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# **Impunity and the International Criminal Court (ICC)**

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Thesis submitted for the degree of PhD in International  
Criminal Law

2012

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**Declaration for PhD thesis**

I have read and understood regulation 17.9 of the Regulations for students of the School of Oriental and African Studies concerning plagiarism. I undertake that all the material presented for examination is my own work and has not been written for me, in whole or in part, by any other person. I also undertake that any quotation or paraphrase from the published or unpublished work of another person has been duly acknowledged in the work which I present for examination.

Signed:     Mansour Talebpour

Date: 24/12/2012

To: My Supervisor and My Family  
&  
In Remembrance of  
My  
Mother

## Acknowledgments

Any errors or omissions contained in this study are my sole responsibility. If the study has any merit, however, it is due to the assistance that I have received from many individuals. My supervisor, Professor Matthew Craven, greatly helped, encouraged and taught me at every stage of this research. He has been an invaluable source of excellent advice that I could access whenever and wherever I needed it; I thank him for his patience, tolerance and encouragement in the course of the last five years. I would like to express my sincere gratitude to Professor Chandra Lekha Sriram for kindly accepting to act as my second supervisor during the most difficult time for me, from last summer until the present time. I also thank her for her continuing support and useful comments on my thesis.

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## ***Abstract***

This thesis looks at the question of impunity in the context of the International Criminal Court and is concerned with elucidating an important paradox: that despite the ICC's explicit aim of ending impunity for the perpetrators of serious international crimes, it may also be seen to create, legitimise, and facilitate impunity in a variety of different ways. Whilst it creates and defines crimes, and empowers certain parties to act, it also immunises the acts of others from criminal judgment and enables the (almost) routine escape from judgment. The research presents a detailed analysis of the specific ways in which the ICC may give rise to situations of impunity.

The thesis focuses on internal and external aspects of the relationship between the ICC and *de jure* and *de facto* impunity. Regarding the former, internal dimension, it is shown that impunity may arise in the Statute through the following ways: criminalisation, definition of new crimes, amnesties, immunities, defences, generic and particular procedural problems of the ICC, the nature of the complementarity of jurisdiction, and deficiencies in the institutional mechanisms of the ICC.

In terms of the external dimension, the research explores the interaction between a number of external agencies and the ICC. It reports how the relationship between the Security Council and the ICC, together with the opposition of several powerful countries and states not party to the Statute, may also lead to a condition of *de jure* and *de facto* impunity in the Statute and the practice of the Court so far.

The thesis finds that the ICC, similarly to previous international tribunals such as the *ad hoc* tribunals, inherited many issues concerning enforcement of international justice, but also has its own particular difficulties and weaknesses. The Court not only was not created as a mechanism of universal international justice, but its limited jurisdiction cannot be implemented in practice equally even regarding all states party to the Statute; thus, the ICC is a Court of partial justice, as justice has been differentiated via the different relative powers of states. From the very outset of the formation of the ICC, certain countries have aimed at its being created as a weak institution with very limited jurisdiction and sanctioning and enforcement power. This weakness, however, is also a source of power for those states that seek to maintain the unequal distribution of criminal justice.

### **Abbreviations**

ASP	Assembly of states parties to the Rome Statute
CICC	Coalition for the International Criminal Court
CLS	Critical Legal Study Criminal Court
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ETS	European Treaty Series
EU	European Union
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICTJ	International Center for Transitional Justice,
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institute of De Droit International
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg Tribunal)
IMTFE	International Military Tribunal for the Far East
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organisation
NGO	Non- governmental organisation
OTP	Office of the Prosecutor
Prep Com	Preparatory Committee
RPE	Rules of Procedure and Evidence
SC	The Security Council
SOFAs	Status of Forces Agreements
UN GA	United Nations General Assembly
UNTS	United Nations Treaty Series
UN SG	United Nations Security-General

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## ***Impunity and the International Criminal Court (ICC)***

### ***Chapter I: Introduction***

Impunity for international crimes and for systematic and widespread violations of human rights is one of the fundamental concerns of the international community in the new century. Some perpetrators are living freely and have never been brought to justice, and we have not yet seen many prosecutions of international crimes that have occurred on a very large scale. As, Kofi Annan, the former Secretary General of United Nations, said: ‘Today, we live in a world where a man has more chances to be judged if he kills only one person than if he kills 100 000.’<sup>1</sup>

The establishment of the first permanent international criminal court the (ICC) is the most significant event since the creation of the United Nation in 1945. It is the major effort to bring criminals to justice, which started at Nuremberg and continued through the creation of *ad hoc* tribunals for Yugoslavia and Rwanda. The ICC has jurisdiction over the most serious crimes of concern to the international community, namely genocide; crimes against humanity; war crimes; and the crime of aggression, jurisdiction over which has been postponed.<sup>2</sup> The Statute describes its aim as being ‘to put an end to impunity for the perpetrators of these crimes’.<sup>3</sup>

The aim of this study is, broadly, to concern itself with the question as to whether this stated rationale for the establishment of the ICC is a sound one, whereby the ICC will in fact contribute to an end to impunity. To what extent can the ICC be understood as a vehicle for overcoming the problem of impunity in international law? How realistic is that idea? Might it be argued, by contrast, that whatever merits it might have as a vehicle for the prevention of atrocities taking place, the ICC also may create the conditions for the perpetuation of impunity: that it is, in that sense, part of the problem? I should state here that the definition of impunity adopted in this thesis implies a broader understanding than simply a lack of retributive justice; I will argue that impunity is not always an awful thing, but may also be seen to be necessary and inevitable in some situations. The main concerns of this thesis,

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<sup>1</sup> As quoted by Beigbeder, Y. *Judging criminal leaders: the slow erosion of impunity* (2002), at 207.

<sup>2</sup> See the Rome Statute Art. 15, in accordance with Art. 5, paragraph 2, of the Rome Statute, the crime of aggression has finally been defined at the review Conference in Kampala (Uganda), but the Court will be able to exercise its jurisdiction over this crime only after 1, January 2017. See *Review Conference of the Rome Statute of the International Criminal Court*, Kampala, Annex 1, (3), (31 May-11 June 2010), Resolution RC/Res.6. Available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) (Accessed 04/01/2012).

<sup>3</sup> See the Preamble of the Rome Statute.

however, will be to explore the following: under what conditions the ICC may be said to create impunity, whether actually or potentially; how the ICC fosters, induces, encourages or tolerates impunity; and whether the ICC could effectively address the issue of impunity or has failed to do so.

Why are these interesting questions?

Standard accounts of the ICC, or explanations provided for its existence, begin with the proposition that there is a need to ‘bring to justice’ those accused of international crimes, and that the ICC provides thereby a mechanism by which this will be achieved. It starts, in other words, from the assumption a) that there are perpetrators of international crimes whose ‘criminality’ remains unpunished, and b) that the ICC will be a means of eradicating that impunity. The Statute emphasises, for example, that most serious crimes of concern to the international community must not go unpunished.<sup>4</sup>

This is potentially problematic because the ICC does not simply provide a neutral mechanism for bringing to justice those who have committed crimes in international law, but actively inserts itself in the regulatory environment. In general, I will argue that the ICC creates, legitimises, and may potentially create or facilitate impunity. It creates and defines crimes, it empowers certain parties to act, and it immunises the acts of others from criminal judgment. Each and every part of the Statute contributes to the sum total of rights and obligations which we know to be international criminal law, and does so in various ways, in some cases it may increase the incidence of impunity, in others may legitimise criminal behaviour, in yet others it may contribute to the conditions under which a criminal may effectively escape the terms of international justice. That it may not do so in every case is certainly to be conceded, but the fact that it may do so in some, or at least has the potential for doing so, certainly changes, and indeed challenges, the way in which we are accustomed to think about the ICC as an initiative.

Impunity in the ICC can be divided into *de jure* and *de facto* impunity. Concerning *de jure* impunity, the first instance to be considered is that the Statute may offer impunity via non-prosecution where prosecution is not in the interests of justice.<sup>5</sup> The Statute provides for the possibility of the Prosecutor reaching such a decision; in particular, in the case of a conflict between peace and order on the one

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<sup>4</sup> *Id.*

<sup>5</sup> Rome Statute 53 (1), (c).

hand and justice on the other hand in a society, rationally the priority should be with peace and order. The ICC may also potentially create impunity through new approaches to the definition of crimes, defences, and via its potential recognition of amnesties.<sup>6</sup> In such cases, one may say that impunity is legitimised or given legal form. Not only does the Statute, paradoxically to the main objective of its existence, provide some room for the recognition and legitimisation of impunity, on some occasions impunity may also be taken to be positively desirable. In addition to *de jure* impunity, the ICC may also contribute to *de facto* impunity as a consequence of a range of procedural and institutional deficiencies such as the inadequacy of the mechanism of the jurisdiction and the enforcement power of the Court. This type of impunity is of various types; it may occur via problems of non-prosecution of certain individuals or groups of people; and extra-judicial factors impacting on the decisions of the judges, and the role of powerful states and external agencies such as the Security Council (SC) also fall into the category of *de facto* impunity.

By way of introduction to this general argument, this chapter will be divided into four sections. The first will address the methodology and theory of the thesis, which is based upon certain insights drawn from American legal realism.<sup>7</sup> The second section will examine the relationship between law and politics and the concept of this relationship in general and concerning the ICC in particular, from the standpoint of legal realism and as it pertains to the question of impunity. This will lead to the two core ideas of this thesis. The first is that the law in books is different from the law in practice;<sup>8</sup> that law is a social creation, an instrument which should serve a social end,<sup>9</sup> and the law is not a simple rule on paper, but a function of authoritative decision makers.<sup>10</sup> Accordingly, when looking at the ICC we need to focus not merely on the Statute, but also on the ways in which the various different actors and institutions may act and behave pursuant to the objectives set out in the Rome Statute and the rules contained therein. The second core idea is related to the connection between law and politics, and observes that a certain legal rule in practice operates in a given social situation marked by disparities in wealth and power, that

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<sup>6</sup> *Id.*, Art. 53, e.g. where these are in the interests of justice.

<sup>7</sup> Herein after legal realism or realism.

<sup>8</sup> Pound R. 'Law in Books and Law in Action,' 44 *American Law Review* (1910),12, at 34.

<sup>9</sup> Holmes O.W. 'The Path of the Law', 8 *Harvard Law Review* (1897), 457, at 467; Holmes O.W. 'Privilege, Malice and Intent', 8 *Harvard Law Review* (1894),1, at 9; Tamanaha B. Z. 'Understanding Legal Realism,' 87 *Texas Law Review* (2008-9), 731, at 737.

<sup>10</sup> Cohen F. 'Transcendental Nonsense and the Functional Approach', 35 *Columbia Law Review* (1935), 809, at 842.

the law cannot as a consequence apply equally to all. We may observe that the ICC is a nascent legal structure that is partly embedded in a functional social context, i.e. the context of unequal power; international law promises the sovereign equality of all states,<sup>11</sup> but the reality is that states are unequal and the Statute cannot apply equally even to all state parties. Justice, if it is to be sought in such a context, may only be ‘real’ as a form of partial justice. In order to elucidate these ideas further, the third section of this chapter will focus upon the definition of impunity and the concept of impunity in the Statute. The fourth, and final, section will consist of a chapter by chapter outline of the thesis.

### ***1.1. Methodology and theory***

The main concern of this thesis is to evaluate the ICC as an institution designed to combat and eliminate impunity. For purposes of such an evaluation, it will not merely be asked whether the rules of the ICC are internally coherent, whether they conform, or depart from, existing precepts of international criminal law, or whether the definition of concepts and crimes leave gaps or ambiguities. Such analytical observations are necessary, but not sufficient. It will additionally be asked whether the ICC can in fact combat impunity, and to that extent, attention will be drawn towards how the rules operate in practice – both actual and potential. This demands a methodology which is, in part, analytical and linguistic, in part also ‘semi-empirical’ or ‘contextual’. On the one side will be an analysis of the terms of the Statute – what it provides on paper, how the rules are defined and determined, and the putative relationship between those rules and the pre-existing provisions of international criminal law and case law of relevant tribunals. On the other side, however, will be a contextual evaluation of the ICC as an institution, that looks at both how the ICC operates (or might operate) in practice, and at the practical constraints that impinge upon its work. This latter analysis, in a sense, is semi-empirical insofar as it is concerned with looking at the social and political context of judicial decision-making, of the effective capacity of an institution such as the ICC to deliver justice in the context of international society, in which power differentials within international society as well as the resourcing and capacity of the ICC itself will be brought into

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<sup>11</sup> Cassese A. *International Law* (2001), at 88; sovereign equality also has been defined, in *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* (24 October 1970), UN G.A. Res. 2625, 25 UN GAOR, SUPP. No. 28, at 121, UN Doc. A/8028 (1971).

consideration. It is, however, not empirical in the sense of concerning itself with the analysis of data-sets or statistical probabilities.

To characterise the research methodology more exactly, I may note that, in order to address the research questions and problems, my research has mainly been based on library and archival research. I will engage in textual,<sup>12</sup> doctrinal and qualitative analysis of situations or actors as appropriate. I also will investigate the different cases - or the stages reached by each case so far - in the ICC, via a series of related topics, each of which supports the main argument of the thesis.

In terms of theoretical standpoints, I will here examine: a) American legal realism; b) the relation between law and politics, or law in the social context; and c) the necessity for the re-examination and revision of the law. American legal realism dominated legal theory in the first half of the twentieth century in the United States<sup>13</sup> the predominant insight of which asserts that the law is what is decided by the courts - the law in action and rules made by judges, rather than paper rules.<sup>14</sup> This insight is central to this thesis the task of which is not merely to describe the content of the Rome Statute -the Court's paper rules- but also to look at the law in action and understand how these rules may operate in particular contexts and cases. In fact, the distinction between the rules in the books (paper rules) and the real rules (the Court's decisions) is not entirely straightforward in this context as there is no more than one case of a conviction in the ICC so far.<sup>15</sup> In order to evaluate the Court's 'real rules', thus, I will focus on the procedural, evidentiary decisions and the Court's administrative decisions thus far. The realist, anti formalist analysis of the relation between law and politics, law as embedded in the social context, and finally the necessity for law to be assessed in terms of its outcomes will be considered in due course.

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<sup>12</sup> Bryman A. *Social Research Method* (2004), at 19-20.

<sup>13</sup> Ratner S.R. 'Legal Realism', *Max Planck Encyclopedia of Public International Law* (2011), Para 1; Tamanaha B. Z. *Supra* note 9, at 731-732; Yntema H. E. 'American Legal Realism in Retrospect,' 14 *Vanderbilt Law Review* (1960-61), 317, at 317-31; see also generally, Horwitz. M. J. *The Transformation of American Law 1870-1960, The Crisis of Legal Orthodoxy* (1994); Kalman L. 'Review Essay, Legal Realism Now,' Reviewed by J. W. Singer, 76 *California Law Review* (1988), 465.

<sup>14</sup> Llewellyn K.N. 'Some Realism about the Realism- Responding to Dean Pound, 44 *Harvard Law Review* (1931), 1222, at 1223 and 1236; Pound R. *Supra* note 8, at 34; Frank J. *Law and the Modern Mind* (1930), at 33; Radin M. 'Legal Realism', 31 *Columbia Law Review* (1931), 824, at 824; Leiter B. 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence,' 76 *Texas Law Review* (1997), 267, at 268.

<sup>15</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber 1 (10 July 2012), *Lubanga* found guilty for war crimes of enlisting of children under the age of 15, to a total of 14 years imprisonment, on 14 July 2012.

It is important to investigate the question of what legal realism implies and why this study has adopted this theoretical standpoint. Realism developed predominantly on the basis of domestic legal issues in America, and realist scholars did not generally extend their investigation into international law.<sup>16</sup> In the 20th century a group of American scholars, as well as several European scholars, such as Georges Scelle and Max Huber, came to regard themselves as ‘new realists’ and attempted to integrate legal realism into international law. They were anti-formalist in their approach and attempted to modernise international law.<sup>17</sup> They have been influential in changing the traditional concept of law into that of a social creation based on tangible rules. Thus, although legal realism was initially purely a domestic school in the US common law system, its effects continue to be felt nationally and internationally today. Realists tend not to accept that legal rules determine the results of legal disputes; they point instead to various other factors contributory to the process of making legal decisions.<sup>18</sup> As Pound observed, ‘the dogma of a complete body of rules to be applied mechanically was quite out of line with reality.’<sup>19</sup>

Accordingly, the investigation of the concept of law in realism, which has a significant impact on the jurisprudence, as a preliminary step would help towards a better understanding of the Rome Statute as a set of paper rules and of how it is actually applied in practice.

## ***1.2 .The concept of law in legal realism***

American legal realism explicitly rejected the idea of law as a body of established, logically connected rules, and instead characterised law as a production of decisions and behaviour by judges and – partly – by administrative agencies,<sup>20</sup> within the limitations set by statutes and ‘public opinion’.<sup>21</sup> Generally realism emphasises law in action, the social creation of law, and the predictability of law as it has been experienced.

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<sup>16</sup> Ratner R.S. *Supra* note 13, Para 2.

<sup>17</sup> *Id.*, at 2; Koskenniemi M. ‘Introduction: Alf Ross and Life Beyond Realism,’ 14, *European Journal of International Law* (2003), 653 at 656.

<sup>18</sup> Rathner R.S. *Ibid.*

<sup>19</sup> Pound R. ‘The Call for a Realist jurisprudence,’ 44 *Harvard Law Review* (1930-31), 697, at 707.

<sup>20</sup> Llewellyn K.N. ‘A Realistic Jurisprudence Next Step,’ 30 *Columbia Law Review* (1930), 431, at 453.

<sup>21</sup> Radin M. *Supra* note 14, 824; Ratner S.R. *Ibid*, Para 1.



Holmes, who is considered a father of the legal realism movement,<sup>22</sup> in his earlier book *The Common Law* asserted that '[t]he life of the law has not been logic, it has been experience.'<sup>23</sup> He insisted that the growth of the law is legislative in substance 'in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds.'<sup>24</sup> The grounds to which Holmes was referring he explained as 'consideration of what is expedient for the community concerned.'<sup>25</sup> In his later writing in 'The Path of the Law', in particular, Holmes asserted the social creation of the law.<sup>26</sup> In a comparison between the implications of the rules and general principles and the significance of the court's decision, Holmes stated that it was the virtue of common law that it decided on the case first and established the principle after that.<sup>27</sup> The actual practice of the courts, then, provided the basis on which the principles are developed. On the definition of law, Pound came to differ slightly with Holmes and asserted that law is derived from both experience and, he added, reason: 'law is experience developed by reason and reason tested by experience. For experience we turn to history. For reason we turn to philosophy.'<sup>28</sup>

A central facet of realism thus is to assert that the law is a social creation, an instrument which should serve a social end and that there is an inevitable duty on the part of judges to realise the social advantages of their decisions.<sup>29</sup> Holmes asserts that society and public policy sacrifice individual welfare to themselves and to universal good, maintaining that the law treats individuals as a means to an end, and uses them to increase the general welfare even at individuals' own expense.<sup>30</sup> Pound similarly asserts that a new jurisprudence should foster a 'weighing of social interest'.<sup>31</sup> Later,

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<sup>22</sup> Horwitz. M. J. *Supra* note 13, at 110.

<sup>23</sup> Holmes O.W. *The Common Law* (1963), at 5; see also Cohen F. *Supra* note 10, at 826; he emphasises that 'all concepts that cannot be defined in terms of the elements of actual experience are meaningless.'

<sup>24</sup> *Id.*, at 31.

<sup>25</sup> *Id.*

<sup>26</sup> Holmes O.W. (1897), *Supra* note 9, at 467-469. He asserts 'I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.' See also at 467.

<sup>27</sup> Holmes O.W. 'Codes, and Arrangement of the Law,' 5 *American Law Review* (1870),1, at 1.

<sup>28</sup> Pound R. *New Paths of the Law* (1950), at 12.

<sup>29</sup> Holmes O.W. (1897), *Ibid.*, at 467; and (1894), *Supra* note 9, at 9. It should be noticed that Holmes's earlier view was different than what he said here for instance, his view law is as independent of the human will in his article on 1894, he asserts '[t]he time has gone by when law is only an unconscious embodiment of the common will'.

<sup>30</sup> Holmes O.W. (1963), *Supra* note 23, at 37 and 40.

<sup>31</sup> Pound, R. 'A Survey of Social interests,' 57 *Harvard Law Review* (1943),1, at 7; Pound R. 'The Scope and Purpose of Social jurisprudence,' 25 *Harvard Law Review* (1912),140, at 146. He asserts

Llewellyn characterised law as a means to a social end as a common point among realisms.<sup>32</sup> Thus, law in realism's view could be understood as more susceptible to change due to the demands of society.<sup>33</sup> Hence, realism insists that legal rules more specifically and concretely, and contextually, could in fact fit reality.<sup>34</sup> Pound, like many other realist scholars, was a critic of natural law theory, maintaining that the latter was highly individualist.<sup>35</sup> It can be seen that realism's scholars have been generally united on an understanding of law as a social fact,<sup>36</sup> and consequently to have taken an anti-formalist position. They have not, however, been opposed to positivism, but regarded this as compatible with the realist position,<sup>37</sup> as positivism has also regarded the law as a matter of social fact. Therefore, both realism and positivism share the same idea about the nature of law.

Realism emphasises the predictability of the law and seeks to increase its predictability, but it considers the law to emanate from the courts and cases rather than the study of legal doctrine.<sup>38</sup> Realists want to predict outcomes (of the courts) and appraise the law empirically based on the court outcomes.<sup>39</sup> Considering the question of what constitutes the law, Holmes asserted that '[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'.<sup>40</sup> Felix Cohen also asserted that 'actual experience does reveal a significant body of predictable uniformity in the behaviour of courts'.<sup>41</sup> Llewellyn criticised Frank, who had become the leader of the so-called 'fact sceptics', who emphasised

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'the conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with life.'

<sup>32</sup> Llewellyn K.N. (1931), *Supra* note 14, at 1236.

<sup>33</sup> Pound R. (1912), *Ibid*, 140, at 146-47.

<sup>34</sup> Horwitz M.J. *Supra* note 13, at 201.

<sup>35</sup> Pound R. (1950), *Supra* note 28, at 12. Pound asserts that the natural law theory is based upon the theory of general ideals that are binding upon all humans at all times and places, which can be established by reason and are inherent in man's nature as a rational animal; Pound pointed out that this inherence was in each individual man, and that natural law theory thus assumed an opposition between individual and society, with the law standing between the two in order to protect individuals.

<sup>36</sup> Ratner. S.R. *Supra* note 13, Para 7.

<sup>37</sup> Simpson G. 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power,' 11 *European Journal of International Law* (2000), 439 at 452.

<sup>38</sup> Holmes O.W. (1897), *Supra* note 9, 458; Llewellyn K.N. (1930), *Supra* note 20, at 450; Llewellyn K.N. (1931), *Supra* note 14, at 1237; Cohen M. 'On Absolutisms in Legal Thought', 84 *University of Pennsylvania Law Review and American Law Register* (1936), 681, at 694; Tamanaha B.Z. *Supra* note 9, at 767-8,

<sup>39</sup> Ratner S.R. *Supra* note 13, at 1; Kalman L. *Supra* note 13, at 467- 471, Kalman asserts realism 'hoped to make judicial decision making more predictable by focusing on both the specific facts of cases and social reality in general, rather than on legal doctrine.' See at 469.

<sup>40</sup> Holmes O.W. (1897), *Supra* note 9, at 461.

<sup>41</sup> Cohen F. *Supra* note 10, at 843.

the role of personal psychology in judicial decision-making,<sup>42</sup> on this point, arguing that his judgment was skewed and that the decisions of courts are in fact greatly more predictable than Frank's treatment would indicate.<sup>43</sup>

Realism insists on the distinction between the law in books and in practice, or between legal theory and judicial administration.<sup>44</sup> Among those who emphasise the limitation of the application of law in practice I have selected Pound for a brief exposition of his views. Pound's distinction between 'legal theory and judicial administration' was the most well-known academic formulation of this distinction, in which he emphasised the importance of the actual practice of the court<sup>45</sup> and argued that the law in the statute books did not represent this actual court practice.<sup>46</sup> One of the causes emphasised by Pound of this distinction is defective executive and judicial administration, which he considered to be responsible for a state of affairs in which 'legislations for the most part fail of effect'.<sup>47</sup> He observed that '[a] great deal of the law in the books is not enforced in practice because our machinery of justice is too slow, too cumbersome and too expensive to make it effective.'<sup>48</sup> The significance of such a division between the law in the books and the law in action is that 'it is the work of lawyers to make the law in action conform to the law in the books' via 'making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it.'<sup>49</sup>

There are diverse views concerning the concept of law and the particular main interest of the study of law among realism's scholars,<sup>50</sup> as well as common ideas. For example, Holmes declared that the law's boundaries make a clear distinction between it and morality.<sup>51</sup> Llewellyn also conceded that 'the heart and core of jurisprudence' was the problem of ethical purpose in the law.<sup>52</sup> Felix Cohen,

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<sup>42</sup> Frank J. *Supra* note 14, at 100-104.

<sup>43</sup> Llewellyn K.N. (1931), *Supra* note 14, at 1242-1243; see also Book review from Llewellyn. 'Law and Modern Mind: A Symposium,' 31 *Columbia Law Review* (1931), 82, at 87.

<sup>44</sup> Pound R. (1910), *Supra* note 8, at 15.

<sup>45</sup> *Id.*, at 13, Pound asserts that the majority of the states court recently seems that 'overturn all legislations, which they deems unwise', this includes even constitutional law of America, he identified examples such as the US Supreme Court's decision to regulate the hours of labor of bakers in case *People v. Coler* and upholding other in *People v. Lochner*, 177 N. Y. 145.

<sup>46</sup> *Id.*, at 34.

<sup>47</sup> *Id.*, at 35.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, at 36.

<sup>50</sup> Cohen F. (1935), *Supra* note 10, at 823.

<sup>51</sup> Holmes O.W. (1897), *Supra* note 9, at 459.

<sup>52</sup> Llewellyn K.N. 'On Reading and Using the Newer Jurisprudence', 40 *Columbia Law Review* (1940), 581, at 603.

in contrast, criticised the positivist view of some of realism's scholars (such as Llewellyn) and insisted on morality and ethics in law; he stated that all assessments of law are moral.<sup>53</sup> These differences in ideas not only exist between the first and the second generations of realism, but also within the same generation. Pound, for instance, in his criticism of realists and in particular 'fact sceptics' stated that '[i]t is just as unreal to refuse to see the extent to which legal technique, with all its faults, applied to authoritative legal materials, with all their defects, keeps down the alogical or unrational element or holds it to tolerable limits in practice.'<sup>54</sup> Realist scholars also disagree as to whether or not realism is a new school of thought and jurisprudence theory, or even whether or not the realists formed a 'group'. For example, Llewellyn, in response to Pound, who considered realism as a school, insisted many times that realism was not a school of thought but a movement, a 'method or technology' not founded on historical, political or ideological controversies.<sup>55</sup>

Due to such inconsistency among the scholars of realism, Llewellyn identified twenty scholars as of undoubted significance in realism,<sup>56</sup> and clarified the nine common points of the movement, beginning as follows:

- 1) The conception of law in flux, of moving law, and judicial creation of law. 2) The conception of law as a means to social ends and not as an end itself...
- 3) The conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs re-examination to determine how far it fits the society it purports to serve.<sup>57</sup>

It is clear that the law as social experience rather than logic, for Holmes, and law as a combination of experience and reason which should be directed towards the social interest, for Pound, both showcase the importance of the law as experience as compared with legal reasoning in realism. Realism in fact changed the conception of

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<sup>53</sup> Cohen F. 'The Ethnical basis of Legal Criticism,' 41 *Yale Law Journal* (1931-32), 201, at 201, he asserts, 'that all valuation of law are moral judgments, that the major part of legal philosophy is a branch of ethics, that the problem which the judge faces is, in the strictest sense, a moral problem, and that the law has no valid end or purpose other than the maintenance of the good life...'

<sup>54</sup> Pound R. (1930-31), *Supra* note 19, at 707.

<sup>55</sup> Llewellyn K.N. (1931), *Supra* note 14, at 1234- 1235; see also Horwitz M. J. *Supra* note 13, at 181. Although Pound is known as a famous legal realism thinker, but later Pound criticises the realism in 'The Call for a Realist Jurisprudence', *supra* note 19.

<sup>56</sup> Llewellyn K.N. *Id*, at 1226-27. He among them elected 20 scholars, such as Jerome Frank, Underhill Moore, Walter Wheeler Cook, Herman Oliphant, Felix Cohen, Hessel Yntema, William Douglas, Thurman Arnold and etc. Horwitz argued that Llewellyn failed to elect other scholars to include in the list, see Horwitz. M. J *Supra* note 13, at 180-181.

<sup>57</sup> *Id*, at 1236-1238. Among these common points, the three points quoted above are much related to the current study. More recently Tamanaha has also attempted to clarify several such significant main points of departure of legal realism; see Tamanaha B. Z. *Supra* note 9, at 737.

legal reasoning and the relationship between the concepts of law and society.<sup>58</sup> In the realist view the law is active, a live phenomenon, which reflects the demands of society. Hence, justice does not apply only via paper rules; judges' eyes are not closed to social realities, but consider the reality and attempt to respond by judging with equity accordingly.

Nevertheless, and pursuant to the concept of law in realism, the question may be raised as to whether, in insisting on the real law as court-made law, the realists completely dismissed the rules and their effects in the court, or rather wanted to reform the rules. I will argue that although realism has challenged formalism's mechanically fitting cases to the rules, 'mechanical jurisprudence',<sup>59</sup> they were also opposed to the dogma of the legal theology, which blocked law reform, and they simultaneously aimed to reform the law.<sup>60</sup> In fact, the interpretation of the rules should be considered; as judges usually decide in accordance with statutes, which is indeed a major task for them, interpretation of rules also has been emphasised by realists.<sup>61</sup>

Despite the views of realism's scholars on the decisions of the courts being the 'real' rules, they – at least many of them – did not discard the effect of 'paper' rules and general principles, but did recognise the law-bound aspect of judging, and saw rules as tools. Cook, for instance, insisted that realism demands rules and general principles as tools for effective work.<sup>62</sup> However, he added that this tool - the application of old rules to new cases - should not be done via merely mechanical and deductive reasoning, but considering other factors such as social and economic policy and ethics.<sup>63</sup> Similarly, Pound asserted:

Legislation must learn the same lesson as case law. It must deal chiefly with principles; it must not be over-ambitious to lay down universal rules. We need for a season to have principles from which to deduce, not rules, but decisions. Legislation

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<sup>58</sup> Kalman L. *Supra* note 13, at 467.

<sup>59</sup> The Classical era called the era of formalism. Formalism sometimes known as 'mechanical jurisprudence'; see Pound R. 'Mechanical Jurisprudence,' 8 *Columbia Law Review* (1908), 605, at 607; Kalman L. *Id.*, at 465; Frank J. *Supra* note 14, at 120.

<sup>60</sup> See 'Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship', 95 *Harvard Law Review* (1982), 1669, at 1671 and 1674-1675; for anti-mechanical concept of judge see also K.N. Llewellyn (1940), *Supra* note 52, at 596; Pound R. *Supra* note 8, at 20 and 26.

<sup>61</sup> Cohen F. (1931-32), *Supra* note 53, at 215-216; Llewellyn K.N. (1931), *Supra* note 14, at 1225 and 1253.

<sup>62</sup> Cook W.W. 'The Logical and Legal Bases of the Conflict of Laws,' 33 *Yale Law Journal* (1924), 457, at 487.

<sup>63</sup> *Id.*

which attempts to require cases to be fitted to rules instead of rules to cases will fare no better than judicial decisions which attempt the same feat.<sup>64</sup>

Furthermore, after emphasising that a great deal of law in the books is not enforced in practice, he asserts that it is the labour of lawyers 'to make the law in action conform to the law in the books....[i]n a conflict between the law in books and the national will there can be but one result. Let us not become legal monks.'<sup>65</sup> Llewellyn too proclaimed clearly his faith concerning the Good in law<sup>66</sup> and insisted clearly that the main purpose of legal realism was not eliminating rules but setting words and paper into perspective.<sup>67</sup> He asserted that realists believed in law as a vehicle to legitimise their decisions and wanted to reform the law and improve legal certainty.<sup>68</sup>

The issue of legal certainty is important because the possibility exists of deriving different, even opposite and conflicting, interpretations of the same rule; given this, realism wants to make law predictable and more certain. Holmes asserted that '[t]he study upon which we have been engaged is necessary both for the knowledge and for the revision of the law...scrutiny and revision are justified'.<sup>69</sup> As judges are usually engaged in the interpretation of law,<sup>70</sup> definition of law can reduce uncertainty and will help the law to be implemented accurately. I argue that the civil and criminal contexts of law should be considered separately as the way of implementation of rules is different in each (many realist scholars have mixed the two together). In many *criminal* cases there is no leeway for an alternative decision for judges other than by reference to existing rules. If a crime has been committed and there is sufficient evidence, then the law applies - not mechanically, but with more restrictions on the judge than are present in civil cases. Similar considerations apply to the rules of criminal procedure. Furthermore, as will be examined in the following section, for international law and lawyers statutes and treaties are central.

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<sup>64</sup> Pound R. *Supra* note 8, at 34.

<sup>65</sup> *Id.*, at 36.

<sup>66</sup> Llewellyn K.N. 'On the Good, the True, the Beautiful in Law,' 9 *University of Chicago Law Review* (1941-42), 224, at 264; he asserts 'I can offer that this my own faith about the Good in this institution of our law,' see also Llewellyn K.N. (1940), *Supra* note 52, at 589, he insists that 'the job of a lawyer is to show how the goal of "justice" in his case can be attained within the framework of the law.'

<sup>67</sup> Llewellyn K.N. (1930), *Supra* note 20, at 453.

<sup>68</sup> Llewellyn K.N. (1931), *Supra* note 14, at 1242; Tamanaha B.Z. *Supra* note 9, at 764.

<sup>69</sup> Holmes O. W. (1963), *Supra* note 23, at 37.

<sup>70</sup> Tamanaha B.Z. *Supra* note 9, at 763.

Concerning the ICC specifically, I argue that the real rules are to be found in the practice of the Court and its administrative decisions; however, the Rome Statute and its rules of procedure should not be dismissed in practice. In addition, it is necessary to examine whether or not the content of the Statute is an appropriate instrument for the ICC's main objectives and of its very existence, given the Statute's fundamental importance to the ICC. The ICC's jurisprudence is very significant, but it should not be exaggerated. Some scholars have indeed criticised realism for being too focused on judges,<sup>71</sup> and it must be admitted that this has been true of many realist scholars. Indeed, speaking generally, over-emphasising judge-made law could be contrary to democratic values, endangering the separation of power in a state and raising the issue of government by judges instead of elected politicians.

