

Juridiska Institutionen
Handelshögskolan vid Göteborgs Universitet

JURIS KANDIDAT PROGRAMMET 180p
Tillämpade Studier, 20p
HT 2001/VT 2002

The International Criminal Court: An End to Impunity?

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1. INTRODUCTION

1.1. Background

The horrors of the 20th century are many. Acts of mass violence have taken place in so many countries and on so many occasions it is hard to comprehend. According to some estimates, nearly 170 million civilians have been subjected to genocide, war crimes and crimes against humanity during the past century.¹ The World Wars lead the world community to pledge that “never again” would anything similar occur. But the shocking acts of the Nazis were not isolated incidents, which we have since consigned to history. Hundreds of thousands and in some cases millions of people have been murdered in, among others, Russia, Cambodia, Vietnam, Sierra Leone, Chile, the Philippines, the Congo, Bangladesh, Uganda, Iraq, Indonesia, East Timor, El Salvador, Burundi, Argentina, Somalia, Chad, Yugoslavia and Rwanda in the second half of the past century². But what is possibly even sadder is that we, meaning the world community, have witnessed these massacres passively and stood idle and inactive. The result is that in almost every case in history, the dictator/president/head of state/military leader responsible for carrying out these atrocities has escaped punishment, justice and even censure. The genocide in Rwanda during 1994 later led to the creation of an international criminal tribunal³, which constitute a major breakthrough in international criminal law, but is yet another tragic example of how the world community chose to turn a blind eye to despicable acts. In spite of accurate and reliable information regarding what was about to happen in Rwanda, the UN and its member-states did not interfere to prevent the catastrophe. Not even when the genocide was under way did the world community intervene. In 100 days, members of the ruling Hutu tribe murdered among 800 000 members of the Tutsi tribe in mass executions.⁴

In the summer of 1998, the world community gathered in Rome for a major diplomatic conference sponsored by the United Nations. A statute was negotiated for the creation of what could be one of the century’s most significant institutions: an international criminal court (the

¹ White, Jamison G., *Nowhere to run, Nowhere to hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of State*, 1999 and Scharf, Michael P., *Results of the Rome Conference for an International Criminal Court*, 1998.

² King, Henry T., and Theofrastous, Theodore C., *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 1999, and Penrose, Mary Margaret, *It’s Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 2000.

³ The genocide in Rwanda and the atrocities in the former Yugoslavia led to the UN Security Council’s establishment of two ad hoc international criminal tribunals, the ICTR and the ICTY respectively.

ICC)⁵ with seemingly broad jurisdiction over alleged perpetrators of the world's gravest crimes. At the end of the conference the statute⁶ for this unprecedented permanent administrator of criminal justice was adopted by a large majority of states, 120 voted for the court's establishment, seven voted against and 21 abstained. In spite of overwhelming global support, the world's only superpower voted against the ICC. In opposing the statute's adoption, the USA joined a rather strange group of allies that included China, Iraq, Israel, Libya, Qatar and Yemen.⁷

The USA raises persistent arguments against the ICC and its statute, even though substantive provisions of the convention represent major concessions to US concerns expressed before and during the negotiations. Essentially, the USA is not prepared to accept the jurisdiction of an international criminal court over American citizens. The US opposition is regrettable because the ICC is founded – through the Rome-treaty – on state co-operation and would suffer gravely from a lack of participation. It is vital for the Court's future effectiveness that it is met with global co-operation and commitment. If key states do not support the Court in the future it will face insurmountable problems as it seeks to investigate international crimes and bring the perpetrators to justice. The Statute is not perfect and many states voiced disappointment over this and that inclusion or exclusion, but it would be hard to expect more of an international negotiated institution. Scheffer, who is the US Ambassador at large for war crimes issues and led the US delegation at Rome, writes that “the US delegation was not prepared at any time during the Rome Conference to accept a treaty text that represented a political compromise on fundamental issues of international criminal law and international peace and security”.⁸ The ICC is a global solution and consequently a compromise between a mosaic of different wills. But the aims that drive the creation and design of the ICC are fundamentally important. As we shall see, there are many situations in which an international criminal court would be the only meaningful forum for pursuing justice for the gravest atrocities in the world. The dilemma with an institution like the ICC stems from the conflict between needs of sufficient powers to bring the perpetrators of genocide, war crimes, crimes against humanity, and aggression to justice, and the reluctance of

⁴ Penrose, Mary Margaret, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 2000.

⁵ The International Criminal Court will in this essay be referred to as the ICC or the Court.

⁶ The Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (1998). It will in this essay be referred to as the Rome Statute or the Statute.

⁷ Scharf, *Results of the Rome Conference for an International Criminal Court*.

⁸ Scheffer, David J., *The United States and the International Criminal Court*, 1999, p. 17.

nation-states to give up the necessary autonomy. On the point of US opposition one author writes: “Any state actor who prefers the somewhat anarchical system of effectively unenforceable international law to a structured, independent tribunal with enforcement power would likely see the court as a direct threat to its national sovereignty”.⁹

1.2. Purpose

This essay will show that the ICC, as founded in the Rome Statute, is in a critical position. The authors of the treaty did their best to establish a court with sufficient powers and managed to avoid a requirement of formal state consent to the court’s jurisdiction on every occasion. Nevertheless the ICC is overly dependent on state co-operation for matters like arrests and gathering of evidence. For states to be encouraged to co-operate, the institutions of international law need legitimacy in the eyes of their subjects – the states. One component of legitimacy is the effectiveness of the institution, which in turn depends upon state co-operation. This creates a precarious “feedback loop”: effectiveness encourages legitimacy, which encourages state co-operation, which increases effectiveness and so on. It is important that the ICC is as effective as possible from the beginning, otherwise it will not acquire legitimacy in the eyes of the international community and states will not be willing to fully support and co-operate with the institution. There would then be a real risk that it would wind away into semi-irrelevance. The position of the USA as the world’s only superpower is of crucial importance for the future of the ICC¹⁰.

1.3. Disposition

This study will show that in order for the ICC to become a practical success, states need to consider the Court as legitimate. Overall the essay will analyse the probability of the ICC to become an effective adjudicator of international criminal law and gain the amount of global support it needs to perform its duties in a meaningful fashion. The paper begins with addressing international law in general and its historical evolution. This will be followed by a consideration of the idea to create an international criminal court, looking at its predecessors and their legacy. The essay will then present several important principles of international criminal law, state

⁹ King and Theofrastous, *‘From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy’*.

¹⁰ Compare with the League of Nations. The fact that the USA never joined or supported the League of Nations definitely contributed to the institution’s failure and demise.

practice as of today and the problem with enforcement on the interstate level. Thereafter the nature of institutions' legitimacy will be examined, before the description turns to the overall organisation and operating principles of the Court. The focus will be on the provisions regulating jurisdiction and how it is triggered as well as the expected UN Security Council (SC) impact. In connection with discussing the different parts of the Statute the note will evaluate the significance of US objections and the consequences of US non-participation in the Court. Finally this note will be concluded by an examination of the possibility of international crimes leading to prosecutions before the Court, using the NATO bombings in Yugoslavia as a case study, followed by an analysis and concluding remarks.

1.4. The Current Situation

The ICC's statute is currently open for ratification. Before ratification, each state has to ensure that its legislation complies with the Rome Treaty. Only recently Great Britain became the 42nd country in the world and the 13th European Union country to ratify the treaty establishing the International Criminal Court¹¹. The treaty that will become operative when ratified by 60 states, was entered into by Sweden on June 28, 2001.¹² Amongst Western nations the USA is almost the only one refusing to ratify the treaty. Some 130 countries have signed the treaty, including the USA that signed through former President Bill Clinton on New Year's Eve 2000 -the last day of eligibility- to assure US involvement in setting up the Court; for example assisting in the remaining drafting and nominating judges. Israel and Iran signed the same day. Many welcomed the British ratification and hope that it will put additional pressure on the United States to bring its policy into line with that of its European allies.¹³ The European Union has strongly supported the establishment of the ICC. The remaining 18 ratifications are expected by mid-2002 which is earlier than originally anticipated. After the British decision, Ireland, Greece and Portugal are the only EU countries left to ratify the treaty.¹⁴

¹¹ As of October 4, 2001.

¹² Lagrådsremissen '*Sveriges samarbete med internationella brottmålsdomstolen*', Stockholm October 4 2001, p. 22-23. (See prop. 2000/01:122, bet. 2000/01:JuU30 and 2000/01:KU13y, rskr. 2000/01:284). In Sweden's case, this has evolved into the processing of one new law and changes in four already existing ones, that ensure that Swedish legislation will be compatible with the ICC Statute.

¹³ Wergeni, Cecilia, '*Får vi en ny internationell brottmålsdomstol?*', 2001; '*Britain Ratifies Treaty Creating Criminal Court –U.S. Isolated in Opposition to World Body*', International Herald Tribune, Frankfurt October 5 2001, and Aftonbladet (kultur), October 27 2001, p. 5.

2. LAW IN THE INTERSTATE SYSTEM

2.1. The Evolution of International Law and International Criminal Law

International Law works in a context of a wide range of independent nations and their domestic law systems, constituting the law of the international system of nation states. Like all legal systems in the world, it reflects the politics and values of the socio-political system it attempts to regulate. This means that International Law has changed through the decades in response to and because of the different prevailing political, ideological and economic powers. It has lived through two world wars and their aftermath', recurrent world wide economic crisis and the ideological division of the world by the two nuclear-armed superpowers. When the international system dramatically changed with the end of the cold war in the late 1980s, due to the Western "victory" over the Communist world and collapse of the Soviet Union, threats of nuclear wars and the ideological hostility withered. The transformed world-order, dominated by new political forces, has brought change in International Law and its values. We are no longer living in a bipolar system but in a system of coexisting independent states, generally triggered as much by economic influences as by political, which strongly encourages over-border collaboration.¹⁵

Some thinkers of the positivist school have opposed International law on the grounds that it cannot be law since it lacks a higher source of legitimate law-making power and enforcement. A sub-argument to this looks at the key elements of domestic rule of law systems and searches for the same elements in international law. This argument says that "international law is not law because the international system has no government and no institutions of government on which law depends, no legislature to make law, no executive to enforce it, no judiciary to resolve disputes and develop the law"¹⁶ and we might add, no constitution to police it. It is true that the international system lacks those institutions, but that there cannot be law without them is not true. Law is still made, through unanimous agreements between the nation states (instead through majority votes by a legislative body representing the states¹⁷) and functions connected with

¹⁴ Ibid.

¹⁵ Henkin, Louis, *International Law: Politics and Values*, 1995, p. 1.

¹⁶ Ibid p. 3-4.

¹⁷ States have consented to law making by a representative body in some matters, for example the Security Council (Charter of the United Nations (1945), chapters. V-VII).

governance under a legal system are taking place; there is neither executive nor courts but the law is *generally* enforced and followed.¹⁸

International Criminal Law as a concept has existed between nations-states for centuries. Its function is to regulate and prevent criminal international violations, thereby securing and maintaining international legal order and peace.¹⁹ Historically, for activities to be considered international crimes they had to violate domestic regulations. Malekian writes: “[i]t may be possible to conclude that the basis of international criminal law is the evolution and enforcement of the concept of domestic criminal law. Criminals were extradited to a large extent in order that domestic criminal law be effectively implemented.” This co-operation resulted in, e.g., the conclusion of numerous bilateral and multilateral treaties for the extradition of criminals.²⁰

International humanitarian law took its modern form after World War II in order to create a deterrent to the repeat of the horrors that took place in the trenches and concentration camps. Important conventions were agreed on including the European Convention on Human Rights²¹, the Genocide Convention²², the Universal Declaration of Human Rights²³ and the four Geneva Conventions and Additional Protocols²⁴ (that protect the civilians and victims of war). By including criminal provisions and obligations for nations these also gave strong notions of a development in international criminal law.²⁵

In spite of the existence of these conventions, and not to mention the globalisation of the world which has lead nations to increase co-operation in combating all kinds of matters, including money laundering, drug trafficking, terrorism, people smuggling, traffic in nuclear and conventional weapons and materials, not to mention tax evasion, individual countries have very

¹⁸ Henkin, *International Law: Politics and Values*, p. 3-4.

¹⁹ Malekian, Farhad, *International Criminal Law –The Legal and Critical Analysis of International Crimes*, 1991, p. 1 and 9, and Malekian, Farhad, *The Monopolization of International Criminal Law in the United Nations*, 1995, p. 26.

²⁰ Ibid Malekian, 1991, p. 2.

²¹ The European Convention for the protection of Human Rights and Fundamental Freedoms (1950).

²² The Convention on the Prevention and Punishment of the Crime of Genocide (1948) (The Genocide Convention).

²³ The Universal Declaration of Human Rights (1948); GA Resolution 217A (III)

²⁴ The four Geneva Conventions of 1949 and Additional Protocol I and II of 1977. The Geneva Conventions as drafted in 1949 evolved from 19th century protocols (1864).

²⁵ Davis, Patricia H., *The Politics of Prosecuting Rape as a War Crime*, 2000, and Supernor, Major Christopher M., *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 2001.

rarely acted on their international obligations to assist each other in punishing grave crimes against humanity.²⁶ A traditional limitation of international law is its lack of a criminal jurisdiction and the institutions to consistently enforce it. There is a vastly bigger chance in this world of getting prosecuted and punished for murdering one person than for murdering a couple of hundred thousand.

The Cold War era led the world community into a standstill and produced a climate that froze foreign interference in domestic affairs. Sovereignty became the crowning and ultimate principle of international law and states were very reluctant to become involved in neighbouring countries' domestic affairs. The climate did not foster international criminal law, on the contrary, there was an absence of community desire to end impunity. Over the last decade both international criminal and humanitarian law have developed substantially compared to earlier years, due to, it seems, growing support from the international community to put an end to the worst international crimes by effective enforcement of the laws preventing them. The depth of this commitment is as yet unknown. The development of international law is engaged in a constant struggle with state sovereignty. Generally (and historically), criminal prosecution has been regarded as a domestic consideration. States may seem willing to create an international criminal court, but are they willing to place the necessary restrictions on their sovereignty in order for it to be independent and effective?

