this proposal that were voiced in the pre negotiating process before the Rome Conference. I will then devote a section to a proposal called the "Singapore compromise", since it signifies a turning point in the discussions, before I go into the negotiating process in Rome. In the last part of this chapter I will present the final wording of the Statute and how it differs from the ILC Draft. In this way I can verify if the criticism against the Draft is still valid or if the right balance between peace and justice seem to have been struck in this respect.

9.2 ILC Draft Statute

9.2.1 Contents of ILC Draft Article 23(3)

Under Article 23(3) of the ILC Draft⁴³⁶, prosecution is precluded if it is related to or arises from a dispute or situation that "is being dealt with" by the Security Council, unless the Council specifically authorises it. Article 23(3) of the Draft Statute reads:

"No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides."

The commentary to the Draft Statute explains that this provision is a consideration of the Security Council's primary responsibility for the maintenance of international peace and security. The International Law Commission regarded the provision as an "acknowledgement of the priority

⁴³⁶ ILC Draft Statute, supra footnote 16

given by Article 12 of the Charter of the United Nations”.⁴³⁷ According to the provision the Court requires prior authorisation of the Council for a situation, which is being dealt with by the Council under Chapter VII. Due to the specific voting procedure of the Council⁴³⁸, this construction would permit any permanent member to veto a Council resolution authorising the Court, and thereby blocking proceedings of the Court. The ILC, however, considered it to be a well balanced co-ordination between the Court and the Council, since the Court only would be barred to act in those cases where the Council had made a determination under Article 39 and was in fact acting under Chapter VII.⁴³⁹ In this way it did not “give the Council a mere ‘negative veto’ over the commencement of prosecution”.⁴⁴⁰ Once the Chapter VII action was terminated the possibility of prosecution being commenced under the Statute would be revived according to the ILC.

9.2.2 Arguments in favour of ILC Draft Article 23(3)

The Draft Article was supported by the permanent member of the Security Council. Throughout the negotiations of the Statute, they expressed the concern of a possible conflict between the jurisdiction of the Court and the functions of the Security Council. They argued that the investigation or prosecution in a particular case by the Court could interfere with the diplomatic resolution of an on-going conflict by the Council.⁴⁴¹ An example given was a peace agreement where the participation of an indicted person is necessary for the negotiations for a peaceful settlement, and danger exist that the person concerned will be apprehended once participating in such negotiations.⁴⁴² Since prosecution by the Court could disrupt a peace process, it was argued that as long as the Security Council was taking action in a situation, it would not be appropriate for the Court to commence or continue proceedings in a case related to that situation.

At the Ad Hoc Committee the delegations in favour of the provision argued that the approach in 23(3) was necessary to preserve the Council’s capacity to perform its functions for the maintenance of international peace and security under Article 24 of the Charter.⁴⁴³

Also during the sessions of the Prep Com did the permanent members of the Security Council support the Article.⁴⁴⁴ France and the United States were the strongest supporters of retaining the provision. These delegations

⁴³⁷ ILC Draft Statute, p.87, para.12, *see* 6.4 for presentation of Article 12

⁴³⁸ *See* 6.3 on voting procedure in the Security Council

⁴³⁹ The meaning of the phrase “being dealt with”, and the question to what degree the Council had to take positive action in a situation, in order to be able to defer Court proceedings, will be further discussed in the criticism of the ILC-proposal.

⁴⁴⁰ ILC Draft Statute, p.87, para.12

⁴⁴¹ R.S. Lee, In: Reflections on the International Criminal Court, 1999, p.149

⁴⁴² A. Zimmermann, 1998, p.219

⁴⁴³ Ad Hoc Committee Report, *supra* footnote 21, p.28, para.124

⁴⁴⁴ *See* C.K. Hall, 1998, p.131

expressed the view that “it would be unacceptable if the Court were empowered to act in defiance of the Charter of the United Nations and to interfere in delicate matters under consideration by the Security Council.”⁴⁴⁵ According to this view, paragraph 3 should be revised to include, not only Chapter VII situations, but all situations which were being dealt with by the Council. Christopher Keith Hall⁴⁴⁶ reports: “France argued that the Security Council should screen all state complaints to see if they involve a situation of threat to or breach of international peace and security. The United States argued that no state complaint concerning a situation that the Security Council was actively considering could be referred to the Court until the Court agreed.”⁴⁴⁷

These arguments put forward by France and the United States supported the International Law Commission’s grounds for inserting a provision like the one in Article 23(3). However, they went further than the ILC Draft in that they wanted to include not only Chapter VII situations, but also Chapter VI situations, and in fact all Security Council action. According to the ILC Draft the Council had to “deal with a situation [...] under Chapter VII” and this was to be interpreted to mean that the Council in that situation had to take positive action under the Chapter. Proposals, such as the one forwarded by the US and France would, in the view of the ILC, give the Council a mere ‘negative veto’ over the commencement of prosecution.⁴⁴⁸

9.2.3 Arguments against ILC Draft Article 23(3)

9.2.3.1 General

The provision was criticised by many delegations in the negotiating process leading up to the Rome Conference. Already in the ILC did several members take the view that the paragraph was undesirable. To clarify what kind of criticism that were forwarded, I will divide them into four categories. The first two kinds of criticism are similar to the first two categories of criticism regarding Council referral; namely that it would lead to politicisation of the Court and inequality between the permanent members and the other states. These arguments carry more weight in the case of Council deferral of proceedings, and as we shall see they were shared by a greater number of delegations. The third point of criticism was that the ILC Draft did not contain a time limit for how long the proceedings could be deferred. The last category contains the criticism, not on the wording of the provision, but of the actual grounds or rationale of inserting a provision at all. In this chapter I

⁴⁴⁵ Prep Com Report, Vol. I, p.33, para. 140

⁴⁴⁶ Legal Adviser, Amnesty International

⁴⁴⁷ C.K. Hall, *The First and Second Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, n: American Journal of International Law, Vol 91, No.1, 1997, p.177-187, at p. 182.