It is also true that the examination of rules (the Statute in the case of the ICC) is necessary for reform because the law's rules are not in a static state of consistency but are rather continually approaching consistency and can have different effects (via judicial interpretation) at one historical moment to another. Holmes asserts:

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.<sup>72</sup>

Pound quoted from Wundt that the law is always 'in a process of becoming.' and must be 'as variable as man himself.'<sup>73</sup> Law should change, amend and develop as a necessity; otherwise it will cease to meet the demands of society. As law should also progress society, the Statute also should progress international justice globally.

A further question which may be raised results from the acceptance of the social jurisprudence theory of realism: what should the connection be between law and society, and should law respond to social demands?<sup>74</sup> As regards the ICC, the adoption of the Rome Statute and the establishment of the Court was necessary due to the demands of the international community, whose collective efforts manifested at the Rome Conference in 1998. Whether the ICC can meet the expectations and

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<sup>71</sup> Jones H. W. 'Law and Morality in the Perspective of legal realism,' 61 *Columbia Law Review* (1961), 799, at 805.

<sup>72</sup> Holmes O.W. (1963), *Supra* note 23, at 36.

<sup>73</sup> See Pound R. *Supra* note 8, at 22.

<sup>74</sup> Holmes O.W. *Ibid*, at 36. He asserts '[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.' See also Cohen F. (1931-32), *Supra* note 53, at 207.

demands of the international community in practice, and whether it would be possible to meet its main objective via the current instruments available to it, are questions which need to be examined. I hereby wish to clarify, in order to avoid any preconceived ideas to the contrary, that the concern of this thesis is with both the Statute itself and with the ICC's cases and functioning so far.

Following on from the above account, I have identified three major aspects of legal realism which will be directly applied in this thesis:

The first is that of the law in practice rather than the law in books or in the Statute;<sup>75</sup> thus, law understood in terms of action rather than in terms of literature, implying that it is not a question of internal coherence, but of external effect. Law should be understood from the standpoint of how the rules shape and orient decision-makers in practice. The significance of the distinction between the law in books and in action should be considered via three perspectives. The first concerns the decisions of judges and administrative offices themselves, which are considered to be the real rules, regardless of the content of the rules in books; the real rules thus derive from concrete cases.<sup>76</sup> The second is that many rules in books and statutes are not actually applied, due to many reasons such as defective executive and judicial administration, and legislation failing of effect due to the law being unable to be enforced in practice.<sup>77</sup> The third perspective is that not only is not all of the provision in practice applicable, but also the portion of law that is to be applied in reality cannot be applied equally to all individuals, due to difficulties arising as a result of extra-judicial influences and social impact and the consequences of implementation of the law in particular cases and situations, etc. This latter perspective has also a relation to the second aspect of realism, as will follow.

The second aspect of realism which is important for this thesis is the idea of law as an instrument of social change, whereby law relates to a given social environment not in an abstract, but in a particular way - law being embedded in the social context. Llewellyn's concept of law as social end and not an end in itself,<sup>78</sup> and similarly the idea of the social creation of law by Holmes<sup>79</sup> indicates the fact that law should reflect societies' actual demands. Thus, for them, there is an inevitable duty on the

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<sup>75</sup> Pound R. *Supra* note 8, at 34.

<sup>76</sup> *Id.*, at 34.

<sup>77</sup> *Id.*, at 35.

<sup>78</sup> Llewellyn K.N. (1931), *Supra* note 14, at 1236.

<sup>79</sup> Holmes O.W. (1897), *Supra* note 9, at 467; Holmes O.W. (1894), *Supra* note 9, at 9; Tamanaha B. Z. *Supra* note 9, at 737.



part of judges to realise the social advantages of their decisions. In addition, not only should rules contextually fit with reality,<sup>80</sup> but, as Llewellyn insisted, the law should also be an instrument of social change. To clarify: assuredly the law should reflect the reality and the demands of society, but it should not stop in the past and present; it should also to some extent guide the society forward, for instance to common goods and values, in a practical way: law should progress society. In case of this study, the key question concerns whether or not the Rome Statute and the ICC meet or can meet the demands of the international community concerning criminalisation, mechanisms for exercising authority, and sufficient enforcement power for the prosecution of international crimes? If the ICC is embedded in a social context, what prospects are there for progressive social change? How might this be furthered?

The third major aspect of realism that will be applied in this thesis is the necessity for the re-examination and the revision of the law. Realism emphasises that the law ought to be assessed in terms of its outcomes and effects rather than in terms of its purpose. Law should be examined in a society via its effects, what its consequences were in society, whether the reaction of society to the implementation of the law was positive or not, whether or not, for example, it sustained peace and security or endangered it. Each part of the law needs such re-examination, in order to determine the extent to which it fits the society it ought to be serving.<sup>81</sup> As realists aim to reform the law,<sup>82</sup> such a revision of law is necessary and justifiable.<sup>83</sup> Accordingly, the law is not an untouchable phenomenon, but should be changed and revised in order to respond to the demands of society,<sup>84</sup> its deficiencies amended and its ambiguities clarified. In this regard, when we look at the Rome Statute we can see several deficiencies<sup>85</sup> and ambiguities, such as some of the definitions of crimes<sup>86</sup> that potentially may lead to impunity. The revision of law requires, in the first instance, a clear view as to its deficiencies.

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<sup>80</sup> Horwitz M.J. *Supra* note 13, at 201.

<sup>81</sup> Llewellyn K.N. (1931), *Supra* note 14, at 1236.

<sup>82</sup> *Id.*, at 1242; Tamanaha B. Z. *Supra* note 9, at 764.

<sup>83</sup> Llewellyn K.N. *Ibid.*, at 1242; Tamanaha B.Z. *Id.*, at 764; Holmes O.W. (1963), *Supra* note 23, at 37.

<sup>84</sup> Pound R. 'The Scope and Purpose of Sociological Jurisprudence', 25 *Harvard Law Review* (1912), 140, at 146-47.

<sup>85</sup> E.g. deficiencies such as existed issue regarding to the definition of aggression, the postponement of war crimes, Art. 124, and the missing international crimes such as terrorism in the Statute, and etc. This will be discussed in the Chapter 5 and 6.

<sup>86</sup> E.g. the definition of defences in war crimes Art. 31, the defence of superior order Art. 33 and etc.,

### ***1.2.1. Law and politics and the legal realism movement***

The question is whether and to what extent the nature of the law is affected by politics.<sup>87</sup> Although the dichotomy between law and politics, or by contrast law as politics, is not a new concept, it remains a complex issue. A theory that asserts the rigidity of law toward politics – viewing the law and politics as two autonomous phenomena – was stressed by Kelsen.<sup>88</sup> As for legal realism: it has been discussed that legal realism is a new way of perceiving of legal phenomena, and this also applies to the complex relationship between law and politics. It may be stated that legal realism is generally against the idea of separation between law and politics,<sup>89</sup> although some legal realist scholars have suggested a slightly different idea whereby law is related to politics in part and overlaps with it sometimes, but in which law is itself considered an autonomous concept.<sup>90</sup>

To examine this issue, I will return firstly to the definition of the law in legal realism, whereby it has been defined as the decisions of the body of courts in concrete cases, and not simply paper rules. This method of the understanding of the features of the legal phenomenon by realism leads to at least three significant consequences.

The first is that as far as realism is concerned, law is a mixed structure of the decisions of the courts and their administrative organs<sup>91</sup> (the normative element) and judicial behaviour (socio-psychological elements). The second is that realism, via this definition, has rejected affording any special ontological status to the law, and in

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<sup>87</sup> I am not concerned in this thesis with political realism as this term is used in the field of international relations; political realism would certainly insist on the separation between law and politics, and in fact gives ontological priority to political decision-making, reducing all decisions (whether legal or otherwise), to questions of power or interest.

<sup>88</sup> See Kelsen, H. *The Pure Theory of Law*, University of California Press, Berkeley (1970), at 89-91; see also generally, Morgenthau H.J. *Politics Among Nations*, McGraw- Hill (1993), and *Politics in International Law* (1971); Gumanmal Lodha J. *Law Morality and Politics* (1981); Loughlin M. *Sword & Scales, An Examination of the Relationship Between Law & Politics* (2003).

<sup>89</sup> Horwitz M.J. *Supra* note 13, at 193, he asserts: 'The creation of a system of legal thought that could separate law and politics has been the leading aspiration of American legal orthodoxy since the revolution.... 'The most important legacy of Realism therefore was its challenge to the orthodox claim that legal thought was separate and autonomous from moral political discourse.'

<sup>90</sup> Zamboni M. 'Legal Realisms and the Dilemma of the Relationship of Contemporary Law and Politics', *Stockholm Institute for Scandinavian Law* (1957-2010), at 589-590. He believes that for some realisms a specific part of the nature of the law extends beyond the normative core of the law into the political world.

<sup>91</sup> Llewellyn added 'the action of other officials' as law, see Llewellyn K.N. (1930), *Supra* note 20, at 453; Pound also asserts administrative organ as a centre of the development of the law; see generally Pound R. *Supra* note 8.

this has differed from natural law theory.<sup>92</sup> This latter theory is based upon the theory of general ideals that are binding on all humans at all times and places, as revealed by reason and intrinsic to man as a rational creature; it was accordingly viewed by Pound as being highly individualistic.<sup>93</sup>

The third and most significant consequence is the rigidity and autonomy of law with respect to politics. Some assert that this rigidity of the law derives immediately from the definition of law by realism. They assert that as the law is not a simple rule in paper, but a function of judicial decisions,<sup>94</sup> so the rule - which is assumed integrated into politics (as a fact) appears only in the paper and is not implemented in practice. Hence, for instance, the paper rules in the case of the Rome Statute are not what are actually applied. On the contrary, the functions of the Court and what that the Court decides in concrete cases are the real rules (judge-made rules). Accordingly, it could be assumed that at an initial stage the rigidity of the law - the court-made law - toward politics may exist to some extent as a result of the basic definition of the law.

However, a point perhaps missed by those who insist upon this theory is the socio-psychological element of definition of the real rules, i.e. the judge-made rules. The effect of extra-judicial factors on judges when making decisions has failed to be considered properly by the theory; for example, the effect of personal interests and peripheral circumstances on the judicial decision process. Legal decisions should be understood as complex phenomena going beyond simple legal processes, and for consistency of predictability in the behaviour of courts, need to be understood as more than just the results of an analytical process of judicial decision. Cohen, for instance, emphasises the personal interests, studies and social interactions of judges:

Law is not a mass of unrelated decisions nor a product of judicial bellyaches. Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls.... It is more useful to analyze a judicial "hunch" in terms of the continued impact of a judge's study of precedents, his conversations with associates, his reading of newspapers, and his recollections of college courses, than in strictly physiological terms. A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event.<sup>95</sup>

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<sup>92</sup> Some argued that realism is close to the natural law and the natural law scholar's attack to realism was a 'misidentification of enemy'. See Jones H. W. *Supra* note 71, at 800 and 808.

<sup>93</sup> Pound R. (1950), *Supra* note 28, at 12.

<sup>94</sup> Cohen F. (1935), at 842.

<sup>95</sup> *Id.*, at 843.

Thus, among the factors influencing judges in making decisions, policy considerations, bias, personal prejudices, individual political ideas and beliefs, public interest, education, etc. need to be considered. The decisions of judges, therefore, are affected by such social and political dimensions, and exploring all such grounds of the courts' decisions will increase the predictability of courts' decisions. I do think the political factor or policy considerations could be viewed as paradoxical by those who interpret and support the formalist theory of the 'autonomy of law', as this does unavoidably separate law from politics.<sup>96</sup> From a realist viewpoint, however, the role of politics in terms of its impact and influence on the function of the courts could be viewed in the way I have just described. It can be seen that various political factors will have different measures of influence in both domestic and international courts. In fact, realism in general does not support a clear distinction between law and politics, since it contests the idea of the autonomy of law from social factors.<sup>97</sup> The Rome Statute during its enactment I will examine as a exact paradigm of the theory of the integration of politics into law (this will be examined further in the final Chapter) and furthermore, political influences and policy considerations exist as a reality at all different stages in the practice of the Court, whether before, during or after a judicial process.

In addition to external factors such as the influence of social demands, social forces and interests, the personal preferences of judges - internal factors - on a decision process should be considered. As Cohen argued, concerning the notion of law as a complicated phenomenon: 'Law is a social process, a complex of human activities, and an adequate legal science must deal with human activity, with cause and effect, with the past and the future.'<sup>98</sup> This is the reason that he truly emphasises the function of human behaviour as an ultimate and deciding factor of the definition of law. The end road of any law would be found in the hands of the individual judges; legal systems, rules, establishments, ideas and decisions are only comprehensible when considered as dependent on of human behaviour.<sup>99</sup> Hence, different judges in the same case may have totally different or opposing opinions.

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<sup>96</sup> Horwitz M. J. *Supra* note 13, at 193, 209.

<sup>97</sup> *Id.*, at 209.

<sup>98</sup> Cohen F. (1935), *Supra* note 10, at 844.

<sup>99</sup> *Id.*, at 845. Cohen asserts that: 'Concretely and specifically, we know that Judge so and- so, a former attorney for a non-union shop, has very definite ideas about labor injunctions, that another judge, who has had an unfortunate sex life, is parsimonious in the fixing of alimony; that another

Therefore, if we say that the law lacks autonomy, this means that there is no essential division between law and morals or between legal and political questions.<sup>100</sup> The idea of autonomy for the law is in fact not compatible with the idea of the social impact of the law and the theory of the social jurisprudence. For some realists the idea of the lack of legal autonomy means that law is fully dependent on society rather than there being a state of interdependence. The realists' aim of bringing law 'back in touch with life' implies in this case that law ought to be a mirror of social relations. However, I argue that the law is in reality both descriptive and normative: both describing society as it is and attempting to lay down rules as to what it should be like. The law cannot simply be a mirror of society if it is to be 'law-like'.

The Rome Statute is a clear expression of the reality of the law-politics relation in the current system of the International Criminal Court, which is effectively surrounded by political reality. It will be examined further in this thesis that the Statute perfectly exemplifies the relation between law and politics, and that the ICC's difficulties in practice to exercise its jurisdiction and compel enforcement of its arrest warrants, if not in their entirety, significantly relate to political will (the case of Darfur and the long standing arrest warrant against the Sudanese President Al-Bashir is an example of this reality). Bearing in mind the clarification of the decisions of judges as law and real rules, what I argue is that this complicated way of reaching a decision may include, among its outcomes, non-prosecution, failure to exercise jurisdiction over some individuals, and non-implementation of the paper rules of the Rome Statute; and that due to the aforementioned difficulties and realities, the Court's decisions may result in inevitable impunity.

Thus, this study supports realism's idea concerning the role of rules in judging -rule-scepticism - in which many rules do not apply, or are impossible to be applied. Overall, it may be said that realists generally criticise the orthodox idea of separation between law and politics and instead believe that law and politics are related, although some disagreement always exists.

As well as legal realism itself, it is worth considering briefly the *new-stream* and *Critical Legal Studies (CLS)* movements and the viewpoints that have been expressed within these movements on the question of the relation between law and

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judge can be "fixed" by a certain political "boss" that a series of notorious kidnappings will bring about a wave of maximum sentences in kid-napping cases.' See at 845-846.

<sup>100</sup> Horwitz M.J. *Supra* note 13, at 209.

politics. The new-stream scholars' approach to politics and international law is one in which they are integrated, in harmony with the realist approach. New-stream scholars believe that international law 'should not and cannot be separated from politics. If politics were explicitly acknowledged, then doctrinal biases would be disclosed.'<sup>101</sup> For example, Kennedy (as one of the new-stream scholars) argues that international law should more explicitly consider political concerns.<sup>102</sup> To emphasise this idea he claims that politics is 'battling in the shadow of the law' and that 'we make war in the shadow of law, and law in the shadow of force'.<sup>103</sup>

Scholars of the CLS movement have also insisted that law is politics.<sup>104</sup> The CLS in fact took its inspiration on this point from realism, in particular from realist ideas of the significance of social context for legal action and intervention and the realist opposition to the (apparent) determinism of philosophical or analytical positivism. The scientific orientation of positivism was to seek to justify legal authority in its own, independent, terms – which in part meant separating it from other motives for, or descriptions of, social action (as provided by psychology, economics, anthropology or politics) and in part insisting upon its own self-sufficiency, i.e. asserting that law was determinate and complete, that there were right and wrong answers. If realism was to insist upon the importance of the social and political context for legal action, then CLS merely continues this theme, but does so by integrating within the realist account: a) a structuralist/post-structuralist scepticism towards linguistic determinism, whereby the claim is made that the meaning of words is radically indeterminate; and b) the corresponding belief that the conventional categories of 'law' and 'politics' cannot be kept apart. According to CLS, then, the legal 'decision' over the meaning of a particular term is not a function of the term itself, but of the power of the decision-maker to make it stick – i.e., it is a political decision.

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<sup>101</sup> Cass D. 'Navigating the New-stream: Recent Critical Scholarship in International Law', 65 *Nordic Journal of International Law* (1996), 341, at 377; Simpson G. *The Nature of International Law* (2001), at 377.

<sup>102</sup> Kennedy D. 'New World Order: Yesterday, Today and Tomorrow', 4 *Transnational Law & Contemporary Problems* (1994), 329 at 374; see also Cass D. *Id.*

<sup>103</sup> Kennedy D. *Of War and Law* (2006), at 34 and 165.

<sup>104</sup> See generally, Hutchinson A. C & Monahan P.J. 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought', 36 *Stanford Law Review* (1984), 199; Kennedy D. 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* (1976), 1685; Unger R.M. 'The Critical Legal Studies Movement', 96 *Harvard Law Review* (1983), 561. Kennedy, Unger and Horwitz are three of the leading scholars in CLS.

It is evident that contemporary legal theory suggests that law is shaped by political issues.<sup>105</sup> Based on the above considerations, I would like to make the following observations on the relationship between the law or legal decisions and the political environment in which these take place.

- 1) In both realism and CLS there is a general scepticism towards the autonomy of rules, or the belief that legal decisions can be made solely on the basis of the law itself. All decisions are, in this sense, ‘political’.
- 2) Legal institutions thus become a medium through which political authority can be expressed. This may be such as to make them institutions for social change (as in realism) or institutions of domination (as in CLS).
- 3) The critical point of difference between these two alternatives turns upon the extent to which the judiciary may be seen to stand outside the political structures in which they are embedded, or to be trapped within them.

This thesis, in conducting its investigation of the relation between law and politics as worked out in the ICC, will tackle this crucial question of assessing the extent to which the judiciary of the ICC is bound within its surrounding political structures to the extent that it becomes an institution of domination (e.g. by the Security Council) or alternatively stands outside these political structures to the extent that the ICC may become an institution of social change.

### ***1.3. The definition of impunity***

It is undoubtedly difficult to offer a comprehensive definition of impunity, which encompasses all the different aspects implied in the term; this may be due to the nature of impunity, which has become so ‘ubiquitous’.<sup>106</sup> Etymologically ‘impunity’ comes from the Latin ‘impunitas’;<sup>107</sup> as a term, it means exemption from penalty or punishment,<sup>108</sup> but it has been described as a ‘vague term’<sup>109</sup> which has been interpreted in different ways by scholars. Two particular distinctions are immediately

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<sup>105</sup> Cotterrell R. *Law's Community, Legal Theory in Sociological Perspective* (1995), at 162-165; Hutchinson A. C & Monahan P. J. *Ibid*, at 206.

<sup>106</sup> Penrose M. ‘Impunity Inertia, Inaction, And Invalidity, 17 *Boston University International Law Journal* (1999), 269, at 273.

<sup>107</sup> *Pocket Oxford Latin Dictionary*, J. Morwood (eds), (1994), in *Oxford Reference Online* (SOAS Library), available at: <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t131a.e4670> (13 August 21012).

<sup>108</sup> *Black Law Dictionary* (1983), at 386.

<sup>109</sup> Vinuales J.E. ‘Impunity: Elements for an Empirical Concept’, 25 *Law and Inequality* (2007), 115, at 121.

apparent. In the first place there are those who define impunity in terms of non-prosecution, or escaping from prosecution in a system of retributive justice; others, however, define it more broadly, as connoting an escape from justice or a lack of accountability, where justice or accountability are conceived of as including the concept of restorative justice or methods not involving prosecution. A second, and associated distinction is that impunity may be conceived by some as always illegal, whereas others might perceive certain types of impunity as lawful (e.g. in cases of insanity) or as inevitable or necessary (cf. the '*peace versus justice*' debate). Concerning such complexities as these, in this section firstly general definitions of impunity by scholars, and secondly what impunity means in terms of the Statute and how impunity is to be understood for purposes of this study.

Whilst much has been written about the ICC, particularly by scholars such as Cassese, Bassiouni, Schabas, Christopher and Sadat, few scholars have worked on the question of impunity itself. Although some, including Susan Opatow, Bassiouni and Christopher, have sought to define it, such definitions are frequently limited. As a starting point, we may consider the definition of Opatow, who describes impunity as 'the exemption from accountability, penalty, punishment, or legal sanction for perpetrators of illegal acts'.<sup>110</sup> She adds that impunity 'can occur before, during or after judicial process'.<sup>111</sup> Many other authors utilise this broad definition.<sup>112</sup>

There are three main aspects to this definition that are worth highlighting. First is the emphasis placed here upon the lack of 'accountability'<sup>113</sup> as opposed to

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<sup>110</sup> Opatow S. 'Reconciliation in Times of Impunity: Challenges for Social Justice', 14 *Social Justice Research* (2001), 149, at 149, and 'Psychology of Impunity and Justice: Implications for Social Reconciliation' in C. Bassiouni (eds), *Post-conflict Justice* (2002), 201, at 202.

<sup>111</sup> Opatow S. *Id.* (2001), at 149.

<sup>112</sup> Christopher C. 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability', 26 *Denver Journal of International Law and Policy* (1998), 591, at 595-596, he defines impunity as an exemption or liberty from punishment ... and '[w]ithin the context of human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations'. Bassiouni C. (2002) *Ibid.*, at 26; Harper C. 'From Impunity to Reconciliation' in C Harper (eds), *Impunity An Ethical Perspective* (1996), at ix. See the UN. *Economic and Social Council. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Second interim report on the question of the impunity of perpetrators of human rights violations*, E/CN.4/Sub.2/1996/15, 3 July 1996, prepared by El Hadji Guissé, he defines impunity as 'the absence or inadequacy of penalties and/or compensation for serious and large-scale violations of the human rights of individuals or groups of individuals.' Baeza P.R. 'Impunity: An Impossible Reparation', 69 *Nordic Journal of International Law* (2000), 27, at 28; Vinuales J.E. *Supra* note 109, at 115-117; Mattarollo P.R. 'Impunity and International Law,' 11 *Revue quibdoise de droit international* (1998), 81, at 89.

<sup>113</sup> Ellis M.S. 'Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability- The Role of International War Crimes Tribunals', 2 *Journal of National Security Law & Policy* (2006), 111, at 112. Bassiouni C. *Id.*, at 26; Hooper K. 'The Ending of Impunity and the Fight



the absence of an effective remedy for victims.<sup>114</sup> In this view, impunity is not simply a synonym for ‘non-punishment’; accountability is understood as the antithesis of impunity,<sup>115</sup> where accountability has a wider meaning than retributive justice. In the case of non-retributive justice for instance, Richard Goldstone, former Chief Prosecutor of the ICTY, believes that (conditional) amnesty applicants ‘suffered a very real punishment’: shame through ‘public confessions’.<sup>116</sup> This idea is also followed by Blumenson.<sup>117</sup> He emphasises punishment of the perpetrators by alternative methods such as the South African Truth and Reconciliation Commission (TRC) of 1995. It is clear, however, that some still believe that international serious crimes such as genocide, crimes against humanity, etc. (*jus cogens* crimes) must be prosecuted<sup>118</sup> and that justice is not achieved without formal trial or punishment.<sup>119</sup> Nevertheless, such an approach is far from universal.

The second aspect of Opatow’s definition concerns the various moments in which impunity may arise. This is mirrored in Amnesty International’s account of impunity, in which it is stressed that:

[T]he term conveys a sense of wrongdoers escaping justice or any serious form of accountability for their deeds. Impunity can arise at any stage before, during or after the judicial process: in not investigating the crimes; in not bringing the suspected culprits to trial; in not reaching a verdict or convicting them, despite the existence of convincing evidence which would establish their guilt beyond a reasonable doubt; in not sentencing those convicted, or sentencing them to derisory punishments out of all proportion to the gravity of their crimes; in not enforcing sentences.<sup>120</sup>

The possibility of impunity, in other words, is associated here with the perceived adequacy or otherwise of the criminal justice system, and whether it achieves the purposes it sets itself.

A third aspect of the definition concerns a matter which is not explicitly addressed in it, namely the question of the different sources of impunity. Many assert that impunity is the result of political considerations and compromise or

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for Justice for Victims of Human Violation: A Chasm Too Great to be Crossed?’ 9 *Flinders Journal of Law Reform* (2006), 181, at 182-3.

<sup>114</sup> Christopher C. *Ibid*, at 495-496.

<sup>115</sup> Bassiouni C. *Ibid*, at 26.

<sup>116</sup> Blumenson E. ‘The Challenge of the Global Standard of Justice: Peace Pluralism, and Punishment in the International Criminal Court’, 44 *Columbia Journal of Transnational Law* (2006), 801, at 869.

<sup>117</sup> *Id*, at 866-867.

<sup>118</sup> Bassiouni C. (2002), at 27.

<sup>119</sup> Blumenson E. *Ibid*, at 871.

<sup>120</sup> Amnesty International, *Disappearances and Political Killings; Human Rights Crisis of the 1990s Bringing the Perpetrators to Justice*, Doc. AI Index No. ACT 33/005/1993 (5 July 1993), at 2.

‘*realpolitik*’,<sup>121</sup> and emphasise in the process the function impunity may have in legitimating falsehood or denying justice.<sup>122</sup> Others, however, have suggested that impunity can occur either *de jure* or *de facto*.<sup>123</sup> The UN Special Reporter, for instance, distinguishes between two types of impunity as follows: ‘the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account...’.<sup>124</sup> This speaks of two different possible sources of impunity: one of which is concerned with the legitimisation of impunity at the hand of either a domestic or international court; the other of which is concerned with the general features of a court’s inability to prosecute, i.e. its procedural weakness, unwillingness to prosecute, etc.

Regarding impunity in the Statute, it must first be remarked that, in the above definitions of impunity by scholars, just some aspects and characterisations of impunity have been explored. Impunity in the Statute has also become the subject of different approaches. One attitude is that impunity in the Statute means only non-prosecution; this is evidenced by the fact that the Rome Statute does not include amnesty law.<sup>125</sup> This may also be understood from the language of the Statute, 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...’.<sup>126</sup> From this viewpoint, impunity is understood to relate only to retributive justice, and accordingly exemption from prosecution and punishment means impunity.

The second approach to impunity in the Statute regards impunity as meaning the lack of accountability; in this broader view of the definition of impunity, accountability may comprise other methods of justice besides retributive, such as restorative justice, reparations, truth commissions, rehabilitative, or compensatory justice etc. Scholars holding to this viewpoint assert that the Statute also provides

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<sup>121</sup> Bassiouni C. ‘Combating Impunity for International Crimes’, 71, *University of Colorado Law Review* (2000), 409, at 409, 414, and 415.

<sup>122</sup> Harper C. *Supra* note 112, at ix.

<sup>123</sup> See Amnesty International. *Ibid*, at 2; see also Bassiouni C. (2002), *Supra* note 110, at 26.

<sup>124</sup> *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity for Perpetrators of Human Rights Violations (Civil and Political)* Final revised in 1996, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997. By the UN Special Rapporteur, Joinet, his definition of impunity led to the similar definition by the Commission on Human Rights when the latter defined impunity in February 2005; see the UN. Economic and Social Council, Sixty-first session, UN Doc. E/CN.4/2005/102/Add (18 February 2005).

<sup>125</sup> The inclusion of amnesty in the Statute was suggested by the US delegation during the negotiations for the establishment of the ICC, but in the final draft it was not adopted at the Rome Conference.

<sup>126</sup> See the Preamble of the Rome Statute.

some room for amnesties in it.<sup>127</sup> As Pensky asserts, simply considering the concept of amnesty itself implies that absence of punishment cannot be a comprehensive account of impunity.<sup>128</sup> The Prosecutor's Policy Paper on the Interests of Justice has also expressed the idea that the interest of justice has a broader meaning in the Statute than retributive justice alone.<sup>129</sup>

For purposes of this thesis, it is not necessary to decide whether the wider or narrower definition of impunity is to be preferred. At the outset, they may both be seen to work with different notions of justice: the wider definition appealing to those who focus upon 'restorative justice' who seek to resolve conflict via participation of both victims and perpetrators which results in the harmonisation of society,<sup>130</sup> the narrower definition appealing to those who focus upon 'retributive justice' and the prosecution and punishment of criminals. The Preamble of the Rome Statute, of course, does not resolve the issue one way or the other promising merely 'the enforcement of international justice'.<sup>131</sup> Yet it is clear that the wider and narrower definitions are not entirely incompatible with one another: the prosecution of a criminal may be as important for those advocating restorative justice as it is for those who adhere to the principles of retributive justice. Where they principally differ, as we shall see, is in determining the point at which the demand for prosecution and punishment may be subordinated to other processes of conflict resolution (such as through the award of amnesties). To decide, in such a context, whether one definition or the other is right or wrong would seem to foreclose an important discussion that was itself unresolved at the Rome conference. That, as a consequence, a certain semantic indeterminacy has to be tolerated is only such as to entail a more qualified form of evaluation. It is still possible to point out where and how impunity may be created or fostered, just that at certain points recognition may have to be given to the fact that such a determination will depend upon the question whether the wider or narrower definition is preferred.

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<sup>127</sup> Scharf M. P. 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (1999), 507, at 521-27; Stahn C. 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', 3 *Journal of International Criminal Justice* (2005), 695, at 719-720; Robinson D. 'Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *European Journal of International Law* (2003), 481, at 488.

<sup>128</sup> Pensky M. 'Amnesty on Trial: impunity, accountability, and the norms of international law', 1 *Ethics & Global Politics* (2008), 1, at 20; see also Hooper K. *Supra* note 113, at 181.

<sup>129</sup> See *Policy Paper on the Interest of justice, ICC-OTP-Interests of Justice* (September 2007), at 8.

<sup>130</sup> Penrose M. *Supra* note 106, at 274.

<sup>131</sup> See the Preamble of the Rome Statute.

In either case, the starting point of impunity is the idea that, following the commission of crimes,<sup>132</sup> criminals deserve to be brought to justice (whether or not punished) and generally held responsible for their unlawful conduct; hence, the deprivation of responsibility for unlawful conduct of criminals constitutes impunity. On this definition, any actions resulting in the escape of criminals from liability, whether accidental, i.e. procedural (via lack of evidence, which is not significant for this thesis) or intentional, via the possible exemption of some perpetrators, or legal lacunae allowing escape of perpetrators from justice (i.e. definitions of some crimes, etc.) constitute impunity. However, I argue that impunity may also be lawful and that such lawful impunity falls into three categories. The first is impunity which legitimises ‘unlawful’ conduct due to the personal character of some criminals,<sup>133</sup> i.e. excuses, defences, insanity and intoxication.<sup>134</sup> With this category of impunity, although the conduct comprises a crime and is ‘unlawful’ at least in abstract, the perpetrator is not held responsible and is unpunishable. The second, and associated, category is where unlawful conduct is held to be unpunishable, not by reason of the character of the perpetrator, but for extraneous reasons – such as in case of amnesties and immunities from prosecution in order to preserve peace or facilitate the conduct of government. The third category of lawful impunity concerns cases where the conduct from the outset has been assessed as lawful, i.e. such as in cases of self-defence.<sup>135</sup> Here, of course, speaking of this as a form of ‘impunity’ is somewhat more problematic insofar as the defence will apparently determine what is required as a matter of justice. It is, nevertheless, necessary to keep in mind particularly so far as the determination as to what constitutes a justifiable act is itself liable to be unstable.

In addition to these forms of *de jure* impunity there is also the category of *de facto* impunity, *de facto* impunity in the Statute has two main aspects: i) It comprehends the impossibility of the prosecution and accountability of some individuals, some categories of crimes, or certain nationalities. It can be derived from extra-judicial factors and peripheral obstacles, such as powerful states’ relation to the ICC. This category of impunity, which will be discussed further in Chapter 6, is

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<sup>132</sup> Penrose M. *Ibid*, at 275.

<sup>133</sup> Greenawalt K. ‘The perplexing Borders of Justification and Excuse’, 84 *Colombia Law Review* (1984), 1897, at 1915.

<sup>134</sup> Rome Statute Art. 31 (a), and (b).

<sup>135</sup> Berman M, N. ‘Justification and Excuse, Law and Morality’, 53 *Duke Law Journal* (2003), 1, at 4.

likely to remain definitely beyond the reach of the ICC. ii) *De facto* impunity may also consist of procedural and structural impunity originating from the internal procedural hurdles, obstacles, difficulties and structural design of the ICC. These structural problems are related to the institutional problems and jurisdictional mechanism of the ICC (this variety of impunity will be discussed in Chapter 5).

The ICC proclaimed that it was established to enforce international justice and ‘to put an end to impunity for the perpetrators of these crimes,’<sup>136</sup> and that ‘the international crimes as a whole must not go unpunished’.<sup>137</sup> As a preliminary observation it may be seen that wholly idealistic objective. Universal justice, even if aspirational, will never be realised. Yet at the same time, the declaration has a particular function, it raises the expectation that the ICC should have more capability, stronger enforcement power, and extensive jurisdictional mechanisms to combat impunity, in comparison with prior tribunals; in short, that it should be evaluated purely in terms of whether it is ‘weak’ or ‘strong’, coercive or timid. The difficulty, however, is that such an understanding works on the supposition that the ICC stands outside the regulatory regime of justice within which it is located. It assumes, in other words, that it is possible to think, act, and speak about impunity in relation to international crimes without, at the same time, examining the place of the ICC within that system, or contemplating its role in producing knowledge of what is, or is not, impunity (through the definition of crimes and defences etc) and legitimising the possibility of its avoidance (both *de jure* and *de facto*).

Accordingly, rather than ‘externalise’ the problem of impunity this study attempts to identify some of the complexities of the ICC’s objectives and examine the various ways in which the ICC may itself be implicated in its production. There are two particular means by which one may bring this productive dimension into view. In the first place through a comparative analysis of ICC with the previous international tribunals’ statutes and international criminal law instruments, the outcome of which may be to disclose the points at which the Rome Statute appeared to legitimise new forms of impunity (in the sense of providing more extensive defences or bars to prosecution). The second is by identifying those moments at which the ICC’s *actual* effects (may or do) deviate in considerable ways from its

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<sup>136</sup> See the Preamble of the Rome Statute.

