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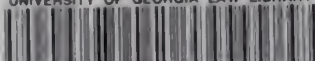
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ROME STATUTE

by

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INTRODUCTION

The advent of the ad hoc international criminal tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) raised for the first time the topical question of the appropriate relationship or concurrent jurisdictional regime between national courts and international tribunals.¹ While the Statutes of the ICTY² and ICTR³ provide for concurrent jurisdiction with national courts, they at the same time unequivocally resolve the jurisdictional conflict by bestowing the international tribunals with primacy or priority jurisdiction.

The Rome Statute,⁴ which gave its imprimatur for an International Criminal Court (hereinafter ICC) has a totally different jurisdictional regime. The most general and effective jurisdictional limit on the ICC lies in its relationship to national courts and this is based on the principle known as "complementarity." Tersely, complementarity as encapsulated in Article 17 of the Rome Statute,⁵ means that a state with jurisdictional competence has the foremost right to institute proceedings before its national courts.

¹ Bartram S. Brown, Primacy Or Complementarity: Reconciling The Jurisdiction Of National courts And International Criminal Tribunals, 23 Yale J. Int'l L. 383, 385 (1998).

² Art. 9 (1) of the ICTY Statute

³ Art. 8 (1) of the ICTR Statute

⁴ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, Annex II, U.N. Doc. A/CONF. 183/9 (1998)

⁵ See specifically Article 17 (1)(a) which provides that... the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, para. 3 (Art. 20(3) talks of the ne bis in idem or double jeopardy rule)
- (d) The case is not of sufficient gravity to justify further action by the Court

Such a competent state would not devolve jurisdiction to the ICC, unless the ICC itself decides that the State is “unwilling” or “unable” to genuinely investigate or prosecute.⁶ Although it is the catch phrase in the Rome Statute, the term “complementarity” does not appear in the Statute. Neologists, coined the term from the word “complementary”, which is used in the preamble,⁷ and Article 1 of the Statute.

In a nutshell, primacy represents the precedence of international courts over national courts. In this case, the national judicial systems devolve their sovereign criminal jurisdiction to the ad hoc tribunals created by the Security Council acting under its Charter conferred powers. Complementarity on the other hand presents the opposite scenario. Here, the ICC defers to national courts, unless it determines that the national court is genuinely incompetent to investigate and prosecute a particular case.

The law of nations recognizes five principles, which permit the exercise of criminal jurisdiction by a state. They include territorial jurisdiction based on the location where the alleged crime was committed; nationality jurisdiction based on the nationality of the offender; ‘objective’ territorial jurisdiction, which allows states to reach acts committed outside territorial limits but intended to produce, and producing, detrimental effects within the nation; protective jurisdiction based on the protection of the interests and the integrity of the nation; passive personality jurisdiction based on the nationality of the victim; and universality jurisdiction for certain crimes where custody of the offender is sufficient.⁸ Nationality and territoriality are the most widely recognized principles of

⁶ Katherine L. Doherty & Timothy L.H. McCormack, Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. Davis J. Int’l L. & Pol’y 147, 152 (1999)

⁷ Preamble of Rome Statute, para. 10 emphasizes, “that the International Criminal Court established under the Statute shall be complementary to national criminal jurisdictions.”

⁸ Harvard Research in International Law, Jurisdiction With Respect to Crime, 29 Am. J. Int’l L. 437 (Supp. 1935); The Restatement (Third) of the Foreign Relations Law of the United States (1986) §. 402

jurisdiction. Indeed, sovereignty over territory and authority over nationals are the hallmarks of statehood.⁹ International law provides no definite priority over the various principles of jurisdiction and this leads to conflict between states as a result of the fact that more than one state could have an interest in exercising jurisdiction over a particular offender or defendant.

Concurrent criminal jurisdiction depicts a scenario where two or more judicial systems have the legal capacity to investigate, prosecute and punish an accused person for the same criminal acts under their respective, separate jurisdiction.¹⁰ This usually occurs between sovereign states.¹¹ In the realm of crimes under international law, the distinguishing characteristic is the universal jurisdiction that is conferred on all States to prosecute and punish the perpetrators of such crimes.¹² The “cumulative effect of these different principles of jurisdiction sometimes is to vest multiple states with concurrent jurisdiction to prosecute a given crime.”¹³

This paper would attempt to analyze the concept of primacy that governs the concurrent jurisdiction model between the two ad hoc ICTY and ICTR on the one hand, and national judicial systems; and the concept of complementarity, which governs concurrent jurisdiction between the ICC and national courts. In both cases, reference shall be made to the concept of state sovereignty and the leverage it still has in international law, albeit the transition to globalization and supranationalism. Most of the case studies

⁹ Brown, *supra* note 1, at 393

¹⁰ Ian Brownlie, *Principles of Public International Law*, 317-318 (4th ed., 1990) (discussing concurrent jurisdiction of the flag state and the territorial state over vessels in ports or territorial waters of the latter). See Frederik Harhof, *Justice In Cataclysm Criminal Trials In The Wake Of mass Violence: Consonance Or Rivalry? Calibrating The Efforts To Prosecute War Crimes In National And International Tribunals*, 7 *Duke J. Comp. & Int'l L.* 571, 572 (1997)

¹¹ See *The Case of The Lotus (France v. Turkey)*, P.C.I.J. Ser. A, No. 10 (1927)

¹² See Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, at 121 (vol. 1, 1994)

¹³ Brown, *supra* note 1, at 392

will refer to the ad hoc ICTY and ICTR because they are functional. The ICC is still to come into existence, thus its analysis shall be based on hypothesis.

CHAPTER 1

INTERNATIONAL CRIMINAL JURISDICTIONS

A- HISTORICAL ANTECEDENTS

The creation of ad hoc international criminal Tribunals brought to the limelight the debate about the appropriate relationship between national courts and international criminal Tribunals.¹⁴

As a result of the fact that justice was imposed by the victorious Allies over the vanquished Germans, the issue of concurrent jurisdiction was remotely raised after World War I and at Nuremberg. However, this writer thinks it is important to take a ride down memory lane to the Treaty of Versailles in order to discern the trend and tortuous path taken by international law until the Rome Statute creating an International Criminal Court.

1- The Treaty of Versailles¹⁵

In a paper presented before the Grotius Society in London in the heat of World War One (hereinafter WWI), Hugh H.L. Bellot articulated that “the public opinion of the civilized world will not rest satisfied unless, upon the termination of the conflict, not only the instigators but also the actual perpetrators of the more heinous offences against the

¹⁴ Brown, *supra* note 1, at 385

¹⁵ Treaty of Peace Between The Allied And Associated Powers and Germany, concluded at Versailles, June 28, 1919, 2 Bevans 43 (hereinafter Treaty of Versailles)

usages of war are brought to trial before some impartial tribunal.”¹⁶ At the end of the War and after much compromise, the representatives of the Allied Powers and Germany signed the Treaty of Versailles. Article 227 of the Treaty provided for an ad hoc international criminal tribunal to prosecute Kaiser Wilhelm II of Hohenzollern “for a supreme offence against international morality and the sanctity of treaties.”¹⁷ However, the Allies seemed unprepared to create the precedent of prosecuting a Head of State for a new international crime. The Treaty’s characterization of aggression as a ‘political’ crime and its failure to make reference to a specific international crime gave the Dutch Government a legal basis to reject an Allied request for extradition of the Kaiser from the Netherlands if such a request was ever presented. Due to the lack of political will, such a request was never made and the Kaiser was never tried.¹⁸

Articles 228 and 229 of the Versailles Treaty, which provided for the prosecution of Germans before Allied Military Tribunals for violating the laws and customs of war was never implemented for the same reason. Instead of establishing an Allied Tribunal, the Allies asked Germany to prosecute a limited number of alleged German war criminals before the Reichgericht,¹⁹ in Leipzig (hereinafter the Leipzig Trials).²⁰ Germany, which before had passed a national legislation implementing Articles 228 and 229, passed a new law allowing it to assume jurisdiction under its national laws at Leipzig.²¹ The Leipzig Trials turned out to be a sham. Only twelve German military

¹⁶ Hugh H.L. Bellot, War Crimes: Their Prevention And Punishment, 2 Transactions Of The Grotius Society 31, 37-38 (1917). See Mathew Lippman, Nuremberg: Forty Five Years Later, 7 Conn. J. Int’l L. 1, 4 (1991)

¹⁷ Art. 227, 2 Bevans 43, 136.

See Lippman, *supra* note 16, at 8-9

¹⁸ Lippman, *id*

¹⁹ The Reichgericht is the Supreme Court of Germany

²⁰ *Id.*

²¹ *Id.*

officers out of the 895 prepared by the 1919 Commission were prosecuted.²² This lends credence to the premise that states are always reticent to prosecute their own crimes.

The Treaty of Sevres of 1920 between the Allies and Turkey, which provided for Turkey's surrender of its nationals in order to stand trial presumably for 'crimes against the laws of humanity,' was never ratified. The Treaty of Lausanne of 1923 that replaced the Treaty of Sevres instead granted amnesty to Turkish officials.²³ The search for an independent, fair and effective permanent system of international criminal justice started on a wrong footing due to the lack of political will.

2- Nuremberg and Tokyo Tribunals

The International Military Tribunals for Nuremberg and for the Far East (hereinafter Tokyo Tribunal) were established through the London Agreement of August 8, 1945.²⁴ The Agreement was signed by the United States, The Soviet Union, France and Great Britain, and was adhered to by the other Allied countries. The Nuremberg Tribunal determined that its jurisdiction was based upon the premise that:

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal...it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.²⁵

²² Id. at 14 (The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties was established when the victorious Allies convened the 1919 Preliminary Peace Conference in Paris)

²³ Id. See Cherif Bassiouni, *The Time Has Come For An International Criminal Court*, 1 Ind.Int'l & Comp.L.Rev.1,2-4(1991)

²⁴ Agreement for the prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, August 8, 1945, 82 U.N.T.S. 279

²⁵ Nuremberg Judgement, at 48. See 22 Trial Of The Major War Criminals Before The International Military Tribunal, 412-413 (S.Paul A.Joosten ed., 1948). See Virginia Morris & Michael P. Scharf, An

This gives credence to the concept that Nuremberg “constitutes a precedent for the collective delegation through a treaty of a mix of territorial and universal jurisdiction to an international criminal court.”²⁶ The Tribunal thus affirmed the primacy of international law over national law by holding that the “very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”²⁷ The Nuremberg jurisprudence thus seemed to lay to rest as a practical matter, the theory that the constitution of an international criminal tribunal contravenes the sovereignty of states *per se*.²⁸ With regard to territoriality principle as basis of jurisdiction by the Nuremberg Tribunal, Hans Kelsen articulates the concept as follows:

The unconditional surrender signed on June 5, 1945, by the representatives of the last legitimate Government of Germany may be interpreted as a transfer of Germany's sovereignty to the victorious powers who are signatories to the surrender treaty.

... Since the German territory together with its population has been placed under the sovereignty of the occupant states, the whole legislative and executive power formally exercised by the German government has been taken over without any restriction by the governments of the occupying states.²⁹

Subsequent to the London Agreement and by virtue of their exercise of sovereignty over Germany following the latter's unconditional surrender, the Allies enacted Allied Control Council Law No. 10 (hereinafter CCL No. 10), which gave them

Insider's Guide To the International Criminal Tribunal for The Former Yugoslavia, 37-38. See Lippman, *supra* note 4, at 28.

²⁶ Michael P. Scharf, ICC Jurisdiction over Nationals, in *The United States and the International Criminal Court*, 222 (Sarah B. Sewall & Carl Kaysen eds; Rowman & Littlefield Publishers, Inc. 2000)

²⁷ “Historical Survey of the Question of International Criminal Jurisdiction: Memorandum Submitted by the Secretary General,” U.N. Doc. A/CN.4/7/Rev.1, U.N. Sales No. 1949.V.8 (1949), 16. See 22 Trial of the Major War criminals before the International Criminal Tribunal, 461, 466 (Lake Success, N.Y.: United Nations, 1949). See Sewall & Kaysen eds., *supra* note 26, at 34

²⁸ Egon Schwelb “Crimes Against Humanity,” *British Yearbook of International Law* (1946), 178

²⁹ Hans Kelsen, *The Legal Status of Germany according to the Declaration of Berlin*, 93 *American Journal of International Law* 518, 524 (1945)

carte blanche to prosecute German nationals in their respective zones of occupation.³⁰ The legal predicate elicited by the Allies was that they were carrying out the functions of government in Germany. This Allied conception meant that the CCL No. 10 proceedings were part of the domestic law of Germany. The coexistence between the Nuremberg (international jurisdiction) and CCL 10 (national jurisdiction) Trials is the nearest that the Allies came to the issue of concurrent jurisdiction. However, the fiction of national proceedings was inverted when each of the four Allies set out its own system of justice in its zone of occupation, with all but the United States implementing law of a military nature.³¹

Contrary to the Nuremberg Tribunal, the legal foundation of the Tokyo Tribunal was established with the acquiescence of the Japanese Government that continued to exist after the war.³² John Pritchard, the foremost expert on the Tokyo Tribunal articulates this view:

The legitimacy of the Tokyo Tribunal, unlike its Nuremberg counterpart depended not only upon the number and variety of states that took part in the Trial but more crucially upon the express consent of the Japanese state to submit itself to the jurisdiction of such a court, relinquishing or at least sharing a degree or two of sovereignty in the process.³³

However, little probative value is accorded to the decisions of the Tokyo Tribunal for a number of reasons, amongst which is the perception that its proceedings were

³⁰ Allied Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council of Germany, No.3, Berlin, January 31, 1946, reprinted in Benjamin B. Ferencz, *An International Criminal Court: A Step Toward World Peace*, 488 (1980) (hereinafter CCL 10)

³¹ Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 200 (1992). See Bassiouni, *supra* note 2, 37-38

³² Sewall & Kaysen eds; *supra* note 26, at 224

³³ R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances, in the Tokyo Major War Crimes Trial*, xxxi, (R. John Pritchard, ed., 1998)

substantially unfair to many of the defendants.³⁴ Professor Cherif Bassiouni corroborates this when he says that General Douglas Mac Arthur in his capacity as Supreme Commander of the Allied Powers had a heavy hand in the proceedings of the Tokyo Tribunal.³⁵ In the words of one critic, the Tokyo example “is primarily relevant in considering what a credible international criminal justice system ought not to look like.”³⁶

The issue of concurrent jurisdiction was vaguely or remotely raised at the Nuremberg and Tokyo Trials. It is clear that the intention of the Allied Powers was to punish Nazi Germany for waging war and for committing the most egregious crimes ever witnessed by humanity. Thus, granting Germany concurrent jurisdiction over crimes committed by its nationals was not an issue for the Allied Powers. Britain initially favored the summary execution of the major Nazi war criminals like Hitler and Himmler on the premise that their “guilt was so black” that it “was beyond the scope of any judicial process.”³⁷ This justifies why Nuremberg has been criticized for its *ex post facto* applications of laws and for being justice of victors over the vanquished. Many felt after World War II that the Allies were applying one law to themselves and another to the defeated. Thus, the Roman law maxim *quod licet jovi non licet bovi* was not respected.³⁸

The Soviet Union used the Tribunal to rewrite history when they prosecuted Germans for crimes that the Soviets were responsible, like the disappearance of

³⁴ Leila Nadya Sadat, *The Evolution Of the ICC: From The Hague To Rome and Back Again*, in Sewall & Kaysen eds., *supra* note 26, at 34

³⁵ Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish A Permanent International Criminal Court*, 10 Harv. Hum. Rts. J. 11, 31-37 (1997)

³⁶ Sewall & Kaysen eds., *supra* note 26, at 34

³⁷ Telford Taylor, *The Anatomy of the Nuremberg Trials*, 17 (1992).

³⁸ The maxim means “what is lawful for victors is not unlawful for the vanquished.”

approximately 15,000 Polish prisoners and 8300 Polish officers in Katyn Forest.³⁹ A defining example of this trend was the imposition of individual criminal liability on the Nazis. The justification by United States Justice Robert H. Jackson for this was tenuous under international law.⁴⁰ To emphasize the fact that the Allies were acting from a position of authority, Jackson reminded the conferees that “there is greater liberty in us to declare the principles as we see them now.”⁴¹ Professor Andre Gros of France elicited the view that even though German aggression was an international crime, it did not justify individual criminal liability on the Germans. In his view, the imposition of such liability would be “morally and politically desirable but...it is not international law.”⁴²

Even if Nuremberg bequeathed a cloudy legal legacy, its moral value is compelling. This was confirmed when the United Nations General Assembly on December 11, 1946, unanimously affirmed the “principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal,”⁴³ thereby “codifying the jurisdictional right of all states to prosecute the offenses addressed by the IMT (Nuremberg Tribunal),” namely war crimes, crimes against humanity, genocide and the crime of aggression.⁴⁴ These have become part and parcel of the corpus of customary international law as expressed in the practice of States and requisite *opinio juris*.

³⁹ J.K. Zawodny, *Death In The Forest: The Story Of The Katyn Forest Massacre*, at 5 (1962), See Bassiouni, *supra* note 35, at 24

⁴⁰ Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, at 295, 297. His notes provide the only contemporaneous record of the proceedings (hereinafter the Jackson Report). See Bassiouni, *supra* note 35, at 22 (excerpts of the Jackson Report)

⁴¹ Lippman, *supra* note 16, 22

⁴² *Id.* at 23-24

⁴³ G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946). See Sewall & Kaysen eds., *supra* note 26, at 219

⁴⁴ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Review 785, 786 (1988)

CHAPTER 2

AD HOC INTERNATIONAL CRIMINAL TRIBUNALS AND PRIMACY

A – CREATION OF AD HOC TRIBUNALS

1 – Legal bases for the creation of the ad hoc Tribunals

In a precedent setting venture, the United Nations Security Council (hereinafter UNSC) acting under its Charter conferred Chapter VII powers and with a vision for justice, created ad hoc International Criminal Tribunals for former Yugoslavia (hereinafter ICTY)⁴⁵ and Rwanda (hereinafter ICTR).⁴⁶ Professor Cherif Bassiouni holds that within the period from 1919 to 1994:

There were five ad hoc international investigation commissions, four ad hoc international criminal tribunals, and three internationally mandated or authorized national prosecutions arising out of World War I and World War II. These processes were established by different legal means with varying mandates, many of them producing results contrary to those originally contemplated.⁴⁷

After determining that the atrocities unraveling in the former Yugoslavia and Rwanda constituted a threat to international peace and security, pursuant to Article 39 of the United Nations Charter, the UNSC clearly expressed the view that the establishment

⁴⁵ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law in the Territory of the Former Yugoslavia since 1991, was created on May 25, 1993, by UNSC Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Session, 3217th mtg., U.N. Doc. S/RES/827(1993), reprinted in 32 I.L.M. 1203 (1993) (hereinafter the ICTY Statute)

⁴⁶ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian law committed in the Territory of Rwanda, created on November 8, 1994, by Security Council Resolution 955. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd Mtg., U.N. Doc. S/RES/955(1994), reprinted in 33 I.L.M. 1598 (1994) (hereinafter the ICTR Statute)

⁴⁷ Bassiouni, supra note 35, 11

of ad hoc tribunals would lead to the prosecution of those responsible for egregious crimes and also contribute to the restoration of international peace and security.⁴⁸

Since the establishment of an international criminal jurisdiction can be achieved only with the benediction of states that are expected to relinquish part of their sovereignty, the question arose as to whether these ad hoc Tribunals and their Statutes should be established by a multilateral treaty or via a U.N. Security Council fiat.⁴⁹ In the case of the former Yugoslavia the argument was made that:

The treaty approach had several disadvantages in terms of the time required for the elaboration, negotiation and conclusion of a treaty in a multilateral forum, the additional time required to attain the necessary ratifications for its entry into force and, in particular, the absence of any guarantee that the States concerned whose participation would be essential to the effectiveness of the Tribunal would become parties to the treaty.⁵⁰

The other alternative was establishing the tribunals via the UNSC acting under Chapter VII of the Charter. Two advantages enunciated by proponents of this option were that “it would provide an expeditious method for establishing the tribunal because the Security Council would act relatively quickly” and also that, the “Security Council’s decision to establish the tribunal...would be effective immediately and would create binding obligations for all States.”⁵¹

The legal bases for the creation of the ad hoc tribunals can be traced in the United Nations Charter. The UNSC can create subsidiary organs as provided in Article 29 of the Charter, pursuant to Chapter VII edicts dealing with the maintenance of international

⁴⁸ U.N. Charter, Art. 39

⁴⁹ Morris & Scharf, *supra* note 12, at 40

⁵⁰ *Id.*

⁵¹ *Id.*, *See* U.N. Charter, Arts. 2 (6) & 25

peace and security.⁵² Article 41 of the Charter is the *wade mecum* on which the legal authority to create the tribunals is derived and it provides that the “Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions.” It goes forth to give a non-exhaustive list of such measures amongst which the creation of an international tribunal is not expressly mentioned, but neither is it excluded.⁵³ Supporters of the UNSC find solace in the argument that the foundations of the tribunals are not different from that of a treaty. To them, while the ICTY and ICTR were established pursuant to UNSC Chapter VII resolutions, the underlying authority for the Council’s action was the U.N. Charter, which is a constitutive treaty.⁵⁴ Coupled to this is the fact that almost all countries on earth, and all U.N. members are parties to the U.N. Charter, “thus it could be argued that the ICTY and ICTR exercise jurisdiction over nationals of countries with their implied consent by virtue of their obligations as U.N. Members.”⁵⁵

As can be expected in such situations that impinge on the sovereign rights of states in international law, there were challenges to the legal bases for the establishment of the ad hoc tribunals. These challenges are pertinent because they hinge on the momentous issues of primacy, states’ compliance with the orders of the tribunals and the effectiveness of concurrent jurisdiction between the ad hoc tribunals and national jurisdictions, as shall be seen in the next chapter. The Federal Republic of Yugoslavia (Serbia and Montenegro) promptly challenged the Security Council’s authority to

⁵² Id., See U.N. Charter, Art. 29

⁵³ Id., See U.N. Charter, Art 41 provides that: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include (emphasis added) complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

⁵⁴ Sewall & Kaysen eds., *supra* note 26, at 225

⁵⁵ Id.

establish the ICTY.⁵⁶ She particularly questioned whether the UNSC could establish the tribunal as a subsidiary organ under Article 29 of the Charter, expressing the view that “no independent tribunal, particularly an international tribunal, can be a subsidiary organ of any body, including the Security Council.”⁵⁷

The legality of the establishment of the ICTY was again challenged in a pre-trial motion brought before the ICTY by the defense counsel for Dusko Tadic.⁵⁸ Concurring with the argument of the Prosecutor that the ICTY “is not a constitutional court set up to scrutinize the actions of organs of the United Nations,” but “a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction,” the Trial Chamber held that the question was “pre-eminently a matter for the Security Council and for it alone and no judicial body.”⁵⁹

The Appeals Chamber in an interlocutory appeal brought by the defense, took issue with Trial Chamber’s decision. It found instead that its inherent ‘incidental’ power to determine the validity of its own jurisdiction gives it leeway to review the legality of the establishment of the ICTY by the UNSC.⁶⁰ This inherent jurisdiction is better known by the phrase *la competence de la competence*.⁶¹ This is an important component of the judicial fabric of a court and does not need to be expressly provided for in the Statutes and Rules of Procedure and Evidence. The decision of the Appeals Chamber to confirm the legality of its establishment had some practical results. It precluded Tadic’s attorneys from raising the matter again during his trial and pre-empted further challenges to the

⁵⁶ Letter dated 19 May 1993 from the Charge d’affaires of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General, U.N.Doc. A/48/170-S/25801

⁵⁷ Id., at 3. See Morris & Scharf, *supra* note 12, at 47

⁵⁸ Prosecutor v. Tadic, Case IT-94-I-T, (Aug., 1995). See Michael P. Scharf, *Balkan Justice*, at 103-104 (1997)

⁵⁹ Prosecutor v. Tadic, Case IT-94-I-T, Decision on Jurisdiction, at 11 (Aug 10, 1995)

⁶⁰ Prosecutor v. Tadic, Case IT-94-I-T-AR72, 8-10 (Oct. 2, 1995). See Scharf, *id.* at 104

⁶¹ French phrase relating to a court’s “jurisdiction to determine its own jurisdiction.”

