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THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE INTERNATIONAL COMMUNITY

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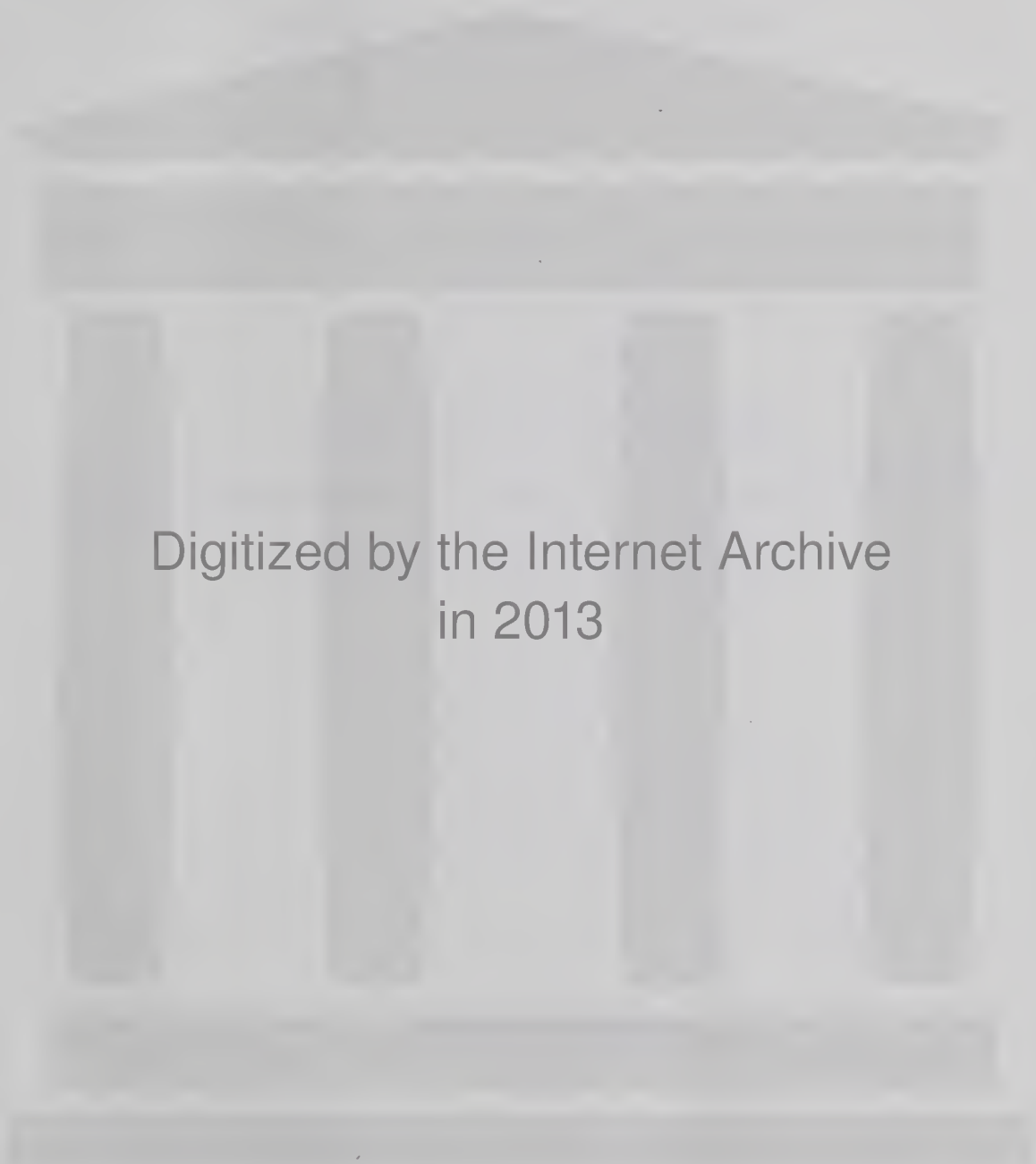

THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE INTERNATIONAL COMMUNITY

by

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AND THE INTERNATIONAL COMMUNITY

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DEDICATION

To My Father,

The great judge, who taught me everything.

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I am indebted to so many people that I have to thank them all.

First, I am grateful to Professor Cherif Bassiouni who supported me and assisted me when I was a District Attorney, where I first became interested in the international criminal court, and then helped me through my academic journey in The University of Georgia. His numerous valuable books and law review articles on the ICC and International Criminal Law have helped me and led me to write this paper. It was his enthusiasm for international justice and his common sense approach to life that encouraged me to obtain my LL.M degree and write my thesis on the ICC.

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TABLE OF CONTENTS

Page

ACKNOWLEDGMENTS v

ABBREVIATIONS ix

PREFACE x

CHAPTER

1 INTRODUCTION 1

2 OVERVIEW ON THE INTERNATIONAL CRIMINAL COURT 6

2.1 The Road to the International Criminal Court 6

2.2 The Role of the NGO's in Establishing the International Criminal Court 12

2.3 The Place of the International Criminal Court in the International Legal System 15

2.4 The Main Objectives of the International Criminal Court 16

3 THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 21

3.1 Overview on the Jurisdiction of the International Criminal Court 21

3.2 Subject Matter Jurisdiction 22

3.3 Jurisdiction over a Case 32

3.4 Complementarity Threshold 40

4 INTERNATIONAL COOPERATION BETWEEN THE STATES AND THE INTERNATIONAL CRIMINAL COURT 46

4.1 Cooperation from States parties 47

4.2 Cooperation from Non-Party States 66

4.3 Cooperation with Intergovernmental Organizations 68

4.4 Cooperation Requested from the Court 68
4.5 Costs of Cooperation....69
4.6 Confidentiality 70
4.7 Implementation 70
5 RECOGNITION AND ENFORCEMENT OF THE ICC's JUDGMENTS....74
5.1 Enforcement of Sentences of Imprisonment....74
5.2 Enforcement of the ICC's Orders 79
5.3 Reduction of a Sentence....80
5.4 Escape 81
5.5 Implementation 82
6 CONCLUSION....84
APPENDIX
RATIFICATION STATUS OF THE ROME STATUTE 91
BIBLIOGRAPHY....98

ABBREVIATIONS

CICC	Coalition for an International Criminal Court
ICC	International Criminal Court
ICTFY	International Criminal Court for Former Yugoslavia
ICTR	International Criminal Court for Rwanda
ICL	International Criminal Law
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal Sitting in Nuremberg
IMTFE	International Military Tribunal for the Far East
NGO	Nongovernmental Organization
PrepCom	Preparatory Committee
U.N	United Nations
U.N.G.A	United Nations General Assembly
U.N.S.C	United Nations Security Council

PREFACE

The road from Nuremberg to the International Criminal Court has been a very long journey that carried along with it the pain and cries of millions of victims of massacres, terrible atrocities, and the horrors of wars. The aftermath of World War I, World War II, the holocaust, the Armenians, and the victims in Cambodia, China, East Timor, Rwanda, Somalia, South Africa, and the former Yugoslavia resulting in the death of more than 170 million people is a clear indication that the twentieth century has been the most violent century humanity has ever seen. Accordingly, in an attempt to break the endless cycle of violence, the push for a permanent International Criminal Court (ICC) began to grow in the international community for the purpose of creating a permanent international judicial system capable of putting an end to all conflicts and bring global justice to victims of wars and the most heinous crimes.

The international community must not wait for disaster before acting, rather it needs to punish warlords before victims of horrors and atrocities become tempted to take justice on their own hands.

Indeed, slow justice is a denial of justice, and the denial of atrocities has the effect of committing another atrocity. Recognition of this need led to the formation of the ICC. The adoption of the Rome Statute marks the end of immunity and the beginning of a new historical process where global justice will take place.

CHAPTER 1

INTRODUCTION

Despite the fact that, during the past eight decades, the international community had established four Ad Hoc tribunals[1] and five commissions[2] to investigate the terrible crimes committed against humanity,[3] the search for global justice goes on.[4] In view of the host of tragic situations and the massive use of force against civilians causing of grave massacres that have shocked the conscience of humanity, and the failure of the international community to bring to justice those responsible for them, the need for a more complete system of justice has continued.

The post-World War I era witnessed almost 250 international or domestic armed conflicts.[5] Some reached massive proportions, while others, though smaller, involved organized military units against unarmed civilians. Inhumane regimes have slaughtered innocents and committed genocide and other grave violations of International Humanitarian Law resulting of the death of millions of people. For example, in Rwanda, the conflict between the Tutsis and the Hutus resulted in the killing of between 500,000

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[1] The International Military Tribunal in Nuremberg, the International Military Tribunal in Tokyo, the International Criminal Tribunal for the Former Yugoslavia in The Hague, and the International Criminal Tribunal for Rwanda in Arusha.

[2] The 1919 Commission of the Responsibilities of the Authors of War and on Enforcement of Penalties investigating crimes occurred during World War I. 2The 1943 United Nations War Crime Commission investigating crimes occurred during World War II, the 1946 Far Eastern War Crimes Commission investigating crimes occurred during World War II, the Commission of Experts Established pursuant to Security Council Resolution 780 to investigate violations of International Humanitarian Law committed in the former Yugoslavia, and the Independent Commission of Experts Established in accordance with Security Council Resolution 935 to investigate violations of International Humanitarian Law committed in Rwanda.

[3] For a comprehensive analysis of the history of international investigatory commissions and tribunals *see* M. C. Bassiouni, Explanatory Note on the International Criminal Court Statute, 71 International Review of Penal Law, 5 (2000).

[4] For a comprehensive analysis of the history of the International Criminal Courts, *see* Gary Jonathan Bass, Stay the Hand of Vengeance; The Politics of War Crimes Tribunals (2000).

and 1 million people; all of whom were brutally murdered, while most of the perpetrators went unpunished. The incident in Rwanda and those like it indicate a need to investigate and prosecute the crimes and horrors of wars like those committed since the beginning of World War I, and yet such crimes are still being committed even after the Rome Statute was adopted in July 1998.[6]

The multitude of crimes since World War I is a clear indication that humankind's capacity for evil is unlimited. The cries of victims have gone unanswered, while those responsible for committing such crimes continue enjoying impunity under the protection of various international law principles, such as the sovereign immunity of heads of states, the execution of orders of superiors, and sovereignty itself.

On one hand, it is doubtless that the political will of the major powers has played a very significant role in establishing international criminal tribunals,[7] and as a direct result, those same powers controlled the development of these tribunals. On the other hand, discussions at the academic level continued throughout the twentieth century[8] reflecting the continuing recognition of the importance of establishing a permanent, international criminal tribunal capable of investigating crimes and grave violations of humanitarian law. Thus, it was indeed justifiable to observe "The U.N need to set up a

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[5] Roy Lee, The International Criminal Court: Contemporary Perspectives and Prospects for Ratification, 16 N. Y. L. Sch. J. Hum. Rts. 506-507 (2000).

[6] *See* Rome Statute of the International Criminal Court, July 17, 1998, U.N.Doc. No. A/Conf. 183/9, 37 I.L. M. 999 [hereinafter Rome Statute or the Statute] <http/ www.un.org/icc/statute >[last visited on May 4, 2001]

[7] The major powers have always feared that an international tribunal would jeopardize their sovereignty, *see* Leila Nadya Sadat, The Establishment of the International Criminal Court: From the Hague to Rome and Back Again, 8 MSU-DCL J. Int'l L. 100-101 (1999).

[8] *See* generally Michael Scharf, The Jury Is Still Out on the Need for an International Criminal Court, 1 Duke J. Comp. & Int'l L. 135 (1991); M. Cherif Bassiouni, An International Criminal Code and Draft Statute for an International Criminal Tribunal (1980); Louis Kos-Rabcewicz-zubkowski, The Creation of an International Criminal Court, in International Terrorism and Political Crimes 519(M. C. Bassiouni ed. 1975); Julius Stone and Robert Woetzel, Toward a Feasible International Criminal Court (1970); Wolfgang Friedmann, The Changing Structure of International Law, 168 (1964); George A. Finch, Draft Statute for an International Criminal Court, 46 AM. J. Int'l L. 89 (1952); Sheldon Glueck, War Criminals; Their

new international court to try those classes of offenses in which not only they but all members of the family of nations have a common interest."[9]

With this observation, Glueck,[10] five decades ago rightly focused on the importance behind the establishment of the ICC to combat the new classes of offenses that shock the humanity during the armed conflicts that occurred on the first half of the twentieth century.

In an attempt to clear up the confusion surrounding the relationship between the Court and states parties to the Rome Statute, the purpose of this paper is to highlight the provisions of the Rome Statute that regulates that relationship. This interaction was, and still is, the subject of controversial and ongoing debates over the realistic role for the ICC in the international community as well as the obligations and duties of states parties.

Due to the fact that no work of this size could address every aspect of the Rome Statute, this study is limited to the provisions of Parts 2, 9, and 10 of the Rome Statute. These provisions cover all matters being on the relationship between the Court and states, in general, and especially the obligations of states parties under the Statute. The first Chapter will examine the historical journey toward an international criminal court, beginning with World War I, continuing throughout the twentieth century and ending with the adoption of the Rome Statute in the Diplomatic Conference in Rome June 1998.[11] It will be seen that the will and intent of the world community constantly

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Prosecution and Punishment, (1944); Hugh Bellot, Report to the thirty-first Conference OF International Law Association, Buenos Aires (1922).

[9] Sheldon Glueck, War Criminals; Their Prosecution and Punishment, 91 (1944).

[10] *Id.*

[11] For a comprehensive history of the events leading up to the Rome Statute, *see* Fanny Benedetti and John L. Washburn, Drafting the International Criminal Court Treaty: Two Years to Rome and an After word on the Rome Diplomatic Conference, 5 Global Governance 1 (1999); M. Cherif Bassiouni "Historical Survey 1919-1998" *In, The Statute of the ICC: A Documentary History*, 1 (Compiled by M. C. Bassiouni, 1998); M. 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(1997); M. Cherif Bassiouni, The Time has Come for an International Criminal Court, 1 Ind. Int'l & Comp. L. Rev. 1 (1991).

advocated the creation of an institution capable of punishing perpetrators of the most heinous crimes against mankind.

Chapter II discusses Part 2 of the Rome Statute, which contains provisions on the ICC's jurisdiction, admissibility of cases before the Court, and the applicable law for the Court. As will be shown in the analysis that follows, the jurisdiction of the Court was the most contentious issue discussed in Rome. Consequently, Chapter II will serve as an analysis of the most highly contested provisions related to the ICC's jurisdiction. It will introduce an overview to the Court's jurisdiction, including the nature and scope of that jurisdiction. Moreover, it will examine the preconditions for the Court to exercise its jurisdiction over a crime, the triggering mechanism for the Court's jurisdiction, and the complementarity threshold, including its requirements and exceptions.

In Chapter III, one the most important factors for the success of the Court in the future, namely, international cooperation and judicial assistance, is examined. Part Nine of the Rome Statute governing the cooperation between states and the Court is considered to be the cornerstone for the future of the Court. This study, in light of the Rules of Procedure and Evidence,[12] will present a detailed analysis of the cooperation and assistance provisions needed from states parties, non-states parties, and intergovernmental organizations. Furthermore, it will examine the various forms of cooperation addressed in the Rome Statute, including the request for the arrest and surrender of persons to the Court, and requests for provisional arrest. In addition, Chapter III addresses the difficult question of implementation, and how states should take

[12] *See* Finalized Draft Text of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/ 2000/INF/3/Add.1, 12 July 2000. The Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/10 (1998), Annex I, Resolution adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, established a Preparatory Commission for the ICC to work on (Para. 5) Rules of Procedure and Evidence.

a positive role in the success of the Court by implementing the provisions of Part Nine within their national institutions.

Chapter IV addresses states' recognition of the Court's judgments, the enforcement techniques for the states to execute the sentences of imprisonment issued by the Court, how a state is designated to enforce a sentence, and who bears the costs of enforcing an imprisonment sentence imposed on persons convicted by the ICC. Moreover, it explores the technique for enforcing the Court's orders related to fines, forfeiture and reparation, and the relation between the Court and national institutions as to the control and supervision over the enforcement of such orders.

Finally, Chapter V contains a discussion of the future of the ICC as a permanent institution. Specifically, the factors that will help support the court achieve its goals are explored against the backdrop of the features of the ICC that allow it successfully to function as an independent international criminal tribunal.

It will be seen from that analysis that the ICC will not be able to operate its jurisdiction without the cooperation and assistance of the international community, and that states parties will have a crucial role in making the Court a practical success, especially by enacting national implementing legislation to allow the provisions of the Rome Statute into their national laws.

CHAPTER 2

OVERVIEW ON THE INTERNATIONAL CRIMINAL COURT[13]

2.1 The Road to the International Criminal Court

It is undeniable that "[An] historical survey of efforts to create an International Criminal Court may safely start with the First World War, 1914-1918."[14] The aggressive use of force and new weapons, such as chemical weapons during World War I, resulted in the death of hundred of thousands of people. The magnitude of the atrocities committed in that war constituted the real impetus behind the Treaty of Versailles,[15] which provided in articles 227-229, for the establishment of a special international court to prosecute the German Kaiser,[16] while the others responsible for committing those crimes were to be tried either before the National Military Courts of the victors or the state in the territory of which the act was committed.[17] Unfortunately, none of these provisions were ever enforced, especially after the German Kaiser escaped to the Netherlands without being tried, and only a few German war criminals were prosecuted before the Supreme Court of the Reich sitting in Leipzig.[18]

In 1937, the League of Nations adopted the Convention for the Creation of an International Criminal Court for the purpose of enforcing the 1937 Terrorism

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[13] The International Criminal Court was established by the Rome treaty in the conclusion of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998 [hereinafter The ICC or the Court].
[14] Herman Von Hebel, Reflections on the International Criminal Court, 15 (The Hague, 1999).
[15] Treaty of Peace Between the Allied and Associated Powers and Germany, concluded at Versailles, June 28, 1919, [hereinafter Treaty of Versailles].
[16] Jeffrey S. Morton, The International Law Commission of the United Nations, 56 (2000).
[17] *See* M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years, *supra* note 11, at 18.
[18] *Id* at 19-22

Convention.[19] The convention on the court, however, was never entered into force due to the conflicts that took place in Europe before the beginning of World War II.[20]

In 1945, at the end of the Second World War, the Allied powers insisted on initiating international military tribunals to prosecute war crimes committed by the Nazis (Nuremberg trials) and the Japanese (Far East tribunals).[21] On the first day of October 1946, after 216 days of trials, the Nuremberg Tribunal sentenced twelve out of twenty-two surviving leaders of the Nazi conspiracy against humanity to death and seven to imprisonment for terms ranging from ten years to life. [22]

> That judgment was a proceeding that made it a landmark in the history of international law; in the same judgment, the court addressed the importance of drafting an international criminal code and court in order to be able to prosecute and punish the individuals responsible for committing crimes against humanity.[23]

Unquestionably, in terms of international law, the most important feature of the Nuremberg trials was that the tribunal was established by international authority and exercised an international jurisdiction over individuals with the authority to hold individuals criminally liable under international law.[24]

Professor M. Cherif Bassiouni,[25] joined by many other scholars, has observed that, notwithstanding the criticism that Nuremberg represented the victor's justice, it is

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[19] League of Nations Doc. C. 547(I). M. 384 (I). 1937. V (1938).

[20] The Spanish Civil War, and the aggressive practices of the German and Italian forces, *see* Julius Stone and Robert Woetzel, Toward a Feasible International Criminal Court, *supra* note 10, at 95.

[21] *See* Leila Nadya Sadat, The Establishment of the International Criminal Court, *supra* note 7, at 105.

[22] The Nuremberg Tribunal was established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945 [hereinafter the IMT]. For a complete historical record of the IMT, see generally Robert H. Jackson, The Nürnberg Case: As Represented by Robert H. Jackson (1946).

[23] *See* Robert H. Jackson, The Nürnberg Case, *supra* note 1, at *XII.*

[24] Leila Nadya Sadat, The Establishment of the International Criminal Court, *supra* note 7, at 105-106.