2.2. Law vs. Politics

Even though lawyers sometimes have a tendency to separate them, one must realise that it is very hazardous to distinguish law from politics. Our legislatures are political actors creating law under political influences and for political ends. This is not to depreciate the role of law or the awareness of the fact that law-making is also subject to law, but to get an understanding of law – and of International Law in particular – it is important to keep the political influences and limitations on law firmly in mind.²⁷

²⁶ White, *'Nowhere to run, Nowhere to hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of State'*.

²⁷ Henkin, *'International Law: Politics and Values'*, p. 8.

Since international law and the creation of it is influenced by the political forces in the world, it is obvious that dominant states will have a huge impact on the international legal system (as they have on international politics). One can often explain sources of international law by studying the political environment and the system of states that it emerged from. The environment for law-making was hampered for a long time as a direct consequence of the cold war's bipolar political system but since then the prospects for interstate unanimity and regulation have widely improved. Also state compliance with existing international law (as well as the general health of international order) is determined by the international system of states and political forces and thus changes from time to time.

This is indeed significant for the evolution of the International Criminal Court, looking at the realities in which it is slowly taking form. Even if it is easy to support the establishment of an international criminal court for prosecutions of grave international crimes in theory, the political reality is another and the ICC's practical success is far from assured.

3. INTERNATIONAL COURTS

3.1. The Predecessors and Their Legacy

There is no permanent international court except for the International Court of Justice, to which jurisdiction states consent *ad hoc* or have consented to in advance. The International Court of Justice resolves disputes between states as an arbitrate body but has no criminal or individual judicial determination.²⁸ Up until the present the international community has been very reluctant to enforce international criminal law. It has only been done a couple of times in history, without doubt due to the very specific circumstances and the political climate at the time. The idea of establishing a permanent international criminal court is not new though. Attempts in that direction were taken as early as the end of World War I²⁹, but the international community never reached agreement on the matter.

The ICC's predecessors are primarily the Nuremberg and the Tokyo Tribunals created by the victorious Allies after World War II. These tribunals have been accused of being unfair and

²⁸ The Statute of the International Court of Justice (1945), Articles 34 and 36.

merely institutions for “victor’s justice”, but nevertheless they did lay the groundwork for modern international criminal law. They were the first tribunals where violators of international law were held responsible for their crimes. They also recognised individual accountability and rejected historically used defences based on state sovereignty.³⁰ These principles of international law recognised in the Nuremberg Charter and Judgements were later affirmed in a resolution by the UN General Assembly.³¹

The Nuremberg and Tokyo trials were founded on the wish that atrocities similar to those that had taken place during the Second World War would “never again” recur. In 1948 the UN General Assembly adopted a resolution reciting that “[i]n the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law.”³² Initiatives to create such an institution were taken as early as 1937 by the League of Nations that formulated a convention for the establishment of an international criminal court, but the cold war led to deadlock in the international community and the matter fell into oblivion.³³ For fifty years the global community shut its eyes to international lawlessness and let the worst perpetrators go free.³⁴ Sadly we realise that the cruelties during World War II were not isolated incidents. Genocide has since Nuremberg taken place in Uganda, in Cambodia, in Rwanda, in Somalia, in Bosnia, and the list could go on.

Not until the world were shocked by the ethnic cleansing in the former Yugoslavia and the genocide in Rwanda could the UN, no longer paralysed by the cold war, take action. In response the Security Council, basing its decision on chapter VII of the UN Charter, commissioned two *ad hoc* international criminal tribunals (the ICTY for the former Yugoslavia and the ICTR for Rwanda) to investigate alleged violations and to bring the perpetrators to justice.³⁵ These were the

²⁹ It is expressed in the Treaty of Versailles Articles 227-230.

³⁰ Ward, Alex, *Breaking the Sovereignty Barrier: The United States and the International Criminal Court*, 2001.

³¹ King and Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*.

³² United Nations Doc. A/760, Dec. 5, 1948.

³³ Wallace, Rebecca M.M., *International Law*, 1997, p. 218-219, and Wergeni, *Får vi en ny internationell brottmålsdomstol?*, p. 1.

³⁴ Matas, David, *International Conference: The Universal Declaration of Human Rights: Fifty Years Later*, 2000, p. 4.

³⁵ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (the ICTY) was established by UN Security Council Resolution 827 on May 23, 1993. The International Tribunal for the Prosecutions of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory Rwanda and

first international ‘courts’ created after the Nuremberg and Tokyo tribunals and the first judicial organs ever to be established by the SC.³⁶ They were granted limited geographical (over Yugoslavia and Rwanda respectively) and subject jurisdiction^{37 38}, but were made superior to the national courts of Yugoslavia and Rwanda.³⁹ Without doubt, these courts have significantly contributed to the development of international criminal law, but they have not been entirely successful. Their biggest problems have been the lack of formal means of enforcement to seize indicted criminals. The departing president of the ICTY criticised the UN SC for “doing too little to help bring indicted people to justice”.⁴⁰

Of course the role of the SC in creating ad hoc tribunals is controversial considering the vetopowers of the victorious Allies from the Second World War. Countries that do not have permanent seats in the SC and are not allies with those who have are wary of the SC’s ability to protect themselves from similar adjudication and investigation. The prospect of ever establishing an ICT covering the Chechnya or Iraq conflicts for example is minimal. This creates consequences for other countries’ perception of the legitimacy of the ICTY and ICTR. In this case especially the perceptions of the Former Yugoslavia and Rwanda.

Except for the institutions mentioned, the European Court of Human Rights created by the Council of Europe, has compulsory jurisdiction over state parties that violate the European Convention of Human Rights. But it has no criminal jurisdiction; its judgement merely indicates that a violation has been committed and does not include remedy or enforcement of a certain decision, though it may award compensation and costs. Additionally it works only in Europe where in comparison with other parts of the world, the support for criminal law enforcement and

Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between January 1, 1994 and December 31, 1994, (the ICTR), was established by UN Security Council Resolution 955 on November 8, 1994. See Lagrãdsremissen, p. 23-24.

³⁶ Danner, Allison Marston, ‘*Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*’, 2001.

³⁷ The subject jurisdiction covered violations against the Geneva Conventions and Additional Protocols, crimes against humanity and genocide, and in Yugoslavia also violations of the law or customs of war.

³⁸ Supenor, ‘*International Bounty Hunters for War Criminals: Privatizing the Enforcement Justice*’.

³⁹ Ward, ‘*Breaking the Sovereign Barrier: the United States and the International Criminal Court*’.

⁴⁰ Supenor, ‘*International Bounty Hunters for War Criminals: Privatizing the Enforcement Justice*’.

basic human rights has been strong.⁴¹ A similar Inter-American human rights court is active and has had modest success.⁴²

3.2. The Birth of an International Criminal Court

After the cold war tensions had dissolved the world community showed a renewed interest in creating an international criminal court. On December 4, 1989, the United Nations General Assembly adopted a resolution that instructed the International Law Commission (the ILC) to study the feasibility of the creation of a permanent ICC.⁴³ Four years later, and obviously pleased with the ILC's report, the General Assembly called on the Commission to commence the process of drafting a statute for the court. This statute was presented in 1994. The following year a preparatory committee was established to further review the substantive issues regarding the creation of a court based on the ILC report and statute. The aim was to prepare a convention for the ICC that had the prospects of being widely accepted globally. The committee worked on a draft for three years that was presented in 1998 and delivered the same year to the Conference of Plenipotentiaries, which started the negotiations in Rome on June 15 (and ended with the signing of the ICC Treaty July 17).⁴⁴

Of course there are also other reasons explaining why we are now keen to create a world court even though those ideas have failed so many times in history. We are witnessing a rising confidence in domestic courts that is mirrored also in the interstate system. Henkin writes: "We live in the age of judges: spreading commitment to "constitutionalism" has included commitment to the rule of law and an independent judiciary is increasingly seen as essential to the rule of law; impartial adjudication is increasingly seen as at the heart of legal remedy."⁴⁵

⁴¹ Charney, Jonathan I., 'Progress in International Criminal Law?', 1999, and Morris, Madeline, *The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-party States*, 2000.

⁴² Ibid Charney.

⁴³ It was Trinidad & Tobago's desire to see drug traffickers effectively tried that motivated their statement to the General Assembly in 1989.

⁴⁴ King and Theofrastous, 'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy', and Barrett, Matthew A., 'Ratify or Reject: Examining the United States' Opposition to the International Criminal Court', 1999. See also Lagradsremissen, p. 23.

4. IMPORTANT PRINCIPLES OF INTERNATIONAL CRIMINAL LAW

4.1. State Autonomy and How it Affects the Two Components of International Law

One of the principles of International Law: “the principle of unanimity”, means that a state is only bound by law that it agrees to in advance. State consent makes sure that state autonomy is protected. International law consists of two components, custom and treaty.⁴⁶ Treaty law includes all inter-state binding agreements, like the ICC-treaty, and is *made* in comparison to customary law that *results* from general and consistent state practice out of *opinio juris*, which means that the states act out of a sense of legal obligation.⁴⁷ The principle of unanimity means that no state can be bound by a treaty it has not consented to or can be forced to join a treaty but also that no state can veto legislation through multilateral treaty between other states.⁴⁸

But even if no state can hinder others from joining a treaty this does not mean that the absence of significant states will not cause problems. For a multilateral treaty to become general law, it has to gain world-wide support and co-operation, which means that abstention of a particular state like the USA easily can undermine an otherwise widely recognised treaty, by refusing to act in accordance with it (in the case of the ICC Treaty withholding information, refuse to extradite Americans, etc). Accordingly, as long as a treaty is met with determined resistance from important states (important meaning that they are in a position where they have control over the subject-matter of the treaty), law cannot be made. Any attempt to, will likely result in ineffective treaties that have little chance of ever reaching the provisions necessary for general customary international law. Universal rules need to be based on the principle of reciprocity why US non-approval would lead to an unaccepted asymmetry.

4.2. Jus Cogens

International law recognises the principle of *jus cogens*, which means that there is a couple of norms that have the character of peremptory form or supreme law and thus cannot be modified or derogated from by treaty or custom. The Vienna Convention on the Law of Treaties refers to *jus cogens* but it is not clear which norms fall within the concept. Article 2 (4) of the United Nations

⁴⁵ Henkin, ‘*International Law: Politics and Values*’, p. 54-55

⁴⁶ Article 38 of the Statute of the International Court of Justice is generally said to list the sources of international law, though it does not say so explicitly. It directs how the court is to decide disputes that it has to settle.

⁴⁷ Henkin, ‘*International Law: Politics and Values*’, p. 27-31, and Wallace, ‘*International Law*’, p. 9.

⁴⁸ Henkin, *ibid* p. 40-41.

Charter has been accepted as *jus cogens* and the same goes for rules prohibiting genocide, slave trade and slavery, apartheid, use of force and other gross violations of human rights⁴⁹; basically the crimes within the ICC jurisdiction are regarded as *jus cogens*.

4.3. Individuals as Subjects of International Criminal Law

Until after World War I states were the only ones that had rights and duties due to international criminal law, but at the end of World War II this changed. The Nuremberg Tribunal exercised jurisdiction over individuals, pronouncing that the fact that “international law imposes duties and liabilities upon individuals as well as states has long been recognised. [...] Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.⁵⁰ Since Nuremberg the principle of individual criminal responsibility has been expressed and affirmed in the 1948 Genocide Convention, the 1949 Geneva Conventions governing the laws of war and its 1977 protocols, and the 1973 Convention on Apartheid⁵¹. The conventions went a step further towards criminalising such activity by obliging ratifying states to implement the provisions in national law. Notwithstanding the fact that individuals can never have the capacity to conclude treaties, only states, individuals are now seen as subjects of international criminal law.⁵²

4.4. Jurisdiction Based on Territory and Nationality

Historically, the jurisdiction of criminal violations is based on the principle of territoriality, which originates from the equality and sovereignty of states within the international system of law. Malekian express that “every state owns and exercises exclusive territorial jurisdiction upon its subjects and aliens”.⁵³ In comparison, the principle of nationality is based upon the conception that the nationals of a state are an important part of state sovereignty. Thus the country of nationality can exercise jurisdiction and has the right to punish a violator of international crimes. When the two principles coincide, the most common example would be when a national commits a crime abroad and then returns to his home state, the question of jurisdiction and which principle should prevail, may arise. Most European states’ law, as well as most treaties, acknowledge the

⁴⁹ Henkin, ‘*International Law: Politics and Values*’, p. 38-39 and Wallace, ‘*International Law*’, p. 238-239

⁵⁰ Malekian, ‘*International Criminal Law –The Legal and Critical Analysis of International Crimes*’, p. 43.

⁵¹ The International Convention on the Suppression and Punishment of the Crime of *Apartheid* (1973).

⁵² Malekian, ‘*International Criminal Law –The Legal and Critical Analysis of International Crimes*’, p. 40.

⁵³ *Ibid* p. 11.

principle of nationality to be complementary to the principle of territoriality. Accordingly, the fact that the state of nationality claims jurisdiction over its nationals does not preclude the right of the state in which the offence took place to exercise jurisdiction based on the territorial principle.⁵⁴

4.5. Universal Jurisdiction

International treaties governing international crimes have been given limited jurisdictions based on territorial and national jurisdiction, but some offences have been made “crimes of universal concern”. Henkin writes: “as to which the desire to assure punishment or deterrence was deemed to outweigh the sensitivities of the territorial state or the concerns of the state of nationality of the person charged; hence the move to render certain offences – genocide, war-crimes, and later, apartheid – to be violations of customary law, of obligations *erga omnes*, and subject to universal jurisdiction”.⁵⁵ *Erga omnes* obligations are of such weight and importance for the world community that they are the concern of all states.⁵⁶

The term ‘Universal’ means that international criminal law imposes compulsory obligations upon the nation-states that prohibit them from certain activities and that have to be followed no matter what.⁵⁷ The principle of ‘Universality’ entails a right in every nation to punish certain acts that are so grave that they are considered crimes against the whole international community, notwithstanding that the crime occurred outside the prosecuting nation’s territory and neither the perpetrator nor victim were nationals of it. The crimes that fall under this rule are historically piracy and slave trade, but also war crimes, genocide and other crimes against humanity have been widely accepted as having universal jurisdiction. The principle of ‘Universality’ thus means that every state can seize and prosecute perpetrators of these crimes under its domestic criminal laws.⁵⁸

⁵⁴ Malekian, ‘*International Criminal Law –The Legal and Critical Analysis of International Crimes*’, p. 13-14, and Wallace, ‘*International Law*’, p. 112-115.

