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## THE ICC AND THE PEACE VS. JUSTICE DILEMMA

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### INTRODUCTION

On 17 July 1998 in Rome (Italy), the Statute of the International Criminal Court (ICC) was adopted to establish the first permanent treaty based international criminal judicial organ, whose purpose is to promote international peace and security by ensuring that the gravest international crimes do not go unpunished.

The preamble of the ICC Statute announces that states were: “mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of

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humanity” and they “recognize that such grave crimes *threaten the peace, security and well-being of the world*”.

The preamble goes on stating that by establishing a permanent Court, States are committed to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured” in order “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>(1)</sup>

The Statute sets out the Court's jurisdiction, structure and functions. On July 1, 2002 the ICC Statute entered into force, after 60 instruments of ratification were deposited with the UN Secretary-General. Presently the Statute has been ratified by 105 States of the world.<sup>(2)</sup> The Court has started its work and is now dealing with four self-referral situations: Uganda<sup>(3)</sup>, Congo<sup>(4)</sup>, Central African Republic<sup>(5)</sup>, and Cote d'Ivoire.<sup>(6)</sup> In addition, the United Nations Security Council (UN SC) has also referred the situation in Darfur, Sudan (a non State party) to the ICC.<sup>(7)</sup>

Despite major progress in the implementation of the Statute, it is symptomatic to note the absence of nine out of the ten most populous States of the world. Only Brazil has joined the ICC, but countries like China, India, the US, Indonesia and Russia, are still out of the Court. Three of these States (China, Russia and the US) also happen to be Permanent Members of the UN SC. All this adds to ongoing concerns and discussions about the legitimacy of the ICC.

The Statute remains one of the major landmark instruments of modern international law. As many of its provisions can justly be considered as too far away from an ordinary exercise of progressive development of international law, it cannot surprise the many divergent opinions existing both among scholars<sup>(8)</sup> and States<sup>(9)</sup> about the legality of the text adopted or the true interpretation to be given to its provisions in order to reconcile it with existing international law.

Time and time again, scholars will be asked to review the purposes and

mandate of the ICC against the applicable principles of international law. The Statute itself offers in Article 19 (challenges to the jurisdiction of the court), Article 21 (applicable law) and Article 119 (settlement of disputes), some of the legal tools at the hands of States for the interpretation of the Statute.

Among the issues that merit detailed examination this author will address the legality of the ICC by reviewing two interrelated issues: I. The ICC as a novel mechanism to promote international peace and security outside the UN Charter framework; and II. The ICC as a novel derivative subject of international law with ceded jurisdiction. This research shows that the interpretation of the ICC Statute reflects the multidisciplinary character of international relations.

At the end of the research, the author concludes that the apparent contradictions between the ICC Statute and general international law could be remedied if the ICC Statute were viewed as a treaty based on a concept of *presumed consent* of States of the world to be bound by its provisions.

## **I. THE ICC AS A NOVEL MECHANISM TO PROMOTE INTERNATIONAL PEACE AND SECURITY OUTSIDE THE UN CHARTER FRAMEWORK**

During the past century, and specially its second half, our understanding of the legal and institutional foundations of the world order, including the role of international organizations and individuals as subjects of international law has changed dramatically.

The collapse of the bipolar world and the end of the Cold War has brought about new challenges. It is generally agreed that many of the events that have occurred in a recent past, like the egregious violations of human rights in Iraq<sup>(10)</sup>, Haiti<sup>(11)</sup>, Somalia<sup>(12)</sup>, Yugoslavia<sup>(13)</sup>, Rwanda<sup>(14)</sup>, and the mounting of terrorism<sup>(15)</sup>, all that have seriously threatened international peace and security, have occurred in part due to the vacuum of power and

political pressure created by the collapse of the bipolar world.<sup>(16)</sup>

These challenges require a revitalization of international law, in order to cope with the problems and changing demands of contemporary world. One such problem concerns the legal foundations and structure of the universal system of maintenance of international peace and security which is being *redefined* by new developments in the field of prosecution and punishment for the crimes of aggression and genocide, serious war crimes and crimes against humanity which “threaten the peace, security and well-being of the world”.<sup>(17)</sup>

In particular, with the establishment of the ICC and its relationship model with the UN SC on matters directly related to the maintenance of international peace and security, it is not clear whether the ICC is *complimentary or concurrent* with the UN universal system centered on the powers of the UN SC and its primary responsibility for the maintenance of international peace and security. Clearly if the ICC is *concurrent* with the UN SC then, the question arises whether it was properly established by way of a multilateral treaty without amending the UN Charter, i.e. outside the UN Charter framework.<sup>(18)</sup>

The existing system of maintenance of international peace and security, arguably, allows for players other than the UN SC to have a role.<sup>(19)</sup> Generally speaking, under the UN Charter, measures that *are more appropriate* for action by regional or other universal entities should be taken *as a rule* by such other entities, however, nothing shall prevent the UN SC from taking action if it deems necessary to do so. Moreover, when the UN SC is seized of a situation, other such organs of the system are not encouraged to deal with the same situation, in anyway, they should not do so in a manner which could be inconsistent with or jeopardize the work being done by the UN SC.

Under Articles 10 and 11 of the UN Charter, the UN General Assembly may discuss any question relating to peace and security and make recommendations to member States and to the UN SC. The International

Court of Justice (ICJ) by fulfilling its mandate of principal judicial organ of the UN can and does contribute to maintaining international peace and security. Under Article 33 of the UN Charter member States are required to seek a solution to their disputes “the continuance of which is likely to endanger the maintenance of international peace and security” by resorting to judicial settlement, regional agencies or arrangements or “other peaceful means of their own choice”. Moreover, pursuant to Article 95 nothing in the Charter prevents member states “from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future”.

Further Article 52 of the UN Charter also provides that nothing in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” Finally, under Article 51 UN member States may resort to measures of individual or collective self-defense. Collective measures of self-defense, arguably, can include mechanisms established for the prosecution of serious war crimes committed during wars of aggression.

Accordingly, consistent with the purposes and principles of the United Nations, States of the world were entitled to establish either universal or regional permanent judicial organs deemed more appropriate in order to punish perpetrators of egregious violations of human rights as a measure contributing to international peace and security.

This is lawful provided that the primary responsibility of the UN SC is recognized. In other words, despite efforts by other organs, the UN SC itself should be able at any time to take measures, or recommend other appropriate mechanisms to deal with a particular situation. For example, under Article 12 of the UN Charter if the UN SC is exercising, in respect of any situation endangering peace and security, the functions assigned to it, the General

Assembly would not be allowed to make any recommendation with regard to that situation. Upon ceasing to deal with that situation, the UN SC would so notify the General Assembly and Member States. We should note there are no time limits imposed on this notification obligation.

Likewise, under Articles 34 and 36, the UN SC is entitled to deal with any situation in order “to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security” and at any stage (irrespective of any measures already taken by member States or international organizations of those states) may make recommendations to them on the appropriate procedures and ways of returning peace and security to a certain country or region.

Further, under Article 53 Member States can have recourse to regional organizations to deal with situations endangering peace, however, such organizations cannot take enforcement measures without being authorized to do so by the UN SC. And measures of collective self-defense taken under Article 51 should not “in any way affect the authority and responsibility of the Security Council under the present Charter to take *at any time* such action as it deems necessary in order to maintain or restore international peace and security.”

Finally, one of the essential features of the central role of the UNSC in the system of maintenance of international peace and security is that decisions taken under Chapter VII bind all Members and non Member States of the United Nations<sup>(20)</sup> whereas decisions of regional and other entities bind only State Parties to those organs and entities.

Arguably, prosecution and punishment of serious egregious acts, is a function which is more appropriate for a judicial organ. However, the UN SC may find that doing justice would otherwise jeopardize efforts to achieve peace through other means, such as truth and reconciliation commission or amnesties. Hence judgmental functions in such peace versus justice situations may be more appropriate for an organ with broad political powers such as the UN SC rather than an organ with narrow judicial functions like

the international criminal court.

If the new specialized judicial organ established with the aim of contributing to international peace and security respects the primary role of the UN SC in the global system, it is a welcome and lawful *complimentary* mechanism that fits within the existing UN system. But, the situation changes if it is given powers to override or jeopardize the primary competence of the UN SC to deal with situations endangering international peace and security, and is factually viewed as an organ *concurrent* with the UN SC, in which case, it would be in conflict with the UN system. Under Article 103 of the UN Charter, the United Nations system would take precedence.<sup>(21)</sup>

This could mean that the ICC Statute, in what it denies or purports to limit the UN SC exercise of its primary responsibility, might become itself a threat to peace and security requiring the UN SC and member States to take action. In such case, the ICC Statute, the Court and its activities could be considered *ultra vires* and States of the world could be entitled to oppose it by any means available to them. This has been a very delicate issue raising conflicting interpretations both by ICC supporters and non supporters.

With this overview of the existing global system of maintenance of international peace and security and how it works, we can embark on researching how the ICC subsystem fits in it.

## **1. THE COMMISSION OF CRIMES OF AGGRESSION, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY AS A THREAT OR BREACH OF INTERNATIONAL PEACE AND SECURITY**

On various occasions the UN SC has identified particularly egregious crimes committed against the civilian population as a threat or breach of international peace and security, and has called for their punishment. In the aftermath of the events on the territory of the former Yugoslavia, the UN SC acting under Chapter VII, determined that the magnitude of the human tragedy there, involving serious war crimes, genocide and crimes against

humanity constituted a threat to international peace and security and decided to establish an international criminal tribunal. The punishment of the perpetrators of such atrocities was viewed as a measure to promote international peace and security.<sup>(22)</sup> A similar finding was made in relation to the events in Rwanda and a tribunal was also established to punish the perpetrators of atrocities committed there.<sup>(23)</sup>

The Draft Code of crimes against peace and security of mankind prepared by the UN International Law Commission (ILC) provides for a set of acts of serious gravity and of concern to the international community as a whole, that include acts of aggression, war crimes, genocide and crimes against humanity, to which individual criminal responsibility attaches.<sup>(24)</sup>

The ICC itself was established as a permanent judicial organ with jurisdiction to prosecute acts of aggression, genocide, crimes against humanity and war crimes, which “threaten the peace, security and well-being of the world.”<sup>(25)</sup>

In all these instances, the international community easily found the sound interrelationship between human rights and peace and security, and determined that massive violations of human rights seriously endanger peace and security for which appropriate measures should be taken, including through prosecution and punishment. Commentators have correctly argued that since, under the UN Charter, promotion of universal respect for and observance of human rights and fundamental freedoms is necessary for peaceful and friendly relations among nations<sup>(26)</sup>, “allowing massive human rights abuses to go unremedied leads to further violations, and serves to undermine the stability of the world order.”<sup>(27)</sup>

However, the key issue remains to identify “who determines the characterization of a particular offense and on what bases.”<sup>(28)</sup>

## **2. THE ROLE OF KEY PLAYERS IN THE PROSECUTION AND PUNISHMENT OF SERIOUS INTERNATIONAL CRIMES AS CONTRIBUTING FACTORS TO PROMOTE INTERNATIONAL PEACE AND SECURITY**

With the establishment of the ICC it can be said that there are now two key players together with the UN SC with special responsibilities to promote and restore international peace and security in situations of egregious human rights violations amounting to international crimes. However, the delimitation of their respective roles remains unclear.

### **A) THE UN SC AND THE EXPERIENCE OF THE TWO AD HOC TRIBUNALS AND OTHER INTERNATIONALIZED TRIBUNALS**

In the aftermath of massive violations of human rights in the former Yugoslavia and in Rwanda, the UN SC established two tribunals. Both were established by binding UN SC resolutions under Chapter VII of the UN Charter.<sup>(29)</sup> In addressing the objectives pursued with the option of establishing the ICTY, the French representative in the UN SC expressed the view that these aims were twofold: on one side prosecuting the guilty was necessary for punishment and deterrence purposes, (i.e. to do justice to the victims and to the international community, and to send a clear message to those who continued to commit these crimes, that they would be held responsible for their acts), but on the other side it was also first of all for the UN SC a matter of fulfilling its duty to maintain and restore peace.<sup>(30)</sup>

The ICTY Appeals Chamber in *Tadić* has confirmed that the establishment of the ICTY was a proper exercise of the UN Security Council's authority, and that “the Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security.”<sup>(31)</sup> The Appeals Chamber also stated that whether it was the appropriate thing to do, was for the Security Council, “which enjoys wide discretionary powers in this regard,” to decide.<sup>(32)</sup>

Some of the principal characteristics of these *ad hoc* tribunals include primacy over national jurisdictions, and the fact that (as enforcement measure under Chapter VII), all States had binding obligations to cooperate with them.<sup>(33)</sup> While these characteristics have proved effective in dealing with the situations in the former Yugoslavia and Rwanda representing extreme real threats to international peace and security, most countries of the world and scholars were not so convinced about the wisdom of having a *permanent* Court centered on UN SC powers too. On the basis of this unwillingness were not only objective limitations<sup>(34)</sup> of judicial organs created as an exercise of the functions of the UNSC, but most importantly, policy considerations such as the selectivity of UN SC decisions and narrowness of the UN SC objectives.

#### **I) SELECTIVITY AND NARROWNESS OF UN SC POWERS AS HANDICAPS TO A ROLE IN UNIVERSAL CRIMINAL JUSTICE**

Essentially the *selectivity* involved in UN SC decisions (in determining what a threat to peace was and what was not) was viewed as contrary to a sound model of justice which ought to be *impartial*. States argued a new permanent court should have the essential features and objectives of an ordinary national criminal court first, and maintaining international peace and security as a corollary to those objectives. Only this, it was argued, could lead to impartiality in the discharge of justice. For these reasons, during the Rome Conference many countries were opposed to any role of the UN SC in the new Court. Libya, for example, justified its opposition to the UN SC with the fact that “the Security Council and its decisions were influenced by the interests and positions of certain permanent members, so that its resolutions were selective and followed a double standard.”<sup>(35)</sup>

Pakistan argued that “the SC was primarily a political body, and its decisions were based on political considerations rather than legal principles.”<sup>(36)</sup>

Lebanon was also of the view that the UN SC should have no role in it

“as the Court should not have to wait until the SC took a decision on the question of a military threat, act of aggression or breach of peace.”<sup>(37)</sup>

Commentators have also criticized the *selectiveness* involved in tribunals centered on UN SC powers. For example, Theodor Meron was concerned about “the selectivity involved in a system where the establishment of a tribunal for a given conflict situation depends on whether consensus to apply Chapter VII of the UN Charter can be obtained. What is needed is a uniform and definite corpus of international humanitarian law that can be applied apolitically to internal atrocities everywhere, and that recognizes the role of all states in the vindication of such law.”<sup>(38)</sup>

Timothy McCormack agreed that “while there is no suggestion here that the alleged atrocities committed in the former Yugoslavia and Rwanda should not be prosecuted, the argument remains that the lack of commitment to enable international prosecution of alleged atrocities in other conflicts (and in the case of Burundi and Zaire, the same conflict as that which engulfed Rwanda) is inconsistent and selective.”<sup>(39)</sup>

Likewise, James Crawford wrote that: “It is certainly arguable that the Security Council's Chapter VII powers extend to the creation of criminal tribunals where necessary as part of an approach to resolving a conflict. But the creation of such tribunals by executive resolution in the exercise of emergency powers is less than satisfactory. The principle of legality is of particular significance in criminal cases. It connotes that criminal courts be established on a secure constitutional base; that the law to be applied be sufficiently defined in advance; that court personnel, the judges especially, have security of tenure, and that they be independent of executive interference in the performance of their judicial functions.”<sup>(40)</sup>

Other commentators were concerned about *the narrowness* of the objective of maintaining peace (i.e. it was argued that the new court should not wait until peace is considered endangered before it takes action), which is the basis of UN SC actions, as opposed to the interest of just doing international justice and enforcing relevant international norms punishing

such acts.

For example, one commentator has opined that “the UN Security Council resolutions creating the ad hoc Tribunals for Yugoslavia and Rwanda indicate that the *one* place for criminal courts in the UN system is in support of the UN Security Council's function of preserving and maintaining international peace and security. We should recognize that this is the objective and not expect that it will be best filled by creating international tribunals identical with domestic criminal courts.”<sup>(41)</sup>

## II) ATTEMPTS AT RECONCILING JUSTICE WITH PEACE IN A UNIVERSAL JUDICIAL SYSTEM CREATED OUTSIDE THE UN CHARTER FRAMEWORK

A purely *legalistic* model of international justice was not, though, pursued in Rome<sup>(42)</sup> as States realized that in an international set there was a potential real risk of conflict between a) the *mere objective of pursuing justice* and punishing perpetrators and b) the broader objective of *ensuring peace and security which has more of political than judicial elements* and therefore is more appropriate for UN SC actions.