Tribunal's legitimacy by other defendants and national authorities who could bring up such challenges in domestic courts, in order to resist compliance with the Tribunal's orders to surrender and defer an accused person.⁶²

2 – Concurrent jurisdiction of the ad hoc international tribunals and national courts: The Primacy of the international tribunals

Three general principles govern the relationship between the ad hoc international tribunals and national authorities. They include the following: primacy of the Tribunals over national courts; *non-bis in idem* or the double jeopardy rule; and cooperation and judicial assistance between states and the tribunals.⁶³ The last two principles shall be discussed later on in this paper.

While the Statutes of the ICTY⁶⁴ and ICTR⁶⁵ provide for concurrent jurisdiction with national courts, they at the same time unequivocally resolve the jurisdictional conflict by bestowing the international tribunals with primacy or priority jurisdiction. The provisions on primacy in the Statutes are majestic in their sweep and they provide that the "International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the ...Statute and the Rules of procedure and Evidence."⁶⁶ In the words of Bartram S. Brown, this

⁶² Scharf, *supra* note 58, at 104-105

⁶³ See Frederik Harhof, *supra* note 10, at 574

⁶⁴ Art.9 (1) of the ICTY Statute

⁶⁵ Art.8 (1) of the ICTR Statute

⁶⁶ Arts.9 (2) of the ICTY and 8(2) of the ICTR Statutes (Their provisions are similar but with slight variation. The ICTR grants "primacy over national courts," while that of the ICTY grants "primacy over national courts of all states" respectively)

“arrangement represents the high water mark for the priority of international criminal tribunals over national courts.”⁶⁷

Primacy gives the international tribunals the authority to trump, supersede or preempt a national court in a given case, where both can equally exercise jurisdiction. It indeed impinges on states’ sovereign prerogatives to exercise their criminal jurisdiction by requiring them to defer to an international criminal court.⁶⁸ However, primacy does not preclude states or national courts from exercising jurisdiction. A State shall indeed be encouraged to proceed with the investigation and prosecution of a case when there is no reason to doubt that the investigation by the national authorities will be thorough, prompt and impartial and the trial will be conducted by a competent, independent, and impartial tribunal established by law.

It is worth noting that primacy was established by the Security Council in response to specific threats to international peace and security, thus it is binding on all U.N. members. Former Prosecutor for the ad hoc international Tribunals, Justice Louise Arbour, lends credence to the above by saying that the “four international criminal tribunals established this century were each granted primacy over the concurrent jurisdiction of national courts and established by mandatory force”⁶⁹

Concordant with Articles 9 para.2 of the ICTY and 8 para.2 of the ICTR Statutes, the assertion or invocation of primacy has to be in accordance with the Statutes and the Rules of Procedure and Evidence (hereinafter RPE).⁷⁰ In view of the unprecedented

⁶⁷ Brown, *supra* note 1, at 385

⁶⁸ Id., at 386. See Morris & Scharf, *supra* note 12, at 126-127

⁶⁹ Justice Louise Arbour, The Need for an Independent and Effective prosecutor in the Permanent International Criminal Court, 17 Windsor Y.B. Access Just. 207, 214

⁷⁰ ICTY RPE, U.N. Doc IT/323/Rev.10 (1996), ICTR, RPE, U.N. Doc. IT/3/Rev.9 (1996)(revised)

character of primacy, the establishment of a uniform criterion and the procedures to be followed for the assertion of primacy was of primary importance.

3 – Primacy and deferrals under RPE: Conflict with *non-bis in idem* principle

The Rules of Procedure and Evidence are critical to the very survival of the Tribunals because their Statutes do not provide ample information on the investigation, trial and appeals processes.⁷¹ Article 15 of the ICTY Statute endows the Judges with the task of adopting the RPE.⁷² The Statutes do not set forth a mechanism for the operation or application of primacy, but leaves this for the RPE. Rules 8 through 13 enunciate the primacy of the Tribunals over national jurisdictions and also provide the process by which the Tribunals may assert primacy.⁷³ With regard to this, Virginia Morris and Michael Scharf hold that:

In terms of the relevant criteria, the International Tribunal may consider asserting its primacy over those cases that would facilitate or ensure its effective functioning and the fulfillment of its mandate. The International Tribunal would have a legitimate interest in asserting its primacy, rather than having the case decided by a national court, if the alleged criminal conduct involved factual or legal issues that may have significant implications in terms of investigation, prosecution or adjudication of other cases as well.⁷⁴

Rule 9 of the RPE articulates the three bases for the Prosecutor to invoke and ask the Trial Chamber to issue a formal request for deferral of a case from the national court originally seized of the matter.⁷⁵ A deferral expands the concept of primacy and if such a

⁷¹ Scharf, *supra* note 58, at 62- 63

⁷² The RPE are reproduced in Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Tribunal for Former Yugoslavia*, 39-87, (vol.2 1995),)

⁷³ Brown, *supra* note 1, at 396

⁷⁴ See Morris & Scharf, *supra* note 12, 129

⁷⁵ Rule 9: Request for Deferral

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the national courts of any State:

request is granted, the Office of the Prosecutor incorporates the investigations from the national authorities into its investigation, and the persons under investigation become subject to prosecution solely before the international Tribunal.⁷⁶

Rule 9 (iii) is a defining example of the primacy of the Tribunals over national courts. While Rule 9 (i) and (ii) justify deferral on the basis that the national proceedings are deficient, Rule 9 (iii) empowers the Tribunals' Prosecutor to ask for a deferral solely because the national trial overlaps with an investigation or prosecution by the Tribunals. In the words of one writer, "the Tribunal can assert its primacy in virtually any situation, not merely when it will remedy specific problems with an ongoing national proceeding. This distinguishes the primacy of the ad hoc Tribunals from the lesser complementarity jurisdiction" for a permanent ICC.⁷⁷

However, the application of primacy via a deferral seems to conflict with the sacrosanct principle of *non-bis-in-idem* rule as provided in Articles 10 para.1 and 9 para.1 of the ICTY and ICTR Statutes respectively.⁷⁸ The *non-bis in idem* codifies the rule that no one can be tried twice for the same crime. (Art.20 (2) of Rome Statute provides for *ne bis in idem*, which is the same rule). However, Articles 10 para. 2 of the ICTY and 9 para.2 of the ICTR recognize that *non-bis-in-idem* may not apply in cases where the

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- (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
 - (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted ;or
 - (iii) what is in issue is closely related to ,or otherwise involves, significant factual or legal questions which may have implications for the investigations or prosecutions before the Tribunal,
- the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that the national court defer to the competence of the Tribunal.

See Brown, *supra* note 1,396. See Morris & Scharf, *supra* note 12,130

⁷⁶ Brown, *id.* at 436 n.52 (1998)

⁷⁷ *Id.* at 396

⁷⁸ Arts.10 (1) and 9(1) of ICTY & ICTR Statutes provide that:

No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute for which he or she has already been tried by the International Tribunal

proceedings before a national court are “characterized as an ordinary crime,” and when the national trial was a sham “designed to shield the accused from international criminal responsibility.” These two grounds are also incorporated into the Tribunal’s Rule 9 as grounds for requesting deferrals from national courts to the International Tribunals.⁷⁹

Article 25 of the ICTY Statute, permits the Prosecutor of the International Tribunal to appeal an acquittal.⁸⁰ This indeed may infringe the very fabric of *non-bis-in-idem* and the accused’s interest in finality, which underlies the American double jeopardy rule.⁸¹ Defense attorneys have indeed used the doctrine of double jeopardy to challenge the jurisdiction of the ICTY. Such was the issue in the Tadic Case,⁸² where the defense submitted a pre-trial motion asserting that the trial of Tadic before the ICTY will violate the principle of double jeopardy. The defense predicated on the contention that at the time of Tadic’s deferral or transfer to the ICTY from Germany, the proceedings against him in Germany had reached their “final phase.” Even though the Trial Chamber acknowledged that the German proceedings had passed their investigative phase when the German court issued an indictment against Tadic on November 3, 1994, it went forth to conclude that the rule of double jeopardy had not been disturbed because the defendant

⁷⁹ See Rule 9(i) & (ii), *supra* note 62

⁸⁰ Art. 25 of ICTY Statute, *See* Scharf, *supra* note 58, 72. *See* Brown, *supra* note 1, 396

⁸¹ The U.S. Constitution’s Fifth Amendment proscription against placing a person “twice in jeopardy” for “the same offence” may come into play at an earlier phase in the criminal proceeding. Jeopardy applies in a jury trial once the jury is “empanelled and sworn.” *See* *Crist v. Bretz*, 437 U.S. 28, 98(1978); in *Morris & Scharf*, *supra* note 13, at 133. Double jeopardy prohibits prosecution appeals of acquittals. The rationale for the rule is two fold: (i) that the trial itself is a great ordeal, and once the defendant has been acquitted, the ordeal must end. *See* *United States v. Ball*, 163 U.S. 662, 669(1896) (ii) that the increased risk of an erroneous conviction that may occur in the state, with its superior resources, were allowed to retry an individual until it finally obtained a conviction. *See* *United States v. DiFrancesco*, 449 U.S. 117, 130(180); *See* Scharf, *id.* at 72

⁸² Decision on the defense Motion on the Principle of *Non-bis-in-idem*, *The Prosecutor v. Dusko Tadic*, IT-94-1-T (Nov. 14, 1995)

“had not been tried in the full sense, that is, he was neither convicted nor acquitted by the German court.”⁸³

B- PRIMACY IN PRACTICE

1 – Is primacy a theoretical or practical concept?

That primacy as provided in the Statutes and RPE impinges on a state's prerogative to exercise its criminal jurisdiction within its territory is not in contention. Indeed, primacy pierces the veil of state sovereignty by requiring states to defer to the jurisdiction of an international judicial institution even though the state has potent bases to claim or exercise jurisdiction. This raises the question whether primacy is just a theoretical or practical concept. This question is pertinent because states are very jealous of their sovereignty and are reticent to relinquish this power.

That said, the jurisdiction of the ad hoc Tribunals trump those of national courts despite the fact that the latter has both custody of a person accused of *delicti jus gentium*, and concurrent jurisdiction to prosecute and punish.⁸⁴ This was a matter for concern when the Prosecutor made an application for deferral of Dusko Tadic to the ICTY by Germany where the accused was being held. The Judges of the ICTY were concerned about the Tribunal exercising primacy over a low profile defendant like Tadic, when the German Government could prosecute the case effectively, fairly and vigorously.⁸⁵ The erstwhile Prosecutor for the ad hoc Tribunals, Judge Richard Goldstone, responded to the Judges' concern claiming, “in principle, we have encouraged, and we do encourage, national

⁸³ Id. at 4-5. See Scharf, *supra* note 58, at 107

⁸⁴ Brown, *supra* note 1, 395

⁸⁵ See Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Dusko Tadic, Case No. IT-94-1-Dnov. 8, 1994. See also Scharf, *supra* note 58, 100

courts both within the Former Yugoslavia and elsewhere to conduct trials.”⁸⁶ However, the Prosecutor added that the “Tadic case relates to an important investigation which was in any event under way in the Prosecutor’s office.”⁸⁷ This is a reflection of the rationale in Rule 9 of the RPE, which is to the effect that the Prosecutor of the Tribunal could ask for deferral if the issue before the national court is closely related to “significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal.”⁸⁸

Since the Tribunals were created by UNSC fiat, States are obliged to comply with requests for deferrals to the Tribunals. However, this is easier said than done. States usually transplant international obligations to their internal laws by virtue of implementing legislations passed by their respective Parliaments. Several states have enacted local legislation permitting them to transfer indictees found on their territory to the Tribunals. However, the request for deferrals as provided in the Statutes and RPE need not go through this tortuous legislative paths. While appearing as *amicus curiae*⁸⁹ before the ICTY, Germany accepted the primacy of the Tribunal, but also acknowledged that she was not in a position to surrender Dusko Tadic because the necessary legislation had not been passed.⁹⁰ This excuse incensed the ICTY judges who reminded the German Government of the long established principle in international law that “a State cannot avoid compliance with its international obligations by invoking its municipal law.”⁹¹

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ See supra note 63, Rule 9(iii)

⁸⁹ Amicus curiae means friend of the court.

⁹⁰ Scharf, supra note 58, 99

⁹¹ Id., See also Art. 27 of Vienna Convention on the Law of Treaties

This shows how difficult it is to implement primacy than it catches the eye when one reads the sweeping primacy provisions in the Statutes.

Thus, the Tribunals have been compelled to justify their assertion of primacy jurisdiction, notwithstanding the provisions of the Statutes. In its rendition on a pre-trial motion on jurisdiction brought by the defendant Dusko Tadic, the ICTY held that allowing concurrent jurisdiction without granting primacy to the Tribunal would, in effect, permit the accused “to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction.”⁹² This “forum shopping” would indeed allow the accused to chose and pick a sympathetic court, which could result in a sham, bogus or biased trial.⁹³

Other justifications for the sweeping primacy of the international Tribunals were enunciated in a high profile case before the ICTY.⁹⁴ In the Prosecutor’s request for the deferral of Radovan Karadzic to the ICTY, the first reason given for primacy over national courts was that it would prevent multiple courts from simultaneously exercising jurisdiction over an accused. If these national courts were allowed to prosecute the case, this could cause evidentiary problems resulting from different investigative procedures employed in each of their judicial systems.⁹⁵ The second justification for primacy was the danger of evidence being destroyed or damaged if it were produced in more that one trial.⁹⁶ The third reason elicited was that the antagonism among the Croats, Serbs, and Muslims was so intense that if a court dominated by one of the these groups were to

⁹² Prosecutor v. Tadic, Case IT-94-I-T,41(Aug.10, 1995).See also Bartram,supra note 49,398

⁹³ Brown, *supra* note 1,398

⁹⁴ Prosecutor v. Karadzic,Case IT-95-5-D (ICTY May,15,1995)(Request for deferral)

⁹⁵ Id. at 24. See Brown,supra note 1,396

⁹⁶ Id. at 28

prosecute an accused of a different ethnic extraction, the national proceedings would not appear to be independent and fair.⁹⁷

Even though the ad hoc Tribunals have primacy over states, their jurisdiction is still concurrent, not exclusive.⁹⁸ In relative anonymity, States have been exercising concurrent jurisdiction vis a vis the much publicized trials at the international Tribunals. This was the case when Germany prosecuted Novislav Djajic and Nikola Jorgic for war crimes committed in the Balkans.⁹⁹ While explaining her role in the arrest of the defendants, the ICTY Prosecutor held that:

The... cases were initiated and investigated by the German authorities, who consulted with the Office of the Prosecutor of the International Tribunal. The Prosecutor assessed that it was not appropriate to seek a deferral of these cases, and the decision was made that they continue to be prosecuted by the German authorities. There is on-going cooperation between the Prosecutor and the German authorities on these and other cases.¹⁰⁰

Other European nations have tried alleged Yugoslav war criminals in exercise of their concurrent jurisdiction with the international Tribunals. Such was the case of Dusko Cvjetkovic, a Bosnian Serb who was prosecuted and acquitted by Austria of the murder of civilians at Kucice.¹⁰¹ Denmark also prosecuted Refic Saric, a Muslim who allegedly inflicted abuses on his fellow prisoners and was acquitted on the basis of insanity.¹⁰²

⁹⁷ See Proposal for an International War Crimes Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., U.N. Doc. S/25307(1993). See also Bartram, *supra* note 49, 398

⁹⁸ Sean D. Murphy, *Developments In International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, at 65, 93 A.J.I.L. 57(1999)

⁹⁹ *The Prosecutor v. Djajic* (Sup. Ct. Bavaria, 3d Strafsenat, May 23, 1997) See Sean Murphy, *supra* note 98, 65

¹⁰⁰ Justice Louise Arbour's Statements Regarding War Crimes Related Trials Currently Underway in Germany, ICTY Doc. CC/PIO/171-E (Mar. 19, 1997)

¹⁰¹ Iain Guest, *On Trial: The United Nations, War Crimes, and the Former Yugoslavia*, 178(1995)

¹⁰² *Id.*, See Scharf, *supra* note 58, 101

Rwanda has also prosecuted Froduald Karamira who was extradited from Ethiopia and sentenced to death, even though the ICTR had an interest in prosecuting the defendant.¹⁰³

In another pre-trial motion contesting the primacy of the Tribunal, Dusko Tadic's lawyers raised the argument that the ICTY could not lawfully order Germany to defer the prosecution of the defendant to the Tribunal because this impinged on the sovereign right and power wielded by U.N. members to prosecute and adjudicate in their national courts.¹⁰⁴ The Trial Chamber held that Germany and not Tadic had the *locus standi* to raise the issue of violation of state sovereignty.¹⁰⁵ Relying on a number of precedents, amongst which is the one established by the Israeli Court in the Eichmann Trial,¹⁰⁶ the Trial Chamber rejected the defendant's sovereignty plea. The Appeals Chamber concluded otherwise and considered the merits of Tadic's contention.¹⁰⁷ However, the appellate Chamber ruled that borders "should not be considered as a shield against the reach of the law and as a protection for those who trample the most elementary rights of humanity."¹⁰⁸ It went forth to hold that the argument of state sovereignty would not pass muster where the nature of the alleged crimes shocked the conscience of humanity as a whole.¹⁰⁹ The advent of the human rights revolution has led to the slow but steady erosion of the once unassailable concept of sovereignty. The principle of State sovereignty is sacrosanct in the U.N. Charter and is encapsulated in Article 2 paragraph

¹⁰³ Madeline Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 *Duke J. Comp. & Int'l L.* 349,363(1997). See also "Death Sentence in Genocide," *N.Y. Times*, at 6(Feb.15,1997)

¹⁰⁴ Scharf, *supra* note 58,106. See also Brown, *supra* note 1,404

¹⁰⁵ Scharf, *id.* at 106

¹⁰⁶ *The Attorney-General v. Adolf Eichmann*, Decision No. 336/61, May 21, 1962, in Peter Papadatos, *The Eichmann Trial* (1978); The District Court of Jerusalem held that : "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State."

¹⁰⁷ *Prosecutor v. Tadic*, Case No. IT-94-I-AR72 (Oct.2,1995)

¹⁰⁸ *Prosecutor v. Tadic*, Case IT-94-I-AR72,31-32 (Oct.2,1995)

¹⁰⁹ *Prosecutor v. Tadic*, Case IT-94-I-AR 72,31-32 (Oct.2, 1995)

7.¹¹⁰ However, the second part of this provision restricts sovereignty by asserting that “this principle shall not prejudice the application of enforcement measures under Chapter VII.” This attests to the fact that the argument of sovereignty is vitiated when the interests of the international community are in peril. Indeed, the appellate body of the ICTY asserted in its judgment that primacy was a functional necessity for an international criminal tribunal.¹¹¹

The primacy of the ICTR was also challenged in a case brought before its Trial Chamber.¹¹² While taking cognizance of the fact that some of the issues raised in the Kanyabashi Case had also been raised in the Tadic case, the Trial Chamber ascertained “that, in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence and in the interests of justice, the Defense Counsel’s motion deserves a hearing and full consideration.”¹¹³ Amongst the objections of the defense is one that implicitly challenged the primacy of the ICTR by contending that its creation violated the principle of *jus de non evocando*. This is a notion derived from constitutional law in civil jurisdictions, and it elicits that a defendant retains the right to be tried by the regular domestic criminal courts rather than by political courts, created on an ad hoc basis that cannot guarantee a fair trial in times of emergency.¹¹⁴ The Trial Chamber rejected this contention when it opined that the “Tribunal is far from being an institution designed for the purpose of removing, for political reasons, certain offenders

¹¹⁰ Art.2 (7) of the Charter provides that: “Nothing contained in the Present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State...”