<sup>137</sup> *Id.*

*stated* goal. One significant such deviation to be explored is the unequal availability and possibility of different states' nationals to be prosecuted before the ICC.

In general, there are five main different ways one could understand the relationship between the ICC and impunity. a) Firstly, the ICC may eliminate impunity; here the ICC is fulfilling its stated objective of being a means of combating impunity. By contrast, in some circumstances the ICC may: b) *create* impunity; c) *create the potential for* or facilitate impunity; d) *recognise* or legitimise existing impunity; e) *fail to address* existing categories of impunity. Thus, this thesis has adopted the hypothesis that the ICC is not only a means of combating impunity, but in different circumstances may work in the opposite way.

***a) The ICC as a means of combating impunity***

That the ICC may operate as a means of combating impunity is perhaps a fairly banal insight. It was established to do so and in practice one may no doubt assume that it will operate at a certain level of effectiveness. Of course, this does not assume prosecution by the ICC itself, in part at least it was created as a device for encouraging effective prosecution on the national level bringing into play the principle of complementarity. This, of course, is to problematise any accurate 'measure' of its effectiveness which, of course, would have to go some way beyond an observation as to how many cases were to come to the ICC, or indeed, how many prosecutions are undertaken by national authorities. Its effect as a 'deterrence' must also be brought into account.

***b) The ICC effectively create new categories or new forms of impunity,***

That the ICC might create new categories and forms of impunity is perhaps the most alarming of alternatives, and certainly far from easy to establish. The most obvious (potential) form in which this might take place is through the limitation of what is taken to be 'criminal' through the inclusion of new defences, or an extension of existing privileges from prosecution (through immunities or amnesties). In each case, it is not the fact that the Rome Statute defines the parameters of liability to prosecution that is problematic, but that it may do so in a way that limits the existing liability under customary international law. In such a case, the Statute would purport to provide states parties with an excuse for not proceeding to prosecution under the terms of pre-existent international criminal law, creating a new form of impunity

under guise of re-defining what impunity might mean. Two particular examples will be examined in this thesis, one of which concerns the defence of obedience to superior orders in Article 33(2) in the other being the defence of property necessary for a military mission in Article 31(c).

***c) The ICC creates the potential for or facilitates impunity***

If the Rome Statute may only rarely be said to give rise to a new form of impunity, far more frequently it may be said to create the potential for, or facilitate, impunity. The words ‘create’ or ‘facilitate’ are important here. Both imply an active component something which has been introduced by the ICC rather than something which would exist in any case without it. In such cases, what one is looking for, therefore, is not merely the existence of certain weaknesses in the organisation and functioning of the ICC – albeit the case that such weaknesses are clearly relevant – but the introduction of something new into the field of international criminal law that might enable impunity to flourish. It is one thing, for example, to say that the ICC is politically and organisationally weak, that it depends upon state cooperation, that it is subordinate to the authority of the Security Council, or that it will only rarely exercise its jurisdiction over perpetrators of international crimes. This only speaks to the ICC failing to address impunity (see below). It is something else, however, to suggest that the ICC provides new avenues through which those accused of crimes might effectively avoid the machinery of justice.

There are various different ways in which this might occur, but for the most part, the key mechanism by which this takes place is through the creation of a regime which *purports* to address the problem of impunity, but which does not do so, or does so in a partial or defective manner. This brings into play, the realist critique of formalism, and its differentiation between the law on paper and law in action, but adds to it a reminder that the paper rules themselves are not irrelevant, but provide in many instances a necessary ideological cover. Two particular exemplary categories might be cited here. The first category concerns the creation of avenues, or forms of justification, that enable states to maintain that they are committed to the objectives of the Rome Statute, but allow them to shield their nationals (or indeed others) from prosecution. The most obvious cases here being the provisions relating to the role of the Security Council (SC) and in particular the shield provided by article 16. Of relevance also, however, is the principle of complementarity which, albeit designed

to promote the national administration of justice,<sup>138</sup> also envisages the opening of new avenues by which prosecution might be avoided. The second category concerns the creation of opportunities for those accused of crimes to avoid punishment through the exploitation of (both substantive and procedural) loopholes and gaps in the provisions of the Statute. Examples here might be of the different thresholds of criminal responsibility for military and civilian commands as recognised in articles 28 (a) and (b) the opportunities presented by amnesties and immunities and the questionable status of certain defences.

A more general point might also be made here about the role of the ICC in fostering impunity which concerns its place within an international environment marked by vast disparities in wealth and power. Formally speaking, the ICC treats all states parties alike. No one state is more bound by the agreement than the other. By the same token, the ICC operates in an international environment which is profoundly divided in terms of the power and wealth of its parties, and that the kind of ‘justice’ that it purports to administer is likely to be equally partial (as indeed is already maintained). To the extent that it purports to do otherwise is obviously to bring forward the idea that just as it delivers justice in a partial way, so also does it award the condition of impunity to a select few. (All of the above instances of possible creation of impunity will be discussed in chapter 5, 6 and 4).

#### ***d) The possible recognition and legitimisation of impunity by the ICC***

In contrast to the above situations, this category concerns the possibility of recognition or legitimisation of (hence *de jure*) impunity. Firstly, the Statute may recognise impunity, through means such as the potential it offers for the recognition of amnesty and states’ immunity agreements. It will be discussed that amnesty may lead to impunity in some situations, in particular where amnesty is unconditional, and without investigation. The conflict between peace and justice is central concerning the debate over amnesties, and the question of retributive or restorative justice is crucial here. The Statute also may potentially recognise states’ immunity obligations under Article 98(1). The limitation of the obligation of states to extradite or surrender an accused to the ICC when they have a separate agreement has been recognised in this Article, which may thus provide impunity for some perpetrators.

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<sup>138</sup> Bernhardt Observer for the *European Court of Human Rights in the Rome Conferences*, see the *UN. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (15 June 17 July 1998), II, UN DOC. A/CONF.183/SR.3, at 79, Para 100.



These two sub-categories of recognition of impunity will be discussed in Chapter Three.

The second type of situation in this category is the legitimisation of impunity in the Statute: lawful impunity. In contrast to the above categories, impunity is not created or potentially facilitated in these situations, but is legitimised *ex post facto*. This encompasses cases of insanity or intoxication, which are recognised in Article 31 as absolute defences, and cases of self-defence, which is codified in Article 31 (1) (c) as an absolute defence where there has been ‘a threat of imminent death or of...serious bodily harm’. The result of such non-punishment in these cases is not ‘simply’ impunity, as the non-punishment results from the lack of *mens rea*<sup>139</sup> in cases of insanity or intoxication and the blameless nature of the act in cases of self-defence.<sup>140</sup> The differences between these sub-categories in which defendants are not punishable will be discussed in Chapter Four.

***e) The failure to address existing categories of impunity***

This category differs from the above categories in that it covers situations in which impunity has not been created, facilitated or recognised/legitimised by the ICC, but where impunity has not been addressed or the ICC has not been able to deal with it effectively. This may occur in the following situations. Firstly, sometimes crimes are heinous and widespread but are completely ignored and unaddressed. This might happen for different reasons, such as difficulties in reaching a definition, as is the case for the crime of terrorism and missing crimes such as the use of nuclear weapons in the Statute. The latter was under broad negotiations at the Rome Conference.<sup>141</sup> In the previous tribunals, for instance, priority was given, rightly or wrongly, to some types of international crime, and crimes of some other types were ignored. An example of this latter type would be the ‘comfort women’<sup>142</sup> crimes during World War II, whose perpetrators have never faced prosecution.

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<sup>139</sup> Gilbert J. ‘Justice not Revenge: The International Criminal Court and the ‘Grounds to Exclude Criminal Responsibility’-Defences or Negation of Criminality?’ 10 *The International Journal of Human Rights* (2006), 143, at 145.

<sup>140</sup> Cassese A. *International Criminal Law* (2008), at 255-56; Eser A. ‘Justification and Excuse’, 24 *The American Journal of Comparative Law* (1976), 621, 4, at 623; Berman M, N. ‘Justification and Excuse, Law and Morality’, 53 *Duke Law Journal* (2003), 1, at 7-8; Slidregt E. V. ‘Defences in International Criminal Law’, Paper presented at the Conference, *Convergence of Criminal Justice Systems* (2003), 1, at 2.

<sup>141</sup> Lee R.S. ‘The Rome Conference and Its Contributions to International Law,’ in R.S. Lee (eds), *the International Criminal Court the Making of the Rome Statute* (1999), 1, at 24.

<sup>142</sup> Penrose M. *Supra* note 106, at 300.

Secondly, it is also out of the capacity of a court to address all international crimes and perpetrators and all impunity; it needs to focus on those individuals with the greatest degree of responsibility for these crimes. In fact, each previous tribunal on each occasion left certain things unaddressed. This was not simply a jurisdictional incident, but rather, a deliberate act in each case. Furthermore, the ICC has no retroactive jurisdiction for past international crimes.<sup>143</sup> It is clear that addressing all existing impunity for international crimes is not, rationally and practically, within the capacity of the ICC, due to many practical limitations and barriers such as the limited number of judges, budget, etc. Additionally, and more significantly, the ICC cannot always even apply its existing capacity in order to exercise its jurisdiction over some perpetrators. This may happen in a case such as one involving a conflict of interests (*Realpolitik*) between the veto-wielding powers which prevents them reaching a consensus for a referral and subsequently the full support of the SC for the Court.<sup>144</sup>

Concerning limitations to the subject-matter jurisdiction of the ICC, it should be noted that, although the crime of aggression has been defined at the ICC's first review conference in Kampala, Uganda, the Court will not be able to exercise its jurisdiction over this crime until a decision to be taken after 1 January 2017.<sup>145</sup> Furthermore, the Rome Statute provides for state parties to issue a declaration of postponement of jurisdiction of the ICC over war crimes for the period of seven years after the Statute's ratification and entering into force for that state, in Article 124.<sup>146</sup> This Article has recently been extended for a further seven years at the ICC's first review conference.<sup>147</sup> The lack of trial in *absentia* and the universal jurisdiction are deficiency for the Court; I will argue that how the universal jurisdiction and trial in *absentia* may improve its function and jurisdiction over its subject-matter crimes.

Although some of the aforementioned instances of impunity are out of the reach of the ICC, many of the possibilities of the creation of impunity are avoidable by the ICC's judges in practice. However, this depends on the policy of the ICC, in

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<sup>143</sup> See the Rome Statute Art. 11 (1).

<sup>144</sup> The obvious example of this concerns the current ongoing international crimes being committed in Syria; as this country is not a member state, the Security Council has failed so far to refer this situation to the ICC, while in the similar case of Libya, the Council responded promptly and the case has been referred to the ICC. See SC. Res. 1970 (26 February 2011); see also the Pre-Trial Chamber *Arrest Warrant* against Saif Al-Islam Gaddafi and others, in ICC-01/11-4-Red (16-05-2011).

<sup>145</sup> See the Rome Statute Art.15.

<sup>146</sup> *Id.*, Art. 124.

<sup>147</sup> See the *Resolutions and Declarations adopted by the Review Conference*, part II, RC/Res.4 (8 June 2010).

particular the role of the independent Prosecutor, and on the personal character of judges, their training, education, cultural background, etc., as to how far they can work independently and resist external pressures. As the ICC tries the cases, the cases also try the ICC. As Justice Jackson said, ‘Courts try cases but cases also try courts’.<sup>148</sup>

#### ***1.4. Outline of the thesis***

The first Chapter of this thesis has addressed methodology and theory, the concept of law in legal realism, the relation between law and politics, the definition of impunity, and finally the different categories of impunity. The second Chapter provides an historical narrative of the development of individual criminal responsibility and impunity from the Treaty of Westphalia (1648) up to the creation of the ICC, covering the first international tribunals (Leipzig, Nuremberg and Tokyo) as well as the UN *ad hoc* tribunals of the ICTY and ICTR and the role and struggles of the UN International Law Commission, NGOs and specific states in the chain of events which led to the creation of the ICC. The historical development of and the question of impunity concerning previous international tribunals will be discussed in this Chapter.

Chapter Three concerns two forms of possible *de jure* impunity: amnesties and immunities. The first section of the Chapter addresses one of the main methods of the possible creation of impunity by the ICC, i.e. through the possible recognition of amnesties. The second section addresses immunities, examining impunity via possible recognition of states’ immunity agreements which may exclude the extradition of the accused and may limit the cooperation of states.

Chapter Four explores the creation or possible creation of impunity through defences in the Statute. In the first section are the different doctrines of defences in international law; the distinctions between defences in various national legal systems; and finally the historical narrative of defences in international tribunals prior to the ICC. The second section explores defences in the Rome Statute, which encompasses absolute defences: insanity and intoxication; the defence of superior orders, and self-defence. In the third section the defence of duress will be discussed,

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<sup>148</sup> Jackson H.R. ‘The Rule of Law Among Nations,’ 31 *American Bar Association Journal* (1945), 290, at 292.

and in the fourth and final section military commanders' and civilian superiors' responsibility and the different standards of liability between these two categories.

Chapter Five examines the several internal practical problems within the Statute which present a situation which may create impunity. The first section investigates some generic problems of the ICC which are shared by all national and international courts, such as collecting evidence, identification and protection of victims and witnesses, etc. The second section focuses on the several specific procedural issues of the ICC with regards to its functioning. This section discusses the scope and the nature of the jurisdiction of the court, and the principle of complementarity and admissibility of cases and the possible creation of impunity via this principle. Furthermore, the second section deals with the cooperation of states and enforcement issues of the ICC, which have a bearing on the functioning of the Court. In the third section several deficiencies of the Statute are discussed, such as the lack of universal jurisdiction, lack of jurisdiction *in absentia*, and the possible postponement by states of the Court's jurisdiction over war crimes. This chapter attempts to highlight how the ICC was intentionally established to be a weak tribunal, and how it may be linked to situations in which impunity may be created.

Chapter Six, by contrast, focuses on the several peripheral obstacles of the ICC, concentrating on the three most significant of these external issues. The first section of the Chapter concerns the role of the SC and its relationship with the Court. The second section addresses issues related to the role of certain powerful states, such as the US; it includes an appraisal of the US opposition to the ICC and its Bilateral Agreements with many state parties and non-parties to the Statute. The third section examines the issue of non-ratification of the Statute and its relation to the creation of impunity, the application of the Statute to state non-parties, and the main reasons for non-ratification of the Statute. Chapter Seven comprises the conclusion of the thesis; several recommendations for increasing the effectiveness of the Court are offered.

## ***Chapter II: An Historical Background to the International Criminal Court (ICC)***

### ***Introduction***

The establishment of the ICC in the late twentieth century was the major significant historical event toward the development of international criminal law (ICL) and the enhancement of individual criminal liability; it was known as major victory for the international community. The accumulated efforts of governments and international lawyers as well as non-governmental organisations culminated in the 1998 Rome Treaty and the establishment of the ICC as an independent and permanent body committed to judging crimes against humanity, genocide, war crimes, and crimes of aggression.<sup>1</sup> The major concern of the ICC is to put an end to the impunity of perpetrators of serious international crimes and make them accountable for their actions.<sup>2</sup> The ICC of course was not the first initiative of its kind; the concern of the international criminal justice system as a whole is to promote the accountability of individuals and the prosecution of individuals who have violated international law. The majority of international legal norms are concerned with placing behavioural constraints upon states, and holding states accountable to these; international criminal law's focus on individual responsibility has thus been regarded as a novel innovation.<sup>3</sup>

This Chapter contains a brief historical narrative of the previous international tribunals, leading up to the creation of the ICC. The necessity for the creation of the international tribunals and what the reasons were behind their establishment will be examined. There are several accounts of the history of ICL by various scholars;<sup>4</sup> this chapter is not a comprehensive historical narrative of ICL as the author is not an historian. However, the endeavour has been made firstly to draw a brief narrative of

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<sup>1</sup> The Rome Statute, Art. 5. The crime of aggression has recently been defined at the ICC's first review conference in Kampala, Uganda, by the ASP, but the Court will only begin to exercise its jurisdiction if the amendment is passed on 1 January 2017 by the majority of States Parties. See ICC. RC/Res.6 (11 June 2010).

<sup>2</sup> See the Preamble of the Statute.

<sup>3</sup> Simpson G. *Law, War & Crime* (2007), at 55.

<sup>4</sup> E.g. Cryer R. *Prosecuting International Crimes Selectivity and the International Criminal Law Regime* (2005) ; Simpson G. 'War Crimes: A Critical Introduction,' in T. McCormack & G. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997), 1; Bassiouni M.C. 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish an International Criminal Court', 10 *Harvard Human Right Law Journal* (1997), 11; Cassese A. *International Criminal Law* (2003), Kerb C. 'International Criminal Law,' *Max Planck Encyclopedia of Public International Law* (2011), and etc.

the creation of the prior international tribunals and of the ICC, and the reasons behind their establishment, which was significant for the development of ICL. Secondly, I attempt to advance the theory that the development of ICL has always been coincident with non-prosecution of some criminals, categories of crimes or categories of people. Accordingly, the emphasis has been made on the major cases of non-prosecution of individuals in the prior international tribunals, with a brief review of the stages in the development of the ICL, in order to create a picture comprising several aspects of the improvements in ICL as well as its newer problems and deficiencies. The chapter will proceed to show that the ICC in fact continues this same historical narrative, whereby a step forward in the development of individual criminal responsibility is taken and, concomitantly, further opportunities are created for the non-prosecution and politicisation which may be taken as inherent to international criminal law.

The chapter will also examine criticisms of the post-World War tribunals as ‘victor’s justice’,<sup>5</sup> which has also been an issue for the ICTY and ICTR and for ICL in general. It will be discussed that the exemption of some individuals or some categories of crimes is not new; and that the ICC on the one hand inherited some of these issues, and on the other hand has its own historical narrative and ambiguities, resulting from the historical politico-legal context in which the Rome Statue was drafted and in which the ICC has operated since then. The chapter will examine how impunity for some people or some categories of crimes is a common issue among the previous tribunals. Impunity in connection with past tribunals and with the ICC does not refer simply to procedural incidents in the course of due process; impunity in these tribunals is and has been a matter of very complicated political, legal, etc., issues. On some occasions, impunity via non-prosecution may be granted inevitably to some individuals, in cases in which prosecution could threaten peace and increase national unrest;<sup>6</sup> or there may be from the outset one side of a conflict or some

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<sup>5</sup> Bass. G. J. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2003), at 8-16; Wright Q. ‘The Law of the Nuremberg Trial’, 41 *American Journal of International Law* (1947), 38, at 45; Tomuschat C. ‘The Legacy of Nuremberg’, 4 *Journal of international Criminal Justice* (2006), 830, at 832; Simpson G. ‘Politics, Sovereignty, Remembrance’ in D. McGoldrick P. Rowe & E. Donnelly (eds), *The Permanent International Criminal Court Legal and Policy Issue* (2004), 47, at 48-50; Cryer R. *Id.*, at 199-202.

<sup>6</sup> E.g. the case for the non-prosecution of the Japanese Emperor, see Maga M. *Judgement at Tokyo, the Japanese War Crimes Trials* (2001), at 35, he asserts ‘[d]estroying the Emperor would destroy Japan,...’, Minear R.H. *Victor’s Justice: the Tokyo War Crimes Trial* (1971), at 113, he also asserts non-prosecution of Emperor based on legal evidences, that he might would have been found not guilty; Cryer R & Boister N. *The Tokyo International Tribunal: A Reappraisal* (2008), at 65-69.

individuals or category of crimes which are exempt from prosecution.<sup>7</sup> Impunity may also occur due to lack of political will, inaction or inability to prosecute, etc.;<sup>8</sup> all these issues will be examined in connection with the previous international tribunals, in order to illustrate the complexity of the issue of impunity. In fact, impunity has been seen as an innate feature of the past tribunals, and in this they were not very different from the ICC.

In making a comparison between the previous, *ad hoc* tribunals and the ICC, it may be stated that, despite the fact that the later establishment is a momentous development of the ICL, it also has its own difficulties and greater ambiguities insofar for the enforcement of the individual criminal responsibility. In particular, as will be examined, the ICC's structure and the politico-legal environment in which operates lead it to shape impunity in an ambivalent or counterintuitive way. The ICC's unique treaty nature causes two opposite effects; firstly, because of its treaty-based nature, in contrast to the previous international tribunals it is widely agreed upon via the ratification of many states;<sup>9</sup> secondly, however, it has faced the greater problem of non-compliance with the treaty on the part of other states and the lack of sufficient coercive power.

This chapter is intended to serve as historical background covering the evolutionary advances made in international criminal law in the modern era<sup>10</sup> of the institutionalisation of international law, in particular from the World War I to the establishment of the permanent international criminal court (the ICC). There are six sections, the first section examines historical instances of international tribunals and the idea of establishing the first international criminal court prior to World War I; the second looks at the Leipzig tribunal and non-prosecution of individuals after World War I; the third appraises the revolution in international law after the World War II and the creation of the Nuremberg and Tokyo Tribunals in this period; and the fourth

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<sup>7</sup> E.g. the Allies were in the military tribunals after the Second World War, see *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10*, by Telford Taylor, in *The Military Legal Resources* (15 August 1949), at 145 and 228-229.

<sup>8</sup> Bass G. J. *Supra* note 5, at 6; see also Bassiouni C. 'Combating Impunity for International Crimes', 71 *University of Colorado Law Review* (2000), 409, at 410.

<sup>9</sup> The number of the ratification are 121 states until 02 April 2012; see the ICC website at: <http://www.icc-cpi.int/Menus/ASP/states+parties/> (Accessed 17/08/2012).

<sup>10</sup> Kennedy D. 'A new stream of International Law Scholarship', 7 *Wisconsin International Law Journal* (1998), 1, at 12. He divided the history of public international law into three stages: the pre-modern era before 1648; the era of traditional philosophical and doctrinal development (1648-1900), which saw a slight displacement of naturalism by positivism; and the modern era of institutionalised pragmatism since the First World War.

section addresses the establishment of the *ad hoc* tribunals, the ICTY and ICTR, prior to the creation of the ICC. The fifth section provides an account of the creation of the ICC itself, and seeks to analyse the various factors and influences that shaped the formation of the ICC and individual criminal responsibility in the ICC's Statute. The final section examines the relationship between the historical development of individual criminal responsibility and the question of impunity; it seeks to analyse how and under what conditions the development of individual criminal responsibility under international criminal law and tribunals may coincide with the creation or recognition of new forms of impunity.

The problem is that creation of legal categories of offences in and of itself creates the conditions for impunity. It is the creation of impunity that justifies or *warrants* the creation of institutions to prosecute and punish.

### ***2.1. The international tribunal prior to World War I***

The idea of the establishment of an international criminal court is not new. Some assert that the first tribunal with an arguably international character convened in Breisach, Germany, in 1474. It involved the Holy Roman Empire conducting the trial of Peter von Hagenbach with 28 judges, appointed from the members of the coalition who had fought von Hagenbach. Eight judges were selected by the town of Breisach and two by each of the allied towns, which included Alsatian and Upper Rhenanian towns, as well as Berne and Solothurn of the Swiss Confederation; each town represented a political entity within the Holy Roman Empire.<sup>11</sup> Von Hagenbach was charged with murder, rape, torture, perjury, and giving orders to the non-German 'mercenaries' whom he had brought to Breisach that they should kill men in their houses. The defendant was found guilty by the tribunal and put to death for the crimes he had committed against the laws of God and the laws of men.<sup>12</sup>

Some have questioned whether the form of tribunal in von Hagenbach's trial can be defined as an international tribunal.<sup>13</sup> Many commentators have drawn attention to the fact that one of the most important analogous aspects of the von Hagenbach trial to modern trials of international crimes is that of the superior orders

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<sup>11</sup> Schwarzenberger G. *International Courts and Tribunals, the Law of Armed Conflict* (1968), Vol. II, at 462-463.

<sup>12</sup> *Id.*, at 465; see also Cryer R. (2005), *supra* note 4, at 17.

<sup>13</sup> McCormack T. 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in T. McCormack and G Simpson (eds), *The Law of War Crimes National and International Approaches* (1997), 31, at 38.



defence.<sup>14</sup> Although the absolute defence of superior orders was rejected in von Hagenbach's trial,<sup>15</sup> it remains a controversial element of contemporary international criminal law and in the ICC Statute as well; this controversy -defence of superior orders in war crimes-will be discussed in the fourth Chapter of this thesis.

It appears that for almost four centuries after the trial of Peter von Hagenbach in 1474 (until 1872) there was no serious consideration of the idea of establishing an international court. On 3 January 1872, one of the founders of the Red Cross movement, Gustav Moynier of Switzerland, proposed the establishment of a permanent international criminal court by treaty at a meeting of the International Committee of the Red Cross.<sup>16</sup> He drafted a proposal for a permanent court to prosecute individuals for the breach of the Geneva Convention of 1864; in developing his proposal, he considered the legislative, judicial and executive powers connected with criminal law before coming to the conclusion that an international organisation was required in place of national courts. He contended that it was necessary to establish international criminal law on the basis that the state parties to the Geneva Convention had been disinclined to pass the criminal legislation needed to prevent violations; he thought it inappropriate to leave judicial remedies to belligerents because the judges could be placed under pressure at any time, whereas an international court could offer better assurances of neutrality. This, in turn would make belligerents more likely to use it.<sup>17</sup> Governments themselves, he said, would not have anything to fear from such a court, because they would not be implicated directly in the crimes dealt with by it; he thought it absurd to envisage a superior order in contempt of formally established international obligations. His conception did, however, leave the executive function of enforcing sentences to states and it was inadequate to compel criminal responsibility.<sup>18</sup> In fact, no serious attempt was taken to establish the international court following Moynier's proposal. The next attempt at the establishment of an international tribunal occurred after World War I.

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<sup>14</sup> Cryer R. *Ibid*, at 20.

<sup>15</sup> Schwarzenberger G. *Ibid*, at 465.

<sup>16</sup> Keith Hall C. 'The First Proposal for a Permanent International Criminal Court', 322 *International Review of Red Cross* (1998), 57, at 58.

<sup>17</sup> *Id*, at 57-59.

<sup>18</sup> *Id*.

## ***2.2. The establishment of the Leipzig Court after World War I and its deficiencies in the prosecution of individuals***

In the aftermath of World War I, the victorious Allies decided to prosecute Germans responsible for aggression and other war crimes. There was outrage concerning war crimes on the part of Allied states, against Germany's war crimes, and also on the part of foreigners, such as against the Ottoman Empire for the Armenian massacres.<sup>19</sup> During the war the Allies repeatedly expressed their strict determination to bring to justice all Germans who had committed acts<sup>20</sup> which violated the laws and the customs of war.<sup>21</sup> Hence, shortly after World War I, the Allies set up a commission in 1919 in order to 'investigate the responsibility for the start of war crimes' and which type of tribunal would be adequate for trials.<sup>22</sup> The commission reported the responsibility of the Central Powers for initiating the war, and made a number of recommendations, such as the prosecution of high authorities such as the Kaiser and establishing an Allied 'High Tribunal' among the Allied member states.<sup>23</sup> The Report's suggestions were largely followed by the Allies, and led to the Treaty of Versailles being signed between the Allied and Associated Powers.<sup>24</sup> The Treaty provided the legal grounds for the prosecution of Kaiser Wilhelm II and other war criminals before a military tribunal which would be established by the Allied powers.<sup>25</sup> It seems that the first serious initiative to implement the individual responsibility of holders of high positions of state was concerned with the case of Kaiser Wilhelm II, Emperor of Germany.

Article 227 of the Treaty of Versailles described the crimes of Kaiser Wilhelm II as 'a supreme offense against international morality and the sanctity of

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<sup>19</sup> Bass. J. B. *Supra* note 5, at 58; for the Armenian genocide see generally Dadrian V. *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus* (2003), and The Armenian genocide and the legal and political issues in the failure to prevent or punish the crime (1998).

<sup>20</sup> Battle G.G. 'The Trials before the Leipzig Supreme Court of Germans Accused of War Crimes', 8 *Virginia Law Review* (1921), 1, at 1.

<sup>21</sup> Violations against the customs of war included in '[m]assacres, torture, the arrest and execution of hostages, artillery and aerial bombardments of open towns... the use of shields formed of living human beings, attacks on hospitals, [and] disregard of the rights of the wounded, prisoners of war, and women and children.'

<sup>22</sup> See 'The Report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of penalties', 14 *American Journal of International Law* (Jan-Apr 1920), 95, at 95.

<sup>23</sup> *Id.*, see generally 107-120.

<sup>24</sup> *Id.*, at 95-98; see also *Question of International Criminal Jurisdiction*, Report by Ricardo J. Alfaro, Special Rapporteur, UN Doc. A/CN.4/15 and Corr.1, (1950), Vol. II, Para 7.

<sup>25</sup> See the Treaty of Versailles Art. 229.

treaties' before an international tribunal.<sup>26</sup> In addition, Articles 228 and 229 empowered tribunals to put on trial other persons who perpetrated acts in breach of the laws and customs of war.<sup>27</sup> However, none of these international tribunals were established,<sup>28</sup> due to Germany's resistance to the trial: the German government immediately announced that it would not recognise the jurisdiction of the tribunal and argued that the trial of its military and marine elite could jeopardise the existence of its government.<sup>29</sup> The Allied powers were afraid of the public reaction to the trial taking place outside Germany, and eventually agreed to a compromise whereby national tribunals in Leipzig, Germany, would be set up to prosecute those accused. In addition to this reluctant concession, the Allies also agreed to reduce the number of the accused to face trial;<sup>30</sup> the number of accused was brought down from around 3000 to 896 German Officers, and this was again reduced to 46 persons to be prosecuted before Germany's national court.<sup>31</sup> Consequently the conditions of prosecution *meant* that many escaped from justice. Despite the opposition and the Allies' reluctance, the Leipzig tribunal was set up in 1919 on the basis of the Versailles Treaty, and the accused were tried before the German Supreme Court.

The Kaiser was escaped to the Netherlands; the Dutch government rejected an official request by the Supreme Council of the Peace Conference to surrender him, as he had been offered asylum in the Netherlands.<sup>32</sup> The government's statement of broad refusal was accepted by the Allied powers in March 1920, and no further efforts were made in order to extradite the Kaiser.<sup>33</sup> As a result, the Kaiser was effectively immunised from prosecution and was never brought to justice.

There are several reasons for the non-prosecution of the Kaiser. Firstly, there were legal issues, such as the issue of retroactivity; there were discussions among the Allies as to whether or not aggression was a crime at the time. Article 227 of the Treaty of Versailles specified that the Kaiser's committed 'offence against international morality'; this dubious term was enough to justify the constitution of

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<sup>26</sup> *Id.* Art. 227.

<sup>27</sup> *Id.*, Art. 228 & 229.

<sup>28</sup> Cassese A. (2003), *Supra* note 4, at 40.

<sup>29</sup> German War Trials: *Report of Proceedings before the Supreme Court in Leipzig*, London. His Majesty's Stationery Office (1921), 16, at 19; see also, *Report on the Question of International Criminal Jurisdiction* by, Ricardo J. Alfaro. *Supra* note 24, Para 9 and 11.

<sup>30</sup> Cryer R. (2005), *Supra* note 4, at 34.

<sup>31</sup> See Report by Ricardo J. Alfaro, Special Rapporteur. *Supra* note 24, Para, 11; see Also Battle G.G. *Supra* note 20, at 6-12.

<sup>32</sup> See Report by Ricardo J. Alfaro. *Id.*

<sup>33</sup> Bantekas L & Susan N. *International Criminal Law* (2007), at 496.

special tribunal to try him, but was not specific about the crime.<sup>34</sup> Bassiouni has argued that the failure of the Leipzig tribunal may be attributed to ‘realpolitik’, with the impunity for the Kaiser following as a result of an ambiguous agreement and a lack of political will which prevented the application of the legal norm. It may also be attributed to questionable status of the crime.<sup>35</sup>

The Leipzig court was not, in fact, an effective mechanism for war crimes trials of individuals after World War I. It accepted, for instance, that obedience to superior orders could be used as an absolute defence<sup>36</sup> in the trial of Lieutenant Karl Neumann, the commander of a German submarine that had sunk the British hospital ship ‘Dover Castle’.<sup>37</sup> A consequence of the availability of this defence was the exoneration of the officer (Karl Neumann) under orders, as well as the acquittal of other defendants who participated in the sinking of the hospital ship. Even though the court held the view that their actions were a violation of international law, they were acting under superior orders and hence were found not guilty.<sup>38</sup> Judgment in ‘Dover Castle’ by standards would have been a clear case of impunity, for Karl Neumann and other accused of sinking of the hospital ship, but also there is no clear law at that time to be applied. Another important case before the Leipzig court was that of a famous German officer, General Stenger, who was charged with the murder of prisoners of war.<sup>39</sup> Despite overwhelming evidence, the court found him not guilty, even though Crusius, a lower officer, was convicted and sentenced to two years’ imprisonment.<sup>40</sup> In the Leipzig trials even when the accused was found guilty, generally the punishment was lenient. The results of the trials unsurprisingly raised huge indignation among the Allied Powers, in particular in France. Gordon writing in 1947 for example argued that the trial of General Stenger was a ‘miscarriage of justice’,<sup>41</sup> and this acquittal demonstrated the inadequacy of the court, which had accorded impunity to criminals through the process of exoneration.

The agreement between the Allies and Germany allowing prosecutions in the national court in Germany, as opposed to via international tribunals, was the first step

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<sup>34</sup> Bass. J. B. *Supra* note 5, at 58, 71 and 76.

<sup>35</sup> Bassiouni C. (2000), *Supra* note 8, at 410.

<sup>36</sup> Battle G.G. *Supra* note 20, at 11.

<sup>37</sup> ‘German War Trial, *Report of Proceedings before the Supreme Court in Leipzig*. *Supra* note 29, at 630-631.

<sup>38</sup> Battle G.G. *Ibid*, at 15.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, at 12.

<sup>41</sup> *Id.*, at 14.

in that direction for those who regard Leipzig as giving rise to impunity. For the failure of the Leipzig trials some have argued that other factors were also significant, such as the fact that the Germany as a defeated state was not occupied and thus could still resist the Allied demands for prosecution of those who had committed war crimes.<sup>42</sup> Legacy of Leipzig is to encourage as many suggested the necessary for international tribunals, and for matters related to war crimes, national judges might not be independent,<sup>43</sup> impartial and unwillingness, to prosecute, thus national prosecution might not be always appropriate for such crimes. The experience of the Leipzig trial may have affected calls for the creation of an international tribunal after the Second World War.<sup>44</sup>

Another issue which was discussed by the Allies at that time was the Armenian massacres of 1915 in Turkey.<sup>45</sup> The Allied powers accused the Turkish state (Caliphate) of either implicitly adopting a policy of genocide or giving consent to the killing of over 200,000 people during the War.<sup>46</sup> The 1919 Commission, established by the Allied powers to investigate war crimes, reported that systematic killing of Armenians had occurred in Turkey in violation of the ‘laws of humanity’ as stated in the Preamble of the 1907 Hague Convention, and accordingly that the Turkish officials concerned should be punished. It was the first time that an international legal body considered the individual criminal responsibility under international law of those who committed crimes against citizens of their own nations.<sup>47</sup> Although the Allied powers agreed to establish an *ad hoc* criminal tribunal to try the perpetrators of mass killings, no further action was taken against the Turkish officials.<sup>48</sup>

Although a few low-ranking perpetrators of the Armenian massacres, such as Kemal Bay and Tevfik,<sup>49</sup> had been prosecuted and punished before the Ottoman

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<sup>42</sup> Bass. J. B. *Supra* note 5, at 59.