⁵⁵ Henkin, ‘*International Law: Politics and Values*’, p. 246-247.

⁵⁶ Wallace, ‘*International Law*’, p. 178.

⁵⁷ Malekian, ‘*International Criminal Law –The Legal and Critical Analysis of International Crimes*’, p. 29.

⁵⁸ *Ibid* p. 18-19, and Wallace, ‘*International Law*’, p. 115-118. See also the Geneva Conventions and Genocide Convention.

4.6. Extradition and Immunity

If a country is seeking to exercise jurisdiction over an alleged perpetrator present in a territory of another state, it can request that he should be handed over through extradition. Even though it has sometimes been said so, it is now generally agreed that no legal obligation exists in customary law to extradite a person requested by another state. Nevertheless states have commonly agreed to extradite on a reciprocal basis.⁵⁹ Extradition is regulated by bipartite treaties that impose mutual obligations on both states. Without the treaty, there is no legal duty to extradite.⁶⁰ Extradition is a sensitive matter, since the criminal normally has a connection or even a political relationship with the country on which territory he “hides”. Examples are the Shah of Iran and Ferdinand Marcos from the Philippines, who the USA refused to extradite on request, even though both of them had been condemned for alleged crimes against their own populations in violations of the 1948 Genocide Convention.⁶¹

Another example is Pinochet. In October 1998, Spain surprised the international community by requesting the arrest and extradition of the former Chilean head of state, Pinochet, from Britain where he was recovering from a back surgery. Spain sought extradition based on universal jurisdiction for prosecution of alleged human rights violations that had taken place in Chile under Pinochet’s infliction, but he resisted by claiming diplomatic immunity and immunity as a former head of state. These claims were denied by the House of Lords that wrote: “International law has made plain that certain types of conduct (...) are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law”⁶².⁶³ Of course international law cannot grant immunity for perpetrators of crimes the same international law condemns as universally wrong and prosecutable.

Pinochet was later determined mentally unfit to stand trial, but by denying him immunity, the House of Lords reduced the scope for immunity to undermine the objectives of international

⁵⁹ Henkin, *International Law: Politics and Values*, p. 250.

⁶⁰ Wallace, *International Law*, p. 119.

⁶¹ Malekian, *The Monopolization of International Criminal Law in the United Nations*, p. 27-28 and p. 71.

⁶² Charney, *Progress in International Criminal Law?*

⁶³ White, *Nowhere to run, Nowhere to hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of States*.

criminal law. The House of Lord's decision can be understood as saying that Pinochet would have been extradited if it was not for his bad health and age.⁶⁴

5. STATE PRACTICE AS OF TODAY

Despite a large number of international criminal conventions, the global adherence has been low. State practice for prosecution of international crimes against humanity is practically non-existent. As presented, states can prosecute individuals for breaches of international humanitarian law through their domestic criminal courts according to the jurisdiction they have been granted through treaty obligations, for example the 1949 Geneva Conventions, the Hague Conventions⁶⁵ and the Genocide Convention (1948). (These treaties today even bind non-party states since they have matured into customary international law.)⁶⁶

5.1. The Geneva Conventions and Protocols

The Geneva Conventions and Protocols, that protect the civilians and victims of war against war crimes, require states to:

- (i) enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, (...) grave breaches [of the Convention]
- (ii) search for persons alleged to have committed, or to have ordered to be committed such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also (...) hand such persons over for trial to another (...) contracting party concerned, provided [it] has made out a *prima facie* case⁶⁷

Even though the treaty clearly outline the responsibility for states to search for, detain and try domestically or extradite those accused of war crimes, impunity has so far prevailed and it is certainly an ominous precedent for the ICC if it ever begins operations. The Geneva Conventions had never been enacted until the creation of the ICTY and the ICTR.⁶⁸

⁶⁴ Supenor, 'International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice'.

⁶⁵ The Hague Convention Respecting the Laws and Customs of War on Land, Oct 18 1907.

⁶⁶ Ibid.

⁶⁷ For example, the Geneva Convention Relative to the Treatment of Prisoners of War, 1949, at art. 129, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, at art. 146.

⁶⁸ Charney, 'Progress in International Criminal Law?'

5.2. The Genocide Convention

Similarly to the Geneva Conventions, the 1948 Genocide Convention obligates the treaty-parties to prevent and punish genocide, even though it does not explicitly deal with questions of search and arrest. The Convention declares that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals can be tried and for which, as under the Geneva Conventions, states have a duty to prosecute. Additionally, the Genocide Convention specifically calls for the creation of an international criminal court.⁶⁹

Even though the Genocide Convention has been in force since 1948, a violator wasn't convicted for the crime of genocide until fifty years later, notwithstanding that millions of people have been killed in genocide in the meantime and despite overwhelming evidence against for example the Nazis during the Nuremberg Tribunals. The first verdict was pronounced against Jean-Paul Akayesu by the ICTR in 1998.⁷⁰ Still, no sitting head of state has ever been punished or even criminally prosecuted by another state for genocide, torture or other crimes against humanity.⁷¹ The problem has not been that states haven't been able to prosecute and punish individuals during this time, but that they haven't been forced to. State sovereignty has been emphasised over individual criminal responsibility. Sovereignty implies a nationalistic attitude, built on the idea that one must deal only with situations which may affect one's own territory or one's own nationals. Malekian writes that the "overriding influence of power politics on the system of international legal order can be regarded as one of the essential reasons for the non-applicability of the system of international criminal law to certain states".⁷²

Examining the conventions above it is clear that both a right and an obligation to exercise universal jurisdiction over individuals have existed in international law for decades. The crimes that will be prosecuted according to the Rome Statute are largely reflected in already existing international law and states have already an obligation to bring perpetrators to justice. But the

⁶⁹ The Genocide Convention, Articles I, IV-VI.

⁷⁰ Charney, *'Progress in International Criminal Law?'*.

⁷¹ Penrose, Mary Margaret, *'It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law'*.

⁷² Malekian, *'The Monopolization of International Criminal Law in the United Nations'*, p. 50.

obligation has been dependent on states' willingness to comply and there have been no supranational enforcement mechanisms.

6. WHY DO WE NEED AN INTERNATIONAL CRIMINAL COURT?

6.1. The Importance of Enforcement

The principle of state-autonomy in International law means that states have to give their consent to submit to the authority of treaty and customary law. They express a voluntary will to comply with the law and consequently they have to observe it from that day on. The question that arises is what happens when they don't? International law as we know it today lacks enforcement-measures like an international police force and courts. This basically means that even if a state has consented to be bound by the law, nothing but political pressure can influence compliance. There are no legal remedies. So far states have been very reluctant to submit themselves or their nationals to any sort of monitoring or enforcement of its observance by international institutions. Since no international courts with power to inflict remedies for violations of international criminal law have existed, the punishment of violators have been left to domestic criminal courts and their regulations. Consequently, prosecution and punishment of international crimes has varied from one domestic system to another.

To have an effective *system* of law there should be an effective and independent *institution* that ensures its compliance. International criminal law has several weaknesses that handicap its enforceability, though it is arguable that it is not weaknesses but rather the inhibit character of international law. Since the enforcement so far takes place at the domestic level, one can also say that it is there that the principal weaknesses of international criminal law appear. There has been a high degree of political influence in the system of international criminal law by powerful states. It is perfectly clear that without an international criminal court to enforce observance of international criminal law, the system stands and falls on state co-operation and good will. So far states have been entrusted to act in accordance with treaty obligations without any authoritative control to ensure compliance. This has left states free to neglect and disregard international liabilities when and if they deem it necessary. It also provides the opportunity for states to misunderstand or misinterpret their international obligations as well as refusing to recognise its own actions as criminal. The problem has been most noticeable when the alleged violator has

been a national or even the head of state or senior official in the state where he or she can be prosecuted. The feasibility of states to recognise activities of their own individuals, not to mention authorised individuals, to violate international criminal law has been little.⁷³ Of course there is an unwillingness to prosecute one's own personnel. Domestic courts cannot be trusted to impartially prosecute their own nationals for crimes they have committed abroad. The most evident example is the prosecutions after the First World War before the Supreme Court of Germany at Leipzig. The Allies sent a list of 896 suspected German war criminals to Germany, which led to no more than twelve prosecutions and six convictions with initial sentences from six months to four years in prison.⁷⁴

Other states have generally abstained from meddling when violations have taken place on foreign territory, even if they have been obligated or at least given a right through treaties to claim universal jurisdiction to prosecute. This reluctance stems from the principle of sovereignty. Since the crimes in question are often highly political, exercising universal jurisdiction would not only mean prosecuting criminals but probably exposing a whole country and its governance to an overview. This would of course complicate important political and economic relations, not to mention the fact that the country applying universal jurisdiction must be prepared to be subject to the same exposure itself. Authority to exercise universal jurisdiction has been uncertain for centuries, because of the global reluctance to use it in practice. The practical implementation of international criminal law is often behind the theoretical prerequisites. Lately, the concept of universal jurisdiction has received more attention and its meaning has become clearer.⁷⁵

Without mandatory enforcement, one can venture to say that the influence of politically or militarily strong states on criminal conventions and observance, is fundamental. When a state, specifically a powerful state, is reluctant to fulfil its international criminal obligations, what is there to do? The creation of a permanent international criminal court is essential to the observance of international criminal law. We need a legal system of enforceability to ensure (equal) compliance with international criminal law, instead of the existing political pressure.

⁷³ Charney, *'Progress in International Criminal Law?'*.

⁷⁴ Penrose, *'Lest We Fail: The Importance of Enforcement in International Criminal Law'*.

⁷⁵ The U.S. extradition of John Demjanjuk to Israel was based on universal jurisdiction, see Charney, *'Progress in International Criminal Law?'*, and Spain requested extradition of Pinochet from Great Britain based on universal jurisdiction, see Supernor, *'International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice'*.

However, the institution will only be effective if states respect its jurisdiction. The fact is that the system of international criminal law does not function in the absence of support from politically strong states.

6.2. The Need for Uniformity and Consistency

The ICC would bring perpetrators of international core crimes to justice, who would otherwise not be prosecuted by unwilling or in other ways politically deadlocked national courts. The Court would complement national criminal judicial systems when they fail.⁷⁶ It would bring international crimes and their perpetrators out in the open and bring retribution, justice and protection to their victims.

Without doubt, a permanent international court would make a more cost-effective solution, than a continuing creation of *ad hoc* tribunals for future prosecutions of international crimes, not least considering facilities, staff, administration and logistics.⁷⁷ In comparison the ICC as a permanent institution has a much bigger chance of achieving a level of expertise, efficiency, authority and respect.⁷⁸ It would also ensure legal security through uniformity and consistency in conviction and sentences⁷⁹ as well as develop an important case law of jurisprudence and bring international law up to date. Of course a permanent institution would achieve a stronger deterrent effect than the possibility of a costly establishment of an *ad hoc* tribunal.⁸⁰ Certainty and predictability are important factors for a strong deterrent-effect. The mere creation of an ICC assures individuals they will be held accountable for their international violations and compared to an *ad hoc* tribunal, it would be directly available for investigations and prosecutions after a crime has been alleged.

⁷⁶ The Rome Statute of the International Criminal Court, Article 1.

⁷⁷ Ward, *'Breaking the Sovereignty Barrier: The United States and the International Criminal Court'*.

⁷⁸ King and Theofrastous, *'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy'*.

⁷⁹ In terms of sentencing, the ICTY and ICTR have judged very differently, which is not good. Over all, the sentences proclaimed at the ICTY have been much lower than the ones rendered by the ICTR for the same type of crimes. See Penrose, *'Lest We Fail: The Importance of Enforcement in International Criminal Law'*.

⁸⁰ Scheffer, *The United States and the International Criminal Court*, p.13.

7. WHY A LEGITIMATE COURT IS VITAL

7.1. A Feedback Loop

Institutions of international law need legitimacy to encourage states to co-operate. One component of legitimacy is the effectiveness of the institution. The connection can be illustrated with a “feedback loop”: effectiveness encourages legitimacy, which by encouraging state co-operation increases effectiveness. The question is how to achieve the necessary state support. As has been envisaged on numerous occasions in history the problem of enforcement mechanisms in international law will likely make itself reminded also in this case. International institutions lack the level of enforcement that national institutions are equipped with. As shown, there is no international police force and the UN has only weak, politically vulnerable sanctioning ability⁸¹, characterised by the veto-power of the permanent SC members.⁸² The key determinant factor of the ICC’s success in the absence of centralised enforcement of norms, will be the voluntary will of states to comply with ICC requests and to act in furtherance of the aims of the ICC.⁸³ The strength of international censure, embarrassment on the part of the non-complying states as well as pressure and criticism from non-governmental institutions will also play a role. So even if the ICC is intended to work independently above its creators the nation-states, it will be bound by their will to comply. This willingness will stem from a sense of obligation towards the ICC that will derive from the legitimacy of the institution.

7.2. Legitimacy

The legitimacy of an international institution is built upon the perception of it by its subjects and creators, in this case the nation-states. The perception and thus the institution’s legitimacy is dependent on two elements:

1. belief in and commitment to the normative aims of the institution, and
2. the effectiveness of the institution in achieving these aims.⁸⁴

⁸¹ The Charter of the United Nations, Chapter VII, Article 41.

⁸² Ibid, Chapter V.

⁸³ Scharf, *Results of the Rome Conference for an International Criminal Court*.

⁸⁴ Thomas Franck writes “obligation is owed not only to the rules of the game, but also to the game itself.” Franck, Thomas M., *Legitimacy in the International System*, 1988, p. 753 and Franck, Thomas M., *The Power of Legitimacy of Nations*, 1990, p. 24.