[25] M. Cherif Bassiouni is an Egyptian-American Professor of Law and President of the International Human Rights Law Institute, DePaul University College of Law; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences. He was the Chairman of the Drafting Committee of the Rome Diplomatic Conference; Vice- Chairman of the 1996-98 Preparatory Committee on the Establishment of an International Criminal Court (PrepCom); and Vice-Chairman of the 1995 Ad Hoc Committee on the Establishment of an International Criminal Court. Due to his continuing

indeed true that "[T] he IMT, the IMTFE, and subsequent prosecutions by the Allies were significant precedents in the efforts to establish an effective system of International Criminal Justice. These historical precedents have developed new legal norms and standards of responsibilities which have advanced the international rule of law."[26]

On December 9, 1948, the United Nations (U.N.) adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[27] Article VI of the Convention states, "[P] ersons charged with genocide must be tried by a competent tribunal of the state in the territory of which the act was committed or by such International Penal Tribunal as may have jurisdiction." Moreover, the U.N., in the same resolution,[28] invited the International Law Commission (ILC) to "Study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with Genocide".[29] The next day, on December 10, 1948, the U.N. adopted the Universal Declaration on Human Rights, calling on the international community to respect human beings and protect their fundamental rights against a variety of crimes.[30] The Universal Declaration has become international customary law that is binding on all states, but has not reduced the more terrifying atrocities that have occurred, leaving their perpetrators unpunished.[31]

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efforts in human rights protection and his remarkable work towards the establishment of the ICC, in 1999, he was nominated for the Nobel Peace Prize. His sincere and extensive work and contributions for almost Three decades towards the creation of the ICC will always be remembered for him, and his writings will likely remain regarded as the most leading authority on International Humanitarian Law and the International Criminal Court.

[26] M. C. Bassiouni, Establishing an International Criminal Court: Historical Survey, 149 Mil. L. Rev. 56 (1995); Matthew Lippman, Nuremberg: Forty-Five Years Later, 7 Conn. J. Int'l L. 1, 11 (1991); Leila Nadya Sadat, The Establishment of the International Criminal Court, *supra* note 7, at 106-108.

[27] G.A.Res. 2670 A (III) of Dec.9, 1948, 3 GAOR, Part1, U.N.Doc. A/810, p. 174, entered into force 12 Jan. 1951.

[28] G.A.Res. 2670 B (III) of Dec. 9, 1948.

[29] *See* Leila Nadya Sadat, *supra* note 7, at 107-108.

[30] G.A. Res. 217 A (III) of Dec. 10, 1948.

[31] Thomas Buergental, International Human Rights, 29-37 (1995).

Enacted in 1949, the Geneva Conventions[32] codified the grave violations against humanity, expanded the rules of war, and included basic protection for civilians and combatants involved in civil war.[33] The adoption of the Geneva Conventions was an indication that the international community is willing to stop the terrible crimes committed during World War I and II.

In 1951, the Committee on International Criminal Court Jurisdiction,[34] upon a request from the United Nations General Assembly (U.N.G.A.), drafted a statute for an international criminal court.[35] The draft statute was never considered due to a disagreement between states, especially the major powers, on the extent of the court's jurisdiction. Thus, in 1953, the committee presented a revised version of the draft with a number of changes on the controversial issue of jurisdiction,[36] but once again, the draft was not considered further. The 1953 draft was postponed twice by the U.N. General Assembly in 1954[37] and 1957,[38] along with the draft code presented by the ILC on

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[32] For the Geneva Conventions see: Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('First Geneva Convention'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('Second Geneva Convention'); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21October 1950) ('Third Geneva Convention'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('Fourth Geneva Convention'). As at 5 May 1999, there were 188 States Parties to these four conventions.

[33] Anne-Marie Slughter, "Evaluating the International Criminal Court, Policy Speech Options" in *Toward an International Criminal Court? A Council Policy Initiative,* Council on Foreign Relations 3-4 (Alton Frye ed., 1999).

[34] This committee was established by Resolution 489 (V) of 12 Dec. 1950.

[35] *See* Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction on its Session held from 1 to 31 August 1951) C.A., 7th Sees., Supp. NO. 11, A/2136, 1952.

[36] *See* Revised Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction on its Session held from 27 July to 20 August 1953) GAOR, 9th Sess., Supp. 12, at 21, U.N. Doc. A/2645 (1954).

[37] U.N.G.A. Res. 898 (IX) Dec. 14, 1954.

[38] U.N.G.A. Res. 1187 (XII) Dec. 11, 1957.

Offenses Against the Peace and Security of Mankind, because the special Committee mandated with defining the term "aggression" did not yet finish its task.[39]

There were no significant developments for almost two decades. Then, on November 30, 1973, the United Nations adopted the Convention on the Suppression and Punishment of the Crime of Apartheid.[40] Article 5 stated the need for the establishment of an international criminal court with jurisdiction to prosecute the perpetrators of apartheid. Notwithstanding that such a court was not created, the adoption of the Apartheid Convention was a clear indication that the world community would no longer tolerate such activities, but would seek to prosecute and punish those responsible.

The Cold War overshadowed and paralyzed any concerted efforts to advance the process of establishing the ICC.[41] Neither of the major powers at that time was willing to jeopardize its sovereignty for any international judicial institution that might be able to address issues of international criminal justice. However, in 1989, at the end of the Cold War, the way was cleared for an international court.[42] The idea was brought up when Trinidad and Tobago suggested the establishment of specialized International Criminal Court for the crime of drug trafficking. As a result, the U.N. General Assembly requested the ILC to resume the work towards a comprehensive statute for the ICC.[43]

In 1993 and 1994, in an effort to bring justice, the United Nations Security Council used the power vested in it by Chapter VII of the U.N Charter with respect to determining the existence of any threat to the peace, breach of the peace, or act of

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[39] *See* Leila Nadya Sadat, *supra* note 7, at 108.
[40] G.A Res. 3068 (XXVIII) Nov. 30, 1973 entered into force 18 July 1976.
[41] The Honorable Jimmy Carter, Former President of the United States of America "Introduction" *in The Statute of the ICC, supra* note 11; *see also* M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years, *supra* note 11, at 52.
[42] At that time, neither the United States nor the Soviet Union was willing to accept the idea of an international criminal court because each believed such a court would affect its sovereignty. *See* Leila Nadya Sadat, *supra* note 7, at 100-101.
[43] G.A. Res. 44/39 of 15 December 1990.

aggression.[44] It established the International Criminal Tribunal for the Former Yugoslavia (ICTFY)[45] and the International Criminal Tribunal for Rwanda (ICTR),[46] providing more incentive and impetus to the world community to develop a permanent criminal court.

Establishing the ICTFY and the ICTR was an indication that the international community needed a permanent international judicial system capable of investigating and punishing perpetrators of crimes against human beings. In the meantime, it also became clear that, "[t] he creation of international system of criminal justice is feasible in the foreseeable future, but its reality will depend on the political willingness of states to create such a system."[47]

Notwithstanding continuing fundamental differences of opinions, in 1994 the ILC presented a draft statute for the ICC,[48] and in turn, the General Assembly established the Ad Hoc Committee on the Establishment of the International Criminal Court.[49] In 1995, the General Assembly established a preparatory committee (PrepCom)[50] to prepare a consolidated draft text of a treaty to establish the ICC in order to be presented in the diplomatic conference.[51] By the end of the year, the 1995 PrepCom presented its report to

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[44] Chapter VII of the United Nations Charter provided that "The Security Council must determine the existence of any threat to the peace, breach of the peace, or act of aggression and must make recommendations, or decide what measures must be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security", Charter of the United Nations, Chapter VII, <http:/ www.un.org/aboutun/charter/index.html> [last visited May 4, 2001]

[45] S.C. Res. 808, U.N. SCOR, 48th Session, U.N. Doc. S/RES/808 (22 Feb. 1993).

[46] S.C. Res. 955, U.N. SCOR, 49th Session, U.N. Doc. S/RES/955 (8 Nov. 1994).

[47] M. Cherif Bassiouni, International Criminal Law, A Draft International Criminal Code, 23-24 (1980).

[48] *See* Revised Report of the Working Group on the Draft Statute for an International Criminal Court, International Law Commission, 46th Session, 2 May-22 July 1994, U.N. GAOR, 49th Session, Supp. No. 10, U.N. Doc. A/49/10 (1994), *see also* Leila Nadya Sadat, *supra* note 7, at 112-114.

[49] G.A. Res. 49/53 of 9 Dec. 1994.

[50] According to the U.N Res. 50/46, The Preparatory Committee "PrepCom" was established on 1996 for the purpose of discussing further the major substantive and administrative issues arising out of the draft Statute prepared by the ILC on 1994 to draft a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries. However, the 1996 Preparatory committee did not achieve its goals and proposed to the General Assembly to continue its work. Based on that, the General Assembly, in its resolution U.N. Doc/A/51/627 mandated the 1997-1998 to continue the work towards producing a widely acceptable consolidated text of a convention for an international criminal court.

[51] G.A. Res. 50/46, 11 Dec. 1995.

the General Assembly, which, in return, established the 1996 PrepCom to continue the work of the first PrepCom.[52] By April 1998, the 1996 PrepCom was able to prepare the text that was later presented to the U.N. Diplomatic Conference of Plenipotentiaries held in Rome, Italy.[53]

On June 15, 1998, representatives of 160 states, along with representatives of seventeen international organizations, and 124 nongovernmental organization (NGO's) gathered in Rome, Italy,[54] for the purpose of finalizing and adopting a convention on the establishment of the International Criminal Court. Despite aggressive pressure and opposition from some states, on July 17, 1998, after five weeks of very long and intense negotiations,[55] the Rome Statute of the International Criminal Court was adopted by a vote of 120 in favor, 7 against,[56] with 21 abstentions.[57] Provisions of the statute set forth the rules for trial of persons for the most serious crimes of international concern, namely: genocide, crimes against humanity, war crimes, and aggression.

2.2 The Role of the NGO's in Establishing the International Criminal Court:

Although the courts in Leipzig, Constantinople, Nuremberg, and Tokyo were set up without the benefits of today's human right NGO's, it is doubtless that since the 1960's, international human rights groups have grown stronger and have had a noticeable voice in the debate over establishing the ICTFY and the ICTR, and then the ICC. As Bass

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[52] G.A. Res. 50/46, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/46 (1995).
[53] G.A Res. 52/160 of 15 Dec. 1997.
[54] *See* U.N Doc., Press Release, L/ROM/22 (1998).
[55] For a complete record and analysis of the negotiations during the Rome Conference, see Lawrence Weschler "Exceptional Cases in Rome: The United States and the Struggle for an International Criminal Court" *in The United Sates And The International Criminal Court: National Security and International Law,* 85-113 (Sarah B. Sewall and Carl Kaysen ed., 2000); M. C. Bassiouni, Negotiating the Treaty of Rome on the Establishment of an International Criminal Court, 32 Cornell Int'l L. J (1999); M. C. Bassiouni, The Statute of the International Criminal Court, *supra* note 11.
[56] Upon a request from the United States, voting was not electronically recorded; therefore, it was unclear which countries joined the United States and Israel in voting against the court; the majority of the scholars and writers have always believed that the seven states were China, Libya, Iraq, Israel, Qatar, The United States, and Yemen.

observed, the Hague tribunal has taken advantage of NGO sources such as forensic experts and documentation from Human Rights Watch.[58]

An NGO coalition for an international criminal court, known as the (CICC)[59], has made very significant contributions on the road towards creating the ICC. In an effort to foster awareness of the court, the coalition entered the ICC process at an early stage. During the preparatory period, member organizations of the CICC, such as the International Institute for Higher Studies in Criminal Sciences (ISISC) greatly contributed to the ICC. The ISISC, one of a number of international institutions led by Bassiouni, convened various unofficial inter-sessional meetings between delegations that participated during the preparatory period. [60]

The coalition actively contributed during the Rome conference as well, working closely with governments and groups towards adopting the treaty establishing the court.

Moreover, the coalition played a very important role in concluding the Rome Statute.[61] The adoption of several provisions could be credited to their strong lobbying and informational efforts; some organizations lobbied with delegations for the inclusion of specific provisions. For example, organizations such as the Children's Caucus and the United Nations Fund for Children, successfully lobbied delegates to limit the court's jurisdiction to persons over eighteen years.[62] These organizations also collaborated for criminalizing the forcing of children under the age of fifteen to take part in hostilities in

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[57] Countries abstained from voting on the Rome Statute are still unknown due to the above-mentioned fact that the U.S. requested a non-electronically recorded vote.

[58] *See* Gary Jonathan Bass, *supra* note *4*, at 33.

[59] Member organizations of the CICC including Amnesty International, Children's Caucus, Human Rights Watch, IHRLI, ISISC, Lawyers Committee for Human Rights, No Peace Without Justice, and Women's caucus for Gender Justice.

[60] *See* William R. Pace "the Relation between the International Criminal Court and the Non-governmental Organizations" *in Reflections on the International Criminal Court,* 204 (Herman A. M. Von Hebel, ed., The Hague, 1999).

[61] Abram Chayes and Anne-Marie Slaughter "The International Criminal Court and the Future of the Global Legal System" *in The United Sates And The International Criminal Court: National Security and International Law,* 211 (Sarah B. Sewall and Carl Kaysen ed., 2000).

either international or internal armed conflicts.[63] Other NGOs, such as the Women's Caucus for Gender Justice in the ICC, successfully lobbied for the inclusion of the sexual violence-related crimes in the statute.

In addition, NGOs made critical contributions to the development of strong positions taken by other groups by joining the Like-minded Group[64] in empowering the prosecutor to launch investigations on his or her own arguing that such power is totally answerable to the Pre-trial Chamber against any abuse of the prosecutor's office.[65] In other words, they argued that the Pre-Trial Chamber would act as a judicial supervision on the work of the office of the Prosecutor, and that the Chamber will always have the final say in initiating investigations.

Without the NGO community, the Rome Treaty might not have come about.[66] The international community owes a great debt to NGOs for their devotion to human rights and great contributions toward the creation of the ICC as the first permanent international judicial institution to deal with international crimes committed by individuals.

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[62] *See* Rome Statute, *supra* note 6, at part 2, Article 26.

[63] *See* Rome Statute, *supra* note 6, at part 2, Article 8 (2)(B)(26).

[64] During the Rome Conference, the Like-minded Group was the moving force behind the conference successful conclusion, they lobbied for avoiding any obstacles that might prevent the adoption of the Rome Statute. At that time, it included: Australia, Austria, Argentina, Belgium, Brazil, Brunei, Canada, Chile, Costa Rica, Croatia, the Czech Republic, Denmark, Egypt, Finland, Ghana, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Latvia, Lesotho, Liechtenstein, Lithuania, Malawi, Netherlands, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Samoa, Singapore, Slovakia, Solomon Island, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago "representing 12 Caricom states", Uruguay, Venezuela, and the United Kingdom. For the role of the Like-minded Group during the Rome Negotiations *see* Leila Nadya Sadat, The Establishment of the International Criminal Court: *supra* note 7, at 101; *see also* William R. Pace, "the Relation between the International Criminal Court and the Non-governmental Organizations" *supra* note 60, at 220.

[65] See Lawrence Weschler "Exceptional Cases in Rome: The United States and the Struggle for an International Criminal Court" *supra* note 55, at 94.

[66] *See* William R. Pace "the Relation between the International Criminal Court and the Non-governmental Organizations" *supra* note 60, at 211.

2.3 The Place of the International Criminal Court in the International Legal System:

The International Criminal Court is a permanent international institution established by the Rome Treaty for the purpose of investigating and prosecuting individuals who commit the most serious crimes of international concern.[67] Moreover, the ICC is a treaty-based institution with an independent international personality, unlike the ICTFY and the ICTR, which were established pursuant to Security Council resolutions.[68] Therefore, The ICC will have an unique place in the international judicial system. Unlike the limited jurisdiction of ICTFY and the ICTR, according to the Rome Statute, once the ICC Statute enters into force, the court will have jurisdiction over persons to investigate and prosecute all crimes against humanity, genocide, and war crimes.[69]

The ICC has a place equivalent to that of the International Court of Justice (ICJ); these two courts "Will supplement each other, and both are of inestimable importance to the development of the international legal order."[70] The ICC will have jurisdiction only over individuals, unlike the ICJ, which only deals with states. Hence, the ICC, in holding individuals accountable for the crimes committed in violation of international humanitarian law, will be the missing link in criminal responsibility.

Furthermore, the ICC will have an unique relationship with the U.N. because it was neither created by the Security Council nor managed by the General Assembly. The Preparatory Commission, at its sixth session presented the Draft Agreement on the Relation between the ICC and the United Nation.[71] Article 2 of that draft agreement states that, "The U.N. recognizes the ICC as an independent permanent judicial

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[67] *See* M. Cherif Bassiouni, Explanatory Note on the International Criminal Court Statute, *supra* note 3, at 5.
[68] *Supra* notes 45 and 46.
[69] See Rome Statute, *supra* note 6, at part 2, Article 5.
[70] Adriaan Bos, "The International Criminal Court; Recent Developments" *in Reflections on the International Criminal Court,* 45 (Herman A.M. Von Hebel, Ed., 1999).
[71] PCNICC/2000/L.4/Rev. 1/Add.1, 27 November-8 December 2000.

institution which, in accordance with Articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."[72]

2.4 The Main Objectives of the International Criminal Court:

First, the ICC will help in ending conflicts, whether international or domestic. It is undeniable that the twentieth century was one of the most violent centuries humanity has ever seen. It has witnessed numerous armed conflicts, resulting in the deaths of tens of millions of people. Consequently, the international consensus on the need for global justice, embodied in the ICC, is likely to last for a long time. It is thus reasonable to conclude that the ICC will have a deterrent effect on all the on-going conflicts, and it will help to end the cycle of violence and prevent its recurrence. It will be known to all warlords that their activities will no longer go unnoticed, and will be largely punishable.

Second, the ICC will help prevent the commission of future crimes and help put an end to impunity for such crimes.

> From now on, all potential warlords must know that, depending on how a conflict develops, there might be established an international tribunal before which those will be brought who violate the laws of war and humanitarian law.[73]

With this observation, Corell[74] rightly made it clear that the existence of the ICC as a permanent judicial system will have a deterrent effect on war criminals and warlords by indicating that the international world will no longer continue to tolerate such crimes without imposing the proper punishment on them. This argument is especially persuasive given the presumption that everyone knows the contents of the ICC statute, and that a defense of ignorance will not be accepted before the ICC.

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[72] *Id* at part 1, Article 2.
[73] Hans Corell, Overview On the ICC, <http;/ www.un.org/law/icc/general/overview.htm>, (last visited on May 4, 2001)
[74] *Id.*

Furthermore, it is clear from the language of Article 27 that the Rome Statute, "*the law of the Court*", will be applied equally to all individuals, without any exceptions at all regardless of the rank or the government position held by the individual. The Rome Statute should be equally applied to heads of states, commanding officers, and all soldiers in the field, creating a precedent that will bring all offenders to justice no matter how powerful they are.[75]

Frankly, it is difficult to imagine that principles of international law, which under certain circumstances protect representatives of a state, cannot be applied to acts, which are condemned as criminal by international law. Therefore, any person who commits a crime under international law must be held responsible before the ICC and be liable to punishment even if he acted as a head of a state or government official.

Third, the ICC would be the first permanent comprehensive judicial system capable of investigating and prosecuting the most heinous crimes where states are unwilling or unable to do so. Notwithstanding the international consensus on the need to establish a permanent ICC to achieve justice for all, it is also known that, in times of conflicts, for the purpose of shielding their own nationals, states could be either unwilling or unable to investigate or prosecute the many crimes committed. A clear example of that fact would be the failure to bring justice in the former Yugoslavia and Rwanda until the U.N.S.C established the two ad hoc tribunals. The government of the former Yugoslavia was unwilling to prosecute its own high-ranking officers or government officials.[76] Meanwhile, in Rwanda, all the national institutions, including the judiciary, had collapsed. Therefore, it became apparent that if a permanent ICC existed earlier than that, it could have stopped the violence in the Former Yugoslavia and Rwanda, and have

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[75] See Rome Statute, *supra* note 6, at part 3, Article 27.

[76] Anne Bodley, Note, Weakening The Principle of Sovereignty in International Law: The International Criminal Tribunal for The Former Yugoslavia, 31 N.Y.U. J. Int'l L. & Pol. 417, at 430-436 (1999).

been capable of achieving justice and punishing the perpetrators of the masacares and terrible atrocities against humanity.

Fourth, The ICC will remedy the deficiencies of previous ad hoc tribunals. When the Security Council used the power vested in it by Chapter VII of the U.N Charter to establish the ICTFY and ICTR,[77] it could have been concluded that the international community stood willing to achieve justice no matter what the cost. But after assessing the prospects of the effectiveness of these two ad hoc tribunals, and their failure to stop the violence,[78] It is undeniable that a permanent international criminal tribunal would better serve justice for the following reasons: (1) The process of selecting the prosecutor for the ICTFY was a protracted, politicized fiasco.[79] Political maneuvers and overwhelming pressure prevented the selection of distinguished supporters of human rights to fill in the tribunal's top job.[80] (2) The ICC is a permanent judicial system with a view of a "universal jurisdiction,"[81] unlike the ICTFY and the ICTR, which are empowered only to investigate the crimes that occurred within the territories of their respective countries. Moreover, "The temporal jurisdiction of the ICTR is, according to article 1, limited to the year of 1994 when all the horrifying incidents took place. Also, the ICTR, pursuant to article 8, has concurrent jurisdiction with national courts, but with primacy for the tribunal."[82] That is to say, that both the ICTR and the ICTFY had the

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[77] *See* the Charter of the United Nations, *supra* note 44.