⁴⁴⁸ See ILC Draft Statute, p.87, para.12. The proposal was later defeated on the ground that it was too broad and could include just about any situation coming before the Court. See M.H. Arsanjani, In: Reflections on the International Criminal Court, 1999, p.72

will present the four categories of criticism as they were forwarded in the ILC, the Prep Com and in the Ad Hoc Committee, as well as the criticism from legal commentator, human rights organisations and other NGOs.

9.2.3.2 Politisation of the Court

The arguments concerning the politisation of the Court has the same basis as the arguments in 8.2.3.2, that there should be no appearance of political intervention in what was intended to be a wholly independent judicial process. In contrast to the Security Council, which takes political considerations into account when making its decisions, the Court, as a judicial body, must be concerned only with the criminal responsibility of individuals who have committed serious crimes. The concern of many states was that if the Court was subject to the political influence of the Council, this would undermine its judicial independence and credibility.⁴⁴⁹ This fear is more pertinent in this case of Council deferral than Council referral. During the negotiation process, even the delegations favouring a provision that would give the Council the power to defer the Court's jurisdiction, were concerned with this problem. Many delegations at the different steps of the negotiating process agreed that the Council should have some sort of control over the Court's action, as not to disturb the sensitive political considerations by the Council. The powers accorded to the Council in Article 23(3) were however seen to be too broad and far-reaching and thereby threatening the independence and impartial functioning of the Court.

Several members of the ILC took the view that paragraph 3 was undesirable, since "the processes of the Statute should not be prevented from operating through political decisions taken in other forums."⁴⁵⁰ Also in the Ad Hoc Committee did some delegations point at the political character of the Council and argued that "the judicial functions of the court should not be subordinated to the action of a political body."⁴⁵¹ A number of delegations in the Prep Com were of the opinion that the ambit of paragraph 3 was too wide "as to infringe on the judicial independence of the Court."⁴⁵²

Most participants at the 29th UN Issues Conference opposed to granting the Council the power in Article 23(3), as it would "compromise the independence of the Court, allowing a political body to control a judicial body thereby politicising the Court and undermining its independence and legitimacy."⁴⁵³ These participants argued that if the Council had the power to stop investigations or prosecution, "justice would become a bargaining chip to be used in Council-sponsored peace negotiations."⁴⁵⁴

⁴⁴⁹ V.P. Nanda, 1998, p.423

⁴⁵⁰ ILC Draft Statute, p.87, para.13

⁴⁵¹ Ad Hoc Committee Report, p.28, para. 125

⁴⁵² Prep Com Report, Vol. I, p.33 para.142

⁴⁵³ Report of the 29th UN Issues Conference, 1998, p.3

⁴⁵⁴ Ibid.

The human rights organisations following the negotiations also criticised the proposed Article 23(3). Human Rights Watch stated that the control the Council would have over the Court's ability to exercise jurisdiction would constitute a serious threat to the independence of the Court. HRW stated that "[s]ubjecting the Court to the control of the Security Council - and to its highly political decision making process - would have a profoundly negative impact on the Court's ability to function independently, as well as on its legitimacy, authority and creditability."⁴⁵⁵ The Human Rights Watch went on to argue that allowing any one of the permanent members of the Council to veto the exercise of the Court's jurisdiction, in the way that Article 23(3) would do, "would reduce the ICC from an independent judicial body to a subordinate body of the Security Council and render judicial hostage to the political whims of the permanent members of the Security Council".⁴⁵⁶ Also other NGOs commented on the politisation of the Court and meant that Article 23(3) would seriously effect the Court's independent functioning. The International Red Cross found it difficult to "reconcile the principle of an independent and impartial court with the fact that, in certain cases, the court would be dependent on the Security Council or subordinated to its actions, and might thus be prevented from performing its duties freely."⁴⁵⁷

The provision has also in the legal literature been criticised as to subject the Court to the political influence of the Council. Daniel Derby⁴⁵⁸ is of the opinion that granting the Security Council the effective means to limit the exercise of jurisdiction will effectively render the ICC a "political tool of the Security Council".⁴⁵⁹ As such, he argues, the Court would be utilised only on such occasions where political will or public support demanded the punishment of individuals.⁴⁶⁰

9.2.3.3 Unequality between permanent members and other states

The provision was also criticised for extending the privileged position of the permanent members of the Council and for creating an inequality between these states and states not members of the Council. This argument was also forwarded against Council referral, but it is of greater importance in the context of Council deferral. Since the provision would give to each of the permanent members of the Council a power to veto a resolution authorising the prosecution, it would in effect permit them to confer immunity from prosecution on their own nationals. As seen in 6.3 and 6.6.2, due to the veto power of the permanent members of the Council, there exist an inequality

⁴⁵⁵ HRW, 1998, p.58

⁴⁵⁶ Ibid. *See also* LCHR, 1997, p.12 and Amnesty, 1997, p.97

⁴⁵⁷ T. Pfanner, *ICRC Expectations on the Rome Diplomatic Conference*, In: International Review of the Red Cross, No.322, 1998, p.21-28, at. p.26

⁴⁵⁸ Professor of Law, Touro College Jacob d. Fuchsberg

⁴⁵⁹ D. Derby, *An International Criminal Court for the Future*, In: Transnational Law and Contemporary Problems; A Journal of the University of Iowa College of Law, Vol. 5, 1995, p.308-318, at p.311-312

⁴⁶⁰ Ibid.

between them and the other member states of the UN. The veto power makes them immune in the sense that they can veto resolutions in which they are directly involved or have an interest. As stated in 6.3 the central theory behind the right of veto is that since the permanent members bear the main burden of responsibility for maintaining peace and security, no one permanent member should be compelled by a vote of the Security Council to follow a course of action with which it disagrees. There is certain logic behind the veto power when it comes to enforcement action, for such action could not realistically be launched against one of the permanent members. The same logic can however not be applied to prosecution of individuals.⁴⁶¹