Cognizant of these problems, but fearing abuses by the UN SC, the States at the Rome Conference nonetheless rejected a UN SC central role in the new permanent system<sup>(43)</sup>, by entrusting an independent Prosecutor with powers of a political nature, arguably, *contra* balancing against the UN SC. Such is for example the power that the Prosecutor would have, at least in theory, *proprio motu* to initiate or not proceedings if found pursuing them against the interests of justice, even if requested by the UN SC.<sup>(44)</sup>

It still remains to be seen, however, whether the model adopted in Rome centered on powers of an independent Prosecutor with wide political discretion is better than having the UN SC doing the same thing, apart the constitutionality problems that it raises. Henry Kissinger for example has suggested that the ICC model adopted in Rome “with no moral or political checks as part of its structure is a flawed one which can only potentially

cause the Court to become in the long run either irrelevant or dangerous”.<sup>(45)</sup>

This author without endorsing Kissinger’s views agrees that the establishment of the ICC raises legitimate concerns both in terms of policy and law.

#### **B) THE INTENDED ROLE OF THE ICC AS THE NEW KEY PLAYER IN THE GLOBAL SYSTEM OF MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY THROUGH CRIMINAL PROSECUTION OF EGREGIOUS ATROCITIES**

The ICC was established with competence to adjudicate cases of egregious violations of human rights, in particular when these crimes threaten the peace, security and well being of the world.

While the mention of crimes that “threaten the peace, security and well being of the world”<sup>(46)</sup> could be understood as strictly a reference to the powers of the UN SC to trigger the Court’s jurisdiction under Chapter VII, a closer analysis of the provisions and structure of the Rome Statute indicates that the role assigned to the Court is not a purely legalistic one, as many would have wished.<sup>(47)</sup>

Indeed, as one respected commentator has once recognized, “at the fundamental level, the purpose of creating an International Criminal Court is to contribute to maintaining international peace and security, which obviously could not be done while inhibiting the operation –difficult enough at the best of times – of the Charter organ tasked with establishing that very international peace and security.”<sup>(48)</sup>

States assembled in Rome were in no doubt that the Court was to play an important role in the global system of maintenance of international peace and security. Thus Japan argued that: “the relationship between the Security Council and the Court was a key issue. Since crimes within the Court’s jurisdiction would be the most serious crimes of international concern, and since the Council was the principal organ responsible for maintaining international peace and security, it was right that the latter should have a role

under the Statute.”<sup>(49)</sup>

Likewise, Russia was of the view that “there was no conflict between the “political” role of the Council and the activities of the Court. The Council was intended to have a political impact on States and the Court would be playing *an essential role in the maintenance of peace and security*.”<sup>(50)</sup> It further supported the draft preamble of the ICC Statute referring to the United Nations “because the purposes and the principles of the Charter of the United Nations concerning the maintenance of international peace and security and respect for human rights were directly connected with the activities of the future Court.”<sup>(51)</sup>

At the same time, States had no doubts that it was legally proper to establish the ICC as a new organ with a role in the global system of maintenance of peace and security since, as Ukraine emphasized, the UN Security Council was “not the sole body responsible for the maintenance of international peace and security.”<sup>(52)</sup>

The role of the Court in promoting the maintenance of international peace and security became also reflected in the Relationship Agreement of the Court with the UN in which it is noted the “*important role assigned to the ICC in dealing with the most serious crimes of concern to the international community as a whole*, as referred to in the Rome Statute, and *which threaten the peace, security and the well-being of the world*.”<sup>(53)</sup> The Contents of the relationship Agreement is supported by specific provisions of the ICC Statute, in particular the following:

- i) *The ICC is given jurisdiction in relation to crimes committed by nationals of non- state parties.*<sup>(54)</sup> *There is nothing in the ICC Statute otherwise indicating that this provision would apply only if the UN SC would trigger the Court’s jurisdiction;*
- ii) *Under the ICC Statute the UN SC is allowed to defer proceedings only for one year renewable*<sup>(55)</sup>, *after which the Prosecutor is entitled proprio motu to prosecute a case including if*

*in his view the situation represents a threat to international peace and security. Moreover under the Statute all traditional State-to-State conditions apply, including the rules of complementarity, and the immunity regime under Article 98(1), even when jurisdiction is triggered by the UN SC.<sup>(56)</sup> Additionally, the wide discretion given to the Prosecutor, includes the power not to initiate an investigation or to suspend such if it is in the interests of justice not to do so, arguably, even in situations referred to him by the UN SC (for example in cases of amnesties)<sup>(57)</sup>;*

*iii) Under the ICC Statute a special regime applies for war crimes. The Court is encouraged to assert jurisdiction particularly when the crimes result from widespread or systematic policy<sup>(58)</sup>, and the Prosecutor is required to assess the gravity of the crimes before launching an investigation.<sup>(59)</sup> Further, countries have a right to opt-out of the ICC's jurisdiction in relation to war crimes<sup>(60)</sup> (it is had in mind war crimes short of being considered crimes against humanity or genocide since these would constitute ipso facto a serious threat to peace and security).<sup>(61)</sup> And finally a strong regime of exempting defenses<sup>(62)</sup> against liability in case of petit war crimes is pushed forward that would if applied further effectively restrict the jurisdiction of the court to those war crimes situations amounting again to a serious threat to peace and security<sup>(63)</sup>;*

*iv) Lastly, under the Statute the ICC has also jurisdiction over crimes of aggression.<sup>(64)</sup>*

These provisions clearly justify the ICC's role as a specialized organ with responsibilities in the promotion of international peace and security in the specific area of prosecution and punishment of serious human rights violations.<sup>(65)</sup> This of course does not deny the more general objectives of the Court like punishment, justice and deterrence.<sup>(66)</sup> On the contrary, it is

through these actions that the Court can play its role in promoting peace, security and justice.<sup>(67)</sup> Obviously, playing such a role does not require a preliminary finding of a threat to peace or security by it or any other organ. It would be enough that the Prosecutor found that the specific crimes were grave enough to warrant investigations and prosecutions.<sup>(68)</sup>

That these Rome Statute provisions were intended to confer on the ICC a role in the global system of maintenance of international peace and security is not *per se* an issue. It becomes a problem only where these provisions are potentially conflicting with the UN and general international law. How? We will see it below by critically accessing the “constitutionality” of the four ICC provisions just referred above.

1. *Jurisdiction over nationals of non States parties*- Under the existing system of maintenance of international peace and security, nationals of non-States parties can be constrained to respect decisions of organs to which their respective States are not a party only through decisions taken by the UN SC under Chapter VII.<sup>(69)</sup> For example the UN SC has established the ICTY and the ICTR with compulsory jurisdiction over anyone who committed crimes on the territory of the former Yugoslavia and Rwanda. When the UN SC decided to establish these tribunals, Yugoslavia was not even asked, and Rwanda voted against the decision.<sup>(70)</sup> Yet coercive measures taken by the UN SC under Chapter VII are viewed as perfectly lawful.

The ICC, however, is a consensual organ of States parties created outside the UN Charter.<sup>(71)</sup> As such, it could, in principle, only bind citizens of States parties. But, as we know, the ICC was given powers to adjudicate acts committed by citizens of non States parties too. This clearly reflects ambitions of a mechanism of ensuring peace and security with a status similar to that of the UN SC, i.e. a *concurrent* mechanism not a *complimentary* one. Such a concurrent mechanism could, in principle, be established only by amending the UN Charter or with support of the overwhelming majority of the more than 200 States of the world.

2. *Potential ability of the Prosecutor to dilute UN SC powers*. The ICC

Statute is based on two fundamental pillars: the principle of complementarity (Article 17) and the active leading role of an independent Prosecutor, for example, under Articles 16 and 53 of the ICC Statute. The principle of complementarity, for example, in the way in which it is being interpreted by the Prosecutor would allow him to dilute the UN SC powers under Chapter VII, by requiring that UN SC referrals be also subject to the checks and balances of the Court's system, such as unwillingness, immunities, etc.<sup>(72)</sup>

In addition the Prosecutor has, under Article 53 of the ICC Statute, a real chance of deciding, contrary to the UN SC, that prosecution is not the best way of ensuring peace, by allowing, for example, consideration of amnesties. Suppose a situation like in Sierra Leone where the UN SC came to the conclusion that perpetrators of egregious violations of human rights should stand trial and that the amnesty that was declared in an earlier peace agreement was irrelevant.<sup>(73)</sup> An independent Prosecutor using his discretionary powers could, at least in theory, conclude under the ICC model that the declared amnesties should prevail, and that there was no place for prosecutions.<sup>(74)</sup>

Further, using the powers assigned to him under Article 16 of the ICC Statute, the Prosecutor could, at least in theory, conclude at any time after one year (renewable) that the UN SC ongoing review of a situation is no longer justified, irrespective of what the UN SC thinks, and proceed with investigations once suspended by the UN SC under Chapter VII.

3. *The opt-out mechanism.* The opt-out mechanism provided under Articles 121, 123 and 124 for war crimes and other crimes as far as it gives way to interpretations that can legitimize impunity for violations of international law considered as grave breaches, is also far beyond what even the UN SC could afford itself to do. Therefore, it is also *prima facie* contrary to the UN Charter and international legality generally.<sup>(75)</sup>

4. *The UN SC and the crime of aggression.* The disputed role of the UN SC in situations involving crimes of aggression was one of the reasons behind the delayed consideration of the inclusion of this crime within the

jurisdiction of the Court.<sup>(76)</sup> Some States had pretended that the ICC alone be entitled to deal with this issue.<sup>(77)</sup> However, to dispute the role of the UN SC in these situations would be a clear violation of the letter of the UN Charter regarding Chapter VII prerogatives of the UN SC<sup>(78)</sup>, apart from the purely practical problems involved (as discussed further on in this research).

These are all provisions of the ICC Statute that introduce considerable changes in the UN System.<sup>(79)</sup> Under Articles 2(6), 5, 24, 25 of the UN Charter, decisions of the UN SC under Chapter VII are binding upon all States and entities of the world (irrespective of their affiliation or not to the UN), and are not subject to the checks or challenges by States or any other entities or organizations created by them, unless otherwise decided by the UN SC itself.<sup>(80)</sup>

To state that the ICC Statute requires respect for its provisions even if contrary to the UN Charter is of no avail, since Article 103 of the UN Charter states clearly that UN Charter provisions take precedence. As one commentator noted, because “participation in the United Nations has become almost universal, this 'constitutional' dimension of Article 103 still remains, since it manifests the priority of the Charter over any other commitments which may also be concluded between the Member States. It is especially remarkable that Article 103 applies not only to obligations laid down in the Charter but also to the *decisions* taken in conformity with it by the competent organs.”<sup>(81)</sup>

At the end of this analysis it is sound to question whether a treaty can impose limitations on the ability of a UN Charter organ to fulfill its obligations under the UN Charter.

The quick answer would be that these novel changes that the ICC Statute purported to introduce in the UN system could only be made, in principle, by changing the UN Charter itself, or adopting, at the very least, a treaty with similar universal membership and acceptance. Otherwise, as the UN Charter overrides contrary provisions of other treaties, the ICC model could pose a “constitutional” problem.

### 3. IS THE ICC “CONSTITUTIONAL”?

In other words, the question is whether the ICC, as a novel mechanism, can be properly interpreted as conforming to the principle of legality under the UN Charter and the Vienna Convention on the law of treaties. Secondly, what are the implications of making changes in the global system of maintenance of peace and security outside the UN Charter framework? We will review the question both from pragmatic and legal points of view.

#### A) FROM THE VIEWPOINT OF POLITICAL PRAGMATISM

The political pragmatism behind the establishment of the ICC with seemingly constitutional problems, can be seen through the eyes of John M. Czarnetzky and Ronald J. Rychlak who are convinced that the faith in the ICC has been sparked by “the dream that such an empire, ruled by law and not fallible human judgment, will largely eradicate the problem of impunity in international affairs through deterrence, and that violations of human rights will become an abnormality. Current political institutions have not stopped human rights violations of the worst sort, so the problem must be with those political institutions. The ICC is thus an attempt to transcend political institutions, both at the national and the international level, and enthrone law and its institutions as the governing authority of the world.”<sup>(82)</sup>

In this author’s view the ICC model adopted in Rome although championed as the embodiment of impartiality<sup>(83)</sup> is in practical terms, reflection of a growing resentment by midlevel powers like Germany<sup>(84)</sup>, and Canada<sup>(85)</sup> (eager to play a major role in international relations too) of the ability of the five permanent members of the UN SC (the P5) not only to shield themselves from international scrutiny, but also to use their powers under Chapter VII to impose obligations on other States that heavily encroach upon their sovereignty, i.e. the unique ability that the P5 have to influence international developments in the way they find it necessary.

With the end of the Cold War and the enhanced chances of agreement among the P5, added to the UN SC over expanding definition of threats to

peace and security, the one time remote probability of using the mandatory powers under Chapter VII, has become a palpable reality for countries, and the example of Yugoslavia has only sparked concerns about the “unequal” sovereignty of States.

While it was thought that UN reforms were urgently needed to re-invert the perceived misbalances<sup>(86)</sup>, until the situation changed, substantial safeguards protecting the sovereignty, first of all, of the mighty States were suggested for the new ICC.<sup>(87)</sup> It can with certainty be said that the extent of these protective safeguards sparking from complementarity and ending with the immunity provisions will normally ensure that the ICC will be a tool essentially used for the developing world with collapsed judicial systems<sup>(88)</sup>, and rarely for countries with well developed judicial systems, democracy<sup>(89)</sup> and rule of law traditions, and which can therefore have recourse to proper national proceedings.<sup>(90)</sup>

This objective achieved by empowering an independent Prosecutor with the right of scrutiny of the actions of any member of the international community, on one side, and by significantly curbing the powers of the UN SC, on the other, could raise serious issues of “constitutional” legality as a subtle amendment to the UN Charter.

It is, in particular, difficult to see why ICC supporters are concerned about the negative influence that the political decision-making of the UN SC would have on the ICC<sup>(91)</sup>, but at the same time, believe in the ability of the Prosecutor to make the same prudential judgments correctly.<sup>(92)</sup> It is not surprising, that many countries were both opposed to a role by the UN SC and to an independent Prosecutor.<sup>(93)</sup>

Not being completely an *impartial entity*, as long as *it is essentially directed to deal with situations affecting the developing world*, the model adopted in Rome could pose serious legitimacy problems for this reason too. In particular, from a pragmatic point of view, one may question the appropriateness of such a universal court *in lieu* of similar regional institutions based on subsidiarity principles, similar to the institutional

system of protection of human rights which has both universal and regional components.

This author asserts that the establishment of regional criminal Courts closer to the place of events, victims and witnesses might be a valid alternative and a more effective instance to combat impunity rather than the universal ICC. For example, on the basis of the experience with the Tribunal for Rwanda and the Special Court for Sierra Leone, a regional criminal Court could be created in Africa to deal with situations such as those in the Sudan (Darfur), Chad and Kenya.

Likewise, on the basis of experiences with the Trials in Nuremberg and the Tribunal for the Former Yugoslavia, UN Administered Courts in Kosovo, a regional criminal Court in Europe could be established, and on the basis of regional experiences in Asia, such as the Tokyo Trials, the Special Chambers in Cambodia, the UN administered Criminal Panels in East Timor, a regional criminal Court in Asia could also be established, to deal with situations like Burma and Sri Lanka. In addition a new regional criminal Court should also be established in the Americas to deal with events such as those in Colombia, Peru, Haiti, etc, as well as a criminal Court for the Middle East, on the basis of the Special Tribunal for Lebanon, to deal with issues such as those in Iraq, Lebanon, and the Palestine.

The establishment of such regional Courts could help dissipating apprehensions of absence of impartiality of the universal court. Eventually, the universal and regional courts could be combined in a well elaborated division of labor, wherein only major leadership cases would reach the ICC, whereas incidents involving guerrilla formations could be dealt with regionally.

The existence of an already functioning ICC does not necessarily obviate the need to establish such regional criminal Courts. On the contrary, the problems that the ICC is confronted with today (for example the inability to try Sudanese perpetrators for the ongoing events in Darfur, inability of the court to intervene in crisis situations in other regions such as Latin America

and etc) might serve as the catalyst for the establishment of such other regional Courts in future.

b) From a legal point of view: Is the new system *legal*?

If the new system is being modeled outside the UN Charter framework, is it still legal? Or it is our understanding of what is *legal* which needs a reshape? How to react to these new developments challenging the way we interpret the law? An answer to these questions can be given from three different angles (ICC supporters' position, non ICC supporters' approach, and a neutral position). We will review each of these positions below.

#### **I) POSITION ONE: CHANGE THE WAY WE UNDERSTAND AND INTERPRET THE LAW (ICC SUPPORTERS' APPROACH)**

During the discussions about the role of the UN SC in a permanent Court, starting from the UN International Law Commission (ILC) and ending at the Rome Conference, the essential divide was between those who worried that conferring too little powers to the UN SC could undermine the role of the UN SC (and therefore raise problems of constitutionality) and those who were concerned that conferring too broad powers on the UN SC (given the possibility of abuse of the veto powers), could undermine the judicial independence and integrity of the Court or the sovereign equality of States.

Ultimately the ILC chose to confer on the UN SC broad powers, whereas the Rome Conference decided to limit these powers, in a way that conflicts *prima facie* with the UN Charter.