<sup>43</sup> Keith Hall C. *Supra* note 16, at 59.

<sup>44</sup> See generally Opening Statement before the International Military Tribunal by Justice Jackson, in *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg 14 November 1945- 1 October 1946 (1947), Vol, II, 98-155.

<sup>45</sup> Penrose M. ‘Impunity-Inertia, Inaction, and Invalidity: A Literature Review’, 17 *Boston University International Law Journal* (1999), 269, at 292.

<sup>46</sup> Bassiouni C. ‘The International Criminal Court in Historical Context’, *Saint Louis-Warsaw Transatlantic Law Journal* (1999), 55, at 57.

<sup>47</sup> *Id.*

<sup>48</sup> Penrose M. *Supra* note 45, at 293.

<sup>49</sup> E.G. Kemal who was the lieutenant governor of the Yozgat has been convicted to the death penalty and hanged, Tevfik was the commander of the Yozgat police was found fifteen years of hard work. Both of them were accused of the Armenian deportation. See Haigazn K. Kazarian. ‘A Turkish

Court in Constantinople, many perpetrators escaped; young leaders who had had a significant role in the massacres such as Talaat and Enver fled to Germany.<sup>50</sup> The administration of justice at the Ottoman trials was so incompetent that many perpetrators who were arrested escaped from prison and were never rearrested. The government was also frightened to pursue major criminals; the prosecutions caused a wave of nationalist unrest and the government feared causing further nationalist backlash. This was the reason that Kemal was hanged secretly; at his funeral a thousand people gathered in order to pay their respects to him.<sup>51</sup> If Leipzig had shown the possibility that national Tribunals may not be impartial, the Ottoman trials also showed: a) national tribunals may be incompetent whether impartial or not; and b) domestic political pressure may affect such tribunals, rendering them ineffective. Nonetheless, as Bass argues, 'liberal states have mostly pursued international justice when their citizens had been the victims of war crimes'.<sup>52</sup> As the UK response to the Ottoman war crimes showed, few was among the authorities were willing to pursue prosecution in cases not involving British citizens: 'British officials tried to hold onto Turks accused of crimes against Britons to the end, showing more solicitude for Britons than for Armenians.'<sup>53</sup> The non-prosecution of those responsible for the Armenian massacres, whatever the reason, remains an issue today; the yearly observance of the anniversary of the start of the massacres shows that people are unlikely to forget such atrocities, yet the Turkish government still refuses to make an official apology for the atrocities in 1915.

However, despite the major failure to punish those accused of international crimes after World War I, in Constantinople and in Leipzig, the most significant legacy of Leipzig, as Cryer asserts, was that it had been clearly shown that a state is unlikely to undertake effective prosecution of its own citizens before its own courts for war crimes, and hence that international supervision of proceedings is undoubtedly required.<sup>54</sup> The other significant result of the Versailles Treaty was that it signified the point at which the modern international law of institutions begins, and

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Military Court Tries the Principle Genocidists of the District of Yozgat,' 25 *The Armenian Review* (1972), 34, at 36.

<sup>50</sup> Bass G. J. *Supra* note 5, at 118. Talaat was assassinated in Berlin in 1921.

<sup>51</sup> *Id.*, at 125-126.

<sup>52</sup> *Id.*, at 278.

<sup>53</sup> *Id.*

<sup>54</sup> Cryer R. *Supra* note 4, at 35.

thus the prospect of placing entire nations under the scrutiny of institutional mechanisms.<sup>55</sup>

### ***2.3. Post First World War era tribunals and the revolution in the subject of international Law***

After the First World War the idea of the creation of the international criminal court found some support, the League of Nations Advisory Committee in 1921 provided a proposal for the creation of an international criminal court to prosecute war crimes.<sup>56</sup> However, the effort by the League was not successful for the creation of an international criminal court despite the fact that the League drafted and adopted a statute for such an international criminal court.<sup>57</sup> It was only after the Second World War that international tribunals were established. By creation of Tokyo and Nuremberg tribunals, international law had begun to accept that individuals have both rights and duties under international law.

#### ***2.3.1. The creation of the Nuremberg and Tokyo Tribunals after World War II***

Due to the widespread brutality and war crimes committed by the Nazis during the Second World War, after the war several Allied leaders such as Churchill and Stalin were pressing for the summary execution of Axis leaders and trial for the lower ranks, but because of repeated arguments to the contrary by Henry Stimson of the US they were persuaded to accept the establishment of an international tribunal.<sup>58</sup> The Allied states, under Control Council Law Number 10, agreed to the prosecution of the major Nazi and Japanese war criminals in the Nuremberg (IMT) and Tokyo (IMTFE) tribunals.<sup>59</sup> Through the creation of the Nuremberg and Tokyo Tribunals, direct individual criminal responsibility for international crimes was stipulated for the first time.<sup>60</sup> However, whilst the (IMT) in Nuremberg became the centre of media attention, the IMTFE trials passed largely unnoticed.<sup>61</sup> Because of its novelty and the widespread attention given to the Nuremberg tribunal, it quickly became recognised

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<sup>55</sup> Simpson G. *Supra* note 3, at 59.

<sup>56</sup> See McCormack T. (1997), *Supra* note 13, at 51-52.

<sup>57</sup> Cryer R. *Ibid*, at 36.

<sup>58</sup> Bass G. J. *Supra* note 5, at 147 and 158-9.

<sup>59</sup> See the *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10*, by Telford Taylor, in The Military Legal Resources (15 August 1949) The US, France, the UK and the Soviet Union on the basis of an agreement signed in London on August 8, 1945. See Charter of the Tokyo Tribunal, Art. 1.

<sup>60</sup> Simpson G. *Supra* note 3, at 59; Cryer R. *Supra* note 4, at 39.

<sup>61</sup> Roach C. *Politicizing the International Criminal Court* (2006), at 24.

as establishing a legal precedent.<sup>62</sup> In fact, there are many similarities between these two tribunals regarding individual responsibility and subject-matter jurisdiction over crimes.

The Nuremberg had jurisdiction over three categories of crimes: crimes against peace,<sup>63</sup> war crimes,<sup>64</sup> and crimes against humanity.<sup>65</sup> Crimes against humanity were distinguished from war crimes and were codified for the first time.<sup>66</sup> The major advancement was that even crimes committed against the state's own population were included under crimes against humanity, referring to 'any civilian population' in Article 6 (c) of the Charter. Meanwhile prior to the Nuremberg Charter international law was largely concerned with regulating inter-state conduct rather than the treatment of state's own citizens.<sup>67</sup> In fact, the criminalisation of crimes against humanity, as Goldstone asserts, was the most significant legacy of Nuremberg.<sup>68</sup>

Crimes against peace included 'planning, preparation, initiation, or waging of a war of aggression'.<sup>69</sup> War crimes were defined via an incorporation of the 1907 Hague Convention and other customary international laws of war.<sup>70</sup> Most importantly, the Nuremberg and Tokyo Charters not only criminalised war crimes, but, in codifying the concept of 'war against peace' or aggressive war, also criminalised the crime of waging an illegal war.<sup>71</sup> It had previously been recognised

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<sup>62</sup> *Id.*

<sup>63</sup> The Nuremberg Charter, Art. 6 (a).

<sup>64</sup> *Id.*, Art. 6 (b), '[N]amely, violations of the laws or customs of war...'

<sup>65</sup> *Id.*, at 6 (c). '[N]amely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

<sup>66</sup> Cryer R. & *et al.* *An introduction to International Criminal Law and Procedure* (2007), at 188; see also Bassiouni C. (1999), *Supra* note 46, at 61. Bassiouni regarding differences between crimes against humanity and war crimes asserts that 'war crimes are committed by one combatant against another combatant, whereas crimes against humanity are committed by combatants against a civilian population'.

<sup>67</sup> Cryer R. & *et al.* *Id.*, at 188.

<sup>68</sup> Goldstone R. *Prosecuting War Criminals, Annual memorial lecture*, at David Davis Memorial Institution of International Studies (1966), No. 10 at 2.

<sup>69</sup> The Nuremberg Charter Art. 6.

<sup>70</sup> For International Customary sources see *Hague Convention (IV), respecting the Laws and Customs of War on Land* and its annex: *Regulations concerning the Laws and Customs of War on Land* (18 October 1907), and *Hague Convention (III), for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864* (29 July 1899), in *The Laws of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents*, in D. Schindler (eds), (1988), at 63 and 289.

<sup>71</sup> See the Nuremberg Charter Art. 6 (a).



that to wage a war was an absolute right of every state in its sovereignty.<sup>72</sup> The 6<sup>th</sup> edition of Oppenheim, which was revised by Lauterpacht in 1944, states that:

...So long as war was a recognized instrument of national policy both for giving effect to existing rights and for changing the law, the justice or otherwise of the cause of war was not of legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived every war was just.<sup>73</sup>

The 1926 edition of Oppenheim had asserted that: '[T]his conception of war as lacking illegality includes an absolute right of every State to make war, whenever, and for whatever reason, it chooses.'<sup>74</sup> Even if a distinction had been maintained between 'just' and 'unjust' wars, neither just nor unjust wars had been considered crimes under international law before the Nuremberg Charter.<sup>75</sup>

The Nuremberg judgment clearly indicated that 'crimes against international law are committed by men, not by abstract entities'.<sup>76</sup> It was the first time that civil and military leaders were prosecuted for war crimes; and, moreover, the Allies took what Lauterpacht considered 'the more difficult and the wiser course' and determined that the enforcement of international law must cover not only war crimes proper but also 'the crime of war - which is the cause and the parent of war crimes.'<sup>77</sup> The Nuremberg Charter explicitly rejected the defence of sovereign immunity for official authorities and military leaders and made it clear that individuals at any position are responsible for international crimes committed under their directions.<sup>78</sup> The Nuremberg Charter in fact, was the acknowledgment that the individual's having rights and duties under international law tends to lessen the need for, and the compass for, collective punishment of states.<sup>79</sup> Thus, as Simpson asserts, the development of modern international criminal law can be seen as a series of shifts away from collective guilt and towards individual responsibility.<sup>80</sup> The IMT

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<sup>72</sup> Oppenheim. *International Law a Treatise, Disputes, war and Neutrality* (1926), at 114-115; Mansfield A. J. 'The Tokyo War Crimes Trial', *University of Queensland Law Journal* (1948-1951), at 9.

<sup>73</sup> Oppenheim. *International Law atreatise*, in H. Lauterpacht (eds), Sixth Edition (1944), at 176-177.

<sup>74</sup> Oppenheim. (1926), *Ibid*, at 114.

<sup>75</sup> Justice R. B. Pal. *International Military Tribunal for the Far East* (1953), at 32-33. (Mr Justice R. B. Pal was one of the presiding Justices at the IMT),

<sup>76</sup> *Trial of the Major War Criminals before the International Military Tribunal*, *supra* note 44, Vol, I, at 223.

<sup>77</sup> Lauterpacht H. *International Law Being the Collected Papers of Hersch Lauterpacht* (1975), at 165-166.

<sup>78</sup> The Nuremberg Charter Art. 7.

<sup>79</sup> Lauterpacht H. *Ibid*, at 524. He added that '[s]uch necessity cannot always be avoided; neither is it inherently unjust, especially if it can be effected without the indiscriminate infliction of physical harm upon the individual members of the guilty State'.

<sup>80</sup> Simpson G (2007), *Supra* note 3, at 59.

Charter also recognised criminal responsibility for organisations for the first time and in practice several organisations were found guilty.<sup>81</sup>

In practice, in the Nuremberg Tribunal twenty-four defendants, including political and senior military leaders, were tried from 14 November 1945 to 1 October 1946.<sup>82</sup> Twelve of them were sentenced to death, three to life imprisonment, and four to limited imprisonment; three were acquitted.<sup>83</sup> In addition to the number of defendants who were tried in Nuremberg and Tokyo, many other ‘subsidiary’ tribunals were held before the US military tribunal at Nuremberg and over 800 Japanese defendants in the Australian military tribunal.<sup>84</sup>

The Tokyo tribunal (IMTFE) similarly to the Nuremberg, was established by the Allies; the crimes within the jurisdiction of the two courts were almost the same, but in the Tokyo Tribunal General Douglas MacArthur, Supreme Commander of the Allied Powers, followed a different procedure from the Nuremberg Tribunal.<sup>85</sup> He issued a military declaration, specifying the framework of the Charter of the IMTFE (which was, to a large degree, modelled on the Nuremberg Charter)<sup>86</sup> and appointed a judge from each of the eleven Allied countries for this tribunal. The structure of the tribunal was different from the Nuremberg Tribunal, as was the number of countries that took part in each one (eleven countries in Tokyo versus four countries in Nuremberg). Also unlike Nuremberg, the Tokyo Tribunal did not characterise any organisations as criminal; yet like Nuremberg, the Tokyo Trials neither accepted the defence of superior orders nor that government officials were protected through ‘acts of State’.<sup>87</sup> In contrast to the Nuremberg Charter, however, in the Tokyo Trials the ‘official position of an accused could be treated as a circumstance in mitigation of punishment if this was required in the interest of Justice.’<sup>88</sup> In the Tokyo tribunal, 28

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<sup>81</sup> See Art. 10 of the IMT Charter. E.g. the Secret State Police (Gestapo), Security Service (SD), and the major paramilitary organisation under the Nazi party, the SS, were all declared to be criminal organisations; see *The Nuremberg Judgment: The Accused Organizations*, in *Trial of the Major War Criminals before the International Military Tribunal*. *Supra* note 44, Vol, I, at 25, Vol, IV at 80 and Vol, 42 at 522.

<sup>82</sup> Cooper R.W. *The Nuremberg Trial* (1947), at 37-38.

<sup>83</sup> *Id.*, at 41.

<sup>84</sup> McCormack T. ‘Sixty Years From Nuremberg: What Progress for International Criminal Justice? 5 *New Zealand Armed Forces Law Review* (2005), 1, at 3.

<sup>85</sup> See the Tokyo Charter Art. 2. It provides that seven to eleven members of the Tribunal shall be appointed by the Supreme Commander.

<sup>86</sup> Because of the similarity between the Tokyo and the Nuremberg tribunals in particular, the crimes within the jurisdiction of the Tokyo Tribunal have been less noted in this section.

<sup>87</sup> Pritchard J.R. ‘The International Military Tribunal for the Far East and its Contemporary Resonances’, 149 *Military Law Review* (1995), 25 at 32-33.

<sup>88</sup> See the Tokyo Charter Art. 6.

defendants, all class A criminals – who were distinguished from all other, so-called minor, class B and C criminals – were found guilty of conspiracy to wage aggressive war, war crimes, and other atrocities (i.e. crimes against humanity) and were convicted at Tokyo.<sup>89</sup> This was in addition to 5,700 persons who had been tried in various military courts in the Far East, administered by the nineteen Allied countries in their respective zones.<sup>90</sup> In the Tokyo trials, which lasted from 3 May 1946 to November 1948, seven were convicted to death by hanging, and others were sentenced to terms ranging from life imprisonment to seven years.<sup>91</sup> Most importantly, the Japanese state submitted to the jurisdiction of this court.<sup>92</sup>

Impunity arose as an issue in the IMT tribunals in several different ways. The first aspect of this matter is the facilitation of impunity at Nuremberg and Tokyo via non-prosecution or exemption. Although the atrocities committed by the Nazi state were unbelievable in scale in comparison with the alleged crimes committed by the Allies, there was no reason why those latter crimes should have been ignored and not prosecuted in either an international or a domestic court. Both the Nuremberg Trials and the Tokyo Tribunal were set up only for the prosecution and punishment of the major war criminals from the Axis Powers, from Europe and the Far East respectively.<sup>93</sup> This had the effect of the tribunals being regarded as ‘one-sided trials’,<sup>94</sup> and the impartiality and jurisdiction of these tribunals being subject to criticism. In particular, exemption from jurisdiction of the direct attacks of the Allies on German civilians, as occurred at Hamburg and Dresden, and the US atomic bomb attacks on Hiroshima and Nagasaki, were obvious examples.<sup>95</sup> Simpson notes that the principle of *tu quoque* that was invoked by the defence attorney in the Nuremberg trials rested on the fact that the Allies had not appeared before the court with ‘clean hands’.<sup>96</sup> The problem is not simply that certain people escaped justice, but that the simultaneous invocation of universal crimes went together with a partial

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<sup>89</sup> *Judgment International Military Tribunal for the Far East*, Institute of Advanced Legal Studies (Depository), (1948), Part C, Chapter X, Verdicts 453-477.

<sup>90</sup> Pritchard. J.R. *Supra* note 87, at 29-31.

<sup>91</sup> Beigbeder Y. *International Justice against Impunity* (2005), at 3.

<sup>92</sup> Pritchard R. J. *Ibid*, at 28.

<sup>93</sup> See the Preamble and Art. 1 of the *London Agreement of 8<sup>th</sup> August 1945*, and the Nuremberg Charter, Art. 1 and 6, and the Tokyo Charter Art. 1.

<sup>94</sup> Futamura M. *War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy* (2008), at 34; Wright Q. *Supra* note 5, at 45.

<sup>95</sup> Lindqvist S. *A History of Bombing*, Translated by Rugg L.H (2002), Para 11, 200, 202, 203, and 234; see also Futamura M. *Id*, at 34.

<sup>96</sup> Simpson G (1997), *Supra* note 4, at 5.

jurisdiction that made clear their real relationship. Universality of jurisdiction was never intended to be universal. The crimes were only crimes for some. Impunity was an innate feature of justice.

Both tribunals have been subject to enormous criticism. Most importantly, they were condemned as victor's justice<sup>97</sup> without an international tribunal character.<sup>98</sup> The Allied powers that established these tribunals also committed similar crimes; hence, there was an argument *tu quoque*.<sup>99</sup> Even Pal, one of the judges of the Tokyo tribunal, criticised the trial as victor's justice.<sup>100</sup> Justice Jackson also raised this issue in his opening speech at the Nuremberg Trial, stating that it was not the ideal situation to have the victors prosecuting the defeated side. He insisted:

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the first World War, we learned the futility of the latter course.<sup>101</sup>

It seems the criticism of 'victor's justice' is one which also may also apply to the majority of the later *ad hoc* international tribunals. However, one may argue that the Allies, via the establishing of these historic tribunals, were interested in justice, however partial. In this regard, Bass insisted that once the IMT and IMTFE were operating, 'critics could shake their heads at the show of victors' justice, but at least the victors took an interest in justice'.<sup>102</sup> Nevertheless, the prosecutors and judges did all come from Allied countries and some have criticised them for a lack of impartiality.<sup>103</sup>

The second aspect of impunity was that which arose via non- prosecution or by inaction in the Nuremberg and Tokyo tribunals (i.e. via practical and procedural problems). Although many individuals faced trial and were convicted at the Nuremberg and Tokyo trials and by the Allied Zone courts, many others were never

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<sup>97</sup> Tomuschat C. *Supra* note 5, at 832; Wright Q. *Supra* note 5, at 45; Cryer R. *Supra* note 4, at 206-209.

<sup>98</sup> E.g. *Prosecutor v. Tadic*, IT-94-1-T, 7 May 1997, at 1, Para 1. The Trial Chamber insists that the ICTY is the first and truly international tribunal, which established by the UN, but the Nuremberg and Tokyo tribunals 'were multinational in nature, representing only part of the world community'.

<sup>99</sup> Cryer R. *Supra* note 4, at 40 and 199.

<sup>100</sup> See the Dissent Opinion of the Member for India Rabhabinod B. Pal, in *The Tokyo War Crimes Tribunal*, in Prirchard R. J. Zaide . S. M (eds), (1981), Vol, 21, at 11.

<sup>101</sup> See the justice Jackson opening statement at Nuremberg trial on *the Trial of the Major War Criminals, Nuremberg*. *Supra* note 44, at 101.

<sup>102</sup> Bass G. J. *Supra* note 5, at 204.

<sup>103</sup> Tomuschat C. *Supra* note 5, at 832. (2006),

prosecuted in those tribunals. Concerning the Nuremberg trial for instance, two major figures in the Holocaust and the chief managers of genocide, the Gestapo chief, Heinrich Muller, and his deputy Adolf Eichmann, were never brought to trial. Eichmann was later abducted and taken from Argentina to Israel, where he was tried in Jerusalem in May 1960.<sup>104</sup> Although the Holocaust was included in the Nuremberg trials, Allies states such as the US and Britain had not paid enough attention to the Holocaust; instead, they tended to focus on the aggressive war.<sup>105</sup> In the Moscow declaration for instance, the Holocaust was mentioned as ‘slaughters inflicted on the people of Poland’<sup>106</sup> without any reference to the Jewish people. This lack of enough concern for or interest in the Holocaust motivated the Israelis to bring Eichmann to trial in the Israeli court.<sup>107</sup>

In the Tokyo tribunal also there were several significant instances of non-prosecution of individuals, which should be considered. The first concerns one of the main issues that was debated at that time: whether the tribunal would ask to put the Japanese Emperor, Hirohito, on trial or not.<sup>108</sup> Despite overwhelming demand by the American public, General Douglas MacArthur issued a statement arguing that the Emperor’s trial would further undermine the country. Accordingly, the US government accepted that Hirohito should not be prosecuted.<sup>109</sup> The clear rationale for this was that a potentially sensitive trial could endanger peace and security in

<sup>104</sup> His trial attracted a great deal of attention in the world; in fact, the publicity given to the Nazi atrocities against the Jewish people in his trial was more important than his conviction to death. Arendt Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil* (1992), at 8-9; Lasok D. ‘The Eichmann Trial’, 11 *International and Comparative Law Quarterly* (1962), 855, at 855; see also Koskeniemi M. ‘Between Impunity and Show Trials’, 6 *Max Blanck Yearbook of United Nations Law* (2002), at 3-6. Koskeniemi correctly noticed that ‘[h]is death would in no way redress the enormity of the crime in which he had been implicated.’ He has argued that Eichmann’s trial and his punishment were the secondary consequences; the most important aspect of his trial was that it brought about the centrality of the existence of Israeli in community of nations; only then did it become a ‘show trial’; Overy R. ‘The Nuremberg Trials: International Law in the making’, In P. Sands (eds), *From Nuremberg to The Hague, the Future of International Criminal Justice* (2003), 1, at 11.

<sup>105</sup> Bass G. J. *Supra* note 5, at 173, 178, 194, he asserts that: ‘The Allies had been largely passive as the Holocaust went on, although there was in the end a visceral Allied revulsion at the Nazi concentration camps when Dachau and Belsen were liberated by Western soldiers in April 1945... This lends support to the notion that war crimes prosecutions are usually self-serving,...’ see at 173; For the crimes against the Jews at the Nuremberg for instance, see the opening statement by justice Jackson. *Supra* note 44, at 119; he said; ‘Five million seven hundred thousand Jews are missing from the countries in which they formerly lived,...History does not record a crime ever perpetrated against so many victims or one ever carried out with such calculated cruelty.’

<sup>106</sup> See the Moscow Declaration 1943, the Join Four-Nation Declaration, in *A decade of American foreign policy: basic documents, 1941-49*, prepared at the request of the Senate Committee on Foreign Relations (1950).

<sup>107</sup> Bass G. J. *Ibid*, at 174.

<sup>108</sup> Roach C. *Supra* note 61, at 24-25.

<sup>109</sup> *Id*.

Japan. As a symptom of this effort, the Emperor was not included in the list of the defendants at Tokyo, as he was more a symbol of the nation as opposed to an individual who had committed a crime.<sup>110</sup> In one sense this was the same kind of issue that affected the Ottoman trials, but there in addition the question of collective guilt also impinged the question of prosecution.

The second significant instance of non-prosecution concerns the *de facto* impunity accorded to the Japanese government and those responsible for pursuing the policy of 'comfort women' during World War II. The term refers to more than 200,000 Asian women who were enslaved and forced into prostitution for the Japanese military between 1937 and 1945.<sup>111</sup> The case of 'comfort women' only surfaced in 1987 when a work appeared by a Japanese writer, Sena Kako, in which she describes vividly the scope and brutality that these women were subjected to.<sup>112</sup> Initially, the Japanese government denied the existence of 'comfort women' but when presented with documents and witnesses, it eventually accepted the existence of this practice in 1993,<sup>113</sup> and allocated one billion dollars to be spent on cultural projects as an act of apology. However, no direct action was taken to compensate the victims of sexual enslavement, nor was any action taken to bring the surviving perpetrators to justice.<sup>114</sup> This is an example of what one might call prosecutorial blindness, in the sense that whilst it would have been clearly plausible to say an offence had been committed, the Allies did not pay any particular attention to the events concerned.

The third instance of impunity which the Tokyo tribunal stands out for is the *de jure* impunity after trial which was accorded to the convicted criminals. Despite Japan's initial acceptance of the jurisdiction of the IMTFE,<sup>115</sup> after the trial the Japanese government opposed the legality of the Tribunal and insisted that all Japanese prisoners who had been convicted should be transferred to the main Tokyo prison. Even more remarkable is that in 1953, Japan released almost all the prisoners, regardless of outstanding sentences.<sup>116</sup> Not surprisingly, several individuals who had been detained as war crimes suspects by the Allies, and in some cases tried and

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<sup>110</sup> Simpson G (2007), *Supra* note 3, at 61.

<sup>111</sup> Penrose M. *Supra* note 45, at 300.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, at 301.

<sup>114</sup> *Id.*

<sup>115</sup> Pritchard J.R. *Supra* note 87, at 28.

<sup>116</sup> Bassiouni C. (1999), *Supra* note 46, at 62.

imprisoned by the IMTFE, soon after re-entered the political arena. Nobusuke Kishi became Prime Minister and the convicted criminal Shigemitsu was appointed Minister of Foreign Affairs in 1954.<sup>117</sup>

The third way in which impunity arose at the Nuremberg and Tokyo tribunals was in connection with their seeking to codify crimes. In creating 'new crimes', the tribunals also created new conditions for impunity insofar as the mechanisms did not provide for justice and all offences. The IMT tribunals raised the possibility that the actual form of codification may not have perfectly reflected the pre-existing customary international law. Had that been the case they would have created a new form of impunity. This is a problem that potentially faces all international tribunals.

In addition to the criticisms of these tribunals as victors' justice, as just discussed in the above, another significant criticism was the *ex post facto* nature of the judgments; because of the legislative characters of their charters, some have criticised the tribunals on the issue of legality<sup>118</sup> on the principle of *nullum crimen sine lege*, stating that the 'crime of aggression'<sup>119</sup> was not a crime at the time of commission. In particular, the accusation of *ex post facto* judgment was true about the 'crime' of war against peace.<sup>120</sup> In fact, the IMT itself was aware of the legal weakness of the trial. One solution, proposed by Judge Jackson and the US prosecution team themselves, was based on the theory of conspiracy. Aside from the innovative statue of the employment of the theory of conspiracy, this development was to have a certain significance regarding the question of impunity. The crime of conspiracy to wage aggressive war was both simple and expansive enough to include everything the regime had done in the previous eleven years.<sup>121</sup> Conspiracy caught everyone in the net, regardless of their actual responsibility for specific acts, but it had to be combined with a criminal purpose (e.g. a common plan as a member of a criminal organisation).<sup>122</sup>

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<sup>117</sup> Pritchard J.R. *Ibid*, at 35.

<sup>118</sup> Wright Q. *Supra* note 5, (1947), at 44; Kittichaisaree K. *International Criminal Law* (2001), at 16; Overy R. *Supra* note 104, at 21; Cryer R. (2005), *Supra* note 4, at 40.

<sup>119</sup> Nuremberg Charter, Art. 6(a).

<sup>120</sup> See the Dissent Opinion of the Member for India Rabhabinod B. Pal. *Supra* note 100, at 10, Wright Q. *Ibid*, at 48; Cryer R. *Ibid*, at 40.

<sup>121</sup> Nuremberg Charter, Art. 6 (a).

<sup>122</sup> See *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10*, by Telford Taylor, in *The Military Legal Resources* (15 August 1949), at 145 and 228-229.

Despite the shortcomings of the IMT and IMTFE, their trials and judgments made a huge contribution to the development of international criminal law and the creation of customary international law. On December 11, 1946 the UN General Assembly adopted Resolution 95 (1) known as the ‘Affirmation of the Nuremberg Principles’.<sup>123</sup> This affirmation was significant in that the General Assembly showed adherence to those principles as codified by the International Law Commission (ILC) as a subsidiary organ of the General Assembly.<sup>124</sup> In 1950 the ILC issued a report based on these principles, recognising the Nuremberg Tribunal and the judgment of the tribunal.<sup>125</sup> The enhancement of ICL following the Nuremberg Trial was continued through various multilateral treaties and conventions<sup>126</sup> and via the establishment of *ad hoc* tribunals. Additionally, international human rights instruments have affirmed the principle known as ‘extradite or prosecute’, with a view to making criminal offenders responsible for their acts.<sup>127</sup> One of the most important conventions has been, and indeed still is, the Genocide Convention of 1948.<sup>128</sup> This Convention gave explicit treaty recognition to crimes against humanity, as defined in Article 6 of the Nuremberg Charter. Most importantly, Article VI of the Convention provided that trial for the crime of genocide was to take place before ‘a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as many have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’.<sup>129</sup> Conventions

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<sup>123</sup> UN.GA. Res. 95(1), *Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal*, A/RES/95(I), (11 December 1946).

<sup>124</sup> Greppi E. ‘The evolution of individual criminal responsibility under international law’, 835 *International Committee of the Red Cross* (1999), 1, at 3.

<sup>125</sup> *Report of the International Law Commission, Formulation of the principles of international law recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal*, Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1950 (1950), Principle I & II.

<sup>126</sup> The Geneva Conventions of August 12, 1949, UNTS 75/972, Art. 50, 51, 130 and 147 of the first, second, third, and fourth of the Conventions respectively; *Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNTS 249/ 215 (14 May 1954), *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I and II), UNTS 1125/3 (8 June 1977), *International Convention on the Suppression and Punishment of the Crime of Apartheid Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII)*, UNTS 1015/243 (30 November 1973), *International Convention Against the Taking of Hostages*, G.A. Res. 146. UN Doc. A/34/46 (1979), entered into force June 3, 1983; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 UN. Doc A/39/51 (1984), and etc.

<sup>127</sup> See the *Statute of the Permanent Court of International Justice* (December 16<sup>th</sup>, 1920), Art. (2), and (3).

<sup>128</sup> See *Convention on the prevention and punishment of the Crime of Genocide*, UNTS 78 / 277(Dec 9, 1948), entered into force Jan 12, 1951.

<sup>129</sup> *Id.*, Art. VI.



generally imposed the obligation on state parties to criminalise grave breaches of each of the Conventions in their national criminal system. States that become party to these conventions are obligated to extradite or prosecute (*aut dedere aut judicare*) any persons found within their territories who are believed to have been responsible for prohibited acts, under the principle of the ‘vicarious administration of justice’.<sup>130</sup> According to this principle, a state obligates itself either to try a criminal in its court or to extradite perpetrators to a state requesting such extradition.<sup>131</sup>

#### ***2.4. Efforts for the establishment of international courts after the IMT tribunals (during and after the Cold War era)***

Following the hugely important influence of the Nuremberg and Tokyo trials, in 1948 UN Convention of the Crime of Genocide prepared bases for the establishment of an international criminal court.<sup>132</sup> The General Assembly adopted the Genocide Convention’s definition of genocide and its statement, in Article VI, that the genocide trials may take place before ‘a competent tribunal of the State..., or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties’...<sup>133</sup>

Accordingly, the UN General Assembly invited the International Law Commission (ILC) to prepare a report on the possibility of establishing an international court to try individuals charged with the crime of genocide.<sup>134</sup> The ILC was already working on the codification and development of international law. The Commission was also given the duty to provide a draft statute of an international criminal court under Article VI of the Genocide Convention, framed within the ‘Nuremberg Principle’.<sup>135</sup> In 1950 the UN GA recalled Resolution 206 b (III) of nine December 1948, as a necessary for ‘an international judicial organ’.<sup>136</sup> The ILC, as regards the first task, concluded that the establishment of an international court was

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<sup>130</sup> Meyer J. ‘The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction’, 31 *Harvard International Law Journal* (1990), 108, at 108 and 115.

<sup>131</sup> Feller. S.Z. ‘Concurrent Criminal Jurisdiction in the International Sphere’, 16 *Israel Law Review* (1981), 40, at 42.

<sup>132</sup> See *Convention on the Prevention and Punishment of the Crime of Genocide*, UNTS 78 / 277 (Dec 9, 1948),

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*, section B, Para 2 and 3.

<sup>135</sup> *Id.*, B, Para 3.

<sup>136</sup> See the UN. GA Res. 897, titled, *International Criminal jurisdiction*, UN Doc. A/RES/897(IX), (12 December 1950).

desirable and possible.<sup>137</sup> The ILC then established a seventeen member-state committee to study the feasibility of establishing an international court. The committee submitted a draft statute and an annexed report to the General Assembly in 1952.<sup>138</sup> However, the establishment of a court was postponed until the adoption of a commonly agreed definition on 'aggression'.<sup>139</sup>

The General Assembly finally agreed on a definition for the crime of aggression in 1974,<sup>140</sup> but it did not directly address the proposal relating to the creation of the international court. In 1981, the General Assembly asked the International Law Commission to reconsider its earlier draft code of crimes (1954)<sup>141</sup> and prepare a revised version, in light of international political changes. The revised version was then adopted by the General Assembly in 1991.

Despite some periodic discussions on this matter, it was only after the collapse of the Soviet Union in 1989 that once again the establishment of the court became a political priority in international politics. The long delay is attributed to the political tension during the Cold War, state sovereignty, lack of political will and difficulties relating to agreeing on a common definition of the crime of aggression.<sup>142</sup> We can see that many atrocities, mainly with impunity, were committed during the Cold War period around the world, such as the killing and disappearance of two hundred thousand people in Guatemala between 1966 and 1986, Pinochet's brutalities in Chile, the repression in East Timor in 1975 to 1979, and the crimes of Idi Amin's rule in Uganda to name but a few.<sup>143</sup> Those atrocities which were committed with impunity increased the demand for the establishment of an international criminal court which might act as a possible deterrent for perpetrators.