¹¹¹ Brown, *supra* note 1,404

¹¹² Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T (June 18, 1997)

¹¹³ *Id.*,

¹¹⁴ For lucid reading See Virginia Morris, International Decision: Prosecutor v. Kanyabashi, Decision on Jurisdiction, Case No. ICTR-96-15-T (Jun. 18, 1997), 92 A.J.I.L. 66(1998)

from fair and impartial justice and have them prosecuted for political crimes before prejudiced arbitrators.”¹¹⁵

Primacy of the international Tribunals was affirmed in another case before the ICTR.¹¹⁶ The defendant, Colonel Theoneste Bagosora, alleged to be the military brain behind the Rwandan genocide was arrested in the Republic of Cameroon. The Kingdom of Belgium requested for Bagosora’s extradition in order for him to stand trial in connection with the lynching of 10 Belgian paratroopers who were part of the United Nations Assistance Mission in Rwanda (hereinafter UNAMIR). The Rwandan Government also wanted the extradition of one of the brains behind the genocide in order to have a visible demonstration that justice was being done in the country. They felt that this was important to the peace and reconciliation process. However, the ICTR on the basis of its primacy, asserted jurisdiction over national courts and is now prosecuting the case.¹¹⁷

2 – Restricting the concept of primacy: Interpretations by some members of the Security Council

The far-reaching effects of primacy incited some states in the Security Council to make interpretive statements on what they understood by the concept. There was a sense of urgency in the Security Council when the Secretary General’s Report containing a draft Statute for the ICTY was presented, thus leaving very little time for review before

¹¹⁵ See *Prosecutor v Kanyabashi*, at 8

¹¹⁶ *Prosecutor v. Theoneste Bagosora*, No. ICTR-96-7-1

¹¹⁷ *War Crimes Tribunals: The Record And The Prospects: The Rwanda Tribunal and its Relationship to National Courts*, 13 *Am. U. Int’l L. Rev.* 1469(1998)(See presentation on ‘Concurrent jurisdiction held by ICTR and Local Rwandan Courts’ by ICTR Judge, the Honorable Navanathem Pillay). See Richard J. Goldstone, *For Humanity*, at 112-113 (2000)

adoption by the Security Council.¹¹⁸ Some permanent members of the Security Council thought it was necessary for them to make interpretive statements to some of the provisions whose scope and clarity were in contention.¹¹⁹ Primacy was one of those provisions and the United States, Britain, Russia and France (hereinafter the Big Four) made renditions on the scope and meaning of primacy as they saw it. This was indeed an attempt to restrict the notion of primacy. These four nations suggested that the Tribunal's primacy under Article 9 para.2 of the ICTY Statute should be restricted to cases in Article 10 para. 2, when national courts are impartial, not independent, and where the national proceedings are a sham designed to shield the accused from international criminal responsibility.¹²⁰ However, Rule 9 (iii) unequivocally rejects the purported nexus between Articles 9 (2) and 10 (2).¹²¹

A précis of the interpretations by the Big Four articulates the need for the concept of primacy to be carefully circumscribed in the view of these nations. The United Kingdom was of the opinion that primacy was to be interpreted as relating, "primarily to the courts in the territory of the former Yugoslavia; elsewhere it will only be in the kinds of exceptional circumstances outlined in Article 10,para. 2."¹²² These countries' concern

¹¹⁸ Scharf, *supra* note 58,60-63

¹¹⁹ See Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. Doc. S/PV. 3217.(1993)(hereinafter Statements from the Provisional Verbatim Record) See Scharf,*supra* note 58,60-63. See Morris & Scharf,*supra* note 12,127. See Brown,*supra* note 1,398-399

¹²⁰ See U.N. Doc. S/PV.3217

¹²¹ See Rule 9(iii)

¹²² See U.N. Doc. S/PV.3217 Statements from the Provisional Verbatim Reports,*supra* note 97, at 18(United Kingdom statement.).

France was emphatic that the "Tribunal may intervene at any stage of the procedure and assert its primacy,including from the stage of investigations where appropriate, in the conditions covered under Article 10 paragraph 2," Id. at 11

The United States held that "it is understood that the primacy of the International Tribunal referred to in paragraph 2 of Article 9 only refers to the situations referred to in Article 10." Id.at 16

Russia stated that the duty to "give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court" is "not a duty automatically to refer the proceedings to the Tribunal on such a matter.A refusal to refer the case naturally has to be justified." Id.at 46

was to “avoid an arbitrary assertion of primacy or an unnecessary encroachment upon the sovereignty of a State in the exercise of its criminal jurisdiction;”¹²³ to ensure that national courts were uniformly treated in conformity with the principle of sovereign equality,¹²⁴ and to ease coordination with the national courts by providing clear guidance as to procedures to be followed by the ICTY.¹²⁵

The question can be asked about the probative value of these interpretive statements with regard to their effect on the jurisprudence of the international Tribunals on primacy. Michael P. Scharf, an active participant in this venture on behalf of the United States was skeptical about the fact that “the four interpretive statements were not worded identically and, in fact could be read quite differently.”¹²⁶ In addition to this, attempts by the Big Four to codify the interpretive statements into the Tribunal’s Rules of Procedure and Evidence were rejected by the ICTY Judges.¹²⁷ That said, the International Tribunal has already acknowledged that it would consider renditions by Security Council members to be “authoritative interpretations” if they were uncontested at the time they were made.¹²⁸ Another problem is that only four out of fifteen members of the Security Council made interpretive statements.¹²⁹ Decisions in the Council must garner affirmative votes from seven of the fifteen members, subject to the veto of any permanent member.¹³⁰

However, developments surrounding the creation of the ad hoc International Criminal Tribunal for Rwanda attest to the fact that primacy of the Tribunals remain potent and broad based inspite of attempts by the Big Four to restrict its ambit. The

¹²³ Morris & Scharf, *supra* note 12,127

¹²⁴ *Id.*,

¹²⁵ *Id.*,

¹²⁶ Scharf, *supra* note 58,61

¹²⁷ *Id.* at 62

¹²⁸ Prosecutor v. Tadic, Case,IT-94-I,58 (ICTY Oct.2,1995) (Appeals Decision on Jurisdiction).

¹²⁹ Brown,*supra* note 1,401

¹³⁰ U.N. Charter,Art.27

Statutes of the ICTY and ICTR are similar but there is a major variation in their primacy clause.¹³¹ While the ICTR accords its “primacy over the national courts of all States,” the ICTY grants “primacy over national courts”¹³² The change in the ICTR’s primacy provision is testament to the stronger consensus on primacy that later developed within the Security Council.¹³³ The change also rejects the United Kingdom’s view that primacy only relates to national courts in the region of former Yugoslavia.

¹³¹ Brown, *supra* note 1,402

¹³² See Arts.9(2) of ICTY & 8(2) of ICTR, *supra* note 61

¹³³ Brown, *supra* note 1,402

CHAPTER 3

ENFORCEMENT OF PRIMACY

A - A CLOSER LOOK AT THE ICTY

1 – Primacy and the political will of states: Lack of enforcement

In an address to the U.N. General Assembly, Judge Antonio Cassese, former President of the International Criminal Tribunal for the former Yugoslavia had this to say:

The decisions, orders and requests of the International Tribunal can only be enforced by others, namely national authorities. Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants; it cannot seize evidentiary material, it cannot compel witnesses to give testimony, it cannot search the scenes where the crimes have been allegedly committed. For all these purposes, it must turn to State authorities and request them to take action.¹³⁴

The primacy of the ad hoc Tribunals confers a strong obligation on states to cooperate and comply with the Tribunals regarding the arrest and surrender of accused persons.¹³⁵

The ICTY Statute adds impetus to this mandatory edict by providing that States, “shall comply without undue delay” to any request for assistance by the Tribunal.¹³⁶ In the words of Frederik Harhof, these provisions appear to be “dramatically interventionist,

¹³⁴ U.N.Doc

¹³⁵ Harhof, *supra* note 10, 579

¹³⁶ Art. 29 of the ICTY Statute in Michael Scharf, *supra* note 58, 255 : Cooperation and Judicial assistance

- (1) States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
- (2) States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
 - (a) the identification and location of the person;
 - (b) the taking of testimony and production of evidence;
 - (c) the service of documentation;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

See also Art. 28 of the ICTR Statute, which has identical provisions.

making it more appropriate to characterize this part of the Tribunal's jurisdiction not as concurrent with, but superior to, the national jurisdiction of states."¹³⁷ Even though the Tribunal's approach to primacy has been less confrontational, Balkan States have found it easy enough to snub the Tribunal.¹³⁸

Despite the trend towards globalization and interdependence in the international arena, the concept of national sovereignty is still alive.¹³⁹ This assertion flies in the face when the international Tribunal tries to exercise its *in personam* jurisdiction over an accused person.¹⁴⁰ Less visible in the Tribunal's exercise of personal jurisdiction but momentous, is the issue of accessing evidence upon which to convict indictees.¹⁴¹ Coupled to this is the fact that the "harm that the Tribunals are designed, in part to address, is a harm that was perpetrated at the hands of the State either through its collusion or through its impotence."¹⁴² A defining example of state collusion via the destruction of evidence occurred at a site in Kosovo, where close to 150 Kosovo Albanians had been killed by Serbian troops on March 28, 1999,¹⁴³ and the war crimes Tribunal had listed the site as one of the counts for the indictment of Slobodan Milosevic. When a French forensic team arrived for an on site investigation, the bodies were no longer there. In a race to destroy evidence before any war crimes trial could take place, the Serbs had apparently been to the site first, dug up the grave and carried the

¹³⁷ Harhof, *supra* note 10, 580

¹³⁸ Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in Sewall & Kaysen eds., at 56

¹³⁹ David A. Nill, *National Sovereignty: Must It Be Sacrificed To The International Criminal Court?*, 14 *BYU J. Pub.L.* 119 (1999) (read generally)

¹⁴⁰ Art. 6 of the ICTY Statute provides: The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

¹⁴¹ Louise Arbour, *The Status of the International Criminal Tribunals from The Former Yugoslavia and Rwanda: Goals and Results*, 3 *Hofstra L. & Pol'y Symp.* 37, 38 (1999)

¹⁴² *Idem*

¹⁴³ John Kiffner, "Bodies Torn From A Grave Leave A Trail of Evidence," *New York Times*, at A8 (June 29, 1999)

bodies elsewhere.¹⁴⁴ This is the environment in which the Tribunals operate. Croatia, under late President Frandjo Tudjman¹⁴⁵ blatantly refused to respect a *subpoena duces tecum* of Croatian intelligence records pertinent to the trial of the Bosnian Croat General, Tihomir Blaskic.¹⁴⁶

To ensure the effective cooperation of states with the ICTY, the U.N. Security Council acting under its Charter conferred Chapter VII powers, made the following statement:

Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.¹⁴⁷

Figuring prominently amongst the international obligations and authorities to search and arrest war criminals within the former Yugoslavia is the Dayton Peace Accords of December 14, 1995.¹⁴⁸ Article IX of the Peace Accords acknowledged and reaffirmed “the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law”, while Article X of Annex I-A called on the Parties to “cooperate fully with the International Tribunal for the

¹⁴⁴ Id.,

¹⁴⁵ Goldstone, *supra* note 117, at 94 (Writing his memoir about the time spent as Prosecutor for ad hoc Tribunals, Judge Goldstone recounts how he avoided having a meeting and subsequent follow up photo with Frandjo Tudjman and Slobodan Milosevic while on a working visits to Croatia and Serbia respectively. This was because serious criminal allegations had been made against them and they had been the subjects of investigation by his office.)

¹⁴⁶ Prosecutor v. Tihomir Blaskic, Case No. IT-95-14 (1996)

¹⁴⁷ S.C. Res 827, *supra* note 32, at 2

¹⁴⁸ See The General Framework Agreement for Peace in Bosnia and Herzegovina, 50th Sess., Agenda Item 28, U.N. Doc. S/1995/999 (Dec. 14, 1995) (After more than 3 years of diplomatic efforts by the concert of nations and the Balkan Peace Talks held under the aegis of the U.S. in Dayton, Ohio, in November 1995. The Presidents attending were Alija Izetbegovic of Bosnia Herzegovina; Frandjo Tudjman of Croatia and Slobodan Milosevic of the Federal Republic of Yugoslavia.) (hereinafter the Dayton Peace Accords)

Former Yugoslavia.”¹⁴⁹ At the behest of the Parties, the U.N. Security Council established a multinational Implementation Force (hereinafter IFOR) to ensure compliance with the military aspects of the Dayton Peace Accords. IFOR was to operate under the aegis of the North Atlantic Treaty Organization (hereinafter NATO) chain of command. The Security Council resolution granted IFOR the authority to use military force to search and arrest persons indicted by the International Tribunal, should the parties not fully cooperate with the International Tribunal and fail to execute arrest warrants.¹⁵⁰

However, there is a big difference between the positive law of the United Nations and the practice, cooperation and compliance by States. The absence of an independent agency to enforce orders by the Tribunal gives States some leeway to act according to their whims and caprices vis a vis their obligations to cooperate. Matters get a bit complicated when the Government in power in a particular State is wholly or partly responsible for the alleged crimes against international law. This is the reason proffered by the former Prosecutor for the international Tribunals to describe the reluctance by states to respect their obligations under international law when she says that criminal leadership is flatly “uncooperative and obstructive, and that is on good days. On the international scene where some view the concept of state sovereignty as deserving of blind protection regardless of what it serves to hide, abusive and indeed criminal leadership often finds itself a bedfellow with convenience.”¹⁵¹

¹⁴⁹ Id. For a comprehensive discussion on this topic and international obligations to arrest war criminals, See Walter Gary Sharp, Sr., *International Obligations To Search For And Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 *Duke J. Comp & Int'l L.* 411-460

¹⁵⁰ S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. para. 4, U.N. Doc. S/RES/1031 (1995)

¹⁵¹ Justice Louise Arbour, *The Prosecution Of International Crimes*, 1 *Wash. J. Urb. & Contemp. L.* 13 (1999)

2 – The reaction of the Security Council

The ad hoc Tribunal for the former Yugoslavia is a judicial body created by the Security Council pursuant to its responsibilities under the U.N. Charter. This creates legally binding obligations on all U.N. Members. It is also within the ambit of the Security Council to enforce compliance of its resolutions, especially when there is a threat to international peace and security. This has not been the case with failure by states to cooperate with the ICTY. This indeed “sets a very dangerous precedent if the Council, to which the maintenance of peace has been entrusted, allows its orders to be flouted with impunity.”¹⁵²

A defining example of the shameful apathy and inaction by both the government of the Federal Republic of Yugoslavia (hereinafter FRY) and the international community represented by NATO, is the failure to arrest and transfer the Bosnian Serb leader Radovan Karadzic and his military counterpart General Ratko Mladic.¹⁵³ The warrants empowered IFOR to “act promptly with all due diligence to secure the arrest and transfer of Karadzic and Mladic to the Tribunal.”¹⁵⁴ Indeed the *raison d’être* of an international arrest warrant to all states is to overcome the failure of an individual state to give effect to the arrest warrant given to it.¹⁵⁵ If a Trial Chamber certifies that a state has

¹⁵² Benjamin B. Ferencz, *International Criminal Courts: The Legacy Of Nuremberg*, 10 *Pace Int’l L.* 203 (1998)

¹⁵³ International Arrest Warrant and Order for the Surrender, Case Nos. IT-95-5-R61 / IT-95-18-R61 (July 11, 1996)

¹⁵⁴ *Id.*,

¹⁵⁵ Sharp, *supra* note 149, at 448-449 (Rules 54-61 of RPE governs procedures for orders and warrants. There is a fine difference between an “arrest warrant” and an “international arrest warrant”. Pursuant to an indictment, the prosecutor may seek an arrest warrant pursuant to Rule 55 that is signed by a single judge and is only addressed to the “national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be...” Rule 56 re-emphasizes the obligation of states by requesting the “State to which a warrant of arrest ... is transmitted shall act promptly and with all due

failed to fulfill its obligations within the framework of an international arrest warrant, then such a failure will be reported to the Security Council, which can take the necessary enforcement measures to force the state to comply.¹⁵⁶

“How not to catch a war criminal,” is the captivating caption by one newspaper that recounts how some few months after the Dayton Accords were formally signed in Paris, NATO troops learned of the presence of indicted war criminal Ratko Mladic in a military complex they were scheduled to inspect and the troops decided to desist from arresting him.¹⁵⁷ There are also accounts of how NATO troops permitted Radovan Karadzic to pass unhindered via NATO checkpoints.¹⁵⁸

The Federal Republic of Yugoslavia and Republika Srpska have persistently refused to comply with orders for arrests and transfer of indictees to the ICTY, contending that they are constitutionally stymied from doing so.¹⁵⁹ Instances abound where the Serbian Government has defied the ICTY and there are no signs of this practice evaporating. The conflict in Kosovo gave the Serbian Government another opportunity for noncompliance with Security Council edicts.¹⁶⁰ The Hague Tribunal has jurisdiction over the heinous war crimes committed in Kosovo pursuant to three specific Security Council.¹⁶¹ Justice Louise Arbour wrote a letter to former Serbian president Slobodan Milosevic, requesting access to Kosovo for on-site investigations that are

diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute.” Rule 61 permits the Trial Chamber to issue an international warrant addressed to all states.)

¹⁵⁶ RPE 61(E)

¹⁵⁷ Colin Soloway & Stephen Hedges, “How Not to Catch a War Criminal,” U.S. News and World Report, at 63 (Dec. 9, 1996).

¹⁵⁸ Dean Murphy, “Bosnia Pact Reported on War Crimes,” Boston Globe, at 2 (Feb. 13, 1996)

¹⁵⁹ For more detail, see Hazel Fox, The Objections to the Transfer of Criminal Jurisdiction to the UN Tribunal, 46 Int’l & Comp. L. Q. 434 (1997). See also Sean Murphy, *supra* note 98, at 65. See Ferencz, *supra* note 152, 222

¹⁶⁰ Sewall & Kaysen eds., *supra* note 26, at 57

¹⁶¹ Id.

indispensable to the Tribunal's work. Arbour was granted a seven-day single entry visa and was admonished that she had no right to go to Kosovo, whilst much of her team were not granted visas.¹⁶² The most notorious incident was the macabre discovery at Racak, which spurred NATO to take action against Serbia. In January 1999, Arbour tried to gain access to Kosovo and the scene of the massacre, but was unceremoniously turned back by Belgrade.¹⁶³

This non-compliance with binding resolutions of the United Nations Security Council has been met with little action from the latter. Council has yet to take action to enforce primacy and by that token, its own authority is being directly challenged by rogue States. Such heel dragging and outright obstruction could be ominous for the future International Criminal Court, if allowed to prevail. This sends an unequivocal message to recalcitrant states that they can violate international law and Security Council resolutions with impunity. Such lethargy by the Security Council incited the then President of the ICTY, Judge Antonio Cassese, to give a one year ultimatum to Western states to arrest leaders indicted for war crimes in Bosnia, or he and his colleagues "will propose to the Security Council to close down the Tribunal because it is becoming an exercise in hypocrisy."¹⁶⁴

A former top official of the Organization for Security and Cooperation in Europe has in a clarion call asked IFOR to abandon its mantra of "monitor, but don't touch" for a robust "seek and detain" policy.¹⁶⁵ The justification proffered for the cautious approach by NATO, hinges on the fear that arresting the principal Serb indictees could shatter the

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ See Robert Marquand, Bosnia War Crime Judge Talks of Quitting, *Christian Science Monitor*, at 1 (Oct.22,1996). See also Walter Sharp, *supra* note 135,452

¹⁶⁵ James A.Goldstone, Crime Still Pays in Bosnia, *Wall St. J.*, at A20 (Nov26,1996)

fragile peace in the Balkans and lead to escalation.¹⁶⁶ This, alongside risks of human casualties on the side of NATO nations are legitimate fears. However, the search for an independent, fair and effective international system of criminal justice “must be safeguarded from the vagaries of realpolitik. Compromise is the art of politics, not of justice.”¹⁶⁷ The failure by the Security Council to enforce its own orders has incited one author to say :

This has created a deplorable gap between the theoretically binding nature of the Tribunal’s primacy and the de facto limitation of that primacy to cases of voluntary state cooperation. This lack of political support leaves the Tribunal unable to enforce even this most basic aspect of its jurisdiction—a fundamentally weak position by any standard.¹⁶⁸

This section of the paper depicts that the most important barriers to the creation of a viable and sustainable international criminal system are state sovereignty and lack of state cooperation. The lack of political will and the failure of the Security Council to enforce its own mandate could perpetuate these obstacles.

3 - Concurrent jurisdiction dilemma: The Case of Slobodan Milosevic

i – Background History

In an unprecedented move that constitutes a milestone in the movement towards the prosecution of alleged violators of international law, ICTY Prosecutor Justice Louise Arbour indicted the President of the Federal Republic of Yugoslavia, Slobodan Milosevic

¹⁶⁶ See Retiring NATO Commander Says Politics Helps Keep Bosnian War Criminals Free: Arrests Could Result in Serbian Unrest, Disrupted Elections, Baltimore Sun, at A13 (July 13,1996)

¹⁶⁷ Bassiouni, *supra* note 35,12-13

¹⁶⁸ Brown, *supra* note 1, at 411

and top officials of the FRY,¹⁶⁹ for egregious and heinous crimes committed in the name of ethnic cleansing against Kosovo Albanians.¹⁷⁰ The indictment that was confirmed by Judge Hunt, alleged amongst other issues that:

...these operations targeting Kosovo Albanians were undertaken with the objective of removing a substantial portion of the Kosovo Albanian population from Kosovo, in an effort to ensure continued Serbian control over the province. If these pleaded facts are accepted, they establish that the forces from the Federal Republic of Yugoslavia and Serbia persecuted the Kosovo Albanian civilian population on political, racial or religious grounds, and that there was both deportation and murder, constituting crimes against humanity and violations of the laws or customs of war.¹⁷¹

The Prosecutor had to establish a *prima facie* case against the accused persons in conformity with the Rules of Procedure and Evidence of the Tribunal.¹⁷² In providing the requisite causal link necessary for the indictment to pass muster before a Trial Chamber Judge, the Prosecutor established that Milosevic was both the President and Supreme Commander of the Armed Forces of the Republic of Yugoslavia. In addition to his power to implement the National Defense Plan, Milosevic's position in the chain of command, connected him to the alleged crimes.¹⁷³

The Milosevic case constitutes a litmus test for the legitimacy of the ICTY and its resolve to prosecute and punish war crimes. Eventhough the Statutes of the ad hoc tribunals talk about their primacy over national courts, states usually have their own agenda when it comes to implementing international law. "Sovereignty is frequently the

¹⁶⁹ The Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic & Vlatko Stojiljovic, Case No. IT-99-33, Decision on Review of Indictment And Application For Consequential Orders (May 27, 1999) (hereinafter *The Prosecutor v. Milosevic*)

¹⁷⁰ William Miller, Slobodan Milosevic's Prosecution By The International Criminal Tribunal For The Former Yugoslavia: A Harbinger Of Things To Come For International Criminal Justice, 22 *Loy. L.A. Int'l & Comp. L. Rev.* 553 (2000)

¹⁷¹ *Prosecutor v. Milosevic*, *supra* note 169, para.8

¹⁷² *Id.*

¹⁷³ See *supra* note 169, para 10(1)

justification for states to demand the non intervention of other states in matters they consider to be exclusively within their domestic jurisdiction.”¹⁷⁴ This assertion is relevant in the realm of concurrent jurisdiction, where the protagonists are states and an international tribunal. Primacy of the international tribunals notwithstanding, the crux of the matter is that “international law has not yet developed a comprehensive set of rules defining with reasonable precision all forms of jurisdiction that may be exercised by states and other international legal persons.”¹⁷⁵

As seen earlier on in this paper, it is no secret that Serbia is a persistent objector to the primacy of the ICTY over its national jurisdiction.¹⁷⁶ In addition, there is a very close link between politics and the implementation of international law by states, especially when the principal accused is a sitting Head of State as was the case with Milosevic. This makes the issue of political will very pertinent through out this discourse. Prior to Milosevic’s formal indictment, the Dayton Peace Accords whose objective was to quell the fighting and bring a long lasting peace to the Balkans was a bit complacent with the Serbian leader. Milosevic was granted de facto immunity in exchange of his signature on the Dayton Peace Accords. However, his military actions and the heinous crimes that ensued negated this immunity in the eyes of the international community. That said, he continued to rule with impunity as long as he did not venture out of the confines of the Federal Republic of Yugoslavia, and there was no enforcement agency to compel him to submit to the jurisdiction of the ICTY.