The 1994 ILC Draft Statute of an International Criminal Court provided for a Court's jurisdiction that depended on State's consent but with the UN SC having priority jurisdiction under Chapter VII. No independent power of action was envisioned for the Prosecutor.<sup>(94)</sup> This is because it was understood that a permanent ICC would essentially deal with situations of egregious violations of human rights endangering international peace and security requiring UN SC action for most of the cases. Even though it was admitted that in certain circumstances a permanent Court would also be

entitled to deal with any situation amounting to international crimes falling under the jurisdiction of the ICC.<sup>(95)</sup>

It was generally felt that situations in which Chapter VII was at issue ought to be signaled to the Court by the UN SC, whereas in other than Chapter VII cases, individual States would have referral rights. In addition, by analogy with the cases of occurrence of armed attacks that entitle States to use force in self-defense under Article 51 of the UN Charter until the UN SC has taken measures, here too it was understood, that States should have referral rights until such time as the UN Security Council decides to take measures.<sup>(96)</sup>

On the role of the UN SC, the ILC was of the view that despite the possibility of abuse of the veto powers, attributing broad powers to the UN SC was consistent with the UN Charter, and therefore essential to “satisfy the conflicting demands of political realism and legal principle”, as noted by James Crawford.<sup>(97)</sup> It was perceived that only a Court established under these terms would not require a substantial change of the UN Charter, no matter which way States would ultimately have chosen to establish the Court (as a UN principal organ (by amending the UN Charter); a UN subsidiary organ by resolution of its organs; or by treaty).<sup>(98)</sup>

In Rome, the UN SC P5 defended the initial ILC draft model as consistent with present day world order centered on the primary responsibility of the UN SC to maintain peace and security in the world. For example the US argued that “in view of the Security Council’s responsibilities under the Charter for restoring and maintaining international peace and security, recognition of its role in the Statute was vital to the proper functioning of the Court, in accordance with the obligations of Member States under the Charter” and that for this reason it had “long supported the proposal in the original international law commission text requiring affirmative action by the Security Council before a complaint concerning a matter under consideration by the Council could be addressed by the Court.”<sup>(99)</sup>

China also defended that “it was essential that the Security Council be empowered to refer cases to the Court since otherwise it might have to establish a succession of *ad hoc* tribunals in order to discharge its mandate under the Charter. The Security Council should also have the power to determine whether acts of aggression had been committed. The operations of the Court should not impede the Council in carrying out its important responsibilities for maintaining peace and security.”<sup>(100)</sup>

France was also of the view that “there must be consistency between the actions of the Court and the actions of the Security Council where there were situations endangering peace. The Statute should provide for the Security Council to be able to ask the Court to defer action in situations coming under Chapter VII of the Charter of the United Nations.”<sup>(101)</sup>

However, despite efforts by the P5 and other States, a Statute with a limited role for the UN SC was adopted on 17 July 1998 providing for an independent Prosecutor with the potential ability to override the UN SC powers under Chapter VII.<sup>(102)</sup>

Some of the UN SC P5 were promptly to denounce the treaty as violating the UN Charter. Russia voted in favor and signed it but is unwilling to ratify the treaty, whereas China and the US voted against the text of the ICC Statute adopted in Rome.

Marc Grossman, then Under Secretary of State for political affairs affirmed in 2002 that “the treaty approved in Rome dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned.”<sup>(103)</sup>

ICC supporters not surprisingly contend that there was nothing abnormal in the establishment of the ICC conferred with such broad powers outside the UN charter framework. Most of the arguments put forward to substantiate their position are political rather than strictly legal. ICC supporters essentially focus on issues of sovereign equality of States that would be violated by the ability that the UN SC P5 alone would have had to use their veto powers to bar any prosecutions against their own citizens, (if

the ILC model prevailed). For example, Nigeria argued that “in setting up the Court, the international community was doubtless mindful of the many problems which had hindered such a move in the past; including the failure of the Security Council *to act fairly and decisively* in matters of global concern.” For these reasons, Nigeria thought that the Security Council “should have no role whatsoever with regard to referral of matters to the Court.”<sup>(104)</sup>

Lesotho stressed that if “an independent and effective Court was to be established, it was essential that the Prosecutor should have authority to initiate investigations *ex-officio*. If investigations and prosecutions could only be triggered by States and to some extent by the Security Council, the functioning of the Court would be dependent on the political motivations of those entities and as a result be severely hampered, because in practice States and the Security Council would be reluctant, or unable, to lodge complaints or refer situations to the Court.”<sup>(105)</sup>

Switzerland considered that “the Council should never serve as a filter to prevent matters from being referred to the Court. Nor should the Prosecutor be obliged to notify the Council whenever a State submitted a case to the Court. However, the Council might well wish the Court to defer consideration of a case for a certain period, but that period should not be too long and should not be used to remove or destroy evidence.”<sup>(106)</sup>

Similarly, Iraq argued that “the Court must be independent from any political body. It was therefore unacceptable for the Security Council to have a role in the Court, bearing in mind the veto right given to certain States and the Council’s membership and method of voting.”<sup>(107)</sup>

No one denies the correctness of this type of criticism, but the criticized powers of the UN SC are provided for in the UN Charter, this central treaty of present day world order – *dura lex sedes lex*. To argue that attaching the ICC to the UN SC would have exposed it to potential abuses does not make it any more legal overriding the UN Charter. This would be a political position not a legal one. In order to preserve the principle of legality,

changes in the system if sought should be done, in principle, within the framework of the UN Charter, unless the new treaty adopted could be interpreted in a way which does not conflict with it.

On the other side, one should not lose sight of the fact that the wide margin of discretion accorded to the UN SC P5 was not intended to be used abusively (although this might have happened in the past more often than it is desirable), but responsibly in situations where taking action can potentially cause more harm than good.<sup>(108)</sup> Imagine in the situation of post-apartheid South Africa, a zealous and independent Prosecutor willing, at all costs, to prosecute potential individuals for the crime of Apartheid in replacement of the work of the truth and reconciliation commission. It is uncertain whether this would have brought more peace and security to South Africa than caused more harm to it.<sup>(109)</sup>

We need to admit, therefore, that sometimes justice is not synonymous of peace. If the ultimate goal of both the ICC and UN is peace, securing it might require recourse to other than justice methods. A clear example is given by the events in Uganda, where an agreement of principles has been reached between the rebels and the government, but where rebels have imposed a condition that the ICC withdraws its indictments against rebel leaders.<sup>(110)</sup>

For this reason, some States including the UN SC P5 wished to have States and the UN SC with the sole authority to refer matters to the ICC.<sup>(111)</sup> In which case, if neither the UN SC nor any State party believed a situation was grave enough to be referred to the ICC that would speak “volumes against any potential need for the ICC Prosecutor to get involved”.<sup>(112)</sup>

## **II) POSITION TWO: RESIST THE CHANGES AND RETURN TO THE *STATUS QUO* (US AND POSSIBLY RUSSIA’S AND CHINA’S APPROACH)**

While the US and other permanent members of the UN SC have raised a number of concerns regarding the adopted ICC Model, the most important among them are two:

Firstly, in the eyes of UN SC P5 the “treaty adopted in Rome dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned”<sup>(113)</sup>, and therefore is contrary to the UN Charter.

And secondly, UN SC P5 argue that the extension of the Court’s jurisdiction to nationals of non States parties without these States’ consent violates international law.

The main issues around the first objection have been sufficiently addressed in the preceding chapters, whereas those related to the second objection will be addressed in the next chapter below. Therefore we will discuss in this section the practical implications of the US and other P5 Members’ policy of resistance to the ICC Statute as adopted.

Since 3 of the UN SC P5 share the opinion that the ICC Statute raises serious constitutionality problems, it is only normal that they oppose it and are willing to resist the changes and return to the *status quo*. The United States have been particularly persistent in their objections to the new changes. It is important to review the prospects for their success. It also merits analysis the way in which some countries and scholars have tried to prove that all the elements of the ICC Statutory regime are lawful<sup>(114)</sup> despite *prima facie* evidence tending to show the contrary.

Mainly what makes certain countries and scholars so willing to “override” international law in this case?

The first argument would be that the opposition to the American demands is, of course, reflection of the American stance towards the rest of the world. The American establishment is prone to view international law and international institutions as necessarily instruments for the promotion of the American hegemony in the world.<sup>(115)</sup> One American commentator rightly criticized the US position towards the ICC stating that the Government viewed it as a matter of “everybody but us” justice<sup>(116)</sup> – and rightly warning that this position would “invite the other nations of the world to look at the Court as something that the United States has designed for its

own purposes.”<sup>(117)</sup>

Apart from third world states’ traditional resentment, this US attitude has now also started irritating closer US allies such as the UK, France, Germany, Canada and Australia, all of whom voted in favor of the ICC Statute.<sup>(118)</sup> As a result, in the battle for a UN Charter “friendly” treaty, the US were isolated and had to ally with ideological enemies of the past such as Russia and China. The US were also among the seven only countries to vote against the final text of the ICC Statute adopted in Rome paradoxically together with countries traditionally considered by itself as “rogue” ones, like Iraq, Iran, the Sudan and Libya.

The broad support that the ICC enjoys in the world, despite its problems, appears to be more an opposition to the American hegemonic policy rather than *to existing law and institutions*. It is no surprise that there are more scholars trying to legitimize *post factum* the new born institution rather than against it.<sup>(119)</sup> Moreover, States themselves are more inclined to find *post factum* solutions for the situation created, rather than thinking of closing the new institution for alleged unconstitutionality of its Statute.<sup>(120)</sup>

This notwithstanding, the US has been adamant in its opposition to the ICC. The US have been signing the so called Article 98(2) Agreements, and have even passed a law that sanctions countries that have adhered to the ICC, and refused to sign such Article 98(2) Agreements excluding Americans from ICC jurisdiction.<sup>(121)</sup>

The question is how successful the Americans could be. It is undisputable that with US support, the Court would have been by far stronger and active in the international arena.<sup>(122)</sup> However, in the opinion of this author, US objection has little chance of leading to the collapse of the ICC<sup>(123)</sup>, or making the situation return to the previous *status quo*.

The US have been often unable to distinguish between concerns for preserving the existing system of maintenance of international peace, and those that relate to a more limited aspect of their own ill-perceived national interests.<sup>(124)</sup> Instead of propounding that a security system which is

controlled by the great powers has a chance of doing a better job for the entire world (and consequently for the Americans), the discourse has been that the old system has to be preserved because otherwise Americans will come under scrutiny of other countries.<sup>(125)</sup> The veto powers that were conceded to the UNSC P5 to ensure an effective maintenance of international peace and security are normally propounded by the US establishment instead as powers that would just shield US citizens from criminal responsibility.<sup>(126)</sup>

Under these circumstances, countries view the ICC as a deterrent against super powers that would tend to commit abuses during armed conflicts with no fear of repercussion. Against the weapon of “might”, the “little” of this world have no other choice but to shield behind the force of law which is “blind”.<sup>(127)</sup>

This is not to say that the American and other P5 objections would have no impact on the ICC. Certainly they would, at least on the way in which the ICC Statute will be interpreted and possibly amended (favoring some of the US and other P5 legitimate demands). But in contrast, the UN SC P5 would also need to make more general concessions to other countries. Distending the conflicting interests of States around the ICC will most surely lead to possible reforms of the United Nations organs, in particular its Security Council and the International Court of Justice. And the sooner they are carried out the better. Some of these alternative solutions are reviewed in the session below.

### **III) POSITION THREE: ADAPT *POST FACTUM* TO THE EVENTS THAT OCCURRED AND CHANGE THE LAW**

As a result of the collapse of the Soviet Union and the end of the Cold War, a new multipolar world order is being redefined.

Substantial changes occurred also in the type of threats that one can expect today, unanticipated in 1945 when the UN Charter was adopted. If in 1945, it was expected that threats to peace, would take the form of armed

attacks of one state against another, today these threats are represented by brutal civil wars or terrorist acts in the name of religious ideologies. This type of new threats was clearly not envisioned by the Security system centered on the veto powers of the U SC P5.

As one commentator has noted, the P5 veto powers, “this institutionally disastrous by-product of the Cold War undermined a fundamental assumption on which the post-war system had been based. The Charter had spelled out a bargain: States would renounce their freedom to use force unilaterally in return for a reliable systemic guarantee of collective security. Profligate recourse to the veto made that bargain untenable because States could no longer rely on the Security Council to actually authorize the collective measures necessary to protect against new threats to the peace or their legitimate national interests. Rather, when a threat arose, the State causing that circumstance could be expected to be immune to collective measures either because it, itself, had a veto, or because it was sheltered under the protective wing of one of the Council's permanent members.”<sup>(128)</sup>

Facing the challenges of our time necessarily requires that the institutions established to support the Cold War era *status quo* are little by little replaced by others that reflect the changes operated at the beginning of the 21st century.

The far reaching progressive contents of the ICC Statute is, a claim by State parties for changes in the constitutional foundations of the world order established in 1945 in San Francisco. By limiting the instances of UN SC involvement in the work of the ICC, the Statute attacks the neuralgic centre of the San Francisco system of international security – the veto powers of the UN SC. The ICC Statute has, at least, the merit of showing that the nations of the world are willing to change a system of security that no longer serves their interests, and is viewed as an impediment to progress in one of the most vital areas to promote an effective collective security today.<sup>(129)</sup>

Countries understood that the new demands of the multipolar world required a permanent criminal institution, but one which would not be

controlled by the UN SC in its present day structure and decision making powers. Countries argued in Rome that submitting the Court to the exclusive jurisdiction of the UN SC would be contrary not only to the idea of justice, but doing so was not required under the UN Charter either. The UN SC, as noted, has exclusive jurisdiction over a situation only until such time as it is considering that situation. Once a veto decision is cast, countries are therefore free to have recourse to individual and collective measures of self-help.

States assembled in Rome have resisted the US demands and empowered an independent Prosecutor with *ex officio* triggering rights. This fact of itself does not appear to violate the letter or the spirit of the UN Charter as such. It is not the general idea and purposes behind the ICC Statute that violate the UN Charter, but some of its specific provisions that purport to limit the reach of Chapter VII powers of the UN SC.

To reconcile the conflicting interests between the UN and the ICC the following measures were suggested: a) change/reform the composition of the UN SC (and the veto powers) by making it a more democratic institution; b) accept the ICC as a new mechanism of maintenance of international peace and security alongside the UN, by signing a relationship agreement; c) enhance the role of the ICJ in disputes of legal character, by vesting it with the rights of a “Supreme Court” of the world.

### **(1) CHANGE/ REFORM THE COMPOSITION OF THE UN SC (AND THE VETO POWERS),**

One commentator has noted that one factor that has contributed to US failure to accomplish its goals at the Rome Conference, was severe tension that exists in the United Nations between underdeveloped countries and the more developed ones, like the US. In her view the underdeveloped countries are jealous of the Security Council's expanding power in international security matters, and the recent failed attempt by middle ranking powers to expand the Security Council contributed to this tension. She was of the view that

these factors “made it impossible for the United States to preserve an American veto over prosecution decisions through the use of the Security Council”.<sup>(130)</sup>

Indeed, many view the veto system in the UN SC as an anachronism, that should be abolished because the justifications that there were in the past<sup>(131)</sup> no longer apply nowadays, “because communism is dead, the world is more integrated, and the power structure is multipolar”, which makes political compromise more realistic.<sup>(132)</sup>

Abolishing the veto power would however take time to accomplish since the P5 are not even ready to admit more permanent members into the UN SC. A Panel of Eminent Persons established by the UN Secretary-General had proposed two options for the enlargement of the UNSC: (1) increasing the number of both permanent and non-permanent members; or (2) enlarging the Council with new non-permanent members only.<sup>(133)</sup>

Based on this report, Japan, Germany, Brazil and India, known as the Group of Four or G-4, have put forward an enlargement proposal that would give them, together with two African nations, permanent seats in the UN SC. P5 members were not very much enthusiastic about the idea. The US for example would support Japan’s bid for a permanent seat, but no more than that.<sup>(134)</sup> While the US “are open to considering expansion proposals”, they think “the primary purpose of Security Council reform should be to make the Council more *effective*”, rather than more numerous.<sup>(135)</sup>

However, if by “*effective*” it is meant considering *abolishing* the veto power altogether instead of expanding the Security Council with new veto holder Member States, that would have been welcome. Otherwise, it is clear that in the new multipolar world, as a minimum the veto power needs to be diversified to take account of the geographic distribution of the members of the international community, if the UNSC wants to be trusted in matters like the ICC. As one commentator has rightly put it: “Many members of the United Nations with little or no voice in the deliberations of the Council are probably somewhat surprised to find that it may order them to take major

steps that they consider contrary to their national interest and that, moreover, are incongruent with expectations created by multilateral treaties to which they are parties. ...The more the Council uses these very wide powers, especially in the absence of a broad consensus, the more urgent will be the calls for institutional reform.”<sup>(136)</sup>

## **(2) CHANGE THE SYSTEM OF MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY AND ACCEPT THE ICC AS A NEW KEY PLAYER**

Article 2 of the ICC Statute provides that the Court should be put in relationship with the UN. On the basis of Article 2, a relationship agreement was approved both by the ICC Assembly of State parties on 7 September 2004 and the UN General Assembly on 13 September 2004.<sup>(137)</sup> On 4 October 2004 it was signed in New York by Mr. Philippe Kirsch, ICC President and Mr. Kofi Anan, then Secretary General of the United Nations and entered into force.<sup>(138)</sup>

The Agreement between the ICC and the UN regulates “the working relationship between these two organizations, and establishes the legal foundation for cooperation within their respective mandates. The ICC is an independent international institution *with a mandate – in support of the UN Charter – to address crimes that threaten international peace and security*. The Relationship Agreement therefore reflects a delicate balance between independence and cooperation, respecting the autonomy and confidentiality of both institutions” (emphasis added).<sup>(139)</sup>

The relationship agreement “bears in mind the principles and purposes of the UN Charter”, notes the “*important role assigned to the ICC in dealing with the most serious crimes of concern to the international community as a whole, as referred to in the Rome Statute, and which threaten the peace, security and the well-being of the world*”, and “bears in mind that in accordance with the Rome Statute, the International Criminal Court is established as *an independent permanent institution* in relationship with the United Nations system.”<sup>(140)</sup>

Further, Article 2, of the Agreement lays down the principles under which the relationship is established. It provides that the relationship will be based on UN recognition of the existence of the Court as an independent judicial institution with legal personality, and on the Court's recognition of the responsibilities of the UN under the Charter. The parties also pledge themselves to respect each other's mandate as stated in their respective constitutive instruments and as recognized under the relationship agreement.<sup>(141)</sup>

It is clear that the Agreement was intended to be a recognition by the United Nations of the mandate assigned to the ICC, under the Rome Statute, of dealing with "the most serious crimes of concern to the international community as a whole", "which threaten the peace, security and the well-being of the world."<sup>(142)</sup>

However the question is whether this agreement could be viewed as replacing, amending or legitimizing any amendments that the circumstances would require to make in the UN Charter, in order to avoid the ICC Statute being interpreted as overriding it. This would appear to be what some commentators had hoped for after the conclusion of the relationship agreement.<sup>(143)</sup> This author finds it difficult to agree to such a proposition.