The International Law Commission argued that it would be hard to pursue a government to become a party to a treaty that would apply to all states except the permanent members of the Council. The provision in 23(3) was therefore “not likely to encourage the widest possible adherence of states to the Statute.”⁴⁶² Later in the negotiation process, the states not permanent members of the Council continued to hold that the veto power granted to the permanent members effectively would shield them from prosecution.⁴⁶³ It was argued that, at a minimum, “the ICC would never be able to exercise jurisdiction over breaches of the peace occurring in any of the nations with a permanent seat on the Security Council.”⁴⁶⁴

The provision was also criticised on this ground by human rights organisations,⁴⁶⁵ and by some legal authors. Among these are Daniel Derby, who stated that the role that the ILC assigns to the Council in relations to the Court “would place non members of the Council at a disadvantage in terms of influencing court behaviour.”⁴⁶⁶

9.2.3.4 Lack of time limit for deferral

The provision in Article 23(3) was also criticised on the ground that the Court could, in effect, be deprived of jurisdiction by the mere placement of a situation on the agenda of the Council, where it could remain under consideration for a potentially indefinite period of time.⁴⁶⁷ If there was inaction by the Security Council after it has placed the relevant item on its

⁴⁶¹ See V. Gowlland-Debbas, 1998, p.108

⁴⁶² ILC Draft, p.88, para. 15

⁴⁶³ See M.P Scharf, *The Politics of Establishing an International Criminal Court* In: Duke Journal of Comparative and International Law, Vol. 6, 1995, p.169

⁴⁶⁴ M.D. Peter, “*The Proposed International Criminal Court: A Commentary on the Legal and Political Debates Regarding Jurisdiction that Threaten the Establishment of an Effective Court*,” In: Syracuse Journal of International Law and Commerce, Vol 24, 1997, p.177-197, at p.194

⁴⁶⁵ See e.g. LCHR, 1997, p.12. The LCHR also criticised the provision on the ground that it imposed inequality between the non-permanent members of the Council and those not serving the body.

⁴⁶⁶ D. Derby, 1995, p.312

⁴⁶⁷ R.S. Lee, In: Reflections on the International Criminal Court, 1999, p.150

agenda, the Court would forever be precluded from acting on the matter.⁴⁶⁸ In 6.7.3.2 we saw that international crisis, that fall under the Article 39 definition, can develop over long periods of time, and that the Council therefore can keep them on their agenda for many years. Many cases can be found in the Council's practise where it has made a determination under Article 39, but then waited a considerably long time before acting, and in some cases it has not acted at all.⁴⁶⁹

In the report of the ILC this kind of criticism was not forwarded. This is probably due to the way they intended the words "being dealt with [...] under Chapter VII" in Article 23(3) to be interpreted. As previously mentioned the Commission interpreted it to mean "a situation in respect of which Chapter VII action *is actually being taken*" by the Security Council.⁴⁷⁰ They were of the opinion that the Council had to take positive action under Chapter VII in order to defer the Courts jurisdiction and that when the Council action was terminated the Court could commence proceedings regarding the situation.⁴⁷¹ It was first in the negotiating process following the ILC Draft that this weak point was discovered and criticised. In the Ad Hoc Committee concern was voiced that the Court could be prevented from performing its function through the mere placing of an item on the Security Council's agenda and that it could be "remained paralysed for lengthy periods", not only while the Security Council was actively dealing with a particular situation, but also when it "retained the item on its agenda for possible future considerations."⁴⁷² In the Prep Com, where the same type of concern was forwarded, reference was made to the large number of situations that were under the consideration by the Security Council and the fact that in many of those cases the Security Council had been 'seized' for more than 30 years without taking effective action.⁴⁷³ Some delegations at the Prep Com proposed to include a provision stating that "should no action be taken in relation to a situation which has been referred to the Security Council as a threat to or breach of the peace or act of aggression under Chapter VII of the Charter within a reasonable time, the Court shall exercise its jurisdiction in respect of that situation".⁴⁷⁴ The purpose of this proposal was to allow the Court to take action in situations where the Security Council, though seized of a matter, would not or could not act upon it.

⁴⁶⁸ S. Yee, *A Proposal to Reformulate Article 23 of the ILC Draft Statute for an International Criminal Court*, In: Hastings International and Comparative Law Review, Volume 19, 1996, p.529-537, at p.530

⁴⁶⁹ See 6.7.3.2 It is worth to note that the main reason that the Council did not act in these situations was that it was paralysed by the veto. With the ending of the Cold War this paralysation of the Council is gone and one can assume that once the Council has made a determination under Article 39 it will more readily proceed with the actual action under the following Articles in the Chapter.

⁴⁷⁰ ILC Draft, p.87, para.12. (emphasis added)

⁴⁷¹ ILC Draft, p.87, para.12

⁴⁷² Ad Hoc Committee Report, p.28, para.125

⁴⁷³ Prep Com Report, Vol. I, p.33, para 142

⁴⁷⁴ Prep Com Report, Vol. I, p.33, para 143

9.2.3.5 Criticism of the grounds for inserting the provision

Last, but not least, there was criticism, not only to the formulation of the provision, but of the grounds for inserting the provision. As previously stated, the ILC meant that the provision was an acknowledgement of the Security Council's primary responsibility for the maintenance of international peace and security. The whole idea for inserting the provision was the thought that the work of the Court could interfere with the diplomatic resolution of an on-going conflict by the Council. Some critics of the Article meant that this assumption was wrong and that the recent years' conflicts demonstrate that justice is necessary for lasting peace.⁴⁷⁵

This kind of criticism was primarily produced by human rights organisations. The Human Rights Watch held that the grounds for inserting such a provision was non-existent. First of all they meant that the functions of the Court were quite separate from the political functions of the Council, but that there were very much complimentary in the protection of international peace and security.⁴⁷⁶ They held that the argument that ICC jurisdiction may interfere with the promotion of peace agreements was spurious. "Rather, any suggestion that the Court's jurisdiction might be used as a negotiable element in any potential peace agreement brokered by the Council should be rejected".⁴⁷⁷

Neither the Lawyers Committee for Human Rights could see that there was a conflict between the need to ensure international justice and the competence of the Security Council to maintain and restore peace and security under Chapter VII of the UN Charter.⁴⁷⁸ They meant that "[t]he nature of the crimes over which the ICC would have jurisdiction renders untenable the argument that the Court should not be able to interfere with the Council's peacekeeping efforts in Chapter VII situations [---] On the contrary, it was the realisation that there can be no peace without justice that rekindled international interest in establishing an International Criminal Court."⁴⁷⁹ Accordingly, they emphasised that the Court's ability to proceed with an investigation or prosecution should not be subject to Security Council approval.