[78] See Ruth Wedgwood "The Constitution and the ICC" *in The United Sates and The International Criminal Court: National Security and International Law,* 127 (Sarah B. Sewall and Carl Kaysen ed., 2000); Lawrence Weschler "Exceptional Cases in Rome: The United States and the Struggle for an International Criminal Court" *supra* note 55, at 92-93.

[79] *See* Gary Jonathan Bass, *supra* note *4*, at 214-220.

[80] The author believes that, despite the success that Judge Richard Goldstone has achieved in the ICTFY, the role of the U.N.S.C in selecting the prosecutor was a great failure of justice, and that the international community is not willing to let that happen again.

[81] For a complete analysis on the "universal jurisdiction" and examinations of the American objections see Michael Scharf, The ICC's Jurisdiction over the Nationals of Non-Parties States *in* " *The United Sates And The International Criminal Court: National Security and International Law, 217-237* (Sarah B. Sewall and Carl Kaysen Ed., 2000).

[82] Herman Von Hebel, Reflections on the International Criminal Court, *supra* note 14, 32-33.

priority over national judicial institutions to practice their jurisdiction in accordance with the above mentioned provisions. (3) History and experience indicate that the question of selective justice arises whenever ad hoc tribunals are being addressed. For example, one might argue why Yugoslavia and not Somalia? , or why Rwanda and not East Timor? (4) The Security Council has reached what is sometimes referred to as "tribunal fatigue."[83] An ad hoc tribunal for every conflict, such as the ICTR or the ICTFY, would be illogical and impractical because the formation process is of a very time consuming nature,[84] and involves too much effort and resources to justify it and support it in executing its duties to investigate and prosecute perpetrators of the crimes under their jurisdiction.

Fifth, the ICC will bring justice to the international community at the end of a very violent century. The search for criminal justice has not stopped since the beginning of the twentieth century, but in a serious attempt to bring justice to all human beings and especially victims of wars, the last decade has witnessed unusual developments ending with the adoption of the Rome Treaty establishing the ICC, a dream that, with the help of the U. N., has finally come true.

> For nearly half a century-almost as long as the United Nations has been in existence-the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought that the horrors of the Second World War–the camps, the cruelty, the exterminations, and the Holocaust-could never happen again. And yet they have. In Cambodia, Bosnia and Herzegovina, and in Rwanda. Our time –this decade even-has shown us that man's capacity for evil knows no limits. Genocide is now a word for our time, too, a heinous reality that calls for a historic response.[85]

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[83] See M.C. Bassiouni, *supra* note 23, at 57; Michael P. Scharf, The politics of Establishing an International Criminal Court, 6 Duke J. Comp. & Int'l L. 169-170 (1995).

[84] Richard J. Goldstone and Gary Jonathan Bass, Lessons from the International Criminal Tribunals, *in The United Sates And The International Criminal Court: National Security and International Law,* 52 (Sarah B. Sewall and Carl Kaysen ed., 2000).

[85] Kofi Annan, Statement by the United Nations Secretary General Kofi Annan at the Ceremony held at Campidoglio Celebration the Adoption of the Statute of the International Criminal Court (18 July 1998) <http://www.un.org/icc/speeches/718sg.htm>, (last visited on May 4, 2001).

From this observation by the United Nations Secretary-General, it is clear that the issue of universal jurisdiction over individuals has become a compelling one, and that the world community needs a permanent judicial institution to face the host of new offenses that developed during the twentieth century and continue to develop. The deaths of more than 170 million people, most of whom, if not all, are seemingly forgotten[86] should be vindicated. This can only be accomplished through a judicial institution such as the ICC.

[86] *See* Michael Scharf, Is a U.N International Criminal Court in the U.S Interest? Statement Presented in a hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105th Congress, 2nd Sess. 52 (July 23, 1998); *see also* Dinah Shelton, International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, IX (2000).

CHAPTER 3

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

3.1 Overview on the Jurisdiction of the International Criminal Court:

Despite the criticism of the ICC's said universal jurisdiction,[87] intensive negotiations led to the adoption of the present formulation, which is a unique and successful combination of different legal systems and views of how a court like the ICC should operate. Due to a shortage of time, the present formula of Part 2 of the Rome Statute containing the provisions on jurisdiction was adopted as a package deal in the last day of the Rome Conference, and was never reviewed by the drafting committee.

The most important features of the jurisdiction of the ICC are: (1) The ICC, as the first permanent international criminal tribunal, will have jurisdiction over the most serious crimes of international concern; namely genocide, crimes against humanity, war crimes, and crimes of aggression.[88] (2) Unlike the IMT and other ad hoc tribunals,[89] the court will not have a retroactive jurisdiction; therefore, it will not have any jurisdiction over crimes committed before it comes into force.[90] Further, no person may be found criminally responsible under the statute creating the ICC for conduct prior to its entry into force. [91] (3) As to the states that become a party to the statute after the ICC enters into force, the Court will not have jurisdiction over crimes committed in such a state until the entry into force of the statute for that state.[92](4) The ICC adopted the principle of *Ne bis*

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[87] Ruth Wedgwood, The Constitution and the ICC, *supra* note 78, at 125.
[88] See Rome Statute, *supra* note 6, at part 2, Article 5, *see also* M. Cherif Bassiouni "Historical Survey 1919-1998" *supra* note 11, at 7; Jamison G. White, Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, The ICC, And a Wake-Up Call for Former Heads Of States, 50 Case W. Res. 139 (1999).
[89] *See* Leila Nadya Sadat, *supra* note 7, at 106.
[90] See Rome Statute, *supra* note 6, at part 2, Article 11(1).
[91] See Rome Statute, *supra* note 6, at part 3, Article 24(1)
[92] See Rome Statute, *supra* note 6, at part 2, Article 11(2).

in idem[93] "double jeopardy" stating that no person must be tried before the court for a crime for which the person had been previously convicted or acquitted by the court.[94] Moreover, no person must be tried by any other court for any of the crimes listed in article 5 for which the person has already been convicted or acquitted by the ICC.[95]

In contrast, the Rome Statute assures that the ICC will have jurisdiction to retry a person who has already been tried by another court for committing any of the crimes listed in articles 6, 7 or 8 in two cases. First, if the previous trial was conducted for the purpose of shielding that person from any criminal responsibility; second, if the trial was not conducted independently or was inconsistent with the intent to bring the person concerned to justice.[96] (5) The court will have jurisdiction only over natural persons.[97] That is to say, it will not have jurisdiction over neither states nor organizations. Rather it will only have jurisdiction over individuals who have attained the age of 18 at the time the crime was committed.[98]

3.2 Subject Matter Jurisdiction:

After five weeks of intense and complex negotiations, the Rome negotiators succeeded in merging different legal systems and views of the crimes that should be punished by the ICC. The present formula of the statute focuses on the core crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression as the most serious violations of international humanitarian law. Notwithstanding the fact that codifying grave crimes, such as the mass killing of civilians, systematic ethnic cleansing, widespread torture, sexual violence related crimes, and the massive use of force against

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[93] *See* Michael Scharf "Justice Versus Peace" *in* " *The United Sates and The International Criminal Court: National Security and International Law,* 191 (Sarah B. Sewall and Carl Kaysen ed., 2000)
[94] *See* Rome Statute, *supra* note 6, at part 2, Article 20(1).
[95] *See* Rome Statute, *supra* note 6, at part 2, Article 20(2).
[96] *See* Rome Statute, *supra* note 6, at part 2, Article 20(3).
[97] *See* Rome Statute, *supra* note 6, at part 3, Article 25(1).
[98] *See* Rome Statute, *supra* note 6, at part 3, Article 26.

civilian persons and targets was a great achievement for the Rome negotiators, it is undeniable that the ICC did not establish new crimes, but rather, embodied pre-existing international criminal law by codifying crimes that already fall within the meaning of *jus cogens*[99], which are binding, on all states as a customary international law.

3.2.1 The Crime of Genocide

The linguistic origin of the word "genocide" indicates that it is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).[100] Today, genocide denotes the destruction of a nation or of an ethnic group in whole or in part. A widespread agreement has always existed on the proscription of genocide as the crime of all crimes. Moreover, it is regarded as a norm of "*jus cogens*", that is, a rule of customary law which cannot be set aside by treaty unless a subsequent rule of international law to the contrary is enacted. Consequently, the Rome Statute adopted the exact definition[101] given to the crime of genocide in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.[102] In addition, the Statute provides that direct or public incitement to commit genocide is also punishable under the statute.[103]

That being said, it is reasonable to conclude that the language of Article 6, in contrast with the Genocide Convention, confirms that the purpose of the ICC is to intervene before the occurrence of any future catastrophic harm by prohibiting any conduct that might constitute the crime of genocide as listed in Article 6.[104] One notable remark here is that in the first successful international prosecution for the crime of

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[99] *See M.* Cherif Bassiouni, *supra* note 3, at 15-16; *see also* Michael Scharf "Justice Versus Peace" *supra* note 93, at 185.
[100] RÅPHAËL LEMKIN, Axis Rule in Occupied Europe, 79, 2nd Ed. (1944).
[101] *See* Rome Statute, *supra* note 6, at part 2, Article 6.
[102] *See* the Genocide Convention, *supra* note 24, at Article 2.
[103] *See* Rome Statute, *supra* note 6, at part 3, Article 25 (3)(e).
[104] See Rome Statute, *supra* note 6, at part 2, Article 6 (a) (b) (c) (d) (e).

genocide, the ICTR, in its landmark judgment delivered in *Prosecutor v Akayesu*,[105] found that, "It was possible to infer genocidal intent (to destroy the Tutsi as an ethnic group) from a number of presumptions of fact."[106] It is thus reasonable to conclude that the ICC, in future genocide cases, will benefit from such precedent, and will not be faced by the problem of proving the genocidal intent of an offender as an element of the crime.

The Finalized Draft of the "Elements of the Crime"[107] did not add any substantial changes to the elements of the crime of genocide. Rather, the draft clarified that the perpetrator of genocide may commit any of the acts listed in Article 6 against one or more persons, and that the conduct must take place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

3.2.2 Crimes Against Humanity

The definition of crimes against humanity[108] given in the Rome Statute is considered to be the first comprehensive multilateral treaty definition of such crimes.[109] Nevertheless, that definition was a combination of Article 6 (c) of the Nuremberg Charter,[110] Article 5 of the ICTFY,[111] and Article 3 of the ICTR.[112] The Rome Statute, unlike the other three statutes, provides a "*chapeau of acts,*" which outlines the threshold requirements for a crime against humanity and contains an enumerated list of acts, which

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[105] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (2 September 1998); 37 ILM 1401 ('Akayesu').
[106] Ibid, 1408-1410.
[107] *See* Report of the Preparatory Commission of the International Criminal Court, Finalized Draft of the Elements of the Crimes, U.N.Doc. PCNICC/2000/INF/3/Add.2 of 30 June 2000. The Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/10 (1998), Annex I, Resolution adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, established a Preparatory Commission for the ICC to work on draft for the Elements of the Crimes to be adopted by the States Assembly once the Court comes into force.
[108] *See* Rome Statute, *supra* note 6, at part 2, Article 7.
[109] Theodor Meron "*Crimes under the Jurisdiction of the International Criminal Court*" *in Reflections on the International Criminal Court, 49* (Herman A.M. Von Hebel ed., 1999).
[110] Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 of 8 August 1945.
[111] The ICTFY, *supra* note 23.

can constitute the crime. Furthermore, it provides more specific details of each crime reflecting the progressive evolution of customary international law.[113] The main features of the definition given to crimes against humanity are contained primarily in Article 7.

Article 7 (2) contains definitions of the acts that constitute such a crime, some of which may differ from previous definitions as given to the same crime in the other statutes. The "*chapeau of crimes*" listed in Article 7 is not a creation of the Rome negotiators. Rather, it encompasses standing violations of the basic principles of human rights.[114] Despite the objection of some delegations, the nexus between crimes against humanity and armed conflicts was removed. The new position is that crimes against humanity are applicable during peacetime as well as during wartime.[115]

This formulation represents a serious challenge to immunity given that a head of state could be held criminally responsible and punished for committing such a crime against his own people even during peacetime. Moreover, the ICC would also benefit from another landmark judgment of the ICTFY in *Prosecutor v Tadic.*[116] In *Tadic,* The Court held that, "The Nuremberg formulation of jurisdictional competence was no longer reflective of customary international law and that the nexus with an armed conflict was no longer required."[117] This finding, along with the new position in the Rome Statute, will unquestionably create a new rule for international customary law that is binding on all states.

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[112] The ICTR, *supra* note 24.
[113] *See* M. Cherif Bassiouni, *supra* note 3, at 13; M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, 252-259 (2d rev. ed. 1999)
[114] *See* M. C. Bassiouni, "The Permanent International Criminal Court", *in Justice for Crimes Against Humanity: International Law after Pinochet*, 35 (Mark Lattimer and Philippe Sands ed., in print 2001).
[115] *Id.*
[116] *See Prosecutor v. Tadic*, Case No. IT-94-1-T (7 May 1997); 36 ILM 913. Tadic, the defendant was acquitted of the charges of grave breaches of the Geneva Conventions, not because there was no armed conflict, but because the victims were deemed not to be a 'protected person' within the meaning of that term. However, Tadic was convicted for the same acts as crimes against humanity.
[117] Ibid 929.

The Rome Statute, unlike the statutes of the ICTFY[118] and ICTR, does not require proof of discrimination against the targeted civilians; rather, it adopts the language of the Nuremberg Charter by making discriminatory intent pertinent only to the offenses of persecution.[119] The structure of Article 7 indicates that there are three necessary elements of a crime against humanity in order for the ICC to take jurisdiction over it: (a) the commission of one of the crimes listed in article 7(1); (b) the crime has to be committed in a widespread or systematic attack as a course of conduct involving the multiple commission of acts,[120] and (c) such crimes must have been committed by states or by organizations as an organizational policy.[121] Finally, the definition of the crime of torture[122]has been broadened beyond the definition given to it within the Torture Convention[123] so that it no longer requires the involvement of a public official.

As to the of the "Elements of the Crimes",[124] it clarified two very important elements for crimes against humanity; namely, the participation in and knowledge of a widespread or systematic attack against civilian population, and satisfying the mental element if the perpetrator of such crime intended to further such attack.[125] It should be noted that it is possible to prove the material element of such crimes by proving that a state or non-state policy existed through intentional, deliberate, or purposeful failure to act.[126]

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[118] *See* Virginia Morris and Michael Scharf, An Insider's guide to the International Criminal Tribunal for Rwanda, 82 (1997).
[119] *See* Rome Statute, *supra* note 6, at part 2, Article 7(1)(h); *see also* Theodor Meron, *supra* note 109, at 50.
[120] *See* Rome Statute, *supra* note 6, at part 2, Article 7(1)
[121] *See* Rome Statute, *supra* note 6, at part 2, Article 7(2) (a).
[122] *See* Rome Statute, *supra* note 6, at part 2, Article 7(2) (e).
[123] *See* Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, entered into force 26 June 1987.
[124] *See* Finalized Draft of the Elements of the Crimes, *Supra* note 107.
[125] Bartram S. Brown, "The Statute of the ICC: Past, Present, and Future", *in The United Sates and The International Criminal Court*: *National Security and International Law* 70 (Sarah B. Sewall and Carl Kaysen, Ed., 2000).
[126] *See* Finalized Draft of the Elements of the Crimes, *supra* note 107, at Article 7.

Indeed as Bassiouni observed, "[a]ctively promoting and encouraging obviously includes engaging in conduct by a state or non-state actor which results in the commission of crimes against humanity."[127]

3.2.3 War Crimes

The fact that Article 8 was the most difficult article to draft is undeniable.[128] The provisions of the Rome Statute addressing war crimes are the most substantial of the four substantive crimes within the ICC's subject matter jurisdiction.[129] The Court, according to Article 8, will have jurisdiction over war crimes if committed as part of a plan or policy or as part of a large-scale commission of such crimes. Article 8 includes the following offenses: (1) grave breaches of the Geneva Conventions of August 12, 1949, namely, acts against persons and property originally protected by the Geneva Conventions;[130] (2) grave violations of the laws and customs applicable in international armed conflicts, within the established framework of international law;[131] (3) serious violations of Article 3 common to the four Geneva Conventions, namely, acts committed during an armed conflict not of an international character against persons taking no active part in the hostilities;[132] and (4) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.[133]

Article 8 (2)(d)(f) provides that the Rome Statute does not apply to armed conflicts not of an international character and thus does not apply to situations of internal

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[127] *See* M. Cherif Bassiouni, *supra* note 3, at 16-17

[128] The difficulties behind drafting Article 8 arose from the position of the U.S, France and the United Kingdom that their military personnel around the globe could be charged with war crimes as a result of their participation in peace-keeping operations.

[129] Katherine L. Doherty and Timothy L.H. McCormack, Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. Davis J. Int'l L, & Pol'y, 167-168 (1999).

[130] *See* Rome Statute, *supra* note 6, at part 2, Article 8(2)(a).

[131] *Id* at Article 8 (2)(b).

[132] *Id* at Article 8 (2)(c).

[133] *See* Rome Statute, *supra* note 6, at part 2, Article 8(2)(e).

disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.[134] Consequently, it is reasonable to conclude that war crimes, unlike genocide and crimes against humanity, are not implied to situations that do not fall within the definition mentioned in Article 8.

Apparently, the most important areas of concern to the drafters of the Rome Statute regarding war crimes are the following issues. As discussed above, the Rome Statute adopted the results of the recent evolution of international jurisprudence criminalizing war crimes committed during armed conflicts of non-international character. That is to say, that the Court will have jurisdiction over war crimes committed within states. Next, the language of article 8 indicates that the definition of war crimes given in the statute is broader, in some respects, than the traditional definition given in previous international instruments,[135]in that it covers acts that were not previously punishable, such as conscripting, enlisting, and using children soldiers under the age of fifteen.[136] Such additions were an undeniable triumph for the Rome negotiators.

The Rome Statute created a seven-year war crimes opt-out for states parties;[137]that is to say, that states, on becoming party to the statute, can declare that they do not accept the jurisdiction of the ICC with respect to war crimes for a period of seven years. Such declaration can be withdrawn at any time upon a request from the state. Notwithstanding the serious and aggressive criticism that such provision had faced on the ground that such a jurisdictional limitation was not given to non-states parties, and that

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[134] *See* Theodor Meron, *supra* note 109, at 53

[135] *See* Juan E. Méndez "International Human Rights Law, International Humanitarian Law, And International Criminal Law and Procedure: New Relationships" *in International Crimes, Peace, and Human Rights, supra* note 86, at 73.

[136] *See* Rome Statute, *supra* note 6, at part 2, Article 8 (2)(b)(26).

[137] *Id*, at part 13, Article 124.

such exception was an inducement to non-states parties to join the ICC,[138] the majority of states agreed on the opt-out provision. Eventually, the provision was adopted within the take-it-or-leave-it package offered to states one night before conference in Rome ended.

Finally, the Court will not prosecute isolated incidents of military misconduct occurring during wartime. Rather, the Court focuses only on crimes committed "As part of a plan or a policy," or as a part of "A large-scale commission of such crimes."[139] Such language affirms that the ICC will concentrate on major incidents that represent danger from a regime that threatens to become a criminal actor.

As to the "Elements of the Crimes,"[140] it clarified that, for the purpose of crimes listed under Article 8 (2)(a) and (b), the conduct must take place in the context of and be associated with an international armed conflict, and the perpetrator must be aware of factual circumstances that indicated the existence of an armed conflict. On the other hand, for the purpose of crimes listed under Article 8 (2)(c) and (e), the Elements of the Crimes clarified that the conduct must take place in the context of and be associated with an armed conflict not of an international character. Moreover, the "Elements of the Crimes" introduced concepts such as military necessity, reasonableness, and unlawful conduct without setting forth an evidentiary standard by which to assess such additions leaving this to the jurisprudence of the court.[141]

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[138] David J. Scheffer, "The United States Perspective on the ICC", *in The United Sates and The International Criminal Court*: *National Security and International Law,* 117(Sarah B. Sewall and Carl Kaysen ed., 2000).
[139] Ruth Wedgwood "Improve the International Criminal Court" *in Toward an International Criminal Court? A Council Policy Initiative,* Council on Foreign Relations, 64 (Alton Frye ed., 1999).
[140] *See* Finalized Draft of the Elements of the Crimes, *supra* note 107, at Article 8.
[141] *See* M. Cherif Bassiouni, *supra* note 6, at 16.