It is true that the Agreement represents the recognition of international legal personality upon the ICC as a whole new institution. It is also true that the UN recognizes that the ICC has a mandate in dealing with serious crimes specially those that threaten international peace and security.

However, the UN, without making it general, appears to have reserved to itself the right to decide on a case by case basis, whether specific provisions of the ICC Statute purport to limit the powers of its organs in a manner inconsistent with the UN Charter. The Agreement makes it explicit that the Court recognizes the UN responsibilities under the Charter and the purposes and principles that it enunciates.<sup>(144)</sup> One of the essential principles enunciated in the Charter (Article 103) states that the Charter takes precedence over conflicting provisions in other treaties. Another principle

(Article 2(6)) provides that the UN shall ensure that even non States parties to the UN Charter comply with the UN SC decisions under Chapter VII, when required.<sup>(145)</sup>

The Agreement does not validate any aspect of the ICC work that would purport to override the established mechanism centered on the leading role of the UN SC in situations endangering peace and security. This basically means that the UN will use the ICC to the extent that it does not run against the UN Charter. Whenever it runs, it will be ignored.

The UN SC practice so far that ignores the jurisdiction of the ICC<sup>(146)</sup> or limits it<sup>(147)</sup> in cases in which decisions are taken under Chapter VII is a clear illustration of this policy position.

### **(3) ENHANCE THE ROLE OF THE ICJ AS ANOTHER PROBABLE ACTOR IN THE NEW SYSTEM**

As one commentator has once noted, the proliferation of judicial institutions in the world dealing each with specific areas of international law, is reason enough to assign a leading role to the ICJ.<sup>(148)</sup>

Article 34 of the ICJ Statute that provides that only States may appear before the Court in litigation, means of course that the ICJ “cannot be a court of criminal jurisdiction, where individuals are found to be guilty or innocent”<sup>(149)</sup>, still the ICJ “has a potentially universal subject matter jurisdiction. It may adjudicate upon the interpretation of a treaty and *any* question of international law, including, of course, the laws of war and humanitarian law.”<sup>(150)</sup>

Arguably, the ICJ’s leading judicial role might find more justification in today’s world, where judicial institutions are being created with jurisdiction over potentially political issues that were normally the realm of political bodies such as the UN SC or the UN General Assembly.

This is particularly the case with the ICC, which States parties have entrusted with a mandate to prosecute and punish international crimes that threaten peace and security.

As noted, the problem here is not so much with the appropriateness of prosecution of serious violations of human rights, as it is with the powers of essentially a political nature that were conferred upon an independent Prosecutor, to decide of the appropriateness of measures- other than prosecution – even where evidence shows that serious acts amounting to serious violations of human rights might have been committed.<sup>(151)</sup> For example, the dilemma facing the Prosecutor in the Uganda case, where the rebels are willing to sign a peace agreement with the government only if the ICC indictment against them is lifted.<sup>(152)</sup>

Arguably, deciding or not to consider amnesties for example, is a political discretion that the Prosecutor is entitled to use irrespective of what the UN SC position is. Under the terms of the ICC Statute, the UN SC can refer situations and can defer investigations and prosecutions.<sup>(153)</sup> But the UN SC cannot even control the ultimate outcome of its referral or deferral decisions. It cannot, for example, decide that in the particular circumstances of a situation in a country, such as the Uganda case, where the ICC Prosecutor has already vowed not to lift the Indictment against rebel leaders<sup>(154)</sup>, international prosecutions should not be carried out.

The powers of the ICC Prosecutor also involve the ability to override UN SC referral decisions on the basis of the preliminary consent rules enshrined in the ICC Statute (complementarity). The Prosecutor can also overrule a UN SC deferral, after one year (renewable) irrespective of what the UN SC position is.<sup>(155)</sup>

The situation is even more troublesome if one considers that the ICC would have jurisdiction over crimes of aggression (once it is defined), and that the Prosecutor could trigger of its free will the Court's jurisdiction in these cases too. In potential situations of aggression, the problem is not that the Prosecutor and the ICC could not be allowed in the ordinary process of doing justice, to find that a specific individual (the president of a country) was guilty of the crime of aggression. The problem is that such determination necessarily implies too a finding that a certain State behind

that individual has committed the crime of aggression.

Under the UN Charter the determination of whether a State was an aggressor is left normally to the UN SC (if the situation is ongoing) or to the ICJ under any circumstances. Moreover that determination necessarily entails State responsibility.<sup>(156)</sup> In particular, the State victim of aggression is entitled to seek compensation for the unlawful acts of war, and other sanctions may be imposed on the aggressor State.<sup>(157)</sup>

The ICC has no jurisdiction over legal entities but only over individuals.<sup>(158)</sup> It is clear that allowing the ICC to determine whether anyone was guilty of the crime of aggression, would embroil it in serious political controversy and would have far reaching implications contrary to the provisions of its Statute, since it would mean in practice passing too a judgment on the acts of States.<sup>(159)</sup>

Conversely, making the jurisdiction of the Court dependent upon a finding of aggression by the UN SC could preempt the work of the Court in a way which is contrary to fundamental principles of due process like the presumption of innocence until guilty is proved, impartiality and so on. However, letting the Court to work alongside and independently from the UN SC would also risk having contradictory decisions on one and the same question (imagine the UNSC deciding that there was no aggression and the ICC finding a specific individual (the Prime Minister) of that country guilty of the crime of aggression). The end result would be justice denied.

Under these circumstances, the ICJ could represent a viable alternative. There are certainly still some statutory limitations to surmount before the ICJ can be allowed to play a major role in the work of an impartial ICC. Among them is the fact that the ICC does not allow States or individuals direct access to the ICJ<sup>(160)</sup>, and also that the ICJ would not accept direct challenges by individuals.<sup>(161)</sup>

These, though important, are not insurmountable difficulties. With sufficient political will States can waive the statutory limitations in both institutions and give the ICJ an enhanced role in a new system of

maintenance of international peace and security more consonant with present day needs.

## **II) THE ICC AS A NOVEL DERIVATIVE SUBJECT OF INTERNATIONAL LAW WITH CEDED JURISDICTION**

International Organizations are secondary derivative subjects of international law. They have normally only such rights as conferred upon them by the entities (states or other organizations) that have created them. This normally raises the question, whether the entities that have created such organizations were entitled to do so.

For example, the ability of the UN SC to establish judicial organs was challenged in the *Tadić* case before the International Criminal Tribunal for the Former Yugoslavia.<sup>(162)</sup> The accused argued that the establishment of the Tribunal was *ultra vires*, since the UN Charter does not confer upon the UN SC the right to establish such organs. The question concerned the scope of measures allowed to the UN SC under Article 41 of the UN Charter. The *Tadić* Appeals Chamber came to the conclusion that under the UN Charter, the UN SC was entitled to establish the tribunals because, the list of measures the UN SC is entitled to take under Article 41 was not exhaustive, as the list was preceded by the terms “*may include*”, which the ICTY Appeals Chamber understood as *not excluding* other measures that the UN SC deems appropriate.<sup>(163)</sup>

This issue could, potentially, be relevant also in situations where an organization is created by States. For example, it is accepted that the ability of States to establish international organizations is limited by the existence of norms *jus cogens*. States cannot purport to establish a lawful organization whose purpose would be contrary to a *jus cogens* norm of international law. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) provides that a *jus cogens* norm is one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent

norm of general international law having the same character”.

Article 53 of the VCLT also provides that a treaty would be “void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. Norms prohibiting, for example, slavery, racial discrimination, genocide, or the unlawful use of force in international relations have been recognized as *jus cogens*.<sup>(164)</sup>

States cannot purport to establish a lawful organization whose aims would be to promote for example slavery, acts of aggression, or genocide. Such a treaty and the organization created with these aims would be considered void *ab initio*. Obviously, the situation would appear even more illegal if these States decided that the organization would consider as its members *ipso facto* any other State of the world that has not specifically consented to it.

Does it make the situation any *less illegal* if the organization is not created to promote acts violating *jus cogens*, but instead to protect norms *jus cogens*. The fact that the organization intends to pursue a good cause, does it justify conferring upon it a binding force reaching any State of world with or without its consent?

My preliminary submission would be that since international organizations are consensual organs of States, they should bind obviously only those States that have consented to it either *implicitly or explicitly, and the nobleness or peremptoriness of its objectives should not change the rule*.

Articles 34 to 38 of the VCLT regulate the types of relationship that can be established between a treaty and non States parties. In particular, under Article 34, “a treaty does not create either obligations or rights for a third State without its consent”. Article 38 further provides that “nothing precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such”.

With these preliminary observations in mind we will review the provisions of the ICC Statute regarding third States.

The question whether the ICC can lawfully exercise jurisdiction over

nationals of third States without those States' consent is at the heart of much of the opposition to it by the three permanent members of the UN SC, but also other States that have so far not yet joined the ICC. Jurisdiction over nationals of non-State parties is central to the original jurisdictional mechanism adopted in the ICC Statute. Under its Articles 12 and 13, States ratifying the ICC Statute are bound by it. However, in addition, under the formulation adopted, non-State parties can also be *unwillingly* forced to accept the jurisdiction of the court. This happens in two situations:

- a) When a situation involving nationals of non States parties is referred to the Court by the UN SC, and*
- b) When a crime is committed by a national of a non State party on the territory of a State party.*

Both situations raise legitimate concerns about the legal sources of this binding obligation upon non States parties. We will review them one by one.

### **1. THE UN CHARTER AS THE PRIMARY LEGAL BASIS OF UN SC REFERRALS BINDING NON STATES PARTIES TO THE COURT**

Article 13(b) of the ICC Statute provides that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 “if ... a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council.” If the situation referred relates to a State party, then, everything should be legally appropriate, since the State party in question has agreed to be bound by this referral mechanism.

But, does the situation change, if the State in question is not a State party to the ICC? Virtually no one disputes that the situation does not change<sup>(165)</sup>, but depends obviously on the basis put forward to justify the lawfulness of the UN SC actions.

Provisions of the Vienna Convention on the Law of Treaties allow us unambiguously to clarify this issue. Article 31 of VCLT clearly states that “a

treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Further 31(3)(c) of the Vienna Convention also states that in interpreting the treaty other factors could be taken into account such as, for example, any relevant rules of international law applicable in the relations between the parties. Article 32 also allows recourse to supplementary means of interpretation if the interpretation under Article 31 leads to a result which is manifestly absurd or unreasonable.

The ICC Statute, in line with the VCLT, provides in its Article 21 that apart the Statute itself, in interpreting the law, the Court shall have recourse to other applicable treaties and the principles and rules of international law.

It is clear from the ICC Statute that UN SC referral decisions are based not only on the possibility conferred upon it under Article 13(b) of the ICC Statute, but principally on the UN Charter itself. The *travaux préparatoires* show that most States assembled in Rome shared the view that in relation to non States parties the UN Charter would be the primary binding basis of jurisdiction. For example, Chile correctly argued that “the case of a State not party to the Statute in which heinous crimes had been committed and which had not accepted the Court’s jurisdiction should be discussed in relation to the role of the Security Council. Under Chapter VII of the Charter of the UN, the Security Council could certainly submit a situation involving a State or its nationals to the Court.”<sup>(166)</sup>

Similarly Russia “was unable to agree that an international treaty could create obligations for third parties which were not parties to it. The only way the Court could exercise jurisdiction over a non-party was by means of a Security Council decision.”<sup>(167)</sup>

The US affirmed that “the universal jurisdiction proposal for the Court would represent an extraordinary principle, in conflict with certain fundamental principles of international law, and would undermine the Statute generally. The proposals by Germany and the Republic of Korea would have the effect of applying a treaty to a State without that State’s

consent, and in the absence of any action by the Security Council under Chapter VII of the Charter of the United Nations. Even if a State was not a party, the Court would have jurisdiction to judge its official acts and imprison even its head of State. Such a situation could not be justified on the basis of existing law and the US objected to it in principle. An international treaty could not impose itself in that manner on non-party States; the only solution was to reach out to other States through the Charter and the powers of the Security Council that had been created by States under that separate regime.”<sup>(168)</sup>

Commentators have voiced closer views. For example Sir Franklin Bergman, Legal Adviser of the British Foreign Office, has persuasively stated that it was “not in actual fact correct to say that Article 13 “gives the Security Council the key”, in the sense of purporting to convey *any new power* on the Council. It was widely understood from an early stage that this would have been neither legally nor politically possible. Instead what the provision does –correctly- is to stipulate that the powers of the Court are brought into play when the Security Council makes reference to it, in other words to empower the *Court*, not the Council.”<sup>(169)</sup>

The UN Charter is according to Article 30 of VCLT the only legal instrument binding both non States parties and State parties to such UN SC referrals to the Court under Chapter VII. This proposition is also supported by provisions of Articles 34, 35 and 38 of VCLT, since the UN Charter is the only agreement to which both non States parties and State parties to the ICC Statute have consented to.

Additionally, the problem of the *forum convenient* chosen to enforce the UN SC decision to initiate criminal proceedings in this case, (i.e. the ICC to which a State has not adhered) is also solved by recourse to provisions of the UN Charter, mainly Articles 24, 25, 41, 43 and 48. According to Article 24(1) of the UN Charter, Member states “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the

Security Council acts on their behalf.” Under Article 25, Members States “agree to accept and carry out the decisions of the Security Council.”

Regarding the powers to institute jurisdictions to punish serious violations of international law, the so called Chapter VII powers of the UN SC are described in particular in Articles 39, 41 and 48. Article 39 provides that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

Article 41 provides for non military measures whereas Article 42 for the military ones.

Finally under Article 48(1) of Chapter VII, the Security Council may determine whether the action required to carry out its decisions is to be taken by all or only some of the UN Member States. Member States carry out such decisions either directly or through their action in appropriate agencies of which they are members. Moreover, under Article 43 (1), UN member States are required to make available to the UN SC any assistance and facilities necessary for the purpose of maintaining international peace and security.

The ICC can justly be viewed as one such “facility” or “appropriate agency” made available by some member states to the UN SC for the purpose of maintaining international peace and security, through prosecution of serious violations of human rights. The state party in which serious violations of human rights in question occur does not need to be part of these facilities or agencies.

Accordingly, the primary legal basis of the jurisdiction of the Court in situations referred to it by the UN SC is the UN Charter.<sup>(170)</sup> It was also based on UN Charter provisions that the UN SC did establish the *ad hoc* criminal Tribunals for the former Yugoslavia and for Ruanda, whose decisions are binding on all States of the world.

## 2. LEGITIMACY OF THE TRANSFER OF TERRITORIAL JURISDICTION OF ONE STATE TO AN INTERNATIONAL INSTITUTION WITHOUT CONSENT OF AFFECTED THIRD STATES

According to Article 12, the ICC can exercise its jurisdiction if the State of the territory where the crime was committed *or*<sup>(171)</sup> the State of nationality of the accused is a party to the Rome Statute or has accepted the jurisdiction of the ICC with respect to the crime in question. Therefore under this formulation, persons accused of committing the relevant crimes may be subject to prosecution even if the State of their nationality is not a party to the Rome Statute.