In the 29th UN Issues Conference some participants stated that the Council's role as the paramount institution preserving peace and security should be maintained, but argued that it is far from clear whether investigations or prosecution by an international tribunal would always threaten the peaceful resolution of a conflict.⁴⁸⁰ Unlike the human rights organisations, these critics did not mean that the provision should be excluded, but argued that the roles of the Security Council and the Court "need to be carefully

⁴⁷⁵ See Report of the 29th UN Issues Conference, p.24

⁴⁷⁶ HRW, 1998, p.60-61

⁴⁷⁷ HRW, 1998, p.61

⁴⁷⁸ LCHR, 2000, p.5

⁴⁷⁹ LCHR, 1997, p.12

⁴⁸⁰ Report of the 29th UN Issues Conference p.24

calibrated and balanced to avoid potential negative consequences of judicial intervention in ongoing peace negotiations”, and that Article 23(3) was a too blunt instrument that left too much discretion to the Council.⁴⁸¹

9.2 The Singapore compromise

During the negotiations leading up to the Rome Conference a proposal was introduced that to a great extent lessened the grounds for criticising the Council’s power to defer proceedings. This compromise formulation eventually became known as the “Singapore compromise”⁴⁸² and proposed the opposite effect as compared to the ILC Draft. The ILC Draft stated, as mentioned, that no prosecution could be commenced unless the Security Council otherwise decided. This meant that any permanent member of the Security Council could unilaterally have used its veto power under Article 27 of the UN Charter to reject a proposal for commencing Court proceedings and thus block the proceedings. The Singapore compromise, however, proposed that proceedings of the Court may proceed unless the Security Council takes a formal decision to stop the process. Since the adoption of a Security Council decision requires a minimum of nine affirmative votes in the Council, the Court’s proceedings may only be stopped by a concerted effort of the Council’s members. Theoretically, not even all five permanent members joined together could block the Court’s proceedings, since nine votes in favour is needed for a valid decision. Thus the possibility that one single permanent member, by exercising its veto power, would suspend the jurisdiction of the ICC would be excluded. Pursuant to the Singapore formula, the ‘negative veto’ given to the Court by the ILC text would be replaced by a ‘positive’ arrangement where the Court could exercise its jurisdiction unless it was directed not to do so by the Council.

There was a general support for the alternative language adopted in the Singapore compromise, and at the Prep Com a significant number of states that previously preferred to delete Article 23(3) supported the proposal.⁴⁸³ Three of the Security Council’s permanent members; China, Russia and the United Kingdom, also expressed interest in the compromise.⁴⁸⁴ Although many delegations favoured the Singapore compromise to the ILC Draft proposal, no decision was reached on the subject by the end of the preparatory negotiations. The different views were presented as options to be considered by the Diplomatic Conference in Rome.

⁴⁸¹ Ibid.

⁴⁸² A/AC.249/WP.51

⁴⁸³ C.K.Hall, 1998, p.131,

⁴⁸⁴ Ibid.

9.3 Negotiations at the Rome Conference

9.4.1 General

The different views, presented as options to be discussed at the Rome Conference, can broadly be classified into three groups. The first group supported the approach taken in the ILC Draft Statute and demanded affirmative action by the Council before the Court could act.⁴⁸⁵ A second group were those in favour of the Singapore compromise that demanded affirmative action by the Council to require the Court not to act.⁴⁸⁶ The third group opposed to giving the Council any role at all and they moved to have the provision excluded.⁴⁸⁷

9.4.2 Support of the first option

During the Rome Conference the permanent members continued to hold that the Court should not undermine the authority of the organ.⁴⁸⁸ The United States ambassador to the Rome Conference stated that “[t]he Council must play an important role in the work of the permanent Court [which] must operate in conjunction -not in conflict- with the Security Council and its role and powers under the Charter.”⁴⁸⁹ It was however only the Malawi delegation that expressly supported the first option, which prohibits the Court from commencing a prosecution arising from a situation with which the Security Council is dealing, unless the Council otherwise decides.⁴⁹⁰ The United States delegation seemed to support the first option, but as stated earlier, they insisted that the Council should not, as in the ILC Draft, be limited to situations arising under Chapter VII.

9.4.3 Support of the second option

The second option, that required the Council to take affirmative action in order to block the proceedings, was supported by 32 states. Among these were China, Russia and the United Kingdom, all permanent members of the Council.⁴⁹¹ In its opening statement at the Rome Conference the Czech Republic stated that it could not support the idea that the Council should

⁴⁸⁵ Prep Com Draft Statute, Article 10(7) Option 1.

⁴⁸⁶ Prep Com Draft Statute, Article 10(7) Option 2

⁴⁸⁷ This groups view is indicated by footnote 31 attached to Article 10(7) of the Prep Com Draft Statute.

⁴⁸⁸ M. Zwanenburg, *The Statute for an International Criminal Court and the United States: Peacekeeping under Fire?*, In: *European Journal of International Law*, Vol.10 No.1, 1999, p.124-171, at p.137

⁴⁸⁹ Statement by Bill Richardson, United States Ambassador to the UN, to the Rome Conference. www.un.org/icc/speeches/617usa.htm, 17 June 1998

⁴⁹⁰ NGO's team report. Trigger Mechanism and Admissibility Team, Report 5, 30 June 1998

⁴⁹¹ Ibid.

have the power to preclude proceedings before the Court if a situation is being dealt with by the Security Council under Chapter VII.⁴⁹² During the negotiations at the Conference, the delegation however supported the Singapore compromise in the second option, during the negotiations. Also New Zealand expressed concern for the implied politisation of the Court if the Council had too broad powers to defer proceedings, but supported the second option.⁴⁹³ Another example of a state supporting the second option is Italy. In his opening statement to the Conference, the Italian Minister of Foreign affairs called for solutions that balanced relations between the Security Council and the Court, ensuring that it can perform its judicial functions in total independence and without hindrance.⁴⁹⁴ By these examples we see that the states, that at the preparatory negotiations argued that the Security Council should not direct or hinder the functions of the Court, now were in favour of a provision such as the Singapore compromise. These states that had stressed the importance of an independent Court that was free from political influence, were of the opinion that this provision would not lead to politisation of the Court and would not compromise the Court's independence.