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<sup>137</sup> *Report of the ILC on the work of second session* UN. GAOR, Fifth Session, UN Doc. A/1316, Para 140 (5 June -29 July 1950).

<sup>138</sup> *Id.*

<sup>139</sup> GA Res. 897 (IX), 4 Dec (1954), *Draft Code of Offences against the Peace and Security of Mankind* UN Doc. A/RES/897(IX).

<sup>140</sup> GA Res. 331 (1974), *Definition of Aggression*, UN Doc. A/RES/3314, XXIX (1974).

<sup>141</sup> *Draft code of offences Against the Peace and the Security of Mankind*, UN Doc. A/RES/36/106 (1981).

<sup>142</sup> Kircher A.R. 'Attack on the International Criminal Court: A policy of Impunity', 13 *Michigan State Journal of International Law* (2005), 263, at 264; Leonard E.K. *The Onset of Global Governance, International Relations Theory and the International Criminal Court* (2005), at 21; see also Sadat N. L. 'The Evolution of the ICC: From The Hague to Rome and Back Again', in S. B Sewall & C Kaysen (eds), *the United States and the International Criminal Court* (2000), 31, at 34.

<sup>143</sup> Leonard E. K. *Id.* at 29.

In fact, the Nuremberg and Tokyo Tribunals served as a fundamental legal and judicial basis for the creation of the later *ad hoc* international tribunals,<sup>144</sup> as well as for the establishment of the ICC. Importantly, all three groups of international crimes in the Nuremberg Charter have now become customary international law.

#### ***2.4.1. The creation of the ad hoc ICTY and ICTR***

Before the collapse of the Soviet Union in 1989 and the end of cold very little progress was for the creation of international criminal courts. It may be said that after the Cold War the institutionalisation of modern international criminal law appeared through the establishment of the ICTY and ICTR by the SC in 1993 and 1994 respectively.

The creation of the ICTY and its history, like other tribunals, reflected contemporary events. The conflicts in former Yugoslavia started in June 1991, with independence movements by Croatia and Slovenia. At this time these two republics declared their independence from Yugoslavia and their intention to establish sovereign states.<sup>145</sup> This national liberation movement then spread to Bosnia, Montenegro, and Kosovo and led to internal armed conflict. The news of the massive atrocities and violations of human rights in the former Yugoslavia, and in particular of ‘ethnic cleansing’ conducted against Moslems in Bosnia, gripped the world and led to demands from the international community that such criminals should not go unpunished. The role of the media was thus highly significant in developments. At this time the international community decided to act. Due to such widespread violations of the laws of war and basic human rights, and the inadequacy of the national jurisdiction for prosecuting the high state authorities in the former Yugoslavia,<sup>146</sup> the idea arose that an international court and judge should prosecute

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<sup>144</sup> E.g. See generally the *Report of the International Tribunal for the prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. A/49/342 S/1994/1007 (29 August 1994).

<sup>145</sup> Tolbert D & Knotic A. ‘The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC’, in Stahn C and Sluiter G (eds), *The Emerging Practice of the International Criminal Court* (2009), 135, 139-140; Leonard E.K. *Supra* note 142, at 33; see also generally, Kerr P. *The International Criminal Tribunal for the Former Yugoslavia and Exercise in Law Politics, and Diplomacy* (2004).

<sup>146</sup> Simpson G & McCormack T. (1997), *Supra* note 4, at 29.

international offences.<sup>147</sup> The establishment of this tribunal was ‘a judicial response to the demands posed by the situation in the former Yugoslavia’.<sup>148</sup>

The armed conflict among different rival ethnic groups and widespread human rights violations in the Former Yugoslavia promoted the SC to describe the situation as a threat to international peace and security.<sup>149</sup> Accordingly, Resolution 780 empowered the UN to establish a Commission of Experts under the SC in 1992. The Security Council, under resolution 808, gave discretionary power to the Secretary General to examine whether there was a need for establishing a criminal tribunal for the former Yugoslavia. In February 1993, the report was submitted to the UN Secretary General, who subsequently affirmed the necessity for a tribunal and annexed an appropriate statute based on customary international criminal law.<sup>150</sup> Consequently, an international criminal tribunal for the former Yugoslavia was established by the SC via Resolution 827, on 2 May 1993. Cassese, the head of the Court, asserted that ‘unlike the Nuremberg and Tokyo Tribunals, the Tribunal is truly international’.<sup>151</sup> This tribunal was the first *ad hoc* tribunal with multiple judges from different countries who were appointed by the SC and had the authority to try both sides of the conflict.<sup>152</sup> However, some defendants challenged the legality of the establishment of the ICTY by the Security Council; its supremacy and subject matter jurisdiction, they argued that the SC had no mandate to establish the Tribunal and that Chapter VII of the Charter does not expressly mention the creation of a criminal tribunal.<sup>153</sup> The position to them by the Court in the *Tadic* case was Among such critics, the Appeal Chamber also pursuant to the Articles 24 and 39 of the UN Charter<sup>154</sup> which provides the duty of the SC for maintenance of the peace, argued

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<sup>147</sup> See the *Report of the International Tribunal for the prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia* (29 August 1994). *Supra* note 144, Para 10, A, at 9.

<sup>148</sup> *Id.*, at 9, Para 4.

<sup>149</sup> SC Res. 808 (22 February 1993, and 780 6 October 1992); see also the *Letter from the Secretary General to the Security Council*, S/1994/674 (27 May 1994).

<sup>150</sup> Bantekas L and Nash S. *Supra* not 33, at 339.

<sup>151</sup> See the *Report to the General Assembly, Security Council*, UN Doc. A/49/342, S/1994/1007 (29 August 1994), at 11, Para 10; Goldstone R & Bass G.J. ‘Lessons from the International Criminal Tribunals’, in S. B. Sewell and C. Kaysen, *The United States and the International Criminal Court* (2000), 51, at 51.

<sup>152</sup> McCormack T. (2005), *Supra* note 84, at 10.

<sup>153</sup> *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber IT-94-1-AR72 (2 October 1995), Para 8, 32, 33 and 37.

<sup>154</sup> See the UN Charter (26 June 1945), Art. 39 it provides: ‘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.’

that the situation justifies resort to the power under Chapter VII as ‘threat to peace’<sup>155</sup> on the bases and reason that:

‘[A]n armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words “breach of the peace” (between the parties or, at the very least, would be a as a “threat to the peace” of others). But even if it were considered merely as an “internal armed conflict”, it would still constitute a “threat to the peace” according to the settled practice of the Security Council and the common understanding of the United Nations membership in general.’<sup>156</sup>

However and despite of such argument , it seems that the UN Charter under Chapter VII, with a broad definition, has been granted the authority to establish such a Tribunal if the situation is a threat to international peace and security<sup>157</sup>

Regarding the jurisdiction of the tribunal, the ICTY has jurisdiction over all serious violations of human rights in the former Yugoslavia since 1991.<sup>158</sup> The massive violations have given rise to the concept of ‘ethnic cleansing’.<sup>159</sup> The Tribunal has jurisdiction to prosecute individuals who have committed or ordered grave breaches of the Geneva Convention of 1949, crimes against humanity (a part of Nuremberg law) violation of the law of war committed in armed conflicts with national or international character, and persons who have committed genocide.<sup>160</sup> However, the tribunal’s jurisdiction is limited to a specific period and to crimes committed in the territory of the former Yugoslavia, as an *ad hoc* temporary tribunal. In contrast to the ICC, the ICTY has concurrent jurisdiction with domestic courts with primacy in any stage over the national courts.<sup>161</sup> Thus national courts should defer any cases to ICTY if this is formally requested. The ICTY has captured many individuals and authorities of the former Yugoslavia, such as Milosevic, former president of Yugoslavia, who died in prison, and the former Serbian president Radovan Karadzic who was arrested in 2008.<sup>162</sup>

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<sup>155</sup> *Prosecutor v. Tadic*. IT-94-1-AR72, 2 October 1995, Appeal Chamber. *Ibid*, Para 28 and 29.

<sup>156</sup> *Id*, Para 30, see also Para 137.

<sup>157</sup> Cryer R. *Supra* note 4, at 54.

<sup>158</sup> The SC Res. 827 (25 May 1993).

<sup>159</sup> E.g. see *Prosecutor v. Radovan Karadzic Ratko Miladic*, UN Doc.IT-95-5-R61, (11 June 1996).

<sup>160</sup> The ICTY Statute Art. 2-5; see also *Convention on the Prevention and Punishment of the Crime of Genocide*, UNTS 78 / 277(Dec 9, 1948).

<sup>161</sup> *Id*, Art. 9. (ICTY Statute),

<sup>162</sup> See Press release, *Statement of The Office of The Prosecutor on the Arrest of Radovan Karadzic* (21 July 2008), Press release, *Milosevic found dead in his cell at the detention Unit* (11 Mar 20011).

Despite its achievements, the non-prosecution of some individuals also exists in the ICTY. The ICTY has jurisdiction over all parties;<sup>163</sup> yet some have criticised the actions of the other party in the conflict, namely NATO, and hold that the charge of ‘victor’s justice’ may also apply to NATO in the former Yugoslavia in 1999.<sup>164</sup> The NATO bombing from 24 March 1999 to 9 June 1999 led to numerous civilian casualties (deaths were estimated at 1,200)<sup>165</sup> and arguably constituted a violation of international humanitarian Law. It was also subjected to legal action in the ECHR in the *Bankovic* case<sup>166</sup> and to inter-state proceedings before the ICJ.<sup>167</sup> As a consequence of criticisms and various complaints against NATO’s senior leaders, the Prosecutor Carla Del Ponte prepared indictments pursuant to Article 18(1) & (4) of the ICTY Statute.<sup>168</sup> However, she did not open a formal investigation against NATO, and on 2 June 2000 she concluded that there was no basis for criminal investigation against the NATO air campaign.<sup>169</sup> The Prosecutor insisted that ‘there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign’.<sup>170</sup> The NATO operation and the decision by the ICTY Prosecutor not to open an investigation despite ‘compelling evidence’ have become the subject of

<sup>163</sup> See the SC Res. 827 (25 May 1993).

<sup>164</sup> Cohn M. ‘No “Victors Justice” in Yugoslavia: NATO must be held Accountable for War Crimes,’ 56 *Guild Practitioner* (1999), 146, at 146-149.

<sup>165</sup> See the Human Rights Watch, ‘NATO’s Use of Cluster Munitions in Yugoslavia’, (11 May 1999), Available at: <http://www.hrw.org/en/reports/1999/05/11/natos-use-cluster-munitions-yugoslavia>; see also the Crises in Kosovo. At: <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (Accessed 17/08/2010).

<sup>166</sup> *Banković and Others v. Belgium and Others* (dec.), [GC], no. 52207/99, ECHR 2001-XII – (December 2001). In this case an application brought before the ECHR by six citizens of the former Yugoslavia against the NATO, on the building of *Radio Televizije Srbije* during the Kosovo crises in 1999. As a result of the attack the building was collapsed 16 people was killed and another 16 were injured seriously. The applicants argued that the attack was the violation of the right of life (Art. 2), and the freedom of press in Article 10 of the European Convention of the Human Rights. However, the Court unanimously declared that the application inadmissible and it concluded that there is no “any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question.” See at 19, Para 58.

<sup>167</sup> *Legality of Use of Force, Yugoslavia v. Belgium*, Provisional Measures, Order of 2 June 1999, (1999), ICJ Reports, at 139, Para 45. In this case the former Yugoslavia instituted an application against the Belgium and other NATO members before the ICJ for the NATO bombing, the Belgium, under Article 36 paragraph 2, argued that the former Yugoslavia is not a member of the UN nor a party to the Statute, the ICJ finally decided that it has ‘no *prima facie* jurisdiction to entertain Yugoslavia’s Application’.

<sup>168</sup> See the Prosecutor’s *Report on the NATO Bombing Campaign*, PR/ P.I.S./ 510-e ( 13 June 2000), see also the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, available at: <http://www.icty.org/sid/10052> (Accessed 25/01/2012).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

criticism concerning the ‘neutrality and objectivity’<sup>171</sup> or otherwise of the ICTY. The political pressure on the Prosecutor should also not be dismissed; as Anghie *et al* observed, for some scholars ‘the ICTY’s decision unhappily tends to confirm the suspicion that justice is selective’.<sup>172</sup> The decision not to commence investigation of NATO’s alleged crimes might have been reflective of the fact that it was NATO countries that were also financially supporting the ICTY.

The question is again one of ‘victor’s justice’: if the ICTY is a truly international court, how could such things happen? It may thus be said that ‘victor’s justice’ is an issue even in the case of the international tribunals, and the exemption of the NATO crimes from investigation provides evidence for regarding the tribunals as administering ‘justice’ of this sort.

#### ***2.4.2. The International Criminal Tribunal for Rwanda (ICTR)***

Similarly to the ICTY, the ICTR has been established by the SC.<sup>173</sup> The tribunals have many similarities: both tribunals are subsidiary organs of the SC under Article 29 of the Charter; both have a limited time and jurisdiction and are specific to a particular country; both have individual jurisdiction over natural persons; both have primacy of jurisdiction over national courts; and both have the same structure of one prosecutor and one appeal chamber. The single appeal chamber is intended to reduce expenses when invoking the right to appeal.<sup>174</sup> Judges are elected by the General Assembly from a list which is confirmed by the Security Council. The enforcement mechanisms of these trials are provided by the Security Council, and all states are obligated to cooperate with the tribunals and enforce the decisions arrived at.<sup>175</sup> Because of their affinity they are often called twin tribunals.

The only significant difference between the two tribunals is the definition of crimes against humanity in their respective statutes. Article 3 of the ICTR does not require a link with an armed conflict, since the conflict in Rwanda had a largely internal character, whereas the ICTY tribunal is empowered to prosecute persons

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<sup>171</sup> See Amnesty International, *NATO violations of the law of war during operation Allied Force must be investigated*, EUR 70/025/2000( 5 June 2000), available at:

<http://www.amnesty.org/en/library/info/EUR70/025/2000/en> (Accessed 20/07/2012); see also Anghie A & Chimni B.S. ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts,’ 2 *Chinese Journal of International law* (2003), 77, at 91.

<sup>172</sup> Anghie A & Chimni B.S. *Id.*, at 92.

<sup>173</sup> See SC Res. 955 (8 November 1994).

<sup>174</sup> Beigbeder Y. *International Justice against Impunity* (2005), at 12.

<sup>175</sup> See the ICTY Statute Art. 29.

who have violated the customs of war or breached the 1994 Geneva Conventions, which apply to international armed conflicts.<sup>176</sup>

Furthermore, the ICTR has its own narrative and reasons for existence; its creation was precipitated by events in Rwanda in 1994. Atrocities on a scale many times wider than those committed in the former Yugoslavia were taking place in Rwanda in a type of genocide against the Tutsi minority. The Rwanda situation arose following the plane crash and death of the presidents of Rwanda and Burundi and their high-ranking officials at Kigali airport on April 6, 1994. Hidden tribal tensions surfaced in genocidal killing, whereby members of the Hutu majority tribe tried to eliminate the minority Tutsi tribe.<sup>177</sup> The number of deaths as a result of the genocide is estimated at between 500,000 and one million.<sup>178</sup> The genocide in Rwanda was unarguably one of the worst events in modern history, and despite numerous warnings from the UN peacekeepers about the dangerous situation in Rwanda, the United Nations failed to act and apply preventative action while the genocide was going on.<sup>179</sup> Eventually, and after the experience of the creation of the ICTY, the SC took action, but not before hundreds of thousands of people had already been killed. Similarly to the case of the ICTY, the SC decided that the situation in Rwanda constituted a threat to international peace and security under Chapter VII of the Charter.<sup>180</sup> Hence, in comparison to the ICTY on the issue of the legality of the establishment of this Tribunal by the SC, it seems that this issue was less controversial in the case of the ICTR, since the power of the SC to establish such a tribunal under Chapter VII had been confirmed.<sup>181</sup>

The ICTR has jurisdiction for the prosecution of persons responsible for genocide or other serious violations of human rights committed in Rwanda between January 1 and December 31, 1994.<sup>182</sup> Many Hutu authorities were accused of inciting the crime of genocide in Rwanda. For example, Jean Kambanda, who was the prime minister at the time of the genocide, was found guilty of the crime of genocide.<sup>183</sup> He

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<sup>176</sup> Beigbeder Y. *Supra* note 174, at 93.

<sup>177</sup> *Id.*

<sup>178</sup> See the ICTR website 'general information'; see also Bantekas L. *International Criminal Law* (2010), at 404-404.

<sup>179</sup> Ball H. *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* (1999), at 163-164.

<sup>180</sup> SC. Res. 955 (8 November 1994).

<sup>181</sup> Cryer R. *Supra* not 4, at 56.

<sup>182</sup> SC. Res. 955, *Ibid.*

<sup>183</sup> The *Prosecutor v. Jean Kambanda*, Judgment, ICTR 97-23-S (4 September 1998), Para 40.



was not only planning in advance widespread genocide and systematic attacks against Tutsi civilians, but also directly and publicly ordered the committing of genocide.<sup>184</sup> It was immediately recognised, however, that the prosecution of all the accused was impossible. Efforts are therefore being made to use the Rwandan community courts named ‘Gacaca Courts’,<sup>185</sup> which are traditional and popular courts, to do the work of a truth commission in promoting justice and the prospect of reconciliation.<sup>186</sup>

Thus, during the creation of these tribunals there was a continuing sense that domestic legal systems are inadequately equipped and inappropriate for such trials.<sup>187</sup> Municipal tribunals mainly face difficulties such as bias and partiality, and prove ‘unsatisfactory, subjective and selective’ in their definition of international crimes, whereas, as Simpson has mentioned, international tribunals have been considered synonymous with impartiality.<sup>188</sup> Hence, history again turns towards the creation of an international tribunal as a means of maintaining justice and global humanity.<sup>189</sup>

Since the creation of these *ad hoc* tribunals after the Cold War, and alongside the growth of a culture of impunity in some societies, the idea of, and demand for, the creation of a permanent international court started to increase.

#### ***2.4.3. The efforts made towards the establishment of the permanent international court in the post-Cold War era; and the establishment of the ICC***

The most significant progress towards the establishment of a permanent international court occurred in 1989, the year of the fall of the Berlin Wall at the end of the Cold War.<sup>190</sup> In December 1989, a letter issued by Trinidad and Tobago requested the establishment of an international court with jurisdiction over the illicit trafficking in drugs. In response to this letter the UN Security General again asked the ILC to restart its work on the draft code of crime.<sup>191</sup> It was only in 1993 that under the guidance of James Crawford, as the Special Rapporteur, that the ILC provided a draft

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<sup>184</sup> *Id.*

<sup>185</sup> For more detail about Gacaca see at: <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm> (Accessed, 01/02/2012).

<sup>186</sup> Koskeniemi M. *Supra* note 104, at 9.

<sup>187</sup> Simpson G (2007), *Supra* note 3, at 29.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*, at 29.

<sup>190</sup> Broomhall B. *International Justice & the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), at 2.

<sup>191</sup> UN. GA. Res. 44/39 (4 Dec 1989).

statute of the International Criminal Court which was submitted to the General Assembly in 1994.<sup>192</sup>

Increasing armed conflict and the shocking reports of war crimes, crimes against humanity and ethnic cleansing in the former Yugoslavia once again focused the attention of the international community on the necessity of establishing an international court. The efforts of many NGOs and reports of widespread human suffering around the world forced the UN SC to establish *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda. In fact, the events in the Balkans and Rwanda and the establishment of these two *ad hoc* tribunals prompted the notion of a permanent international criminal court.<sup>193</sup> By then, the ILC had completed the first draft Statute, consisting of sixty Articles, in 1994 and submitted to the 49<sup>th</sup> Session of the General Assembly.<sup>194</sup> After the submission of the draft in 1994 many issues and questions were raised in conjunction with the structure and procedural processes required for an international court. An intercessional meeting was therefore convened by the Committee to choose six specialised sub-committees. Simultaneously, the General Assembly established a preparatory committee on the establishment of an International Criminal Court in November 1995. The General Assembly passed a resolution asking a preparatory committee to hold a meeting for the preparation of a draft statute.<sup>195</sup> In 1996 the Commission finally accepted the last draft of the 'Code of Crimes against the Peace and Security of Mankind'. The draft Statute of 1994 and the Draft Code of Crimes against Peace in 1996 played a significant role in the arrangement of the ICC's Statute.<sup>196</sup> The remit of the Preparatory Committee was to formulate a widely acceptable draft text for final submission to a diplomatic conference. The Preparatory Committee, after extensive discussion lasting from 1996 to 1998, prepared a draft text and asked the General Assembly to set up a diplomatic conference for the purpose of finalising the draft Statute in treaty form.

Subsequently, the General Assembly decided to convene a meeting of the United Nations Diplomatic Conference of plenipotentiaries on the establishment of an International Criminal Court. A conference of plenipotentiaries was then held in

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<sup>192</sup> *Report of the International Law Commission on the work of Its Forty-Sixth Session, Draft Statute of an International Criminal Court*, UN Doc. A/49/10, SUPP, (May 2- July 22 1994).

<sup>193</sup> Sadat Nadya L. *Supra note* 142, at 38; Bassiouni C. (1999), *Supra note* 46, at 64.

<sup>194</sup> See the ICL. *Report, Sixth Session. Ibid.*

<sup>195</sup> UN. GA. Res. 50/46 (18 December 1995).

<sup>196</sup> Schabas W. *An Introduction to the International Criminal Court* (2002), at 10.

Rome from 15 June to 17 July 1998, and after intense negotiation and compromise in many areas, ultimately the ICC Statute, consisting of 128 Articles, and largely resembling the ILC proposal, was signed on 17 July 1998.<sup>197</sup> Among one hundred and forty-eight states who participated in the Rome Conference, one hundred and twenty of them voted in favour of the treaty, 21 states abstained and seven voted against it, namely the US, China, Libya, Iraq, Israel, Qatar, and Yemen.<sup>198</sup>

The establishment of the first international criminal court with jurisdiction to try individuals who had committed the most serious international crimes was the culmination of a challenge which started almost a century ago.<sup>199</sup> The creation of this tribunal indicates the continuing trend in the international sphere towards the institutionalisation of international criminal law at the end of the twentieth century. It entailed overcoming many obstacles in its creation and highlights the growing consensus among states that the establishment of a permanent international justice system is desirable and necessary, most notably as a response to the twentieth century, which has been labelled the 'century of violence'.<sup>200</sup>

Although the ICC is an independent judicial institution, Article II of the Statute stated clearly that it has a close relationship with the UN. After protracted negotiations between the two institutions, an agreement on the nature of the relationship was signed between the former UN Secretary General Kofi Annan and the President of the ICC Philippe Kirsch, and the agreement came into force on 4<sup>th</sup> October 2004. Article 18 of the agreement provides the terms of cooperation between the UN and the Prosecutor of the ICC.<sup>201</sup>

Unlike the *ad hoc* tribunals, which were created by the SC for a limited time and jurisdiction, the ICC is the first permanent international criminal court based on a multilateral treaty.<sup>202</sup> The ICC has jurisdiction over four core crimes, namely genocide, crimes against humanity, war crimes, and aggression.<sup>203</sup> The first three core crimes are defined in the Statute and the last one was defined in the ICC's first

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<sup>197</sup> Bantekas L and Nash S. *Supra* note 178, at 536; Sadat N. L. *Supra* note 142, at 40.

<sup>198</sup> See the *United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 15 June-11 July 1998; see also Kircher A. R. *Supra* note 142, at 264.

<sup>199</sup> McCormack T. *Supra* note 13, at 31; see also above section about the IMT tribunals.

<sup>200</sup> McGoldrick D. 'Criminal Trials Before International Tribunals: Legality and Legitimacy', in D. McGoldrick, P. Rowe & E. Donnelly (eds), *The Permanent International Criminal Court* (2004), 9, at 40.

<sup>201</sup> See *Agreement between the International Criminal Court and the United Nations*, The Hague (4 October 2004), ICC-CPI-20041004-78.

<sup>202</sup> See the Rome Statute Art. 1.

<sup>203</sup> *Id.*, Art. 5.

review conference in Kampala, Uganda in 2010 by the Assembly of States Parties.<sup>204</sup> However, the Court will only begin to exercise its jurisdiction over these crimes once the amendment has been passed by the majority of States Parties; the vote will take place on 1 January 2017.<sup>205</sup>

The ICC's Statute emphasises that the Court will exercise its jurisdiction over individuals on the basis of the principle of complementarity. Complementarity means that if one of the crimes within the jurisdiction of the ICC happens in the territory of a state party to the Statute or against a citizen of a state party, the priority of jurisdiction will always belong to the state in question, and the ICC's Prosecutor would only be allowed to initiate any investigation in cases where states are unable or unwilling to prosecute. Accordingly, the Court will not have primary jurisdiction and will not compete with national courts' jurisdiction.<sup>206</sup>

The ICC is located at The Hague<sup>207</sup> and its judges and prosecutor are elected by the States Assembly under Article 35 and 43 of the Statute. To date, 121 countries have become party to the Statute and 139 countries have signed the Statute.<sup>208</sup> The Court has opened 16 cases in seven situations so far.<sup>209</sup>

The crimes that fall within the jurisdiction of the ICC apply to individuals regardless of their official position. The definition of individual criminal responsibility stipulated in Article 25 of the Rome Statute is the most comprehensive one to date.<sup>210</sup> This Article gives a wide scope to individual criminal responsibility, covering all persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime. Generally the ICC has contributed to the development of customary international law by referring to the customary law in its jurisprudence over individuals.<sup>211</sup>

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<sup>204</sup> See the crime of aggression, ICC. RC/Res.6 (11 June 2010).

<sup>205</sup> *Id.*

<sup>206</sup> See Art. 1 and 17 of the Rome statute.

<sup>207</sup> *Id.*, Art. 3 (1).

<sup>208</sup> See the ICC website. *Supra* note 9.

<sup>209</sup> *Id.*, namely the situations in the Democratic Republic of the Congo, Uganda and the Central African Republic; two referrals by the UN Security Council, regarding the situation in Darfur, Sudan, and the current situation in Libya, see the SC Res. 1970 (26 February 2011), and the situation in Kenya, which was initiated by the Prosecutor under the authorisation of the Pre-Trial Chamber in 2009; See also the Pre-Trial Chamber II decision on 31 March 2010, ICC-01/09-19 31-03-2010 1/163CB PT; and Côte d'Ivoire, which is not party state, but had accepted the jurisdiction of the ICC on 18 April 2003.

<sup>210</sup> Bogdan A. 'Individual Criminal Responsibility in the Execution of a Joint Criminal Enterprise in the Jurisprudence of the *ad hoc* International Tribunal for the Former Yugoslavia', 6 *International Criminal Law Review* (2006), 63, at 67.

<sup>211</sup> Cryer R & *et al.* *Supra* note 80, at 126.

The main progress in the jurisdiction of the ICC, as reflected in Article 7, has taken place with respect to crimes against humanity.<sup>212</sup> The Statute provides a comprehensive definition of crimes against humanity as comprising acts ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>213</sup> The origin of this definition lies in general customary international law and in the Nuremberg Charter.<sup>214</sup> It takes into account the experience of both previous *ad hoc* tribunals and of domestic conflicts over the last 50 years.<sup>215</sup> For Example, Article 7 provides for an extensive number of crimes with a sexual nature.<sup>216</sup> Regarding war crimes, the list of 26 acts as war crimes in Article 8<sup>217</sup> is derived from the four Geneva Conventions and Protocols and previous international tribunals’ statutes, yet with many new categories of war crimes, such as the protection of the natural environment.

Unlike the ICTY and ICTR, the ICC has permanent jurisdiction after July 1, 2002 when it came into force.<sup>218</sup> The jurisdiction of the ICC was first developed by codifying serious crimes, and then extending these codified crimes to individual responsibility. Thus, the ICC, by criminalisation of a new code of crimes, promoted individual liability at large. However, the Statute in several instances differed from the customary international law, which may create impunity, i.e. concerning the issues related to obedience to superior orders for war crimes – the distinction between the command and civilian superior responsibility, and etc.

The rule of enforcement for the ICC is different from that of the previous international tribunals. Enforcement of decisions of the ICTY and ICTR is based on mandatory obligation and cooperation by states.<sup>219</sup> In contrast, because of the treaty-based nature of the Statute, the operation and success of the ICC mainly depends on the support of the SC and the voluntary cooperation of states, which are relied on for matters such as surrendering of fugitives,<sup>220</sup> collecting and securing evidence,<sup>221</sup> and

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<sup>212</sup> Rome Statute Art. 7.

<sup>213</sup> *Id.*, Art. 7.

<sup>214</sup> See the Nuremberg Charter Art. 6.

<sup>215</sup> Greppi E. *Supra* note 124, at 542.

<sup>216</sup> Rome Statute in Art 7<sup>th</sup> provides: ‘[I]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity, enforced disappearance of person, *apartheid*...’

<sup>217</sup> *Id.*, Art. 8.

<sup>218</sup> The Rome Statute Art. 11.

<sup>219</sup> The ICTY Statute Art. 29.

<sup>220</sup> Rome Statute Art. 89.

other aspects of international cooperation.<sup>222</sup> Furthermore, there is no mandatory obligation for non-party states. However, an exception is made when a case is referred by the SC to the ICC. Some scholars have criticised the ICC for not having adequate power to exercise its jurisdiction.<sup>223</sup> This may give rise to impunity due to the lack of adequate cooperation by state parties and non-parties.

## ***2.5. Historical development of the post war tribunals and the question of impunity***

The different aspects of impunity in the ICC will be examined in the following chapters of this thesis. In the present section a brief historical account and analysis of the common aspects of impunity in the post war tribunals will be examined.

As we have seen in the above sections, the establishment of each tribunal has been affected by the situation of other tribunals which came before it. Whilst international tribunals are undoubtedly trying to create something new and positive, they have also created certain problems, in particular, various forms of impunity that have emerged in these tribunals. This reflects the fact that each tribunal on each occasion left certain things unaddressed. This was not simply a procedural incident, but rather, a deliberate act in each case. In examining historical background of these tribunals and the question of impunity, the relation between the forms of impunity, impunity as a deliberate act, and the widespread examples of impunity that occurred in these tribunals, are all issues which merit discussion.

The first point to be considered is the relationship between the forms of impunity among previous international tribunals. An initial observation is that clearly one form of impunity rests on the relation between a tribunal and its historical background. Impunity in the ICTY is connected to what happened before it, and thus to the Nuremberg and Tokyo trials; Nuremberg and Tokyo, in turn, perhaps relate back to the Leipzig trials. The understanding of what constitutes impunity, and how the institutions may recognise, create, or foster impunity, arises through an understanding of the legal history of the relations between what these institutions are doing and what has already being established. This is evident in two different

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<sup>221</sup> *Id.*, Art. 93 (1).

<sup>222</sup> *Id.*, Art. 86.

<sup>223</sup> Burke-Whit W. A. 'The International Criminal Court and the Future of Legal Accountability', 10 *Journal of International and Comparative Law* (2003), 195, at 198, he states '[t]here is probably no weaker court in the world -including the local traffic court down the street- than the International Criminal Court. The ICC was designed to be weak', at 196.

respects: in one respect it is exemplified by the retrospective character of many such tribunals, the jurisdiction of which was consistently premised upon the idea that the behaviour in question had already been criminalised. Reliance, therefore, upon the experience of earlier tribunals or efforts at the codification of international criminal law, was the only way of avoiding the obvious moral and political problems of retrospective criminalisation. In another respect, however, the turn to historical precedents was not merely to bring with it the possibility of criminalisation, but also the possibility of the exclusion of criminal liability. The connection between the non-punishment of the Japanese Emperor by MacArthur in Tokyo,<sup>224</sup> the Allied atrocities that were not prosecuted in the Nuremberg Tribunal, and the NATO atrocities<sup>225</sup> that went unpunished in the former Yugoslavia is not to be missed.

The second point is that impunity occurred as a *deliberate act*. The historical backgrounds of these tribunals show that the impunity did not just happen as an accident or as a result of jurisdictional deficiencies that led to perpetrators not getting captured, escaping from prosecution, or being found but then exonerated, identified but not prosecuted. This kind of accidental procedural impunity of course occurs, but it is not the main point of significance, which is that the decision is deliberately made that some categories of crimes or certain people are not to be punished and are instead exempted prior to or during the creation of these tribunals. The purposes of these tribunals are officially announced in the name of humanity and universality: international crimes, whenever, wherever, and by whomever they are committed, must be punishable. Despite such announcements the punishments are not to be equally applied for all. On the one hand, universality is proclaimed in relation to international crimes, and on other hand there is a lack of universality observable when these institutions are set up and when they operate. One might therefore suggest that proclamations of universality of this kind are always understood to have their exemptions.

The third point that needs to be considered is the pervasiveness of non-prosecution and impunity in the post-war tribunals. All of these historical cases show the constant feature of the exoneration or exemption of certain classes or individual criminals from the jurisdiction of these tribunals. In all cases the tribunals were set up and proclamations were issued in which the heinous crimes were declared to be in

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<sup>224</sup> See *Supra* notes 108-110.

<sup>225</sup> See *Supra* notes 169-172.

existence and the intention was stated that perpetrators should not go unpunished. Yet significant exceptions or exemption from prosecution arose and impunity occurred in different ways and for different reasons, as follows:

a) Non-prosecution because of the law, whether the lack of law at the time or actually due to the implementation of the law. As Bass has pointed out, Allied attempts to punish German and Turkish war criminals after World War 1 ended in debacle mainly due to the law. Without ‘definite proof against him’, as the British High Commissioner in Constantinople complained regarding a top Ottoman official whose guilt he was confident of, the latter might escape justice; and the Allies’ demonstrated difficulty in obtaining convictions in the respective courts made the expectation of acquittals into a reason for non-prosecution of German and Turkish war criminals.<sup>226</sup>

b) Impunity because of the lack of military victory and occupation and resultant lack of power to enforce prosecution on the former officials of the defeated state.<sup>227</sup> The Leipzig trial is an example of this issue in that the Allies could not compel their demands for the prosecution of war criminals. However, sometimes war crimes tribunals do seem to be effective even where there has been no military victory, which suggests that norms may possess a degree of independent power even when they are not fully supported by states power. For example, the ICTR cannot be easily explained as victor’s justice; there was a victory in Rwanda, but the attempt at international justice was mainly set up to allay the excesses of this same victory.<sup>228</sup>

c) Impunity through political fears. This refers to situations in which prosecution was deliberately avoided for fear of negative political consequences, rather than through incidental and jurisdictional procedural factors. Examples of this would be the case of Kaiser Wilhelm II after World War I and the Japanese Emperor after the World War II. Regarding the former, despite the fact that the Versailles treaty explicitly accused Kaiser Wilhelm II<sup>229</sup> and the Court had power to prosecute him, he never faced trial.

d) Impunity through *exemption* of a party by Statutes or Charters. The exemption may be either explicitly or implicitly recognised in the Statutes and practice of the

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<sup>226</sup> Bass G. J. *Supra* note 5, at 7.