This, as noted, is one of the most controversial formulations in the ICC Statute. All turns around the right that States have or not to confer to an international organ rights that they enjoy in their mutual relations without the consent of the State affected. While the US<sup>(172)</sup> and some other States<sup>(173)</sup> have argued that based on Articles 34, 35 and 38 of VCLT, it would be illegal to pass onto an international body rights that States as sovereigns enjoy in their territory without the consent of all involved, ICC supporters say it is possible. However, despite claims that the US position is ill-founded they have so far not presented convincing arguments to support their allegations either. Often ICC supporters rely on *political* considerations.<sup>(174)</sup> But still this *is not the law*. We will critically review below the traditional allegations advanced by ICC supporters:

*a) First argument: If sovereign States have the right to try nationals of non States parties in their own territory, then they can also cede such a right to an international institution<sup>(175)</sup> consistent with the lotus principle.<sup>(176)</sup>*

This position is not convincing, as the sovereign rights that States have to try foreign nationals who have committed crimes are reciprocally exercised by them. The same right that a State A has to try nationals of State B is equal to the right that State B has to try nationals of State A. This is

derived from the fundamental principle of sovereign equality of States. This is clearly different from ceding *such a right to an international organ* without the consent of the State of nationality concerned.<sup>(177)</sup>

International organizations, though independent subjects of international law, are not sovereign entities and therefore cannot work on the basis of reciprocity with a sovereign State, i.e. the right that an international organization would have to try nationals of non States parties cannot be compensated by a similar right that non States parties would have to try “nationals” of the international organization. The only way by which a non State party would have to respond on the basis of reciprocity would be to create with some other countries another international organization B and confer to it the same type of jurisdiction over non States parties that are members of the international organization A. This logic would result in chaos in international relations.<sup>(178)</sup>

*b) Second argument: The Nuremberg, Tokyo and the ad hoc Tribunals are precedents that legitimize the principle of ceded jurisdiction.*<sup>(179)</sup>

This position is also unconvincing. The Nuremberg and Tokyo Tribunals were covered by provisions of Articles 53 and 107 of the UN Charter that legitimize any action against former aggressor States during World War II. In contrast, the ICC would have jurisdiction over future cases, not aggressor States of the WWII period. The *ad hoc* Tribunals cannot serve as an example either. They were established under Chapter VII of the UN Charter, and countries of the world have accepted to be bound by coercive measures taken by the UN SC under Chapter VII.

*c) Third argument: The crimes for which jurisdiction was ceded to the Court are all crimes for which universal jurisdiction applies, i.e. crimes of concern to the international community as a whole or jus cogens prohibitions entailing erga omnes obligations for all.*

*Therefore the ICC should have jurisdiction over such crimes committed by nationals of non-party States.*<sup>(180)</sup>

This position also fails. Firstly, was it a valid argument, the ICC would have been given universal jurisdiction as actually Germany did propose.<sup>(181)</sup> However, this proposal was rejected by the same States.<sup>(182)</sup> States clearly distinguished between the universal jurisdiction that attaches to such crimes, and the jurisdiction that the Court –a consensual organ of States -should have.<sup>(183)</sup>

Secondly, *jus cogens, erga omnes*, apply to the prohibitions themselves, but not the jurisdiction of the ICC. Jurisdiction is not *jus cogens*, it still remains only *a right conferred to adjudicate a case or situation*. This necessarily raises the question of the *forum convenient* to exercise such adjudicative right. All procedural rules still would apply. For example, in the recent *Congo v. Rwanda* case<sup>(184)</sup> on genocide issues, Congo attempted to have recognized upon the ICJ, a right to adjudicate the case despite absence of consent by Rwanda to the Court's jurisdiction. Congo justified this with the fact that it was a question of a violation of *jus cogens* in which case there was no need for State's consent to be bound by specific jurisdictions.<sup>(185)</sup>

The ICJ rejected this reading and stated that one thing is the *prohibition* itself that is *jus cogens*, and another thing is the *jurisdiction* to entertain such a case that can be exercised in different ways.<sup>(186)</sup> The ICJ was only but one of such ways, and consent to it as the *forum convenient* need to be taken from all the interested parties.<sup>(187)</sup>

Further on this, provisions of the ICC Statute denying jurisdiction over States in certain cases, also justify a position according to which the “*jus cogens*” of a violation does not justify compulsorily submitting individuals to the jurisdiction of a forum not consented to by the nationality State. For example, provisions under Article 98 on “immunities” and “previous agreements” that exempt nationals of third States from the ICC's jurisdiction clearly show that consent of third States is required. Additionally, if the “*jus cogens*” argument is valid, States parties would not have been allowed to

opt-out of the Court's jurisdiction under Articles 121, 123, and 124. All this shows the consensual basis of the ICC.

*d) Fourth argument: the ICC Statute imposes obligations not on States but on national individuals.<sup>(188)</sup>*

This position is also doubtful since it again makes useless provisions in the Statute about immunities, and previous treaties under Article 98; surrender rules under Article 90, and opt-out provisions under Articles 121, 123 and 124. These provisions affect individuals, but require *positive action* from the State of nationality. Moreover, the provisions on complementarity (Article 17), arguably, also oblige non States parties to be involved in the work of the Court if and when they wanted to avoid the exercise of jurisdiction over their nationals. So with or without their free will non States parties are necessarily constrained by the existence of the ICC. These are all provisions, arguably, protecting individuals, not States, but which necessarily involve States at the end of the day.<sup>(189)</sup> On the other side, the notion of State is always a combination of at least three elements: territory, population and government. To disassociate the population from the notion of State would be to deprive the notion of State of its contents, which is contrary to international law.<sup>(190)</sup>

*e) Fifth argument: Recent treaties on combating terrorism also provide for jurisdiction in relation to citizens of non States parties, therefore the ICC is not a novel.<sup>(191)</sup>*

This position is not convincing either. The main point is that these treaties do not create *international organs* to which competence is ceded to try nationals of third States. States have conferred to each other rights and obligations to punish terrorist acts that they can exercise towards foreigners on a reciprocal basis and according to the *Lotus* principle (i.e. nothing prevents a State from exercising non-prohibited rights *in its own territory*). However, the suggestion to include these treaties under the jurisdiction of the ICC was rejected in Rome.<sup>(192)</sup>

## CONCLUSIONS

Unless provisions of the ICC Statute are read in a way that conforms with fundamental cannons of the Vienna Convention on the Law of Treaties, the same reasons that have prevented States from adopting the universal basis of jurisdiction for the ICC, would be the same denying legitimacy to a purely territorial basis of jurisdiction of the ICC (with no formal consent (explicit or implicit) of all interested and affected states, since both jurisdictions (universal or territorial) would be based on the potential right of the ICC to try nationals of non States parties.

Does this mean that the ICC Statute is an illegal treaty? In this author's view not, but the scale of resistance to it from non States parties will depend to a large extent on how provisions of the Statute are interpreted. No matter how we are all interested in seeing the ICC functioning, denying that under current international law consent (either implied or express) is needed to bind a country to the jurisdiction of an international organ will not help. Denying that the plain text of the ICC Statute appears *prima facie* to oblige non States parties to it will not help either.

The solution is to read the legality of the ICC Statute in a way which conforms to *traditional* international law and is non states parties "friendly".

It is argued here that the different provisions of the ICC Statute that allow some *flexibility* in the *consent* given by states parties and non states parties to be bound by it (Articles 17, 90, 98, 121, 123, 124), are indications enough to *presume such consent* only when states have not overtly spoken against the ICC jurisdiction.

Non-state parties like the US that have signed 98 (2) agreements with states parties, for example, have clearly shown their opposition to the ICC jurisdiction. The same would apply in the case of States parties using the opt out provisions under Articles 121, 123, 124 of the ICC Statute. In these cases, only a UN SC referral can bring such states back under ICC jurisdiction. Additionally, non states parties not willing to be subjected to the Court's jurisdiction can also opt to exercise their own jurisdiction, following the

principle of complementarity under Article 17 of the ICC Statute.

This essentially means that there is a *presumption of consent* binding all states of the world to the ICC Statute, however states are allowed to deny such consent either permanently (by signing specific agreements under Articles 90 and 98) or on an *ad hoc* basis by enforcing the complementarity regime and using their primary jurisdiction under Article 17 of the ICC Statute.

This author's submission is that *presumption of consent* is one valid way of reading "constitutionality" into the ICC Statute, as it relates to non state parties.

Concerning the UN SC, consent is presumed until the SC does not taken action to the contrary under Article 103 of the UN Charter.

It is hoped that possible positive developments will occur when the UN SC is democratically reformed to include representatives of other geographic regions, or the veto power is eventually abolished. Until then, the peace versus justice dilemma can be solved by recourse to the UN SC without putting the ICC Prosecutor in the uneasy situation of taking political decisions.

The establishment of regional criminal courts would be a step forward in combating impunity, complementing the work of the ICC in particular when prosecutions of mid and low level perpetrators appears more advisable at local level. ❖

## NOTES:

1. Rome Statute of the International Criminal Court adopted July 17, 1998, U.N. Doc. A/Conf.183/9 [hereinafter Rome Statute], (Preamble)

2. Data available at <http://www.icc-cpi.int/statesparties.html> (last visited 15 December 2007).

3. In December 2003, Yoweri Museveni, the President of Uganda self-referred to the ICC Prosecutor the situation concerning the Lord's Resistance Army. The ICC Prosecutor decided to start investigations into the case and in August and September 2005 the first warrants of arrest were issued against Joseph Koni, Vincent Otti, Raska Lukwya, Okot Odhiambo, Dominic Ongwen, all senior leaders of the Lord's Resistance Army. Available at <http://www.icc-cpi.int/cases/UGD.html> (last visited 15 October 2007).

4. In April 2004, the ICC Prosecutor has received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute. The ICC Prosecutor decided to start investigations and in February 2006 a warrant of arrest was issued against Thomas Lubanga Dyilo. Available at <http://www.icc-cpi.int/cases/RDC.html> (last visited 15 October 2007).

5. In January 2005, the ICC Prosecutor has received a letter sent on behalf of the government of the Central African Republic. The letter refers the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic. The Prosecutor has not yet decided to start official investigations into this situation. Available at <http://www.icc-cpi.int/cases/RCA.html> (last visited 15 October 2007).

6. See *Office of the Prosecutor Report on the activities performed during the first three years* (The Hague, 12 September 2006, p.10 (noting that "the five situations currently under analysis include the situation in the CAR, following the referral by the CAR Government, and the situation in Cote d'Ivoire which through a declaration lodged with the Court, accepted the Court's jurisdiction for crimes committed in its territory since 19 September 2002").

7. In March 2005, the UNSC adopted resolution 1593 (2005), referring the situation in Darfur (the Sudan) to the ICC Prosecutor, and in June of the same year the Prosecutor decided

to start investigations. The first warrants of arrests were issued early 2007. Available at <http://www.icc-cpi.int/cases/Darfur.html>. See also *Fourth Report of the Prosecutor to the UN SC pursuant to UN SC Res. 1593 (2005)*, 15 December 2006. Available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_ReportUNSC4-Darfur\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC4-Darfur_English.pdf) (last visited 16 December 2007).

8. See for example, the ongoing discussion in US. Among those against the ICC Statute adopted and supporting the US position not to adhere to it, see Ruth Wedgwood, *The US and the ICC, the Irresolution of Rome*, in 64 *Law & Contemporary Problems* (2001)193; Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, in 64 *Law & Contemporary Problems* (2001)13. Among those supporting the ICC and condemning US for not adhering to it see, Michael P. Scharf, *The ICC's jurisdiction over non-party States: a critique of the US position*, in 64 *Law & Contemporary Problems* (2001) 67; Thomas Frank, *The United States and the ICC: Unilateralism rampant*, in 35 *New York University Journal of International Law and Politics* (2003) 519.

9. The well known US opposition to the Statute has served as the starting point for this research. States in favor of the ICC have so far ratified the Statute and enabled the start of the Court's work.

10. See UN S C Res. 688 (1991) (situation of Kurds in Iraq), 5 April 1991.

11. See UN SC Res. 940 (1991) (Haiti), 31 July 1991.

12. See UN SC Res. 794 (1992) (Somalia), 3 December 1992

13. See UN SC Res. 827 (1993) (former Yugoslavia), 25 May 1993.

14. See UN SC Res. 955 (1994) (Rwanda), 8 November 1994.

15. The Attacks on the twin towers of the World Trade Center in New York, 11 September 2001.

16. See James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, in 88 *American Journal of International Law* 140 (1994), at 141 (noting that "...the end of the Cold War coincided with a recrudescence of ethnic or communal violence and mass violations of human rights, for example, in Yugoslavia, Iraq and Somalia.")

17. ICC Statute (Preamble).

18. At the Rome Conference, many States were concerned that some of the far reaching proposals for the jurisdiction of the Court could not be made without amending the UN Charter. Thus Bangladesh affirmed that "Regarding the role of the Security Council unless the Charter of the UN itself was amended there was an inescapable link between the crime of aggression and the functions of the Security Council in response to acts of aggression." Likewise, Russia "did not believe it was possible in principle for the provisions of the Charter

to be amended by other international instrument; those provisions would override any others. Extreme caution was therefore called for in the drafting of the Statute.” See *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Cherif Bassiouni, ed.), Transnational publishers, New York, 2005, (hereinafter *The Legislative History of the ICC Statute*) at 141, para.13 and at 186, para.9 respectively.

19. At the Rome Conference, countries were cognizant of this possibility. Egypt, for example, opined that under Article 39 of the UN Charter, “the role of maintaining peace and security did not belong only to the Security Council, but also to other UN bodies, notably the General Assembly”. Ibid, at 182, 183, para. 89.

20. See UN Charter, Article 2(6).

21. At the Rome Conference, countries have argued about the need to respect the central role of the UN SC. Kazakhstan for example, noted that “the Council’s role in such an important issue as the determination of acts of aggression should not be disregarded. It might be true that the Council was not adapted to present-day circumstances and that the Charter should be amended accordingly, but for the time being the Council’s role must be recognized.” See *The legislative History of the ICC Statute*, at 187, para.13.

22. See UN SC Res. 827 (1993), 25 May 1993 on the establishment of the ICTY.

23. See UN SC Res. 955 (1994), 8 November 1994 on the establishment of the ICTR.

24. The ILC Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996 lists the following crimes: crime of aggression (article 16), genocide (article 17), crimes against humanity (article 18), crimes against United Nations and Associated Personnel when committed in a systematic manner or on a large scale with a view to preventing or impeding that operation from fulfilling its mandate (article 19), war crimes when committed in a systematic manner or on a large scale (Article 20).

25. See ICC Statute (preamble); Relationship Agreement between the ICC and the UN, 04 October 2004 (preamble). Recently the ICC Prosecutor in its *Fourth Report to the UNSC* on the situation in Darfur, the Sudan, explained that “The crimes are particularly serious given that they affect a population that is already suffering greatly due to the violence of previous years; moreover these perpetrators are standing in the way of progress towards peace and security in Darfur and the region.” See *Fourth Report of the Prosecutor to the UN SC* pursuant to UN SC res. 1593 (2005), 15 December 2006. Available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_ReportUNSC4-Darfur\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC4-Darfur_English.pdf) (last visited 16 December 2007).

26. See UN Charter, Article 55.

27. Cedric E. Evans, *The concept of “threat to peace” and humanitarian concerns:*

*Probing the limits of Chapter VII of the UN Charter*, in *Transnational Law & Contemporary Problems* (1995) 213, at 224.

28. Timothy McCormack, *Selective reaction to atrocity: war crimes and the development of International criminal law*, in 60 *Albany Law Review* (1997) 681, at 728.

29. See UN SC Res. 827 (1993) (former Yugoslavia), 25 May 1993; UN SC Res. 955 (1994) (Rwanda), 8 November 1994

30. See Statement of the French Representative, UN SCOR, 48th Sess., 3175th mtg. at 8, UN Doc. S/PV.3175 (1993).

31. See *The Prosecutor v. Dusko Tadić a/k/a "Dule"*, Appeals Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Oct. 2, 1995, [hereinafter *Tadić case*], para.38.

32. *Tadić case*, para.39.

33. All these features substantially distinguish the Tribunals from the ICC established on a consensual basis and therefore respectful of the States parties' sovereignty.

34. Commentators have pointed to a number of limitations of the *ad hoc* Tribunals model. See Philippe Kirsch, *The International Criminal Court and the enforcement of international justice*, in 17 *Pace International Law Review* (2005) 47, at 49 (noting the following: "They are geographically limited. They respond primarily to events in the past. Their establishment involved substantial costs and delays. And last but not least, their creation depends on the political will of the international community of the day. In the case of an ad hoc tribunal, they required a decision by the Security Council acting under Chapter VII of the Charter. Because of all these factors, both the punishment and the deterrence function of the ad hoc tribunals are limited").