Green expresses it in this phrase: “Legitimacy commands obligation. Obligation is derived from an idea that the sovereign [or institution] embodies the general will of the community and upholds a system of rights that is recognized by its members.”⁸⁵ Before considering whether the international community is generally committed to the aims of the ICC, these should be stated.

7.2.1. *The Objectives of the Court*

In brief, the International Criminal Court will exercise jurisdiction on a permanent basis complementary to national criminal jurisdiction over individuals alleged to be perpetrators of the most serious crimes of international concern, specifically defined in the Rome Statute. The ICC is to undertake unbiased investigation and if necessary bring the accused to trial by an impartial panel according to impartial law and due process in accordance with international legal norms.⁸⁶

7.2.2. *Belief in and Commitment to the Institution’s Normative Aims*

The Rome Treaty was negotiated in Rome during five weeks and in the presence of 160 states, 33 intergovernmental organisations and 236 non-governmental organisations.⁸⁷ The negotiations were characterised by a mosaic of positions and wills that divided countries into different groupings, quite dissimilar to the normal political and regional ones. Of course the result from Rome is what can be expected from a conference where the world community tries to create an international institution: a global compromise. It is not my purpose to second-guess the states’ commitment in the ICC’s normative aims, but 120 individual signing parties⁸⁸ to the treaty at least indulges expectations of widespread international support. Because even if various states wished for various inclusions or exclusions during the negotiations⁸⁹, their “for” vote obviously stands for a general agreement with and belief in the normative aims of the Court. Consequently, and assuming that nothing will change the international community’s commitment (42 states have ratified the Statute so far⁹⁰), the ICC’s legitimacy stands and falls on the second factor, its

⁸⁵ Green, T.H., *Lectures on the Principles of Political Obligation*, 1986, p. 68.

⁸⁶ See the primary source The Rome Statute of the International Criminal Court, the Preamble and Article 1, but also secondary sources, for example Danilenko, Gennady M., *The Statute of the International Criminal Court and Third States*, 2000.

⁸⁷ Arsanjani, Mahnoush H., *The Rome Statute of the International Criminal Court*, 1999, p. 22.

⁸⁸ Ds 2001:3 *Romstadgan för internationella brottmålsdomstolen*.

⁸⁹ For example, Brazil and Venezuela were concerned because their constitutions prohibit life imprisonment; Trinidad & Tobago sought a death penalty; Cuba sought to include weapons of mass destruction.

⁹⁰ *Britain Ratifies Treaty Creating Criminal Court –U.S. Isolated in Opposition to World Body*, International Herald Tribune.

effectiveness in fulfilling its aims. This in turn is dependent on how well the Rome Statute positions the ICC in achieving the aims it has been created for. Thus, we need to examine the Statute and the willingness of states to provide the ICC with the necessary strength, power, funds and independence to become an effective international institution that delivers impartial justice. The ICC will in any case be dependent on the international community's willingness to support it. The refusal of China and the USA to adopt the Statute illustrates this very problem well.

7.2.3. *The Effectiveness of the Court*

Sceptics would say that adjudication without institutions of enforcement is not impressive and unlikely to be effective. The rule of law, when defined in the abstract, is said to require certainty and consistency of enforcement as one of the elements of its existence.⁹¹ The United Nations Security Council is sometimes referred to as the international police force but that is neither its purpose nor operation.⁹² Without effective enforcement mechanisms to bring indicted criminals to the Court, the ICC is in a position when it has to rely on state support even before it can prove itself efficient. Suprenor writes: "Increasing the number of available forums to prosecute (...) criminals will not serve the interests of justice if the international community lacks the ability to locate and arrest indicted (...) criminals" and proscribes the establishment of an international police or authorised international bounty hunters to help the ICC reach its aims.⁹³ Unfortunately the precedent from the *ad hoc* tribunals is not positive in this regard. They have had remarkable problems due to the lack of formal means of enforcement to cease indicted criminals. They have not been able to rely on state co-operation⁹⁴ even though they have had the consent of UN member states to act in accordance with SC actions in its favour.

⁹¹ Raz, Joseph, *The Rule of Law and Its Virtue*, 1979, p. 210, 213.

⁹² The SC was designed to maintain or restore international peace and security, not to enforce law. Additionally the SC only addresses situations covered by prohibitions in the United Nations' Charter against the threat or use of force, or other violations of international peace and security, not International law generally. Chapter V-VII of the Charter of the United Nations.

⁹³ Suprenor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*.

⁹⁴ Ohl, Shawn K., *U.S. Opposition to the International Criminal Court: Outside the Realm of Responsibility*, 2000.

8. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

8.1. The Conference in Rome

As mentioned, the participating states at the Rome Conference numbered 160, and they were joined by a couple of hundred different organisations. At the end of the negotiations, 120 states voted for the adoption of the ICC Statute⁹⁵, while 21 abstained and 7 voted against. As of now, 139 states have signed the treaty and 42 have ratified it. Since it is a multilateral agreement, countries will be bound to it once they ratify it (compared to for example the ICTY and ICTR that through their creation by the UN SC, bind all members of the UN).

The convention involved many areas of international criminal and humanitarian law, criminal procedure and extradition that touched sensitive domestic sovereignty and political issues. Four different brands of arguments could be distinguished during the negotiations: (1) a voluntarist position that demanded that consent should be required for jurisdiction, which is closely related to (2) the realist position that is typically stated by the USA and its allies who believe in the supremacy of the sovereign state, opposes a powerful, independent court and instead wants the Court to be closely connected to and monitored by the UN SC; (3) a universalist attitude that denotes a court with inherent jurisdiction over all or some crimes, and (4) the legalist argument that argues for a strong and effective court, believing that law is more important than national sovereignty.⁹⁶

The Rome Statute as drafted at the conference by the states present, is the foundation from which the ICC emerges. The multilateral treaty provides it with the unique power to prosecute and sentence individuals that violate the gravest international crimes. The Statute is structured by a preamble and thirteen parts which include 128 articles.⁹⁷ I will, in the following, analyse these

⁹⁵ Rome Statute for an International Criminal Court, UN Doc A/CONF.183/9 (1998)
<www.un.org/icc/romestat.htm>.

⁹⁶ McCormack, Timothy L.H., and Simpson, Gerry J., *'A New International Criminal Law Regime'*, 1995, explicitly refer to the groupings. See also Davis, *'The Politics of Prosecuting Rape as a War Crime'* for the realist and legalist positions, and Kirsch, Philippe and Holmes, John T., *'Developments in International Law: The Rome Conference on an International Criminal Court: The Negotiating Process'*, 1999.

⁹⁷ Lagradsremissen, p. 25.

closer, with a focus on the provisions I regard as the core of the Statute.⁹⁸ These parts are: (1) the concept of complementarity; (2) the subject matter jurisdiction; (3) the geographical jurisdiction (4) the mechanisms for triggering the ICC's jurisdiction; (5) admissibility and (6) enforcement of state co-operation. I will start off by presenting the three underlying principles that the ICC is based on. In connection with my analysis of the ICC Statute I will address and examine some of the relevant US objectional arguments and concerns.

8.2. Three Underlying Principles

8.2.1. Complementarity

With the emphasis on sovereignty the US strongly advocated basing the ICC on the concept of complementarity, which the drafters also did (Article 1).⁹⁹ This means that crimes fall within the Court's jurisdiction only when the domestic judiciary of competent primacy jurisdiction is unable or unwilling to prosecute.¹⁰⁰ This is in contradiction to the ICTY and the ICTR, which are superior to national courts, while the ICC is merely complementary and consequently has the character of a last resort.¹⁰¹ The ICC will only be enacted when domestic courts are unable to secure the international legal system. "Complementarity" is thus rather a generous way of describing it: "subsidiarity" would be better.

8.2.2. International Core Crimes

The Court's jurisdiction is limited to the most serious crimes of concern to the international community as a whole.¹⁰² This principle was meant to encourage broad acceptance of the Court and also avoid overloading the Court and thus stretching the resource demands on member states. This gave the court a better chance of attaining effectiveness and credibility.¹⁰³

8.2.3. Customary International Law

The crimes that will be prosecuted according to the Rome Statute are largely reflected in existing international law. Even if some voices have been raised in contradiction, the crimes in the Rome

⁹⁸ The full Rome Statute can be found at <www.un.org/icc/romestat.htm>.

⁹⁹ Ward, 'Breaking the Sovereignty Barrier: the United States and the International Criminal Court'.

¹⁰⁰ Scharf, 'Results of the Rome Conference for an International Criminal Court'.

¹⁰¹ Lagradsremissen, p. 25.

¹⁰² Rome Statute Article 5.

¹⁰³ Arsanjani, 'The Rome Statute of the International Criminal Court', p. 25.

agreement are not founded on new definitions. As will be shown below, the Statute is a reinforcement of the human rights violations of genocide, crimes against humanity, war crimes and the crime of aggression in force since years back.¹⁰⁴ ¹⁰⁵ A majority of the world community additionally considered these crimes to be norms of *jus cogens*.¹⁰⁶ The wish in Rome was not to create new criminal law but, through restatement of crimes prohibited in international treaties and customary law, clarify the obligations under ICC jurisdiction.¹⁰⁷ Danilenko writes that the majority of states participating in the Rome negotiations agreed that the criminal law of the Rome Statute essentially restated the existing law. One should note, that the permanent members of the SC had already acknowledged a substantive part of these as constituting customary international law, when establishing the ICTY and ICTR. At the creation of the Yugoslav tribunal the Secretary-General wrote in a report regarding the ICTY statute that with respect to the principle *nullum crimen sine lege*, the tribunal “should apply rules of international humanitarian law which are beyond any doubt part of customary law”. The SC accepted the report and established the ICTY based on the referred statute and thereby recognised that it was merely restating existing criminal law.¹⁰⁸

8.3. General Provisions

8.3.1. Funding

The ICC budget is to be determined by the state parties (through the Assembly of States Parties¹⁰⁹)¹¹⁰ and will be financed by these. Additionally, contributions can be received from UN funds and from voluntary governments, international organisations and individuals, according to certain prescribed criteria.¹¹¹

¹⁰⁴ Except for some innovations, see below Chapter 8.5.

¹⁰⁵ Charney, ‘*Progress in International Criminal Law?*’.

¹⁰⁶ Sadat, Leila Nadya, and Carden, S. Richard, ‘*The New International Criminal Court: An uneasy revolution*’, 2000.

¹⁰⁷ Arsanjani, ‘*The Rome Statute of the International Criminal Court*’, p. 25.

¹⁰⁸ Danilenko, ‘*The Statute of the International Criminal Court and Third States*’.

¹⁰⁹ The Rome Statute addresses the need for continuing oversight of the organisation and operation as well as development of the Court by establishing an Assembly of States Parties (Article 112).

¹¹⁰ Rome Statute Articles 112, 113.

¹¹¹ Rome Statute Articles 115 and 116.

The ICC will not be cheap; it is likely to cost as much as a hundred million dollars annually.¹¹² Funding is always a problem for international institutions, as the UN has found out on more than one occasion. Accordingly, one can imagine a situation where unsatisfied states withhold their dues in order to force national objectives on the ICC. Here the issue of legitimacy will again be crucial. As long as the Court is regarded as legitimate the possibility of refusals to pay will be reduced.

8.3.2. Judicial Competence

According to Article 34 the Court shall be composed by the following organs: (a) the Presidency; (b) an Appeals Division, a Trial Division and a Pre-Trial Division; (c) the Office of the Prosecutor and (d) the Registry.

The Court will have 18 judges. With respect to the eligibility of these, the Rome Statute follows in the form of the ICJ founding statute, which has generally been commended. The ICJ has been regarded as institutionally and adjudicatively independent.¹¹³ The Judges eligibility is determined by the qualifications that would be required in their respective states for appointment to the highest judicial offices.¹¹⁴ They will be nominated as well as elected by the Assembly of State Parties in accordance with Article 36. The judges shall be independent when performing their duties and are prohibited from engaging in any activity that could interfere with or affect this independence or impartiality.¹¹⁵ No two judges can be nationals of the same state.¹¹⁶

The office of the prosecutor shall be headed by the prosecutor and act independently as a separate organ of the Court. The prosecutor is responsible for receiving referrals and information about alleged crimes within the ICC jurisdiction, for examining them and conducting investigations and prosecutions.¹¹⁷ He or she will be elected by secret ballot by an absolute majority of the members of the Assembly of state parties. The independence and impartiality of the prosecutor as well as the grounds for disqualification is considered in detail and is similar to that of the judges.¹¹⁸ Both

¹¹² Scharf, Michael P., *'Rome Diplomatic Conference for an International Criminal Court'*, 1998.

¹¹³ Scharf, *'Results of the Rome Conference for an International Criminal Court'*.

¹¹⁴ Rome Statute Article 36.

¹¹⁵ Rome Statute Article 40.

¹¹⁶ Barrett, *'Ratify or Reject: Examining the United States' Opposition to the International Criminal Court'*.

¹¹⁷ Rome Statute Article 42.

¹¹⁸ Rome Statute Article 42.

the prosecutor and judges will be elected for a term of nine years and are not eligible for re-election.¹¹⁹

8.3.3. Constitutional Issues

The US has claimed that a major reason for not being able to accept the ICC statute is that it is “unconstitutional”, meaning that American nationals accused of crimes before the Court are not guaranteed their rights under the United States Constitution. However, the Statute provides for “minimum guarantees” very similar to the United States’ Bill of Rights, especially formulated to alleviate US concerns. This means that the ICC would offer Americans more protection than many national courts that would otherwise have jurisdiction over the accused.¹²⁰ For example, the Statute includes provisions stating that the trial must be in the presence of the accused (Article 63); double jeopardy is prohibited (Article 20); there is a presumption of innocence (Article 66); the right to an attorney is guaranteed (Article 67:d) and the decision can be appealed by both the defendant and the prosecutor (Articles 81-83).¹²¹ The principles of legality: *nulla poena sine lege* and *nullum crimen sine lege* that means no conduct can be criminalised and/or punished without prior legislation, can be found in Article 22 and 23 of the Rome Statute.