9.4.4 Support of the third option

A minority of 12 states supported the third option and opposed to inserting a provision at all.⁴⁹⁵ They were throughout the Conference against granting any such power to the Security Council. Some of these states voted against the Statute of the Court in pursuance of their opposition to the role given to the Security Council. India, in its explanation of the vote stated that: "the power to block is in some ways even harder to understand or to accept. On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other hand, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the conference accepts the proposition that justice could undermine international peace and security."⁴⁹⁶ India went on to state that: "[t]he statute violates this

⁴⁹² Czech Republic, Opening Statement at the Rome Conference for the Establishment of an International Criminal Court, 16 June 1998

⁴⁹³ See e.g. New Zealand Protests at the Security Council 'Secrecy', On the record inserted in Terra Viva (IPS/No Peace Without Justice), 23 June 1998, at 2, New Zealand did here express that it during its term as a Council member had witnessed first-hand how political the Council could be. They referred to the secret informal consultations where the permanent members of the Security Council has the upper hand in the agenda setting opposed to the smaller state who rotate every two years.

⁴⁹⁴ Minister of Foreign Affairs in Italy, Mr. Dini, Opening Statement before the Rome Conference for the Establishment of an International Criminal Court, 17 June 1998

⁴⁹⁵ These states were, Egypt, India, Iraq, Libya, Nigeria, Oman. Pakistan, Senegal, Sudan, Tunisia and Venezuela, See the NGO's team report. Trigger Mechanism and Admissibility Team, Report 5, 30 June 1998

⁴⁹⁶ See the unofficial "Explanation of vote by India on the adoption of the Statute of the International Criminal Court" Rome, July 17, 1998.

fundamental principle of international law by conferring on the Council a power which it does not have under the Charter and which it cannot and should not be given by any other instrument.”⁴⁹⁷ This last view was supported by the Arab states. In its General Statement after the Statute had been adopted, Sudan, on behalf of the Arab group of states, declared that the Statute increased the power of the Council.⁴⁹⁸

9.5 Article in the Rome Statute

9.5.1 General

The text finally adopted in Article 16 of the Statute reads:

“No investigation or prosecution may be commenced or proceeded under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”

In the first part of this section I will discuss in what aspects the final Article differs from Article 23(3) in the ILC Draft. In this way I hope to see to what extent the criticism forwarded in the negotiating process is still relevant, and assess if the Article is a well-balanced compromise between the points of view presented at the negotiations. By comparing the final Article to Article 23(3) of the ILC Draft four major differences can in my view be detected. First of all there is the “reversed veto” as in the Singapore proposal, and secondly a 12-month time limit of deferral has been introduced. The third and fourth differences are that, while in the ILC Draft the suspension or prohibition would apply only to the commencement of a prosecution, in the final Statute it applies to the commencement and *continuance* of an *investigation* or prosecution. In the second part of the section I will look at the question on what grounds the Council can make a request of referral, and the significance of the phrase ‘resolution adopted under Chapter VII’

9.5.2 Differences from the ILC Draft Article 23(3)

9.5.2.1. Reversed veto

The text finally adopted in article 16 is based on the Singapore compromise and the second option discussed at the Rome Conference. As stated before the provision in the ILC Draft prevented the Court from acting on a situation, unless the Council otherwise decided. The provision would therefore give to each of the permanent members of the Council a power to

⁴⁹⁷ Ibid.

⁴⁹⁸ UN press release L/2889 of 20 July 1998

veto a resolution authorising a prosecution. The Conference in Rome managed to depart from such a strong dependence of the Council and turned around the ILC provision. From an automatic consequence of seizure by the Council of the situation, the deferral or the suspension of prosecution by the Court can only be the result of a formal request by the Security Council on the basis of a resolution under Chapter VII. According to Article 27(3) of the UN Charter, such a decision by the Council requires the votes of nine members, including the five permanent members. As a result, no single permanent member of the Council can block a case from coming to the Court.

The Article signifies an acceptable compromise between requiring the Court to obtain Security Council permission and precluding the Security Council from any ability to stop investigations. On one hand, much of the criticism against the ILC Draft, that it was too far-reaching and that too much power would be given to the Council's permanent members, becomes less relevant when the provision is turned around. The Court would not be as sensitive to the Council's political influence and the permanent members of the Council would not be able to shield its own nationals from prosecution in a way that was feared if one single permanent member could exercise its veto power against Court action. The Council has to decide on a case to case basis, with full use of the veto, whether to bar the Court's proceedings or not. Although Council jurisdiction is still presumed under the Statute, the fact that the Council has to take a positive decision of referral in each case should offer the necessary guarantee that the process will be managed in restraint. On the other hand the Article does "not amount to an illegal interference with the competence of the Council under the Charter" given the fact that the organ itself, but not just a single permanent member, would still be in position to stop any proceeding.⁴⁹⁹ The Article still gives the Council an important position with regard to the Court, if no permanent member vetoes the resolution calling for deferral. The fact that the Council has the primary responsibility for international peace and security does not mean that it should have full control over case referral to the Court. "Such control would result in the Security Council exerting a *dominating* rather than a merely *significant* role."⁵⁰⁰

⁴⁹⁹ A. Zimmermann, 1998, p.218, For the opposite opinion see however Ruth Wedgwood who argues that the requirement of a vote for the suspension of the Court action displaces the traditional power of the Council. She states that the Rome Statute attempts to limit the power of the Security Council in a way that "hints of a palace revolution against the competence assigned by the UN charter itself", and is a arrogation of powers of the Council as the organ primary responsible for international peace and security. R. Wedgwood, *The International Criminal Court: An American View*, In: European Journal of International Law, Vol. 10, No.1, 1999, p.93-107, at p.97

⁵⁰⁰ G. Hafner, K. Boon, A. Rübesame, *A Response to the American View as Presented by Ruth Wedgwood*, In: European Journal of International Law, Vol. 10, No.1, 1999, p.108-123, at p.113

9.5.2.2 Time limit for deferral

While the ILC Draft had no time limit to the deferral, the final text states that the suspension of proceedings is limited to a 12-month period. This period is renewable and the Article does not restrict the number of times the Council can make such a renewal request.