35. See *The Legislative History of the ICC Statute*, at 135, para.79.

36. *Ibid*, at 143, para.41.

37. *The Legislative History of the ICC Statute*, at 160, para.17.

38. See Theodor Meron, *International Criminalization of Internal Atrocities*, in 89 *American Journal of International Law* (1995) 554, at 555.

39. See Timothy L.H. McCormack, *Selective reaction to atrocity: War crimes and the development of international criminal law*, at 727.

40. James Crawford, *The ILC adopts a Statute for an International Criminal Court*, in 89 *American Journal of International Law* (1995) 404, at 416.

41. Colin Warbrick, *The United Nations System: A Place for Criminal Courts?*, in 5 *Transnational Law and Contemporary problems* (1995) 237, at 260.

42. Some commentators still think that what was established was indeed a legalistic

model. See John M. Czarnetzky and Ronald J. Rychlak, *An Empire of Law? Legalism and international criminal court*, in 79 Notre Dame Law Review (2003) 55, at 61 (noting that: “The ICC as an institution is the result of absolute faith in a nonpolitical, legalistic model of justice: where human rights violations have occurred, prosecutions must take place either on the national level or in the ICC. The ICC is, therefore, the apotheosis of "legalism").

43. At the Rome Conference the UK and some other countries argued that such fears were unfounded. See *The Legislative History of the ICC Statute* at 183, para.95 (the UK noting that it “was somewhat puzzled by the fears expressed by some delegations that such referrals would interfere with the independence of the Court simply because the Security Council was a political body: no one had accused the Security Council of interfering with the independence of the tribunals for the former Yugoslavia and Rwanda, which had already been in operation for some time”).

44. See ICC Statute, Article 53.

45. Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, in Foreign Affairs, July-Aug. 2001, 86, at 95-96.

46. ICC Statute (Preamble).

47. Colombia, for example, argued in Rome that “the Court’s independence and impartiality should be clearly reflected in the Statute. While the Court should have an institutional relationship with the United Nations, none of the latter’s bodies ought to have any influence over the Court or be able to obstruct its activities.” Colombia, therefore, “viewed with concerns those provisions of the draft which might enable the Council to thwart the jurisdiction of the Court.” See *The Legislative History of the ICC Statute*, at 185, para. 6. See also *supra* notes 41, 42 and 43.

48. See Sir Franklin Berman, *The Relationship between the International Criminal Court and the Security Council*, in Reflections on the International criminal court (Herman A. M. von Hebel *et al*, The Hague, 1999), at 177.

49. *The Legislative History of the ICC Statute*, at 183, para.97.

50. *The Legislative History of the ICC Statute*, at 186, para. 9 (emphasis added).

51. *The Legislative History of the ICC Statute*, at 256, para.32.

52. *The Legislative History of the ICC Statute*, at 185, para.4.

53. See Relationship Agreement between the UN and the ICC, signed 04 October 2005.

54. See ICC Statute, Article 12 (2) (a).

55. See ICC Statute, Article 16. The UN SC had once attempted to extend this period for an indefinite time by adopting yearly resolutions to protect UN peacekeepers from the Court’s jurisdiction. Countries pressed that it would be illegal, first because the UN SC should only

have recourse to Article 16 when there was real (not imaginable) threat to peace and security, and second because the Article was clearly intended to impose time limits to the deferral powers of the UNSC. The UN SC was forced to change its mind. See UN SC res. 1487 of 12 June 2003, paras.1,2 (stating that “acting under Chapter VII requests consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises evolving current or former officials or personnel from a contributing State not a Party to the Rome Statute, over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise”; “expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary.”)

56. See *Fourth Report of the Prosecutor to the UN SC on the situation in Darfur*, at p.2 (the Prosecutor noting that “In the first report to the UNSC the Office emphasized that the ICC is a court of last resort, only acting in situations where: (I) there has not been any national investigation or prosecution of the case being brought to the Court; or (II) where there is or has been, such an investigation or prosecution, but it is vitiated by an unwillingness or inability to genuinely carry out that investigation or prosecution.”). It is true that in the particular situation of Darfur the UN SC resolution encourages the Court to support local judicial efforts and truth commissions. Therefore the UN SC empowers the Court to do so, but it cannot be assumed for granted that the UN SC would do so in every such situation (as circumstances in which crimes are committed might change). The ICC Statute should, in principle not limit the UN SC powers. Decisions taken under Chapter VII are, normally, viewed as sanctions against the State concerned (Articles 5, 25, 39 of the UN Charter), and other members of the international community are required to cooperate fully with the UN SC (Articles 25, 43, 48 UN Charter), unless the UNSC decides otherwise.

57. See ICC Statute, Article 53.

58. See ICC Statute, Article 8(1).

59. ICC Statute (Articles 17(d) and 53(1) (c), 53(2) (c)).

60. See ICC Statute, Article 124.

61. At the Rome Conference, France justified the need for an opt-out procedure for war crimes and suggested that whereas “acceptance of the jurisdiction of the Court could be obligatory for any State becoming a party to the Statute with respect to the crime of genocide and crimes against humanity. War crimes however, as defined in the 1907 Hague Convention and the 1949 Geneva Conventions and additional Protocols thereto, *might be isolated acts*. A solution must be found to enable States with particular difficulties in that area to be able to

become parties to the Statute. It was not a matter of drawing up an *a la carte* Convention, but of allowing some flexibility. There could be a system requiring consent by the State of nationality of the perpetrator, so that the Court could exercise its jurisdiction”. See *The Legislative History of the ICC Statute*, at 154, para.49 (emphasis added).

62. See ICC Statute, Articles 31-33.

63. Just to compare, defenses for war crimes under the ICTY jurisprudence are only allowed as a mitigating factor and not as a basis to exclude criminal responsibility. Yet prosecutions at the ICTY are justified since the entire situation in the former Yugoslavia (not just the specific war crimes) was already viewed as a breach or threat to international peace and security, in which many of the war crimes committed, also amounted to serious crimes against humanity or genocide.

64. See Article 5(2) ICC Statute, providing that “the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

65. This view is generally supported by scholars too. See Luigi Condorelli and Santiago Villalpando, *Relationship of the Court with the United Nations*, in *The Rome Statute of the International Criminal Court: A Commentary*, 219, at 221 (noting that “the function of the Court is considered to have an intrinsic connection with the purposes of the UN, especially with the Role of the Security Council. In fact, the Court is intended to contribute to the maintenance and restoration of international peace, both under a preventive perspective –as its mere existence can hinder potential criminals from committing heinous crimes that threaten the peace, security and well-being of the world – and more directly –by contributing to general reconciliation (and thus effective restoration of peace) through the punishment of those who have committed such crimes”).

66. See Philippe Kirsch, *The International Criminal Court and the Enforcement of Criminal Justice* at 49 (noting that: “The rationale behind creating international tribunals is that when united systems fail, they can further three objectives: to punish individuals responsible for the most serious international crimes; to bring justice to victims; and, over time, to contribute to the deterrence of potential perpetrators and the building of a culture of accountability. The work of international criminal tribunals is also linked to maintaining security, guaranteeing lasting respect, and the enforcement of international justice”).

67. For example the ICC Office of the Prosecutor considers that the role of the Court in contributing to international peace and security will be better accomplished by *maximizing the*

*impact of its activities as deterrence* to future crimes. The Prosecutor has affirmed this as one of the guiding principles of his prosecutorial strategy and asserts that: “as noted in the Preamble of the Statute, the Court has a role in contributing to the prevention of future crimes. The Office has to maximize the impact of each of its activities, from the analysis of the information, to the beginning of the investigation, to the trial and eventual conviction. Massive crimes are planned; the announcement of an investigation could have a preventive impact. The mere monitoring of a situation could deter future crimes from being committed. It increases the risk of punishment even before trials have begun. Interestingly, this effect is not limited to the situation under investigation but extends to different countries around the world.” See *Report on the Prosecutorial Strategy*, 14 September 2006, The Hague, p.6.

68. In the ICC Prosecutorial Strategy the Prosecutor pledges to have adopted a “sequenced” approach to selection, “whereby cases inside the situation are selected according to their gravity. Although any crime falling within the jurisdiction of the Court is a serious matter the Statute clearly foresees and requires an additional consideration of “gravity” whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court. In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes, the nature of the crimes, the manner of commission of the crimes.” See *Report on the Prosecutorial Strategy*, p.5.

69. See UN Charter, Articles 2(6), 32 and 35. At the Rome Conference, several States were concerned about this. The US for example stated that it “had grave difficulties with establishing a Court that presumed to have jurisdiction over the citizens of a State that had not ratified the treaty creating it, except in situations where the Security Council had taken enforcement action under Chapter VII of the Charter of the United Nations, which was binding on all Member States.” See *The Legislative History of the ICC Statute*, at 309, para.42.

70. See Adoption of the UN SC Res. 955, 8 November 2004. Provisional Verbatim Records, UN Doc. S/PV.3453.

71. Sweden, for example, “was not fully convinced by the representative of Germany’s arguments about inserting the Court fully into the system of universal jurisdiction, even with regard to the core crimes.” It stressed that “the Court was being created by a Convention, and some regard must be had to that fact.” See *The Legislative history of the ICC Statute*, at 148, para.69.

72. At the Rome Conference, States were concerned about these restrictions on the work of the UN SC that raise serious issues of lawfulness. The US, for example, stated that it was willing to work with others to find “a compromise with respect to the Council’s proper role,

but the powers and functions of the Council must not be rewritten. Wording was needed that did not impose an obligation on the Council to draft its own resolution with a specified period for its applicability.” See *The Legislative history of the ICC Statute*, at 309, para.48.

73. On Sierra Leone, see UN SC Resolution 1325 (2000), in 14 August 2000. See also the *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 4 October 2000.

74. Under Article 53(3) (a) the UNSC is only given the consolation of challenging in Court the appropriateness of its referral decision. However this would be an unprecedented situation to have the UNSC that adopted a binding coercive Chapter VII decision to dispute with the State concerned and the Prosecutor the appropriateness of its decision that prosecutions are the best way of ensuring peace and security in a certain region, and that no amnesties should be recognized.

75. At the Rome Conference, the ICRC reacting to the proposed opt-out mechanism for war crimes emphasized that “any form of additional consent, such as an opt-in precondition to the exercise of the Court’s jurisdiction, might give the impression that States could lawfully protect war criminals from prosecution. That would be a retrograde step for international law and would severely limit the Court’s effectiveness.” Similarly Switzerland stated that it could not endorse the adoption of models that “took the form of an opt-out mechanism for war crimes.” See *The Legislative History of the ICC Statute*, at 382, para.51 and at 343, para.19 respectively.

76. For example, Pakistan opposed “the inclusion of the crime of aggression because of its controversial nature”. It argued that “aggression was traditionally considered a crime committed by States whereas Pakistan favoured the principle that the Court’s jurisdiction should be limited only to crimes committed by individuals. That raised the complex problem as to how an individual might be prosecuted and punished for aggression, unless the Security Council first determined the existence of aggression, and that then those responsible were identified. In most cases those in authority would be the accused, something which threatened the concept of sovereignty of States.” See *The Legislative History of the ICC Statute*, at 130, paras.41, 42.

77. At the Rome Conference, Syria was against a UK proposal according to which the Court would be unable to exercise jurisdiction with respect to a crime of aggression unless the Security Council had first determined that a State had committed such an act. Syria argued that “in over 200 cases dealt with by it, the Council had avoided making such a determination. It had become a club of superpowers, whose right of veto could protect thousands of international criminals by blocking the Court’s procedures.” Therefore, in order to have a

Court that would deal with all who committed international crimes, Syria “was against assigning any role to the Security Council.” See *The Legislative History of the ICC Statute*, at 186, para.10.

78. Several States supported this position at the Rome Conference. For example Israel suggested that it was inappropriate at the present stage to include the crime of aggression in the jurisdiction of the Court. However if it was included, “determination by the Security Council under Article 39 of the Charter of the United Nations of the existence of an act of aggression should be a precondition to the exercise of the jurisdiction of the Court in so far as acts of aggression were concerned. That function, a basic function of the Council under Article 24 of the Charter, could not be ignored by the Statute, transferred to the Court or shared with the Court.” Likewise, Bangladesh dismissed as invalid the suggested dichotomy between the UN SC that was purportedly a political body and the Court that was supposed to be a legal body. Bangladesh argued that “when the Security Council acted under Article 39 of the Charter of the United Nations in cases involving the crime of aggression, its determination was the legal characterization of a situation. No Court could escape the binding effect of such a determination.” See *The Legislative History of the ICC Statute* at 171, para.114 and at 186, para.11, respectively.

79. At the Rome Conference, with regard to deferral, Russia “found it difficult to agree with any wording that might be interpreted as modifying the obligations of States under the Charter of the United Nations, in particular under Chapter VII. Moreover, the introduction of any time limit might be interpreted as affecting the Council’s powers under Chapter VII.” Likewise Namibia agreed, with regard to the role of the Security Council that “the Conference could not amend the Charter of the United Nations”. See *The Legislative History of the ICC Statute*, at 314, para.115, and at 315, para.128 respectively.

80. See Mahnoush H. Arsanjani, *Reflections on the jurisdiction and trigger mechanism of the International Criminal Court*, in *Reflections on the International Criminal Court*, 57, at 70 (correctly noting that: “Article 17 on admissibility and Article 90 on the obligation of the third State regarding competing requests by the Court and by another State do not provide any priority for the jurisdiction of the Court even if the matter has been referred to it by the Security Council. The result may not be fully consistent with the original intention of empowering the Security Council with the right of referral which was to avoid the creation of ad hoc tribunals”).

81. Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, in *1Max Planck Yearbook of the United Nations Law* (1977) 1, at 12.

82. John M. Czarnetzky and Ronald J. Rychlak, *An Empire of Law? Legalism and*

*international criminal court*, at 62.

83. For example, Germany argued at the Rome Conference that it believed that “in order to ensure the independence of the Prosecutor it was vital to give him or her the power to initiate investigations *ex officio*, since otherwise prosecutions could only be brought if a State party or the Security Council referred a situation to the Court. Giving the Prosecutor the power to act *proprio motu* has the advantage of depoliticizing the process of initiating investigations”. Likewise Sweden stated that it did not “wish the Court to be a mere tool of the Security Council; it should be truly effective, and the Prosecutor should be given an *ex officio* role.” See *The Legislative History of the ICC Statute*, at 175, para.14, and at 176, para.17, respectively.

84. These countries were the undisputed leaders of the so called like-minded group of states at the Rome Conference and were the ones pushing for the most radical jurisdictional mechanism in the ICC, based on universal jurisdiction, and with a marginal role of the UN SC. At the same time Germany is also one of the four countries members of the so-called G4 group of states pushing for a permanent seat in the UNSC. See Section b) iii) 1) *infra*.

85. Canada, for example, vividly supported the universal jurisdiction principle suggested by Germany as the sole basis of the Court’s jurisdiction stating that it “was committed to a Court with inherent or automatic jurisdiction over the three core categories of crime: genocide, war crimes and crimes against humanity. An opt-in or State consent regime would allow States to veto Court action and would render the Court ineffective. The number of States whose acceptance was required must be kept to a minimum.” See *The Legislative History of the ICC Statute*, at 160, para.11.

86. For example, Mexico noted in Rome that the “Conference was taking place at a time when the United Nations was discussing a number of proposals for reform of the Security Council” and that “those discussion were relevant for the present debate.” In particular Mexico alerted that “the Conference should not repeat the mistake made at San Francisco by tying the new Court to the organs of the United Nations, like the International Court of Justice.” In its view the “Security Council would be one source of information for the new Court regarding the existence of situations involving aggression, but not the only one.” See *The Legislative History of the ICC Statute*, at 179, para.52.

87. At the Rome Conference, Germany approving of the complementarity principle held that “where national criminal justice systems were non-existent or unable or unwilling to prosecute a given serious crime, the International Criminal Court should exercise jurisdiction.” See *The Legislative History of the ICC Statute*, at 110, para.55.

88. Three years after the start of its work, the ICC is still uniquely focused on events on

one continent (Africa). Reacting to growing criticism, the Prosecutor stated not without an apparent dose of cynics that his Office understood the “concerns about geographic focus, but regional balance is not a criterion for situation selection under the Statute.’ See *Office of the Prosecutor: Report on the activities performed during the first three years*, The Hague, 13 September 2006, p.2

89. President Philippe Kirsch has, indeed, frankly recognized this by stating that “In the case of democratic countries that have systems that function perfectly well, there is no reason why any issue should come before the ICC, because . . . a determination of how a proceeding is conducted does not depend on its outcomes. It does not require a prosecution. It could require an acquittal or even a decision not to prosecute. All that is required is that proceedings are conducted normally.” See Philippe Kirsch, *Remarks on Accountability vs. Impunity: The Role of the International Criminal Court*, Statement to the Council on Foreign Relations, Washington D.C. (Jan. 16, 2004), available at [http://www.cfr.org/publication/6696/accountability\\_vs\\_impunity.html](http://www.cfr.org/publication/6696/accountability_vs_impunity.html) (last visited 23 November 2006).