8.4. Jurisdiction of the Court

The jurisdiction of the ICC is based on four components: (1) *ratione personae* (personal jurisdiction), (2) *ratione materiae* (subject matter jurisdiction), (3) *ratione loci* (geographic jurisdiction); and (4) *ratione temporae* (time).¹²²

8.4.1. Ratione Temporae

The Court’s jurisdiction is expressly limited to crimes committed after its establishment and entry into force for each state.¹²³

¹¹⁹ Rome Statute Articles 42 and 36.

¹²⁰ King and Theofrastous, ‘From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy’ and Supple, Shannon K., ‘Global Responsibility and the United States: The Constitutionality of the International Criminal Court’, 1999.

¹²¹ The Rome Statute and Barrett, ‘Ratify or Reject: Examining the United States’ Opposition to the International Criminal Court’.

¹²² Sadat and Carden, ‘The New International Criminal Court: An Uneasy Revolution’.

¹²³ Rome Statute Articles 11 and 24.

8.4.2. *Ratione Personae*

The Statute provides for personal jurisdiction over individuals above the age of eighteen years only.¹²⁴ Natural persons are since the Nuremberg Tribunals regarded as the proper subjects of international criminal law, which excludes entities such as organisations and states.

Article 27 provides accountability for all persons, including heads of state, that have committed a crime under the ICC's jurisdiction: "official capacity as a Head of State or Government (...) shall in no case exempt a person from criminal responsibility".¹²⁵

Some concern has been raised in the matter of the ICC's influence on interstate disputes. The fear is expressed in arguments regarding the possibility that the indictment of an individual that has violated ICC regulations pursuant to state policy or even authorised by a state government, will in reality represent a judgement of his or her state's actions and interfere in diplomatic relations.¹²⁶ These concerns are misplaced. The ICC has not been created to consider or pass judgement on the interstate roles or the ideological backdrop of a dispute, rather to avoid the notion of winner's justice. The ICC will not adjudicate the legality of states' actions or settle any disputes between them, but exclusively try individuals "on both sides" for international crimes.¹²⁷ It is hardly the fault of the ICC if this is interpreted as judgement of a state's actions.

8.4.2.1. *Superior Orders and Prescription of Law*

The fact that a crime has been committed by a person pursuant to an order of a Government or of a superior, whether civilian or military, are not grounds for excluding responsibility unless the person was under a legal obligation to obey the orders, the person did not know that the order was unlawful, *and* the order was not manifestly unlawful. Orders to commit genocide or crimes against humanity are manifestly unlawful.¹²⁸

¹²⁴ Rome Statute Articles 25 and 26.

¹²⁵ Rome Statute Article 27.

¹²⁶ Morris, 'The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-party States'.

¹²⁷ Panel Discussion, Association of American Law Schools Panel on the International Criminal Court, 1999.

¹²⁸ Rome Statute Article 33.

8.5. The ICC Crimes

The Court has jurisdiction in accordance with the Statute to the most serious crimes of global international concern, namely: (a) The Crime of Genocide; (b) Crimes against Humanity; (c) War Crimes and (d) The Crime of Aggression.¹²⁹

8.5.1. Genocide

Genocide, meaning acts like killing or causing serious bodily or mental harm to members of a group, committed with intent to destroy that national, ethnical, racial or religious group¹³⁰ has long been recognised as a crime of international criminal law. The definition of genocide in Article 6 follows verbatim the definition in the Genocide Convention Article II, which is regarded as constituting both international treaty and custom law.¹³¹ The same definition was used in both the ICTY and ICTR Statutes, and its meaning has been furthered detailed in the important ICTR case of *Prosecutor v. Akayesu*, which led to the first verdict based on genocide in history and will no doubt serve as precedent for the ICC.¹³²

8.5.2. Crimes against Humanity

Although crimes against humanity are recognised crimes under international law, there is no generally accepted definition of such crimes in either treaty or customary law. When the crime has been regulated earlier in the Tokyo, Nuremberg, ICTY and ICTR charters, the definitions have been brief and differed from each other. The definition in Article 7 adopted in Rome borrows from all of them, and is broader than its predecessors'. The most significant contrast to both the Nuremberg and *ad hoc* tribunals is that the Rome Statute states that crimes against humanity can take place in either wartime or peacetime.¹³³

But the Rome Statute imposes high thresholds for crimes to be considered crimes against humanity that stretch further than existing international standards.¹³⁴ According to Article 7:1 the crime must be part of a "widespread or systematic attack" directed against a "civilian

¹²⁹ For a full description of the crimes see <www.un.org/icc/romestat.htm> and prop. 2000/01:122.

¹³⁰ Rome Statute Article 6.

¹³¹ Lagradsremissen, p. 30.

¹³² Sarooshi, Danesh, *The Statute of the International Criminal Court*, 1999.

¹³³ Lagradsremissen, p.30.

¹³⁴ Supple, *Global Responsibility and the United States: The Constitutionality of the International Criminal Court*.

population”, with “knowledge of the attack”.¹³⁵ This means that not only must the prosecutor show that the crime was committed by the defendant, but that he or she personally knew the larger context of his or her actions.¹³⁶ Additionally, the attack must entail “a course of conduct involving the multiple commission of acts (...) against any civilian population *pursuant to or in furtherance of a State or organizational policy to commit such attack*” (Article 7:2 (a)).¹³⁷ This seems to require that the crime is based on a plan on behalf of a state or another sort of entity.

Crimes against humanity are for example: murder, extermination, enslavement, torture and the crime of apartheid. The Rome Negotiations led to a couple of innovations that were added to the Statute, for example under the heading of “rape”: “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”.¹³⁸

8.5.3. War Crimes

Article 8 of the Rome Statute more or less restates existing laws and customs regarding war crimes found in the Geneva conventions, the 1977 Additional Protocol I and II and the Hague convention. These treaties do not provide for criminal responsibility, but according to the ICTY Appeals Chamber and the general development, criminalisation of the prohibitions against war crimes are now acknowledged.¹³⁹

Since only the gravest international crimes shall be prosecuted before the ICC, Article 8 states that the Court shall have jurisdiction in respect of war crimes *in particular* when they have been committed as part of a plan or policy or as part of a large-scale commission of such crimes.¹⁴⁰ This excludes random acts of over-broad personnel from ICC jurisdiction and was specifically inserted in the statute to alleviate US concerns.¹⁴¹

¹³⁵ Rome Statute Article 7.

¹³⁶ Sadat and Carden, *The New International Criminal Court: An Uneasy Revolution*.

¹³⁷ Sarooshi, *The Statute of the International Criminal Court*, p. 398.

¹³⁸ Ibid p. 398.

¹³⁹ Danilenko, *The Statute of the International Criminal Court and Third States*.

¹⁴⁰ Lagrårdsremissen, p.31.

War crimes means for example: wilful killing, torture or inhuman treatment including biological experiments and extensive unjustified destruction and appropriation of property. Article 8 of the Rome Statute includes a couple of innovations. For example are various acts against UN and humanitarian organisation personnel as well as enlisting children under the age of fifteen years into national armed forces, included as crimes. A controversial innovation is the amendment of the words “directly or indirectly” in Article 8(b) (viii), defining the crime of transfer by the occupying power of its civilian population to an occupied territory.¹⁴² This has resulted in Israeli objections since the new definition seems to label Israeli settlement activity as war crimes. According to Israel the definition is “an example of either poor drafting or deliberate misuse of the Court for political purposes”.¹⁴³ But the definition is an already existing provision in international law, except for the addition of the words “directly or indirectly”. Bare in mind that the Court will hear only the most serious crimes of global concern and that an act to be regarded as a war crime needs to be committed during an armed conflict, must be part of a plan or policy or committed on a large scale.¹⁴⁴

The exclusion of chemical, biological, and nuclear weapons from the list of war crimes is based on a political compromise that greatly disappointed many.¹⁴⁵ The US wanted the Statute to prohibit chemical and biological weapons but wanted to keep nuclear weapons out of the ICC jurisdiction at any cost, which ended with a trade-off and none was included.¹⁴⁶

8.5.4. The Crime of Aggression

After World War II, a prohibition against aggressive war was included in the UN Charter, Article 2(4). Based on the SC’s finding of aggressiveness, the Council can order use of its Chapter VII powers to end it.¹⁴⁷ The crime of aggression was also embodied in the ICC’s jurisdiction, even

¹⁴¹ Scharf, ‘Results of the Rome Conference for an International Criminal Court’, and White, ‘Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of States’.

¹⁴² Danilenko, ‘The Statute of the International Criminal Court and Third States’.

¹⁴³ Levy, Ayelet, ‘Israel Rejects Its Own Offspring: The International Criminal Court’, 1999.

¹⁴⁴ Panel Discussion, Association of American Law Schools Panel on the International Criminal Court.

¹⁴⁵ Sadat and Carden, ‘The New International Criminal Court: An Uneasy Revolution’.

¹⁴⁶ Panel Discussion, Association of American Law Schools Panel on the International Criminal Court.

¹⁴⁷ According to Article 39 of the Charter of the United Nations: ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’.

though it has yet to be properly defined.¹⁴⁸ Many states sought that the Court should not be able to pursue a prosecution based on the crime of aggression unless the SC first makes a finding that aggression exists. States not in control over the SC of course opposed tying the ICC to the power of another institution, especially to the SC in its current form.¹⁴⁹ One Author writes: “it is incompatible with the concept of law that an entity subject to the law should have the final authority to determine whether a legal rule applies to it”.¹⁵⁰ ¹⁵¹ As a compromise, the crime of aggression was included in the Statute undefined. The final definition needs to be approved by a 7/8th majority, and until then the ICC shall not exercise that part of its subject-matter jurisdiction.¹⁵²

8.5.5. Opt-out of War Crimes

When a state ratifies the statute, it accepts the ICC’s jurisdiction over all crimes within the scope of the statute. There is no right to opt-out of certain provisions, which the USA strongly advocated (Scheffer refers to it as a “take it or leave it” text¹⁵³), with one temporal exception. States are allowed to opt out of ICC automatic jurisdiction over war crimes committed on its territory or by its nationals for a period of seven years after the ICC has become operative for that particular state (Article 124).¹⁵⁴

8.6. Ratione Loci

ICC jurisdiction is primarily consensual and based on the traditional principles of territoriality and nationality. According to Article 12, the ICC may exercise its geographical jurisdiction on one of the following grounds: (a) if the state on which territory the crime occurred is a member to the Statute; (b) if the person accused of committing the crime is a national of a member state to the Statute or (c) if any of the states consent to ICC jurisdiction over the crime in question *ad hoc*.

¹⁴⁸ Rome Statute Article 5.

¹⁴⁹ Sadat and Carden, *The New International Criminal Court: An Uneasy Revolution*.

¹⁵⁰ Sadat and Carden, *The New International Criminal Court: An Uneasy Revolution*.

¹⁵¹ See further discussion about SC influence on the ICC in the following Chapter 8.7.1.

¹⁵² Lagradsremissen, p. 30.

¹⁵³ Scheffer, *The United States and the International Criminal Court*, p. 20.

¹⁵⁴ Sarooshi, *The Statute of the International Criminal Court*.

8.6.1. Are Non-party States Bound by the Treaty?

One of the fundamental principles of international treaty law is as mentioned before, that only states that are party to a treaty can be imposed by its terms. It seems to be in contradiction to this, that jurisdiction empowered by consent from the territorial state, means that even nationals from non-party states can be subject to prosecution.

The US has objected against this; in the words of Ambassador Scheffer: “While we successfully defeated initiatives to empower the court with universal jurisdiction, a form of jurisdiction over non-party states was adopted by the conference despite our strenuous objections”.¹⁵⁵ The USA claims that jurisdiction over non-consenting non-party states must be incompatible with the law of treaties and the principle of self-autonomy proscribing that a state has to give its consent to be bound by a treaty.¹⁵⁶ The general rule spelt out in Article 34 of the Vienna Convention on the Law of Treaties states that treaties cannot create either obligations or rights for a nation that is not a party to the treaty or has given its consent.¹⁵⁷ The fact that the ICC can exercise jurisdiction over nationals of non-party states does not equate with imposing obligations on them.¹⁵⁸ In fact, non-party states are not bound to or obligated through the treaty, and do not have to assist the ICC in its work.¹⁵⁹ What can happen is that nationals of non-party states can be tried for crimes they commit on the territory of a party-state or a consenting state, if the crime is considered an international core crime. There is nothing new in this. Surely the US cannot be objecting to the well-established territorial jurisdiction of the state on which territory the crime has occurred. As mentioned above,¹⁶⁰ international core crimes are crimes of universal concern and subject to the jurisdiction of any state in the world. The Rome Statute provides the State Parties with the same jurisdictional rights that they already enjoy according to existing multilateral conventions. Additionally there is nothing unusual about conferring jurisdiction over nationals of non-party

¹⁵⁵ Scharf, *Results of the Rome Conference for an International Criminal Court*.

¹⁵⁶ Orentlicher, Diane F., *Politics by Other Means: The Law of the International Criminal Court*, 1999.

¹⁵⁷ The Vienna Convention on the Law of Treaties (1969).

¹⁵⁸ Morris, *The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-party States*.

¹⁵⁹ Barrett, *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*.

¹⁶⁰ Chapter 4.5.

states through the creation of a treaty, and the USA is not only a party to many such treaties, but have also exercised jurisdiction over non-party nationals in the very way they are opposing.¹⁶¹

The issue remaining would be the correctness of letting an institution, established by the international community, exercise the states' delegated (a) universal jurisdiction; and, (b) extra-territorial jurisdictional powers. One author questions the correctness of states delegating a matter of customary international law like universal jurisdiction to an international court. She suggests that it 'would constitute an innovation beyond the customary meaning of universal jurisdiction'.¹⁶² On the contrary, the prevailing global opinion is that a theory of universal international jurisdiction has developed from the precedent of Nuremberg and the two ad hoc tribunals and further established through the creation of the ICC, according to which states unanimously can delegate their individual universal jurisdiction to a representative organ. Sadat and Carden write: "Since Nuremberg it has been accepted that, with respect to the establishment of Courts for the trial of international crimes over which there exists universal jurisdiction, States may do together what any one of them could have done separately".¹⁶³ This view is expressed in UN documents commenting on the creation of the Nuremberg Tribunal and also established through the creation of the globally ratified Genocide Convention, that calls for the establishment of a world court.¹⁶⁴

Since any State on its own could prosecute perpetrators of the crimes contained in the ICC Statute under universal regardless of his or her nationality and regardless where the crime took place, it is difficult to fathom how a non-State party's right under international law could be violated if states through a treaty enabled an international court to prosecute the same crimes on their behalf.¹⁶⁵

¹⁶¹ Scharf, 'Results of the Rome Conference for an International Criminal Court', and Danilenko, 'The Statute of the International Criminal Court and Third States', and Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court'.