The ILC Draft was criticised on the ground that the deferrals could last for an indefinite period of time. It was noted that the Council often was seized with a matter for longer periods without the Council taking positive action. The Court could in these cases forever be precluded from acting on the matter. By the introduction of a time limit these arguments lose some of their importance. Since the 12-month period can be renewed perpetually, a case can still under the Statute be blocked from reaching the Court at all. For this effect the Council, however, has to make a public and political sensitive request every 12 months. In this request they have to state that the continuance of the blocking is necessary in order not to obstruct their work for international peace and security. It will probably be hard to make such a request in a situation where the Council has made a determination under Article 39, but remains inactive. The fact that the veto power is effective even when a request for renewal is made also serves as a restraint on the process.

The time-limit is, in my view, not in breach of the UN Charter and the power there given to the Council. The Council has the possibility to renew the 12-month period as long as they find Court proceeding or investigation unwise. Ruth Wedgewood⁵⁰¹ however holds that, “[t]he Rome Statute displaces the traditional power of the Security Council, requiring that a vote for suspension of ICC action be renewed every 12 months”.⁵⁰² She argues that the 12-month period is not sufficient because delicate situations will often continue for many years. She goes on to say that “[t]he Rome Statute attempts to limit the power of the Security Council - forbidding the Council from suspending the investigation of a matter for more than 24 months even in a situation where the Council holds that immediate criminal prosecutions would complicate its efforts for, say, a cease-fire.”⁵⁰³ It is quite obvious that Wedgewood has misunderstood Article 16. As stated before, the period of 12-months is not only renewable once, but an unlimited number of times. Article 16 and the time limit thus fails to limit the Security Council’s powers in the way Wedgewood describes.

Furthermore, if there would be a conflict between Article 16 and a Security Council resolution, taken under Chapter VII of the UN Charter, the latter would take precedence. If, for example, the resolution request an indefinite duration, or duration in excess of 12 months, the states would still be bound by this resolution pursuant to Article 25 of the UN-Charter. As seen in

⁵⁰¹ Professor of Law, Yale University

⁵⁰² R, Wedgewood, 1999, p.97

⁵⁰³ Ibid.

chapter 7, Article 103 of the UN-Charter provides that, in the event of a conflict between the obligations of the members of the UN under the Charter and their obligation under any other international agreement, their obligation under the Charter prevails. While the Court, as a non-party to the UN Charter, would not be bound to refrain from proceedings after the expiry of the 12-months period, state parties to the Statute might, depending on the terms of the Security Council resolution, be prevented by the provisions of the Charter from either triggering proceedings before the Court or rendering co-operation to the Court under the Statute.⁵⁰⁴

9.5.2.3 Suspension of the continuance and commencement of prosecution and investigations

As we have seen so far, the final Statute provides for a narrower role for the Council than the ILC Draft. Its scope was however broadened in two specific respects that will be discussed in this section. The first difference is that while the ILC Draft only gives the Council the power to bar prosecution, the final Statute states that prosecutions as well as *investigations* can be barred. This means that the Council can bar the Court⁵⁰⁵ from acting at an earlier stage. The preliminary examination or analysis of the information phase proceeds the investigation phase.⁵⁰⁶ The Prosecutor is thus not prevented from gathering information on the deferred case. Secondly, unlike the ILC Draft, the suspension or prohibition would apply not only to the commencement of a prosecution, but to the commencement and *continuance* of prosecution. Under the final Statute even once prosecution is underway, the Council can therefore step in and call a halt to the proceedings. This means that the Council can interfere with the work of the Court at a later stage. These changes in the text give the Council broader powers in blocking the Courts work. Taken in the context of the other changes, that is the reversed veto and the introduction of the 12-months limit, there seems to be enough safeguards that the Council will not abuse these powers. Instead these changes seems to be an acceptable compromise in order to get through the more important changes that limited the Council's powers of deferral.

9.5.3 Meaning of the phrase “in a resolution adopted under Chapter VII of the Charter”

It is clear that Article 16 does not mean that the Council will be able to have a case deferred by simply coming to such a decision with the required majority of votes. Instead it would have to adopt a resolution under Chapter VII. The question of exactly how the phrase “in a resolution adopted under Chapter VII of the Charter” is to be interpreted is more difficult to answer.

⁵⁰⁴ For this discussion see R.S. Lee, *The International Criminal Court, The Making of the Rome Statute*, 1999, p.152

⁵⁰⁵ Note that Article 34 defines “the Court” as the organs of the Court, including the Office of the Prosecutor and the Pre-Trial and Trial Divisions.

⁵⁰⁶ G.H. Oosthuizen, 1999, p.386

As a minimum, the Council will have to make an Article 39 determination. The situation, involving the alleged commission of the crimes falling within the jurisdiction of the Court, would have to constitute, at least, a threat to the peace. What the requirements are above this is however uncertain. It has been suggested that every action of the Council on the basis of Chapter VII, thus also the pure adoption of non-binding recommendations under Article 39 of the Charter, would be sufficient.⁵⁰⁷ It has also been suggested that the Court would not have to take any action at all, but that it could be sufficient that the Council made such a determination under Article 39.⁵⁰⁸ It is also possible that the phrase will be interpreted to mean that the Council in fact has to take measures according to Article 41 or 42.