¹⁷⁴ Anne Bodley, Weakening the Principle of Sovereignty in International Law: The International Tribunal for the Former Yugoslavia, 30 N.J.U. J.Int’l L. & Pol. 417,421()

¹⁷⁵ Id. at 421

¹⁷⁶ See *supra* note 56

ii – The arrest and feasibility of a Milosevic deferral to the ICTY

Following turbulent presidential elections in Yugoslavia, Vojislav Kostunica defeated Slobodan Milosevic to become the new leader. Rumours abounded of the desire of the new regime to arrest and prosecute Milosevic for the crimes committed during his tenure at the helm of the Yugoslav nation. Events took a sudden turn for the worst and after a standoff with security forces, Milosevic voluntarily surrendered and was taken into custody at the Belgrade central prison.¹⁷⁷ Milosevic was indicted on ‘grounded suspicion’ that he “committed crimes with the intention of securing benefits for himself and a certain number of persons, to secure to his SPS party property and other benefits with the aim of preserving that political party in power.”¹⁷⁸

After the arrest of the once redoubtable dictator, expectations were very high in the international legal community of the imminent transfer or deferral of Milosevic to The Hague to stand trial for crimes against humanity as contained in the indictment issued by the Prosecutor of the ICTY.¹⁷⁹ However, Belgrade manifested little hurry in surrendering Milosevic to the ICTY. The Serbian Interior Minister, Dusan Mihajlovic succinctly said that Yugoslav citizens could not be amenable to extradition until a law was passed on cooperation with the war crimes Tribunal.¹⁸⁰ Russia, Serbia’s strongest ally and an erstwhile supporter of Milosevic, described the arrest as an exclusively internal matter for Yugoslavia.¹⁸¹ It is important to note that Serbs think the ICTY is

¹⁷⁷ Irena Guzelova & Staefan Wagstyl, “Serb Rulers Hope Arrest will Secure Support,” *Financial Times*, at 2 (Apr. 2, 2001)

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* note 169

¹⁸⁰ Stefan Wagstyl & Irena Guzelova, “West presses for Milosevic to face war tribunal,” *Financial Times*, at 1 (Apr. 2, 2001)

¹⁸¹ *Id.*

biased and they are victims of the leverage the West exerts in international affairs. There is indeed some pertinence in the Serbian position when one considers the fact that no NATO soldier or official has been indicted to this day, despite allegations of crimes against international humanitarian law committed during NATO's bombing campaign against Serbia.¹⁸²

Subsequent to the 1999 NATO bombing of Yugoslavia, some pressure groups including Russian parliamentarians and North American law professors,¹⁸³ requested the ICTY to investigate whether NATO had indeed committed crimes against humanitarian law.¹⁸⁴ The ICTY Prosecutor decided that there was "no basis for opening an investigation into any of the allegations or into other incidents related to the NATO bombings."¹⁸⁵ This holding is reminiscent of one of the criticisms that tainted the Nuremberg Trials as being justice of the victors over the vanquished, especially after the Allied bombing of the German town of Dresden went unpunished. Worthy of note however, is the fact that the ICTY Prosecutor premised her conclusion on the contention that "there was no deliberate targeting of civilians or unlawful military targets by NATO during the bombing campaign."¹⁸⁶ However, Serbs are still skeptical about the Prosecutor's findings.

The Milosevic Case depicts the clash between the jurisdiction of states to prosecute their nationals and the jurisdiction of international tribunals to try these same nationals for crimes against international law. The concurrent jurisdiction scenario becomes more contentious when the primacy of the international tribunals is asserted vis

¹⁸² Barbara Crosette, "U.N. War Crimes Prosecutor Declines To Investigate NATO," New York Times, 3 June, 2000, at 4

¹⁸³ See <http://jurist.law.pitt.edu/kosovo.htm> (Kosovo & Yugoslavia: Law in Crisis. A presentation of JURIST: The law professor's network)

¹⁸⁴ Sarah B. Kewall, Carl Kaysen, & Michael P. Scharf, The United States and the International Criminal Court: An Overview, in Sewall & Kaysen eds., at 16

¹⁸⁵ See Crosette, *supra* note 187, at 4

¹⁸⁶ *Id.*

a vis a state which has persistently objected to the latter's superior jurisdiction. In spite of his political demise, there are many Serbs who contest the fact that Milosevic has a case to answer on war crimes. Many also refuse to acknowledge that the ICTY and not Serbian courts is the *forum conveniens* for hearing these war crimes allegations. Prominent amongst these contestants is the new President of the Federal Republic of Yugoslavia, Vojislav Kostunica, who made no secret of his reluctance to extradite Milosevic to The Hague, preferring a trial in Serbia.¹⁸⁷

In the view of one author, while "states' refusal to comply with requests for deferral has not materialized as a problem for the International Tribunal, their failure to execute arrest warrants has emerged as the single greatest obstacle to the tribunal's success."¹⁸⁸ The rules and procedures of the Tribunal depend not only upon the cooperation of states but also upon the support of the Security Council to enforce that cooperation. After investigating a case and drafting an indictment, the Tribunal's Prosecutor must present that indictment to one of the Tribunal's Judges for review and confirmation.¹⁸⁹ Upon confirming the indictment, the judge issues warrants for the arrest of the accused and an order for his surrender to the Tribunal.¹⁹⁰ These warrants are then transmitted to the state where the accused is suspected to be seeking refuge.¹⁹¹

The standoff between the ICTY and Serbia raises the pertinent issue of the feasibility of bringing Milosevic before the ICTY to answer questions on his international criminal responsibility. The outcome of this jurisdictional conflict will go a long way to

¹⁸⁷ Irena Guzelova, "No Plans To Extradite Milosevic But Charges Rise at Home," Financial Times, at 2 (Apr. 2, 2001)

¹⁸⁸ Brown, *supra* note 1, at 413

¹⁸⁹ ICTY, RPE 47

¹⁹⁰ Id. RPE 55(B)

¹⁹¹ Id.,

enhance or diminish the legitimacy of the ICTY and the Security Council in their crusade to prosecute, punish and enforce international humanitarian law. International law as articulated in the Statutes of the ad hoc tribunals enunciates that the jurisdiction of the ICTY trumps that of Serbia with regard to the prosecution of Milosevic. It is on this premise that the president of the ICTY, Judge Claude Jorda, and the Prosecutor, Carla del Ponte, reminded the Federal Republic of Yugoslavia of its "absolute obligation" to transfer Milosevic to the ICTY "with all due diligence."¹⁹² Hans Holthuis, the Registrar of the ICTY, paid a visit to Serbia in order to serve a warrant of arrest on Milosevic, as well as arrange modalities for his smooth transfer to The Hague.

Renegade regimes must not be allowed to flout edicts of the Security Council with impunity. The international community must garner the requisite political will in order to ensure that its orders are obeyed and effective penalties are enforced against those states which fail to meet their obligations under international law. With Milosevic, the international community was ready to wait. However, the international community should engage in a more robust approach and exert more pressure on Serbia in lieu of its present 'wait and see' policy. The fact that Serbia relies on the West for economic aid gives the international community much leverage to impose stringent conditions and pressure on the former. Thus, the decision by the Congress of the United States of America to tie aid to Serbia with the latter's cooperation with the ICTY is both effective and laudable.¹⁹³

¹⁹² http://www.un.org/icty/pressreal/p_584-e.htm (Visited on May 21, 2001)

¹⁹³ Fiscal 2001 Foreign Operations Appropriations Bill (Public Law 106-429) (adopted on Oct. 25, 2000), See also 2000 Congressional Quarterly (CQ) Weekly, vol. 58, No. 42, at 2552-2554 (Oct. 28, 2000) March 31st, 2001, was the date set by the United States Congress as deadline by which the US Administration was required to judge whether Belgrade was cooperating or not with the ICTY. See also Stefan Wagstyl & Irena Guzelova, "US extends aid to Belgrade," Financial Times, at 16 (Apr. 3, 2001)

A provision in the U.S. Senate's Fiscal 2001 Foreign Operations Appropriations Bill stipulates to cut up to \$ 100 million in U.S. aid to Serbia and end U.S. support for World Bank and other loans, unless Belgrade cooperates with the War Crimes Tribunal at The Hague (ICTY).¹⁹⁴ U.S. lawmakers had given a short moratorium on implementing the restrictions, in order to allow the new Kostunica regime time to consolidate power. The Serbian Government reacted on the eve of the deadline for certification of cooperation with the ICTY by arresting Milosevic. However, they eschewed more substantive actions, particularly the court's order for the extradition of former Yugoslav strongman Slobodan Milosevic.¹⁹⁵ Even Senator Zoran Voinovich, R-Ohio, who is partly of Serbian descent, conveyed in unequivocal terms the message to Belgrade when he said that it "is in the hands of the Yugoslav government and the Serbian Government... We've got to hold them to the requirements. We've got to incentivize a course correction, not the corrupt status quo."¹⁹⁶

The economico-financial leverage exerted by the U.S. Congress is a defining example of the kind of resolve the international community should wield on states that renege on their international obligations like Yugoslavia. This indeed has had far reaching effects in the case of Milosevic. Under intense and persistent pressure from the West to show real cooperation with the ICTY, ahead of an international donors conference for Yugoslavia,¹⁹⁷ the Yugoslav Cabinet adopted a decree on Saturday, June 23, on cooperation with the International Criminal Tribunal for former Yugoslavia.¹⁹⁸

¹⁹⁴ Miles A. Pomper, "Macedonian Unrest, Serbian Aid Force a Renewed Focus on Balkans", 2001 CQ Weekly, vol. 59 No.12, at 676-677 (Mar.24,2001)

¹⁹⁵ Id.,

¹⁹⁶ Id.,

¹⁹⁷ Conference scheduled on June, 29,2001 in Brussels, Belgium.

¹⁹⁸ Reuters, June 23,2001

This was expected to pave the way for the handover of war crimes suspects like Milosevic. The decree took effect a day after it was published in the Yugoslav Official Gazette, and is subject to appeal. A flashback of events elicits that the Yugoslav Parliament had postponed discussions on a bill enabling cooperation with the ICTY, while the ruling coalition tried to resolve internal differences on the matter.¹⁹⁹ However, the coalition's junior partner and former ally of Milosevic's Socialist Party, the Montenegrin Socialist Peoples' Party (hereinafter SNP), vowed to vote against any law that advocates cooperation with the ICTY. Serbia's DOS Reform Alliance, the senior partner in the coalition needed the support of the SNP to pass the law, which is seen as crucial to securing badly needed Western funds for Yugoslavia.²⁰⁰

A strong advocate for reform and cooperation with the ICTY, Serbia's western trained Prime Minister, Zoran Djindjic stated clearly that the reformers would resort to other means if the measure did not pass in parliament. He was of the opinion that Yugoslavia "should not delay meeting the international community's conditions, regardless of whether the law on cooperation with the Hague Tribunal will be on the agenda of the Federal parliament or not."²⁰¹ He implored his colleagues to reflect on the specter of 10 million people paying the price for protecting Milosevic.

Milosevic's defense team immediately lodged an appeal to Yugoslavia's Constitutional Court contesting the validity of the decree.²⁰² The defense contended that the decree did not pass muster under the Yugoslav constitution, which proscribes the extradition of Yugoslav citizens. The reformers on the other hand argued that handing a

¹⁹⁹ Id

²⁰⁰ Id

²⁰¹ Id

²⁰² Jovana Gec, "Milosevic Files Extradition Challenge," Associated Press (Jun.25,2001)

suspect over to the ICTY does not amount to an extradition, as the Tribunal is a United Nations body and not a foreign state. The Yugoslav Justice Minister, Momcilo Grubac, expressed confidence that the decree would pass muster because it is "in line with part of the Constitution which stipulates respect for all established international obligations."²⁰³ Toma Fila, lead attorney for the defendant qualified the decree as "legal piracy" and alleged that it is a "political decision and it renders the law helpless against such bullying methods."²⁰⁴

Although this trier of fact is of the opinion that the decree is premised on political expediency rather than firm legal predicate, the possibility of deferrals from Yugoslavia to The Hague constitutes a momentous victory for international law, international pressure and the crusade against impunity. The decree permits the Governments of Serbia and Montenegro to object to a particular case.²⁰⁵ Yugoslavia's pro-democracy leader Vojislav Kostunica, when confronted on the legality of the decree was of the opinion that it went against the Constitution but said, "out of two evils, the country chose the lesser one."²⁰⁶ The international community did not relent in exerting pressure on the Serbian government, until Milosevic is deferred to The Hague for trial. By so doing, the interests of international law were served. The road from Belgrade to The Hague is long and plagued with legal conundrums and intricate wranglings, but the international community should stay resolved in bringing an end to impunity.

On a day of fast breaking news, two important events occurred on Thursday, June 28, 2001. First, the Constitutional Court temporarily stalled the federal extradition decree

²⁰³ Reuters, June 25, 2001

²⁰⁴ Jovana, *supra* note 202

²⁰⁵ *Id.*,

²⁰⁶ Katarina Kratovac, "Ministry wants Milosevic Extradited", AP, June 25, 2001

that would have cleared the way for Milosevic's transfer, pending its decision on the constitutionality of the fiat.²⁰⁷ The Court's preliminary decision was received with contumacy by the reformers in the Serbian government. The Serb Prime Minister said that the decision was "worthless" because the Judges were Milosevic appointees.²⁰⁸ Vice Prime Minister, Korac, called the decision a parody of justice and went forth to indict the integrity of the Court by saying that its presiding Judge was the same who had nullified last year's elections, which eventually led to the popular uprising of October 2000, that toppled Milosevic.²⁰⁹ It is clear that the judicial transition from the Milosevic era to one of democracy has not occurred.

Then in a sudden volte-face, came the breaking news that Slobodan Milosevic had been spirited to U.N. authorities in the Bosnian town of Tuzla, and was on his way to The Hague to stand trial for crimes against humanity, humanitarian law and possibly genocide.²¹⁰ The deferral of the erstwhile president was effectuated pursuant to an extraordinary meeting of the Serbian Government, called to discuss the earlier ruling of the Constitutional Court.²¹¹ The Serb Prime Minister, Zoran Djindjic, a renowned Milosevic foe, seems to be the dynamo or instigator of the transfer of Milosevic. He apparently ignored the Constitutional Court's decision, and in what appears to be a growing rift with the Federal President Kostunica, reports allege that the latter was not informed by Djindjic of the imminence of the deferral.²¹² Djindjic relied on a clause

²⁰⁷ Aleksandar Vasovic, "Milosevic Extradition Decree Suspended," AP (June 28, 2001)

²⁰⁸ <http://www.cnn.com/world>, "Milosevic in U.N. custody" (cite visited on July 28, 2001)

²⁰⁹ Id.,

²¹⁰ <http://www.bbc.co.uk>, "Milosevic extradited" (cite visited on July 28, 2001)

²¹¹ Id.,

²¹² Id.,

inserted into the Serbian Constitution by erstwhile President Milosevic, which provided that Serbia's interests supersede those of the Yugoslav federation.

However, an issue which cannot be lost even on the inadvertent onlooker in the Milosevic saga is the extra pressure exerted on Yugoslavia by the U.S. Government. Milosevic's surreal handover to the U.N. War Crimes Tribunal happened barely a day before an international donor conference was held in Brussels, where Belgrade was expecting to secure a billion dollars, necessary to salvage its economy in dire straits. The U.S. made the transfer of chief war crimes suspects like Milosevic, a condition *sine qua non* for the release of funds and that was not lost on the Yugoslavs.

However, the timing of his snap deferral to The Hague left many Serbs thinking he was sold for money. This sparked off demonstrations where the West was denigrated, and the hand over of Milosevic was described as an act of treason. This minority feels that Serbia lost its national pride in the venture. In what seems to be a budding political crisis that could threaten the very fabric of the Yugoslav Federation, the Yugoslav Prime Minister, Zoran Zizic, considering the deferral "illegal and unconstitutional," resigned in protest and was followed suit by the Montenegrin allies of Milosevic.²¹³ This indeed is a defining example of the acrimony engendered when a State has the impression that its sovereignty is impugned by an imperious ICTY that is influenced by the West.

However, the arrest of Milosevic, which was effectuated only after the latter had become politically irrelevant, compels the conclusion that national sovereignty is still very much alive. In the Milosevic case, there was no way international law could be enforced so long as he was the Head of State and refused to cooperate or recognize the legitimacy of the ICTY. Whether or not this is ominous, or a harbinger of what is

²¹³ Dusan Stojanovic, "Yugoslav Prime Minister Resigns," AP (July 29, 2001)

reserved for the permanent International Criminal Court, remains to be seen. The fact that these international judicial bodies do not have their own independent enforcement agencies means that such standoffs are conceivable in the case of the International Criminal Court. With the final transfer of Milosevic to The Hague, he becomes the first Head of State to be indicted while in office, and the first former Head of State to stand trial before the ICTY. He is indeed the ICTY's biggest prize. A spokesperson for the U.N. War Crimes Tribunal said that it is "an extraordinary moment. It is a very important moment for the life of the institution. The message is clear...No individual is above the law, no matter what position he held."²¹⁴ However, the ICTY Prosecutor, Carla Del Ponte, was quick to emphasize that Milosevic's presence at The Hague should not overshadow the absence of other indicted war criminals. Paradoxically, this is the case of Milan Milutinovic, President of Serbia, who is one of the top officials indicted alongside the "Butcher of the Balkans." Perpetual fugitives on the ICTY's most wanted list like Radovan Karadzic and Radko Mladic aka "Butcher of Srebrenica" have all gone into hiding once more. The International community should not relent until these criminals are arrested and deferred to the ICTY.

²¹⁴ Id.

CHAPTER 4

THE PERILS OF PRIMACY

A - A CLOSER LOOK AT THE ICTR

1 - Surrender of the accused or extradition? : The case of

Elizaphan Ntakirutimana v. Janet Reno et al.²¹⁵

As seen in preceding parts of this thesis, the primacy of the ad hoc Tribunals over national judiciaries confer a strong obligation on states to cooperate with the Tribunals regarding the arrest and surrender of accused persons. There is no contention about the fact that the Statutes' provisions on primacy are compelling and mandatory vis a vis states, which can also exercise jurisdiction on a concurrent basis. Pursuant to an order by a judge of the Tribunal for the surrender of an accused person who is in the custody of a state, the Rules of Procedure and Evidence provide that the obligations laid down in Article 28 of the ICTR Statute "shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned."²¹⁶ Extradition is part of the fabric of a state's judicial sovereignty and an exegesis of this area of the law elicits that states are reluctant to defer to the Tribunals' edicts in the absence of implementing legislation. To this effect, several states including the United States of America have

²¹⁵ *Elizaphan Ntakirutimana v. Janet Reno*, Attorney General of the United States; Madeleine Albright, Secretary of State of the United States; Juan Garza, Sheriff of Webb County, Texas, 184 F.3d 419 (5th Cir. 1999)

²¹⁶ Rule 58 (See supra note 125 for the provisions of Art.28 of TCTR Statute)

enacted national legislation allowing them to transfer indictees to the Tribunals.²¹⁷ Other states like Serbia and Montenegro say transferring nationals to the ICTY is unconstitutional.²¹⁸

In the realm of the ICTR, the Ntakirutimana case is instructive of the clash between national judicial sovereignty as exercised by local courts and the primacy jurisdiction of the international Tribunals. Though the trier of fact might think this case is more of an exercise in US constitutional law rather than international law, it goes a long way to explain the tensions that stem from the fact that national courts and the international Tribunals have concurrent jurisdiction and both would like to exercise this right of jurisdiction. In spite of the primacy of the Tribunals over national courts, the latter is not always ready to yield to the former, even if its actions imperil international law.

The defendant, Elizaphan Ntakirutimana is a Rwandan citizen, a member of the dominant Hutu tribe and was President of the Seventh Day Adventist Church in Mugonero, Gishyita commune, Kibuye prefecture. In one of the two indictments issued by the ICTR, it is alleged that he was responsible for the preparation and execution of a plan to encourage members of the minority Tutsi tribe to seek refuge in the Mugonero church complex.²¹⁹ Once there, the Tutsis were slaughtered. A Tribunal's Judge confirmed his indictment and issued a warrant for the arrest of Ntakirutimana who had left Rwanda and was legally residing with his son in Laredo, Texas.²²⁰

²¹⁷ Murphy, *supra* note 98, at 64

²¹⁸ *Id.*,

²¹⁹ 184 F.3d 419, at 422 (5th Cir.1999)

²²⁰ *Id.*, at 423

Pursuant to the ICTR's request for the arrest and surrender of Ntakirutimana,²²¹ the United States Federal Government filed a request to that effect in the United States District Court of Texas,²²² in conformity with the "Agreement" between the US Government and the ICTR.²²³ The Magistrate Judge in Texas, serving as judicial officer, denied the Government's request for surrender.²²⁴ He premised his denial of the government's request on the grounds that the congressionally mandated National Defence Authorization Act or Public Law 104-106 of 1996 is unconstitutional, and that based on historical practice, extradition requires a treaty.²²⁵ He held alternatively that the request for surrender, and the supporting documents did not establish probable cause to support the charges against the indictee.²²⁶ In order to address the evidentiary issue raised by the Magistrate Judge, the Government refiled its request for surrender seeking review by a different Judge in the same court.²²⁷ The district court certified the surrender to the ICTR, concurring with the Government's contention that the Agreement and Public Law 104-

²²¹ The Prosecutor v. Ntakirutimana, No. ICTR-96-17-1, Warrant of Arrest and Order for Surrender (Sept. 7, 1996) The warrant reads in pertinent part that: "I, Judge William H. Sekule, Judge of the International Criminal Tribunal for Rwanda...HEREBY DIRECT the Authorities of the United States of America to search for, arrest and surrender to the International Criminal Tribunal for Rwanda: Elizaphan Ntakirutimana...who is currently believed to be in the United States of America."