3.2.4 The Crime of Aggression

The efforts to define and punish the crime of aggression started very early in the twentieth century. Article 10 of the Covenant of the League of Nations provides that the world community needs to protect member states against acts of external aggression.[142]

Article 6 (a) of the Charter of the IMT defined the planning, preparation, initiating, or waging of a war as crimes of aggression.[143] Moreover, in a landmark judgment, the IMT held that,

> Aggression is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[144]

On 1948, the United Nations charged the International Law Commission "ILC" and charged it with drafting a code on the Offenses against the Peace and Security of Mankind. Two years later, the General Assembly removed "aggression" from the ILC's mandate to elaborate a Draft Code of Offenses, and gave it to a special committee of the General Assembly. It took that committee Twenty Years to define the term "aggression."[145] However,

Interestingly, despite these early efforts, the question of aggression was still not ripe for definition in the ICC Statute and the Rome negotiators failed to reach a consensus as to the definition of term "aggression."[146] Consequently, the Rome Statute, in another compromise, provides that the Court will punish the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and

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[142] *See* League of Nations Covenant, Article 10.
[143] *See* Charter of the International Military Tribunal, *supra* note 108, at Article 6(a).
[144] International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 186 (1947).
[145] There were four committees on the question of define aggression. The last committee finished its work in 1974, finally defining aggression after 20 years of debating the issue. The General Assembly adopted the definition by a resolution. U.N. G.A Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631(1974). For history on the task to define "aggression", see BENJAMIN FERENCZ,

setting the conditions under which the court must exercise jurisdiction with respect to it.[147]

One might argue that the failure of the Rome negotiators to include the crime of aggression in the Rome Statute would result in excluding that crime from the jurisdiction of the Court and it will not be included in any later stage. As a matter of fact, the international community did not lose any thing; rather, the inclusion of the crime of aggression in its present formulation would have jeopardized the independence of the ICC. The Draft Statute presented by the ILC provided that the Court should not be able to pursue any individual for aggression unless the Security Council has made a determination that a case of aggression exists.[148] That is to say that if the Rome conference adopted the formula proposed by the ILC, the Security Council would have controlled the proceedings in all cases concerning aggression because it is the only authority that can decide the existence of aggression.

To put it another way, while the world community was willing to put an end to immunity, such proposal would have established the idea that the permanent five states members are unaccountable for their aggression while they are authorized to determine which other state committed aggression.[149] Indeed, this would have undermined the Court's authority, and jeopardized its independence and capability to operate away from any politically motivated decisions.

DEFINING INTERNATIONAL AGGRESSION (1975); *see also* M. C. Bassiouni, The Statute Of The International Criminal Court, *supra* note 11, at 12-14.

[146] *See* M. C. Bassiouni, The Statute Of The International Criminal Court, *supra* note 11, footnote 77.

[147] *See* Rome Statute, *supra* note 6, at part 2, Article 5 (2).

[148] Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 80 Geo. L. J. 336-340 (2000).

[149] *Id,* at 448.

3.3 Jurisdiction over a Case

Article 12, which contains the preconditions to the exercise of the Court's jurisdiction, was one of the most controversial aspects of the Rome treaty. Article 12(1) provides that states, which become a party to the statute, thereby automatically accept the jurisdiction of the court over the core crimes referred to in Article 5 of the statute.[150] In contrast with that, the Statute provides that no reservations might be made to the statute.[151]

3.3.1 Preconditions to the Exercise of Jurisdiction:

The debate related to Article 12(2) proved to be the most contentious during the Rome conferences. Accordingly, the final text reflected various compromises between different views of several states. For example, some delegations lobbied for the inclusion of the principle of "universal jurisdiction"; they argued that the Court should have the same power given to states that are willing to enforce international criminal law to prosecute a person for committing certain international crimes irrespective of the territory or location of the crime and of the nationality of the perpetrator or the victim.[152] Other delegations argued that explicit consent should be a prerequisite for the ICC to exercise its jurisdiction.[153] In other words, the Court would need permission from the state before launching the investigation.

Consequently, the present formulation[154] represents a compromise between several proposals[155] including, the German,[156] the United States,[157] NGOs,[158] and the

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[150] *See* Bartram S. Brown, The Statute of the ICC: Past, Present, and Future, *supra* note 125, at 64.
[151] *See* Rome Statute, *supra* note 6, at part 13, Article 120.
[152] *See* M. C. Bassiouni, International Extradition: United States Law and Practice, 356 (3rd ed. 1996).
[153] *See* David J. Scheffer, The United States Perspective on the ICC, *supra* note 138, at 116.
[154] A/CONF. 183/C.1/L.76/Add.2, op. Cit. N. 3.
[155] For a complete analysis of the discussions on Article 12 and the different proposals, *see* Lawrence Weschler "Exceptional Cases in Rome, *supra* note 55, at 97-101; *see also* Michael Scharf "The ICC's Jurisdiction Over the Nationals of Non-Party States", *supra* note 81, at 213-233.
[156] *See* A/AC. 249/1998/DP.2,23 (March 1998) (Discussion paper submitted to the PrepCom with a view of a universal jurisdiction for the ICC independent of state acceptance of the court's jurisdiction).

Korean[159]views. It provides that in cases, other than referrals by the Security Council, the Court will only be able to act where the states in whose territory the crimes were committed or the state of nationality of the accused person had ratified the treaty.[160] As to non-states parties, the Rome Statute departed from the standing ad hoc tribunal's position that did not require a prior consent to have jurisdiction over a case in any state. Rather, the Rome Statute provides that the prior consent of a non-state party is necessary for the ICC to have jurisdiction over the case.[161]

As noted by Professor Michael Scharf, there is nothing novel in international law with respect to states exercising jurisdiction over nationals of other states and especially over nationals of non-party states to the Rome Statute.[162] A state has jurisdiction to punish certain crimes and offenses of universal concern that are recognized by the community of nations such as piracy, hijacking of an aircraft, genocide, war crimes, and other inhuman crimes such as torture.[163]

The explicit language of the Restatement Third of the Foreign Relations Law of the United States,[164] has recognized the universal principle confirming that states may prescribe and prosecute certain international offenses recognized by the law of nations as of universal concern even absent any special connection between the state and the offense. Further, the U.S. Courts have always recognized the universal jurisdiction,

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[157] A/CONF.183/C.1/L.53 (6 July 1998) (Discussion paper submitted to the Committee of the Whole with a view to the necessity of a prior consent from Non-States to the court to exercise its jurisdiction).

[158] NGO's such as Human Rights Watch and the Lawyers Committee for Human Rights argued that the principle of universal jurisdiction should apply in the Statute: *see* Lawyers Committee for Human Rights, the Rome Treaty for an International Criminal Court (1998) < http:// www.lchr.org/icc/papv2n1.htm >[last visited May 4, 2001].

[159] A/CONF.183/C.1/L.6, 18 June 1998.

[160] *See* Rome Statute, *supra* note 6, at part 2, Article 12(2).

[161] *See* Rome Statute, *supra* note 6, at part 2, Article 12(3).

[162] *See* Michael Scharf "The ICC's Jurisdiction Over the Nationals of Non-Party States" *supra* note 81, at 225.

[163] *See* Louis Henkin et al, International Law: Cases and Materials, 1049 (3rd Ed. 1998).

[164] *See* Restatement Third of the Foreign Relations Law of the United States §§ 404, 423 (1987).

thereby applied it in several cases such as, *United States v. Fawaz Yunis,*[165] and *Demjanjuk v. Petrovsky.*[166] Therefore, it was striking that the U.S delegation aggressively opposed the universal principle.[167]

In *Yunis*, the defendant was charged of hijacking a Jordanian aircraft from Lebanon on June 1985, and holding civilian passengers, including two American citizens, hostages. Two years later FBI agents lured him onto a yacht in the eastern Mediterranean Sea with promise of a drug deal, and then arrested him once they reached international waters. The U.S Court of Appeals found that the District Court correctly ruled that international law does not restrict the statutory jurisdiction to try *Yunis* on charges of air piracy as one of few crimes so clearly condemned under the law of the nations that states may assert universal jurisdiction to bring offenders to justice even when the state has no territorial connection with the crime and its citizens are not involved in it.[168]

In *Demjanjuk,* the State of Israel requested the extradition of *John Demjanjuk* from the United States to prosecute him for murdering thousands of Jews at a concentration camp in Poland during World War II. In ruling that the state of Israel had jurisdiction under the universal principle, the U.S. Court of Appeals for the Sixth Circuit specifically stated:

> The fact that *Demjanjuk* is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial. Further, the fact that the State of Israel was not in existence when *Demjanjuk* allegedly committed the offences is no bar to Israel's exercising jurisdiction under the universality principle. When proceeding on the jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are

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[165] *United States v. Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) *see* Louis Henkin et al et al, *supra* not 152, at 1077, *see also,* M. C. Bassiouni, International Extradition, *supra* note 152, at 237.

[166] *Demjanjuk v. Petrovsky,* 776 F.2d 571 (6th Cir. 1985), cert. Denied, 475 U.S. 1016 (1986).

[167] The opposition to that issue reached the point where an Act named the Protection of U.S. Troops from Foreign Prosecutions Act of 1999 was submitted to Congress providing prohibition of any economic assistance for countries that ratified the Statute.

[168] *See* Edward M. Wise and Ellen S. Podgor, International Criminal Law: Cases and Materials, 62-66 (2000).

offenses against the law of the nations or against humanity and that the prosecuting nation is acting for all nations.[169]

3.3.2 How a Case is Brought to the Court: "The Triggering Mechanism"

A case may be brought to the court with respect to a crime referred to in Article 5 in three circumstances.[170] First, is when a state, which is a party to the Statute, requests that the prosecutor initiate an investigation with respect to a crime under the jurisdiction of the Court.[171] Second, the prosecutor may initiate an investigation "*Proprio Motu*"[172] on a crime under the court's jurisdiction.[173] The prosecutor's authority is safeguarded against abuse by a direct judicial review from the Pre-trial Chamber to ensure that the investigation is in accordance with the statute and the objectives of the court.[174]

Finally, acting under Chapter VII of the Charter the United Nations, the Security Council, may refer a situation to the court.[175] The word "situation" was used intentionally for few reasons, *inter alia*, to minimize prejudicing the court by naming individuals at that early stage. Such referral by the Security Council gives the ICC full jurisdiction over the case, even if a national of a state who is not a party to the statute committed the crime. No state consent is required in such a case. That being said, it is reasonable to conclude that referral by the Security Council, using its inherent authority overrides any requirement of consent by the relevant state as a precondition for the ICC to practice its jurisdiction.

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[169] *See Demjanjuk v. Petrovsky, supra* note 166, at 582, *see also,* M. C. Bassiouni, International Extradition, *supra* note 152, at 366..
[170] *See* Rome Statute, *supra* note 6, at part 2, Article 13, *see also* Dorean Marguerite Koenig, Panel Discussion: Association of American Law Schools Panel on the International Criminal Court: From The Hague to Rome: The International Criminal Court in Historical Context, 36 Am. Crim. L. Rev. 246 (1999).
[171] *See* Rome Statute, *supra* note 6, at part 2, Article 14.
[172] Bartram S. Brown, The Statute of the ICC: Past, Present, and Future, *supra* note 125, at 73.
[173] *See* Rome Statute, *supra* note 6, at part 2, Article 15(1)(2).
[174] *See* Rome Statute, *supra* note 6, at part 2, Article 15(3)(4).
[175] *See* Rome Statute, *supra* note 6, at part 2, Article 13(2).

Due to the fact that the U.S. has deployed its military around the globe in an attempt to shape international behavior to be congenial to the U.S interests,[176] the U.S. had major concerns about requiring the consent of the states as a pre-condition to jurisdiction.[177] The U.S. argued that the language of Article 12 endangers U.S. troops overseas and potentially subjects them to prosecution by the court even if the U.S. did not sign the Statute.[178] Furthermore, the U.S. argued that Article 12 will prevent the U.S. from participating in multinational operations, such as humanitarian intervention, and that the ICC's jurisdiction over nationals of non-state parties violates the principle of treaty law and international law in general.[179]

On the other hand, opponents, such as the "Like-Minded Group,"[180] held a strong opposite position arguing that requiring the consent of a state, as a prerequisite for jurisdiction would paralyze the court.[181] Moreover, they argued that it would be illogical to prosecute the citizen of a party state while requiring prior consent to have jurisdiction over non-nationals committing the same crime.

It is difficult to imagine that the ICC would violate any international law principles by not requiring prior consent. If the crime alleged is committed within the

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[176] Sarah B. Sewall et al "The United States and the International Criminal Court: An Overview" *in The United States and The International Criminal Court; National Security and International Law*, 25 (2000).
[177] *See* Bartram S. Brown, The Statute of the ICC: Past, Present, and Future, *supra* note 125, at 75-76.
[178] William L. Nash, "The ICC and the Deployment of U.S Armed Forces" *in* " *The United Sates And The International Criminal Court: National Security and International Law"* 154-156 (Sarah B. Sewall and Carl Kaysen ed., 2000); John Bolton "Reject and Oppose The International Criminal Court" in *Toward an International Criminal Court? A Council Policy Initiative,* council on Foreign Relations (Alton Frye ed., 1999); David Scheffer, The United States at the International Criminal Court, American Journal of International Law, 18 (1999); David J. Scheffer, Is a U.N International Criminal Court in the U.S Interest? Hearing before the Subcommittee on International Operation of the Committee on Foreign Relations, United States Senate, 105th Congress, 2nd Sess. 45 (July 23, 1998).
[179] Major William K. Lietzau, U.S.M.C, panel Discussion: The International Criminal Court: Contemporary Perspectives and Prospects for ratification, 16 N.Y.L. Sch. J. Hum. Rts. 513-515 (2000); Anne-Marie Slaughter, *Supra* note 28, at 4; Kenneth Roth "Endorse the International Criminal Court" in *Toward an International Criminal Court? A Council Policy Initiative,* 25 (Alton Frye ed., 1999); John Bolton, "Reject and Oppose The International Criminal Court" *supra* note 178, at 45-47.
[180] *See supra* note 64.

territory of a state that is a party to the Rome Statute, that state would have jurisdiction to prosecute the accused individual. Therefore, it would be illogical to prevent states that already have a legal obligation to do so from creating a permanent international criminal court to implement such an obligation on behalf of the international community. However, the language of Article 12 indicates that the ICC does not have any compulsory jurisdiction. Rather, prior consent of either the territorial state or the state of the nationality of the accused is necessary as a pre-condition before the ICC can exercise its jurisdiction.

3.3.3 the Role of the U.N. Security Council in the ICC

While the world community as a whole has steadily progressed towards acceptance of universal jurisdiction, at least four of the five permanent members of the Security Council (China, France, the U.S and the Russian Federation) have argued to keep the power to veto prosecutions involving situations under the Security Council control pursuant to Chapter VII of the U.N Charter.[182] The "Like-minded Group" strongly opposed that vision, arguing that granting the Security Council such power would jeopardize the court's judicial independence, and moreover, politicize its work.[183] Hence, in an attempt not to undermine or diminish the authority of the Security Council,[184] the Rome negotiators adopted the Singapore proposal as a compromise between those two positions.[185]

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[181] Mahnoush H. Arsanjani, "Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court" *in Reflections on the International Criminal Court,* 60 (Herman A.M. Von Hebel ed., 1999).

[182] The descussions in Rome revealed that the permanent five state members to the Security Council, but the United Kingdom, were of the position that the Security Council should mentain its power on matters under Chapter VII of the Charter of the United Nation.

[183] *See* Lawrence Weschler "Exceptional Cases in Rome: The United States and the Struggle for an International Criminal Court" *supra* note 55, at 93.

[184] *See* Katherine L. Doherty and Timothy L.H. McCormack, *supra* note 129, at 151.

[185] *See* Lawrence Weschler, *supra* note 55, at 93.

The present text provides that prosecutions might be commenced for a period of twelve months where the Security Council has adopted a resolution under Chapter VII of the U.N Charter to that effect.[186] Interestingly, the U.S. once more aggressively opposed it. Further, in a very damaging picture to the United States' perceived role as a crusader for international human rights and the rule of law, Senator Rod Gram, Chairman of the Subcommittee on International Operations, in a hearing held few days after the conclusion of the Diplomatic Conference in Rome, declared that:

> It turns the functioning of the Security Council on its head, and I think sets a very bad precedent. The Security Council must act affirmatively to stop a prosecutor from taking up a case.[187]
>
> This is a great victory to the critics of the Security Council that have finally achieved their goal of diluting the power of the permanent five with the realization that their bids to increase the number of permanent members were destined to ultimately fail.[188]

The author here deeply joins the view contrary to that taken by U.S. If such provision is adopted giving the Security Council the veto power over prosecutions, the ICC would be greatly politicized. Moreover, any member state of the Security Council could delay the Court from investigating or prosecuting cases by including the situation or the case on the Council's agenda. Furthermore, the present formulation, despite the requirement that the Security Council–as a whole-adopt a resolution to prevent the commencement of an investigation or prosecution, opened the door for the Security Council to interfere with the administration of justice.

The Security Council, according to the language of Article 16, is able to prevent the ICC from initiating the investigation or the prosecution for consecutive periods of 12 months each. Moreover, the Rome Statute does not provide any means for review of

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[186] *See* Rome Statute, *supra* note 6, at part 2, Article 16.

such resolution. That is to say, that if the Security Council adoptes such resolution, it could eventually bar investigation or prosecution for as long as the Council wishes.

As to the crime of aggression, the ICC draft Statute proposed by the ILC to the Rome Conference states that a finding from the Security Council that aggression exists is a prerequisite for the ICC to initiate any proceedings against the individual. As a matter of fact, requiring such finding is not in the interest of the ICC. A determination that aggression exists would interfere with the duties of the ICC as a criminal tribunal concerned with addressing individual criminal responsibility for acts including aggression.

Further, as observed by Sadat, joined by others,[189] "Subjecting the Court's jurisdiction to Security Council determination could needlessly undermine the Court's authority and would reinforce the perception that the members of the Security Council, especially the permanent members, are unaccountable for their actions, while the rest of the world must struggle to meet established standards of conduct."[190]

The outcome of the Rome Conference, as mentioned before,[191] was somewhat more acceptable in comparison with the language of the ILC draft. The inclusion of the crime of aggression is to be decided in a later conference to be held seven years after the ICC enters into force.

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[187] Senator Rod Gram, Chairman of the Subcommittee on International Operations, Is a U.N International Criminal Court in the U.S Interest? Hearing before the Subcommittee on International Operation of the Committee on Foreign Relations, United States Senate, 105th Congress, 2nd Sess. 3 (July 23, 1998).
[188] *Id.* at 1
[189] Leila Nadya Sadat and S. Richard Carden, The New International Criminal Court, *supra* note 148, 443, *see also* Oscar Schachter, In Defense of International Rules on the Use of Force, 53 U. CHI. L. Rev. 113, 128-131.

3.4 Complementarity Threshold

First, note that the word "complementarity" does not exist either in the statute,[192] or in the English language. Rather, the 1995 ad hoc committee and the 1996 PrepCom selected the term, which is derived from the French term "complementarité" to describe the relationship between the ICC and national systems.[193]

Complementarity[194] has been one of the most controversial issues discussed in Rome, and perhaps it stands as the cornerstone of the Statute.[195] Further, the Rome discussions revealed doubts that the existence of the ICC, as a super-international judicial institution- would have priority over national judicial institutions and override decisions of a nation's judicial system or subject individuals, such as heads of states or high ranking commanding officers, to the risk of politically motivated investigations or prosecutions.[196]

The idea behind the principle of complementarity is that the ICC has departed from the standing principle of jurisdictional primacy of the ICTY and the ICTR tribunals over national judicial systems. Rather, the ICC will be complementary jurisdiction to the national judicial institutions, and will not practice its jurisdiction unless it is clear that the state is unwilling or unable to practice its jurisdiction over the case.

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[190] *Id.* at 443.
[191] *See* the crime of Aggression, paragraph 2.2.4.
[192] The Rome Statute used the word "Complementary" in the Preamble to define the relation between the court and national criminal jurisdictions.
[193] *See* M. Cherif Bassiouni, *supra* note 6, at 6.
[194] *See* Rome Statute, *supra* note 6, at part 1 & 2, Articles 1 & 17.
[195] *See* Lawrence Weschler "Exceptional Cases in Rome: The United States and the Struggle for an International Criminal Court" *supra* note 55, at 96.
[196] Rod Gram, *supra* note 187, at 2: *see also* David J. Scheffer, The United States Perspective on the ICC, *supra* note 138, at 117.

3.4.1 The Legal Effect of the ICC:

The ICC is neither a substitute for nor is it intended to displace national courts.[197] Rather, it is envisioned as a supplement to national judicial institutions, which are unwilling or unable to carry out their international obligations to investigate and prosecute crimes of international concern. In other words, "Complementarity will be the last resort which comes into play only when domestic authorities are unable or unwilling to prosecute."[198]

Despite all the criticism, complementarity means that the primary responsibility for enforcing the principles of international humanitarian law will remain with states, not the Court. Moreover, the international community did not, and will not, override state sovereignty through the actions of the ICC. Rather, states with competent jurisdiction have the right to initiate proceedings,[199] and the ICC must defer to these national proceedings.[200] The real question is where to draw the line between the sovereignty of states and the jurisdiction of the ICC. The answer for such a question appears to be that states must initiate an investigation in accordance with the definitions given to the crimes listed in Articles 6,7,8 and the Elements of the Crimes. Otherwise the ICC could decide that the state is unwilling or unable genuinely to carry out the investigation or prosecution under the provisions set forth in Articles 13 and 17 (2)(3) of the Rome Statute.