90. The Prosecutor informed in his first Report on activities that “of the approximately 20% of communications warranting further analysis, 10 situations have been subjected to intensive analysis. Of these 3 proceeded to investigation (the DRC, Northern Uganda, and Darfur), two were dismissed (Venezuela, and Iraq), and five analysis are ongoing.” In the case of Iraq where the alleged crimes were committed by nationals of a state party to the ICC (the UK) that was one of the coalition states in the war in Iraq, the communication noted, indeed, that “the information available supported a reasonable basis to believe that a limited number of instances of willful killing and or inhuman treatment had occurred. However the alleged crimes committed by nationals of State Parties in Iraq did not appear to meet the required gravity threshold. Additionally the Prosecutor noted that although it was not necessary to reach a conclusion on complementarity in light of the conclusion on gravity, national proceedings had been initiated in relation to each of the incidents.” See *Office of the Prosecutor: Report on the activities performed during the first three years* pp.8, 9 and 10. See also *ICC OTP Iraqi Response*, 9 February 2006, available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (last visited 21 October 2007).

91. Norway, for instance, expressed the view that “a qualified and independent Prosecutor would be the best insurance against politicized action by the Court and should be able to deal with criticism in relation to the setting of priorities when there were many possible cases.” Likewise the Netherlands argued that “the Prosecutor should have the full use of all sources of

information, from governmental and non-governmental sources as well as from victims' associations." See *The Legislative History of the ICC Statute*, at 173, para.130; at 173, para.134 respectively.

92. For example, the United States argued at the Rome Conference that "the argument that the State and Security Council referral approach would mean a politicized Prosecutor, while the *proprio motu* approach would ensure an impartial one, seemed simplistic. It would be naïve to ignore the considerable political pressure that organizations and States would bring to bear on the Prosecutor in advocating that he or she should take on causes which they championed. Both organizations and States might seek to act politically, but there was a significant difference in the accountability of States, as opposed to individuals and organizations." "The *proprio motu* proposal thus risked routinely drawing the Prosecutor into making difficult public policy decisions he or she was neither well equipped nor inclined to make. Such initial public policy decisions would be best made elsewhere, freeing the Prosecutor to deal for the most part with the law and the facts." Russia agreed that "if the Prosecutor was given direct power to initiate investigations, *proprio motu*, both the Prosecutor and the Court would become politicized." See *The Legislative History of the ICC Statute*, at 172, para.127, and 173, para. 130; at 173, para.133 respectively.

93. Cuba argued, for example, that it was opposed to an independent prosecutor because even in this case "conflicts of interest and jurisdiction would undoubtedly arise and politically motivated investigations could affect the credibility of the Court. A frank commitment to international cooperation was preferable to the so-called impartiality of one individual." India that also opposed a UN SC role in the Court was of the view that "the necessary cooperation would not be promoted by allowing the Prosecutor to act on his own, on the basis of sources of information, regardless of their reliability. Such an *ex officio* role for the prosecutor would jeopardize the principle of complementarity which was generally accepted as the basic foundation for the establishment of the Court." Iran thought it was premature to give the Prosecutor the power to initiate investigations on his own, "the Court would be established on the basis of a multilateral treaty and would be an international criminal Court, but not a supranational Court, justifying the Prosecutor's having *ex officio* powers of investigation." *The Legislative History of the ICC Statute*, at 171, para.118; at 169, para. 105; and at 167, para.82, respectively.

94. See *ILC Draft Statute* Articles 21,22,23and 25; See also *Report of the Working Group on the Question of an International Criminal Jurisdiction*, Report of the International Law Commission on the work of its forty-fourth session, 4 May-24 July 1992, A/47/10, Annex ("1992 Working Group Report"), para.4.

95. The ICC Prosecutor has actually recognized that “Although any crime falling within the jurisdiction of the Court is a serious matter, the Rome Statute (articles 53(1) (b) 53 (2) (b) and 17(1) (d)) clearly foresees and requires an additional consideration of “gravity” whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court.” See *Office of the Prosecutor Report on the activities performed during the first three years*, p.6.

96. See Mark S. Stein, *The Security Council, the International criminal Court and the crime of aggression: How exclusive is the Security Council power to determine aggression?* In *16 Indiana International & Comparative Law Review* (2001)1, at 15 (noting that “Under Article 51, the Security Council’s power to determine aggression is supreme, but not exclusive. Pending a determination by the Security Council, States can make their own determination of aggression. This arrangement makes it more plausible that the ICC can determine aggression, consistent with the Charter, especially given the Security Council’s authority to suspend ICC proceedings under Article 16 of the ICC Statute”).

97. See James Crawford, *The Work of the International Law Commission*, in the Rome Statute of the International Criminal Court: A Commentary, Vol. I, (Antonio Cassese *et al.* eds. Oxford 2002), 23, at 25.

98. See ILC Draft Statute, Report of the ILC Appendix III.

99. *The Legislative History of the ICC Statute*, at 309, paras.47, 48.

100. *The Legislative History of the ICC Statute*, at 182, para.85.

101. *The Legislative History of the ICC Statute*, at 154, para.46.

102. See Section 2, b) above.

103. Marc Grossman, *American Foreign Policy and the International Criminal Court* (May 6, 2002), available at <http://www.state.gov/p/9949.htm> (last visited, 12 March 2005).

104. *The Legislative History of the ICC Statute*, at 167, para.76 (emphasis added).

105. *The Legislative History of the ICC Statute*, at 167, para.84.

106. *The Legislative History of the ICC Statute*, at 308, para.30.

107. *The Legislative History of the ICC Statute*, at 165, para.62.

108. In Rome the US argued that it “remained unconvinced by the arguments put forward in favour of a *proprio motu* Prosecutor, and rejected the idea that the community of States was so lacking in moral and political courage that, when faced with an atrocity meriting the attention of the Court, not one State party would respond. It was wrong to argue that States’ unwillingness to invoke the Court’s jurisdiction was presumptively foreshadowed by the past reluctance of States to take on national prosecution of atrocities. On the contrary, the Court would provide an alternative to overcome the variety of legal, political, practical and resource

difficulties which had made States reluctant, if not unable, to take on such prosecutions.” See *The Legislative History of the ICC Statute*, at 172, para. 126. In the opinion of this author the self-referral cases so far before the ICC at least confirm these US arguments.

109. Of Course ICC supporters would say that Article 53 of the ICC Statute gives a margin of discretion to the Prosecutor to consider the interests of justice in *lieu* of prosecutions. But then this would be the same “politization” that the ICC supporters wanted to avoid by limiting the Security Council’s role.

110. See “Uganda, rebels sign disagreement accord” in *Inquirer.net*, Philippines News, Saturday 1 March 2008 (noting that “Kony has vowed never to sign a final peace agreement unless the ICC indictments are lifted, a position that has cast a pall over the peace process”. The ICC position is that the indictment must stay as “the ICC is not a part of the peace process.” The rebels wanted ICC justice replaced by traditional forms of justice in Uganda).

111. Kenya for example also argued that “it saw no reason why the Prosecutor would require *ex officio* powers to trigger Court action. The twin triggers of States and the Security Council, subject to appropriate controls, were sufficient to cover all cases which would need to go before the Court”. See *The Legislative History of the ICC Statute*, at 168, para.92.

112. See Ambassador David J. Scheffer, *War Crimes Tribunals: The Record and the Prospects*, Address at the Conference Convocation for the Washington College of Law Conference, in 13 *American University International Law Review* (1998) 1389, at 1398.

113. See *supra* note 110.

114. Portugal stressed for example that it “endorsed the position of the German delegation with regard to states not parties to the Statute. The solution proposed would result in a more effective tribunal and *was in harmony with international law*.” See *The Legislative History of the ICC Statute*, at 164, para.47 (emphasis added).

115. As one commentator notes: “In the initial phases of the deliberations for the establishment of an international criminal court, the United States sought to safeguard its own nationals from prosecution in the ICC by insisting on Security Council authorization of all prosecutions in the ICC. That would enable the United States, as a Permanent Member of the Security Council, to veto decisions of the Council calling for the prosecution of an American national.” See Johan D. van der Vyver, *American exceptionalism: Human rights, international criminal justice, and National self-righteousness*, in 50 *Emory Law Journal* (2001) 775, at 797.

116. Tina Rosenberg, *Conference Convocation, War Crimes Tribunals: The Record and the Prospects*, in 13 *American University International Law Review* (1998) 1406, 1408.

117. *Ibid.* at 1409-10.

118. As Ambassador David Scheffer, Head of the American Delegation to the Rome Conference has frankly recognized “On the larger issue of overall protection for the U.S. military, however, we finally had to face the fact that we were barking up the wrong tree and our military services were not being well-served with losing arguments. I spent many years seeking full immunity for our military forces and their civilian leadership in negotiations that quite frankly sometimes seemed the theater of the absurd. I was given nothing to offer--certainly not signature or ratification--in return *for an absolutist carve-out that other governments, particularly our closest allies, found arrogant and hypocritical*. I finally successfully lobbied my colleagues in Washington to permit me to offer a "good neighbor" pledge towards the Court in return for full protection. Since the next administration could reverse that political pledge, however, it proved unconvincing.” See David J. Scheffer, *A negotiator's perspective on the International Criminal Court*, in 167 International Military Law Review (2001) 1, at 8-9 (emphasis added).

119. See for example Luigi Condorelli and Santiago Villalpando, *Can the Security Council extend the ICC'S Jurisdiction?*, in *The Rome Statute of the International Criminal Court: A commentary* 571, at 577 (interestingly stating that “the extension of the Court’s jurisdiction would result from a resolution by virtue of which the Security Council request (or orders) that the Court take action beyond the terms of the Statute. Such a request *per se* would imply that the Court would contravene its own constitutive act, thus patently violating the principle of specialty. By virtue of this later rule, the scope of the powers of the ICC is a function of the common objectives that determined its creation and that are specified in its constitutive act. As a consequence the ICC could not be entitled to act beyond the terms of the Statute, except in case of an amendment or review in that sense approved under the procedure provided for in Part 13 or following a subsequent agreement between all the States Parties.”). This author finds this and others arguments disputable. The *lex specialis* theory is not applicable to the present case. Article 103 of the UN Charter clearly provides that in cases when countries enter into treaties overriding the UN Charter, the later takes precedence. Limiting the powers of the UNSC by a treaty outside the UN Charter regime is clearly contrary to it, and therefore the UN SC can in principle use the fullest of its powers under Chapter VII, if compelling reasons warrant doing so. If the ICC Statutory provisions are an impediment, the UNSC could make use of the resources of the same institution on an *ad hoc* basis, conferring it jurisdiction under a separate UN SC resolution extending for example its temporal jurisdiction, abolishing the complementarity and immunity regime and obliging States of the world to cooperate unconditionally with the ICC.

120. See *infra* Section iii).

121. See The American Service members' Protection Act of 2002 (ASPA), Pub. L. No. 107-206, 116 Stat. 820. tit. II (2002). This law is also called the "The Hague Invasion Act" for it gives the American President a right to free by force, Americans detained at the ICC Detention Unit in The Hague.

122. As Wedgwood correctly points out, if the US adhered to it, the ICC would have gained "the advantage of American diplomatic, military, and economic power to give teeth to the tribunal's orders..." See Ruth Wedgwood, *The United States and the International Criminal Law: The Irresolution of Rome*, at 198.

123. John Bolton the then Under Secretary of State for Arms Control recognized once that making the ICC collapse was the key objective of the US anti-ICC policy: "We should isolate and ignore the ICC. Specifically, I propose for United States policy--I have got a title for it . . . I call it the Three Noes: no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the Statute. . . . This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective." See John Bolton, *Is a UN International Criminal Court in the U.S. National Interest?* : Hearing Before the Senate Subcommission on Foreign Relations, 105th Cong. 724 (1998). (Statement of John R. Bolton, Under Secretary of State for Arms Control, Department of State). 23 July 1998.

124. See David J. Scheffer, *A negotiator's perspective on the International Criminal Court*, at 9 (frankly recognizing that: "in the eight years of my deliberations in Washington on the International Criminal Court--beginning with the work of the International Law Commission in 1993 and 1994--I do not recall hearing any senior Defense Department official refer to the core purpose of the Court, namely to advance international justice and enforce the law of armed conflict. Every single discussion was dominated by how the Court would impact the United States military") (emphasis added).

125. See John Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, in 64 *Law & Contemporary Problems* (2001)167, at 171 (stating that the ICC was "a strategy to assert supremacy over the United States"). See also Senator Jesse Helms, *We Must Slay This Monster*, *Financial Times*, July 31, 1998, at 18 (stating that the ICC is "a threat to US national interests ... and it is our responsibility to slay it before it grows to devour us").

126. John Bolton, the Under Secretary of State for Arms Control and International Security called the ICC a threat "to the independence and flexibility that America's military forces need to defend U.S. national interests around the world" See John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, at 169.

127. Indeed the 1933 Montevideo Convention on Rights and Duties of States, whose provisions are considered today general customary international law and find expression in the UN Charter, provides in Article 4 that “States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law”. See Montevideo Convention on Rights and Duties of States, signed 26 December 1933, and entered into force 26 December 1934.

128. Thomas Frank, *Collective Security and UN Reform: Between the Necessary and the Possible*, in 6 Chicago Journal of International Law (2006) 597, at 601.

129. For example Mexico stressed during the Rome Conference that “the Statute was not the right place to resolve differences of interpretation concerning the powers of the principal organs of the United Nations, particularly in view of the fact that the United Nations itself was now undergoing a process of far-reaching reform which could include changes in the role and powers of the Security Council. To link the Court solely to the Council, many of whose decisions were limited by the right of veto, was in Mexico’s view not only a grave political error but also a decision which was without foundation in law.” See *The Legislative History of the ICC Statute*, at 399, para.17.

130. Wedgwood, *supra* note 9, at 21.

131. These justifications were: first, *unanimity* which was considered indispensable for peace; second, *protection* of respective national security interests of the UNSC permanent members; third *protection of minority* blocs from overbearing majority coalitions; and fourth *prevention* of rash Security Council decisions. See Keith L. Sellen, *The UN Security Council veto in the new world order*, in 138 Military Law Review (1992)187, at 235.

132. *Ibid.* at 235.

133. United Nations, *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565 at 65, P 200 (2004).

134. See R. Nicholas Burns, *On United Nations Reform*, Testimony as Prepared Before the Senate Foreign Relations Committee (July 21, 2005), available at <http://www.state.gov/p/us/rm/2005/49900.htm> (last visited 12 September 2007).

135. See R. Nicholas Burns, *On United Nations Reform*. Security Council Reform. *Ibid.*

136. Thomas Frank, *The Powers of appreciation, who is the ultimate guardian of UN legality?* in 89 American Journal of International Law (1992) 519, at 523.

137. See ICC Press Release, 1 October 2004, available at <http://www.icc-cpi.int/press/pressreleases/46.html>, (last visited 22 October 2007).

138. See *ICC-UN Agreement signed*, ICC Newsletter No. 2, October 2004, available at [http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL2-200410\\_En.pdf](http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL2-200410_En.pdf), (last visited 22 October 2004).

139. See *The Relationship Agreement between the ICC and the United Nations*, Non-Paper, Coalition for the International Criminal Court, available at [http://iccnow.org/documents/CICCF5-NRelationshipAgmt\\_12Nov04.pdf](http://iccnow.org/documents/CICCF5-NRelationshipAgmt_12Nov04.pdf), (last visited 21 November 2007).

140. See *Relationship Agreement between the ICC and the United Nations*, signed 04 October 2004, (Preamble).

141. *Ibid.* Article 2 (3).

142. *Ibid.* Preamble (para.3); Article 2(1, 3). Scholars recognized indeed that the Agreement will establish, in general terms, “the principles of cooperation between the Court and the UN for the purpose of maintaining and restoring international peace and security”. See Luigi Condorelli and Santiago Villalpando, *Relationship of the Court with the United Nations*, in the Rome Statute of the International Criminal Court: A Commentary 219, at 223.

143. For example Condorelli and Villalpando have asserted that the “the Agreement provided for in Article 2 will not only have the effect of tying the Court to the UN system, but it will also legally bind the UN to respect the spirit and the rules of the Statute. In other words, the Agreement will have the legal effect of establishing an obligation for the UN to abide by the provisions of the ICC Statute” and that the UN Charter “does not entitle the Security Council to overlook its own obligations deriving from a conventional source (such as the Relationship Agreement concluded by the Organization with the Court) or the conditions established in an autonomous treaty (such as the Statute) regarding its intervention in the activity of a separate legal entity.” See Luigi Condorelli and Santiago Villalpando, *Relationship of the Court with the United Nations*, in the Rome Statute of the International Criminal Court: A Commentary 219, at 223; Luigi Condorelli and Santiago Villalpando, *Can the Security Council extend the ICC’s Jurisdiction*, *ibid.*, 517, at 580 respectively.