²²² Re Surrender of Ntakirutimana, 988 F.Supp. 1038 (S.D. Tex. 1997)

²²³ In 1995, the President of the United States entered into an executive agreement with the ICTR entitled "Agreement on Surrender of Persons Between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the Territory of Neighboring States," (Agreement) U.S.-Int'l Trib. Rwanda, 1996 WL 165484 (Treaty) (Jan. 24, 1995); In 1996, Congress enacted Public Law 104-106 to implement the Agreement. See National Defense Authorization Act, Pub. L. 104-106, § 1342, 110 Stat. 486 (1996). § 1342(a)(1) of this legislation provides that the federal extradition statutes (18 U.S.C. § 3181 et seq.) shall apply to the surrender of persons to the ICTR.

²²⁴ 18 U.S.C. § 3184 authorizes a judicial officer to hold a hearing to consider a request for surrender. If he finds the evidence sufficient enough to sustain the charges under the treaty or convention, then he certifies to the Secretary of State that the person can be surrendered. (§ 3186 confers on Secretary of State final authority to surrender fugitive after determination by judicial officer.)

²²⁵ Re Surrender of Ntakirutimana, 988 F.Supp. at 1042

²²⁶ Panayioti Alexandropoulos, Enforceability of Executive-Congressional Agreements In Lieu Of An Article II Treaty For Purposes Of Extradition: *Elizaphan Ntakirutimana v. Janet Reno*, 45 Vill. L. Rev. 107 (2000) (A comprehensive account of the case and US constitutional issues regarding extradition)

²²⁷ The Government did not appeal the request because extradition decisions are not appealable under 28 U.S.C. § 1291.

106, provide a constitutional basis for Ntakirutimana's extradition to the ICTR. The court found that the Constitution sets forth no specific requirements for extradition; that the Supreme Court has indicated its approval of extraditions made in the absence of a treaty, and that there is precedent wherein fugitives were extradited pursuant to statutes that "filled the gap" left by a treaty provision.²²⁸ The court also held that the evidence sufficed to establish probable cause. Ntakirutimana filed a habeas corpus petition challenging the district court's grant of the government's second request for surrender.²²⁹ The district court turned down his petition, of which he appealed to the United States Court of Appeals for the Fifth Circuit.²³⁰

Contending amongst other issues, Ntakirutimana alleged that the district court's certification of extraditability to the ICTR on the basis of a Statute did not pass muster under Article II of the Constitution of the United States, since the latter requires an extradition to occur pursuant to a treaty.²³¹ Since this represented a challenge to the jurisdiction of the committing court, the Fifth Circuit decided to review the constitutionality of Ntakirutimana's extradition *de novo*. The Fifth Circuit made reference to a Supreme Court decision, which supports the constitutionality of using Executive-Congressional Agreement to extradite Ntakirutimana.²³² Even the "last in time rule" contemplates that a statute and a treaty may cover the same subject matter, as was the

²²⁸ Re Surrender of Ntakirutimana, No. CIV. A. L-98-43, 1998 WL 655708, at 9, 17 (S.D. Tex. Aug. 6, 1998)

²²⁹ 28 U.S.C. § 2241

²³⁰ Ntakirutimana, 184 F. 3d 419

²³¹ U.S. Const. art. II, § 2, cl. 2 that enumerates the President's foreign relations power provides in part that "the President shall have power, by and with the Advice and Consent of the Senate, to make Treaties...

"(This provision does not refer either to extradition or the necessity of a treaty to extradite.)

²³² *Valentine v. United States*, 299 U.S. 5 (1936)

dictum in a Supreme Court case where it was held that “if the two are inconsistent, the one last in date will control the other.”²³³

Ntakirutimana also contends that the district court erred when it dismissed his habeas corpus petition because the request for surrender fails to establish probable cause.²³⁴ The Circuit court held that the matter was one to be decided by the committing district court, which had earlier found that there was indeed probable cause. Accordingly, the Fifth circuit affirmed the order of the district court denying Ntakirutimana’s petition for writ of habeas corpus, and by that token concurred with the lower court’s certification of extraditability.²³⁵

In his dissenting opinion, Circuit Judge DeMoss, fervently asserts that historically, an extradition agreement is found in a treaty and therefore governed by the Treaty Clause.²³⁶ Extradition which is defined as “the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which being competent to try and punish, demands the surrender.”²³⁷ Judge DeMoss goes forth to say that until the advent of the ad hoc Tribunals, every extradition agreement entered into by the US has been by treaty. He also argues that the original extradition statutes, enacted in 1848, required the existence of an extradition treaty and there was no exception until the enactment of the National Defense Authorization Act.²³⁸ The terse message in the dissent is that the international Tribunal is not a sovereign nation and thus lacks the *locus standi* to enter into a treaty

²³³ Whitney v. Robertson, 124 U.S. 190 (1888)

²³⁴ Ntakirutimana, 184 F. 3d, 427

²³⁵ Id. at 430

²³⁶ Ntakirutimana, 184 F.3d, at 436

²³⁷ Terlinden v. Ames, 184 U.S. 270, 289 (1902)

²³⁸ Ntakirutimana, 184 F. 3d, 436

with a sovereign nation like the United States. Furthermore, “the principles of international law recognize no right to extradition apart from treaty.”²³⁹

Some pundits have held that the Fifth Circuit’s holdings in the Ntakirutimana Case set both positive and negative precedents.²⁴⁰ On a positive note, finding that the Executive-Congressional Agreement with the ICTR passed constitutional muster, lent credence to the international Tribunal’s personality. However, critics hold that the court’s ruling on the issue of probable cause was a negative development.²⁴¹ Verily, the court could justify its decision not to review the weight and sufficiency of the evidence, since that was the duty of the committing court. But the fact that the overwhelming majority of the witnesses were members of the minority and victimized Tutsi tribe, and they were testifying against Ntakirutimana who is from the dominant tribe reeks of bias, prejudice and lack of credibility following US standards.²⁴²

This case has far reaching implications for the respect of international obligations by all states. It is clear that the district judge who refused to grant the request for the surrender of Ntakirutimana had a different agenda from international law. It is unequivocal that the Security Council resolution creating the ICTR and calling on all states to comply is mandatory to all. The United States was instrumental in establishing the ICTR, even though this is considered a fig-leaf-after-the-fact. It would have been an affront to the United Nations and the international community as a whole if the same US Government would turn around and flout UN edicts by not extraditing an ICTR indictee.

²³⁹ *Factor v. Laubheimer*, 290 U.S. 276, 287 (1993)

²⁴⁰ Panayiota Alexandropoulos, *Enforceability of Executive-Congressional Agreements In Lieu Of An Article II Treaty For Purposes of Extradition* : *Elizaphan Ntakirutimana v. Janet Reno*, 45 Vill. L. 107 (2000)

²⁴¹ *Id.*

²⁴² *Id.*

This would have sent a clarion message to other rogue nations that they too could refuse to comply with Security Council resolutions with no fear of reprisals.

2 – Stratified concurrent jurisdiction and anomalies of inversion: The Barayagwiza Case

i - Background of the judiciary in post genocide Rwanda

A brief flashback on the Rwandan genocide of 1994 elicits the slaughter, massacre and maiming of nearly a million Rwandans, while close to two million fled the country. In the aftermath of this catastrophe, the Rwandan judiciary was moribund. A vast majority of judicial and law enforcement officers had been decimated or had fled the country²⁴³ Close to a hundred thousand people were arrested on charges of planning and executing the genocide, but the judicial structures were effete or inexistent to handle such a caseload. In fact, the prosecution of more than 90.000 defendants would be “infeasible in even the wealthiest nation and is emphatically not an option in Rwanda.”²⁴⁴ The situation is rendered more complex by the fact that the Rwandan Government, based on its Organic Law,²⁴⁵ and the ICTR, based on its Statute and RPE, have concurrent jurisdiction for the prosecution of genocide. The “interaction of national and international

²⁴³ See United Nations High Commissioner for Human Rights Field Operation in Rwanda, The Administration of Justice in Post Genocide Rwanda, at 2, para. 11, U.N. Doc. HRFOR/JUSTICE/June 1996/E (1996)

²⁴⁴ (For detailed and comprehensive account of concurrent jurisdiction between the ICTR and Rwanda) See Morris, *supra* note 103, 349-374

²⁴⁵ National prosecutions for the Rwandan genocide are governed by the “Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1 1990,” Organic Law No. 08/96 (Aug.30, 1996), in Official Journal of the Republic of Rwanda (Sept.1, 1996)(hereinafter Genocide Law). This law relies heavily on a system of plea agreements. All perpetrators other than those in Category One (who will be subject to the death penalty-art.14) will be entitled to receive a reduced sentence as part of a guilty plea bargain (arts.5, 15,16), in return for an accurate and complete confession, a plea of guilty to the crimes committed, and an apology to the victims (art.6). See also *id.* at 357-361

jurisdictions in the Rwandan context” raises the possibility of difficulties and “potential friction...including the distribution of defendants” among others.²⁴⁶

ii – Stratified concurrent jurisdiction

“Stratified concurrent jurisdiction” depicts the International Tribunal’s prosecutorial policy regarding the distribution of defendants vis a vis the Rwandan judiciary.²⁴⁷ Madeline Morris, a foremost expert on stratified concurrent jurisdiction elucidates the policy when she says that:

Under this policy, the international fora seeks to prosecute the leadership stratum and leaves the lower strata defendants to be tried in national courts. This approach to the distribution of defendants predictably produces anomalous outcomes in the handling of leaders and followers, creates impediments to national plea-bargaining arrangements, and may tend to undermine national judicial authority.²⁴⁸

In confirming the policy of stratified concurrent jurisdiction, the Prosecutor of the International Tribunals characterized her strategy as “maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences.”²⁴⁹ The systematic application of this policy by the Tribunals has led to anomalous results, which though undesired, are foreseeable and inevitable. There is unanimity on the fact that leaders who are tried in the international Tribunals receive more favorable treatment than the followers who are tried in national courts.²⁵⁰ A major advantage for defendants

²⁴⁶ Id. at 349

²⁴⁷ Madeline Morris, *Complementarity and Conflict: States, Victims, and the ICC*, in Sewall & Kaysen, eds., *supra* note 26, at 203

²⁴⁸ See id.

²⁴⁹ See Statement by the Prosecutor Following the Withdrawal of Charges Against 14 Accused, ICTY Doc. CC/PIU/314-E (May 8, 1998)

²⁵⁰ Sewall & Kaysen eds., *supra* note, at 203

of international prosecution is the fact that the death penalty is not applicable.²⁵¹ In the case of Rwanda, the disparity has momentous proportions because the Rwandan Penal Code provides for the death penalty.²⁵² During negotiations for the creation of the ICTR, Rwanda, which fortuitously held a non-permanent seat in the Security Council vehemently, objected to the non-inclusion of capital punishment in the Statute.²⁵³ The Rwandan objection was premised on the specter of disparate sentencing and penalties.²⁵⁴ This policy of stratified concurrent jurisdiction “leads to anomalies of inversion in which these crucial advantages flow to the leaders who are, by hypothesis, most responsible for the mass crimes, while the followers are subject to harsher treatment.”²⁵⁵ As noted by the then Rwandan Ambassador to the U.N, the “situation is not conducive to national reconciliation.”²⁵⁶ In Rwanda, many low profile defendants have been summarily sentenced to death in national courts,²⁵⁷ at times without defense counsel, while leaders of the genocide have received light sentences after trials with full due process at the ICTR.²⁵⁸

²⁵¹ Arts. 24 of ICTY Statute & 23(1) provide that: “The penalty imposed by the Trial Chamber shall be limited to imprisonment...” The Rule 101 of the RPE of ICTY & ICTR provides that: “A convicted person may be convicted for a term up to and including the remainder of his life.”

²⁵² See Republic of Rwanda Decret-Loi No. 21/77, Code Penal Art. 26, 1 Codes et Lois du Rwanda 391(1995).

²⁵³ Morris, *supra* note 100, 356

²⁵⁴ *Id.*

²⁵⁵ Sewall & Keyser eds., at 204. *See also* Jose E. Alvarez, *Lessons from the Akayesu Judgement*, 5 ILSA J. Int'l. & Comp. L. 359, at 365 (1999)

²⁵⁶ See U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc S/PV. 3453,

²⁵⁷ (On April 24, 1998, twenty two defendants, most of them low level functionaries and peasants without significant political involvements were executed pursuant to death penalties issued by Rwandan courts for genocide related crimes) See Sewall & Kaysen eds., 210 n.35 (2000)

²⁵⁸ See e.g. *The Prosecutor v. Jean Paul Akayesu*, No. ICTR-96-4-T, 1998 Sentence (Life imprisonment. Akayesu was a former Mayor of Taba) *The Prosecutor v. Jean Kambanda*, No. ICTR-97-23-S, Judgement and Sentence-1998 (life imprisonment sentence. Kambanda was the Prime Minister of Rwanda during the genocide)

Some proponents of stratified concurrent jurisdiction predicate their argument on the international nature of leadership responsibility.²⁵⁹ They claim that the role of an international court is to prosecute the leaders because the nature of their crimes is global. However, this argument does not pass muster even under the international responsibility rationale because all “crimes of genocide and crimes against humanity, whether committed by leaders or by followers are international crimes. As such, all of those crimes are defined as being of distinctly international concern.”²⁶⁰ One writer remarks that there is the risk of the international community becoming engaged in a two-track approach which consists of preferring international venues on the one hand, and a “benign neglect for domestic approaches” on the other.²⁶¹

Other advantages for defendants standing trial before an international Tribunal are better due process protections (including appointed defense counsel) than many national jurisdictions offer; better conditions of incarceration than would the prisons of the national court in question (Rwanda);²⁶² and greater assurance of impartiality than national courts which tend to dispense victor’s justice in such cases.²⁶³

iii – The case of Barayagwiza v. The Prosecutor.²⁶⁴

This case highlights the utmost due process that is granted to defendants appearing before the ICTR and the acrimony of the Rwandan Government to what it

²⁵⁹ Morris, *supra* note 100, at 370

²⁶⁰ Id.

²⁶¹ Alvarez, *supra* note 255, at 364

²⁶² Art. 26 of ICTR Statute. Rule 103(A) of ICTR RPE provides that: Imprisonment shall be served in Rwanda or any state designated by the Tribunal from a list of states which have indicated their willingness to accept convicted persons. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.

²⁶³ Kaysen & Sewall eds., *supra* note 26., at 203-204

²⁶⁴ Jean Bosco Barayagwiza v. The Prosecutor, No. ICTR-97-19-AR72, Decision on Prosecutor’s Request for Review or Reconsideration (Mar.31,2000)

considered a travesty of justice. The case is a review of the decision by the Appeals Chamber of the ICTR on November 3rd, 1999 (hereinafter November decision).²⁶⁵ The defendant Jean Bosco Barayagwiza was a founder and senior administrative officer of the Radio Television Libre des Milles Collines (RTLM), the media organization that contributed a great deal to the propaganda, incitement and execution of the Rwandan genocide.²⁶⁶ He was indicted on numerous counts including genocide, conspiracy, complicity and direct incitement to commit genocide and crimes against humanity.²⁶⁷ In the words of one writer, taking "everything into account, and assuming the allegations in the indictment can be even partially established, Barayagwiza stands out as one of the most heinously evil of those responsible for the Rwandan genocide- -and not for want of competitors."²⁶⁸

A chronology of events is pertinent to the understanding of the case and they reveal the following²⁶⁹: that the defendant fled Rwanda and sought refuge in Cameroon in Cameroon; that on March 15, 1996, Rwanda, followed by Belgium on a later date, issued international arrest warrants and filed requests for extradition of the defendant from Cameroon. On April 17, the ICTR Prosecutor requested provisional measures with respect to the defendant,²⁷⁰ but informed Cameroon a month later that he was no longer interested in Barayagwiza. On May 31, 1996, the Yaounde Court of Appeal suspended

²⁶⁵ Barayagwiza v. Prosecutor, No ICTR-97-19-AR72 (Nov. 3, 1999) (hereinafter November decision)

²⁶⁶ On the role of the media in inciting genocide, see Jean-Pierre Chretien, Jean-Francois Dupaquier, Marcel Kabanda & Joseph Ngarambe, *Rwanda: Les Medias du Genocide* (1995)

²⁶⁷ Prosecutor v. Barayagwiza, No. ICTR-97-19, Indictment (Oct. 22, 1997); Prosecutor v. Barayagwiza, No. ICTR-97-19 (June 28, 1999), (leave to amend granted on April 11, 2000, Prosecutor v. Barayagwiza, No. ICTR-97-17-I). The trial Chamber had delayed its decision on the amended indictment until the appeals chamber decided whether the prosecution of Barayagwiza (which was a central issue in the march decision) could proceed.

²⁶⁸ For a detailed and comprehensive analysis of the Barayagwiza case, see International Decision: Barayagwiza v. Prosecutor (Bernard H. Oxman, ed.), 94 A.J.I.L. 563, 564

²⁶⁹ For a chronology of events, see *id.*

²⁷⁰ Rule 40 RPE

Rwanda's extradition hearing, citing the primacy of the ICTR as the basis for their decision. Barayagwiza complained of his detention in a letter addressed to the ICTR, but the ICTR prosecutor, Louise Arbor responded that he was not being held at her behest. Rwanda's extradition request was denied by Cameroon and on the day Barayagwiza was released (February 21, 1997), the ICTR prosecutor this time issued a request for the provisional detention of the accused pursuant to Rule 40 bis.²⁷¹ After an order for deferral to the ICTR was signed by Judge Lennart Aspergen on March 3,²⁷² and shown to the accused on March 10, the President of Cameroon did not order the transfer of the defendant until October 21. Barayagwiza was finally transferred to the Tribunal's Detention Center in Arusha, Tanzania on November 19, 1997. Prior to his transfer, the indictee had filed an application for habeas corpus, but the Trial Chamber of the ICTR never heard the motion. Appearing before the ICTR on February 23, 1998, Barayagwiza pleaded not guilty on all counts in the indictment and went on to file an "extremely urgent motion" seeking to quash his arrest. After the Trial Chamber dismissed the motion,²⁷³ Barayagwiza appealed.

In a decision that had the effect of a bombshell and was received with incredulity in Rwanda, the Appeals Chamber ordered the dismissal of the indictment and release of the appellant "with prejudice" to the Prosecutor,²⁷⁴ thus effectively blocking any effort to bring Barayagwiza to justice before the ICTR.²⁷⁵ The appellate body of the ICTR, found

²⁷¹ Rule 40 bis RPE

²⁷² The Prosecutor v. Barayagwiza, No. ICTR-97-19-DP, Order for the Transfer and Provisional Detention (Rule 40 bis) (March 3, 1997)

²⁷³ The Prosecutor v. Barayagwiza, No. ICTR-97-19-I, Decision on the Extremely Urgent Motion By The Defence To Review and/ Or Nullify the Arrest And Provisional Detention of the Suspect (Nov. 1998)

²⁷⁴ Barayagwiza v. Prosecutor, No. ICTR-97-19-AR72, para. 108 (Nov. 3, 1999)

²⁷⁵ Id., para. 110 (The Appeals Chamber makes reference to Rule 40 bis (H), which provides in part that the "subject shall be released." In the court's interpretation, "shall" is imperative and is certainly not intended to permit the prosecutor to file a new indictment and re-arrest the accused.)

the Prosecutor's conduct "egregious" and was of the opinion that her "failure to prosecute this case was tantamount to negligence,"²⁷⁶ since she "failed with respect to her obligation to prosecute the case with due diligence."²⁷⁷

The Appeals Chamber ascertained three distinct periods during which the appellant was in illegal detention.²⁷⁸ The Appeals Chamber premised its decision to stay proceedings against the appellant on the "abuse of process doctrine." In lauding the validity and importance of the supervisory powers that go with the due process doctrine, the Appeals Chamber held that:

To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the tribunals is at stake in this case. Loss of public confidence in the Tribunal as a court valuing human rights of all individuals including those charged with unthinkable crimes would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary, to halt this prosecution, so that no further injustice results.²⁷⁹

The court then asked the Registrar to arrange for the suspect's transfer back to Cameroon. The Rwandan Government's reaction was immediate and uncompromising. Rwanda threatened to suspend all cooperation with the ICTR, and by that token the very existence of the International Tribunal was in peril. Without cooperation from Rwanda, the ICTR

²⁷⁶ Id. para. 106

²⁷⁷ Id. para. 101

²⁷⁸ The 1st period was from April 17, 1996, while the Rwandan and Belgian extradition requests were being considered, and ended on May 16, when the prosecutor informed Cameroon that he did not intend to try Barayagwiza. This period of detention exceeded by 9 days the 20 day limit specified in Rule 40 (however, Barayagwiza was being held legally pursuant to the 2 extradition requests); The 2nd period commenced on March 4, 1997, following the dismissal of the Rwandan extradition request, and concluded 233 days later with the appellant's deferral to the ICTR on Nov. 19. The Appeals Chamber held that the appellant was in the "constructive custody" of the ICTR. According to Rule 40 bis, the prosecutor had a period of 90 days from the moment Barayagwiza was detained to obtain an indictment, failing which he was entitled to be released. The 3rd period began when the appellant was transferred to the ICTR's detention center, where he remained for 96 days prior to formally appearing before the ICTR in Feb. 1999. The Statute and RPE require the formal appearance to take place "without delay".