3.4.2 Complementarity Requirements:

Under the principle of complementarity, the ICC cannot take jurisdiction over a crime unless this crime is among those listed in Articles 6,7, or 8. Therefore, the ICC is concerned only with those crimes. As discussed below, for the ICC to exercise its

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[197] *See* Bartram S. Brown, The Statute of the ICC: Past, Present, and Future, *supra* note 125, at 73.
[198] *See* Michael P. Scharf "Is a U.N International Criminal Court in the U.S National Interest, *supra* note 84, at 73.
[199] *See* Katherine L. Doherty and Timothy L.H. McCormack, *supra* note 129, at152.
[200] *See* Bartram S. Brown, The Statute of the ICC: Past, Present, and Future, *supra* note 125, at 73-74.

jurisdiction, the prosecutor has to prove that the national judicial system is unwilling or unable to carry out the investigation. Where a situation has been referred to the ICC by a state or where the prosecutor has initiated the investigation *"proprio motu"* in accordance with Articles 13 (c) and 15, the prosecutor is required to inform all state parties, as well as non-state parties, which would normally exercise jurisdiction over the crime.[201] In such case, a state has thirty days to respond by informing the prosecutor that it is already investigating or has already investigated the case or the crime concerned.[202] The prosecutor would then defer to the state's investigation. Due to its preliminary nature, such deferral to national jurisdiction, or "inadmissibility" as it is called in the Statute, could be raised by the court itself, the accused, or by a state with jurisdiction over the matter before trial, and both sides would then have a right to appeal the decision to the Appeals Chamber of the court.[203]

Indeed, the ICC's deference to national judicial institutions, and the guaranties conferred by it, represent a unique example of how efficient the complementarity principle will be. States have the right to exercise jurisdiction over the case as long as their courts are exercising the international duties of the state independently and with the intent to bring justice. On the other hand, the Prosecutor only grants the deference subject to his review six months after the date of the deferral or at any time when there has been a significant change of circumstances based on the unwillingness or inability genuinely to carry out the investigation.[204] Moreover, the Prosecutor may take any necessary measures

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[201] *See* Rome Statute, *supra* note 6, at part 2, Article 18 (1)
[202] *See* Rome Statute, *supra* note 6, at part 2, Article 18 (3).
[203] *See* Rome Statute, *supra* note 6, at part 2, Article 18; *see also* Louise Arbour and Morten Bergsmo " Conspicuous Jurisdictional Overreach" *in Reflections on the International Criminal Court, 131* (Herman A.M. Von Hebel ed., The Hague, 1999).
[204] *See* Rome Statute, *supra* note 6, at part 2, Article 18 (3)(5)

for the purpose of preserving evidence where there is an unique opportunity to obtain or protect any crucial evidence related to the case.[205]

In conclusion, the ICC, contrary to the ICTFY and ICTR, does not constitute international judicial intervention. Rather, the ICC depends on domestic constitutional or statutory provisions, which allow the ICC to take over a case.[206] In other words, the ICTY and ICTR as tribunals created upon Security Council resolutions, enjoy primacy over national jurisdictions, and can take over any proceedings initiated by the judicial institutions of a state concerning crimes committed on the territories of the Former Yugoslavia and Rwanda. By contrast, the ICC cannot take over national proceedings initiated by the state as long as the latter is willing and capable of carrying out such obligation. Rather, it is clear that the ICC will not decrease the role of national judicial institutions, but will push forward the steady rise seen over the last decade in the involvement of national judicial institutions in prosecuting perpetrators of severe violations of human rights.[207]

3.4.3 Exceptions to the Principle of Complementarity

In light of the fact that deploying a permanent, fully empowered, international, criminal tribunal to investigate the most serious crimes was the main purpose for the ICC, the Rome negotiators managed to create a very well balanced system of jurisdiction between the ICC and states. This system, embodied in the principle of complementarity, contains two main exceptions, under which the ICC may take jurisdiction over the crime committed: (1) when the state in question is unwilling genuinely to prosecute or

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[205] *See* Rome Statute, *supra* note 6, at part 2, Article 18 (6).

[206] Madeline Morris "Complementarity and its Discontents: States, Victims, and the International Criminal Court" *in International Crimes, Peace, and Human Rights: The Role of the International Criminal Court,* 191 (Dinah Shelton ed., 2000).

[207] National courts have taken an active role during the last decade in prosecuting human rights abusers such as Pinochet and Marcos for crimes they committed while being heads of Chili and Philippine.

investigate the crime concerned;[208]and, (2) when the state in question is unable to prosecute or investigate the crime concerned.[209] Under these two exceptions, the ICC can hear a case that has already been referred to a national court. It is thus reasonable to conclude that it was imperative that priority be given to national judicial systems to investigate and prosecute. Moreover, it is equally imperative to have a strong mechanism capable and ready to function where national judicial system is not operating in accordance with rules of justice or is unable to carry out its duties to investigate terrible crimes against human beings.

3.4.4 The Guidelines on How to Determine the Unwillingness or Inability of National Judicial Institutions

To determine that a state is unwilling to carry out an investigation or prosecution, the ICC, giving proper regard to the principle of due process, will consider the following factors:[210] First, If the decision or the proceedings were or are being undertaken for the purpose of shielding or protecting the person concerned from criminal responsibility for the crime committed. Second, unwillingness may also exist where there has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with intent to bring the person concerned to justice. Finally, if the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner that, in the circumstances seems contrary to an intent to bring the person concerned to justice.[211]

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[208] The strongest example would be the Former Yugoslavia, the government was unwilling to prosecute those responsible, such as Slobodan Milosevic, for the atrocities committed on its territory.

[209] The strongest example would be Rwanda; all the national institutions, including the judicial, have collapsed; therefore, Rwanda was unable to investigate or prosecute the massacres that occurred on its territory.

[210] *See* Rome Statute, *supra* note 6, at part 2, Article 17(2).

[211] *Id.*

Similarly, to determine the inability of states to investigate or prosecute a case, the Court must consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to arrest the person accused or obtain the necessary evidence and testimony or otherwise unable to carry out its proceedings.[212] The inability of a state to carry out such procedures could be indication of its failure to investigate and prosecute the case.

[212] *Id, see also* Mahnoush H. Arsanjani, *supra* note 181, at 69-70.

CHAPTER 4

INTERNATIONAL COOPERATION BETWEEN THE STATES AND THE INTERNATIONAL CRIMINAL COURT

International cooperation is crucial to the achievement of the ICC's goals. Such cooperation must include full compliance with the Prosecutor during the investigation, and with the Chambers during the prosecutions conducted by the Court. Part Nine of the Rome Statute provides the necessary legal framework for cooperation. Despite the fact that the Rome Statute does not grant the Court any explicit power to enforce the provisions on cooperation, states parties should assist the Court by executing all forms of cooperation such as arrest or search warrants, transferring of persons to the court, gathering information and evidence.[213]

As Swart and Sliter observed, "[A]ny international criminal court, whether created on an Ad Hoc or a permanent basis, depends heavily on the willingness of states and international organizations to provide support and to assist in its own work."[214] State cooperation has proven to be a very effective factor in the success of the previous ad hoc international criminal tribunals. In recognition of that, the Rome drafters emphasized the importance of cooperation culminating in Part Nine, which contains seventeen Articles regulating international cooperation and judicial assistance.

Under Articles 86 and 87, cooperation could be between the ICC and states parties,[215] non-party states,[216] or intergovernmental organizations are advocated.[217]

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[213] *See* Bartram S. Brown, The Statute of the ICC: Past, Present, and Future, *supra* note 125, at 77-78.
[214] Bert Swart and Göran Sliter "The international Criminal Court and International Criminal Co-operation" *in Reflections on the International Criminal Court,* 91, (Herman A.M. Von Hebel ed., 1999).
[215] *See* Rome Statute, *supra* note 6, at part 9, Articles 86 and 88.
[216] *See* Rome Statute, *supra* note 6, at part 9, Article 87(5).

It is important to note that the cooperation provisions contained in Part Nine present another compromise that was successfully achieved just before the Rome Conference came to a close.[218] The formulation adopted presents a wide range of views that reflects the importance of Part Nine to all states parties. Moreover, the language used in drafting Part Nine represents a departure from the language used in most traditional treaties or agreements between states, or U.N. model treaties.[219] The Rome negotiators used novel terms to describe cooperation provisions; they replaced the term "*extradition*" with the term "*surrender*", and the term "*international cooperation and judicial assistance*" replaced the term "*mutual assistance*".[220] Further, the usage of the term "*the Court*" does not mean the Court itself, rather, it may mean the Prosecutor, the Chamber, or the Presidency.

4.1 Cooperation from States parties

Generally, only states parties to the Rome Statute have a general obligation to cooperate fully with the ICC,[221] and they must ensure that their national laws allow all forms of cooperation with the ICC, as specified under Part Nine of the Statute.[222] Therefore, the ICC, as a treaty based tribunal, creates a binding obligation on states parties only.

Article 86 is consistent with the provisions of the Vienna Convention on the Law of Treaties of May 23, 1969.[223] Under the Vienna Convention, states parties to the Rome Statute are under obligation to cooperate with the Court. However, the language of

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[217] *See* Rome Statute, *supra* note 6, at part 9, Article 87(6).
[218] *See* Claus Kreβ et al, "Preliminary Remarks", *in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article,* 1045, (Otto Triffterer ed. 1999) [hereinafter Commentary on the Rome Statute].
[219] U.N. model treaties such as the U.N. Model Treaty on Extradition and Mutual Assistance on Criminal Matters, U.N. Doc. A/CONF. 144/28/Rev. 1, pp. 78, 80 and 82.
[220] *Id*, at 1048.
[221] *See* M. C. Bassiouni, "The Permanent International Criminal Court", *supra* note 114, at 35.
[222] Mahnoush H. Arsanjani, Developments in International Criminal Law: The Rome Statute of the International Criminal Court, 93 A. J. I. L. 40(1999).

Article 86 barely reflects that obligation, rather, it must be read together with the Articles contained in Part Nine to bring about such obligation.

Under Article 12(1), a state having joined the ICC automatically accepts the ICC's jurisdiction over the crimes listed in Article 5. In contrast with that, Article 86 provides that states parties must, in accordance with the provisions of the Rome Statute, fully cooperate with the Court in its investigations and prosecutions.[224] Accordingly, the Court has the authority to ask states parties to cooperate with the Prosecutor or the Chambers of the Court with respect to any ongoing investigation or prosecution.

The ICTFY and the ICTR, were created on the basis of Chapter VII of the U.N Charter, which creates a binding obligation on all states to take all necessary steps to cooperate fully and assist the tribunal in all stages of proceedings.[225] The obligation to cooperate with the ICC is structured differently. It depends on the well-recognized principle of good faith, which means that states parties must *fully* comply with cooperation requests willingly by giving effect to the provisions on cooperation contained in Part Nine.[226]

4.1.1 Cooperation Requirements for States Parties

The Rules of Procedure and Evidence,[227] provide that, upon ratification, approval, acceptance, or accession, every state must designate a national authority charged with receiving cooperation requests.[228] The national authority can be changed at any time upon a written request from the state informing the Registrar of the Court.[229] However, requests from the Court may also be transmitted through the International Criminal Police

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[223] U.N. Doc. A/CONF. 39/11/Add.2.
[224] *See* Rome Statute, *supra* note 6, at part 9, Article 86.
[225] *See* M. C. Bassiouni and Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia, 775 (1996).
[226] *See* Claus Kreβ, "Preliminary Remarks", *in Commentary on the Rome Statute, supra* note 218, at 1053.
[227] *See* Finalized Draft Text of the Rules of Procedure and Evidence, *supra* note 12.

Organization or any appropriate regional organization.[230] For the sake of practicality, a state can designate its embassy in the Netherlands to be the national authority. Making this designation will ensure that requests are dealt with expeditiously. This seems the most efficient alternative, unless a state designates a special section of its Ministry of Justice or Ministry of Foreign Affairs to handle such requests.

Moreover, upon ratification, approval, acceptance, or accession, states must designate the language that should be used for cooperation requests.[231] If such a choice has not yet made, requests and supporting documents will be in or accompanied by a translation into the official language of the requested state or any of the working languages of the Court under the terms of the Rome Statute.[232]

When a state party has more than one official language, it may indicate that any requests and any supported documents should be drafted in any of its official languages.[233] In case where a state party does not designate one of its own languages, the Court must transmit the request either in or accompanied by a translation into the official language of the that state, or in one of the working languages of the Court.[234] Any subsequent changes to the chosen language must be communicated by the state party to the Registrar in writing at the earliest opportunity.[235]

In the interest of practicality, the office of the Prosecutor is responsible for transmitting requests for cooperation made by the Prosecutor during an investigation, and

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[228] *See* Rome Statute, *supra* note 6, at part 9, Article 87 (1)(a), *see also* M. C. Bassiouni, The Permanent International Criminal Court, *supra* note 114, at 36.
[229] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 180 (1).
[230] *See* Rome Statute, *supra* note 6, at part 9, Article 87 (1)(b).
[231] *See* Rome Statute, *supra* note 6, at part 9, Article 87 (2).
[232] Under Article 50 of the Rome Statute, the working languages of the Court are Arabic, Chinese, English, French, Russian and Spanish.
[233] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 178 (1).
[234] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 178 (2); *see also See* Rome Statute, *supra* note 6, at part 9, Article 87 (2).
[235] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Article 180 (1).

receiving all responses, information and documents from the requested state.[236] As to cooperation requests relating to prosecutions before any of the Court's Chambers, the Registrar is responsible for transmitting requests and receiving responses, information and documents from the state party involved.[237]

4.1.2 Forms of Cooperation

Theoretically, under the Rome Statute and the Rules of Procedure and Evidence, states parties are obliged to cooperate with the Court and provide assistance as long as the requested action is not prohibited or contradictory to the state party's national laws, and the cooperation is related to an investigation or trial of a crime within the jurisdiction of the Court.[238] The language used in that Article indicates that a state party may refuse to comply with the request from the Court only in these two circumstances. That is to say,

> Assistance may not be refused because the offense is characterized as a political, military or fiscal offense nor is there a general provision allowing for refusal where execution of the request would be contrary to the public order, sovereignty or public interest of the state, as is often found in traditional mutual assistance treaties.[239]

Taking that into account, the Rome drafters designed Article 93 to provide a wide range of cooperation with the Court that should be permissible under the national laws of states parties. It provides eleven forms of cooperation, that states parties should engage in to the extent allowed under the procedures of their own laws, such as the taking of evidence, questioning persons, serving documents and the protection of victims and witnesses.[240]

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[236] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Article 176 (2).
[237] Id.
[238] *See* Rome Statute, *supra* note 6, at part 9, Article 93(1)(l).
[239] Kimberly Prost, "Article 93", *in Commentary on the Rome Statute, supra* note 218, at 1105.
[240] *Id,* at 1104.

4.1.3 The Request for the Arrest and Surrender of a Person

In recognizing the importance of the request for arrest and surrender of a person as one of the most problematic procedures in Part Nine, Articles 59, 89, 90 and 91 were specifically drafted to ensure that such requests would be executed expeditiously in accordance with the provisions of the Rome Statute and the national law of the requested state. First, It should be noted that Article 89, governing the surrender of persons to the Court, must be read in conjunction with Article 58 that lays down the requirements for the issuance of a warrants of arrest by the Trial Chamber.[241] Under Article 89, the ICC, upon the issuance of a warrant of arrest, may request the arrest and surrender of any person from any state in whose territory that person may be found.[242] If that state is a party to the Rome Statute, it must comply with the request and take all the necessary steps to execute it promptly.[243]

Generally, the request for the arrest and surrender of a person must be in writing. However, in urgent cases, the request may be transmitted to the state via any medium capable of delivering the request in written form, such as a facsimile or e-mail, provided that the original request follows the emergency request via the regular designated channel.[244]

As for the contents of the request, the Rome negotiators differentiated between requests made for a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under Article 58 and requests made for a person who has already been convicted by the Court.[245] In the first case, the request must include information

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[241] *See* Claus Kreβ and Kimberly Prost, "Article 89", *in Commentary on the Rome Statute, supra* note 218, at 1073.
[242] *See* Rome Statute, *supra* note 6, at part 9, Article 89 (1).
[243] *See* Rome Statute, *supra* note 6, at part 5, Article 59(1).
[244] *See* Rome Statute, *supra* note 6, at part 9, Article 91(1); *see* also Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 182(1).
[245] *See* Kimberly Prost, "Article 91", *in Commentary on the Rome Statute, supra* note 218, at 1094.

describing the person, his or her probable location, and a copy of the warrant, and any other information, documents or statements that is required by the law of the state involved.[246] Further, for the purpose of facilitating the cooperation with the Court, the Rome Statute provides that those additional requirements must be less burdensome than those required for requests or treaty or arrangements with other states.[247] Prost observed that using the phrase "*except that those requirements should not be more burdensome*" "limits the state's ability to require evidence by mandating that any requirements imposed upon the Court cannot be more burdensome than those applicable in the extradition practice of that state."[248]

In cases where a request is made for a person who has already been convicted, the request is to include a copy of the warrant, a copy of the judgment or conviction, information to support the fact that the person sought is the one referred to in the judgment or the conviction, and a copy of the sentence imposed, if any, or a statement of the time already served and the time remaining to be served if the person has been already sentenced to imprisonment.[249] In all events, the request must be accompanied by a translation of the text of any relevant provisions of the Statute in a language that the person sought fully understands and speaks.[250]

Paragraph (2) of Article 89 addresses the case where a person applies to the national Court challenging the admissibility of the case before the ICC on the basis of the principle of *ne bis in idem*. As mentioned earlier,[251] the Rome Statute states that in such instance, *only* the Court can decide the issue of admissibility.[252] Thus, the state receiving

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[246] *See* Rome Statute, *supra* note 6, at part 9, Article 91(2)(a)(b)(c).
[247] *See* M. C. Bassiouni, The Permanent International Criminal Court, *supra* note 114, at 38.
[248] *See* Kimberly Prost, "Article 91", *in Commentary on the Rome Statute, supra* note 218, at 1094.
[249] *See* Rome Statute, *supra* note 6, at part 9, Article 91(3)(a)(b)(c)(d).
[250] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 187.
[251] *See* Chapter 2, at 21.
[252] *See* Rome Statute, *supra* note 6, at part 2, Article 19.

such application must consult with the Court to determine whether the Court ruled on the admissibility of the case. If the Court has ruled the case admissible, the requested state party must promptly proceed with the execution of the request. While a ruling is pending, the requested state may, at its discretion, postpone the request pending a decision from the Court on admissibility.

An issue arises when the person sought appeals the admissibility decision. Some might argue that the Statute is silent in such instance, and that if the Court has decided that the case inadmissible, the requested state should proceed with the execution proceedings regarding a request from a third state.[253] In such instance, it would be more practical if the requested state proceeds with the request from a third state, but not to surrender the person until a ruling on the appeal is decided by the Court.

Paragraph 4 of Article 89 explores the situation where the person sought by the Court is being proceeded against or serving a sentence in the requested state. In an attempt to avoid overriding the orders of domestic courts, another compromise was achieved by including the possibility of temporary surrender to the Court.[254] As a matter of fact, this compromise is not complete. Rather, the Rome negotiators could not decide who ultimately has the final say when the temporary surrender itself is not possible. In such instance, the Rome Statute leaves that issue to be resolved between the Court and the requested state party through consultation. Consequently, state parties, in such situation, are under no obligation to comply with the Court request.