It can be concluded that Article 16 differs from Article 13(b), in that in the latter the phrase “acting under Chapter VII” is used instead of the phrase “in a resolution adopted under Chapter VII of the Charter.”⁵⁰⁹ A possible argument is that “acting under” means that Article 39 as well as either Article 41 or Article 42 come into play, whereas “in a resolution adopted under” could simply imply the making of an Article 39 determination. There is, however, no suggestion that this is what the drafters of the Statute had in mind. As noticed in the previous, the exact way in which the Council should adopt resolutions under or act under Chapter VII was not the foremost in the minds of the negotiators at all. From the negotiating process it is however possible to draw the conclusion that the idea behind the phrase in Article 16 was to ensure that the Council had to take a formal vote, in accordance with Article 27 of the Charter, on the deferral of the Court’s proceedings, instead of merely discussing a Chapter VII situation. Consequently, it seems reasonable to conclude that the phrase does not impose a requirement on the Council to decide on Article 41 or Article 42 measures to satisfy the requirement of adopting a resolution under the Chapter. The interpretation of the phrase will however remain unclear until the Court has been established.

9.5.4 Grounds for making a request

In addition to adopt a resolution under Chapter VII, the Council has to make a finding that Court proceedings in a particular situation would impede its work in the field of international peace and security. Article 16 gives no indication on the grounds on which the Security Council makes its request to the Court. As mentioned, it is implicit that the Council makes such a request of referral when it considers that the pursuit of an investigation or of a prosecution would impede the exercise of its primary responsibility under the Charter for the maintenance of international peace and security. In the arguments for introducing the provision, peace negotiations were mentioned

⁵⁰⁷ A. Zimmermann, 1998, p.218

⁵⁰⁸ E. La Haye, 1999, p.14

⁵⁰⁹ See 8.4.3 for the discussion on the interpretation of the phrase “acting under Chapter VII”.

as an example of when the Courts prosecution could disrupt the work of the Council. The Council is however free to decide, on a case to case basis, in what situations they consider that Court proceedings would interfere with their work. The text of the Article could not specify the grounds for a request since such a provision could be seen as controlling the powers of the Security Council. As stated before, the Statute as a legal instrument cannot confer a new power on the Council, or indeed control the exercise of the Council's power under the UN Charter.

The Court does not have the power to make a substantive review of the deferral decision.⁵¹⁰ It is not possible for the Court to reject the grounds for deferral, but the Council is the sole judge of this.⁵¹¹ In making such a finding the Council is however bound by the limitations discussed in 6.6. The legal limitations are extremely broad in scope and therefore not of a great importance in this case. The political limitations on the Council's power are however of greater importance. A decision that grounds for a deferral exist must be seen as a non-procedural matter and the veto rules in Article 27(3) are therefore applicable. This means that any of the permanent members, three of which have voted in favour of the Statute, can use its veto power to prevent a decision stating that proceedings will disrupt the work of the Council. The conclusion is that the Court has very broad powers in deciding that grounds for a deferral exist, as long as there is unanimity within the Council's permanent member states.

⁵¹⁰ G.H Oosthuizen, 1999, p.384

⁵¹¹ The Court however has a limited power of review, in that it can satisfy itself that the Council in fact did request the Court to defer proceedings in accordance with Article 16. See Oosthuizen, 1999, p.381

10 Conclusion

One of the major *strengths*, concerning the preconditions to the exercise of jurisdictions, is the fact that the Rome Conference broke with the tradition in international law that membership and jurisdiction are separated. In the past, acceptance of jurisdiction has been subject to additional declaration or state consent, but according to the Rome Statute automatic jurisdiction is the main rule. In my opinion this was an important step to take. If membership and jurisdiction were separated it could have taken very long before the Court could have functioned effectively, and the Court would through this have lost credibility. The arguments that automatic jurisdiction would infringe national sovereignty were, in my view, not strong enough. They were advocated by states that wanted to weaken the jurisdiction of the Court. One has to remember that automatic jurisdiction does not mean that the Court will have jurisdictional supremacy over national legal institution. The principle of complementarity will adequately protect the legitimate state interest.

Another *strong point*, that is closely related to the previous one, is that the Statute does not require consent by the state of nationality, but only requires that the state of nationality *or* the territorial state is party to the Statute or gives its ad hoc consent. As stated earlier the United States did not approve of this regime since they were afraid that the Court could exercise jurisdiction over its nationals even if the US were not a party to the Statute. They argued that the Statute would have few participants if some variant of universal jurisdiction was embodied in it. The US meant that, in the interest of creating a strong Court with as many ratifications as possible, the Statute should have included rules that the consent from the state of nationality always was needed. In the choice between establishing a weak Court, where the US would have participated, and a more ambitious Court, without the US participation, I think that the right path was taken in choosing the latter. If state consent was always required this could have totally paralysed the Court. What the US wanted to create was basically a state and Security Council-controlled permanent war crimes Court. I think that the Statute as it stands now has bigger potentials to fulfil the expectations put on it. A Court with too limited powers would, no matter how many ratification it got, be too weak and in the end not worth creating. It was better to create a stronger Court, and hope that the countries in favour of a weak Court will in time ratify, instead of creating a weak Court and hope that in time it can be re-negotiated to be given stronger powers.

As to the *weaknesses* concerning the preconditions to the exercise of jurisdiction, Article 124 creates a de facto opt-out regime for war crimes if states make use of it. The possibility of opting out will however only be a transitional provision and I think this price was worth paying to secure the French support.

Another possible *weak point* is embodied in the rules on admissibility. While the principle of complementarity in itself seems to be well balanced, enabling states concerned with their sovereignty and primacy of national proceedings to accept the Statute, there lies a weakness in the criteria on which the Court must determine admissibility. The inability test could become a serious challenge to the legitimacy of the judges. What the judges have to do is to sit in judgement of an entire criminal justice system. The judges may need to find ways to narrow the scope of their findings of inability so that their credibility will not be harmed by persistent criticism by victims and others on the ground of serious inconsistency. Also the question of unwillingness can be troublesome. The question of deciding if the state is acting in good faith is a complex jurisdiction matter that could nearly paralyse the Court, especially in the early years. It remains to be seen how the Court will interpret these criteria. The effectiveness of the Court will depend on how much evidence of bad faith the judges demand of the Prosecutor and how easily they are prepared to pierce a sham.