²⁷⁹ November Decision, *supra* note 265, para. 112

cannot function. This is because almost all the investigations, evidence, and witnesses are obtained from Rwanda.²⁸⁰ Rwanda went on to file an international warrant of arrest for Barayagwiza with the Registrar of the ICTR. She also requested Tanzania to detain Barayagwiza, rather than transfer him to Cameroon. Rwanda was angered at the decision by the ICTR to transfer the accused to Cameroon because the latter had refused to extradite Barayagwiza in the past to Rwanda. Rwanda's perception was that the ICTR still had a duty to promote international criminal responsibility, prevent and prosecute genocide.²⁸¹ The basis of this argument is the Genocide Convention, which offers two jurisdictional bases viz: an international tribunal or the state where the crime was committed.²⁸² Since the genocide occurred in Rwanda, the latter thought it should have been the alternative forum and the ICTR should have seen itself as bound by this forum.²⁸³ Sending the defendant to Cameroon would have achieved the opposite.

Another alternative to Cameroon was to release Barayagwiza at Arusha. The Tanzanian authorities had manifested their willingness and cooperation to bring to justice those responsible for genocide in Rwanda. However, Tanzania was stymied from doing exactly that pursuant to the Headquarters Agreement between the ICTR and Tanzania.²⁸⁴ This put enormous pressure on both the Prosecutor and the ICTR as a whole. Even the former Prosecutor for the International Tribunals Justice Richard Goldstone

²⁸⁰ Rwanda suspension of cooperation with the ICTR was ephemeral

²⁸¹ Oxman ed., *supra* note 268, at 569

²⁸² Art. VI of the Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 (entered into force Jan. 12, 1951)

²⁸³ Oxman ed., *supra* note 268, at 569

²⁸⁴ Agreement Between The United Nations and the Republic of Tanzania Concerning the Headquarters of the International Tribunal of Rwanda, Art. XX, U.N. Doc. S/RES/977(1995) (Pursuant to this Agreement, Tanzania must abstain from exercising its jurisdiction over any individuals in its territory who have been transferred as a suspect or accused to the ICTR. This immunity, ceases to have effect only when the person, having been acquitted or otherwise released by the ICTR and having had for a period of 15 days from the date of his or her release the opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned)

affirms that the ad hoc Tribunals “have been legalistic to a fault” and they have gone through the “frustrations and the delays that come with the genuine exercise of due process. Judges take issue with the chief prosecutor; rules of evidence are strictly maintained; precedent is given its due homage. This legalism is terrifically frustrating to prosecutors.”²⁸⁵

In a motion interpreted as a bid to assuage the Rwandan Government’s ire at what it saw as an injustice and perpetuation of impunity by the ICTR, the Prosecutor filed a “request for review of decision.” Pending the outcome of these proceedings, the ICTR momentarily stayed its November 3, order for Barayagwiza’s release. The Statute allows the ICTR to review a decision “where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or before the Appeals Chamber and which could have been a decisive factor in reaching the decision.”²⁸⁶ The Rules of Procedure and Evidence requires the party requesting the review must show that the newly discovered information was not available to the party and could not have been discovered by the party with due diligence at the time of the initial proceeding.²⁸⁷

In considering the request for review, the Appeals Chamber noted several “new facts.”²⁸⁸ Taking these new facts into consideration, the appellate chamber came to the

²⁸⁵ Sewall & Kaysen, *supra* note 26, at 55-56

²⁸⁶ Art. 15 of ICTR Statute

²⁸⁷ Rule 120 of RPE provides: Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

²⁸⁸ The first fact related to a transcript of proceedings before the Court of Appeal in Cameroon (in March, April and May), which provided evidence that Barayagwiza knew the nature of the ICTR charges against him. This new fact disposed of one of the findings of the Appeals Chamber in its earlier ruling that Barayagwiza learned of the charges only in March 1997. The 2nd new fact concerned information by the Cameroon and US ambassador at large David Scheffer, which showed that political difficulties in Cameroon and not prosecutorial negligence, had prevented the deferral of Barayagwiza from Cameroon to Arusha. Thus, his detention, though a violation of his human rights was not his fault. The 3rd new fact

conclusion that they diminished the scale of the prosecutorial abuse, as well as “the intensity of the violation of the rights of the appellant.”²⁸⁹ With this reduction in the “cumulative effect” of the various breaches, the remedy of dismissing the charges and releasing the accused was seen as “disproportionate.”²⁹⁰ However, since all breaches demand a remedy, the Appeals Chamber ruled that if found not guilty, Barayagwiza would be entitled to financial compensation, and if guilty, to a mitigation of sentence.

Some critics have held that the “second decision of the Appeals Chamber “ultimately distorts the law in an effort to achieve the desired result... to compensate for its previous decision and in view of new facts adduced, to enable the prosecution of Barayagwiza to proceed.”²⁹¹ In the view of this writer, the granting of the request for review of a decision soundly arrived at by the ICTR, smacks of double jeopardy. However, the dual judgments of the Appeals Chamber are unanimous in their findings that the “ICTR has had a cavalier approach to matters of procedure.” This case served as a clarion call on the ICTR to be more assiduous and less perfunctory in dispensing international justice. Rwanda’s fury from the first decision was predictable and its threat of suspension of cooperation with the ICTR real and legitimate, since she viewed the outcome as an ICTR imprimatur for impunity for Barayagwiza.

To an extent, this case also tarnished the confidence of the ICTR as an independent judicial body whose decisions are based solely on legal principles and not pressure from countries that threaten non-cooperation. Although they would not concur,

concerned evidence that in January 1998, while Barayagwiza was detained in Arusha awaiting his initial appearance, his attorney met with ICTR authorities and agreed to a cut date, thereby waiving his objection to 76 days of the 96 day period.

²⁸⁹Barayagwiza v. Prosecutor, No. ICTR-97-19-AR72 (This decision has no numbered paragraphs). See also Oxman ed., *supra* note 268, at 563

²⁹⁰ Id

²⁹¹ Id. at 567

this issue was very much in the minds of the Judges when they passed the second judgment. This is manifested in the statement proffered by Judge Nieto-Nava:

I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive governing role, in order to assuage states and ensure cooperation to achieve the long term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise its judicial independence and integrity."²⁹²

The Kingdom of Belgium encountered similar problems with the ICTR in the Ntuyahaga Case.²⁹³ The defendant was indicted for the murder of 10 Belgian UNAMIR paratroopers and the erstwhile Rwandan Prime Minister, Agathe Uwilingiyimana.²⁹⁴ The case involved an unprecedented motion to withdraw the indictment against Major Bernard Ntuyahaga,²⁹⁵ because Belgium sought to prosecute him for the aforementioned crimes. In its submission, the prosecution gave reasons to support the unprecedented application, amongst which was the contention that the case fell in the category of cases most appropriate for the exercise of concurrent jurisdiction by Belgium which had instituted criminal investigations against the accused in 1994.²⁹⁶ The prosecution also proffered that "concurrent jurisdiction is not about competing or antagonistic claims. It is about universal jurisdiction for the crimes in question."²⁹⁷ It was the prosecution's contention that "primacy of jurisdiction ought not be construed as monopoly of jurisdiction" and that it was up to the ICTR to decide which it could appropriately deal

²⁹² Barayagwiza v. Prosecutor, No. ICTR-97-19-AR72 (Mar.31, 2000)

²⁹³ The Prosecutor v. Ntuyahaga, No.-98-40-I(Sept.29,1998)

²⁹⁴ See ICTR\ UPD-013, (ICTR Press Releases-March 16,1999)

²⁹⁵ RPE Rule 51

²⁹⁶ See supra note 294

²⁹⁷ Id.,

with.²⁹⁸ The Prosecution rested its case by asking the ICTR Trial Chamber to order the release of the accused from the ICTR's custody to the Tanzanian authorities.

Appearing as *amicus curiae*, Belgium supported the prosecution's motion on the following basis: that if withdrawal is granted, the ICTR should order the direct transfer of the accused to Belgium; or if this was not feasible on any legal grounds, he should be handed to Tanzanian authorities. In the latter scenario, the ICTR should obtain guarantees of his extradition to Belgium.²⁹⁹ Belgium, which had issued an international warrant of arrest against the accused since 1995, transmitted a request for extradition to Tanzania immediately the accused was transferred to the ICTR's Detention Facility in Arusha, Tanzania. She argued that concurrent jurisdiction as provided in the Statute "is the rule and primacy of the tribunal over national courts is the exception."³⁰⁰

The defense on its part, argued that the Statutes do not empower the ICTR to handover an accused person to a national jurisdiction if the Prosecution seeks to withdraw charges as in the present case. The defense attorney admonished the ICTR not to "act as a rubber stamp for some national jurisdictions. It is a United Nations body."³⁰¹ In its decision on the motion to withdraw the indictment, the Trial Chamber ordered the immediate release of Ntuyahaga.³⁰² The Chamber also invoked a fifteen-day immunity against arrest of the accused by the Host Country, pursuant to the Headquarters Agreement.³⁰³ In its rendition, the ICTR amongst other issues, made reference to the *non bis in idem* principle which provides that no person shall be tried by a national court for

²⁹⁸ Id.,

²⁹⁹ Id.,

³⁰⁰ Id.,

³⁰¹ Id.,

³⁰² Prosecutor v. Ntuyahaga, No. ICTR-98-40-T, Decision on Motion To Withdraw Indictment (March 18, 1999)

³⁰³ See Headquarters Agreement, *supra* note 284

acts which he has already been tried by the ICTR, even if in circumstances provided in Article 9 para.2, a person who has been tried before a national court may be subsequently tried by the ICTR. In response to the extradition requests lodged by Belgium and Rwanda to the Tanzania authorities, the Registry of the ICTR was of the opinion that this was a bilateral issue between states concerned, which in no way involved the War Crimes Tribunal.³⁰⁴ This infuriated the then Belgian Minister of Justice, Van Parys, who criticized the fact that cooperation between the ICTR and other U.N. member states was unilateral and not reciprocal.³⁰⁵

³⁰⁴ ICTR\INFO-9-2-174, "Implementation of Trial Chamber's Decision in Ntuyahaga Case Was Correct, ICTR Registry Says," (Mar.31, 1999)

³⁰⁵ Le Matin, "Premiere elections depuis le genocide," (Mar.31, 1999)

CHAPTER 5

THE INTERNATIONAL CRIMINAL COURT (ICC)

A - The Rome Statute creating an ICC

The thrust for an International Criminal Court and the subsequent Rome Treaty, which adopted the Statute for the ICC, culminates more than seventy-five years of efforts and struggle by the international community to bring about a permanent international criminal judicial body.³⁰⁶ July 17,1998,constitutes a milestone in the crusade towards the eradication of impunity for crimes which are of utmost concern to the international community. On that day, 120 states voted to approve the text of a treaty to create a permanent ICC (hereinafter the Rome Statute), with the United States and six other states initially refusing to sign the Rome Statute.³⁰⁷

Since its inception, the idea of an international criminal justice system fashioned to deal with the most egregious crimes against humanity has bedeviled the United Nations. In the earlier days of the UN, the General Assembly resolved to “study the desirability and the possibility of establishing an international judicial organ...”³⁰⁸ Efforts to create an ICC in the past were thwarted by political considerations of states, with sovereignty being the chief culprit.³⁰⁹ The enthusiasm manifested by the Allies after the war gave way to the harsh realities of the Cold War. The logical sequence in the absence

³⁰⁶ Rome Statute, *supra* note 4

³⁰⁷ U.N. Doc. A/CONF. 183/9 (139 states have signed and 37 states have ratified the ICC Statute as of June 28,2000)

³⁰⁸ G.A. Res.260, U.N. GAO,3d Sess., U.N. Doc.A/810(1948)

³⁰⁹ Miller, *supra* not 170,at 553

of an ICC was the laissez faire that greeted the proliferation, and commission of heinous crimes against mankind. Cherif Bassiouni is of the opinion that:

Impunity must no longer be the reward of those who commit the most egregious international crimes and violations of human rights. In addition to the many never prosecuted by the ad hoc tribunals established following certain international conflicts, many more criminals in internal conflicts have not been brought to justice.³¹⁰

Serious negotiations for an ICC began in 1995 when the General Assembly created a Preparatory Committee on the Establishment of an International Criminal Court (hereinafter PrepCom).³¹¹ A series of six PrepCom meetings were held between 1996 and 1998 to resolve a number of technical questions. However, many issues remained unresolved and the General Assembly decided to hold a Diplomatic Conference in Rome in June and July of 1998.³¹² The target was to reach agreement on the final text of a treaty "that would create the last great international organization of the twentieth century."³¹³ However, it is worthwhile to note that the ICC will actually come into existence only after sixty states have ratified the Rome Treaty.³¹⁴

The establishment of a permanent ICC forges the "missing link" in the international legal system. The absence of a judicial body to deal with individual criminal responsibility in the international arena meant that the most egregious violations of human rights and humanitarian law benefited from impunity. The International Court of Justice, otherwise known as the World Court, has *locus standi* to handle only cases

³¹⁰ Bassiouni, *supra* note 35

³¹¹ U.N.G.A. Res. 50/46, U.N. Doc. A/RES/50/46, Dec. 11, 1995

³¹² Sewall & Kaysen eds., *supra* note 26 at 61

³¹³ *Id.*,

³¹⁴ Art. 126 of the Rome Treaty

between States, not individuals. The ICC would provide a forum and thus acknowledge the crimes that perpetrators commit.³¹⁵

1- The need for an effective ICC

There are ample reasons for the establishment of an effective ICC amongst which are the following³¹⁶:

(i)- Deterrence

The culture of impunity “not only encourages the recurrence of abuses against human dignity, but also strips human right and humanitarian law of their deterrent effect.”³¹⁷ One advocate for a permanent ICC is of the opinion that:

The quantum of human harm produced since World War II by conflicts of a non-international character –purely internal conflicts and victimization by tyrannical regimes far exceeds the combined casualty figures of World War I and World War II...While an international justice system might not stop future conflicts, it would vindicate the victims of international crimes and remind ourselves and future generations of the victims’ plight and the perpetrator’s misdeeds.³¹⁸

It is obvious that the lack of prosecution emboldens perpetrators. The failure of the international community to prosecute Turkey for the genocide committed against Armenians serves as a lesson in morality. In response to a question posed by his generals before the German invasion of Poland in 1939, Hitler responded, “Who after all is today speaking about the destruction of the Armenians?”³¹⁹ His alter ego, Albert Speer, was of the opinion that “it would have encouraged a sense of responsibility on the part of leading

³¹⁵ Richard Goldstone, Conference Luncheon Address, 7 Transnat’l L. & Contemp. Probs. 1, at 7 (1997)

³¹⁶ For a comprehensive account of this subject, see Young Sok Kim, The Cooperation of a State to Establish an Effective Permanent International Criminal Court, 6 D.C.L.J. Int’l & Prac. 157 (1997)

³¹⁷ The Lawyers Committee for Human Rights, Establishing an International Criminal Court, at 3

³¹⁸ Bassiouni, *supra* note 35, 62

³¹⁹ James F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War, at 173 (1982) (quoting Hitler, Speech to the Chief Commanders and Commanding Generals on the Obersalzberg, Aug. 22, 1939, in 7 British Documents on Foreign Policy, 1919-1939, Third Series, 258 (E.L. Woodward et al eds., 1949-55))

political figures if after the First World War the Allies had actually held the trials they had threatened.”³²⁰

(ii)-To counter the failure of national judicial systems:

Violations of human rights and humanitarian law are ideally dealt with by national authorities of the state where the crimes or violations were committed. However, states are very reticent to prosecute their citizens, especially when the accused persons are in positions of authority.³²¹ A permanent ICC could salvage this lacuna in national systems, if they are unable or unwilling to prosecute.

(iii)- To remedy the shortcomings of ad hoc international tribunals:

A permanent ICC will indeed remedy the criticism levied against the ad hoc tribunals that they are limited in both space and time. The scope of their jurisdiction is exercised only within certain geographical areas,³²² and they cover only crimes committed within a certain period of time. The a-la-carte or selective creation of ad hoc tribunals by the Security Council has also come under attack by some states like Serbia who claim that the decision to create the ICTY was politically motivated. Former Prosecutor for the ad hoc tribunals, Judge Richard Goldstone lends credence to this criticism when he says that the “essence of justice is its universality, both nationally and internationally. A decent and rational person is offended that criminal laws should apply only to some people and not to others in similar situations.”³²³ Judge Goldstone goes

³²⁰ Albert Speer, *Spandau: The Secret Diaries* 43(Richard & Clara Winston trans., MacMillan Publ'g 1976)

³²¹ Lawyers' Committee for Human Rights, *supra* note 317, at 3

³²² Former Yugoslavia in the case of the ICTY; and Rwanda in the case of the ICTR

³²³ Goldstone, *supra* note 117, at 122

forth to articulate how he felt “distinctly uncomfortable” when confronted with a question by the Serb Justice minister as to why the United Nations had a War Crimes Tribunal for former Yugoslavia when it had not done so for Cambodia, Iraq,³²⁴ as well as Sierra Leone or Liberia. This raises questions of double standards. Why is different treatment being applied to similar situations? Was the former Yugoslavia being treated differently or was this an act of discrimination. It is also widely acknowledged that the Security Council is now experiencing “tribunal fatigue,” and is probably reluctant to set up another ad hoc tribunal.³²⁵

Indeed, there are practical reasons for advocating a permanent system of international criminal justice, amongst which is the premise that such a system would eliminate the necessity of establishing ad hoc tribunals every time the need arises:

The decision to establish such tribunals, not to mention drafting the applicable statutes, takes considerable time during which the evidence of the crime dissipates. Moreover, a political debate is invariably reopened over the provisions of the statute, who will conduct the prosecutions, and who will sit in judgement. Such pressures leave ad hoc tribunals vulnerable to political manipulation.³²⁶

B – Complementarity

Unlike the Statutes of the ad hoc tribunals, which resolve the conflict of concurrent jurisdiction with states by bestowing the tribunals with primacy, the Rome Treaty that gave its imprimatur for the creation of an International Criminal Court (hereinafter ICC) has a totally different jurisdictional regime commonly referred to as “complementarity.”

³²⁴ Id.,

³²⁵ The Lawyer’s Committee for Human Rights, *supra* note 317, at 3

³²⁶ Bassiouni, *supra* note 35, at 60

The ICC's central concept of complementarity reflects a growing interrelationship between national and international courts.³²⁷ The ICC will have jurisdiction only when its Judges ascertain that national judicial authorities are "unable or unwilling." In the words of one informed commentator:

This concept provides a framework for a new relationship and perhaps even for a partnership between national and supranational judges. Although the most obvious implication of this arrangement is that supranational judges must evaluate the quality and the sincerity of their national counterparts, the relationship need not be and is unlikely to be primarily confrontational. Instead of the supranational tribunal seeking to encroach on national jurisdiction by carving out specific issues or doctrinal areas for its own, this arrangement instead assumes that national courts have primary jurisdiction and indeed presumes that national courts will be fully up to the task of doing justice. It is only in exceptional circumstances where this assumption does not hold that jurisdiction will devolve to the supranational level.³²⁸

The precept of complementarity concerns the allocation of jurisdiction between domestic courts and the ICC. Since "complementarity questions can arise only in cases where both the Court and a State have not only the capacity, but the intent to prosecute the same crime, complementarity presupposes that there is a subset of 'interested states' with an interest in prosecuting these cases."³²⁹ The first PrepCom based complementarity on the view that the exercise of police power and penal law is a prerogative of States, and therefore national courts should have primacy.³³⁰

The most developed judicial partnership between national and supranational tribunals, analogous to complementarity is the one between the European Court of Justice

³²⁷ Abram Chayes & Ann-Marie Slaughter, *The ICC and the Future of the Global Legal System*, in Sewall & Kaysen eds., at 242

³²⁸ Id.

³²⁹ Jeffrey L. Bleich, *Report of the International Law Association: Complementarity*, 20 *Denv. J. Int'l L. & Pol'y* 281 (1997)

³³⁰ "Taking into account that under international law, exercise of police power and penal law is a prerogative of States, the jurisdiction of the Court should be viewed only as an exception to such State prerogative." 1 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, 117, U.N. Doc. A/51/22 (1996)

and the national courts of European Union member states.³³¹ This is known as the “principle of subsidiarity,” and it signifies that the Community may take action in areas which do not fall within its exclusive competence “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”³³²

Prior to the Rome Statute, the International Law Committee (hereinafter ILC)³³³ had come up with a Draft Statute of the International Criminal Court in 1994.³³⁴ The ILC had to address some issues, which are pertinent to the smooth functioning of jurisdiction between States and the ICC. These issues included the determination of which competent forum has priority; what factors define an ‘interested state’ for the purposes of challenging ICC jurisdiction; what standard shall apply for determining the competency of a domestic forum; who has the burden of proof in determining whether a domestic forum is competent; what institution will ultimately resolve whether a domestic forum is competent and at what stage in the proceedings.³³⁵ Some of these issues shall be discussed later on. However, “the Statute as drafted thus reflects a general consensus that the ICC should not supplant national judicial authorities, but may only complement these authorities.”³³⁶ Thus, contrary to the ad hoc tribunals that have primacy over national

³³¹ Abram Chayes & Anne-Marie Slaughter, *The Future of the Global Legal System*, in Sewall & Kaysen eds., *supra* note 26, at 243

³³² The Treaty on European Union introduced the principle of subsidiarity into the EC Treaty, Art. 3b. See also Werner Weidenfeld & Wolfgang Wessels, *Europe from A to Z. Guide to European Integration*, 247-248

³³³ The ILC is responsible for the development and codification of international law (ILC was established by U.N. General Assembly Resolution 174(II) of Nov. 1947)

³³⁴ See Report of the International Law Committee on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10(1994) (hereinafter ILC Draft)

³³⁵ Bleich, *supra* note 329, at 282

³³⁶ *Id.*

courts, the trier of fact can adequately say that with complementarity, the ICC defers to viable and competent national courts.