4.1.4 Competing Requests

Where a state party receives a request for assistance from the Court and another request from a state party to arrest and surrender a person for the same conduct, the

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[253] *See* Claus Kreβ and Kimberly Prost, "Article 89", *in Commentary on the Rome Statute, supra* note 218, at 1075.

requested state is instructed by the Rome Statute to give priority to the request from the Court, provided that the Court, upon notification from the state involved,[255] has made a determination that the case is admissible.[256] Here, it is important to note that paragraph (1)(b) of this Article requires the state receiving the request to notify the Court promptly that a state has submitted a competing request for the surrender and extradition of the same person. In such instance, the Court must decide on the admissibility of the case expeditiously.[257] If such a determination has not yet been made, the requested state, at its discretion, may proceed to deal with the other request, but should not extradite the person sought until the Court has made a determination on the admissibility of the case.[258]

In a situation where a non-state party makes the second request, the same provisions apply to Article 90(6), provided that the requested state is under an existing international obligation to extradite the person to the non-state party.[259] However, consistent with the principle of complementarity, if such an international obligation does not exist, the state receiving the request must give priority to the request from the Court if a determination has been made that the case is admissible.[260] The requested state party can proceed, at its discretion, in dealing with the request from the non-state party until the Court makes such determination on the admissibility of the case.[261]

By comparison, if the request from the state is made for conduct other than that which constitutes the crime for which the Court seeks the person's surrender, the requested state must give priority to the request from the Court if it is under no

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[254] Claus Kreß and Kimberly Prost, "Article 89", *in Commentary on the Rome Statute, supra* note 218, at 1079.
[255] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 186.
[256] *See* Rome Statute, *supra* note 6, at part 9, Article 90(1)(2).
[257] Claus Kreß and Kimberly Prost, "Preliminary Remarks", *in Commentary on the Rome Statute, supra* note 218, at 1085.
[258] *See* Rome Statute, *supra* note 6, at part 9, Article 90(3).
[259] *See* Rome Statute, *supra* note 6, at part 9, Article 90(6).
[260] Claus Kreß and Kimberly Prost, "Article 90", *in Commentary on the Rome Statute, supra* note 218, at 1086.

international obligation to extradite the person to the other state.[262] If an international obligation does exist, the state party, once again, at its discretion, determines whether to surrender the person to the Court or the state making the request, after considering several factors including, but not limited to, the dates of the requests and the relative nature and the gravity of the conduct in question.[263] Here, the use of the term "*include*" has opened the door for requested state parties that are not willing to cooperate with the Court in considering all possible factors to escape from complying with the request.

4.1.5 Exceptions to the Duty to Comply with the Request

The Rome Statute provides two exceptions under which a state party may not comply with the request from the Court. First, when the request concerns the production of any documents or disclosure of evidence, which relates to its national security, a state party may choose not to comply with the request from the Court.[264] The language of paragraph (4) indicates that it is up to the state receiving the request to determine whether the matter relates to its national security. That is to say, that the requested state is under no obligation to cooperate, and that states that are unwilling to cooperate with the Court might use that provision as ground for not to comply with the request of the Court. Further, the Court is not allowed to "double-check" whether in fact the request relates to the national security of the requested state.[265]

The second exception provides that a state receiving a request to cooperate may deny the request if the form of requested assistance is not provided for in the Rome

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[261] *See* Rome Statute, *supra* note 6, at part 9, Article 90(4)(5).
[262] *See* Rome Statute, *supra* note 6, at part 9, Article 90(7).
[263] *See* Rome Statute, *supra* note 6, at part 9, Article 90(6).
[264] *See* Rome Statute, *supra* note 6, at part 9, Articles 72 and 93(4), *see* also *See* M. C. Bassiouni, The Permanent International Criminal Court, *supra* note *114*, at 36
[265] Kimberly Prost and Angelica Schlunck, "Article 93", *in Commentary on the Rome Statute, supra* note 218, at 1113.

Statute, is prohibited by the laws of the requested state[266] or violates existing fundamental legal principles of general application. In such instances, cooperation need not be given; rather states are obliged to consult with the Court prior to deciding on the request, to determine if the assistance could be provided subject to certain conditions, at a later date, or in a different manner.[267] If no solution can be achieved, the Court has to make concessions to the national laws of the requested state insofar as it has to modify the initial request.[268] In other words, in that respect, the state receiving the request, once again, has the final say in deciding whether to comply with the request from the Court.

4.1.6 Postponement of Execution of Requests

The Rome Statute provides that states parties can postpone the execution of the requests in two situations. The first such situation is when immediate execution would interfere with an ongoing investigation or prosecution of a case before the national legal institutions of the requested state.[269] In such a situation, the state, after consulting with the Court, may postpone execution of the request from the Court for a reasonable period of time in order to complete the relevant investigation or prosecution. However, the state receiving the request may consider immediate execution of the request subject to certain conditions, such as the return of the documents to the receiving state within a certain period of time.[270] Second, where there a challenge of admissibility before the Court is pending, the requested state may postpone the execution of the request until the Court makes a determination.[271]

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[266] *See* Rome Statute, *supra* note 6, at part 9, Article 93(1)(l).
[267] *See* Rome Statute, *supra* note 6, at part 9, Article 93(5).
[268] Gerhard Hafner et al, A Response to the American View as Presented by Ruth Wedgwood, 10 Euro. J. Int'l L., 122-123, (1999).
[269] Mahnoush H. Arsanjani, Developments in International Criminal Law, *supra* note 222, at 41.
[270] *See* Rome Statute, *supra* note 6, at part 9, Article 94(1).
[271] *See* Rome Statute, *supra* note 6, at part 9, Article 95.

4.1.7 The Temporary Surrender of Persons

Article 93(7) provides that, for the purpose of identifying a person or obtaining testimony, the Court may request the temporary surrender of the person provided there is the consent of both that person and the requested state. [272] In such instance, the person must remain in the custody of the Court until the completion of the proceedings before the Court, at which time that person will be returned to the requested state's custody.[273]

4.1.8 The Request for Provisional Arrest

Where it is necessary for the person to be urgently arrested, Article 92 allows for provisional arrest of persons pending submission of the formal request for arrest accompanied by the supporting documents. Such procedure is consistent with general extradition practice, which allows it only for the purpose of preventing the person from escaping the territory of the requested state, destroying evidence, or endangering the community.[274] Accordingly, the Rome Statute allows the Court, after issuing a warrant for arrest, to request that the state or states involved take preventive measures, such as the provisional arrest of the individual pending presentation of the proper supporting documents.[275] However, such request must be used only in urgent cases where the preparation of the documents supporting the request may require long period of time.[276]

As to the formal requirements of this request, Article 92(2) mirrors Article 87 concerning the general requirements for cooperation request.[277] The request must be in writing and communicated to the requested state by any medium capable of delivering a

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[272] *See* Rome Statute, *supra* note 6, at part 9, Article 93(7)(a)(b).
[273] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 183.
[274] Kimberly Prost, "Article 92", *in Commentary on the Rome Statute, supra* note 218, at 1098.
[275] *See* Rome Statute, *supra* note 6, at part 9, Article 58(8)and 92(1), *see also* Jeffrey S. Morton, The International Law Commission, *supra* note 16, at 73.
[276] *See* Rome Statute, *supra* note 6, at part 9, Article 92(1)
[277] *See* Rome Statute, *supra* note 6, at part 9 Articles 87 and 92(2).

written document such as a facsimile.[278] The states receiving such requests must respond to it expeditiously.[279]

The contents of the request, outlined in Article 92(2), should include information on the person sought, which will be sufficient to establish his or her identity. Moreover, the request must include a statement of the existence of an arrest warrant or of a judgment against the person, and a second statement that a request for the surrender of that person will follow.[280]

Here, it is important to note that the requested state may release the person from custody if it does not receive the request for surrender and supporting documents within sixty days from the date of the provisional arrest.[281] However, the person can be re-arrested and surrendered to the Court if the request and supporting documents are properly presented at a later date.[282] In any event, the person sought may consent to surrender before the expiration of the sixty days, if permitted by the national law of the requested state.[283] Such practice, known as the "*Simplified Extradition*" is consistent with Article 6 of the U.N Model Treaty on Extradition, which allows the state receiving the request immediately to surrender the person after the provisional arrest, provided that that person has already consented to the surrender.[284] In such instances, the requested state has to surrender the individual to the Court as soon as possible, and the Court is not required to provide the information or the statements required unless the requested state indicates otherwise.[285]

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[278] *See* Rome Statute, *supra* note 6, at part 9, Article 92(2).
[279] *See* Rome Statute, *supra* note 6, at part 9, Article 59.
[280] *See* Rome Statute, *supra* note 6, at part 9, Article 92(2).
[281] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 188.
[282] *See* Rome Statute, *supra* note 6, at part 9, Article 92(3)(4).
[283] *See* Rome Statute, *supra* note 6, at part 9, Article 92(3).
[284] Kimberly Prost, "Article 92", *in Commentary on the Rome Statute, supra* note 218,at 1100.

4.1.9 Cooperation With Respect to Waiver of Immunity

In the interest of practicality, and in another compromise, Article 98 of the Rome Statute, provides in mandatory terms that where the request from the Court to arrest and surrender of a person would place the requested state in breach of its international obligations with respect to diplomatic or state immunity, the Court is obliged to seek cooperation from the third state first before contacting the state receiving the request.[286] It is important to note that this Article is not in conflict with Article 27.[287] Rather, this Article requires the Court not to proceed with the request, but rather to seek the consent of the third state first.[288]

4.1.10 The Failure To Comply with A Request

As noted above,[289] Part Nine, which contains international cooperation and judicial assistance provisions, is the most crucial factor for the success of the Court in achieving its goals. Theoretically, a Court's request is binding upon the state party addressed. Consequently, under the treaty relationship between the Court and its member states, "the obligations under the provisions of Part Nine are primary treaty law and any obligation to comply with a request constitutes secondary treaty law."[290] Moreover, it is important to note that any noncompliance with the provisions of the Rome Treaty, theoretically, constitutes a breach of an international obligation by a state.

As a matter of fact, however, the language of Part Nine has proven to be somewhat fragile and virtually powerless in compelling states to cooperate with the

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[285] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 189.
[286] Kimberly Prost and Angelika Schlunck, "Article 98", *in Commentary on the Rome Statute, supra* note 218, at 1131.
[287] As discussed earlier in Chapter II, Article 27 of the Rome Statute states that the provisions of the Statute would apply on all persons regardless the capacity, or immunity that persons might have.
[288] Kimberly Prost and Angelika Schlunck, "Article 98", *in Commentary on the Rome Statute, supra* note 218, at 1133.
[289] *See* p.42.
[290] Claus Kreβ and Kimberly Prost, "Preliminary Remarks", *in Commentary on the Rome Statute, supra* note 218, at 1065.

Court. The Rules of Procedure and Evidence drafted by the PrepCom. In the summer of 2000 have not brought about any change. Rather, those rules asserts again the language of the Rome Statute that states-even states parties- are under no definite obligation to cooperate with the ICC.

Notwithstanding the fact that Article 86 provides that states parties are required to cooperate fully with the Court, Articles 87 through 101 does not provide the power to enforce such cooperation. Article 89(1) provides that states parties, in cases of request for arrest and surrender of a person, must cooperate with the Court in accordance with their national laws. An issue arises if the national law does not contain any provision regulating such requests. Arguably, in such situations the terms of the Statute mandate that states parties should ensure that such proceedings are available in their national laws.[291] In reality, this seems to be illogical, since the failure to cooperate with the Court would only result in a finding by the Court that the state is not complying with the request, followed by a report to the Assembly of States parties or, where the Security Council referred the situation to the Court, to the Security Council.[292] As noted earlier, such referral to the Assembly of States Parties, would not be accompanied by any suggested sanctions, while the referral to the Security Council would be, theoretically, more effective in case the Security Council imposes any sanctions on the state that is not complying with the request. Therefore, in light of the absence of any enforcing powers or serious penalties for the failure to comply with Court requests, states that are not willing to cooperate with the Court will suffer no repercussions for failing to cooperate.

Article 91(2)(c) provides that the requirements for the arrest and surrender request should be less burdensome than those applicable to other requests for extradition found in treaties or other international arrangements the requested state might have with other

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[291] *See* Rome Statute, *supra* note 6, at part 9, Article 88.

states. It also requires that the request for arrest and surrender should meet the requirements for the surrender process in the requested state. This language will likely open the door for various delays and noncompliance with requests. Moreover, "it will make it difficult for the Court by impeding it from developing a standard surrender request."[293]

Article 89(4) is considered to be another escape for states parties from their duties and obligations. Under this Article, if the person requested is serving a sentence in the requested state for a crime other than that for which surrender is requested, the state is under no obligation to surrender the person to the Court until the completion of the sentence imposed by the requested state. In other words, the Statute gives states party the final say in situations involving surrender of persons who are already serving other sentences imposed by the state receiving the request for a crime other than for which the individual is requested.

In regard to competing requests, the drafting of the Rome Statute allows the requested state in several circumstances not to comply with requests from the Court. For example, where the competing requests address the same conduct that constitutes the crime for which the court has requested the surrender of the person, Article 90(2) allows the requested states not to surrender the person sought unless a determination is made by the Court that the case is admissible under the Statute. Moreover, it allows the requested state to proceed with the other request from another state party until the Court makes such a determination. With respect to non-state parties, the Rome Statute provides that if the state receiving the request is under an international obligation with the non-state party making a request, it need not to comply with the competing request from the Court.

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[292] *See* Rome Statute, *supra* note 6, at part 9, Article 87(7).
[293] Leila Nadya Sadat and S. Richard Carden, The New International Criminal Court, *supra* note 148, 445.

Rather, in determining whether to surrender the person to the Court or the non-state party, it needs only to consider all the relevant facts and circumstances.[294]

In cases where competing requests address different conduct for which the Court is requesting the surrender of a person, the state receiving such a request, if under an international obligation with the requesting state, is under no obligation to surrender the person to the Court. Rather, the state party, taking into account all relevant criteria, can at its discretion determine whether to surrender the person to the Court or to the state.[295] Once again, in light of the absence of any serious enforcement mechanism, this language would allow states parties not to comply with requests from the Court basing their decisions upon other factors, including political considerations.

In addition, neither the Rome Statute nor the Rules of Procedure and Evidence grant the Court any subpoena power. As Professor Sadat observed, "Neither the judges nor the Prosecutor of the ICC (or defense counsel, presumably) appear to have any power to compel witnesses to appear."[296] Further, it is important to note that it is the state party and *not state officials* individually that are under the obligation to cooperate, and that Article 86 does not extend the obligation to cooperate to individuals acting in their private capacity. Therefore, the Court lacks the power directly to compel any person, state, or organization to produce evidence needed for an on-going investigation or prosecution.

Finally, both the Rome Statute and the Rules of Procedure and Evidence are silent as to what is considered to be related to the national security of a state. Under Article 93(4), states parties may deny a request for assistance if the state believes that complying with the request would be against its national security. Thus, the requested state has the

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[294] *Id,* at 446., *see also* Rome Statute, *supra* note 6, at part 9, Article 90(6).
[295] *See* Rome Statute, *supra* note 6, at part 9, Article 90(7).
[296] Leila Nadya Sadat and S. Richard Carden, The New International Criminal Court, *supra* note138, 447.

final say as to determining whether the request relates to national security. Consequently, for the purpose of preventing unwilling states parties from using this language to escape from their duty to comply with the request, a clear definition of the national security exception should have accompanied the article or at least have been mentioned within the Rules of Procedure and Evidence.

A conclusion here would be that the ICTFY, as an ad hoc tribunal created by the Security Council, has a better cooperation enforcement mechanism. According to the Security Council resolution 827 adopting the Statute of the ICTFY, "all states must take any measures necessary under their domestic law to implement the provisions of the Statute, including the obligation of states to comply with all requests of assistance or orders."[297] In other words, creating the ICTFY under the authority of Chapter VII of the U.N. Charter creates binding obligations upon all member states of the international community.[298] Further, failure to comply would subject a state directly to penalties or measures from the Security Council. The ICC lacks the power to compel its own states members to comply with any request for cooperation.

4.1.11 Transit of a Person

Article 89 deals with the situation where a person is being transported to the Court through the territory of a third state. The language used in that provision is framed in mandatory terms, requiring every state party to authorize the transit.[299] Further, Article 89(3)(e) is to be read in conjunction with Article 88, which requires sates parties to ensure the existence of national procedures under their national laws allowing the transit of a person through their territories.[300]

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[297] *See* S.C. Res. 827, U.N. SCOR, 48TH Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).
[298] *See* M. C. Bassiouni, International Extradition, *supra* note 152, at 364.
[299] Claus Kreß and Kimberly Prost, "Preliminary Remarks", *in Commentary on the Rome Statute, supra* note 218, at 1076.
[300] *Id.*

As to the formalities of the request, Article 89(3)(e) mirrors Article 87 in requiring the designation of a channel for conduct of communications, a language to be used, and confidentiality of the request. Where the surrender of a person is based upon a request for temporary transfer under Article 93(7), the Registrar is responsible for ensuring the proper conduct of the transfer, in accordance with the arrangements made with the national authorities of the state involved.[301] In all cases, after the fulfillment of the proceedings before the Court, the Registrar must arrange for the return of the individual to the requested state.[302]

When a request for arrest and surrender or provisional arrest is granted, the state receiving such request must immediately communicate to the Registrar the first available date of surrender.[303] If the surrender does not take place on the specified date, the state and the Registrar must then arrange for another date to complete the proceedings.[304]

In cases where an unscheduled necessary landing occurs within the territory of another state party, Article 89(3)(d) reflects the same procedures contained in Article 15(1) of the U.N. Model Treaty on Extradition.[305] This Article provides that that state may, at its discretion, require a formal transit request, and may detain the person being transported for a period of no more than 96 hours pending receiving the transit request. If the request is not been made within this period, the person must be released.[306] However, the Rules of Procedure and Evidence provide that, the release of the person who is being transported does not prevent a subsequent arrest when a request is later received and

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[301] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 192(1)(2).
[302] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 192(4).
[303] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 184(1).
[304] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 184(3).
[305] *See* Claus Kreß and Kimberly Prost, "Article 89", *in Commentary on the Rome Statute, supra* note 218, at 1077; *see* also Model Treaty on Extradition and Mutual Assistance on Criminal Matters, *supra* note 219, at Article 15(1).
[306] *See* Rome Statute, *supra* note 6, at part 9, Article 89(3)(e).

given legal effect.[307] In the interest of practicality, the drafters of the Rome Statute used the term "*may*" to indicate that the request for transit may not be necessary if that state choose to allow the transit to the Court without any formal requests.

4.1.12 Execution of Requests

In general, the Rome Statute recognizes that the execution of requests must be conducted in accordance with the national laws of the state receiving the request. Thus, the existence of such laws that would allow the assistance is crucial to executing the Court orders.[308] In some circumstances, the Court may need to execute the request in a certain form that would require the presence of its personnel. Thus, the Prosecutor may conduct on-site investigations only if no compulsory measures are necessary.[309] Such compulsory measure, including search and seizure or exhumation of grave sites, must be conducted by or with the assistance of the requested state's officials, and in the presence of the Prosecutor if he wishes to be present.

4.1.13 Rule of Specialty

The rule of specialty bars the requesting state, which secures the surrender of a person, from prosecuting the individual for an offense other than the offense for which he or she was surrendered by the requested state, unless the requesting state obtains the consent of the requested state.[310] This rule is broadly recognized in international law and practice, and consistent with traditional extradition practice.[311] Moreover, it has become a rule of customary international law. In recognition of the importance of that rule, the Rome Statute provides that the Court should request a waiver of the required consent and,

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[307] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 182(2).
[308] *See* Rome Statute, *supra* note 6, at part 9, Articles 88 and 99(1).
[309] Kimberly Prost and Angelika Schlunck, "Article 98", *in Commentary on the Rome Statute, supra* note 218, at 1138.
[310] M. C. Bassiouni, International Extradition, *supra* note 152, at 429-430.
[311] The Rule of Specialty has been recognized in most, if not all, the extradition treaties, and it is a standing position in the UN Model Treaty on Extradition and Mutual Assistance.

if necessary, the Court must provide additional information in accordance with the requirements listed in Article 91.[312]

Here, it is important to note that the rule of specialty, in practice, is linked to the notion of "*states' sovereignty*" as the state making the request cannot exercise its jurisdiction over the person sought were it not for the cooperation granted by the requested state, implying a restriction of this state's sovereignty.[313] In the meantime, it is also important to remember that this rule only applies to conduct committed prior to the surrender; that is to say is that the above-mentioned requirements are not necessary in case where the conduct is committed after the surrender took place.

4.2 Cooperation from Non-Party States

Article 34 of the Vienna Convention on the Law of Treaties,[314] states that states not-parties to the Rome Statute are under no legal obligation to cooperate with the Court.[315] However, in recognition of the importance of cooperation among all states, the Rome Statute provides that the ICC may invite any state that is not a party to the Statute to cooperate with the Court.[316] Thus when the Court is conducting an investigation or prosecution under the provisions of the Rome Statute, it may seek the assistance and cooperation from states that are non-party to the Statute. Such assistance and cooperation is voluntary, and may include all forms of cooperation that could be requested from states parties to the Statute, such as obtaining testimony, gathering evidence, executing arrest and surrender requests, and enforcing court orders imposing fines, forfeiture, or reparation. It is important to note that the use of the term *include* indicates that the Court

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[312] *See* Rome Statute, *supra* note 6, at part 9, Article 101(2)
[313] *Id.*
[314] *See* the Vienna Convention, *supra* note 223, Article 35 reads as follows: "An obligation arises for a third State from a provision of a treaty if the Parties to the treaty intended the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing."
[315] *See* Jeffrey S. Morton, The International Law Commission, *supra* note 16, at 73.
[316] *See* Rome Statute, *supra* note 6, at part 9, Article 87(5)(a).

can seek any form of cooperation from non-states parties as long as it is acceptable under the national law of the requested non-state party.