¹⁶² Morris, 'The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-party States'.

¹⁶³ Sadat and Carden, 'The New International Criminal Court: An uneasy revolution', and Dalinenko, 'The Statute of the International Criminal Court and Third States'.

¹⁶⁴ Ibid Dalinenko.

8.7. Trigger Mechanisms

Cases can be triggered either by (1) the Security Council or by (2) individual countries respectively the ICC prosecutor acting *proprio motu*, based on credible information of grave atrocities (Article 13). The first track is based on Security Council action and will therefore enforce compliance of orders for example evidence and extradition by all UN member states according to their consent to co-operate with SC actions under Chapter VII of the UN Charter. In comparison track two has no built in mechanism of enforcement but must rely upon the state-parties' co-operation and good will.¹⁶⁶

As seen above, the ICC was not granted jurisdiction based on universality, except for in situations when cases are referred to the Court by the SC. When the SC refers a case, consent to adjudication is not needed from any state and the ICC jurisdiction stretches as far as UN membership, while if the matter is referred by a state or by the prosecutor *proprio motu*, the jurisdiction is limited to the states that have ratified the ICC Statute, or consent to it *ad hoc*.¹⁶⁷ This means that if the SC will not refer the case, ICC will never have jurisdiction over atrocities committed on the territory of a third state by its own nationals.

While the USA sought iron-clad veto of jurisdiction for itself, it is amusing to take part of Ambassador Scheffer's concern for other non-party states avoiding the ICC: "The United States has long supported the right of the Security Council to refer situations to the court with mandatory effect, meaning that any rogue state could not deny the court's jurisdiction under any circumstances. We believe this is the only way, under international law and the U.N. Charter, to impose the court's jurisdiction on a non-party state".¹⁶⁸

Obviously the second track is much more limited than the first one, but because of its veto, the US is not concerned about SC triggered cases. Instead, the Americans tried to stem the support for an independent prosecutor and presented two major objectives against the *proprio motu* right. Firstly the US expressed a fear that the prosecutor and judges of the Court would not be impartial and secondly that in front of a politically motivated institution, cases would be brought against

¹⁶⁵ Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court'.

¹⁶⁶ Scharf, 'Results of the Rome Conference for an International Criminal Court'.

¹⁶⁷ See above Chapter 8.6.

the USA for political reasons by malevolent states.¹⁶⁹ It is of course a concern of the whole international community for both political and legal reasons, that the prosecutor should not be granted too much individual power. This is also appropriately attended to in the Rome-treaty through extensive procedural safeguards designed to limit the Prosecutor in his or her line of work, and there is no reason to doubt their sufficiency. Article 15 proscribes that the three-judge Pre-Trial Chamber has to give the prosecutor authorisation before he or she can commence an investigation *proprio motu*. After receiving information of a crime within the ICC jurisdiction, the prosecutor shall examine the seriousness of this referral and conclude if there is a reasonable basis to proceed with an investigation. In such case, the prosecutor must present the information in front of the Pre-Trial Chamber, which will review the Prosecutor's decision. If it finds reasonable basis to exist, it shall authorise the commencement of an investigation.¹⁷⁰

In contradiction to the US position I would say it is necessary to have a prosecutor *proprio motu* that can initiate investigations when states and the SC fail to refer cases to the ICC for political reasons.

8.7.1. The Role of the Security Council

In comparison to the *ad hoc* tribunals that were set up by the SC, the ICC was established on a treaty basis and is thus independent of the UN. In spite of this there seems to be an unwarranted degree of UN influence on the future adjudicator, advocated by some more eagerly than others. The US for example, requested a very strong SC role in the operation of the ICC.

I think there are good reasons to keep the SC influence low. One of the most important notions of the Rule of Law is equality before the law. We know that states are not equal in wealth, power and influences but in legal conception they are equal in status, person-hood, legal capacity, rights and duties. To assure legal equality among states and their nationals, we need to make sure that the adjudicator is impartial and independent. A domestic court should be under the influence of neither government nor parliament. Accordingly an international court should not be under the

¹⁶⁸ Scheffer, *'The United States and the International Criminal Court'*.

¹⁶⁹ King and Theofrastous, *'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy'*.

¹⁷⁰ Lagradsremissen and Rome Statute Article 15.

influence of, for example, the UN, especially not with the SC in its current form.¹⁷¹ The International Criminal Court cannot be made subservient to the interests of powerful states, or its legal character will be demolished.

The SC is prevented from taking any decision of significance against the will of the five permanent members.¹⁷² The veto-power has left the SC, and as a consequence the UN, ineffective and paralysed on many occasions when the political, military, economic and legal interests to act have been lacking (even though the end of the Cold War has meant that the SC is not as deadlocked as before).¹⁷³ Malekian writes: “In all conceivable situations governing the maintenance of international peace and security, it is solely the permanent members of the United Nations who have the actual power to make judgements about breaches of peace and obviously never successfully accuse themselves of violating the principles of international legal order”.¹⁷⁴ The fact is the SC has adopted quite different approaches in different cases involving the maintenance or restoration of international peace and security and it is obvious that the SC is not independent of political ties.

It would not be positive to tie the ICC’s operation to an institution which legitimacy is questionable in its current form. Furthermore to establish an international criminal court where states are given unequal influence would be the best way to ensure an illegitimate institution that would lack confidence and hence would not be supported. The Court must have the power to enforce law over all criminals, regardless of their political, legal and military strengths and regardless of their position in the United Nations.¹⁷⁵ It would go against the ICC’s purpose if only nationals from the states not members or friends of the permanent five would be accountable for their actions under international criminal law, and undoubtedly undermine the Court’s authority.

8.7.2. Still Some Security Council Control

The SC permanent members expressed concerns during the negotiations about the possible conflict between ICC and SC respective functions. The permanent members of the SC were

¹⁷¹ Henkin, *‘International Law: Politics and Values’*, p. 10-11.

¹⁷² Article 27 and 39 of the Charter of the United Nations.

¹⁷³ Malekian, *‘The Monoploization of the International Criminal Law of the United Nations’*, p. 15.

¹⁷⁴ *Ibid* p. 93.

¹⁷⁵ White, *‘Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC and a Wake-up Call for Former Heads of States’*.

denied a right to individually veto cases within the ICC jurisdiction which they had suggested, but were still collectively granted substantial control over the cases at the Court through Article 16: “No investigation of prosecution may be commenced or proceeded with 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”. This article allows the SC to affirmatively vote for a postponement of an investigation or a case for up to a year and the request can be renewed unlimited times by the Council under the same conditions.¹⁷⁶

8.8. The Opt-out Right

Article 12 states that the signatory states accept the ICC jurisdiction on a *continual*, as opposed to a *case-by-case*, basis.¹⁷⁷ One of the US objections was the fact that the whole Rome-treaty had to be consented to and that there didn't exist a right to enter reservation from certain provisions of the treaty.¹⁷⁸ Obviously, there is no legal requirement in international law that this right should be provided for.¹⁷⁹ On the contrary one can understand the prohibition on reservations since that would permit the parties to the statute to opt-out on parts of it, thus create a very complex applicability of jurisdiction. The statute's non-uniformity would if not totally paralyse the Court, undoubtedly weaken the prospects of an effective and legitimate international criminal court. In my view, the right to reservation from parts of the statute undermines the whole idea of vital international criminal law; the crimes under the ICC Statute are already of universal character and the idea was to create a permanent international (and I assume) effective court. Concession to the US position would have presented the very criminals the ICC is designed to prosecute with an immunity clause.

8.9. Complementarity and Admissibility

The Court's complementary jurisdiction is evidenced by the provisions in Article 17, where various cases are found inadmissible when:

¹⁷⁶ Rome Statute Article 16, and Arsanjani, *The Rome Statute of the International Criminal Court*, p. 26-27.

¹⁷⁷ Except for the opt-out possibility concerning war crimes Rome Statute Article 124.

¹⁷⁸ Scheffer, *The United States and the International Criminal Court*, p. 20.

¹⁷⁹ See The Vienna Convention on the Law of Treaties. Furthermore, in the *Reservations to the Genocide Convention* (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21 (May 28)) case, the International Court of Justice noted that reservations must be in harmony with the object and purpose of the agreement. A reservation from the jurisdiction of certain crimes would surely not be in harmony with the Rome-statutes object and purpose.

(a) The Case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person has already been tried for conduct which is the subject of the complaint (Article 20:3); or (d) The case is of insufficient gravity to proceed with the investigation (Article 15).

In order for the ICC to decide if a country is unwilling to prosecute an alleged perpetrator, the statute provides guidelines on what shall be regarded as unwillingness. The Court shall consider if the proceedings were or are actually being undertaken or if “the national decision was made for the purpose of shielding the person concerned from criminal responsibility”, if there are any unjustified delays in the proceedings and if the proceedings are not being conducted “independent or impartially”.¹⁸⁰ Inability to prosecute can be determined when for example, the entire judicial system of the prosecuting state has collapsed or if the state is unable to obtain the accused or necessary evidence and testimonies.¹⁸¹

The admissibility of a case may be challenged by an accused; by a state that has jurisdiction over a case on the grounds that it is investigating or prosecuting the matter or has investigated or prosecuted; or by the state on whose territory the crime was committed or the state of nationality of the accused, whose consent to the Court’s jurisdiction is required.¹⁸²

8.9.1. Notification and Its Consequences

At the insistence of the USA, yet another protective mechanism was added in Article 18. This provision proscribes that the prosecutor when about to commence an investigation, in addition to being forced to request an authorisation in the matter from the Pre-Trial Chamber, also has to notify states (including non-parties) that may have jurisdiction over the matter. Before the prosecutor is allowed to start investigating he or she has to wait one month to see if the notified

¹⁸⁰ Rome Statute Article 17:2.

¹⁸¹ Rome Statute Article 17:3.

¹⁸² Rome Statute Article 19.

state wants to initiate its own examination of the matter under its domestic jurisdiction. If this turns out to be the case, the prosecutor must defer his or her investigation, unless he or she can show the Pre-Trial Chamber that the state's wish to investigate is nothing but a sham.¹⁸³ The Pre-Trial Chamber's decision is subject to appeal before the Appeals Chamber. As long as the state pursues its investigation in a genuine manner, there is nothing preventing it from initiating it for the sole purpose of hindering the case from proceeding before the Court. The state does not actually have to prosecute the proposed criminal, just investigate the matter.¹⁸⁴

8.10. Enforcement of State Co-operation

Part 9 of the Statute address the interaction between the ICC and states in questions like arrest and transfer of subjects and investigation by the Court on state territory. Obtaining custody of the accused as well as necessary evidence can be a big problem in establishing the ICC's legitimacy if there is a lack of support from powerful states. On the state parties' territories, the Court will have no capacity to operate independently and will have to work through the domestic authorities and be subject to national law.¹⁸⁵ The Statute obligates its parties in Articles 86-88 to co-operate fully with the Court in its investigation and prosecution of crimes, which includes handing over relevant evidence, and it is the responsibility of every state that their domestic legislation provide for the form of co-operation the Statute requests.¹⁸⁶ Reviewing the articles that follows under part 9, one author writes: "the articles (...) are so riddled with exceptions and qualifications that it is difficult to think of this as anything but an exhortation. The equivocations of the text underscore the fragile consensus that brought the states of the world together in Rome to approve the treaty".¹⁸⁷

According to the Statute State Parties must comply with requests from the Court for, for example, the arrest and surrender of a person, while non-States Parties are under no such obligation. Surprisingly enough, Article 90 states that a State Party does not have to execute a request from the Court if the request would require a State to breach a pre-existing treaty obligation undertaken

¹⁸³ Scharf, *'Rome Diplomatic Conference for an International Criminal Court'*.

¹⁸⁴ Sadat and Carden, *'The New International Criminal Court: An Uneasy Revolution'*.

¹⁸⁵ Ibid.

¹⁸⁶ Lagr adsremissen, p. 46, and Rome Statute Articles 86-88.

¹⁸⁷ Sadat and Carden, *'The New International Criminal Court: An Uneasy Revolution'*.

with respect to another State.¹⁸⁸ This seems to leave the State Parties a broad possibility to escape their obligations to the Court, maybe to satisfy friendly connections with a non-State Party with interest in the specific request.¹⁸⁹ If a couple of states chose to stand outside of the ICC's jurisdiction, these can make perfect refuges for persons the ICC wish to prosecute. If evidence is located or in the possession of one of these states, the ICC cannot expect to take part of it.¹⁹⁰

Even if it is a party to the statute that refuses to provide necessary support, the mechanisms to enforce state co-operation are very limited. The Statute provides the Court with "authority to make requests to State Parties for co-operation" and if the state fails, the ICC can make a finding and if it please, report it to the Assembly of State Parties, and to the SC if the council referred the case to the Court.¹⁹¹

9. THE US OPPOSITION

In voting no to the statute, the USA joined the likes of China, Libya, Iraq, Israel, Qatar and Yemen.¹⁹² The fact that the world's only remaining superpower voted against the ICC is regrettable because the Rome Statute lays the foundation for a remarkably important international instrument and the USA holds an important position in the world community. As one delegate to the Rome negotiations commented: "You cannot have a court of universal jurisdiction without the world's major military power on board".¹⁹³ The USA was an active participator in the Rome negotiations and had significant influence on the final Statute. Although efforts had been taken to accommodate the United States' concerns during the conference, the end-result wasn't compatible with the US position in a few obviously crucial aspects. Therefore the American delegation expressed itself incapable of adopting the statute. The US had strongly supported the establishment of both the ICTY and the ICTR, but this didn't translate into supporting an international criminal court¹⁹⁴, where US nationals would be liable for prosecution. The US main

¹⁸⁸ Lagrådsremissen, p. 49.