1 – Complementarity: The deference of the ICC to national courts

The Rome Conference, will go down in the annals of history as a gigantic stride by the international community to bring about a permanent, independent and effective ICC that would put an end to impunity by prosecuting, deterring and punishing those accused of the worst crimes against humanity. However, the Statute's provisions on complementarity have left pundits reflecting as to whether the ICC would fall in desuetude at its inception, or whether such an ICC would be stymied from acting effectively. Central to the principle of complementarity is the "notion that national judicial systems would be taking precedence over international ones, and specifically over this Court."³³⁷ This signifies that if a state could show that it was already engaged in *bona fide* investigations and prosecutions, then those national efforts would automatically trump any interest by the ICC in the venture.³³⁸ Some prophets of doom have predicted that:

in the best of all possible worlds, one day in the future, the International Court will have no cases whatsoever. Under the pressure of its oversight, all national judicial systems will be dealing in good faith with their own war criminals, at the local level. That would obviously be a better system, and getting to such a point is one of the goals of the entire exercise. In the meantime, democracies like the United States, with highly developed systems of military as well as civilian justice, would invariably be able to shield their own nationals by invoking complementarity.³³⁹

³³⁷ Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in Sewall & Kaysen eds., *supra* note 26, at 96

³³⁸ *Id.*,

³³⁹ *Id.*,

Amongst the most sensitive issues in the negotiation of the Rome Statute was the relationship between the States and the ICC. With the principle of complementarity, “the ICC is to function as a jurisdictional ‘safety net’ only when there is no alternative forum to prosecute those linked to serious international crimes.”³⁴⁰ The jurisdiction of the ICC is expressly limited to cases where a State with jurisdiction has failed to genuinely investigate or prosecute the case.³⁴¹ This signifies that a state with jurisdiction has primacy and “can assert a superior right to deal with a case simply by investigating ...or prosecuting it.”³⁴² In such a case the ICC must defer to national proceedings even if the state determines that no prosecution is warranted.³⁴³ In the opinion of one writer, this “positions the ICC essentially as a substitute for national courts, to fulfill their functions when they are unavailable, and would seem to imply that, at least in some respects, priority of place is given to national-level justice interests.”³⁴⁴

States are very jealous of their sovereignty, and would not cede any part of it to an international or supranational body without a fight. This has been the case of ad hoc international tribunals, where states use the sovereignty paradigm to snub the primacy and orders of the international judicial bodies. Worthy of note here is the fact that the ad hoc tribunals were created by the Security Council acting under its Charter conferred Chapter VII powers and not via a multilateral treaty as would have been appropriate. This means that states that were against the creation of the ad hoc Tribunals were compelled to comply with UNSC resolutions, because these are mandatory.

³⁴⁰ Sewall & Kaysen eds., *supra* note 26, 73-74

³⁴¹ Art 17(1), *supra* note, 5

³⁴² Sewall & Kaysen eds., *supra* note 26, 74

³⁴³ *Id.*

³⁴⁴ Sewall & Kaysen eds., *supra* note 26, 197

The principle of complementarity or the deference by the ICC to national criminal proceedings is “embodied in an elaborate set of procedural requirements limiting the ICC Prosecutor’s authority to proceed with a case.”³⁴⁵ Pursuant to Article 18, it is easy for a State that has investigated or is investigating a case to challenge at every time any investigation by the ICC of the same case. The Prosecutor of the ICC is expected to notify all states with jurisdiction about any investigations commenced,³⁴⁶ except those based on a referral by the Security Council. Within a month of receipt of notification, States must inform the Prosecutor about their own investigations of the defendant.³⁴⁷ At the request of that State, the Prosecutor shall defer to the State’s investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.”³⁴⁸ The same is true of a state, which is not a party to the Rome Treaty.³⁴⁹

Under Article 17,a Pre-Trial Chamber can decide to authorize an ICC investigation only if two out of three Judges ascertain that the State is grossly incompetent to carry out a proper investigation.³⁵⁰ Pursuant to such a determination by the Pre-Trial Chamber, the State concerned may appeal the decision on an expedited basis to the Appeals Chamber,³⁵¹ where a majority of five judges will decide the matter.

With the Rome Statute, the choice of complementarity was a conscious and deliberate one. In the view of one observer, the “decision by the international community of sovereign independent states to negotiate a Statute for a new permanent International

³⁴⁵ Sewall & Kaysen, *supra* note 26, at 74

³⁴⁶ Rome Statute, Art. 18(1)

³⁴⁷ Id., Art. 18(2)

³⁴⁸ Id.

³⁴⁹ Sewall & Kaysen eds., *supra* note 26, 74

³⁵⁰ Id.

³⁵¹ Rome Statute, Art. 18(4)

Criminal court, while undertaken with an acute sense of the historical significance of such an institution, was never intended to override state sovereignty entirely.”³⁵² The most important question in Rome was where to draw the line on the guarantee of primacy by national courts and who would make the decision on which side of the line a particular case fell.³⁵³

2 – Complementarity as a limitation on the jurisdiction of the ICC

The common man on the street or the uninformed onlooker might have the simplistic perception that when the ICC comes into being, it would be a panacea for all crimes against humanity committed around the world. However, it will not actually be so, especially with the concept of complementarity. In the opinion of one observer, provisions “exist within the ICC Treaty that could be interpreted as providing a statutory basis for the ICC taking a very low-volume prosecutorial approach.”³⁵⁴ The validity of this statement becomes compelling when the trier of fact simultaneously makes an exegesis of Articles 1,5 and 17 of the Rome Statute.³⁵⁵

Article 1 provides that the ICC “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern...and shall be complementary to national criminal jurisdictions.” Article 5 articulates a similar message when it states that the subject matter “jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.”³⁵⁶ Article 17

³⁵² See Doherty & McCormack, supra note 6, 152

³⁵³ Id.

³⁵⁴ Sewall & Kaysen eds., supra note 26, 199

³⁵⁵ Id.,

³⁵⁶ Rome Statute, Art.5 (1), provides for crimes within the jurisdiction of the ICC viz: (a) The crime of genocide (b) Crimes against humanity (c) War Crimes (d) The crime of aggression

includes as a basis for inadmissibility of a case before the ICC that the crime, even while within the subject matter jurisdiction of the ICC, “is not of sufficient gravity to warrant further action by the Court.”³⁵⁷ The inclusion of “insufficient gravity” as a basis for inadmissibility of cases otherwise within the ICC’s jurisdiction compels the conclusion that some instances of genocide, crimes against humanity, war crimes, and aggression shall be held ‘not sufficiently grave’ to warrant the ICC’s action. Reading Articles 1, 5 and 17 together, Virginia Morris thinks this “minimalist approach” to the Treaty would be damaging to the ICC, and a plausible “interpretation of this gravity requirement would be that the ICC try a very small number of the most culpable perpetrators.”³⁵⁸

With the objective of preserving the jurisdiction of states and to limit the right of the ICC to intrude on that jurisdiction, the Rome Statute elicits in “clear and narrow” terms the standard of what constitutes the “unwillingness” or “inability” of a state to carry out a genuine prosecution.³⁵⁹ The ICC may determine “unwillingness” if the proceedings before the national court “was made for the purpose of shielding the person concerned from criminal responsibility;”³⁶⁰ when there has been an unjustified delay in the proceedings inconsistent with an intent to bring the person concerned to justice;³⁶¹ or where the proceedings were or are being conducted in a manner inconsistent with an intent to bring accused to justice.³⁶²

In determining what constitutes “inability” of a State to carry out genuine prosecution, the ICC shall consider whether, “due to a total or substantial collapse or

Under Art.5 (2), the ICC shall exercise jurisdiction over the crime of aggression once the crime is defined and conditions are set out under which the Court shall exercise jurisdiction

³⁵⁷ Rome Statute, Art.17 (1)(d)

³⁵⁸ Sewall & Kaysen eds.,supra note 26,199

³⁵⁹ Id. at 74

³⁶⁰ Rome Statute, Art. 17(2)(a)

³⁶¹ See id. Art.17 (2)(b)

³⁶² See id. Art. 17(2)(c)

unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”³⁶³ This indeed sets a high threshold for the ICC to exercise jurisdiction in a case and it is thus conceivable that there would be instances where the judicial system of a state is incompetent to investigate and prosecute a case, but the State might not be willing to devolve jurisdiction to the ICC.

The Rome Statute’s provisions on International Cooperation and Judicial Assistance,³⁶⁴ has been dubbed the ICC Achilles’ heel. Contrary to the Statute proposed in 1943 by the London International Assembly, which would have furnished the ICC with its own constabulary or enforcement agency, the ICC created by the Rome Treaty “will be completely dependent on states for assistance with respect to the investigation of offenses, the arrest of suspects, the location and procurement of evidence and witnesses, and the enforcement and recognition of its judgments.”³⁶⁵ In the absence of State cooperation, it is evident that the ICC could fall in desuetude at its inception, or its effectiveness could be stymied by the failure of States to cooperate. This leads to the cynical perception that when the vital interests of States are at stake, the latter usually supersede international law. Thus, suggesting that although firm notions of sovereignty may have eroded, the idea is appealing to states.

³⁶³ See *id.* Art. 17(3)

³⁶⁴ See *id.* Part 9

³⁶⁵ Sewall & Kaysen eds., *supra* note 26, 40-41

C – Is complementarity a vestigial form of primacy?

1 - Complementarity and challenges to admissibility of a case before the ICC.

The principle of complementarity is intended to avoid some of the problems that were linked with the concept of primacy, which governs concurrent jurisdiction of the ad hoc international Tribunals and national courts.³⁶⁶ As seen earlier on in this paper, the ICTY and ICTY in their “renditions of concurrent jurisdiction, have previewed some of the conflicts to be confronted when an international court tries some cases while national courts concurrently try others arising from the same context of mass crimes.”³⁶⁷ By the provisions of their Statutes, the ad hoc international Tribunals can trump national court proceedings by virtue of wielding jurisdictional primacy. In some cases, “this arrangement has engendered acrimony” between the Tribunals and States wishing to prosecute accused persons over whom the Tribunal have taken jurisdiction.³⁶⁸

This part of the paper seeks to answer the question whether complementarity incorporates a vestigial form of primacy jurisdiction, as is the case with the ad hoc Tribunals. A case is inadmissible before the ICC if it has been or shall be competently handled by a national jurisdiction.³⁶⁹ If admissibility is challenged pursuant to Article 19 para.2, ³⁷⁰ the International Criminal Court shall be the final arbiter on admissibility.³⁷¹

³⁶⁶ Sewall & Kaysen eds., *supra* note 26, 202

³⁶⁷ Morris, *supra* note 103 (The problem of active concurrent jurisdiction in the sphere of the ad hoc Tribunals have arisen primarily in the Rwandan context rather than the former Yugoslav context. The Rwandan Gov't has actively attempted to conduct extensive national prosecutions than have the former Yugoslav states). See also *id.*

³⁶⁸ A defining example of this acrimony is the Barayagwiza Case, *supra* note 264 (as well as stratified concurrent jurisdiction and anomalies of inversion)

³⁶⁹ See *supra* note 5, Art.17

³⁷⁰ Under Art.19 (2), challenges to the jurisdiction of the ICC may be made by the following:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

Once the ICC makes such a determination, its jurisdiction over the admissible case would be exclusive, thus precluding a national court's handling of the case, in conformity with the Rome Statute's *ne bis in idem* rule.³⁷²

Even though the Statute evinces a constant tension between supranationalism and deference to state sovereignty, a momentous victory for proponents and advocates of a strong, effective and independent ICC is the fact that, "it is the Court, not State Parties, that will decide whether cases are admissible, whether the Court has jurisdiction, whether a State's investigation or prosecution is genuine in determining complementarity, and whether evidence is admissible or not."³⁷³ This is a defining example of the assertion that the "ICC's complementarity thus incorporates a revised form of primacy in the sense that the ICC can assert exclusive jurisdiction even over the objection of a state."³⁷⁴ However, a fine distinction with the ad hoc Tribunals is the fact that the latter wield their power of primacy to prosecute and exclude national prosecution without any statutory guidance as to when that power should be applied.³⁷⁵ That said, whether it is the ad hoc tribunals or the ICC, it is the international tribunals that ultimately determine whether they will exercise jurisdiction over a particular case, to the exclusion of national courts.

³⁷¹ Rome Statute, Art. 19(1) provides that: The Court shall satisfy itself that it self that it has jurisdiction in any case brought before it. The Court may on its own motion, determine the admissibility of a case in accordance with article 17.

³⁷² Art.20 (2) provides: No person shall be tried before another court for a crime ... for which that person has already been convicted or acquitted by the Court.(This is similar to the *non bis in idem* provisions in the Statutes of the ad hoc Tribunals.)

³⁷³ Sewall & Kaysen eds.,*supra* note 26,at 40. See also Sadat Wexler, A First Look at the 1998 Rome Statute, 656-657

³⁷⁴ Id. at 202

³⁷⁵ Id.,

With regard to preliminary rulings regarding admissibility, the Prosecutor's deferral to a state investigation,³⁷⁶ is open to review if there is significant change in circumstances affecting that state's unwillingness or inability to prosecute.³⁷⁷ Even when an ICC investigation has been deferred to a state, the Prosecutor may ask the Pre-Trial Chamber to authorize procedures for the preservation of evidence. Eventhough this is envisaged only on an exceptional basis "for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."³⁷⁸ This goes a long way to show that inspite of ICC deference to national courts, complementarity does not constitute a *carte blanche* for national judicial systems.

2 – Complementarity and Security Council referrals to the ICC:

In response to the question regarding the trigger mechanism of the ICC, or who can bring cases before the ICC, the Rome Statute makes provisions for three avenues, viz: referrals by a State Party; referrals by the Security Council acting under its Chapter VII powers; and the *proprio motu* or self initiating investigation by the Prosecutor.³⁷⁹ However, there are preconditions for the exercise of jurisdiction, and they are required

³⁷⁶ Art.18 (2)

³⁷⁷ Art.18 (3)

³⁷⁸ Art.18 (6)

³⁷⁹ Rome Statute, Art. 14 provides: The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by a State in accordance with article 14
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15

when a State Party or the *proprio motu* Prosecutor brings a case before the ICC.³⁸⁰ In such cases, the ICC can only exercise its jurisdiction if the State on whose territory the crime was committed (territoriality principle) or the State of nationality of the defendant (nationality principle) is a State Party to the Statute.³⁸¹ This is a reflection or a continuum of the principle of complementarity that is visible throughout the Rome Statute.

On the flip side, the Rome Statute provides for “automatic jurisdiction” or inherent jurisdiction. Thus, a State Party consents to the jurisdiction of the ICC automatically when it ratifies the Rome Statute.³⁸² Some States like the U.S. wanted the requirement of state consent to be at two different stages, that is, at the acceptance and exercise of ICC jurisdiction.³⁸³ Such a requirement would have imperiled the ICC at its inception. One observer opines that:

for the Court to be as effective as possible, state consent should be called for once and for all, when a State becomes a party to the Statute. Otherwise, it would deprive the Court of the predictability of its function by granting States *de facto* right of veto to determine whether the Court is able to exercise jurisdiction. Thus, State consent to the acceptance and exercise of jurisdiction should be integrated into a single act.³⁸⁴

In the same light, when the United Nations Security Council, acting under its Charter conferred Chapter VII powers refers a case to the ICC, no precondition is required. In such a case, the ICC can exercise jurisdiction even when neither the state of nationality of the accused or the state on whose territory the crime was committed is a State Party to the Rome Treaty.³⁸⁵ This is usually the classic case when the Security

³⁸⁰ *Id.*,

³⁸¹ Rome Statute, art.12 para.2

³⁸² Young Sok Kim, *The Preconditions to the Exercise of Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute*, 8 J. Int'l L. & Prac. 47(1999)

³⁸³ *Id.*, at 64

³⁸⁴ Proposal submitted by the Republic of Korea, U.N. Doc. A/ CONF.183/C.1/L.6 (June 19,1998)

³⁸⁵ Sok Kim, *supra* note,382, 55

Council has determined that there is a threat to international peace and security. In such instances, the edicts of Council are mandatory on all U.N. members, irrespective of whether they are party to the Rome Statute. Thus, a referral by the Security Council constitutes one of the rare and direct instances where the principle of complementarity is inexistant, and the ICC takes precedence over national criminal judicial systems. The situation is the same as that of the primacy of the ad hoc tribunals, where there is a clear deference by national courts to the international bodies. This is a testament to the fact that there are still some vestiges of primacy of the ICC in the Rome Statute.

The issue of whether the ICC Prosecutor should self initiate an investigation without the referral or benediction of a State Party or the Security Council was topical too.³⁸⁶ The United States was particularly concerned about a potent and independent Prosecutor, reminiscent of its own domestic political fiasco when Independent Prosecutor, Kenneth Starr investigated President Clinton on the Monica Lewinsky scandal.³⁸⁷ Ambassador David J. Scheffer, the U.S. Representative to the ICC Conference, was of the opinion that the Treaty “creates a proprio motu, or self initiating prosecutor, who on his or her own authority, with the consent of two judges, can initiate investigations and prosecutions without referral to the Court of a situation either by a government that is party to the Treaty or by the Security Council.”³⁸⁸

However, U.S. apprehensions and contentions are tenuous because there are safeguards against unbridled prosecutorial discretion in the Rome Statute. Ambassador

³⁸⁶Sok Kim, *supra* note 382, 54 (1999)

³⁸⁷Lori Sinanyan, The International Criminal Court: Why the United States Should Sign the Statute (But Perhaps Wait to Ratify), 73 S. Cal. L. Rev. 1171, 1198 (2000)

³⁸⁸ See Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcommittee on International Operations of the Senate Committee on Foreign Relations, 105th Cong., at 14

Scheffer himself confirms this when he says, that the “prosecutor cannot simply walk into other countries and start investigatingHe has to fulfill documentary requirements, and he has to work with other governments in order to achieve his investigative objectives. So, it is not a completely independent prosecutor with access throughout the world.”³⁸⁹

However, the Rome conferees recognized that for there to be an effective ICC, free from the political obligations and considerations of States, as is the case of the Security Council, there had to be an independent Prosecutor to start an investigation. In the opinion of one observer, an independent prosecutor is fundamental to the effectiveness of the ICC because “States have proved unwilling to initiate proceedings against another state and/or its nationals because of the political and diplomatic ramifications involved. Their reluctance is also based a fear inviting retaliatory scrutiny of their own human rights practices.”³⁹⁰

3-ICC jurisdiction on non-State Parties: Or reason for U.S. reticence to the ICC?

The Rome Treaty for an ICC provides for the creation of an international court with subject matter jurisdiction over genocide, crimes against humanity and aggression (when the latter is defined).³⁹¹ As a precondition to the exercise of ICC jurisdiction, either the state on whose territory the crime was committed or the state of nationality of the perpetrator must be a party to the Treaty, or grant its voluntary consent to the jurisdiction of the Court.³⁹² A state that becomes party to the Statute, automatically accepts the

³⁸⁹ Id, at 27

³⁹⁰ Jelena Pejic, The Need for an Independent Prosecutor, in Lori Sinanyan, *supra* note 387, 1200

³⁹¹ Rome Statute, art.5

³⁹² Rome Statute, art.12 (2); ...the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

jurisdiction of the ICC with respect to the above crimes.³⁹³ The ICC may exercise jurisdiction over states that are not parties to the treaty and have not otherwise consented to jurisdiction.³⁹⁴ Thus, in addition to jurisdiction based on Security Council acting under its Charter conferred Chapter VII powers and jurisdiction based on the consent of the state of nationality of the accused, one writer observes that:

the ICC will have jurisdiction to prosecute the nationals of any state when crimes within the Court's subject matter jurisdiction are committed on the territory of a state that is a party to the Treaty or that consents to ICC jurisdiction for that case. That territorial basis would empower the Court to exercise jurisdiction even in cases where the defendant's state of nationality is not a party to the Treaty and does not consent to the exercise of jurisdiction.³⁹⁵

The United States vigorously contended and pressed for an amendment that would make the consent of state of nationality of the accused a condition *sine qua non* for the ICC to exercise subject matter jurisdiction.³⁹⁶ Norway called for a no action and the majority states, propelled by the Like-Minded Group,³⁹⁷ overwhelmingly rejected this proposal for amendment.³⁹⁸

(b) The State of which the person accused of the crime is a national

³⁹³ Art.12 (1): A State which becomes Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5

³⁹⁴ Rome Statute, art.12 (3): If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting state shall cooperate with the Court without any delay or exception in accordance with Part 9.

³⁹⁵ Madelin Morris, The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States, 6 ILSA J. Int'l & Comp. L. 363 (2000). See generally Young Sok Kim, The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute, 8 J. Int'l L. & Prac. 47 (2000). For a detailed account of U.S. arguments, see also Lori Sinanyan, The International Criminal Court: Why the United States should sign the Statute (But Perhaps wait to Ratify), 73 S. Cal. L. Rev. 1171 (2000)

³⁹⁶ Proposal submitted by the United States of America, U.N. Doc. A/CONF.183/C.1/L.70 (July 14, 1998); see Annex 4

³⁹⁷ The Like-Minded Group was the group of states at the Rome Conference that were willing to give the ICC broader powers and functions, in order to assure its effectiveness. They were made of more than 60 nations, including the United Kingdom, Germany, Norway, Canada, Argentina, South Africa, Senegal, Singapore, South Korea ...

³⁹⁸ The voting on the no action was 113-17, with 25 abstentions

The U.S. contended that international law prohibits the ICC from exercising jurisdiction over nationals of non-parties. While testifying before the Senate Foreign Relations Committee, Ambassador Scheffer asserted that the Treaty purports to establish an arrangement whereby "U.S. armed forces operating overseas could be conceivably prosecuted by the international Court even if the United States has not agreed to be bound by the Treaty. This is contrary to the most fundamental principles of treaty law."³⁹⁹ This position is buttressed by Article 34 of the Vienna Convention on the Law of Treaties, which provides that a "treaty does not create either obligations or rights for a third State without its consent."⁴⁰⁰

However, some academics have opined that the source of obligation for the non-Party State is not the Treaty but customary international law. This is corroborated by Article 38 of the Vienna Convention which is to the effect that nothing in "Article 34 and 37 precludes a rule set forth in a treaty from becoming binding upon third States as a customary rule of international law recognized as such."

Customary Law according to Article 38 of the Statute of the International Court of Justice is defined as "evidence of a general practice accepted as law."⁴⁰¹ Customary law entails both a quantitative element as reflected in the practice of states and a qualitative element as reflected by *opinio juris* or states' declarations, which constitute their acquiescence of the rule of international law.⁴⁰²

³⁹⁹ David Scheffer, "Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate," 105th Cong., 2nd Sess., S.Hrg. 105-724, 13 (July 23, 1998)

⁴⁰⁰ Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) (hereinafter the Vienna Convention)

⁴⁰¹ Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1, 59 Stat. 1031

⁴⁰² See Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit, *International Law Cases and Materials* (Third Edition), at 54-57 See also, Section 102(2) of the Restatement Third of the Foreign Relations Law of the United States (1987) which provides that customary law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation."