In case where a non-state party agrees to cooperate, it enters into an ad hoc agreement with the Court.[317] The formal requirements of the agreement mirror the requirements supplied for the same request submitted to states parties; it must include the channel of communication to be used and the language that the non-state party wishes to use in its communications with the Court. Where a state does not choose a language for the communication, all requests and supporting documents must either be in, or be accompanied by a translation into one of the working languages of the Court.[318] After entering into such an agreement with the Court, non-party states are expected to cooperate fully with the Court as to all forms of cooperation stipulated in the agreement.

A failure to comply with the request will be referred to the Assembly of States Parties or, where the Security Council referred the situation to the Court, to the Security Council.[319] In cases where the Security Council referred the matter, the Council could adopt sanctions against the responsible state in accordance with its power under Chapter VII of the U.N. Charter.[320] However, if a state party has referred the matter to the Court, or the prosecutor has initiated the investigation on his own motion, the Court can *only* inform the Assembly of States Parties.[321] Some would argue here that the Assembly of States Parties should, on behalf of the Court, invoke the international responsibility of the state by demanding its cooperation and by condemning its internationally wrongful behavior.[322]

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[317] *Id.*
[318] *See* Rules of Procedure and Evidence, *supra* note 12, at Chapter 11, Rule 179.
[319] *See* M. C. Bassiouni, The Permanent International Criminal Court, *supra* note 215, at 36.
[320] *See* Claus Kreβ and Kimberly Prost, "Preliminary Remarks", *in Commentary on the Rome Statute, supra* note 218, at 1063
[321] *Id.*
[322] *Id.*

Here, it should be noted that even if the failure to cooperate with the Court would contributes internationally wrongful behavior against the non-state party, the language of Article 87(5) does not indicate that either states parties to the Statute or the Assembly of States Parties can compel the non-state party to cooperate with Court or even impose any sanctions for the noncompliance with the provisions of the ad hoc agreement between the Court and that non-state party. Rather, it indicates that noncompliance with the provisions of the ad hoc agreement would be referred to the Assembly of States Parties or the Security Council.

4.3 Cooperation with Intergovernmental Organizations

In general, intergovernmental organizations are under no obligation to cooperate with the Court. However, under Article 87(6), the Court may seek cooperation from any intergovernmental organization. Such cooperation includes the providing of any information or documents or any other form agreed upon.[323] In such cases, the Registrar, when necessary, must ascertain the designated channel of communication that should be used when communicating between the Court and the intergovernmental organization and obtain all relevant information relating thereto.[324]

4.4 Cooperation Requested from the Court

The Rome Statute provides that the Court may, upon submission of a request to the Registrar,[325]cooperate with and provide assistance to national investigations or prosecutions of conduct that constitutes a crime falling within the jurisdiction of the Court.[326] Such cooperation includes, *inter alia*, transmission of any evidence obtained during an investigation or trial conducted by the Court, and the questioning of persons

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[323] *See* Rome Statute, *supra* note 6, at part 9, Article 87 (6).
[324] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 177(2).
[325] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 194(2).
[326] *See* Rome Statute, *supra* note 6, at part 9, Article 93(10)(a).

detained by the Court.[327] It is important to note that the use of the term "*include*" indicates that cooperation from the Court should not be limited to any form listed in the Part Nine, rather, it could include any acceptable form of assistance that the Court might agree upon. However, the language of Article 93(10) also indicates that the Court is under no obligation to cooperate with such requests under any circumstances.

In situations where the above-mentioned evidence was obtained with the help of a state or a witness, the Prosecutor or the Chamber must obtain a written consent from the relevant state or witness before proceeding with the request.[328] In the meantime, the Court may, upon request from a non-state party, assist or cooperate with an investigation or trial involving conduct that constitutes one of the crimes listed in Article 5 or which constitutes a serious crime under the national law of the state making the request.[329]

It is also important to note that Article 93 (10) applies only to cooperation requested from states parties or non-states parties because international organizations, in principle, do not have the capacity to conduct criminal investigations.

4.5 Costs of Cooperation

In general, states must bear the ordinary costs of executing requests for cooperation.[330] However, the Court bears the costs associated with the travel and security of witnesses, experts, and the Court's personnel, as well as all costs of translation, interpretation, expert opinions, transportation of surrendered persons, and any other extraordinary costs.[331]

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[327] *See* Rome Statute, *supra* note 6, at part 9, Article 93(10)(b)(i).
[328] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 11, Rule 194(4).
[329] *See* Rome Statute, *supra* note 6, at part 9, Article 93(10) (c).
[330] *See* Rome Statute, *supra* note 6, at part 9, Article 100 (1).
[331] *See* Rome Statute, *supra* note 6, at part 9, Article 100(a)(b)(c)(d)(e)(f).

4.6 Confidentiality

For the purpose of protecting evidence and any potential witnesses from harm, Article 87(3) provides that the requested state must keep the request and the supporting documents confidential. The language of this provision indicates that it applies only in cases where a state, including a non-state party, is receiving a request from the Court for cooperation or assistance. Such obligation is not absolute, but in cases where the disclosure of the request is necessary to execute it, the requested state may do so to the extent necessary for execution of the request.[332]

Furthermore, the requested state, upon a request from the Court, should apply the necessary protective measures for handling the information contained in the request to ensure the safety and physical or psychological well-being of any victim or potential witness and their families.[333]

4.7 Implementation

In light of the imperfection of the cooperation provisions contained in Part Nine of the Rome Statute, it is clear that the success of the Court is in the hands of the states. If the Court does not have a strong enforcing mechanism that will ensure the compliance of states parties with assistance requests, its other attributes and powers are of little importance. Despite the overwhelming vote adopting the Rome Statute, it will be a powerless instrument if it does not receive adequate international cooperation and judicial assistance, especially from states parties. Thus, states parties will have the burden of proving how willing they are to cooperate with the Court in the implementation of the cooperation provisions in their present form.

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[332] *See* Claus Kreβ and Kimberly Prost, "Preliminary Remarks", *in Commentary on the Rome Statue, supra* note 218, at 1059

[333] *See* Rome Statute, *supra* note 6, at part 9, Article 87 (4).

Consequently, in another compromise achieved to resolve this critical issue, the Rome Conference adopted Article 88, which provides that states parties must ensure the availability of national procedures to allow the state to comply with all forms of cooperation with the Court.[334] As a matter of fact, Article 88 should be read together with Articles 89 and 93, which states that the obligation to comply with the request of the Court should be carried out in accordance with the provisions of Part Nine and under the procedures of the national law.[335] Accordingly, Article 88 was drafted to ensure that no state party would refuse to comply with the request on grounds of absence of procedures under the national law. Rather, states parties must review their national laws and procedures to ensure the existence of national procedures that would allow all forms of cooperation.

For purposes of preventing any conflict with the provisions of existing legislation, states parties must enact implementing national legislation and procedures adopting the Rome Statute as a whole. That legislation will enable states parties to cooperate fully with the Court according to the obligation imposed upon all states parties by Article 86. The new legislation should specifically state that it has priority over any existing legislation, including modifications of any contradicting provisions that could prevent the Court from carrying out its international obligations, and should take into account any forms of cooperation that might not be permissible under the national laws of states parties, such as allowing the Prosecutor or any of the Court's personnel to travel to the state party to participate in executing the cooperation requests within the territory of the state,[336] or executing the requests themselves without the presence of any officials from the requested state party. In the interest of practicality, the new legislation should also

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[334] Kimberly Prost, "Article 88", *in Commentary on the Rome Statue, supra* note 218, at 1069.
[335] *Id,* at 1070;*See also* Rome Statute, *supra* note 6, at part 9, Articles 89(1) and 93(1).
[336] *See* Rome Statute, *supra* note 6, at part 9, Article 99(4).

include the specific procedures that should be followed when a request for cooperation is filed.

Once the ICC enters into force, state parties should inform the Registrar's office of special requirements they might have, if any, with respect to assistance requests. In doing so, states parties would then be able expeditiously to execute requests without any delay due to consultations required by the Statute between the Court and the state for the purpose of amending the request so that it complies with the state's requirements for such requests.[337] In extreme circumstances, some states parties, will have to modify their constitutions and national codes to allow for provisions of the Statute that are unconstitutional under the state's existing laws, such as the provisions regulating extraditing nationals, which is, in most countries, currently prohibited under any circumstances.

Where a state party lacks witness or victim protection programs, it must adopt new measures creating such programs that would allow the state part to the Statute to comply with a request to protect witnesses or victims.[338] Further, states parties must have modern mechanisms in place capable of complying with requests concerning tracing or freezing proceeds, assets, or instruments of crimes.

In adopting practical procedures to enhance cooperation with the ICC for the purpose of expediting proceedings, every state party should set up an office within its embassy in the Netherlands and charge that office with working along with the Registrar's office. A legal diplomat who has experience in International Criminal Law and International Law Relations should head that office. Such offices should have continuous contact with the office of the Registrar. In addition, in order to ensure that the

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[337] *See* Rome Statute, *supra* note 6, at part 9, Articles 93(7) and 97.
[338] Kimberly Prost and Angelica Schlunck, "Article 93", *in Commentary on the Rome Statute, supra* note 218, at 1109.

Court's orders will be dealt with in a manner that will ensure quick response within a reasonable period of time, every state should set up a local office within its Ministry of Justice charged with receiving requests and court orders. This office should include members from all executive agencies, including representatives from the Justice, State, Defense, and National Security Departments. Moreover, this office should have a concrete relationship with its counterpart in the embassy in the Netherlands to ensure continuous consultations between the two offices.

CHAPTER 5

RECOGNITION AND ENFORCEMENT OF THE ICC's JUDGMENTS

Due to the fact that the ICC has no police force or special prison for enforcing sentences imposed by the Court, it will once again be forced to depend on states parties to enforce prison sentences imposed, and all similar Court orders, such as orders of forfeiture issued by any of its chambers. Unquestionably, states parties are bound to accept judgments and sentences imposed by the Court the same as sentences imposed by their national courts. That obligation is derived from their mere acceptance of the Court's criminal jurisdiction as having the primacy given the principle of complementarity.[339] Consequently, the language used in Part Ten of the Rome Statute is somewhat more mandatory than that used for Part Nine concerning international cooperation and judicial assistance. There is no margin for any state party to omit the enforcement or even amend the sentence imposed by the Court under any circumstances. However, in recognizing the constitutional right of states to scrutinize the Court's sentences to determine the constitutionality of such procedures under their national laws, the Rome Statute provides that, upon designation, states parties willing to accept convicted persons within their territory will advise the Registrar of any such bars. [340]

5.1 Enforcement of Sentences of Imprisonment

In general, all sentences of imprisonment imposed by the Court could be served in any of the states parties that are willing to accept sentenced persons in their territories.[341] As noted by Professor Strijards, only willing states parties could be sought to act as

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[339] Gerhard A.M. Strijards, "Article 103", *in Commentary on the Rome Statute, supra* note 218, at 1160.
[340] *Id,* at 1161-1162.
[341] *See* Rome Statute, *supra* note 6, at part 9, Article 103(1)(a).

custodians on behalf of the Court.[342] The Registrar is charged with keeping a record of such states along with any attached conditions that any of the states might have regarding accepting ICC prisoners.[343] Such system of conditions was adopted to avoid placing willing state in a position contradictory with typical authority of head of a state of the administering state, such as the right of pardon, abolition, or amnesty.[344] However, conditions may be withdrawn at any time upon written notification from the state to the Registrar.[345]

5.1.1 Designating the State of Enforcement

The Presidency[346] is the authority charged by the Court with the implementation of enforcement proceedings.[347] In exercising its discretion to make designation of a state to enforce the sentence of imprisonment, Article 103(3)(a) provides that the Presidency must employ the principle of equitable distribution, taking into account that all states parties should share the responsibility for enforcing such sentences. The criteria for such designation should recognize several factors, including the wealth of the state party, the penitentiary capacity of the state, and the geographical location of the state. Recognizing these factors would ensure that the designated state party is capable of bearing the ordinary costs of the enforcement in its prison facility without any difficulties.[348] Moreover, the Presidency should consider the views of the convicted person by giving him or her a written notice addressing the designation of a state of enforcement.[349] It is important here to note that using the term the "*views*" of the sentenced person indicates

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[342] Gerhard A.M. Strijards, "Article 103", *in Commentary on the Rome Statute, supra* note 218, at 1165.
[343] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 200(1).
[344] Gerhard A.M. Strijards, "Article 103", *in Commentary on the Rome Statute, supra* note 218, at 1168.
[345] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 200(3)(4).
[346] Under Article 38 of the Rome Statute, the President along with the First and Second Vice-Presidents constitute the Presidency. They must be elected by an absolute majority of the judges, and they serve for a term of three years or until the end of their respective term of office as judges, whichever expires earlier, however, they might be re-elected once.
[347] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 199.
[348] Gerhard A.M. Strijards, "Article 103", *in Commentary on the Rome Statute, supra* note 218, at 1167.

that there is no need to have the consent of that person, rather his or her view and nationality would be factors to be considered.

Upon designating a state to enforce sentence, the Court must communicate its decision to the state along with all information on the person sentenced and copies of the judgment and the sentence imposed, including the length and date of commencement, and any information on the medical status of the person.[350] The state must inform the Court as soon as possible whether it accepts the Court's designation.[351] If any conditions are set regarding enforcement of the sentence, the state has to notify the Court immediately.[352] In return, the Court must decide within 45 days whether it agrees with these conditions.[353] If not, the Court must use the power vested upon it by Article 104(1) to transfer the convicted person to another state at any time.[354]

If the state agrees to the designation, the Registrar should ensure proper conduct for the person sentenced to be delivered to the designated state as soon as possible.[355] During the transfer, if any unscheduled landing occurs in the territory of the transit state, the same rules governing the unscheduled landing of the surrendered person apply here as well.[356]

In cases where no state party agrees to the designation, Article 103(4) provides that the host state "The Netherlands" should act as residual custodian on behalf of the Court.[357] In such instance, the sentence of the Court must be served in a prison facility made available by the host state.

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[349] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 203(1).
[350] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 204.
[351] *See* Rome Statute, *supra* note 6, at part 9, Article 103(1)(c).
[352] *See* Rome Statute, *supra* note 6, at part 9, Article 103(2)(a).
[353] *Id.*
[354] *See* Rome Statute, *supra* note 6, at part 9, Articles 103(2)(b) and 104 (1), *see* also Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rules 205, 209, and 210.
[355] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 206.
[356] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 207.
[357] Gerhard A.M. Strijards, "Article 103", *in Commentary on the Rome Statute, supra* note 218, at 1170.

In any event, the Court has the right to transfer the convicted person for the designated state if it deems it necessary to enforce the sentence in another state. The language used in Article 104 indicates that the Court can decide to transfer the convicted person at any time to another state. Further, using the term "*another state*" indicates that that state does not have to be a state party to the Statute. In sharp contrast with that, in addressing the conditions that states might have, Article 105 uses the term "*a state*" as another indication that the state of enforcement does not have to be a state party. Rather, the Presidency could designate a non-state party to carry out the sentence imposed by the Court.[358] In such case, the Court should enter into a special agreement with the non-state party.[359] To ensure the same position that the Court enjoys when a state party is enforcing a sentence, the agreement should mirror the provisions contained in Articles 103 through 107 of the Rome Statute.

By comparison, Article 104(2) allows the sentenced person to apply to the Court to be transferred to another state to serve any remaining period of the sentence. Here, it is also important to note that using the term "*at any time*" means that the convicted person can apply for transfer repeatedly without any limitations.

During the enforcement of the sentence, the conditions of imprisonment are governed by the state of enforcement.[360] However, the Court has the right of full supervision over the enforcement,[361] consistent with widely accepted, international treaty standards governing treatment of prisoners. Moreover, the Court possesses the sole authority to review any appeals or applications to modify the sentence.[362] Therefore, the sentence of imprisonment is binding on the designated state, either party or non-party to

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[358] *Id,* at Article 104, 1171.
[359] *Id.*
[360] *See* Rome Statute, *supra* note 6, at part 9, Articles 106(2).
[361] *See* Rome Statute, *supra* note 6, at part 9, Articles 106(1).
[362] *See* Rome Statute, *supra* note 6, at part 9, Articles 105

the Statute, which is in no case allowed to modify it or impede the making of an application to the Court by a convicted person.[363] In other words, the Court alone enjoys the authority to decide any application for appeal or revision. Consistent with that, Article 106(1) states that the Court has the primacy in the supervision on the enforcement of the sentence and that it is the only authority, which may make any important changes or decisions regarding the execution of the sentence.[364]

Upon completion of the sentence, if the person is not a national of the state of enforcement, the state of nationality will be obliged to receive the person in accordance with the fundamental right to return to one's own country.[365] However, where the return of the person to the state of nationality would subject the person to any other measures, the state of enforcement may authorize him or her to stay on its territory.[366] Alternatively, the state may transfer the individual to any other state that agrees to receive the individual, taking into account the wishes of that person.[367] Once again, it should be noted that the use of the term "*taking into account the wishes*" indicates that such wishes are not binding upon any state. Rather, it means that the wish will prevail only if the willing state agrees to receive the person.[368]

Moreover, the state of enforcement, upon a request from a third state, in accordance with its national law, and after hearing the views of the convicted person, may decide to extradite or surrender the person to that third state for the purpose of a trial or the enforcement of a sentence provided that the conduct which is the subject of the trial or sentence was committed prior to that person's delivery to the state of

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[363] Roger S. Clark, "Article 105", *in Commentary on the Rome Statute, supra* note 218, at 1177.
[364] *Id,* at 1178.
[365] *Id,* at Article 107, 1182.
[366] *See* Rome Statute, *supra* note 6, at part 9, Articles 107(1).
[367] *Id.*
[368] Roger S. Clark, "Article 107", *in Commentary on the Rome Statute, supra* note 218, at 1182.

enforcement.[369] However, if the person remains voluntarily for more than 30 days after having served the sentence imposed by the Court or returns to the territory of the state of enforcement after having left it, that person could be extradited or surrendered to the state requesting their presence without having to meet any of the above-mentioned requirements.[370]

5.1.2 The Costs of Enforcement

On one hand, the state of enforcement will bear all the ordinary costs arising from the enforcement of a sentence in its territory.[371] On the other hand, other costs, such as those associated with the transfer of the sentenced person to enforce the sentence or after the completion of the sentence, must be born by the Court.[372]

5.2 Enforcement of the ICC's Orders

Under the treaty relationship between the states parties and the Court established by the Rome treaty, all states members are under obligation to give effect to Court's orders, including those imposing fines or forfeitures. The enforcement of such orders is to be in accordance with the national law of the enforcing state and without any prejudice to the rights of bona fide third parties.[373] Request for enforcement should include all the information necessary to identify the person against whom the order is issued and the proceeds, assets, or property that have been ordered by the Court to be forfeited along with the location of these items.[374]

As Schabas noted, besides imposing a general obligation on states parties to give full effect to its orders, the Statute provides an alternative way of enforcing forfeitures

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[369] *See* Rome Statute, *supra* note 6, at part 9, Articles 108(1)(2).
[370] *See* Rome Statute, *supra* note 6, at part 9, Articles 108(3).
[371] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 208(1).
[372] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 208(2), *see* also Rome Statute, *supra* note 6, at part 9, Articles 107(2).
[373] *See* Rome Statute, *supra* note 6, at part 9, Articles 109(1), *see also See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 217.

and indicates the destination of all proceeds resulting from the enforcement of fines and forfeitures.[375] Thus, where a state is unable to enforce a court order specifically, it must take measures to recover the value of the proceeds, property, or assets ordered by the Court to be forfeited, and transfer it to the Court.[376] Furthermore, the national authorities are not, under any circumstances, to modify Court orders imposing fines.[377]

States parties are also required to facilitate the enforcement of Court orders for reparation. Such orders are required to include all the information necessary to identify the person whom against the order is issued, the nature of the reparation order, and the identity of the victims with whom individual reparations are to be deposited if the reparation is of a financial nature.[378] Finally, the national authorities of no state may, in any case, modify the reparations specified by the Court.