<sup>227</sup> *Id.*, at 11. Bass insists that: ‘Criminals such as Stalin, Mao, and Pol Pot never faced justice from Western states appalled at their atrocities because they had not been militarily defeated first.’

<sup>228</sup> *Id.*, at 15.

<sup>229</sup> *Id.*



post-war tribunals. For example, the Allied states were explicitly exempted from prosecution in the IMT Tribunals, which were established solely to exercise jurisdiction over Axis countries.<sup>230</sup> Examples of implicit, non-visible exceptions might include amnesty laws or what happened to Kaiser Wilhelm II after World War I.<sup>231</sup> Such exceptions are not written in the text of these tribunals, but are written in the context of when these tribunals emerge.

The universality of the criminalisation, the prosecution and punishment of certain individuals, was always dependent on something else. In the case of the Emperor of Japan, for example, the prosecution and punishment was always seen to be dependent not only on the American and Allied side, but also on the Japanese people, and that in this case it seemed not to be in their interest to punish him. What must be emphasised is that it was a part of the logic of this tribunal that the Emperor was not going to be prosecuted; it was an understanding that his trial might danger the security of the Japanese people, so he was exempted from prosecution and the universal crimes under investigation did not apply to him. A key point is that these exemptions were routine in these tribunals and existed in all of them.

e) Impunity through criminalisation. The central part of the story of the international criminal justice system is that it is always the case when criminalising certain behaviour that new conditions of impunity are also recognised, as a paradoxical function. This is a common feature of all tribunals prior to the ICC, and was examined in this chapter concerning the IMT and the IMTFE. The necessity of defining the parameters of criminal liability not only brings with it the possibility of extending criminal liability into new arenas, but also its limitation.

f) Impunity through lack of political will. Sometimes an act is criminalised, the decision has been made to prosecute, and there is a mechanism for prosecution, but there is no political will to act. This situation is similar to that of c) above, but here the issue is not fear of negative consequences but rather a lack of consensus or certainty over what possible positive outcomes might result from exercising the law, because of political interests of a victorious side, because of ignorance, or simply as a result of neglect. As Bass insists, war crimes tribunals depend on military force and

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<sup>230</sup> See the Nuremberg Charter Art. 1 and 6, and the Tokyo Charter Art. 1; the preamble and Art.1 of the London Agreement of 8<sup>th</sup> August 1945.

<sup>231</sup> See *Supra* note 32-35; see also Art. 227 of the Versailles Treaty.

the political will of foreign powers.<sup>232</sup> An example of impunity through lack of political will was what happened following the Armenian massacres in 1915 in Turkey. The treaty of Versailles provided for the Allies' purpose of trying those who were most responsible for crimes.<sup>233</sup> However the prosecution never happened and no further action has ever been taken against Turkey in connection with these massacres.

g) Impunity through inaction or failure to address such crimes. Sometimes the crimes are heinous and widespread but are completely ignored and unaddressed. This might happen for different reasons: for instance, priority is given, rightly or wrongly, to some other types of international crime and crimes of some types are ignored. An example of this would be the "comfort women"<sup>234</sup> crimes during World War II, whose perpetrators have never faced prosecution.

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<sup>232</sup> Bass G. J. *Supra* note 5, at 6.

<sup>233</sup> See Art. 227 of the Versailles Treaty.

<sup>234</sup> Penrose M. *Supra* note 45, at 300.

### ***Chapter III: Amnesties and Immunities in the Rome Statute***

#### ***Introduction***

The main concern of this Chapter is to examine two forms of the possible recognition of impunity in the Rome Statute: amnesty and immunity. This Chapter is not a complete analytical approach to amnesty and immunity under international law or the relationship between peace and justice, as these topics have been addressed abundantly in the legal literature.<sup>1</sup> The purpose of this chapter is instead to shed light on the policy of the ICC in theory – under the Statute – and in the practice of the Court and examine the relationship between that practice and the self-proclaimed goal of the ICC to ‘end impunity’, and prosecuting international crimes.<sup>2</sup>

The first major section is concerned with question of amnesties and the extent to which the Statute admits or prohibits the granting of amnesties. Amnesty was the subject of a controversial debate during the drafting of the Statute at the Rome Conference, many delegations asserting that retributive justice should be the sole response to international crimes within the jurisdiction of the ICC due to their heinousness.<sup>3</sup> In the end, the adopted Statute and its Rules of Procedure and Evidence, in contrast to the situation with regard to immunities, do not deal with amnesty explicitly. However, many scholars assert that the Rome Statute is broad enough to potentially allow for several instances of leeway for amnesties,<sup>4</sup> such as

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<sup>1</sup> E.g. Freeman M. *Necessary Evils, Amnesties and the Search for Justice* (2009); O’Brien R. ‘Amnesty and International Law’, 74 *Nordic Journal of International Law* (2005), 261; Sadat L.N. ‘Exile, Amnesty and International Law,’ *Notre Dame Law Review* (2005-6), 955; Sterio M. ‘Rethinking Amnesty’, 34 *Denver Journal of international law and policy* (2006), 373; Correa G. ‘Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship’, 67 *Notre Dame Law Review* (1991-1992), 1455; Orentlicher Diane F. ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100 *Yale Law Journal* (1991), 2539; Roht-Arriaza N. ‘Amnesty and the International Criminal Court’, in S. Dinah (eds), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (2000), 77; Akande D. ‘International Law Immunities and the International Criminal Court’, 98 *The American Journal of International Law* (2004), 407; Dinstein Y. ‘Diplomatic Immunity from Jurisdiction Ratione Materiae’, 15 *International and Comparative Quarterly* (1996), 76; Cassese A. ‘When may Senior State Officials be tried for International Crimes? Some Comments on the *Congo v. Belgium* Case’, 13 *European Journal of International Law* (2002), 853; McGregor L. ‘State immunity and jus cogens’, 55 *International & Comparative Law Quarterly* (2006), 437; Yitiha, S. *Immunity and International Criminal Law* (2004), and etc.

<sup>2</sup> See the Preamble of the Rome Statute.

<sup>3</sup> *Preparatory Committee for Establishment of the international Criminal Court* (4-15 August 1997), UN Doc. A/AC/249/1997/L8/Rev.1. The *US Delegation Draft, State Practice Regarding Amnesties and Pardons*.

<sup>4</sup> Scharf M. P. ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, 32 *Cornell International Law Journal* (1999), 507, at 521-27; Stahn C. ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal

non-prosecution on the basis of the ‘interests of justice’.<sup>5</sup> In contrast, some insist that, due to the treaty nature of the Statute and the fact that it is pursuant to the Vienna Convention,<sup>6</sup> the Statute should be interpreted in accordance with its main objective as proclaimed in its Preamble; one such scholar suggests that amnesty cannot be read into the Statute in light of its silence on this matter plus the nature and purpose of the Statute.<sup>7</sup> Regardless of such opposing arguments, in order to explore whether or not national amnesties may bar the Court’s prosecution and what the real rules are, this study will look at the practice of the Court and how it has addressed this issue so far.

The discussion of amnesty is divided into four sub-sections. The first of these sheds light on some of the difficulties regarding the debate concerning amnesties in the Statute, insofar as this concerns the idea of peace versus justice. There is no consensus or clear definitive answer that amnesty for core international crimes runs contrary to international law;<sup>8</sup> but it does seem that there is strong though inconclusive support for the argument that international law is in fact violated by it.<sup>9</sup> It is not my intention to analyse in depth the concept of amnesty in terms of whether or not it should be granted for international crimes, but the question will be examined in brief in order to indicate its complexities. In the second sub-section the possibility of the recognition of amnesties in the Statute will be discussed. In this sub-section the attempt will be made to develop and highlight the argument concerning the conditions in which the ICC may recognise amnesties and how the Statute provides some room for amnesties in the theory and the practice of the Court. The theoretical aspect will be examined in the third sub-section, in which the arguments at the Rome

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Court’, 3 *Journal of International Criminal Justice* (2005), 695, at 719-720; Robinson D. ‘Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court’, 14 *European Journal of International Law* (2003), 481, at 488; Angermaier C. ‘The ICC and Amnesty: Can the Court Accommodate Model of Restorative Justice?’ *Eyes on the ICC* (2004), 131, at 144; Majzub D. ‘Peace or Justice? Amnesties and the International Criminal Court’, 3 *Melbourne Journal of International Law* (2002), 247, at 263-71; Hafner G & *et al.* ‘A Response to the American View as Presented by Ruth Wedgwood’, 10 *European Journal of International Law* (1999), 108, at 108; Kerr R & E. Mobekk. *Peace and Justice, Seeking Accountability after War* (2007), at 71; Pensky M. ‘Amnesty on Trial: impunity, accountability, and the norms of international law’, 1 *Ethnics & Global Politics* (2008), 1, at 1; O’Brien R. *Supra* note 1, at 270-271.

<sup>5</sup> Rome Statute Art. 53(1), (c), and 53(2), (c).

<sup>6</sup> See Art. 31 of the *Vienna Convention on the Law of Treaties* UNTS. A/CONF.39/11/Add.2. (1969), (23 May 1969).

<sup>7</sup> Kourabas M. Kourabas M. ‘A Vienna Convention Interpretation of the “Interest of Justice” Provision of the Rome Statute, The Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A “Great Qualitative step forward,” or a Normative Retreat?’, 14 *University of California, Davis* (2008), 59 at 69.

<sup>8</sup> Pensky M. *Supra* note 4, at 8.

<sup>9</sup> Cryer R. *Prosecuting International Crimes, Selectivity and the International Law Regime* (2005), at 108.

Conference concerning amnesty and the possible interpretations by scholars of the Articles which might be interpreted to allow for amnesty will be discussed. Particular attention will be paid to the fact that the Statute is silent on the issue and does not ‘prohibit, discourage or encourage amnesties’,<sup>10</sup> and the conclusions that may be drawn therefrom.

In the fourth sub-section, which covers the practice of the Court, among the seven different situations so far being investigated by the ICC the Ugandan situation, which is most relevant to the question of amnesty, will be discussed. The Prosecutor in the Uganda case has stated that the national amnesty will not bar him from prosecution,<sup>11</sup> so the question is raised as to whether this would be applicable to all similar cases or the decision of the Prosecutor could be different under different circumstances. The issue is whether the interpretation of the concept of the ‘interests of justice’ by the Prosecutor should concern justice as an abstract principle or should be one which allows the Prosecutor to recognise genuine amnesties which would help the peace building in a transnational society.

The second major section of this Chapter deals with immunity in the Statute and the practice of the Court so far concerning immunity. Immunity in general has been regarded as a part of positive international law;<sup>12</sup> immunity, whether *ratione personae* or *ratione materiae*, has also in particular been laid down in the Vienna Convention<sup>13</sup> as a necessity for international relations and a protection for state officials, regardless of the relative strength of their respective states. However, the doctrine of state immunity has been restricted since the 19<sup>th</sup> century onwards; in particular, in the Nuremberg and Tokyo Tribunals<sup>14</sup> and the later *ad hoc* ICTY and ICTR,<sup>15</sup> immunity for international crimes has been rejected absolutely.<sup>16</sup> The Rome Statute, pursuant to the previous international tribunals and to customary international law, has rejected official immunity in Article 27, but in Article 98 provides leeway for immunity agreements between states. The arguments concerning

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<sup>10</sup> Freeman M. *Supra* note 1, at 75. The *Special Court for Sierra Leone*, for instance, in Article 10 precluded consideration of amnesty for the crimes within its jurisdiction.

<sup>11</sup> See below *supra* notes 119-121.

<sup>12</sup> Gardiner R. *International Law* (2003), at 34; Akande D. (2004), *Supra* note 1, at 409.

<sup>13</sup> See *Vienna Convention on Diplomatic Relations*, UNTS 500 / 95 (1961).

<sup>14</sup> The Nuremberg Charter Art. 7.

<sup>15</sup> See Art. 7(1), and 23(1), of the ICTY’s and Art. 6(1), and 22(1), of the ICTR.

<sup>16</sup> Although in the *Congo v. Belgium* the ICJ has been divided between an office and out of office minister, but previous international tribunals rejected the immunity absolutely for the state’s officials, see generally *Congo v. Belgium, Judgment* (14 February 2012).

the possible conflict between Article 27 and Article 98 on this point will be discussed in this Chapter.

I will attempt to shed some light on the possibility of recognition of immunity in the Statute. This does not mean that the ICC creates new forms of immunity in the Statute, but that it provides significant leeway for the recognition of immunity agreements which may bar the Court from exercising its jurisdiction over state officials.<sup>17</sup> This study will then look at the practice of the Court so far. In this section the situation of Sudan in the ICC and the case of President Al-Bashir will be discussed. This case in fact indicates the complexities involved in the enforcement of ICL; on the one hand it exemplifies the most obvious non-recognition of the immunity of heads of state in the Statute by the Trial Chamber,<sup>18</sup> and on the other hand it showcases the difficulties inherent in such prosecution of high authorities in practice, which has resulted in *de facto* impunity for Al-Bashir. Concerning his arrest warrant issued by the ICC, the question is why many states party and non-party to the Statute have been so reluctant to co-operate with the Court, and what the reason is for their non-compliance with the ICC.<sup>19</sup> It will be argued that, although the trend of the international criminal law, in particular in the Statutes of the *ad hoc* tribunals, has been towards the non-recognition or limitation of officials' immunity from prosecution for international crimes, it is still a complicated issue involving in practice a conflict between the general principle of international law of respecting the immunity of state officials, on the one hand, and the principle of international criminal law rejecting immunity, on the other. The dilemmas and challenges confronting the Court Prosecutor are ongoing in this case.

The first part of this section will consider, as preliminary matters, a brief definition of states' national immunity legislation and the different types of immunities under customary international law. In the second part, immunity in theory under the Rome Statute and the possible contradiction between Article 27, and Article 98 (1) which may lead to impunity, will be examined; while an

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<sup>17</sup> Paulus A L. 'Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Courts', 14 *European Journal of International Law* (2003), 843, at 856.

<sup>18</sup> Pre-Trial Chamber I, found that the current position of Omar Al Bashir as Head of a State not a party to the Statute has no effect on the Court's jurisdiction over this case.

<sup>19</sup> Malawi, which is a state party, in order to justify its non-cooperation in the case of Al-Bashir, officially declared to the ICC that the Article 27 of the Statute is not applicable for non-party heads of state (i.e. Al-Bashir). Article 98 (1), has also been raised in connection with this case; see the ICC Pre-Trial Chamber I, ICC-02/05-01/09-139 (12/12/ 2011), at 11 Para 17.

assessment of immunity in the practice of the Court will be made in the third and final section, which will highlight the case of most relevant to immunity in the practice of the Court, i.e. that concerning the situation in Sudan and President Al-Bashir.

### ***3.1. General discussion concerning amnesties for international crimes***

There is a controversial debate as to whether or not granting amnesty for international crimes is compatible with international law much of which concerns the apparently competing demands of ‘peace’ and ‘justice’. To balance between the demands of retributive justice and ‘restorative justice’ such as amnesties in cases in which prosecution may threaten the peace and reconciliation process or exacerbate the dangers of military or other force being used is a real dilemma, and there are forceful arguments being made by scholars on both sides of the debate.

Proponents of criminal prosecutions argue that granting amnesty to those who have committed heinous international crimes or violated human rights law is not compatible with the objective of world order.<sup>20</sup> They use variety of arguments, including ethical, moral and policy approaches, to contend that trials must be conducted by transitional societies seeking to address a legacy of human rights abuses.<sup>21</sup> They affirm that such trials would provide intrinsic benefits to a democratic government because they enhance and promote the rule of law and enhance the intrinsic dignity of individuals.<sup>22</sup> This is because the rule of law is integral to democracy itself; some supporters of retributive justice argue that criminal trials are essential in order to reinforce democratic governments and maintain popular support for them.<sup>23</sup> Failure to prosecute may result in the devaluation of the rule of law in that society.

The second major argument made by advocates of prosecution is this may act as a deterrent against future violations and helps to prevent a repetition of those

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<sup>20</sup> See Joinet L. & Guisse H. *Study on the Question of Impunity of Perpetrators of Violation of Human Rights*, UN Doc. E/CN.4/sub.2/1993/6 (19 July 1993), they considered that amnesty should not be granted for crimes against humanity. See Also, Committee on Human rights, concerning prohibition of torture and cruel treatment or punishment (Art. 7), CCPR, General Comment No. 20 (1992), declared that: ‘The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts;...’. See also Sterio M. *Supra* note 1, at 373.

<sup>21</sup> *Id.* See also Landsman S. ‘Alternative Response to Serious Human Rights Abuse: Of Prosecution and Truth Commission’, 59 *Law and Contemporary Problems* (1996), 81 at 83.

<sup>22</sup> Orentlicher D. *Supra* note 1, at 2542.

<sup>23</sup> *Id.* at 2543; see also Majzub D. *Supra* note 4, at 250.

crimes.<sup>24</sup> This acts as a specific deterrent for perpetrators and a general deterrent for society, sending a strong message to society that perpetrators of crimes will face punishment.<sup>25</sup> Orentlicher notes that, if the law is not able to punish pervasive recent brutality, it will not be able to compel the exercise of restraint in the future.<sup>26</sup> The failure to prosecute those responsible for human rights abuses brings about contempt for the rule of law and promotes future criminal actions.<sup>27</sup> Prosecution can also improve the development of international norms.<sup>28</sup> Additionally, prosecution's importance as a public forum where the facts can be determined cannot be underestimated. It is true that the fact-finding nature of these trials helps to educate the public as to the extent of the wrongdoing.<sup>29</sup> Generally, investigation, prosecution, and a fair trial help to find the reality of atrocities and to place those who had principal roles in the commission of crimes or in supporting, aiding and abetting criminals in front of the public.

The third major advantage given for prosecution is that trials provide for the accountability of the criminals before their victims. This provides the victims of abuse and their families with a sense of justice, so that their grievances can be put to rest. This sense of justice will help to dissipate the desire for revenge on the part of victims, and their calls for retribution.<sup>30</sup> As Landsman notes, 'society cannot forgive what it cannot punish.'<sup>31</sup> In addition, they insist that prosecuting violations of human rights abuses has become an affirmative obligation for states by customary international law and a variety of international instruments, including treaties and conventions.<sup>32</sup> The prosecution may also facilitate the rehabilitation of victims and the social shame or stigmatisation of perpetrators in society.<sup>33</sup>

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<sup>24</sup> Correa G. *Supra* note 1, at 1456. See Roht-Arriaza N. 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', 78 *California Law Review* (1990), 449, at 482; Landsman S. *Supra* not 21, at 83.

<sup>25</sup> Freeman M. *Supra* note 1, at 21.

<sup>26</sup> Orentlicher D. *Supra* note 1, at 2537.

<sup>27</sup> Scharf Michael P. *Supra* note 4, at 513.

<sup>28</sup> Sterio M. *Supra* note 1, at 376-377.

<sup>29</sup> Koskeniemi M. 'Between Impunity and Show Trial', *Max Plank UNYB* (2002), 6, at 3, 4, 18 and 31; see also generally, Shapira A. 'The Eichmann Trial: Changing Perspectives', 23 *The Journal of Israeli History* (2004), 18; Daniel Han S.W. 'The International Criminal Court and National Amnesty', 12 *Auckland University Law Review* (2006), 97.

<sup>30</sup> Cassese A. 'On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998), 2 at 6.

<sup>31</sup> Landsman S. *Supra* note 21, at 84.

<sup>32</sup> E.g. *Convention on the Prevention and Punishment of the Crime of Genocide*, UNTS 78 / 277 (1948); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNTS 1465/ 85 (1984), also international treaties which, although not referring directly to a state's duty to prosecute, do recognise for individuals the right of remedy when their rights have



However, through the development of restorative justice in the form of conditional amnesties, truth commissions and redress towards the end of the twentieth century, it has become increasingly clear that retributive justice is not a natural or inevitable response, but a social choice in the national judiciary system of national courts.<sup>34</sup> Insofar as alternative ways of confronting human rights abuses are concerned, some nations have employed an approach which has often been described as the ‘truth commission’,<sup>35</sup> or ‘truth and reconciliation commission’. Such commissions have been used many times in the last two decades, and played an important role as an alternative form of justice in countries such as South Africa, Uruguay, and Chad.<sup>36</sup> In South Africa, for instance, conditional amnesty, which was based on public confession, comprised a very real punishment of the criminals.<sup>37</sup>

The advocates of amnesties argue that punishment may be viewed as a backward-looking exercise in retribution, rather than as the renewal of the rule of law.<sup>38</sup> They have preferred to forego prosecutions because of practical considerations, issues of legitimacy, and questions concerning the utility of prosecutions, as follows.

Firstly, practical considerations which may dissuade judicial authorities, whether national or international, from prosecution include the inability of the judicial system to bring a powerful defendant to justice who is often an integral part of an intact military, capable of bringing down the government if threatened.<sup>39</sup> At other times, there has been a lack of popular national or international support for the pursuit of the criminals, which may lead to the continuation of conflict, as happened in Uganda after intervention by the ICC.<sup>40</sup> There are often difficulties with evidence gathering, or the prosecution may be rendered impossible because of the broad range of criminals who participated in the crimes committed.

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been infringed; for examples of these latter, see the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, UNTS 999/171(1966), and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No.11 and 14 (1950).

<sup>33</sup> Freeman M. *Supra* note 1, at 21.

<sup>34</sup> Johnstone G. *Restorative Justice, Ideas, Values, Debates* (2002), at 7.

<sup>35</sup> Landsman S. *Supra* note 21, at 82.

<sup>36</sup> *Id.*

<sup>37</sup> Blumenson E. ‘The Challenge of the Global Standard of Justice: Peace Pluralism, and Punishment in the International Criminal Court’, 44 *Columbia Journal of Transnational Law* (2006), 801, at 869.

<sup>38</sup> Majzub D. *Supra* note 4, at 250.

<sup>39</sup> Correa G. *Supra* note 1, at 1463. The Chile case after Pinochet is one of the clearly example of this point.

<sup>40</sup> Allen, T. *Trial Justice* (2006), at 3 and 87.

Secondly, there may be issues related to the legitimacy and impartiality of the body or persons prosecuting the crimes. There are often questions of the neutrality of the prosecutors and their bias, particularly in international conflicts, but also in intra-state conflicts; and these can mean, in some circumstances, that the prosecution would be viewed as a form of ‘victor’s justice’ or one-sided court.<sup>41</sup> It might further cause problems in fully reintegrating the society, if it would destroy a fragile compromise.<sup>42</sup>

Thirdly, there may be policy reasons against proceeding with prosecutions. Many of the great religions of the world have accepted that ‘an eye for an eye’ is an unacceptable type of justice as it creates a continuous and never-ending cycle of violence. In contrast, ‘turning the other cheek’ may help to break that cycle and aid in establishing lasting peace.<sup>43</sup>

The advocates of amnesties see this as a matter of ‘balancing’ one against the other, and in the process are forced to demarcate between, on the one hand, ‘normal’ (or alternatively ‘egregious’) criminal behaviour for which punishment is deserved, and the ‘special’ criminal behaviour that is deserving of amnesties for the promotion of social harmony.<sup>44</sup> The advocates of prosecution, by contrast, are forced to equate social harmony with peace and good order, blinding themselves to the partial character of the justice that might arise as a consequence. How to balance between the demands of justice and amnesty when prosecution may threaten the peace and reconciliation process or exacerbate the dangers of military or other force comprises an issue to which no one has been able to provide an overall acceptable solution, and perhaps there is no perfect solution and it is in fact impossible to balance the one against the other.<sup>45</sup> Certainly, these problems appear to be extremely awkward in some societies. As Pensky also rightly argued, there is no clear, definitive answer to the question as to whether amnesty for international crimes runs contrary to international law;<sup>46</sup> yet it seems that there is strong, albeit not conclusive, support for the argument that it does in fact violate international law.<sup>47</sup>

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<sup>41</sup> The ‘victor justice’ has been discussed in Chapter II.

<sup>42</sup> Landsman S. *Supra* note 21, at 85.

<sup>43</sup> *Id.*, at 87.

<sup>44</sup> Orentlicher D. *Supra* note 1, at 2537.

<sup>45</sup> *Id.*, at 2539.

<sup>46</sup> Pensky M. *Supra* note 4, at 1.

<sup>47</sup> Cryer R. (2005), *Supra* note 9, at 108.

Those on each side of the debate on justice versus peace (or, alternatively, no justice and no peace) have argued that reconciliation can only be attained through their own particular approach.<sup>48</sup> What is evident, however, is that amnesties may come to represent a form of impunity – a way of exonerating certain individuals from punishment for criminal acts – and, to that extent, represent an exception to the rule of prosecution which appears to be the mainstay of international criminal law and the explicit rationale for the creation of an International Criminal Court. With regard to the ICC, such debates crystallise around the issue as to whether or not it should recognise domestic amnesties.

### ***3.2. Arguments regarding amnesty and prosecution under the Rome Statute***

The debate regarding the possible recognition of amnesties for the crimes within the jurisdiction of the Statute is also a controversial one. Although the issue of how the ICC should deal with national amnesties and reconciliation efforts was raised in the Preparatory Committee<sup>49</sup> and at the Rome Conference,<sup>50</sup> it was not explicitly dealt with in the Rome Statute.<sup>51</sup> During the preparatory meeting some delegations expressed the strong view that prosecution was the sole appropriate response for perpetrators of international crimes within the ICC's jurisdiction; many NGOs and advocates of human rights such as Amnesty International also asserted strongly that amnesty should not be granted to perpetrators of international crimes.<sup>52</sup> Other delegations, however, such as the US delegation, expressed concern that the ICC would hinder efforts to put a stop to human rights violations and reinstate peace and democracy in countries like South Africa, Guatemala, and Haiti.<sup>53</sup>

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<sup>48</sup> Majzub D. *Supra* note 4, at 250.

<sup>49</sup> See *the Preparatory Committee August 1997, the US Delegation Draft, State Practice Regarding Amnesties and Pardons*. *Supra* note 3, at 2-5.

<sup>50</sup> *Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (15June-17July1998), Vol, II, at 168, Para 101 and at 216 Para 38. The UN Doc. A/CONF.183/13.

<sup>51</sup> Roht-Arriaza N. (2000), *Supra* note 1, at 79; Robinson D. 'Serving the Interest of Justice: Amnesties, Truth Commissions, and the International Criminal Court', in J. Harrington, M. Milde, and R. Vernon (eds), *Bringing Power to Justice? The Prospects of the International Criminal Court* (2006), 210 at 211; Gropengieber H. 'Amnesties and the Rome Statute of the International Criminal Court', 5 *International Criminal Law Review* (2005), 267, at 280-290.

<sup>52</sup> See *Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice*, Amnesty International (17 June 2005), AI Index: IOR 40/023/2005.

<sup>53</sup> *Preparatory Committee for Establishment of the international Criminal Court* (1997), *Supra* note 3, *The US Delegation Draft, State Practice Regarding Amnesties and Pardons*.

Accordingly, the issue was not ultimately resolved during the Rome Conference.<sup>54</sup> Some have stated that during the Preparatory Committee on the Statute, the issue of how to deal with amnesties was never seriously discussed because of pressure from human rights groups.<sup>55</sup> Rather than an explicit reference to amnesty, the adopted provisions bear evidence of creative ambiguity via their silence on this issue; Philippe Kirsch, the chair of the Preparatory Commission who became the ICC's first president, asserted that the Rome Statute deliberately reflects a 'creative ambiguity that could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty or asylum exception to the jurisdiction of the court.'<sup>56</sup>

One author suggests that the ambiguity may have been deliberate in order that the Court be able to respect national amnesties.<sup>57</sup> But it is equally clear that the absence of explicit recognition may also be construed as a general prohibition. The literature on the subject, indeed, demonstrates this interpretive ambiguity. Scholars such as Scharf and Stahn insist that the Statute provides some leeway for the judges of the ICC to recognise amnesties;<sup>58</sup> Scharf asserts that this is an exception to the jurisdiction of the Court.<sup>59</sup> On this view, it is significant for the ICC to be able to balance the needs of a society in a transitional situation with the requirement of prosecution under international law.<sup>60</sup>

Others, however, insist that the Statute does not recognise amnesties and that the Statute, as a treaty pursuant to the Vienna Convention, should be interpreted in the light of its main objective, which is the prosecution of international crimes.<sup>61</sup> On this view, it is argued that the states party to the Statute have the obligation to prosecute alleged perpetrators who have committed crimes within the jurisdiction of the

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<sup>54</sup> See the UN *Diplomatic Conference*, *supra* note 50, at 214-217, 71 Para, 117, and at 168, Para 101.

<sup>55</sup> Arsanjani M H. 'The International Court and National Amnesty Law', 93 *American Society of International Law* (1999), 65, at 67. Also, the daily debate during the Rome Conference indicates that the issue of amnesties was never independently discussed at the Conference, see *Id.*

<sup>56</sup> Scharf M. *Supra* note 4, at 522. Professor Scharf in this Article states that he discussed this issue with Philippe Kirsch over dinner during an international conference in Strasbourg, France, on November 19, 1998.

<sup>57</sup> Angermaier C. *Supra* note 4, at 144.

<sup>58</sup> Scharf M. P. *Ibid*, at 521-27; Stahn C. *Supra* note 4, at 719-720; Robinson D. (2003), *Supra* note 4, at 488; Angermaier C. *Ibid*, at 144; Majzub D. *Supra* note 4, at 263-71; Newman D.G. 'The Rome Statute Some Reservations Concerning Amnesties, and a Distributive Reform', 20 *American University International Law Review* (2004-5), 293, at 316-320, and etc.

<sup>59</sup> Scharf M.P. *Ibid*.

<sup>60</sup> Stahn C. *Supra* note 4, at 718.

<sup>61</sup> Kourabas M. *Supra* note 7, at 69.

Court.<sup>62</sup> It is stated that the Rome Statute not only affirmed states' duty to prosecute such perpetrators, but also established their initial duty, with primacy over the ICC's jurisdiction, to prosecute criminals in their own national courts.<sup>63</sup> Furthermore, it is occasionally argued that there are also duties under customary international law to prosecute, which apply to states whether party or non-party to the Statute.<sup>64</sup>

By contrast to the above arguments regarding the obligation of state parties to prosecute crimes within the jurisdiction of the Statute, Freeman addresses this ambiguity as regards amnesty in considering the question as to 'whether the treaty creates an obligation on states parties to prosecute the crimes falling under its jurisdiction.' In response to this he states that 'there is no explicit *aut dedere aut judicare* requirement in the treaty'.<sup>65</sup> Freeman concludes that, because of the 'gravity threshold' and the rules on the admissibility of cases in the Statute, it in fact 'limits the obligation imposed on states parties'.<sup>66</sup> It would appear that this argument rightly indicates the fact that the ICC was not designed to prosecute all crimes within its jurisdiction, but that the rules on the admissibility of cases limit the cases which can be brought before the Court. This limitation is one of the reasons, as I will discuss later on in this Chapter, for the inevitability of the possibility of domestic amnesties being offered not in good in practice. However, I think a point missing from Freeman's analysis is related to the 'gravity threshold', as this is ambiguous too; the Statute did not define the required gravity, or even what sort of measure would determine the gravity (whether the number of victims is significant or the nature of the crimes). In this regard, the ICC's Prosecutor's *proprio moto* investigation in Kenya raises criticism regarding the number of victims. However, in the practice of the ICC, neither the Office of the Prosecutor nor the judges have indicated that the number of victims would determine the gravity. Concerning such ambiguity in the Statute, the Prosecutor's policy paper defines the gravity,<sup>67</sup> and in one sense this could be seen as indicating the 'real rule' on the matter, although from another point of view one could rightly argue that the judges of the Court's Chambers are not obliged to follow such a definition as given by the Office of the Prosecutor.

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<sup>62</sup> See the Preamble of the Rome Statute.

<sup>63</sup> Rome Statute Art. 1 and 17.

<sup>64</sup> Angermaier C. *Supra* note 4, at 140-145.

<sup>65</sup> Freeman M. *Supra* note 1, at 76.

<sup>66</sup> *Id.*

<sup>67</sup> *Policy Paper on the Interest of justice*, ICC-OTP-Interests Of Justice (2007), at 5, it provides '[i]n determining whether the situation is of sufficient gravity, the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact.'

It should be noted that the Statute is silent about amnesties, however, concerning the possibility that the ICC may admit national amnesties.<sup>68</sup> Concerning amnesties, then, the overall question is how amnesties for international crimes are related to impunity and whether amnesties provide impunity; if the answer is yes, the question then becomes one as to whether granting amnesties for crimes within the jurisdiction of the Statute is consistent with the Statute or whether amnesties represent an exception.

At the outset, it has to be noted that the extent to which amnesties are consistent with the prohibition of impunity depends initially upon the construction given to impunity itself. If, as has already been noted, impunity is to be conceived strictly-speaking as an 'escape from punishment' then any grant of amnesty would presumably constitute an authorisation of impunity. If, however, impunity were to be conceived more broadly as an 'escape from justice' and justice, in turn, understood to be capable of being delivered by non-judicial forms of accountability, then it does not necessarily follow that the granting of an amnesty would be inconsistent with the prohibition on impunity. Much would depend, in that sense, upon the circumstances in which the amnesty was granted. In that context, the granting of a conditional amnesty such as that provided by the South African Truth and Reconciliation Commission (TRC) after confession might well be construed as a real punishment and hence not a violation of the prohibition on impunity.<sup>69</sup> But yet in other cases, if the amnesty were simply granted without any accompanying process of truth-finding or confession, an accusation of impunity would be difficult to avoid.

### ***3.3. Potential for the consistency of some amnesties with the Rome Statute***

There are three principal situations indicated in the Statute in which the grant of an amnesty might serve to exempt prosecution. These are: i) in the case of a decision not to initiate an investigation by the Prosecutor under Articles 53(1) and 53(2) in order to serve the interests of justice; ii) in the case of a decision of non-admissibility in view of the principle of complementary jurisdiction under Article 17(1) (a) and (b) and iii) when a person who has received an amnesty from a national court might also be in a position to claim the principle of *ne bis in idem* before the ICC.<sup>70</sup>

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<sup>68</sup> *Id*; see also the section below.

<sup>69</sup> Blumenson E. *Supra* note 37, at 869.

<sup>70</sup> The Rome Statute Art. 20.