Indeed, the “*opinio juris* of states on the Nuremberg principles, the principles of the Genocide Convention and universal jurisdiction over the core crimes,”⁴⁰³ was a compelling fact at the ICC Conference. Although most commentators focus on the “delegated territorial basis of the ICC as legitimizing its exercise of jurisdiction over the nationals of non-party states,” universal jurisdiction is also relevant given the unique nature of the core crimes within the subject matter jurisdiction of the ICC.⁴⁰⁴ While other basis of jurisdiction require a nexus between the prosecuting state and the offense, the perpetrator or the victim, universal jurisdiction provides every state with jurisdiction over a limited category of offenses generally recognized as of concern to the international community, regardless where the offense occurred, the nationality of the perpetrator, or the nationality of the victim.⁴⁰⁵ However, the U.S. maintains that the “requirement of the consent of the state on whose territory the crime was committed would be unnecessary if the Court’s basis were universality.”⁴⁰⁶

The concept of universal jurisdiction has two alternative predicates.⁴⁰⁷ The first involves the gravity of the crimes involved. Many of the crimes subject to the universality principle are so egregious in scope and degree that they offend the interest of all humanity and any state may, as humanity’s agent punish the offender.⁴⁰⁸ The second involves the place where the crime was committed. Many of the crimes that fall under universality, occur in territory over which no state has jurisdiction, or in situations where

⁴⁰³ Sok Kim, *supra* note 382, at 74

⁴⁰⁴ Sewall & Kaysen eds., *supra* note 26, 215

⁴⁰⁵ Kenneth C Randall, Universal Jurisdiction under International Law, 66 Tex. L. Rev. 785, 786 (1988)

⁴⁰⁶ David Scheffer, International Criminal Court: The Challenge of Jurisdiction (address at the annual meeting of the of the American Society of International Law, March 26, 1999), 3

⁴⁰⁷ Lee A. Steven, Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations, 39 Vir. J. Int’l L. 425, 434 (1999)

⁴⁰⁸ Sewall & Kaysen eds., *supra* note 26, at 216

the territorial state is unlikely to exercise jurisdiction because the perpetrators are state authorities or the crime was committed with state complacency.⁴⁰⁹ The first crime of universal jurisdiction was piracy and U.S. Supreme Court jurisprudence in that domain enunciates that “pirates being *hostis humani generis* [enemies of all mankind] are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defense and safety of all.”⁴¹⁰

The four offenses within the subject matter jurisdiction of the Rome Statute were considered crimes of universal jurisdiction under customary international law by most states and experts, “even though their precise definition had not been completely agreed by all States.”⁴¹¹ A precedent was indeed set by the international community in 1945, when the Nuremberg Charter enumerated the first definition of crimes against humanity. The U.N. General Assembly subsequently recognized the Charter and jurisprudence of Nuremberg, and has also confirmed that no statute of limitations may be applied to bar prosecution of such crimes.

With a view to avoiding the *ex post facto* application of laws that so tainted the Nuremberg and Tokyo Tribunals, the Statutes of the ad hoc ICTY and ICTR were strictly drafted in order to cover only those crimes that were recognized by the international community as crimes of universal jurisdiction. The need for the “conservatively formulated jurisdiction” of the ad hoc Tribunals was defended by the U.N. Secretary General, who articulated that the “application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian

⁴⁰⁹ Id.,

⁴¹⁰ United States v. Smith, 18 U.S. 153 (1820)

⁴¹¹ See generally Leila Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 Geo. L. J. 381 (2000)

law which are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise.”⁴¹² The Appeals Chamber of the ICTY has held that crimes within the Court’s Statute, including war crimes in internal conflict, are amenable to universal jurisdiction.⁴¹³

Michael P Scharf is of the opinion that “customary international law on the definition and scope of the war crimes and crimes against humanity has been clarified and crystallized by the promulgation of the Statutes of the ICTY and...ICTR, the decisions rendered by these tribunals, and the acceptance of the international community of these developments.”⁴¹⁴

Domestic courts in Spain and the United Kingdom have determined that former Chilean dictator, Augusto Ugarte Pinochet, could be tried in both countries under the principle of universal jurisdiction for acts of torture and other crimes against humanity committed in Chile during his tenure at the helm of the state.⁴¹⁵ The House of Lords also held that although the basic reasoning varies in detail, the “basic proposition common to all...is that torture is an international crime over which international law and the parties to the Torture Convention have given universal jurisdiction to all courts wherever the torture occurs.”⁴¹⁶ On the basis of universal jurisdiction, Israel tried Adolf Eichmann in 1961,⁴¹⁷ and John Demjanjuk in 1988⁴¹⁸ for crimes committed before the creation of the Israeli state. A court in Senegal on the basis of universal jurisdiction, indicted the former

⁴¹² Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), U.N. Doc S/25704, para.34 (1993)

⁴¹³ Prosecutor v. Tadic, Appeal on Jurisdiction, No. IT-94-1-AR, para..94 (Oct.2, 1995),35 ILM 32(1996)

⁴¹⁴ Sewall & Kaysen, supra note 26, 219

⁴¹⁵ Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 2 W.L.R. 272(H.L.)(1999), reprinted in 38 ILM 430(1999)

⁴¹⁶ Regina v. Bartle *ex parte* Pinochet, H.L.(March 24,1999)

⁴¹⁷ Attorney General of Israel v. Eichmann, 36 I.L.R. 277,299,304(Isr.Sup.Ct. 1962)

⁴¹⁸ Demjanjuk v. State of Israel (Special Issue), 395-395

dictator of Chad, Hissen Habre. Thus, it is certainly “possible to view the drafters in Rome merely as scribes writing down already existing customary international law, rather than as legislators prescribing laws for the international community.”⁴¹⁹

The argument has been made that if states have jurisdiction to investigate and prosecute these international crimes under the banner of universal jurisdiction, they can collectively confer this jurisdiction to the ICC, by virtue of the Rome Treaty. The German Delegation to the ICC Conference concluded that:

“There is no reason why the ICC established under the basis of a Treaty concluded by the largest possible number of states, should not be in the same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves.”⁴²⁰

If any individual state can try a war criminal, regardless of nationality, for these core crimes, then the conference participants rightfully empowered the ICC with the same rights.

However, opponents of universal jurisdiction as a basis for ICC exercising jurisdiction over non-State Parties, like the U.S, claim that:

There is no instance of prior state practice involving the delegation of states’ jurisdiction to an international court without the consent of the defendant’s state of nationality. The International Criminal Tribunals for former Yugoslavia and Rwanda base their jurisdiction on Security Council powers under Chapter VII. The Tokyo Tribunal...based its jurisdiction on Japan’s consent. And the Nuremberg Tribunal based its jurisdiction on the consent of the Allies, acting as the German sovereign.⁴²¹

The compelling conclusion from this group’s perspective is that none of the four modern international tribunals has exercised the delegated jurisdiction of states “in the absence of

⁴¹⁹ See Sadat & Carden, *supra* note 411

⁴²⁰ See German Proposal, U.N. Preparatory Committee on the Establishment of an International Criminal Court (Mar.16-Apr.3, 1998), U.N. Doc. A/AC.249/1998/DP.2 (Mar.23, 1998)

⁴²¹ Madeline Morris, *The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States*, 6 *ILSA J. Int’l & Comp. L.* 363,366-367

consent by the defendant's state of nationality. Therefore, there appears to be no prior instance of state practice to support the ICC's exercise of universal jurisdiction delegated to it without the consent of the defendant's state of nationality."⁴²²

Advocates for an effective ICC with broad based jurisdiction, assert that what the United States claims is a problem is already an international norm recognized by the U.S. itself. The nationality and territoriality principles are the most firmly established in international law. Phillipe Kirsch, Chairman of the Rome Diplomatic Conference writes:

In particular, the territorial basis is the primary jurisdictional link accepted in all legal systems and confirmed in numerous conventions, including those on genocide, torture, hostage taking, and several forms of terrorism. This does not bind states that are not parties to the Statute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal law applicable in the territories to which they travel, including laws arising from treaty obligations.⁴²³

That said, there is no novelty in conferring universal jurisdiction over nationals of non-party states through the mechanism of treaty law. The United States is party to numerous international treaties that endow State Parties to exercise jurisdiction over perpetrators of any nationality found within their territory, irrespective of whether the state of the accused's nationality is also a party to the treaty.⁴²⁴ Worthy of note is the fact that none of these conventions purport to limit their application to the offenses committed by the nationals of parties; nor do the U.S statutes implementing the conventions limit prosecution to the nationals of signatory parties. The United States has indeed exercised treaty based universal jurisdiction over the nationals of non-party states even in cases

⁴²² Id.

⁴²³ Phillipe Kirsch, The Rome Conference on the International Criminal Court: A Comment, ASIL Newsletter, 1(Nov/Dec. 199)

⁴²⁴ These include amongst others the 1949 Geneva Conventions; the 1958 Law of the Sea Convention; the 1970 Hijacking Convention; the 1971 Aircraft Sabotage Convention; the 1988 Airport Security Protocol; the 1973 Internationally Protected Persons Convention; the 1979 Hostage Taking Convention; the 1984 Torture Convention; the 1988 Maritime Terrorism Convention; et al. See also Sewall & Kaysen eds., *supra* note 26, 220

where the crime was not recognized by customary international law as being subject to universal jurisdiction.⁴²⁵

It is clear that the ICC Treaty will have a difficult time if it ever comes up for ratification by the U.S. Senate. The United States has legitimate reasons to worry about the fate of its peacekeepers around the world, and the possibility of these facing the ICC one day. However, the principle of complementarity stipulates that the ICC will not exercise jurisdiction over U.S. citizens unless the U.S. justice system is unwilling or unable to prosecute. This is highly unlikely, given the reputation of the U.S. justice system. That said, the United States came to terms with the fact that whether it signed the Rome Treaty or not, its citizens would be amenable to the jurisdiction of the ICC. The U.S. would have lost its right to participate in further conferences or discussion on remaining issues of the ICC, like the selection of judges, prosecutors and in establishing the rules of procedure and evidence amongst others.⁴²⁶ One observer concludes by asking this question, "Can the United States aspire to world leadership without holding the high moral ground."⁴²⁷ The United States did sign the Rome Treaty on the eve of the deadline for states.⁴²⁸ The U.S. finally came to terms with the uncompromising conclusion that the International Criminal Court can legitimately investigate, indict and prosecute U.S.

⁴²⁵ See cases of *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1998) (where the U.S. indicted, apprehended, and prosecuted Fawaz Yunis, a Lebanese national, for hijacking a Jordanian airliner with 2 US citizens in it, from Beirut airport. US inter alia, asserted jurisdiction on the basis of the Hostage Taking Convention, even though Lebanon is not a state party to the convention. The D.C. Cir. Court upheld its jurisdiction based on the domestic legislation implementing the Hostage Taking Convention that had conferred on it universal and passive personality jurisdiction over this type of terrorist act.). See also *United States v. Ali Rezaq*, 134 F.2d 1121 (D.C. Cir. 1998) (here, the US prosecuted a Palestinian national for hijacking an Egyptian airliner, despite the fact that Palestine is not party to the Hague Hijacking Convention.).

⁴²⁶ Sinanayan, *supra* note 387, at 1189

⁴²⁷ See Young Sok Kim, *supra* note 382, at 80

⁴²⁸ U.N. doc. A/CONF. 183/9 (Rome Statute was opened for signature in New York, at the U.N. Headquarters, until 30 December 2000).

officials for crimes committed in the territories of State Parties, notwithstanding the fact that the U.S. is not a signatory to the Rome Treaty.

CONCLUSION

The international community heralded and greeted the Rome Statute establishing an International Criminal Court with pomp and pageantry. Designed to overcome the limits, deficiencies and lacunae of ad hoc international criminal tribunals, the ICC is expected to forge the missing link in the international legal community by creating a forum to prosecute and punish individuals, irrespective of their official positions for the most serious crimes against humanity. The International Court of Justice cannot play this role, since it has capacity to hear only cases between States. Worthy of note is the fact that the ICC is still an untested judicial entity and will remain in the abstract until sixty articles of ratification are deposited in Rome.

However, no sooner had the dust settled on the Rome Conference did legal pundits come to terms with the fact that the Rome Treaty was the product of political conflict and compromise. The leverage of states in the realm of international law is still potent, the concept of sovereignty very much alive, and the ICC Statute is a testament to these assertions. Many states in Rome were wary of allowing the ICC to exercise powers traditionally reserved to states would negatively impact national sovereignty. The treaty contains some intricate jurisdictional provisions on the vaguely defined concept of complementarity. While the ICC defers to national courts as a matter of principle, that primacy of national courts would be vitiated when it is determined that the national court is grossly incompetent to try the case. There are also times when the national courts must defer to the ICC, despite their usual objections. This occurs when the Security Council

acting under its Chapter VII powers under the U.N. Charter ascertains that there is a threat to international peace and security, and thus seeks to redress the situation.

Until the International Criminal Court becomes fully operational and starts making renditions on some of the provisions on complementarity, it is indeed difficult for this trier of fact to ascertain the exact meanings and contours of the Rome Statute. Though a milestone in the fight against impunity and the deterrence of the most heinous and egregious crimes, the Statute also has its loopholes. This conclusion seeks to answer the question whether the ICC and its dominant principle, "complementarity", constitute a regression of international law or not.

A closer look at Article 12 of the Rome Statute elicits that the state, which has custody of an accused person, is not one of the means by which the ICC can obtain jurisdiction. Human rights groups were nervous about the unfortunate exclusion of the custodial state. They claim that excluding the custodial was unnecessary under international law because the latter already allows individual states to try perpetrators of core genocide, war crimes and crimes against humanity under the principle of universal jurisdiction.⁴²⁹ Critics fear that the ICC will be ineffective in dealing with rogue states if the leaders "kill their own people on their own territory,"⁴³⁰ and decide not to stray away from their home states, they would not be accessible for prosecution before the ICC. However, with the principle of universal jurisdiction, such an accused person may not be free to travel out of his country without the specter of some type of prosecution. Indeed, the exclusion of the custodial state was one of the compromises necessary for the Rome Treaty to garner wide support.

⁴²⁹ See Melissa M Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in The Rome Statute*, 49 Duke L.J. 825 (1999)

⁴³⁰ Theodor Meron, *The Court We Want*, Wash. Post, at A 15 (Oct. 13, 1998)

Another shortcoming in the Rome Statute is the “opt-out” clause,⁴³¹ which gives citizens of State Parties that have ratified the Treaty the opportunity to take advantage of the opt-out provision and be immune from war crimes prosecution for seven years. Human rights groups have questioned the *raison d’être* of such a paradoxical provision for a court that is expected to prosecute those war crimes. Richard Dicker, of Human Rights Watch, is of the opinion that this “sends a message to potential war criminals- - you’ve got six and a half years to do the job...That’s not justice. That’s nonsense.”⁴³²

The possibility of deferral of a case from the ICC subsequent to a U.N. Security Council resolution was hotly contested in Rome. Although there was unanimity that the fundamental role played by the UNSC in maintaining peace and security should not be disturbed, there was disagreement as to the degree of control the Security Council should have over the new Court.⁴³³ When acting under its Chapter VII powers, Council can make referrals to the ICC and by that token, compel national judicial authorities to devolve their primacy to the ICC. However, the Security Council can also suspend any investigation by the ICC or prosecution for a renewable period of twelve months.⁴³⁴ This has also been described as one of the pitfalls of the Treaty. The United States contended that authorization must be obtained from the Security Council before any ICC prosecution could be pursued. The “like-minded” States and others, thought that allowing Council to have unbridled control would constitute a major impediment to the independence and effectiveness of the ICC, since it is a political body where each of its

⁴³¹ Rome Treaty, art. 124

⁴³² See Richard Dicker, in Melissa Marler, *supra* note 429, 841

⁴³³ Sewall & Kaysen eds., *supra* note 26, 75

⁴³⁴ Art. 16 provides that: No investigation or 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; that request may be renewed by the Council under the same condition.

five permanent members have a veto.⁴³⁵ Under this scenario, any veto by the permanent members would have stymied any ICC prosecution. To avoid this monumental flaw, the Statute as adopted in Rome, “balances respect for the Security Council’s role with the need to maintain the independence of the ICC,” by making it possible for a single veto to prevent the suspension or renewal of Security Council deferral.⁴³⁶ This indeed dilutes the original power of the UNSC in the sense that, all the five permanent members must agree on a resolution before the ICC can be barred. If one of these members wields its veto, then the ICC would continue with the prosecution of the case.

In addition to the above lacunae, the ICC’s *ratione temporis* jurisdiction is limited only to crimes committed after its coming into existence.⁴³⁷ Although this depicts the importance accorded to the *nullum crimen nulla poena sine lege* (no crime or penalty without law) principle and the rights of the accused, it also means that most of the heinous crimes committed before the Statute comes into force would not be subject to the ICC’s jurisdiction.

Another shortcoming concerns the fact that the ICC would not have jurisdiction over the crime of aggression, due to the fact that the Rome Conference failed to come up with a definition. Although aggression is one of the crimes within the ICC’s subject matter jurisdiction, the Statute specifically provides that the ICC shall not exercise jurisdiction over the crime of aggression until the Assembly of State Parties develops a definition and appropriate conditions.⁴³⁸ The Court thus finds itself in an uncomfortable

⁴³⁵ Sewall & Kaysen eds., *supra* note 26, at 75

⁴³⁶ *Id.* at 76

⁴³⁷ Art. 11(1) provides: The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

⁴³⁸ Art. 5(2) provides: The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under

situation where it can investigate and prosecute war crimes, but cannot prosecute aggression, which is the mother of war crimes.

That said, the issue of concurrent jurisdiction between states and international courts is topical. The advent of international criminal courts marks the "end of an era when the exercise of criminal jurisdiction fell within the unfettered prerogatives of the sovereign state."⁴³⁹ The statutes of the ad hoc tribunals resolve the jurisdictional conflict with national judicial systems by granting the former primacy over the latter. This reflects a scenario where states have to defer their criminal sovereign jurisdiction to international bodies. However, the principle of complementarity provides the opposite scenario where the ICC defers to national courts, except in cases where the latter is incompetent or unable and unwilling to investigate a crime.

In spite of the unequivocal primacy of the ad hoc tribunals, the fact that it has not been adequately implemented and enforced, makes it difficult to establish whether primacy is functionally superior to complementarity. The Milosevic case is a defining example of the jurisdictional gap between *de jure* and *de facto* primacy. Facts elicit that Milosevic would not have been deferred or extradited to the Hague without the financial and economic clout of the West, and the United States in particular. This sets an uncertain precedent because, there are indeed no clear cut rules to apply primacy in a case where the state which is expected to defer an accused to the international Tribunal refuses to do so. The Milosevic case is indeed a case study to be revisited, for it enunciates the perils of primacy. Milosevic was indicted alongside four other dignitaries of Serbia. One of them Milan Milutinovic, is actually the President of Serbia and there is no pressure for

which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with relevant provisions of the Charter of the United Nations.

⁴³⁹Brown, *supra* note 1, at 430

these indictees to be extradited to The Hague for prosecution. The absence of an enforcement agency as well as the failure of the Security Council to vigorously implement primacy allows recalcitrant states to snub the edicts of the U.N. If the international community's intention were to send the message that there is no room for impunity, it would not succeed in this venture by trying Milosevic alone.

At the Rome Conference for an ICC, it is clear that states were resolved on retaining some form of control on their criminal sovereign jurisdiction. This is reflected in the principle of complementarity, which represents a delicate compromise between supranationalism and state sovereignty. Despite criticisms that the compromise at Rome was one which settled for the "lowest acceptable denominator of jurisdiction, unable to advance the interests of international law," it is the ICC and not State Parties which makes the final decision as to the admissibility of a case and whether the investigation and prosecution by a state is genuine. Thus, this trier of fact can with guarded caution say that even though the ICC defers to national courts in conformity with the principle of complementarity, complementarity at the same time retains some vestiges of primacy, as is the case of the ad hoc tribunals. This is especially so when the Security Council refers a case to the ICC. In such a case, national courts will defer to the ICC, thus creating a scenario similar to the primacy of the ad hoc tribunals.

The experience with primacy helped shape the approach towards complementarity. For concurrent jurisdiction between international courts and national judicial systems to succeed, there is the need for a comprehensive protocol between the two fora. A foremost expert on the topic, Madeline Morris, is of the opinion that concurrence of jurisdiction "raises complex questions of regarding cooperation in

investigations and sharing of evidence. Obvious advantages in efficiency and effectiveness are to be gained by close national and international cooperation in investigations and evidence gathering.”⁴⁴⁰ As witnessed in the ICTR, and ICTY in the Milosevic case, another area with potential for uncertainties and tension between the international and the national fora concerns the distribution of defendants.⁴⁴¹ These problems are at times due to lack of communication or fundamental conflict of interests, with each forum wanting to exercise the inherent jurisdiction they have. However, the “threshold requirement for greater coherence in the interaction of national and international jurisdictions is a clear articulation, in each case in which an international tribunal is to be convened, of the needs which that particular tribunal is intended to meet.”⁴⁴²

The broad range of issues regarding the concurrence of national and international jurisdiction formed the premise for complementarity. In a treatise on the perils of primacy, one author opines that there are “many difficult problems involved in making international tribunals as effective in enforcing the law as most domestic courts” but because some of these “have proven so intractable, international lawyers have avoided examining the premise that the goals of accountability are furthered by primacy.”⁴⁴³ The international legal paradigm attempts to merge the “profoundly consensual” nature of *jus gentium* with the “profoundly coercive” nature of national criminal law, by imposing the principle of primacy. Complementarity takes the opposite course by endowing national courts with primacy over the ICC, where the latter only complements.

⁴⁴⁰ Morris, *supra* note 100, 362

⁴⁴¹ Id

⁴⁴² Id

⁴⁴³ Jose Alvarez, Crimes of States/Crimes of Hate: Lessons from Rwanda, 24 Yale J. Int'l L. 365, 387 (1999)

It is the humble view of this trier of fact that until the ICC comes into existence after the deposition of sixty articles of ratification at Rome, and starts interacting with States Parties and their judiciaries, it would be an exercise in conjecture to go forth and state which of the principles between primacy and complementarity is best for concurrent jurisdiction between states and international courts.

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