144. See Relationship Agreement, Article 2(2), Preamble (para.1).

145. For example on several occasions UNSC Chapter VII decisions have been directly addressed to and considered binding even on private organized armed groups fighting internal wars. See detailed discussion of UN SC sanctions imposed for example against a former Angolan rebel group-UNITA: Jose Doria, *Angola-A case study in the challenges of achieving peace and the question of amnesty or prosecution of war crimes in mixed armed conflicts*, in 5 Yearbook of International Humanitarian Law (2005) 3.

146. For an example see UN SC Res.1497(2003), 1August 2003, para.7 (authorizing the

deployment of a multinational force of West-African States in Liberia , but deciding under Chapter VII that “current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State”).

147. See UN SC Res. 1593 (2005), 31 March 2005, referring under Chapter VII the situation in Darfur (the Sudan) to the ICC, exempting from the Court’s jurisdiction 98(2) agreements (preamble (para.4) and nationals of any operations in Darfur authorized either by the UN SC or African Union (para.6).

148. See Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, in 31 New York University Journal of International Law and Policy (1999) 697, at 706 (noting that: “The various international tribunals other than the ICJ,... do have their own agendas. They were formed to serve the interests of the states that established them within the treaty regime for which they were created. The allegiance to that treaty regime may become greater than the allegiance to the international legal system as a whole. These specialized tribunals present the risk that their own centrifugal forces will drive them in directions away from the core of international law. As a result, these specialized tribunals could develop greater variations in their determinations of general international law and damage the coherence of the international legal system.”).

149. See Rosalyn Higgins, *The Relationship between the International Criminal Court and the International Court of Justice*, in *Reflections on the International Criminal Court* 163, at 163.

150. *Ibid.* at 163.

151. Some States were disappointed with this outcome. The US argued, for example, that the draft Statute “was strong on paper but weak in reality”, particularly since it “burdened the Court with a *proprio motu* Prosecutor, an institutional weakness which would result in the Court being overwhelmed with complaints and embroiled in controversy.” See *The Legislative History of the ICC Statute*, at 399, para.20. See also the Prosecutor’s position in the Iraqi case involving the United Kingdom *supra* note 96.

152. See *supra* note 113.

153. See ICC Statute (Articles 13(b), 16).

154. See *supra* note 113.

155. The argument of certain ICC proponents to the effect that the limited duration of the suspensive effect of Article 16, would “necessary guarantee that the process will be managed

with restraint” does not make it anymore legal. See Sir Franklin Berman, *The Relationship between the International Criminal Court and the Security Council*, in *Reflections on the International Criminal Court* 173, at 178. In this author’s view the essential thing is that it should not be up to States assembled outside the UN Charter framework to impose limitations on the work of the UN SC in contravention of the Charter.

156. See *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 ICJ at 146-47 (27 June). Reprinted in 4 *International Legal Materials* (1986) 25, at 1023. See also Commentary I. Blischenko, J. Doria, *Precedents in International Public and Private Law*, (Moscow, 1999) at 345. In Rome the US rightly argued that “only the Security Council could take the forceful measures that were necessary if aggression was to be addressed and remedied. That gave rise to political and other problems that had made it difficult to find consensus in the past, yet the Security Council had an essential role to play”. See *The Legislative History of the ICC Statute*, at 135, para.98.

157. See, for an example, UN SC Res. 687, 8 April 1991, on Iraq, para.16-29 (establishing a compensation fund, imposing other sanctions on Iraq and reaffirming under Chapter VII that Iraq “was liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait”).

158. ICC Statute, Article 25(1).

159. At the Rome Conference, France justly warned indeed that “it would be in the interests of the Court itself to be able to rely on a prior determination by the Security Council to avoid having to pass judgment not only on persons but also on States.” See *The Legislative History of the ICC Statute*, at 137, para.115.

160. ICC Statute (Article 119(2)).

161. See Statute of the International Court of Justice (Article 34(1)), available at [http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#Article\\_1](http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#Article_1).

162. See *Tadić* case, paras.8, 37, and 38.

163. See *Tadić* case, paras.35, 37, and 38.

164. See *Barcelona Traction, Light & Power Co.* (Belgium v. Spain), Second Phase, 1970 ICJ REP. 3, para.33 (5 February).

165. Although not supported by the remaining States, it is worth noting that, at least, three States in Rome opposed the legitimacy of having the UN SC to compel non States parties to the Court’s jurisdiction. India argued that “As the Council would almost certainly include non-party States among its members, that provision would confer on such States the power to

compel both States parties and other non-party States to submit to the Court's jurisdiction, in violation of the law of treaties, as well as conferring on the Council a role never envisaged for it by the Charter of the United Nations." Sudan was of the view that the proposal allowing the Security Council to submit complaints to the Prosecutor or refer matters directly to the Court, without the consent of the State concerned being needed, "was dangerous, it was important that the Court should not be weakened." Finally Syria also argued that any proposed triggering option that "would give the Security Council the right to trigger action even with respect to States which were not Parties to the Statute would be a violation of the Vienna Convention on the Law of Treaties." See *The Legislative History of the ICC Statute*, at 345, para.34, at 166, para.69, and at 147, para.55 respectively.

166. See *The Legislative History of the ICC Statute*, at 149, para.5.

167. *Ibid*, at 163, para.40.

168. See *The Legislative History of the ICC Statute*, at 161, para.23.

169. Sir Franklin Bergman, *The Relationship between the International Criminal Court and the Security Council*, in *Reflections on the International Criminal Court*, at 174.

170. Russia reacting to those States that defended the extreme view that non-party States could not be obliged to the Court's jurisdiction even by a UNSC resolution under Chapter VII, recalled that the "Security Council was responsible for maintaining international peace and security and that the question of whether a member was or was not a party to the Statute or to any other treaty was not of vital importance, since Article 103 of the Charter would prevail. There would thus be no violation of treaty law." See *The Legislative History of the ICC Statute*, at 314,315, para.116.

171. During the final stages of the Rome Conference, the US Delegation attempted to change the "or" by "and" (which would have made nationality states' consent mandatory), by arguing that "Article 12 on pre-conditions to the exercise of jurisdiction by both the State on whose territory the crime had occurred *and* the State of nationality of the accused would be required." However this amendment was rejected by a "no action" vote proposed by Norway. See *The Legislative History of the ICC Statute*, at 400, para.22; and paras. 24, 31 respectively (emphasis added).

172. In Rome the US argued that it "supported the Geneva Conventions of 1949 and acknowledged the importance of universality of jurisdiction in its proper context for the effective vindication of international law. However, the proposed Statute took the principle of universal jurisdiction far outside any acceptable context. Moreover, the attempt to impose the jurisdiction of the Court on States which did not become parties to the Statute would violate an elementary rule set out in the Vienna Convention on the Law of Treaties." See *Legislative*

*History of the ICC Statute*, at 400, para.21. See also *supra* note 172.

173. Mexico for example argued that “for the court to exercise its jurisdiction, it should be necessary for the State where the accused was *and* the State of nationality of the accused to have given their consent.” Similarly Iran wished to stress the fundamental importance of the principle of State consent and stated that “the consent of the custodial State, the territorial State *and* State of nationality should be required.” See *The Legislative History of the ICC Statute*, at 156, para.64, and at 157, para.69 respectively (emphasis added).

174. For example New Zealand argued that the suggestion voiced by some States that it would be necessary for the territorial State and possibly the State of nationality to consent “may create a problem by enabling a State whose national had committed serious crimes in another State to withhold its consent and shield the accused. That would not contribute to enhancing peace and security.” Likewise Switzerland considered that the requirement that “the State of nationality of the accused or suspect must accept the jurisdiction of the Court would have the consequence that nationals of non-party States would be outside the jurisdiction of the Court regardless of their whereabouts, whereas currently they were subject to the jurisdiction of States other than their own as soon as they crossed their national frontiers.” See *The Legislative History of the ICC Statute*, at 159, para.7 and at 343, para.20, respectively.

175. See Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, in 10 *European Journal of International Law* (1999)108, at 117 (noting that: “Nationality and territoriality are each an individual and sufficient basis for jurisdiction” and “it is within the sovereign power of a State to allow an international body to exercise jurisdiction in the same way in which that State may exercise jurisdiction.”); See also Hans-Peter Kaul, *Precondition to the exercise of jurisdiction* , in *The Rome Statute of the International Criminal Court: A Commentary*, 583, at 587 (stating : “the universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes. It combines this assumption with the very simple idea that States must be entitled to do collectively what they have the power to do individually. Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf”). In this author’s opinion, these statements would only be correct if the new entity’s authority engaged only Member States. Those who advocate this position forget that universal jurisdiction for the core crimes is also based on presumed or express consent of all States. Hence transposing this to a new non-sovereign entity can only be done with the same kind of consent of all those States otherwise, its effect would necessarily be restricted to the States that accepted it only.

176. Ibid, at 592, Hans-Peter Kaul (noting that “in general, there is no rule in international law which would prohibit such a transfer of a State’s rights to a new entity, under international law, which this State is co-establishing as a Contracting Party and will maintain through its contributions as a State Party.”) Kaul’s position is based on the “Lotus principle” articulated in 1927 in the case *SS Lotus* by the Permanent Court of International Justice which stated that “Restrictions upon the independence of States cannot ... be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules.” See *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No.10, at 18. In this author’s opinion this statement is correct only as far as it pertains to States parties of the new entity, not non States parties.

177. Even the practice of interstate relations shows that States are normally allowed to disregard a request for the exercise of ceded jurisdiction if the person concerned is *not a national or is not a person with at least permanent resident status* in that country. For example Article 11 of 1972 European Conventions on the transfer of proceedings in criminal matters, states that: “The *requested State may not refuse acceptance* of the request in whole or in part, *except in any one or more of the following cases*: c) if the *suspected person is not a national of the requested State* and was not ordinarily resident in the territory of that State at the time of the offence.” (Emphasis added).

178. Ambassador David Scheffer once noted: “Official actions of a non-party State should not be subject to the Court’s jurisdiction if that country does not join the treaty, except by means of Security Council action under the UN Charter. Otherwise, the ratification procedure would be meaningless for governments. *In fact, under such a theory, two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone everywhere in the world.* There will necessarily be cases where the international court cannot and should not have jurisdiction unless the Security Council decides otherwise.”). See *Is a UN International Criminal Court in the U.S. National Interest?* : Hearing Before the Senate Subcommittee on Foreign Relations, 105th Cong. 1314 (1998) (Statement of David. J. Scheffer, Ambassador-at-Large for War Crimes Issues, Department of State). 23 July 1998.

179. See Michael Scharf, *The ICC’s jurisdiction over non-party States: a critique of the US position*, at 103-109.

180. See Seth Harris, *The United States and the International Criminal Court: Legal potential for non-party States*, in 23 *Hawaii Law Review* (2000) 277, at 303 (stating that: “Normally, sovereign States can pass their authority to prosecute these crimes against the international community to an international court. The *erga omnes* obligations imputed from the nature of the subject matter as *jus cogens* entitles prosecution of individuals by an

international court, if the domestic court refuses to prosecute.”) See also Michael Scharf, *ibid*, at 76 (stating that “...where the territorial state gives its consent ...in addition to the principle of territoriality, the ICC has a legitimate interest on the basis of the universal nature of the crimes to prosecute the nationals of non-party states. In this limited context, the jurisdiction of the ICC can be deemed to be based concurrently on the universal and territorial bases of jurisdiction.”).

181. In Rome Germany justified its proposal to confer universal jurisdiction to the Court by stating the following: “The Court would be acting on behalf of the international community as a whole. Since the contracting parties to the Statute could individually exercise universal jurisdiction for the core crimes, they could also, by ratifying the Statute, vest the Court with a similar power to exercise such universal criminal jurisdiction on their behalf, though only of course with regard to the core crimes.” See *The Legislative History of the ICC Statute*, at 145, para.48.

182. France argued for example that “the international community was perhaps not yet ready for the idea of universal jurisdiction as put forward by Germany. There was no obligation on State not parties to the Statute to cooperate. Generally speaking the State on whose territory the crime had been committed and the State of nationality of the accused or the custodial State would have to be parties to the Statute, or have accepted the competence of the Court for it to be in a position to exercise its jurisdiction”. See *The Legislative History of the ICC Statute*, at 154, para.48.

183. For example Israel rejecting the German proposal held that “while States had universal jurisdiction in respect of the core crimes, the Court was a judicial organ, exercising its jurisdiction on a consensual basis, subject to the conditions and limitations contained in the Statute.” See *The Legislative History of the ICC Statute*, at 148, para.66.

184. See *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility (International Court of Justice, 3 February, 2006) [hereinafter *Congo v. Rwanda* case].

185. Congo asserted among others, 3 bases of jurisdiction which involved claimed breaches of norms *jus cogens*. First, Congo asserted that by its acts of aggression and serious violations of human rights Rwanda breached its obligations under the 1948 Genocide Convention and contended that Rwanda's reservation withholding jurisdiction from the ICJ was invalid since it intended to prevent the Court from protecting the norm *jus cogens* prohibiting genocide. Second, Congo asserted that the Rwanda's reservation to the Racial Discrimination Convention was invalid since it codifies norms *jus cogens*. Third, Congo relied on Article 66 of the Vienna Convention on the Law of Treaties, to contend that the

Court had jurisdiction in relation to any violation of norms *jus cogens*. See *Congo v. Rwanda case*, para.15.

186. The Court first held that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things, and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.” Applying this *dictum* to the case at issue the Court held: “Rwanda’s reservation to Article IX of the Genocide Convention *bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves* under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, *which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfillment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.*” See *Congo v. Rwanda case*, paras.64, 67 (emphasis added).

187. The ICJ held that it “has jurisdiction in respect of States only to the extent that they have consented thereto” and not because of the *jus cogens* character of the norms involved. See *Congo v Rwanda case* para.65.

188. See Johan D. van de Vyver, *American exceptionalism*, at 818 (stating that: “the ICC Statute provides a forum for the prosecution of individuals suspected of having committed acts of genocide, crimes against humanity or war crimes. It does not place any obligations upon non-party states unless such states have consented to cooperate with the ICC.”). See also John Murphy, *The Quivering Gulliver: US views on a permanent International Criminal Court*, 34 *The International Lawyer* (2000) 45, at 65 (stating that: “for the court to exercise jurisdiction over the United States, the consent of the U.S. Government would clearly be required. It is an entirely different issue, however, as to whether U.S. consent is required for the Court to exercise jurisdiction over its national.” See also Hans-Peter Kaul, *Preconditions to exercise of jurisdiction*, at 609 (noting that: “the jurisdiction of the Court over nationals of non-States Parties to the extent implied in the universal approach should not be seen as imposing an obligation on a non-State Party (or infringing upon a right of such State), but rather as responding to (existing) obligations of the individual under international law.”). The last remarks disregard two important facts: that individuals are subject of international law to the extent agreed to by their respective countries, and that there is a difference between the obligations as such and the mechanisms chosen to enforce these obligations. States have agreed to confer on themselves on a mutual basis the right to enforce the obligations against individuals. A decision to confer in addition such a right to a third organ is one that can only bind the States involved, since it is not absolutely necessary to enforce the obligation.

189. As India rightly pointed out during the Rome Conference, “the success of the Court would depend in great measure on cooperation among States aimed at punishing heinous crimes of international concern. While the Court’s jurisdiction would be individual, *the nature of the crimes was such that the reputation of Governments would inevitably come under scrutiny.*” See The Legislative history of the ICC Statute, at 169, para.104 (emphasis added).

190. The 1933 Montevideo Convention on the Rights and Duties of States defines indeed that the “State as a person of international law should possess the following qualifications: a) a permanent population, b) a defined territory, c) government, d) capacity to enter into relations with other States.” See Montevideo Convention on the Rights and Duties of States, signed in Montevideo, 26 December 1933, entered into force 26 December 1934, Article 1.

191. See Guenady M. Danilenko *The Statute of the International Criminal Court and third States*, in 21 Michigan Journal of International law (2000) 445, at 461 *et seq* (citing anti-terrorism Conventions and stating that: “there is still another perfectly valid basis for the Rome Statute’s jurisdictional reach. International law recognizes that State Parties to an international treaty may exercise extraterritorial treaty-based jurisdiction over crimes of an international character defined by that treaty.”); See also Michael Scharf, *The ICC’s jurisdiction over non-party States: a critique of the US position*, at 100 *et seq* (stating that: “It has been suggested in this regard that a distinction should be drawn between treaties codifying customary international law and treaties legislating new international crimes”, “But even if some of these crimes were deemed not to reflect customary international law, there is precedent for State parties to exercise universal jurisdiction created solely by treaty over the nationals of non-party States.”)

192. See Patrick Robinson, *The missing crimes*, in the Rome Statute of the International Criminal Court, 497, at 517 (noting that at the Rome Conference, among the principal arguments against the inclusion of international terrorism as a crime within the jurisdiction of the ICC were that “some terrorist acts were ordinary crimes and thus not sufficiently serious to warrant prosecution by an international tribunal” and that “*it could be more efficiently prosecuted at the national level*, though it was acknowledged that there were some terrorist acts that would meet the criteria of gravity required for the inclusion of the crimes in the Statute”) (emphasis added).