Here, it should be noted that using the phrase "*in accordance with the procedure of their national law*" does not mean that states are free to decide whether the Court order is consistent with their national law. Rather, states should enact national legislation allowing execution of Court orders expeditiously.[379]

5.3 Reduction of a Sentence

In recognition of the primacy of the Court during the phase of enforcement, Article 110, once again confirms that the decision concerning the commutation of sentence is with the Court.[380] That is to say, the state of enforcement has no power to decide any reduction, or authorize the release of a person before the expiration of the

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[374] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 218(1)(2).
[375] William A. Schabas, "Article 109", *in Commentary on the Rome Statute, supra* note 218, at 1191.
[376] *See* Rome Statute, *supra* note 6, at part 9, Articles 109(2)(3).
[377] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 220.
[378] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 218(3).
[379] *See* William A. Schabas, "Article 109", *in Commentary on the Rome Statute, supra* note 218, at 1194.
[380] *See* Gerhard A.M. Strijards, "Article 110", *in Commentary on the Rome Statute, supra* note 218, at 1197.

sentence imposed by the Court.[381] Rather, the Appeals Chamber is to appoint three of its judges to conduct review and decide upon the request after hearing from the person, the prosecutor, the state of enforcement, and the victims or their representatives. [382]

In deciding to reduce the sentence, the three judge panel must make sure that the person has already served no less than two thirds of the sentence, or twenty-five years if the sentence is life imprisonment.[383] Moreover, the three judges, in making their decision, must take into account the existence of certain factors including, *inter alia,* the person's willingness to cooperate with the Court, the voluntary assistance of the person in enabling the enforcement of the judgment and orders of the court in other cases by providing assistance to it in locating assets or evidence,[384] the physical status of the person, his or her conduct while in detention, and any positive actions the person has undertaken for the benefit of victims.[385] The three judges are then required to communicate their decision and the reasons for it to all the parties involved in the process as soon as possible.[386] Such a review may be conducted every three years, unless the three judges decide a shorter period or allow the person to apply for a review within the three-year period.[387]

5.4 Escape

Under Article 111 of the Rome Statute, if a convicted person escapes from the custody of the state of enforcement and manages to flee its territory, the state should inform the Registrar as soon as possible through any medium capable of delivering a written document.[388] After consulting with the Court, the state of enforcement may request that person's extradition from the state where he or she is ultimately located if

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[381] *See* Rome Statute, *supra* note 6, at part 9, Articles 110(1).
[382] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 224(1).
[383] *See* Rome Statute, *supra* note 6, at part 9, Articles 110(3), *see also* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 223
[384] *See* Rome Statute, *supra* note 6, at part 9, Articles 110(4).
[385] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 223.
[386] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 224(2).

bilateral or multilateral arrangements are in effect.[389] Otherwise, the Court, acting under Part Nine, must request the surrender of that person.[390] If the state in which the person is located agrees to the surrender, the state of enforcement should notify the Registrar in writing of such agreements, and conduct the transfer as soon as possible.[391]

In such instance, the Presidency, acting on its own motion or upon a request from the Prosecutor or the initial state of enforcement may designate another state to enforce the remaining period of the sentence.[392] It is worth mentioning here, that in transferring that person from the state in which he or she is located, all the provisions discussed earlier on the transfer of persons applies here including that the Court must bear the costs if no state assumes responsibility for them.[393]

5.5 Implementation

States parties must enact appropriate legislative provisions to fulfill their treaty obligations when enforcing sentences imposed by the Court. These provisions should regulate how state would act upon designation by the Court, and the methods that should be followed in enforcing such sentences.

Given the fact that the personnel of the Court, in most cases, are not allowed to implement the Court's orders in the territories of the states parties unilaterally, the national authorities of each state must cooperate fully with the Court to carry out such orders. That is to say, states need to enact national implementing legislation to facilitate cooperation between their national institutions and the personnel of the Court. Such

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[387] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 224(3).
[388] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 225(1)
[389] *See* Rome Statute, *supra* note 6, at part 9, Articles 111.
[390] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 225(3).
[391] *See* Rules of Procedure and Evidence, *supra* note *12*, at Chapter 12, Rule 225(2).
[392] *Id.*
[393] *Id.*

legislation would help to implement the orders expeditiously and in a manner that would make the Court a success.

In the interest of practicality, the Court should enter into special agreements with every willing state, in which the latter expresses its conditions to its acceptance. In doing so, the Court, prior to the designation, would take into account what conditions, if any, every state party might have to execute a sentence or order imposed by the Court. That agreement should also include a detailed technique for the enforcement of sentences and orders so that they would be enforced expeditiously.

Neither the Rome Statute nor the Rules of Procedure and Evidence have made it clear that noncompliance with the Court's orders could result in serious consequences for a state. Rather, the ICC is required to make a finding that a state is not complying with an order, and then refers that finding to the Assembly of States parties, or, where the Security Council referred the situation to the Court, to the Security Council. Therefore, implementation of the framework established by the Rome Statute may be a problematic issue once the Court enters into existence.

The cooperation between the Court and its states parties should have been based on more stronger provisions that could compel states parties to cooperate with the Court, and allow the Court to impose penalties for noncompliance. However, taking into account the support and impetus that led to the adoption of the Rome Treaty creating the Court, the international community will likely keep supporting the Court and assist it achieving its goals.

CHAPTER 6

CONCLUSION

The ICC will come into existence once the statute is ratified by sixty states.[394] As of the writing of this paper, 139 nations have signed the Rome Treaty and 29 states have ratified the Statute.[395]

It is fair to say that the adoption of the Rome treaty was a historic achievement for the international community as a whole, and especially for those who participated in four years of intense and complex negotiations. It is also fair to say that such hard negotiations resulted in a very valuable and balanced statute that, despite its imperfections will be always remembered as the first comprehensive statute for the first international criminal tribunal capable of investigating and prosecuting the most heinous crimes of international concern. The ICC without doubt represents a precious dream come true before the end of the most violent century in the history of humanity. In the long run, the practical success of the ICC will be judged by its ability to bring justice and make a difference in the real world.

As discussed above, the Rome Statute, as the first comprehensive instrument containing the four core crimes listed in Article 5, out of necessity contains many compromises. However, it is rightly considered to effectuate a delicate balance between divergent political and national interests. Moreover, it represents an important step forward in ending serious international conflicts, putting an end to impunity, and holding individuals accountable at the international level for crimes committed where national

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[394] *See* < http://www.un.org/icc/statute.htm > [last visited May 4, 2001].

[395] For status of ratification, *see* Appendix , *see also* <http://www.un.org/icc/ratification/218sg.htm> (last visited May 4, 2001).

judicial systems fail to do so. Indeed, "Adopting the Rome Statute proved that the world community is not willing to tolerate the horrors and massacres that chill the conscience of every individual nor will it tolerate impunity for the perpetrators of such crimes to go unpunished enjoying impunity any more."[396]

It may of course be argued that the ICC will not move forward beyond the enactment of the Rome Treaty.[397] It might also be argued that the ICC, if it enters into force, will not be able to do justice and it will, in effect, be a paralyzed institution. But in the meantime, it is very difficult to believe that the world community, which fought for this court for more than a century, now will waste this chance to put an end to all conflicts and impunity and deter war criminals and warlords from the commission of any future atrocities.

Accordingly, despite all the aggressive opposition and criticism faced by the ICC, especially from the United States,[398] it is doubtless that the success achieved in Rome is the result of a strong international will to create the first permanent international criminal tribunal capable of achieving global criminal justice.[399]

The answer to such a question is not hard to predict any longer. The international consensus on the need for global criminal justice has taken over the strong opposition that faced by the ICC. Indeed, the situation has changed dramatically since the United States,[400] and a host of other countries, including Algeria,[401] the Bahamas,[402] Egypt,[403]

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[396] Giovanni Conso, President of the Diplomatic Conference in Rome, Jun15-July18, 1998, speech before the opening session, 15 Jun 1998 <http://www.un.org/icc/speeches/718sg.htm> (last visited May 4, 2001).

[397] *See* Malvina Halbersta, Panel Discussion: Association of American Law Schools Panel on the International Criminal Court: From The Hague to Rome: The International Criminal Court in Historical Context, 36 Am. Crim. L. Rev. 246 (1999).

[398] In July 1998, in an Anti-ICC Hearing, Senator Rod Gram addressed the subcommittee on International Operations of the Committee on Foreign Relations stating that the U.S must aggressively oppose this court all the way, and that the U.S must insure that this treaty is never ratified by 60 states, otherwise the U.S should have a firm policy of total non-cooperation in anyway with the Court.

[399] *See* M. C. Bassiouni, "The Permanent International Criminal Court", *supra* note 114, at 35.

[400] The United States was the last country to sign the Rome Statute on 31 December 2000.

[401] Algeria signed the Rome Statute on 28 December 2000.

the Islamic Republic of Iran,[404] and Israel[405] decided at the last minute to join the international acceptance of the Court and become parties to the Statute.

In light of the international consensus in favor of the ICC, the differences between the ICC and its predecessors are obvious. The ICC will be the first international criminal tribunal capable of achieving global justice for all human beings. As discussed above, the ICC will help break the cycle of violence, put an end to impunity, and deter warlords from committing any further atrocities.[406] The ICC will also be the first independent tribunal with jurisdiction over the most heinous crimes of international concern. Its independence is based upon the fact that the ICC, as discussed earlier, is not a creation of the Security Council or managed by the General Assembly. Rather, it is a treaty-based institution created by the overwhelming desire of the international community to stop all violations of human rights.

Institutionally speaking, the Assembly of States Parties will consist of all the states members to the Rome Statute. That is to say, that all the major decisions, such as electing the judges and the Prosecutor, the budget of the Court, and making any amendments to the Statute will be made by all member states away from any negative pressure or political maneuvers. The election of the President and the Prosecutor by the judges will similarly guarantee that their selection is based only upon excellent qualifications and experience and not the nationality of the candidates. Furthermore, the formation of the Presidency ensures that that office will exercise its duties in a very efficient, neutral, and fair manner under the supervision of the Assembly of States parties.

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[402] The Bahamas signed the Rome Statute on 29 December 2000
[403] Egypt signed the Rome Statute on 26 December 2000
[404] The Islamic Republic of Iran signed the Rome Statute on 31 December 2000
[405] Israel signed the Rome Statute on 31 December 2000
[406] *See* Paragraph 1.4, at 15-19.

The creation of several Chambers within the Court stands as another victory for justice.[407] The existence of these Chambers helps ensure that justice will be served and that the guarantee of a fair trial will be afforded to all parties in any case before any of the Court's Chambers. Moreover, the Pre-Trial Chamber will perform a very important role within the Court functioning as a supervisory judicial body over the office of the Prosecutor to ensure that the powers of that office will not be abused. Specifically, it will be responsible for reviewing initial decisions to investigate a case, authorizing the Prosecutor to investigate a case, allowing the Prosecutor to conduct an investigation on the territory of a state party, and conducting the preliminary hearings concerning the admissibility of a case.

Notwithstanding the above-mentioned imperfections of the Rome Statute, it is fair to be very optimistic about how the ICC will operate once it enters into force. The will of the international community in support of the Court is strong enough to overcome any difficulties that might face it. Moreover, the tragedies and atrocities occurring even as of the writing of this study are severe enough to emphasize the deep need for an international criminal tribunal capable of stopping such violence and punishing its perpetrators.

As Professor Bassiouni observed in his speech at the Rome Ceremony on July 18, 1998, following the adoption of the Rome Statute, "[T]he World will not be the same after the establishment of the International Criminal Court."[408] The ICC will promote the role of international humanitarian law by acting as a safeguard against all various violations against human beings. Moreover, it will be a mechanism to deter the commission of future horrors and atrocities. In terms of institutional efficiency, the -

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[407] According to Article 39 of the Rome Statute, the ICC will have a Pre-Trial Chamber, a Trial Chamber, and an Appeal Chamber.

[408] *See* M. C. Bassiouni, Negotiating the Treaty of Rome, *supra* note 55, at 468.

international consensus on the establishment of the Court, and the structure of the Rome Statute indicates that the ICC will do better at achieving justice than the earlier ad hoc tribunals created by the Security Council, simply because it will be operating independently to address the most serious violations of human rights.

The Rome Statute will play a critical role in international law and relations. It gathers the core crimes against human beings in one instrument along with their definitions and elements. Moreover, it codifies and criminalizes a host of other crimes that were never punished nor prosecuted before by any international instrument.

The jurisdiction of the Court will also be a critical issue between states and the Court in respect to the practical implementation under the principle of complementarity. It will be seen that complementarity, despite the aggressive opposition it faced in Rome, will act as a safeguard against any state which might be unwilling or unable to carry out its duties and international obligations.

We have now, at the beginning of a new century, a golden chance to bring justice to all human beings after the terrifying last century, during which the world witnessed more than 250 tragic, cruel, and violent conflicts without holding most of the perpetrators accountable for what they did.

It is necessary to mention that success will not be reached automatically. Rather, a group of factors must converge to support the Court in its early stages. The will of the world community is the most important factor to insure the success of the ICC. No matter how perfect the Rome Statute is, it will not bring justice if the world community does not gather around the Court to ensure that it will be established expeditiously and surrounded by as much universal support as possible.

Such support from the international community must also continue after the creation of the Court by assisting the Prosecutor and the Chambers of the Court in doing

their duties. Furthermore, it should be noted that linking the jurisdiction of the Court to the inability or unwillingness of a state requires all states parties to review the adequacy of their existing national judicial institutions to ensure their capability to practice their own jurisdiction over the crimes that fall under the jurisdiction of the Court in accordance with the Rome Statute and principles of justice.

States have a very important role in giving full effect to the crimes and their definitions listed in Articles 5 through 8 by investigating them and punishing their perpetrators. Such policy would certainly have a great deterrent effect on all potential war criminals and warlords. In addition, as mentioned earlier, the absence of an international enforcement mechanism creates an obligation upon states to enact national implementing legislation to enable them to cooperate fully with the ICC and ensure the enforcement of its orders and judgments. Similarly, if the ICC is already exercising its jurisdiction over a case under Articles 1 and 17 of the Statute, national institutions should be ready to cooperate fully with the ICC. Such cooperation is needed throughout the process of investigation, including, but not limited to, the gathering and transfer of evidence, the arrest and surrender of persons, and the enforcement of the Court's sentences and orders.

Ultimately, it will also be important for states parties to support the Court and its activities financially, so it will be able to keep operating independently, away from any pressures or problems due to financial difficulties.[409] The financial contribution of each state could be decided on the same basis used to decide the shares paid by every state for the U.N., that are, the size, population of the state, and the wealth of a state. Finally, to ensure the ability of the ICC to decide cases fairly, the Court must chose the most highly

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[409] *See* Leila Sadat Wexler, Panel Discussion: *supra* note 134, at 244.

qualified Judges and Prosecutor to implement the duties of the ICC in bringing global justice to the international community.[410]

[410] *See* Bartram S. Brown, The Statute of the ICC: Past, Present, and Future, *supra* note 125, at 71.

APPENDIX

RATIFICATION STATUS OF THE ROME STATUTE

AS OF MAY 4, 2001[411]

The Rome Statute of the International Criminal Court is not yet in force. It will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession. Presently 139 nations have signed the Statute and 30 have ratified it.

State Participant	Signature	Ratification, Accession
Albania	18 Jul 1998	
Algeria	28 Dec 2000	
Andorra	18 Jul 1998	29 Apr 2001
Antigua and Barbuda	23 Oct 1998	
Argentina	8 Jan 1999	8 Feb 2001
Armenia	1 Oct 1999	
Australia	9 Dec 1998	
Austria	7 Oct 1998	28 Dec 2000
Bahamas	29 Dec 2000	
Bahrain	11 Dec 2000	
Bangladesh	16 Sep 1999	
Barbedos	8 Sep 2000	
Belgium	10 Sep 1998	28 Jun 2000

Belize	5 Apr 2000	5 Apr 2000
Benin	24 Sep 1999	
Bolivia	17 Jul 1998	
Bosnia and Herzegovina	17 Jul 2000	
Botswana	8 Sep 2000	8 Sep 2000
Brazil	7 Feb 2000	
Bulgaria	11 Feb 1999	
Burkina Faso	30 Nov 1998	
Burundi	13 Jan 1999	
Cambodia	23 Oct 2000	
Cameron	17 Jul 1998	
Canada	18 Dec 1998	7 Jul 2000
Cape Verde	28 Dec 2000	
Central African Republic	7 Dec 1999	
Chad	20 Oct 1999	
Chile	11 Sep 1998	
Colombia	10 Dec 1998	
Comoros	22 Sep 2000	
Congo	17 Jul 1998	
Costa Rica	7 Oct 1998	
Côte d'Ivoire	30 Nov 1998	
Croatia	12 Oct 1998	
Cyprus	15 Oct 1998	
Czech Republic	13 Apr 1999	

[411] The information on the present status of ratification was obtained from <http//

Democratic Republic of the Congo	8 Sep 2000	
Denmark	25 Sep 1998	
Djibouti	7 Oct 1998	
Dominica		12 Feb 2001(a)
Dominican Republic	8 Sep 2000	
Ecuador	7 Oct 1998	
Egypt	26 Dec 2000	
Eritrea	7 Oct 1998	
Estonia	27 Dec 1999	
Fiji	29 Nov 1999	29 Nov 1999
Finland	7 Oct 1998	29 Dec 2000
France	18 Jul 1998	9 Jun 2000
Gabon	22 Dec 1998	20 Sep 2000
Gambia	4 Dec 1998	
Georgia	18 Jul 1998	
Germany	10 Dec 1998	11 Dec 2000
Ghana	18 Jul 2000	20 Dec 1999
Greece	18 Jul 1998	
Guinea	7 Sep 2000	
Guinea-Bissau	12 Sep 2000	
Guyana	28 Dec 2000	
Haiti	26 Feb 1999	
Honduras	7 Oct 1998	
Hungary	15 Jan 1999	

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www.un.org/icc/ratification > [last visited on May 4, 2001]

Iceland	26 Aug 1998	25 May 2000
Iran (Islamic Republic of)	31 Dec 2000	
Ireland	7 Oct 1998	
Israel	31 Dec 2000	
Italy	18 July 1998	26 July 1999
Jamaica	8 Sep 2000	
Jordan	7 Oct 1998	
Kenya	11 Aug 1999	
Kuwait	8 Sept 2000	
Kyrgyzstan	8 Dec 1998	
Latvia	22 Apr 1999	
Lesotho	30 Nov 1998	6 Sep 2000
Liberia	17 Jul 1998	
Liechtenstein	18 Jul 1998	
Lithuania	10 Dec 1998	
Luxemburg	13 Oct 1998	8 Sep 2000
Madagascar	18 July 1998	
Malawi	2 Mar 1999	
Mali	17 Jul 1998	16 Aug 2000
Malta	17 July 1998	
Marmust Islands	6 Sep 2000	7 Dec 2000
Mauritius	11 Nov 1998	
Mexico	7 Sep 2000	
Monaco	18 Jul 1998	
Mongolia	29 Dec 2000	

Morocco	8 Sep 2000	
Mozambique	28 Dec 2000	
Namibia	27 Oct 1998	
Nauru	13 Dec 2000	
Netherlands	18 Jul 1998	
New Zealand	7 Oct 1998	7 Sep 2000
Niger	17 Jul 1998	
Nigeria	1 Jun 2000	
Norway	28 Aug 1998	16 Feb 2000
Oman	20 Dec 2000	
Panama	18 Jul 1998	
Paraguay	7 Oct 1998	
Peru	7 Dec 2000	
Philippines	28 Dec 2000	
Poland	9 Apr 1999	
Portugal	7 Oct 1998	
Republic of Korea	8 Mar 2000	
Romania	7 Jul 1999	
Russian Federation	13 Sep 2000	
Saint Lucia	27 Aug 1999	
Samoa	17 July 1998	
San Marino	18 Jul 1998	13 May 1999
Sao Tome and Principe	28 Dec 2000	
Senegal	18 Jul 1998	2 Feb 1999
Seychelles	28 Dec 2000	

Sierra Leone	17 Oct 1998	15 Sep 2000
Slovakia	23 Dec 1998	
Solomon Islands	3 Dec 1998	
South Africa	18 Jul 1998	27 Dec 2000
Spain	18 Jul 1998	24 Oct 2000
Sudan	8 Sep 2000	
Sweden	7 Oct 1998	
Switzerland	18 Jul 1998	
Syrian Arab Republic	29 Nov 2000	
Tajikistan	30 Nov 1998	5 May 2000
Thailand	2 Oct 2000	
The former Yugoslav Republic of Macedonia	7 Oct 1998	
Trinidad and Tobago	23 May 1999	6 Apr 1999
Uganda	17 Mar 1999	
Ukraine	20 Jan 2000	
United Arab Emirates	27 Nov 2000	
United Kingdom	30 Nov 1998	
United Republic of Tanzania	29 Dec 2000	
United States of America	31 Dec 2000	
Uruguay	19 Dec 2000	
Uzbekistan	29 Dec 2000	
Venezuela	14 Oct 1998	7 Jun 2000
Yemen	28 Dec 2000	
Yugoslavia	19 Dec 2000	

Zambia	17 Jul 1998
Zimbabwe	17 Jul 1998

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3. The Rome Statute of the International Criminal Court, July 17, 1998, U.N.Doc. No. A/Conf. 183/9, 37 I.L. M. 999.
4. Restatement Third of the Foreign Relations Law of the United States §§ 404, 423 (1987).
5. Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, entered into force 26 June 1987.
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