¹⁸⁹ Sarooshi, *The Statute of the International Criminal Court*, p.391.

¹⁹⁰ Charney, *Progress in International Criminal Law?*.

¹⁹¹ Lagrådsremissen, p. 46-47.

¹⁹² Scharf, *Results of the Rome Conference for an International Criminal Court*.

¹⁹³ White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC and a Wake-up Call for Former Heads of States*.

¹⁹⁴ Ward, *Breaking the Sovereignty Barrier: The United States and the International Criminal Court*.

disappointment was the exclusion of UN Security Council control, which would have given the USA an iron-clad veto authority over the prosecutions and consequently the opportunity to consent to the ICC on a case-to-case basis. One Author writes: “a key obstacle to the ICC is that its activities could touch on highly political interests over which some states are not willing to relinquish control, even to facilitate prosecution of international crimes”.¹⁹⁵ It is no secret though that powerful and influential Americans have strongly opposed the court from the beginning in both Congress and Senate.¹⁹⁶

Some of the opposing states are of limited concern since they have limited geographic and political global influence or are even considered ‘out-law states’. Of the more important ones, Israel is afraid of unjustified political prosecutions and objects to the assertion in the Statute that Israeli settlement activity could constitute war crime, and China has always been very protective of its domestic activities and does not wish to expose itself to international scrutiny.¹⁹⁷ The existence of un-co-operative states will mean that these could be safe havens for indicted international criminals. The USA itself has previously considered its obligation to extradite inferior to its sovereignty and its ‘right to grant asylum’.¹⁹⁸

The USA has strongly opposed the exposure of American citizens to ICC jurisdiction, pointing at the special responsibilities of the USA internationally in securing and restoring peace and security. This unique position of the USA denotes specific vulnerability for the US military personnel working abroad.¹⁹⁹ US opposition has raised a warning finger regarding the future willingness of the USA to get involved in humanitarian intervention and peacekeeping operations, if there is a possibility that they can be subjects to ICC scrutiny and a possible target for vengeful prosecutions. ‘The illogical consequence [...] will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers’.²⁰⁰

¹⁹⁵ Charney, ‘*Progress in International Criminal Law?*’.

¹⁹⁶ Ward, ‘*Breaking the Sovereignty Barrier: the United States and the International Criminal Court*’, and Wergeni, Cecilia, ‘*Får vi en ny internationell brottmålsdomstol?*’.

¹⁹⁷ Charney, ‘*Progress in International Criminal Law?*’, and Levy, ‘*Israel Rejects Its Own Offspring: The International Criminal Court*’.

¹⁹⁸ Supernor, ‘*International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*’.

¹⁹⁹ Scharf, ‘*Results of the Rome Conference for an International Criminal Court*’.

²⁰⁰ Scheffer, ‘*The United States and the International Criminal Court*’, p.12-19.

9.1. The American Service-members Protection Act

The Americans' scepticism towards a world-order founded on legal principals has led the Department of Foreign Affairs to move that the American Service-members Protection Act (ASPA), a law which aims to protect American military personnel from prosecution outside the USA, should be agreed to²⁰¹. Thus the USA wants continued freedom to un-reviewably meddle in foreign affairs even if the meddling do not fall within the scope of international law. It seems as though the USA will adopt a policy of total non-co-operation with the Court. The suggested law even goes so far that it has been called "the Hague invasion clause", since it in principle authorise the USA to use military force ("any necessary action") to free Americans that has been brought to trial at the ICC. If the law is passed it will specifically block US classified information to the Court as well as bar US military participation in future NATO, UN or other international peacekeeping operations without an ironclad guarantee that US servicemen will be free from prosecution. The proposal would also effectively hinder American co-operation with the ICC regarding arrests and extradition. This could turn the USA into a refuge for persons facing prosecution²⁰² and the step from non-co-operation to affect other members of the SC to not refer cases to the Court as well as postpone the cases that do reach it. The ASPA gives a clear picture of the importance the Americans give the court's authorisation to remedy war crimes and human rights-violations and strongly indicates that "American values are both immutable, and inherently superior to anything the world has to offer"²⁰³. It is tragic that the world's only superpower says it is defending world democracy and freedom but when put at a standpoint seems to consider international law to be a complication.²⁰⁴ This behaviour could amount to a violation of "a general legal duty of all States to co-operate in effective prosecution and prevention of these crimes. Because it is well established that such grave crimes threaten the peace, security and well-being of the world, such a policy may also amount to violation of UN Charter duties to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace."²⁰⁵

²⁰¹ The proposal is initiated by Senator Jesse Helms, Republican of North Carolina.

²⁰² This truly seems hypocritical in a time when the USA in its battle against terrorism is striking very hard at the people of Afghanistan for "inhabiting terrorists", December 2001.

²⁰³ Hathaway, James C., *'America, Defender of Democratic Legitimacy'*, 2000, p.133.

²⁰⁴ *'Britain Ratifies Treaty Creating Criminal Court –U.S. Isolated in Opposition to World Body'*, International Herald Tribune, and Aftonbladet, October 27 2001, p. 5 "kultur".

²⁰⁵ Danilenko, *'The Statute of the International Criminal Court and Third States'*.

10. HYPOTHETICAL CASE-STUDY

10.1. The NATO Bombings in Yugoslavia

A number of international lawyers and politicians from several countries considered some of the NATO bombings in Yugoslavia during the Kosovo conflict to be war crimes and therefore filed a complaint at the ICTY. The bombings took place from a very high altitude, which meant that the probability of mis-targeting and civilian casualties was high. The chief prosecutor Louise Arbour indicated that she was considering an investigation of the charges against NATO officials and leaders of NATO member states,²⁰⁶ but later reported that there would be “no formal inquiry”. The statement leaves room to wonder whether there was ever an “informal” investigation in the matter.²⁰⁷

In order to examine the accuracy of US fears this calls for an investigation of the assumption that ICC jurisdiction would have covered the NATO bombings during the Kosovo conflict²⁰⁸, and if so, it would have led to a prosecution against US nationals, presuming that the ICC would have been in force when the bombings took place.²⁰⁹

On March 24 1999, NATO began bombing fixed and pre-selected targets inside of Yugoslavia. The campaign lasted during 77 days. Among NATO’s 19 member states, 13²¹⁰ supported the bombings with military resources. The US contributed with the greater part of the 1000 aeroplanes that carried out the bomb-attacks, why it is reasonable to presume that the majority of bombings were carried out by Americans.²¹¹

²⁰⁶ Morris, *The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-party States*, p. 15.

²⁰⁷ Danilenko, *The Statute of the International Criminal Court and Third States*.

²⁰⁸ After a long time of disturbances in Kosovo an impending human catastrophe was on the reach: 250,000 Kosovo Albanians had been driven from their homes and over 2000 people were killed as a result of the Serb government's policies in Kosovo. The UN SC had demanded a cease-fire and the start of real political dialogue but without effective response. For the full background see NATO’s homepage: <<http://www.nato.int/kosovo/history.htm>> and Human Rights Watch’s homepage: <<http://www.hrw.org/hrw/campaigns/kosovo98/natochron.shtml>>.

²⁰⁹ Rome Statute Articles 11 and 24.

²¹⁰ These were Belgium, Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States.

10.2. Application of the Rome Statute

10.2.1. War Crimes

Article 8 of the Rome Statute contains four categories of war crimes. The first two cover crimes committed during international conflicts. With the initiation of the NATO bombing, the existing internal conflict in Kosovo and all of the Federal Republic of Yugoslavia involving NATO and Yugoslav forces became an international armed conflict to which these categories apply. The actions also qualify as actions taken as “part of a policy or plan” (Article 8). The first category (Article 8:2 (a)) involves grave breaches of the Geneva Conventions of 1949. These conventions protect civilians in times of war against dangers arising from military operations. Attackers must distinguish between military objectives and civilian objects. If a target is somewhere in between - “a dual target”- the principle of proportionality places a duty on combatants to avoid or minimise harm to civilians. Attacks may not deliberately set out to kill and maim civilians, or through negligence disregard their obligations to identify a specific military objective, and make sure they do not cause disproportionate harm to civilians in attacking it. The second category (Article 8:2 (b)) is based on the Hague Conventions and it regulates the laws and customs that have to be followed in an international armed conflict.²¹²

10.2.2. Civilian Targets

I will use two specific attacks to study the possibility of a prosecution before the ICC.

10.2.2.1 The Serb Radio and Television headquarters

On April 23 1999, the Serb Radio and Television headquarters in Belgrade was bombed. Sixteen civilian workers were killed and sixteen were wounded. NATO has stated that it bombed the television facilities because the Milosevic government used them as a propaganda tool. Such Radio and TV headquarters is generally considered a “dual target”, but since it is prohibited to

²¹¹ See NATO’s homepage: <<http://www.nato.int/kosovo/history.htm>> and Human Rights Watch’s homepage: <<http://www.hrw.org/hrw/campaigns/kosovo98/natochron.shtml>>.

²¹² See NATO’s homepage: <<http://www.nato.int/kosovo/history.htm>> and Human Rights Watch’s homepage: <<http://www.hrw.org/hrw/campaigns/kosovo98/natochron.shtml>> and Wergeni, Cecilia, ‘*Är USAs negativa inställning till den nya internationella brottmålsdomstolen befogad?*’, 2001.

strike targets in order to silence propaganda, one can question the legitimacy of bombing the building on more than one ground.²¹³

The prosecutor could apply Article 8:2 (b) (ii) claiming that NATO intentionally attacked civilians, but Article 8:2 (b) (iv) would probably be more accurate. 8:2 (b) (vi) prohibits “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects (...) which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”. Considering that the building was situated in a densely populated urban neighbourhood and the military benefit was minimal (the broadcasting operation was quickly moved to other facilities) the attack does not satisfy claims for proportionality. Additionally NATO did not take adequate precautions in warning civilians before the attack. Since it is not clear that the building was a military target at all, Article 8:2 (b) (v) could also be applied: “Attacking or bombarding, by what ever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives”. This Article does not specifically call for the defendant’s intention to be proved.²¹⁴

10.2.2. The Chinese Embassy

Article 8:2 (b) (v) could also be used in prosecuting those responsible for bombing the Chinese Embassy in Belgrade on May 7 1999, where three people were killed and at least fifteen injured. An embassy is nor *per se* a military aim. NATO said they mistakenly targeted the site using outdated maps that indicated the building as a Yugoslav arms agency quarters. The prosecutor could base a prosecution on Article 8:2 (b) (v) claiming gross negligence.²¹⁵

10.2.3. The Probability of an Investigation to Lead to Prosecution

There is a chance that both of these events could lead to prosecutions at the ICC. This is presuming that Yugoslavia or the US had signed and ratified the Rome Treaty at the time of the bombings (and not opted-out of the Statute regarding war crimes) or consented to it *ad hoc*.²¹⁶

²¹³ Ibid.

²¹⁴ See NATO’s homepage: <<http://www.nato.int/kosovo/history.htm>> and Human Rights Watch’s homepage: <<http://www.hrw.org/hrw/campaigns/kosovo98/natochron.shtml>> and Wergeni, ‘Är USAs negativa inställning till den nya internationella brottmålsdomstolen befogad?’.

²¹⁵ Ibid.

²¹⁶ Rome Statute Articles 12 and 124.

In order to start an investigation the case would need to be referred to the ICC prosecutor by a state party (this is probably not going to be one of the NATO member states supporting the campaign), or the prosecutor could initiate an investigation *proprio motu*.²¹⁷ The probability of the SC referring such a case is zero because of US, France and Great Britain veto.²¹⁸ If the prosecutor would find reasonable basis to proceed he or she first has to convince the Pre-Trial Chamber of this in order to receive authorisation to launch an investigation.²¹⁹ Note though that the Rome Statute contains very strict definitions of crimes and that only the most serious crimes of global concern will be prosecuted, not to mention that the NATO campaigns had very broad global support. Secondly, the prosecutor has to give notice to the concerned states according to the principle of complementarity.²²⁰ The call for admissibility means that the US can easily eliminate the prosecutor's involvement and hinder the case from proceeding before the ICC by initiating its own investigation. There is nothing preventing a state from opening an investigation for the sole purpose of hindering the ICC prosecutor from making further inquiries, as long as it appears to be genuine and not a sham.²²¹

If the US for some unlikely reason was unwilling or unable to investigate the case against the Americans, the SC can still defer the prosecutor's work at any time by adopting a request for that purpose. Although the motion must pass by a majority vote of the entire 15 members SC, it seems fairly certain that the United States and the other NATO states present could use its influence to get a deferral. The deferral ability is very powerful since the Statute admits it to be renewed without limits, which means the SC theoretically and lawfully may delay the prosecutor's investigation indefinitely.²²²

Only thereafter can the prosecutor commence an investigation. If it leads to a prosecution, he or she must present the case before a second panel and convince it that sufficient grounds exist for prosecution and jurisdiction.²²³

²¹⁷ Rome Statute Articles 13, 14 and 42.

²¹⁸ Rome Statute Article 13.

²¹⁹ Rome Statute Article 15.

²²⁰ Rome Statute Article 18.

²²¹ Rome Statute Article 17.

²²² Rome Statute Article 16.

²²³ Rome Statute Article 53.

11. ANALYSIS

11.1. The Lack of Legal Remedies in the Inter State System

Despite the large number of international criminal conventions, states' adherence to them so far has been dismal. Ultimately, states have been very reluctant to forgo the incidents of sovereignty they enjoy under a realist system of international relations and submit themselves and their nationals to any sort of independent monitoring or enforcement of conventions by international institutions. The trend when drafting conventions has been to leave undefined or provide only limited criminal jurisdiction. When conventions do provide for criminal accountability, their observance has been uneven, unreliable and consequently lacked legal security. Malekian writes that the "overriding influence of power politics on the system of international legal order can be regarded as one of the essential reasons for the non-applicability of the system of international criminal law to certain states".²²⁴ There have been no meaningful remedies under international law and perpetrators have gone free since national courts lack resources, but foremost political will to prosecute offenders of international crimes.