***3.3.1. Not prosecuting (granting amnesty) in order to serve the interests of justice in Article 53(1) (c) and 53(2) (c)***

The concept of ‘interests of justice’ in Article 53 is one of the most complex aspects of the Statute; it potentially provides room for the evaluation of amnesties and alternative forms of justice by the ICC’s Prosecutor.<sup>71</sup> Article 53(1) (c) provides that the Prosecutor should consider whether ‘taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’. The same consideration arises again under Article 53(2) (c) which provides for the case in which ‘prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime’.<sup>72</sup> Although the exact content of the ‘interests of justice’ has not been defined in the Rome Statute<sup>73</sup> the Prosecutor’s Policy Paper in 2007 highlighted some of the complexities involved. It provides that even when the jurisdiction and admissibility requirements have been satisfied, the Prosecutor may nevertheless not prosecute on the basis of the interests of justice.<sup>74</sup> However, the paper insists ‘that the exercise of the Prosecutor’s discretion under Article 53(1)(c) and 53(2)(c ) is exceptional in its nature and that there is a presumption in favour of investigation or prosecution...the criteria for its exercise will naturally be guided by the objects and purposes of the Statute’,<sup>75</sup> which are prosecution and ending impunity.

A fundamental question in the above Article is whether the notion of ‘interests of justice’ is bound up only with the interests of criminal justice or whether the broader concerns of ‘justice’ can also be considered. The Prosecutor’s policy paper of 2007 explicitly states that the concept of justice implied is broader than criminal justice and may countenance mechanisms such as truth seeking and reparations

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<sup>71</sup> The Prosecutor can investigate on three different bases. Firstly, on the basis of a referral of a situation to Prosecutor by a State Party, in accordance with Art. 13(a), and 14. Secondly, on a referral of a situation by the Security Council acting under Chapter VII of the United Nations Charter, under Art. 13(b), and thirdly, the investigation may be based on an independent initiation of an investigation by the Prosecutor, which has been authorised by the Pre-Trial Chamber of the Court under Art. 13(3), and (15).

<sup>72</sup> Rome Statute Art. 53 (2), (c).

<sup>73</sup> Bergsmo M & Kruger P. ‘Investigation and Prosecution’, in O. Triffterer and C.H. Beck (eds), *Commentary on the Rome Statute of the International Court* (2008), 1065, at 1072.

<sup>74</sup> See the *Policy Paper on the Interest of justice*. *Supra* note 67, at 2-3.

<sup>75</sup> *Id.*, at 1.

programmes.<sup>76</sup> Freeman argues that ‘the interest-of-justice test reads like an escape clause for the OTP. It is a guarantee of prosecutorial diplomacy, built into the Rome Statute.’<sup>77</sup>

Although the Prosecutor’s paper did not explicitly mention amnesty, I would argue that, via non-exclusion of concepts of justice beyond criminal justice, the Prosecutor has in fact recognised it. In particular, the paper addresses the role of the ICC as part of a comprehensive solution which also includes political and security elements.<sup>78</sup> It might be said that amnesties in a peace and reconciliation process may fall into this comprehensive solution. Concerning the political power to suspend an investigation pursuant to Article 53 where that investigation might interfere with political negotiations between different parties in an armed conflict, Amnesty International warned the Prosecutor that he does not have the political power to do so: ‘Justice delayed is justice denied’ and ‘it would demoralize and endanger victims and witnesses; seriously undermine any resumed investigation and the morale of investigators and prosecutors...’<sup>79</sup> Amnesty International added that any political decision to suspend an investigation on the grounds that it could hinder international peace and security is a matter for the SC and not the ICC’s Prosecutor.<sup>80</sup>

In actual fact, there is no case so far in which the Prosecutor has decided on non-prosecution based on the interests of justice. Nevertheless, since the meaning of the ‘interests of justice’ in the above Article not only may involve criminal justice, but justice in a broader sense, the Prosecutor ‘might invoke the concept of interests to justify departures from classical prosecution based on both amnesties and alternative methods of providing justice.’<sup>81</sup> It is, however, true that, for such a substantial decision, the Statute provides for a review of the decision of the Prosecutor by Pre-Trial Chamber, which, ‘on its own initiative’, may even obligate the Prosecutor to pursue the investigations or prosecutions.<sup>82</sup> A decision not to prosecute by the Prosecutor (under the control of the Pre-Trial Chamber) on the grounds of the ‘interests of justice’, when this is given a broad interpretation that includes non-retributive forms of justice and even amnesties when such are granted by the State

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<sup>76</sup> *Id.*, at 8.

<sup>77</sup> Freeman M. *Supra* note 1, at 86.

<sup>78</sup> *The Policy Paper. Ibid.*, at 8.

<sup>79</sup> Amnesty International, *Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice*, AI Index: IOR 40/023/2005 (17 June 2005).

<sup>80</sup> *Id.*

<sup>81</sup> Stahn C. *Supra* note 4, at 596.

<sup>82</sup> Rome Statute Art. 53(3), (b).



Parties, implies that an exception from criminal prosecution would take place in those situations. The ICC may thereby recognise an exception or exemption from prosecution, and Article 53 (1) (c) Rome Statute has provided for such exceptions.

The ‘interests of justice’ has not been defined in the Statute; the phrase was used by various drafters of the Rome Statute at the Rome Conference, but with various intended meanings. Some delegations at the Rome Conference intended the ‘interests of justice’ to refer to the interests of victims;<sup>83</sup> others, who expressed reservations about including the phrase in the Rome Statute, perceived it as giving the Prosecutor an arbitrary right to stop or suspend a case whenever he or she determined that this ‘would serve the interest of justice’.<sup>84</sup> The Office of the Prosecutor, in definition of the ‘interests of justice’, has provided as follows in a policy paper: ‘[t]he interpretation of the concept of “interests of justice” should be guided by the ordinary meaning of the words in the light of their context and the objects and purpose of the Statute’.<sup>85</sup> The policy paper mentions the preamble of the Statute in reference to the main purpose of the ICC, which is the prosecution of perpetrators; however, it does not limit the ‘interests of justice’ to retributive justice alone, but declares that the ‘justice’ referred to in the Rome Statute is ‘broader than criminal justice in a narrow sense’.<sup>86</sup> Thus, it seems that although amnesties do not explicitly appear in the text of the Statute, the Prosecutor may recognise national amnesties. This policy paper from the Prosecutor’s Office suggests a different approach is being taken than that of those who assert that retributive justice for the international crimes within the jurisdiction of the ICC should be only the possible response by the Court.

### ***3.3.2. Amnesty in relation to the complementarity principle***

The principle of complementarity, as spelt out in Article 17 of the Rome Statute may also provide grounds for the exemption from prosecution by way of amnesty. In the first place, it is clear that complementarity in the Rome Statute means that national courts effectively have priority of jurisdiction over that of the ICC.<sup>87</sup> The ICC has to defer to the jurisdiction of national courts and may step in only in case of inability or

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<sup>83</sup> *Rome Conference* Vol, II, *supra* note 50, at 99, Para 48 and Vol, III, at 43, Para 6.

<sup>84</sup> *Id*, Vol, II, at 302, Para 137 and at 359, Para 45, for instance Mr Al-Sheikh from Syria insisted that ‘his delegation’s reservations regarding the provisions in article 54 allowing the Prosecutor to stop an investigation in the supposed interests of justice’, and Vol, III, at 241, Para 3.

<sup>85</sup> See Policy Paper *on the Interest of justice*. *Supra* note 67, at 4.

<sup>86</sup> *Id*, at 8.

<sup>87</sup> See Art. 1, 17(1), (a), and the Preamble of the Statute.

unwillingness to prosecute.<sup>88</sup> By this principle governing the non-admissibility of a case, therefore, a State Party can raise the issue in accordance with Article 17(1) (a) of the Statute and claim that a case has already been investigated or prosecuted in the national courts. The critical issue is in the meaning of the term ‘investigation’ in this Article. The Article requires an investigation, but it does not explicitly declare that it must be a ‘criminal investigation’.<sup>89</sup> The term could also be interpreted by the ICC’s Prosecutor to include a non-criminal investigation.<sup>90</sup> Thus a concerned State Party could argue that a non-criminal investigation such as a truth commission also amounts to a genuine investigation.<sup>91</sup>

A significant issue regarding Article 17 is the conditions under which a decision by a national court not to prosecute may be taken to have been made on legitimate grounds on the one hand or as a consequence of unwillingness or inability to prosecute on the other hand. In cases where a state shows inability or unwillingness to prosecute, the ICC would thereby have jurisdiction over the case; but the practical issue is one of how the ICC should go about assessing whether a given instance of non-prosecution was on legitimate grounds or not, given that the ICC does not have any observers national trials who could assess national decisions. In making such assessments the ICC needs to consider, *inter alia*, whether the concerned state had intent to shield perpetrators from justice<sup>92</sup> by granting amnesties or using other means of non-prosecution. This test is a rigorous one for the ICC, especially where alternative forms of justice such as reconciliation are accompanied by amnesties. Altogether there are three different possible scenarios with regard to the question of whether a state will prosecute or will grant an amnesty: a state may commit itself to genuine prosecutions; it may offer a blanket amnesty; or it may offer a conditional amnesty.<sup>93</sup>

The first of these, genuine targeted prosecution by a state, is not completely relevant to this section. However, the court should ensure that such prosecutions include those who are most responsible, and do not deal only with low-ranking perpetrators; otherwise the situation would definitely lead to impunity, which will be

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<sup>88</sup> *Id.*, Art. 17.

<sup>89</sup> *Id.*, Art. 17.

<sup>90</sup> Robinson D. (2006), *Supra* note 51, at 226; Scharf M. P. *Supra* note 4, at 525; Majzub D. *Supra* note 4, at 267-268; Stahn C. *Supra* note 4, at 696.

<sup>91</sup> A state E.g. could refer such decision to the Art.17 of the Rome Statute.

<sup>92</sup> See the Rome Statute Art. 17 (2), and (3).

<sup>93</sup> *Id.*, Art. 17 (2).

examined later on in this thesis. The second situation is the blanket amnesty: it is hard to see how states granting blanket amnesties would ever satisfy the complementarity test of the Court. These kinds of amnesties may be offered without investigation; in some instances the investigations would be done by a truth commission, without any prosecuting authority under the enabling legislation. Moreover, such legislation may be enacted as a result of unwillingness or inability to prosecute, thus tending to shield perpetrators from prosecutions and justice. That this kind of amnesty clearly leads to impunity means that the ICC has a responsibility to distinguish between acceptable amnesties from mere non-prosecutions by State Parties – a task which would be fraught with difficulties. The third instance is that of the conditional amnesty: this is where a truth and reconciliation commission is authorised to grant amnesties on a case-by-case basis. To the extent that the process for granting this kind of amnesty retains the authority of the state to exercise the option to prosecute where appropriate, it would easily satisfy the complementarity test.<sup>94</sup> Indeed, it might be argued that through conditional amnesty the perpetrator suffers real punishment.<sup>95</sup> South Africa modelled this kind of amnesty, through confession by perpetrators. Consequently, it would be open to the Prosecutor to conclude that a conditional amnesty combined with a truth and reconciliation procedure conforms to the requirement of a state investigation stipulated under Article 17(1) (a) thereby excluding the need for concomitant ICC proceedings. The Pre-Trial Chamber may, in this situation, review the admissibility standards applied by the Prosecutor in its judgment concerning the acceptability of alternative forms of justice if it had been requested by a state making a referral under Article 14 or upon request by the Security Council.

### *3.3.3. Amnesty related to the principle of ne bis in idem before the ICC*

During the preliminary negotiations leading to the establishment of the Statute of the ICC, a proposal was put forward as follows:

Without prejudice to article 18, a person who has been tried by another court for conduct also proscribed under article 5 may be tried by the Court if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a

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<sup>94</sup> Robinson D. (2006), *Supra* note 51, at 228.

<sup>95</sup> Blumenson E. *Supra* note 37, at 869.

*pardon*, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty.<sup>96</sup> (Emphasis added)

The question here was whether the granting of an amnesty or pardon by a national court would be such as to give rise to the application of the principle *ne bis in idem* for purposes of international criminal liability.<sup>97</sup> This proposal was one of the most controversial parts of the negotiations about the *ne bis in idem* principle.<sup>98</sup> The proposal was finally abandoned, but a consequence of these negotiations was the fact that the participants ('like-minded countries') in the Rome Conference were aware that the principle of *ne bis in idem* had a relationship to amnesty proceedings.

Some delegations who related the *ne bis in idem* principle to the pardons and amnesties suggested the court be allowed to try a person previously convicted if that person was subsequently pardoned and paroled.<sup>99</sup> In contrast, many delegations from the so-called 'like-minded countries'<sup>100</sup> argued that the Statute should not allow the Court to intervene in the administrative processes (i.e. the granting of parole) or the political decision-making process (i.e. pardons and amnesties) of a state.<sup>101</sup> On the other hand, some argued that the proposal was not absolutely necessary, because the Court, due to the provisions on admissibility and the complementarity principle, already had sufficient power to examine those cases of pardons or amnesties which were made in bad faith by state parties.

In the end, the participants in the Rome Conference agreed on the *ne bis in idem* principle in the Rome Statute without explicitly referring to the pardons and amnesties in Article 20 (2) and (3) which provide:

No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct...

As the above Article stipulates, no one should be tried and punished twice for 'the same conduct' by 'another court'. The question then arises as to what the

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<sup>96</sup> See *Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*. *Supra* note 50, Vol. III, at 29.

<sup>97</sup> Holmes T. J. 'The Principle of Complementarity', in Roy S Lee (eds), *The International Criminal Court: The Making of the Rome Statute- Issues, Negotiations and Results* (1999), 41, at 51-52.

<sup>98</sup> See Diplomatic Conference. *Ibid*, at 240, and Vol. II, at 102-115.

<sup>99</sup> *Id.* Draft Art. 19, *these delegations were mainly from Portugal and Belgium*.

<sup>100</sup> States normally supportive of stronger provisions in the Rome Statute had been designated as 'like-minded', such as Germany, Switzerland, the United Kingdom, and Canada. See Hall k. C. 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court,' 94 *The American Journal of International Law* (2000), 773, at 779.

<sup>101</sup> Holmes T. J. *Supra* note 97, at 60.

meaning is of the same conviction or punishment. As far as some proponents were concerned, a confession before a truth commission, for example, might be construed as a form of penalty, redress or reparation by a national court, such that it would constitute the functional equivalent of having been tried and convicted for the same offence were they to be charged by the ICC.<sup>102</sup> The question arises also as to how the Court should deal with such situations. It is apparent that there are at least two dimensions to such a question. The first is that Article 20 of the Statute speaks about a trial by ‘another court’, in which circumstances it is arguable that such truth commissions are not the equivalent of a ‘court’ for such purposes. The second dimension is that the principle *ne bis in idem* in the Statute should not apply to a prosecution where it is ‘inconsistent with an intent to bring the person concerned to justice’.<sup>103</sup> This problem would become greater where the granting of amnesties under cover of national legislation took an unconditional form and where the intent was such as to shield the accused from international prosecution. Generally, the ICC’s prosecutor has the right to either reject or accept those amnesties; but the question still remains as to whether the ICC can deal in the same way with amnesties that are the product of *national legislation* rather than as a matter of prosecutorial discretion. In either case the *ne bis in idem* principle provides a right for the accused to claim these amnesties, and it would not be easy for the ICC to make a decision in order to distinguish between an inadequate amnesty and an amnesty arranged to serve both the interest of justice and peace.

### ***3.4. Amnesty in the practice of the ICC***

The ICC has opened investigations into situations in seven different countries so far,<sup>104</sup> and the Uganda situation is the one that is the most relevant to this section.<sup>105</sup> As was discussed in Chapter One regarding legal realism, the real rules are to be found in the practice and decisions of the Court and its administrative body. Hence, the jurisprudence of the Court in the Uganda situation will clarify what the policy of the ICC concerning amnesties has been in practice so far.

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<sup>102</sup> Scharf Michael P. *Supra* note 4, at 525; Gropengiebert H. *Supra* note 43, at 285-286.

<sup>103</sup> Rome Statute Art. 20.

<sup>104</sup> It includes situations in Uganda, Congo, Darfur Sudan, Central African Republic, Kenya, Libya and Cote d’Ivoire. See the ICC’s website at: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (Accessed 28/02/2012).

<sup>105</sup> It should be considered that this section is not a complete case study, I seek here merely to integrate the current policy of the Court into the controversial debates on amnesties.

The Uganda situation was the first referral of a situation to the ICC; the referral was made by the president Yoweri Museveni in 2003.<sup>106</sup> The conflict in Uganda had persisted for almost two decades, and civilians in northern Uganda had been attacked regularly by the LRA insurgent group.<sup>107</sup> The ICC, in its summary of the background situation in Uganda, provides:

[The LRA has been directing attacks against both the [Uganda People's Defence Force] UPDF and [defence units] LDUs and against the civilian population; that, in pursuing its goals, the LRA has engaged in a cycle of violence and established a pattern of "brutalization of civilians" by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements and that abducted civilians, including children, are said to have been forcibly "recruited" as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities.<sup>108</sup>

After the referral by President Museveni in January 2004,<sup>109</sup> the Prosecutor Luis Moreno de Ocampo in a press conference at Kampala, Uganda, announced the initiation of a formal investigation in Northern Uganda.<sup>110</sup> Pursuant to the Prosecutor's investigation, the Pre-Trial Chamber II issued arrest warrants against five top members of the LRA, including the alleged Commander in Chief, Joseph Kony, in 2005.<sup>111</sup> Kony is still at large and devastating the Ugandan people and neighbouring countries, such as the DRC; in fact, four suspects' arrest warrants are outstanding to date.<sup>112</sup> The Prosecutor has been clear that he has no intention of withdrawing the arrest warrant against the LRA leaders or negotiating with their representatives.<sup>113</sup> In 2011 the SC condemned the ongoing attacks by the LRA and

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<sup>106</sup> See *President of Uganda refers situation concerning the Lord's Resistance Army (LRA), to the ICC*, ICC-20040129-44 (December 2003), and ICC-02/04. Uganda has been ratified the Statute in June 2002; for referral of situations to the ICC by state parties, see Rome Statute Art.14 (1).

<sup>107</sup> Kerr R & E. Mobekk. *Supra* note 4, at 72.

<sup>108</sup> See Situation in Uganda, *Prosecutor v. Joseph Kony, Vincent Otti and etc*, ICC-02/04-01/05, at 2.

<sup>109</sup> See Press Release, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA), to the ICC*, ICC-20040129-44 (29 January 2004).

<sup>110</sup> *Id.*

<sup>111</sup> See the Warrant of Arrest for Joseph Kony, by Pre-Trial Chamber II, ICC-02/04-01/05-53 13-10-2005 1/23 UM (25 September 2005), (he remains at large), Vincent Otti, ICC-02/04-01/05-54 13-10-2005 1/24 UM (18 July 2005), Okot Odhiambo, ICC-02/04-01/05-56 13-10-2005 1/16 UM (8 July 2005), Dominic Ongwen, ICC-02/04-01/05-57 13-10-2005 1/14 UM (8 July 2005), and Raska Lukwiya, ICC-02/04-01/05-55 13-10-2005 1/13 UM (8 July 2005). In 2007 the Arrest Warrant against Lukwiya was terminated without effect because of his death; see ICC-02/04-01/05-248 12-07-2007 1/5 SL PT (11 July 2007).

<sup>112</sup> *The Statement by the Office of the Prosecutor, LRA warrants now outstanding for four years*, Press releases ICC-OTP-20090708-PR434 (08/07/2009).

<sup>113</sup> *The Statement of the Office of the Prosecutor on Uganda* ICC-OTP-ST20080304 (4 March 2008).

encouraged all states to cooperate with the ICC in implementing its arrest warrants against the LRA leaders.<sup>114</sup>

The Ugandan president, notwithstanding his referral to the ICC, has several times publicly offered a general amnesty for the LRA. The decision by the Court not to respect such an amnesty after the issuing of the arrest warrants became problematic. The Ugandans passed a law and provided that the crimes within the jurisdiction of the ICC should be prosecuted before the International Crimes Division (ICD) of the High Court in Uganda.<sup>115</sup> The establishment of the ICD attracted human rights advocates and it was a novel development of the ICC's positive complementarity, which is ostensibly intended to encourage domestic prosecution of crimes under the jurisdiction of the ICC. *Thomas Kwoyelo* was the first LRA officer who was prosecuted before the Ugandan Court (ICD) and charged for counts of crimes such as wilful killing, hostage-taking, etc.; he was arrested in 2009. Kwoyelo's defence lawyers referred his case to the Ugandan Constitutional Court and protested that, under the amnesty act, his amnesty has been denied, which violates his equal treatment under the Constitution. In September 2011 the Constitutional Court held that he is eligible for amnesty and ordered his release from the ICD. Although Kwoyelo is (as of August 2012) still under detention, according to the high court's decision he should be freed. The ICC's position of non-recognition of the Ugandan national amnesty law, then, raises the questions of whether or not such a stance taken by the ICC would be applicable to other cases, and how amnesty and prosecution should be related to each other before the ICC; discussion of these points will follow briefly.

Intervention by the ICC in Uganda has been the subject of controversies, hesitation and speculations. Some assert that intervention by the ICC may provide an incentive for states either to engage in or refuse negotiations with powerful perpetrators, since if states show that they are unwilling or unable to prosecute they can refer the situation to the ICC.<sup>116</sup> Furthermore, some have argued that the arrest

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<sup>114</sup> The *Security Council Press Statement on the Lord Resistance Army*, UN SC. SC/10335, AFR/2215 (October 2011).

<sup>115</sup> See *Uganda opens first war crimes trial*, in Aljazeera News at:

<http://www.aljazeera.com/video/africa/2011/07/2011711234513476388.html> (Accessed 30/02/2012),

<sup>116</sup> Burke W. W. *Double Edged Tribunals: The Political Effects of International Criminal Tribunals*, Guest Lecture Series of the Office of the Prosecutor, ICC-CPI (2006), at 20-22, available at: [http://212.159.242.181/iccdocs/asp\\_docs/library/organs/otp/ICC-OTP-20060728-Burke-White\\_en.pdf](http://212.159.242.181/iccdocs/asp_docs/library/organs/otp/ICC-OTP-20060728-Burke-White_en.pdf) (Accessed 20/08/2012).

warrant against the LRA leaders was a major factor in increasing accountability<sup>117</sup> and ‘in convincing the LRA to enter a cease-fire agreement and engage in peace talks with the government’.<sup>118</sup> By contrast, other scholars have insisted that ‘it jeopardizes the concept of amnesty’ and reduced the hopes for the peace agreement.<sup>119</sup> In 2008 the government of Uganda and the LRA seemed about to reach a peace agreement, but it was never signed; the OTP refused to withdraw the arrest warrant, and consequently the LRA has returned to the conflict.<sup>120</sup> With national and international actors engaging forcefully on either side of the argument, the tension between ‘justice’ and ‘peace’ is plain and likely to continue until the situation is finally resolved.<sup>121</sup>

As has been mentioned, the ICC has so far refused to recognise the national amnesty act in Uganda<sup>122</sup> as a bar to its own prosecution of the LRA leaders. It should also be borne in mind that if the ICC were to withdraw its arrest warrants it would risk losing international perception of its legitimacy. An opposing and stronger argument might be that such a threat of the loss of legitimacy might be necessary for the ICC to endure in order to maximise the chances of peace negotiations taking place and the continuation of conflict in Uganda, with the attendant loss of more life, being prevented. The question is whether this decision of the OTP indicates the emergence of an ‘anti amnesty norm’<sup>123</sup> in the practice of the

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<sup>117</sup> Afako B. ‘Country Study Uganda’, in M.D Plessis & J. Ford (eds), in *Unable or Unwilling?* (2008), at 93-94.

<sup>118</sup> Freeman M. *Supra* note 1, at 84.

<sup>119</sup> Hovil L & Lomo Z. ‘Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: the potential for conflict resolution and long-term reconciliation’, *Refugee Law Project Working Paper* (15 February 2005), at 20; see also the American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), *The Current Investigation by the ICC of the Situation in Northern Uganda* (16 February 2006), available at: [http://www.amicc.org/icc\\_activities.html#pstatements](http://www.amicc.org/icc_activities.html#pstatements) (Accessed 2/03/2012).

<sup>120</sup> *International Crisis Group, Northern Uganda: The Road to Peace, with or without Kony, Africa Report* No.146 (10 December 2008), at 1. The LRA also attacked the neighbouring countries such as the DRC and abducted 159 schoolchildren in villages in the Oriental Province, which resulted the condemnation by SC Res. 38 (21 October 2008).

<sup>121</sup> Afako B. *Supra* note 117, at 93-94.

<sup>122</sup> The Uganda Amnesty Act (Ch. 256), was enacted in 2000; it grants amnesty to all nationals and covers all crimes which were committed during the conflict. It was amended in 2006 to limit eligibility for amnesty; in Art. 2 A, it empowered the Ministry of Internal Affairs to propose a list to Parliament for approval. It was extended in 24 May 2008, and again in May 2010 it was extended for the period of the next 24 months from 25 of May 2010, which is the date of entry into force. See *An Act to amend the Amnesty Act, Cap 294* (2006), and its extensions No. 24(2008), and No. 21(2010), in *Uganda Coalition on the International Criminal Court* (UCICC). Available at: <http://www.ucicc.org/index.php/legal> (Accessed 03/03/ 2012).

<sup>123</sup> Pensky M. *Supra* note 4, at 10.



ICC, a real rule which does not appear in the Rome Statute;<sup>124</sup> or whether it merely represents a decision regarding a specific case resulting from certain specific reasons, such as the issuing of the arrest warrants against the indicted perpetrators. It is impossible to answer this question decisively at this stage, due to the lack of sufficient jurisprudence in the ICC regarding various amnesties. What is clear is that not only does the Statute potentially provide discretionary authority for the Court concerning national amnesties, and in particular concerning the influence of prosecution on national security and the ‘interests of justice’ in a society with ongoing conflict; but also that, logistically and financially, it would be impossible for the ICC to prosecute all of the crimes for which states grant amnesty, or to force states to prosecute and/or cooperate with the Court in opposition to their own national amnesty laws. Therefore, I think the outcome of this argument should be balanced between being pro- and anti-amnesty; the ICC is not an abstract entity and purely punitive mechanism which can act without considering the consequences of its actions, but needs to work in a flexible way recognising national amnesties in certain cases.<sup>125</sup> This is justifiable when prosecution imposes extreme costs via the continuation of conflict, although it is unpalatable.

### ***3.5. Immunities under customary international law and the Rome Statute***

In this section I attempt to highlight a *possible* bar to a request for the surrendering of an accused to the ICC, i.e. immunity agreements, and how these relate to the question of impunity. As was indicated earlier, a comprehensive analytical approach concerning state immunity is beyond the scope of this section; however, the question will be discussed as to under what circumstances the rules of immunity in the Rome Statute may effectively lead to impunity. The section will focus on Article 98(1) which explicitly refers to immunity. Article 98(2) which provides that the Court cannot compel states to violate their own agreements with other states in order to surrender accused persons of those states to the Court, could also give rise to immunity if it were used to protect a state’s representatives; however, Article 98 (2) and its related treaties will be discussed in Chapter 6 under the rubric of the opposition of the US to the ICC.

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<sup>124</sup> Pound R. ‘Law in Books and Law in Action,’ 44 *American Law Review* (1910), 12, at 34.

<sup>125</sup> O’Brien R. *Supra* note 1, at 271.

### ***3.5.1. State immunity and different types of immunity under international customary law***

It is generally accepted that state authorities are immune in certain circumstances from the jurisdiction of foreign courts.<sup>126</sup> Immunities derive through state constitutions, regular legislations, customary international law, and applicable international treaties.<sup>127</sup> The Institut de Droit International (IDI) resolution on immunity provides ‘[i]mmunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law...., to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.’<sup>128</sup> Immunity of state officials is a fundamental feature of the way in which the international community is constituted.<sup>129</sup> Heads of state and officials enjoy immunity from the criminal and civil jurisdiction of a foreign state when they are in office or as to acts performed in their official capacity.<sup>130</sup> Immunity under international law is based upon two principles: the sovereign equality of all states and the need to ensure the effective conduct of international relations.<sup>131</sup> Immunity is thus necessary both to preserve state autonomy and promote or maintain a system of peaceful ‘cooperation and coexistence’ between nations.<sup>132</sup> Traditionally, immunity has been divided into

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<sup>126</sup> Fox H. *The Law of State Immunity* (2004), at 503; Gardiner R. *Supra* note 12, at 34; Akande D. *Supra* note 1, at 409; Hohfeld N. W. *Functional Legal Conceptions as Applied in Judicial Reasoning*, in D. Campbell, & P. Thomas (eds), (2001), at 28, he defined immunity as ‘one’s freedom from the legal power or “control” of another as regards some legal relation’; see also generally Simbeye Y. *Immunity and International Criminal Law* (2004), Bellal A. ‘The 2009 Resolution of the Institute of International Law on Immunity and International Crimes’, 9 *Journal of International Criminal Justice* (2011), 227.

<sup>127</sup> Fox H. *Id.*, at 425-426; Cassese A. *International Law* (2005), at 114; Schabas W. *An Introduction to the International Criminal Court* (2008), at 71-72; Akande D, *Supra* note 1, at 409.

<sup>128</sup> See Institute of De Droit International (IDI), *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Napoli Session (2009), at 1, Art. 2(1), it available at: [http://www.idi-iil.org/idiE/resolutionsE/2009\\_naples\\_01\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf) (Accessed 20/08/2012).

<sup>129</sup> Fox H. (2004), *Ibid.*, at 442; Fox H. ‘The First *Pinochet* Case: Immunity of a former head of State’, 48 *International and Comparative Law Quarterly* (1999), 207, at 215.

<sup>130</sup> See *Vienna Convention on Diplomatic Relations* UNTS 500 / 95 (1961), Bantekas I. *International Criminal Law* (2010), at 127.

<sup>131</sup> Cassese A. (2005), *Supra* note 127, at 112; Bantekas I. *Id.*, at 127; Werle G. *Principle of International Criminal Law* (2005), at 173.

<sup>132</sup> Fox H. *Ibid.*, at 1; Akande D. (2004), *Supra* note 1, at 410; see also *Congo v. Belgium*, the ICJ Judgment in the *Congo v. Belgium*, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Para 75.

*ratione personae* (personal immunity) and *ratione materiae* (functional immunity) which are available to state officials.<sup>133</sup>

Immunity *ratione personae* does not prevent criminal responsibility; it only creates an obstacle to prosecution by a foreign state for a temporary time (while the person concerned is in office) even if he has violated the *jus cogens* norm, and even for private acts.<sup>134</sup> Personal immunity is absolute, but its cover is limited to a state's currently-serving high-level officials; a former official may be tried by their domestic court or certain international criminal courts after having left office.<sup>135</sup> The most famous case of this kind of immunity has been exemplified in the ICJ Judgment in the *Arrest Warrant Case* in April 2002 (*Congo v. Belgium*) despite fact that *Yerodia* was alleged to have perpetrated international crimes, the Court finally found that the Belgian Court was obliged to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo, under international law.<sup>136</sup>

Under immunity *ratione materiae*, or immunity related to official acts, state officials are immune from the jurisdiction of other states in relation to acts exercised in their official capacity.<sup>137</sup> In other words, officials who do not remain in office still enjoy immunity from foreign domestic criminal jurisdiction with respect to acts exercised in their official capacity while they were in office.<sup>138</sup> It may also apply to persons who are not officials but have acted on behalf of the state; 'functional immunity does not provide complete protection of the person, it only covers

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<sup>133</sup> Werle G. *Ibid*, at 173; Cassese A. (2005), *Supra* note 127, at 114-115; Brownlie I. *Principles of Public International Law* (2008), at 326-327.

<sup>134</sup> See generally *the Congo v. Belgium*. *Supra* note 16.

<sup>135</sup> Cryer R & *et al.* *An Introduction to International Criminal Law and Procedure* (2010), at 533; Cassese A. (2002), *Supra* note 1, at 853 and 875; see also *Congo v. Belgium*. *Id*, it states in summary Para, 47-55 that '[t]he Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity....Accordingly, the immunities enjoyed under international law by an incumbent... do not represent a bar to criminal prosecution in certain circumstances. The Court refers to circumstances where such persons are tried in their own countries,...and where such persons are subject to criminal proceedings before certain international criminal courts,' see also Para 61.

<sup>136</sup> *Congo v. Belgium*. *Id*, Para 61 and in Para 55 the ICJ 'confirmed that the absolute nature of the immunity from criminal process accorded to a serving foreign minister subsists even when it is alleged that he or she has committed an international crime and applies even when the foreign minister is abroad on a private visit'.

<sup>137</sup> Dinstein Yoram. *Supra* note 1, at 77-78; Werle G. *Supra* note 131, at 174; Cassese A. (2005), *Supra* note 127, at 116.

<sup>138</sup> See the *Vienna Convention*, *Id*, Art. 39(2), it provides: 'with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

[limited] conduct that was an official act of a State.<sup>139</sup> Consequently, in comparison with personal immunity, functional immunity is not absolute, and hence an official may be brought to domestic or foreign courts for private acts.<sup>140</sup> The House of Lords decision in the *Pinochet case* rejected immunity *ratione materiae* for Pinochet. He was detained in London because of a request from the Spanish court to extradite him for international crimes such as torture during his office in Chile, on the basis of universal jurisdiction. The core question in the Pinochet case in the House of Lords was whether international crimes were excluded from immunity *ratione materiae* or not. One view, which was represented by Lords Lloyd and Slynn, etc., was that immunity from criminal proceedings is maintained for all acts in foreign states when these acts were undertaken as official functions of the heads of state, and that, therefore, immunity should continue even though Pinochet was out of office.<sup>141</sup> However, the House of Lords in majority held that certain international crimes were forbidden by *jus cogens*, such that even officials in office can not enjoy immunity (*ratione materiae*) for these crimes in foreign courts; thus, Pinochet's plea of immunity was rejected.<sup>142</sup> The main attention of the House of Lords majority decision was on the Torture Convention of 1984, which provides that:

[B]y Article 1 as the person liable for the commission of the international crime of torture; and that this definition of the offence of torture and the obligation in the Convention to extradite or prosecute offenders is inconsistent with the retention of an immunity for a former Head of State for such crimes.<sup>143</sup>

In fact, in the decision by the House of Lords, immunity *ratione materiae* was restricted to applying to official acts other than the commission of international crimes. Fox asserts that the same logic should be applicable to a serving head of state (i.e. that immunity *ratione personae* should also be restricted to acts other than the

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<sup>139</sup> Cryer R & *et al.* (2010), *Supra* note 135, at 533.

<sup>140</sup> *Id.*

<sup>141</sup> *R v Bow Street Metropolitan Stipendiary Magistrate Ex p, Pinochet Ugarte*, No. 3, (2000), AC 151; (1999), 2 All ER 97, at 119, 146-147, and 179.

<sup>142</sup> See *Pinochet case* No. 3, referenced on 9<sup>th</sup> November 2008. Lords Millet and Phillips of Worth Matravers in the House of Lords' decision of 24 March 1999 on Pinochet took the view, with regard to any senior State agent, that functional immunity can not excuse international crimes. Lord Hope of Craighead stated that Pinochet lost his immunity *ratione materiae* only because of Chile's ratification of the Torture Convention. In other words, for him the unavailability of functional immunity did not derive from customary law; it stemmed from treaty law. Despite the House of Lords' decision, Pinochet was never extradited to Spain.