Another serious *weakness* is that the Statute does not provide for universal jurisdiction. The application of universal jurisdiction in combination with the principle of complementarity, and the other checks and balances in the Statute, would have given the Court the best possibility to effectively fight against impunity. The extension of universal jurisdiction to the Court would not have violated the principle of state sovereignty or the primacy of national jurisdiction. It would have given the Court the possibility to step in when states were effectively unwilling or unable to try the perpetrators of the crimes falling within the jurisdiction of the Court. It is also regrettable that the Korean proposal was negotiated away. Requiring consent of one out of four states, instead of as now, one out of two, would considerably have improved the effectiveness and scope of the Court, especially with regard to internal armed conflicts taking place in non-state parties. In civil wars the present compromise provision does not allow for any jurisdiction unless the state in question is a party to the Statute. If, in line with the Korean proposal, it had also applied to the custodial state, this loophole could have been avoided. Such a provision would have meant that the core crimes committed during a civil war could have been prosecuted if the suspect had been arrested in the state parties.

Under the present Statute there are however two ways in which these negative effects of the Court not having universal jurisdiction can possibly be mitigated, namely by widespread ratification by the states and by sufficient referrals from the Security Council. First it can be concluded that there would be no negative effects if the Statute obtain universal ratification, and that the effects will be less relevant the more states that ratify the Statute. The many signatories, 139 as of April 30, 2001, and the state declarations in the negotiating process, speak for a wide support and suggest that the Statute will be ratified by many states. In the early phase of the life of the ICC there will however not be a widespread ratification. It is realistic

to expect that the situations not involving the territory and citizens of the state parties will be the rule, not the exception.

Another possibility to counter the effects of the Court not being competent because the state in question is not party to the Statute, is through Security Council referrals. Since the referral of a situation by the Council is based on its Chapter VII power, which is binding on all UN member states, it will allow the Court to dispense the admissibility requirements laid down in the Statute. The Court will thus be able to exercise jurisdiction irrespectively of whether the states concerned are parties to the Statute or not. This will be particularly helpful to the Court in securing jurisdiction over crimes committed in internal armed conflict and in situations where the state concerned is not a party to the Statute. Referrals by the Security Council can become an important source of work for the ICC, by extending its jurisdictional reach to the whole world, including the territory and citizens of non-state parties. How far this will be true, and to what extent the Council will in fact refer situations, will depend on the Council's powers under the UN Charter and how the Council uses them in relation to the Court. First of all it can be concluded that the Council has interpreted the concept of "threat to the peace" in such a broad way that it covers all the crimes listed in Article 5 of the Statute. The Council has also shown its willingness to determine civil wars as threat to the peace, under the requirement that the situations have consequences for international peace. In the creation of the ad hoc Tribunals for the former Yugoslavia and Rwanda we have also seen that the Council has an interest, and consider it beneficial in some situations, to require the submission to justice of those responsible for grave crimes of international concern. Since it is easier to refer a situation than to create a tribunal for each particular situation, it is probable that the Council will make more use of its power of referral than it would have been willing to create ad hoc tribunals, if it had been forced to continue on this path.

The *weakness* of Council referrals is however that the Council can be paralysed by the veto of the permanent members when a situation involve their nationals or those of their allies, even when such situations genuinely deserve consideration by the Court. This might lead to double standards and reduce the Court's credibility. The fact that three of the five permanent members have signed the Statute, and the fact that the use of the veto has greatly decreased since the end of the Cold War, however suggest that this fear is overrated. Also the fact that the Council refers "situations" and not "cases", and that it makes the referral to the Prosecutor, and not to the judicial arm directly, speak against the fear of politisation of the Court.

In this context it is also worth to mention a few words about the Council's 'negative' power to defer the Court's jurisdiction. From a negative standpoint one can conclude that the provision makes it possible for the Council, as political body, to obstruct the course of justice. However, the Court must have very good reasons to hamper the work of the independent Court. The Council would need to make a public and politically sensitive

finding that the commencement or continuation of an investigation or prosecution would be detrimental to international peace and security. It requires the Council to publicly state its reasons for voting to halt the Court's proceeding. This would discourage overt and excessive intervention by the Council.

One important **strength** concerning the trigger mechanism is that the Prosecutor is given *proprio motu* power. He or she can seek information from states, organs of the UN, intergovernmental and non-governmental organisations. If the Prosecutors use these powers to seek information it might have a very strong deterrent effect. The *proprio motu* power is also important for the credibility of the Court. If only state parties and the Security Council have the power to bring complaints the Court would run the risk of being politicised. The Prosecutor is empowered to react to reports at a very early stage. One risk is however that the capacity of the Prosecutor is used, by members of the Security Council, as an excuse to reduce the Council referral of situation to the Court. It is only the Security Council that can empower the Prosecutor to conduct investigations and case preparation more efficiently than the weak mode prescribed by the Statute. It is not sufficient that the Prosecutor is able to act in timely manner through the *proprio motu* power to initiate investigations. The Prosecutor still needs the Security Council to act effectively.

As a concluding remark, I would like to state that the Statute has some weaknesses than can affect the Court's effectiveness, credibility, and independence. As I see it, the threats to the independence and credibility are less imminent than the threats to the effectiveness, that are posed by the Court not having universal jurisdiction. There is a risk that the rejection of universal jurisdiction might lead to that the Court becomes more of a deterrent than a real enforcement mechanism of individual responsibility. This can however be cured by the ratification by as many states as possible. Since the Court will become stronger the more states that ratify the Statute, those who want the Court to be effective should make every effort to ensure that as many states accede as soon as possible. Although the Court may be fragile at birth, it is likely that it will take on greater strengths with the passage of time, and then be able to fulfil its task to replace a culture of impunity with a culture of accountability for the most serious international crimes.

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