It is common that international crimes have been committed with the approval of or at the direct request from a government. Thus it is unlikely that the same government would consent to adjudication of its nationals for participating or following orders. One example is the Leipzig trials before German Courts after World War I, which are considered to be lacking in many elements required by the rule of law. But can a national court be expected to prosecute nationals that have acted on behalf of the national government and country? The drafters in Rome managed to avoid the dependency of formal state consent to the Court's jurisdiction on every occasion. Theoretically the ICC will be able to undertake prosecutions without, and even against, the political support of the most powerful states. One author writes that this "depoliticizes the enforcement of international criminal law"²²⁵ However, practically, the whole existence of the ICC is based on state co-operation, which has the potential of substantially weaken the Court's chances of being effective.

²²⁴ Malekian, *'The Monopolization of International Criminal Law in the United Nations'*, p.50.

11.2. The problem with enforcement

While the establishment of the ICC takes international law one step closer to bringing the perpetrators of the world's most serious crimes to justice, it fails to establish a strong basis for accomplishing this goal. The criminal tribunals of Yugoslavia and Rwanda have been described as failures because of their inability to force search, arrest and assistance in sentencing. Both the ICTY and ICTR have had difficulties pursuing their respective aims due to failure to "spontaneously achieve or coerce international co-operation from individual states".²²⁶ Neither of them has had any real power to enforce assistance, even though states have consented to co-operate with SC actions under Chapter VII of the UN Charter and the tribunals' respective statutes require all state parties to fully co-operate.²²⁷

International law is often in situations where it is influenced by, or even competes with, interests of politics and state sovereignty. To have an efficient system of international law, there must exist mechanisms capable of enforcing that law, even against the political will of powerful states. "Otherwise, the "law" is no more than a code of civility that exists at the whim of each independent nation-state. (...) Law without enforcement relies on the altruistic nature of nation-states to peaceably co-exist in a world where economic scarcity and power struggles predominate."²²⁸ History (not least the ICTY and ICTR) has shown us that law without enforcement is destined to fail. Unfortunately this matter is not appropriately addressed in the drafting of the ICC. Analogous to the statutes of the *ad hoc* tribunals, the Rome Statute obligates states to co-operate with the ICC but the Court has no mechanisms of enforcement to see to that they do. The Court cannot compel states to comply with its orders, its only course of action is to report non-compliance to the Assembly of States Parties. The ICC will, like most international institutions today, be relying on states' voluntary or coerced co-operation in, for example, the capture of indicted criminals and gathering of evidentiary matters. On the territory of a state party, the Court will have no capacity to operate independently and will have to work through the domestic authorities and under national law. Consequently it will, to an extent, be unavoidably vulnerable to the political interests of each state. The Court will only work effectively in a world where states are willing to let their nationals be prosecuted for international crimes and eager to

²²⁵ Charney, 'Progress in International Criminal Law?'.
²²⁶ Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law'.
²²⁷ See Article 29 of the ICTY Statute respectively Article 28 of the ICTR Statute.

assist the ICC in the implementation and enforcement of international law. By founding an international criminal court without mechanisms to enforce its aims, the world community has basically left states free to neglect their international liabilities *-again*. Penrose writes: “left to their own desires and devices, nation-states will continue to pursue their own self-interests at the cost of enforcing international law.”²²⁹ I cannot name any existing formal legal system in the world today except for the interstate one, where enforcement is not considered vital for criminal law observance.

It is dismal and depressing that the world community would establish an international criminal court to ease its conscience over its dormancy in situations like Rwanda and Yugoslavia, but leave it in a position where its lack of the necessary independence and power may lead to its ineffectiveness. One author writes: “As with other international organizations, and like the United Nations, the independent action of the ICC depends upon its ability to effectively operate independently of the political interests of the states which bring it into existence. If the ICC must rely on state cooperation, its success, for example, in obtaining custody of an individual present in an uncooperative state, will inevitably depend upon that state’s self-interest; where the interests coincide, the ICC will succeed.”²³⁰ The US concerns regarding the Court’s establishment does not stem from what can be considered the ICC’s shortcomings in effecting justice, such as the problem of ensuring state co-operation. Rather, the United States’ main objection to the Court is its intrusion on US sovereignty and the Statute’s insufficient protection of US interests.²³¹ The majority of nation-states, with the USA in the front, are, in spite of the obvious need for an efficient international criminal court, still reluctant to risk the consequences of international criminal enforcement.

11.3. American Fears and Unilateralism

It is nevertheless the case that many aspects of the Rome Statute and the establishment of the ICC pose a great challenge to the current structure of international law and politics, where the United States exercises a heretofore unchallenged hegemony. No doubt US objections to the Court are

²²⁸ Penrose, *‘Lest We Fail: The Importance of Enforcement in International Criminal Law’*.

²²⁹ Ibid.

²³⁰ Ohl, *‘U.S. Opposition to the International Criminal Court: Outside the Realm of Responsibility’*.

²³¹ Ibid.

unwarranted.²³² For example, the Americans' fear that the Rome Statute was adopted against a backdrop of antagonism toward the United States, and that cases against the USA will be referred to the ICC by malevolent states for politically motivated reasons. Quite aside from the regrettable fact that most international law these days is politics, this concern of the US is a simplification of the mechanisms of justice provided in the statute, and the extremely remote possibility of turning vengeful plotting into successful prosecution before the ICC. The fears are exaggerated and probably shade a deeper concern: that the US simply does not want an independent and powerful supra-national organisation to threaten US foreign policy and sovereignty. The Americans refuse to submit their military actions to the scrutiny of an international court, where they cannot use a veto to condition the consent to adjudication. One American author proposes that in order to produce a court *free from politicization*, it should be responsible to a higher authority, preferably to the five permanent Security Council members.²³³ How that is reconcilable I do not know. Apparently there is an American belief that the US has an inherent right to lead the world and accordingly could serve as a higher authority to a supra-national body.

Indisputably, many US actions are of a defensive or retaliatory nature, caused by 'disregarded' states, and supported often both politically and physically, by the global majority of other states.²³⁴ If Americans working abroad do not violate international law there is no crime to prosecute and no need to worry about the ICC. But if Americans do violate international law using strong arm-tactics in pursue of non-supported American interests, and commit serious crimes under the ICC jurisdiction, why wouldn't they be held responsible for their actions like all other nationals of the world? "The sense that the United States has a special moral status and mission has resulted in an intensive engagement by the United States in foreign affairs, predicated on a belief that America has a unique mission to lead the world"²³⁵ but "American unilateralism reflects a mistaken belief that the United States can be assumed always to operate on the basis of principle-derived autopilot"²³⁶! Why would Americans be immune from standards applicable to

²³² Ibid.

²³³ Rodriguez, Cara Levy, 'Slaying the Monster: Why the United States Should Not Support the Rome Treaty', 1999.

²³⁴ White, 'Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for Former Heads of States'.

²³⁵ Hathaway, 'America, Defender of Democratic Legitimacy', p.132.

²³⁶ Ibid p.121.

the rest of the global community?²³⁷ One of the most important notions of Rule of Law is that all are equally bound and protected by law. We cannot allow power to determine what is lawful.

Many of the Americans' objections are of minor significance. As demonstrated in the case study, the Statute adopted in Rome heavily restricts ICC operation through extensive procedural safeguards and many of these can be traced back to US proposals and were implemented to alleviate the American fears. In fact much of the Statute reflect US interests and influence. As shown, the Statute gives proof of a rather complex and burdensome procedural operation and the likelihood of politically motivated but unfounded cases finding their way through all the safeguards is next to nothing. The risk of abuse is significantly minimised, unfortunately the protection provisions seem to have also minimised the chances of a truly effective Court. The USA participated in the promotion and development of many of the Court's deficiencies. These provide excellent mechanisms for non-supportive states and will very likely hamper the efficient functioning of the Court. Because of the American delegation the Court were granted much weaker jurisdiction than it conceivably should have retained and then the delegation left the Rome conference without signing the treaty.²³⁸

11.4. Concluding Remarks

We must begin somewhere in order to put an end to the atrocities that take place in our world. What could be a better start than to simply enforce the laws prohibiting crimes that the international community has already agreed the existence and illegality of?

For states to be encouraged to co-operate with the ICC it needs legitimacy in the eyes of its subjects – the states. One component of legitimacy is the effectiveness of the institution, which in turn depends upon state co-operation. I have mentioned the precarious “feedback loop”: effectiveness encourages legitimacy, which encourages state co-operation, which increases effectiveness and so on. 139 individual signing parties to the treaty and 42 ratifying states so far indicates widespread international support. Their “for” votes obviously stand for a general agreement with and belief in the normative aims of the Court. The depth of this commitment is yet unknown. The ICC's legitimacy will depend on its effectiveness in fulfilling its aims. This is

²³⁷ Supple, *Global Responsibility and the United States: The Constitutionality of the International Criminal Court*.

essential for it to attract global support and co-operation in order to build a record of success and credibility. The rule of law, when defined in the abstract, is said to require certainty and consistency of enforcement as one of the elements of its existence. The lack of enforcement mechanisms has the potential to undermine the otherwise theoretically strong efficacy based on the Court's institutional structure and definition of crimes. In general, I think we can conclude that the ICC accommodates the legitimate interests of the world community. In theory it has the potential of producing impartial and equal adjudication by an independent judiciary, based on already recognised international crimes. But if states feel there is no international equality, common interests and mutual respect, they will not want to submit themselves to regulations that will impact on their freedom and political achievement.²³⁹

How effectively the ICC will be able to exercise its granted jurisdiction will be dependent on the world community and the prevailing politics at the moment. I am afraid that early failures will strongly reduce the ICC's chances of establishing its legitimacy. There would then be a real risk that the ICC would wind away into semi-irrelevance. The lack of enforcement mechanisms "underscore the fragile consensus that brought the States of the world together in Rome to approve the Treaty; indeed it suggests that while States agree to the establishment of the Court in principle, and even to its jurisdiction in theory, they are not willing to make the concessions to international cooperation that are needed to make the Court a success in practice".²⁴⁰ States are not prepared to change the relatively ad hoc, almost voluntary system into a mandatory one. The ICC could come to rectify, but if worst come to worst merely perpetuate, the inefficiency that has long characterised the system of international criminal law.²⁴¹ International law is constrained on the one side by the requirement in most cases of states' consent, and on the other side by the global political situation at the moment. Even though there needs to be interaction between law and politics, "law must not fall casualty to the politics of the moment, or law will simply become a spurious and reactionary attempt to deal with politically sensitive issues"²⁴².

²³⁸ Ward, *'Breaking the Sovereignty Barrier: the United States and the International Criminal Court'*.

²³⁹ Malekian, *'The Monoploization of the International Criminal Law in the United Nations'*, p.58.

²⁴⁰ Sadat and Carden, *'The New International Criminal Court: An Uneasy Revolution'*.

²⁴¹ Penrose, *'Lest We Fail: The Importance of Enforcement in International Criminal Law'*.

²⁴² Penrose, *'It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law'*.

The institution's effectiveness and consequently its legitimacy will hinge on what support the most influential states will give it. The fact that the world's only remaining superpower voted against the ICC is regrettable because the USA holds an important position in the world community. The Court is unlikely to be effective without US support and participation. The Americans can undermine the otherwise widely recognised treaty by withholding information and refusing to extradite criminals. The League of Nations failed without US membership and the UN is often paralysed due to lack of US co-operation.²⁴³ It is not impossible that the ICC will subsist without US support but there is no doubt American participation would be of great significance both symbolically and economically. This is especially true seeing as the US can be expected to be involved in most of the international conflicts of significance. The US non-co-operation, which is best understood as proxy for the American's claim about the appropriate distribution of political power²⁴⁴, will surely affect the perception and legitimacy of the Court and international law's ability to enforce compliance. One could hope that it would instead raise questions about US commitment to international humanitarian law, the correctness of US power politics and American exceptionalism – "a belief that the United States has a unique mission to lead the world, but ought logically to be exempt from the rules it promotes"²⁴⁵. There are many signs in the world today of a prevailing unilateral self-interest "increasing propensity of powerful states to withdraw, formally or in practice, from the multilateral legal enterprise"²⁴⁶ as it suits them. This seems to mean that "the US can pick and choose the international conventions and laws that serve its purpose and reject those that do not. Call it internationalism *a la carte*".²⁴⁷ Absolute sovereignty should be a dying maxim. Nowadays, states regularly give up sovereignty in order to achieve something more important for the community as a whole, both for economic, ideological and political ends. Maybe the creation of the ICC will lead to a proper allocation of political authority. If the vast majority of states in the world show a commitment in the Court, the political pressure on non-co-operative nations will become quite strong. At least the hindering of US to recreate its special status according to the UN Charter in Rome shows some steps in this direction.

²⁴³ Supple, 'Global Responsibility and the United States: The Constitutionality of the International Criminal Court'.

²⁴⁴ Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court'.

²⁴⁵ Hathaway, 'America, Defender of Democratic Legitimacy', p. 121.

²⁴⁶ Ibid p. 122.

²⁴⁷ Shapiro, Peter J., 'The New Sovereignists: American Exceptionalism and its False Prophets', 2000.

As we race forward to ratify the Rome Statute I think it is prudent that we consider exactly why we are creating an international criminal court and what we want it to achieve. The ICC is potentially the last great international institution of the Twentieth Century. We may not have the solutions for hindering war, conflicts and violations against human rights (the underlying historic, ethnic, religious and territorial reasons behind antagonisms are not easily disregarded), but we do have the ability to enforce the laws of war and human rights, and punish the perpetrators of these laws. A key hope will be that the existence of the ICC itself will deter future atrocities although it is beyond the scope of this essay to consider the strength of such deterrence. What is for certain is that the mere existence of the ICC serves as a normative marker that the world will no longer allow the perpetrators of the worst atrocities known to history to live out their lives and write their memoirs. However, as presently structured, the ICC has the disadvantage of being the adjudicator in a system of law without enforcement mechanisms. Without real power to coerce recalcitrant states to comply with its orders it will not be able to perform its duties in a meaningful fashion. We need to put international law above self-interest politics and state sovereignty, and a prerequisite to assure respect for the law is enforcement. The establishment of a permanent international criminal court is far from realisation of a practical success, but nevertheless a major step in the right direction.

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