<sup>143</sup> *Pinochet*, No. 3, (2000), AC 151, per Browne-Wilkinson at 112-14, the torture was not a criminal offence in English law until 28 September 1988, when the Criminal Justice Act 1988 implemented the 1948 Torture Convention.

commission of international crimes).<sup>144</sup> The IDI resolution insists that '[i]mmunities should not constitute an obstacle to the appropriate reparation to which victims of [international] crimes addressed by this Resolution are entitled.'<sup>145</sup> Others, however, argue against this stance and state that serving state officials enjoy (personal) immunity even if they have violated *jus cogens* norms; this viewpoint has been confirmed by the International Court of Justice,<sup>146</sup> the European Court of Human Rights,<sup>147</sup> and the majority of national courts which have considered the question.<sup>148</sup> This view was followed in the ICJ decision on *Congo v. Belgium*, and means that there is no customary law exception to immunity for international crimes in domestic courts.<sup>149</sup>

It should be noted that personal immunity of officials from criminal jurisdiction is not the equivalent of impunity in domestic courts. This is because this jurisdictional immunity of state officials in foreign courts is procedural in nature, but criminal liability is a matter of substantive law.<sup>150</sup> Jurisdictional immunity can bar prosecution for a certain time or for certain offences and officials in foreign national courts; it cannot absolve the accused from all criminal responsibility.<sup>151</sup> Thus, such state officials firstly might be prosecuted while they are in office in their own country; secondly, if their immunity has been waived by the competent national authorities; thirdly, they may be prosecuted in an international criminal tribunal, if that tribunal has been given the requisite authority; and finally, personal immunity only bars prosecution for a limited time, while a person is in office. In contrast, functional immunity, which might continue after office, is related to substantive law

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<sup>144</sup> Fox H. (2004), *Supra* note 126, at 447.

<sup>145</sup> See the IDI, Resolution. *Supra* note 128, at 2 Art. 2(2).

<sup>146</sup> *Cong V. Belgium*. *Supra* note 16, at 23 Para 56.

<sup>147</sup> E.g. the Case of *Al-Adsani v. the United Kingdom* (2001), Application No. 35763/97, Para 63.

<sup>148</sup> E.g. *Bouzari v. Iran*, the Court of Appeal for Ontario, Goudge, Macpherson and Cronk JJ.A. 2004 Can LII 871 (ON C.A.), in Canada; *Al-Adsani v. Kuwait*, 107 ILR 536 (1996), in the U.K, and *Sampson v. Federal Republic of Germany*, 975 F. Supp. 1108 (N.D. Ill. 1997), in the US All of these cases indicated that the violation of *jus cogens* norms - fundamental international norms of conduct - could not imply the waiver of sovereign state immunity. Spanish, French, and Belgian courts have issued judgements making it abundantly clear that personal immunity will apply to all state officials regarding international crimes while they remain in office; see also Cassese A. (2005), *Supra* note 127, at 119.

<sup>149</sup> Cassese A. 'The Belgian Court of Cassation v. the International Court of Justice: the Sharon and others Case', 1 *Journal of International Criminal Justice* (2003), 437 at 442.

<sup>150</sup> See *Congo v. Belgium*. *Supra* note 16, Para 60.

<sup>151</sup> *Id*, Para 60.

and is, as such, a substantive defence.<sup>152</sup> The violation of the law, for example, might be imputed to the state (Act of state doctrine) but not to individuals.

Functional immunity (*ratione materiae*)<sup>153</sup> then, may give rise to impunity – it admits the criminal nature of the action, the need for prosecution, but bars prosecution taking place.<sup>154</sup> For example, a foreign minister, while he is in office, enjoys both personal and functional immunity; in this case two types of immunity coexist, or intersect somewhat, while an official is in office. When the foreign minister leaves office he or she continues to enjoy functional immunity only, with the exception (for functional immunity) of international crimes.<sup>155</sup> Since this kind of immunity attaches to official acts, it might apply to both serving state officials and former officials in respect of official acts which they exercised when they were in office. Thus, these officials might enjoy impunity via such as *immunity legislation*, either national or constitutional, which may shield former officials when they are out of office, and as a result cause them to enjoy impunity. Functional immunity has a broader scope than personal immunity.<sup>156</sup>

Nevertheless, immunity under international law in foreign national courts is different than immunity under international tribunals. Officials who could enjoy personal immunity or inviolability while they are in office before foreign courts – under customary international law – may nevertheless have their personal immunity waived according to the statutes of international tribunals. Officials' immunity has been restricted from the end of the nineteenth century onward;<sup>157</sup> in particular, this tendency increased significantly following World War II, in the military tribunals<sup>158</sup> and afterwards in the Statutes of the ICTY and ICTR tribunals and of the ICC.<sup>159</sup> The ICTY rejected the pleadings for immunity of Slobodan Milosevic<sup>160</sup> and has

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<sup>152</sup> Cassese A. (2002), *Supra* note 1, at 862.

<sup>153</sup> E.g. Art. 39(2), of the *Vienna Convention on Diplomatic Relations*, provides for subsisting immunity for diplomats after leaving post 'with respect to acts performed ... in the exercise of his functions as a member of the mission.'

<sup>154</sup> See the *Vienna Convention* Art. 39(2), see also *Congo v. Belgium*. *Supra* note 16.

<sup>155</sup> Cassese A. (2002), *Supra* note 1, at 864.

<sup>156</sup> King H. 'Immunities and Bilateral Immunity Agreements: Issues Arising from Art. 27 and 98 of the Rome Statute', 4 *New Zealand Journal of Public and International Law* (2006), 269, at 272.

<sup>157</sup> Brownlie I. *Supra* note 133, at 325; Gardiner A. *Supra* note 12, at 343; Cassese A. (2005), *Supra* note 127, at 100.

<sup>158</sup> See Art. 7 of the Nuremberg Charter, it provides: 'The official position of defendants, whether as Heads of State or... shall not be considered as freeing them from responsibility or mitigating punishment'. The same position was repeated in Article II (4), (a), of *Control Council Law No. 10*; and Tokyo Charter Art. 5.

<sup>159</sup> See Art. 7(2), 6(2), of the ICTY, ICTR, and Art. 27 Statute of the ICC.

<sup>160</sup> See generally, the *Prosecutor v. Slobodan Milosevic*, ICTY, IT-02-54-T (25 JULY 2005).

recently started proceedings against Radovan Karadzic for crimes including genocide and crimes against humanity<sup>161</sup> after he was finally arrested by the Serb authorities. The Sierra Leone Special Courts' Appeals Chamber's tribunals have also rejected the claim of the immunity of serving state officials from prosecution for international crimes, on 31 May 2004, by Charles Taylor.<sup>162</sup> In its summary of its judgement, the court stated that 'the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.'<sup>163</sup> How to reconcile the tension between immunity under customary international law and immunity under international tribunals has become a complex issue in the current practice of the ICC.

### 3.5.2. Immunity under the Rome Statute

Article 27 (1) of the Statute has followed the prior international tribunals, which have abolished immunity for state officials.<sup>164</sup> Article 27(2) of the Statute is novel<sup>165</sup> and eliminates personal immunity for state officials;<sup>166</sup> it provides that, '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'<sup>167</sup> Some insist that Article 27(2) also applies to both immunity *ratione materiae* and *ratione persone*. Summers asserts that this seems unlikely from the language of the Statute, because 'Article 27(1) makes a specific reference to exemption from "criminal responsibility," the theoretical basis of immunity *ratione materiae*, whereas Article 27(2) refers to exercise of the Court's "jurisdiction," the concept behind immunity *ratione personae*.'<sup>168</sup> Some have also argued that Article 27 waives all immunities of state officials before their domestic

<sup>161</sup> See the *Prosecutor v. Radovan Karadzic*, ICTY, IT-95-5/18-PT (27 February 2009).

<sup>162</sup> See *Prosecutor v. Charles Ghankay Taylor*, 'Summary of Decision on Immunity from Jurisdiction,' The *Special Court for Sierra Leon*, Case No. 2003-01-1 (31 May 2003).

<sup>163</sup> *Id.*

<sup>164</sup> Rome Statute Art. 27 (1), provides, '...official capacity as a Head of State or Government,... shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'

<sup>165</sup> Akande D. (2004), *Supra* note 1, at 420; he observes that, by this Article, state parties relinquish any immunity which their officials would otherwise enjoy before the ICC.

<sup>166</sup> Summers M.A. 'Immunity or Impunity? The Potential Effect of Prosecution of State Officials for Core International Crimes in States like the United States that are not Parties to the Statute of the International Criminal Court', 31 *Brook Journal of International Law* (2005), 463, at 489.

<sup>167</sup> See the Rome Statute Art. 27(2).

<sup>168</sup> Summers M.A. *Ibid*, at 490.

courts and in the ICC, when states have become party to the Statute and their officials are accused of the international crimes.<sup>169</sup>

Regardless of such arguments, the main issue concerns the possible tension between Article 27(2) and Article 98(1) and the different interpretations that appear when they are examined in conjunction with each other. Article 98 (1) provides:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.<sup>170</sup>

As we can see, in contrast to Article 27, Article 98(1) recognises state international obligations under international law and respects states' obligations to respect diplomatic immunity agreements which they have made. Thus, explicit denial of immunity in Article 27 has been excluded by this Article, which provides significant room for the recognition of officials' immunity. Akande, concerning Article 98 (1) asserts: '[i]f it were always the case that Article 27 removes the international law immunity of officials of states even with respect to national authorities of other states, then Article 98 would, in turn, be deprived of all meaning.'<sup>171</sup> The question then arises as to whether Article 98 (1) will apply only to officials of states non-party to the Statute or to officials of all states whether party or non-party to the Statute. One view asserts that Article 98 (1) applies only to the officials of non-party states; according to this view, the term 'third State' in the Article refers to non-party states, as is standard in treaties. The Article thus provides that the ICC cannot demand non-party states' officials to be surrendered to the ICC without a waiver of immunity from such states; it may also be understood that demanding the surrender of non-party states' officials to the ICC (without waiver of immunity) would be contrary to states' obligations under customary international law to respect the immunity of officials of non-party states.<sup>172</sup> This view has been declared by many scholars<sup>173</sup> and

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<sup>169</sup> Cassese A. (2003), *Supra* note 150, at 442; Akande D. *Supra* note 1, at 420.

<sup>170</sup> Rome Statute Art. 98 (1).

<sup>171</sup> Akande D. 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009), 333, at 336.

<sup>172</sup> Broomhall B. *International Justice & the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), at 145; Cryer R & et al. (2010), *Supra* note 135, at 555; Schabas W.(2008), *Supra* note 127, at 72-73.

<sup>173</sup> Broomhall B. *Id.*, at 145; Wirth S. 'Immunities related problems, and Article 98 of the Rome Statute', 12 *Criminal law Forum* (2001), 429, at 440; Akande D. (2004), *Supra* note 1, at 420-423; Gaeta P. 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 *Journal of International Criminal Justice* (2009), 315, at 323.



it has also been reflected in the practice of some state parties,<sup>174</sup> which have adopted new provisions that make it possible for non-party states' officials not to be entitled to immunity from arrest under international law, when a request for arrest has been made by the ICC. It seems that this approach may be identical to that of the Statute, which otherwise could result in complete impunity from prosecution for non-party state officials.

Another view of the matter is that individuals whether from states party or non-party to the Statute should not rely on international law immunities in proceedings concerning the ICC's requests. Thus, Cryer *et al.* argue that the first view overlooks, in referring the term 'third State' to non-party states only, the fact that the term 'third State' 'is routinely used in cooperation treaties to refer to a State other than the requesting and requested States'.<sup>175</sup> However, they go on to argue that it is nevertheless not necessary for a requested state to obtain any explicit 'waiver of immunity' from a state which is party to the Statute, on the grounds that all such immunities have already been relinquished by such states through ratification of the Statute and hence being constrained by Articles 27 and 88. The situation where Article 98 (1) applies thus still occurs only in the case where the 'third State' is a non-party state.<sup>176</sup> It will be discussed in the final section of this Chapter that this situation has arisen in practice with regard to the views of several member states concerning the Al-Bashir case before the ICC, whereby these states have not complied with the request of the Court to arrest Al-Bashir, explicitly and implicitly on the bases of Articles 27 and 91(1).

Article 98 (2) concerns obligations to a sending state under international agreements. It may confirm existing immunities and has a capacity to be interpreted in a way so as to countenance the establishment of treaties between state and non-state parties, as was done in the case of the US Bilateral Agreements<sup>177</sup> (to be discussed further in the final Chapter) granting impunity through immunity to US

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<sup>174</sup> Canada's Crimes Against Humanity and War Crimes Act (2000), inserted a new paragraph 6.1 into the Extradition Act (1999), Swiss, Federal Law on Cooperation with the International Criminal Court (2001), which provides for arrest despite any question of immunity; UK International Criminal Act of 2000, whereby Art. 23 (2), provides that the arrest and surrender of non-party states' officials will continue where non-party states have waived the immunity of their officials, and Art. 23(1), provides that: 'Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute' does not prevent such individuals from being arrested in the UK and surrendered to the ICC.

<sup>175</sup> Cryer R & *et al.* (2010), *Supra* note 135, at 555.

<sup>176</sup> Akande D. *Supra* note 1, at 422. Summers M.A. *Supra* note 166, at 490-91.

<sup>177</sup> See the US *Bilateral Agreement* (April 2003).

military and civilian personnel. The Article does not tackle the question of when such obligations under international law arise. It is unclear, for example, whether the Article applies only to obligations that pre-existed the entry into force of the Statute, or those that might have been procured after that time. It is arguable that the intention was to limit it to the former not the latter, but so far as the matter remains unclear, the possibility remains that this provision might be extensively exploited by states wishing to avoid the jurisdiction of the Court. In fact, if this Article is to be interpreted in such a way that it is consistent with the objectives of the ICC, it must be seen as limited to the existing agreements between state and non-state parties.

Some scholars insist that Article 98 has become a significant exception to the rule described by Article 27. Cassese, Gaeta, and Jones have written that ‘the exclusion of immunity for core crimes constitutes the exception rather than the rule.’<sup>178</sup> Schabas also states that Article 98 of the Rome Statute is a significant practical exception that can be applied to shield certain individuals from prosecution before the ICC.<sup>179</sup> Although all may not agree with these scholars, what is clear first of all is that the Statute provides significant leeway for the recognition of state immunity agreements between state parties and non -parties to the Statute. Therefore, immunity regulations in the Statute can be a significant bar to surrender of state officials to the ICC, by state parties and non-parties to the Statute; and this may lead to impunity from prosecution of state officials, since the Court, without surrender of the accused, can not exercise its jurisdiction. As has been indicated, not all immunity leads to impunity; yet when officials are accused of international crimes, it is unlikely their own domestic courts would be able or willing to prosecute them, and when they claim immunity under customary international law, thus preventing states from surrendering them, this may lead to impunity. This has been exemplified in the case of Al-Bashir before the ICC, which is examined in the next section.

The other important point is that the Statute’s denial of immunity in general in Article 27, followed by the exclusion of immunity agreements from this denial in Article 98, reflect the reality that traditional immunity under customary international law for state officials cannot simply be ignored. Even it may lead to impunity, but it

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<sup>178</sup> Gaeta A. ‘Legalist groundwork for the International Criminal Court: commentaries on the Statute of the International Criminal Court’, 14 *European Journal of International Law* (2003), 843, at 850; see also ‘Official Capacity and Immunity’, *The Rome Statute of the International Criminal Court: a commentary* in A. Cassese, P. Gaeta and R.W. D. Jones (eds), (2002), 975, Vol. I, B, 975-976.

<sup>179</sup> Schabas W. (2008), *Supra* note 127, at 73.

may be known as legal or inevitable impunity for functions of states officials, which derives from states' international obligations. The tension between Articles 27 and 98<sup>180</sup> have had significant effects and caused controversies in the practice of the Court so far.

### ***3.6. Immunity in the practice of the ICC: the case of Al-Bashir***

Some of the key challenges to prosecution of heads of state in the ICC have been discussed above, such as the tension between Articles 27 and 98 (1). These issues have been played out in practice and have led to both legal and practical barriers to the prosecution of President Al-Bashir of the Sudan. His case, in fact, indicates the different aims of international law and the international justice system on the one hand, and on the other hand the complexities and controversies involved in the prosecution of an incumbent head of state despite the general denial of immunity for international crimes in the Statute.

One of the world's greatest humanitarian atrocities has occurred as a result of conflict between the Sudanese Liberation Army and Justice and Equality Movement and Sudanese government and Janjaweed militia forces; since 2002 more than three hundred thousand have been killed and about 1.65 million have been forcefully displaced.<sup>181</sup> The Security Council (SC) under Chapter VII of the UN Charter in 2004 adopted resolution 1564, requesting that the Secretary-General quickly establish an international commission of inquiry in order to investigate the atrocities and violation of human rights in Darfur.<sup>182</sup> Then, pursuant to the Report of the Commission,<sup>183</sup> the SC recognised the situation as a threat to international peace and security under resolution 1593, and in 2005 referred it to the ICC.<sup>184</sup> After the referral, the Sudanese authorities refused to cooperate with the Court, instead establishing the Special Criminal Court on the Events in Darfur (SCCED) that proclaim their own

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<sup>180</sup> Rome Statute Art. 98 (1), see also Akande D. *Supra* note 171, at 339.

<sup>181</sup> See *Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564* (2004), of 18 September 2004, UN Doc. S/2005/60 (1 February 2005), at 3; Sudan: *Greatest Humanitarian Crisis*, New York Times (20 March 2004).

<sup>182</sup> SC Res. 1564 (18 September 2004).

<sup>183</sup> See UN Doc. S/2005/60 (1 February 2005).

<sup>184</sup> SC Res. 1593 (31 March 2005).

complimentary domestic proceedings and their ability to handle prosecutions nationally.<sup>185</sup>

The Court has since indicted six defendants, most importantly sitting head of state Al-Bashir. Two arrest warrants for him have been issued, in 2008 and 2010,<sup>186</sup> charging him with crimes against humanity, war crimes and genocide,<sup>187</sup> and the Pre-Trial Chamber 1 has granted the prosecutor's request for an arrest warrant.<sup>188</sup> The arrest warrant against him was despite accepted conceptions of international customary law of immunity; the Pre-Trial Chamber has concluded that 'the current position of Omar Al Bashir as head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.'<sup>189</sup>

The significant thing is that, for the first time, a head of state has been targeted by the ICC, though it is not the first time that a head of state has been targeted by an international tribunal.<sup>190</sup> Notwithstanding the SC calls to the Sudanese government and the international community to cooperate with the Court,<sup>191</sup> the warrants of arrest for Al-Bashir are outstanding and he remains in power to date; in fact, he travels frequently to several state parties<sup>192</sup> and non-party states, including SC permanent member China, freely.<sup>193</sup> What is the reason for his *de facto* and *de jure* impunity and why have states not complied with the ICC's arrest warrant?

In fact, the ICC very soon after the referral faced significant obstacles in investigation in Darfur and, due to the lack of cooperation by the Sudanese

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<sup>185</sup> See generally, *Lack of Conviction: The Special Criminal Court on the Events in Darfur Human Rights Watch Briefing Paper* (June 2006), available at: <http://www.hrw.org/legacy/backgrounder/ij/sudan0606/> (Accessed 13/03/2012).

<sup>186</sup> Press Release, *ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al-Bashir, for genocide, crimes against humanity and war crimes in Darfur*, ICC-OTP-20080714-PR341 (14 July 2008), the second Warrant of Arrest for him has been issued on 4 March 2009 and was authorised by the Pre-Trial Chamber 1 on July 12, 2010; see ICC-02/05-01/09-95 (12 July 2010).

<sup>187</sup> *Id.*

<sup>188</sup> Press Release, *ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan* (4 March 2009), ICC-CPI-20090304-PR394, and ICC-02/05-01/09 (12 July 2010).

<sup>189</sup> *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir*, ICC-02/05-01/09-3 04-03-2009 1/146, Pre-Trial Chamber I (4 March 2009), at Para 41.

<sup>190</sup> E.g., the ICTY issued a warrant for Milosevic when he was head of the former Yugoslavia, or the Special Court of Sierra Leone indicted Charles Taylor when he was the President of Liberia.

<sup>191</sup> SC Res. 1593 (31 March 2005), para 2.

<sup>192</sup> President Bashir freely visited Chad, Kenya, Malawi and Djibouti; all are state parties to the Statute, but they refused to cooperate with the ICC and to enforce the ICC arrest warrant. However, recently the national court of Kenya issued an arrest warrant for him for alleged war crimes and will arrest him if he travels again to Kenya; see BBC News Africa, 'Sudan's Omar al-Bashir : Kenya issues arrest warrant' (28 November 2011), available at: <http://www.bbc.co.uk/news/world-africa-15918027> (Accessed 20/03/2012).

<sup>193</sup> See BBC News Africa, 'Delayed Sudan leader Omar al-Bashir arrives in China' (22 June 2011), available at: <http://www.bbc.co.uk/news/world-africa-13929867> (accessed 20/03/2012).

authorities, in implementing the warrants of arrest. Due to the treaty nature of the Statute, the cooperation of states is essential in the exercising of the jurisdiction of the Court; it is thus significant to analyse the main obstacles the Court has encountered and which entities are obliged to arrest and surrender Al-Bashir to the ICC: state parties, non-party states, or the SC.

The first overall argument is that all *state parties* to the Statute are obliged to cooperate with the Court through surrender of persons on request of the court, taking evidence, questioning of persons, etc.<sup>194</sup> However, under the Statute, other, conflicting obligations under international law bar the cooperation.<sup>195</sup> Nevertheless, Cryer insists that the respect given to immunities under Article 98(1) ‘does not mean there can be no prospect for surrender’: non-party states can agree to waive immunity; immunity can be lost if the SC has ordered the investigation under Chapter VII of the Charter; and finally, when officials are no longer serving office, their personal immunity will be removed and these officials can be surrendered to the Court.

Another view, presented by Akanke and Gaeta, represents Article 98 as allowing immunity obligations: Akanke asserts that ‘Article 98 expressly allows parties to give effect to immunity obligations they owe to non-parties.’<sup>196</sup> State parties are thus not compelled to surrender officials of non-party states to the ICC, and consequently the ICC cannot exercise its jurisdiction over such officials. However, a distinction is made between state parties and non-party states. Immunities of officials as amongst state parties to the Statute are removed by Article 27, and so a state party, on being requested by the ICC to arrest and surrender an official of another state party, at least in theory could not, under Article 98 (1) claim that to do so would be ‘act[ing] inconsistently with its obligations under international law with respect to the state or diplomatic immunity’.<sup>197</sup> Therefore, a requested state party should surrender officials of other state parties to the Court. The ICC is also free to proceed with such requests to a state party for arresting and surrendering a ruling head of state.<sup>198</sup> When the Court insists on the request to surrender, e.g., Al-Bashir, in the conflict between the Court and a state party (claiming it cannot do so because of immunity under

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<sup>194</sup> See the Rome Statute Art. 87 and 93.

<sup>195</sup> Cryer R & *et al.* (2010), *Supra* note 135, at 512-513.

<sup>196</sup> Akande D. (2009), *Supra* note 171, at 334; Gaeta P. (2009), *Supra* note 173, at 323.

<sup>197</sup> Rome Statute Art. 98(1).

<sup>198</sup> Akande D. *Ibid*, at 334.

international law) such as Kenya, Article 98 (1) cannot in fact be a ground for refusal of state parties under the Rome Statute.<sup>199</sup>

However, in practice, several states<sup>200</sup> have raised Article 98(1) as grounds for such refusal; for example, Malawi, which is a state party to the Statute, implicitly referred their non-cooperation to Article 98(1) of the Statute. Al-Bashir had travelled to this state, and Malawi, in order to justify its failure to comply with the Prosecutor's request to surrender him to the ICC, submitted the 'Observations from the Republic of Malawi' to the ICC, arguing therein for the immunity of Al-Bashir on the grounds that Article 27 of the Statute is not applicable to non-party heads of state.<sup>201</sup> In connection with this incident, the Pre-Trial Chamber I in 2011 provided as follows: '[t]he Chamber considers that, although not expressly referred to in the Observations from the Republic of Malawi, article 98(1) of the Statute is the applicable article in this respect...'.<sup>202</sup> In the end, the Chamber rejected the argument by Malawi for the immunity of the heads of non-party states; it found that the immunity of the heads of states either party or non-party to the Statute can not be invoked before international prosecutions, that Article 98 (1) does not apply in this case, and thus that Malawi has failed to comply and cooperate with the Court under Article 86(7) and 89.<sup>203</sup>

Accordingly, the Prosecutor has reported Kenya, Chad, Malawi, and Djibouti, all of which are state parties,<sup>204</sup> and Sudan, which is a non-party state, to both the

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<sup>199</sup> Rome Statute Art. 119 (1), it provides '[a]ny dispute concerning the judicial functions of the Court shall be settled by the direction of the Court'.

<sup>200</sup> The African Union raised Article 98(1), as grounds for non-cooperation on 3 July 2009; see *AU Decision*, Para. 10, 30 June- 1 July 2011 AU Decision, Para 5.

<sup>201</sup> The Pre- Trial Chamber I, ICC-02/05-01/09-139 (12-12-2011), at 7; see also Press Release, *Pre-Trial Chamber I informs the United Nations Security Council and the Assembly of States Parties about Malawi's non-cooperation in the arrest and surrender of Omar Al Bashir*, ICC-CPI-20111212-PR755 ( 12-12-2011).

<sup>202</sup> *Id.*, at 11 Para 17.

<sup>203</sup> *Id.*, at 17 Para 36, at 20 Para 43. However, the Court did admit inherent tension between Article 27 and 98(1), see Para 37, where the Court orders that the non-cooperation by Malawi should be reported to the UN SC and ASPs.

<sup>204</sup> For state parties to the Statute, see the ICC website, available at: <http://www.icc-cpi.int/Menus/ASP/states+parties/> (accessed 24/03/2012), the Prosecutor should report non-cooperation of states under the Rome Statute Art. 87(b), and (7).

Assembly of State Party (ASP) and the SC for their lack of cooperation.<sup>205</sup> Nevertheless, it is unclear what action will be taken by the SC to respond to these reports, and the ASP has few options available since it has no enforcement power over states.<sup>206</sup> Given the composition of the ASP, any disciplinary action would have to come from the Security Council. This indicates the overall challenge to prosecution of state officials due to the ICC's treaty nature and its lack of enforcement power.

The second overall argument is that non-party states are also obliged to cooperate with the Court because of the referral by the SC. From the outset, it may be argued that in the case of Sudan, as it is not a state party to the Statute, there is no direct obligation for other states to cooperate with the Court,<sup>207</sup> but the situation does change if there is a referral by the SC, for Sudan itself and other non-party states. The Pre-Trial Chamber I has stated that, although Sudan is not a party to the Statute and has not issued a declaration to accept the jurisdiction of the Court,<sup>208</sup> 'the Chamber emphasises that the State of Sudan has the obligation to fully cooperate with the Court.'<sup>209</sup> A supporting argument is that, when a situation is a referral by the SC, as is the case in the Sudan situation, all states are obliged to cooperate with the Court under Article 25 of the UN Charter and the SC resolutions; thus, non-party states are obliged to arrest and surrender the Sudanese President Al-Bashir. Furthermore, Article 103 affirms the primacy of obligations under the UN Charter; it was, in fact, drafted to reconcile such competing obligations.<sup>210</sup> Nevertheless, non-state parties are not all obliged to cooperate in the terms of the referral by the SC Resolution 1593 provides:

[T]he Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that *States not party to the Rome Statute have no*

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<sup>205</sup> Press Release, Pre-Trial Chamber I, *informs the Security Council and the Assembly of States Parties about Omar Al Bashir's visits to Kenya and Chad*, ICC-CPI-20100827-PR568 (27/08/2012), *Pre-Trial Chamber I informs the United Nations Security Council and the Assembly of States Parties about Malawi's non-cooperation in the arrest and surrender of Omar Al Bashir*, ICC-CPI-20111212-PR755 (12/12/2011), *The Pre-Trial Chamber I, reported again to the SC and the Assembly of States Parties Chad's non-cooperation in 2012*, see ICC-CPI-20111213-PR756(13/12/2012), see the *Pre-Trial Chamber I, Report for non-cooperation of the Sudan*, ICC-CPI-20100526-PR528, (26/05/2010), and for Djibouti, see ICC-CPI-20110512-PR665 (12/05/2011).

<sup>206</sup> See the Rome Statute Art. 87(7).

<sup>207</sup> *Vienna Convention Law of Treaty*, Art. 34.

<sup>208</sup> *Decision on the Prosecution's Application for a Warrant of Arrest against Al Bashir*. *Supra* note 189, Para 240; Rome Statute Art. 12 (3).

<sup>209</sup> Pre-Trial Chamber I. *Id.*, Para 241.

<sup>210</sup> See the UN Charter Art. 103.

*obligation* under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;<sup>211</sup> [emphasis added]

As we can see, the resolution does not explicitly make the Statute binding on states, nor does it explicitly deal with the issue of national immunity of the head of state (Al-Bashir). It provides limited guidance in terms of the weak language of ‘urging’ and not ‘requiring’ all states to cooperate under the terms of Resolution 1593. Although non-party states can voluntarily enter into agreement with the Court to provide cooperation,<sup>212</sup> when a non-party state has not made such an agreement with the ICC it is clear that there is no obligation to cooperate, unless a Resolution has imposed an explicit obligation on a non-party state - e.g. Sudan in this case- to cooperate. Although Sudan’s cooperation is thus in theory obligatory, the voluntary surrender of Al-Bashir by Sudan is unlikely to happen,<sup>213</sup> while the voluntary arrest and surrender of him by other non-party states might cause tensions and could be against a state’s national interest, etc; in general, states may be reluctant to cooperate with the Court in such cases, as such cooperation could impose a heavy cost on them. If a non-party state fails to cooperate, the ICC can report this to the SC, but there is a question as to what the SC in reality can do in order to bind such non-party states.

Therefore, the Statute cannot remove the immunity granted to non-parties to the Statute, since it, as a treaty, cannot impose obligations on ‘third states’. It is arguable that in the case of Al-Bashir, his national immunity has not been removed in Sudan and the ICC cannot itself remove a national immunity; the SC also did not expressly remove his immunity in its referral resolution.

The third overall argument concerning the question of the immunity of Al-Bashir after the referral holds that the SC has authority to arrest and surrender Al-Bashir and, in general, to act with force in any case where it has referred a situation to the ICC. As has been mentioned, Resolution 1593 did not bind all states to cooperate with the ICC, and it did not clearly make binding the Rome Statute on Sudan.<sup>214</sup> However, one may argue that, in a referral situation, the practice of the Court indicates that, similar to the case of state parties under Article 27, immunity of a head

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<sup>211</sup> See SC Res. 1593 (31 March 2005), Para 2.

<sup>212</sup> See the Rome Statute Art. 87(5).

<sup>213</sup> Needham J. ‘Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law’, 17 *Auckland University Law Review* (2011), 219, at 223.

<sup>214</sup> Gaeta P. (2009), *Supra* note 173, at 324; Akande D. (2009), *Supra* note 171, at 335; see generally Cryer R. ‘Sudan, Resolution 1593, and International Criminal Justice’, 19 *Leiden Journal of International Law* (2006), 195.



of state will be removed when the Court exercise its jurisdiction; thus, the immunity of Al-Bashir, for instance, has been removed and the rule of the Statute applies for him. The Pre-Trial Chamber (PTC) has followed this view; it has expressed that the Court will apply the Statute and the elements of crimes and the Rules in a referral situation.<sup>215</sup> It is true that, theoretically, the ICC will be governed only by the provisions of the Rome Statute;<sup>216</sup> Akande asserts that ‘a decision to confer jurisdiction [by the SC] is a decision to confer it in accordance with the Statute’.<sup>217</sup> If the SC provides otherwise, it is unlikely the Court would have such competence,<sup>218</sup> as the ICC is an independent body and the SC cannot bind it. Nevertheless, the ICC must apply its own provisions; it cannot remove a national immunity or immunity under agreement by state parties with non-party states; states themselves usually remove national immunity. Akande and Gaeta have criticised that the PTC did not respect immunity on the national level for Al-Bashir; the PTC have completely ignored the obligations of state parties under Article 98(1) of the Statute. They assert that, for non-party states, the ICC should apply Article 27 only in conjunction with Article 98, and should thus respect state immunity agreements.<sup>219</sup>

Although the above view presented by these scholars and others who generally support immunity under customary international law is strong and may be compatible with the Rome Statute, I nevertheless think that in a case of a referral the ICC’s provisions should be applied, and the application of the Statute cannot be selective; a core principle is Article 27, which removes immunity for state parties, so in a situation which is a referral the immunity of state officials in question would be removed via implementing of the Rome Statute and exercising of the Court’s jurisdiction. Otherwise the Court is prevented from exercising its jurisdiction. In this regard Gosnell, Defence Counsel of the ICTY, for instance, rightly asserts that Resolution 1593 ‘disables Sudan from asserting any immunity against an ICC arrest warrant’.<sup>220</sup> Additionally, the PTC decision may be understood as the policy of the

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<sup>215</sup> *Decision on the Prosecution’s Application for a Warrant of Arrest against Al Bashir*. *Supra* note 189, at Para 45.

<sup>216</sup> Rome Statute Art. 1.

<sup>217</sup> Akande D. (2009), *Supra* note 171, at 335.

<sup>218</sup> *Id.*, at 335.

<sup>219</sup> Gaeta P. (2009), *Supra* note 173, at 320; Akande D. *Ibid.*, at 333, Akande insists ‘[i]t is regrettable that the PTC chose to ignore Article 98 in its analysis because the PTC proceeded to make a request for arrest and surrender in circumstances where immunity is in issue. ... the PTC was unaware that Article 98 appears to apply in precisely this sort of case.’

<sup>220</sup> Gosnell C. ‘The Request for an Arrest Warrant in Al Bashir, Idealistic Posturing or Calculated Plan?’ 6 *Journal of International Criminal Justice* (2008), 841, at 843.

Court that in practice does not respect immunity of the heads of states non-party to the Statute in a case of referral by the SC for the crimes within its jurisdiction. With respect to these great scholars, in opposition to what Akande has argued I think that the decision of the PTC cannot be attributed to ignorance of Article 98 (1) of the Statute. The evidence of my argument is that, looking carefully at the PTC decision, it does reference the main objective of the establishment of the ICC - putting an end to impunity-<sup>221</sup> and the pursuance of this goal, and has thereby disregarded the immunity of a ruling head of state (Al-Bashir).<sup>222</sup> This type of interpretation is also compatible with the main purpose of the treaty under the Vienna convention. Accordingly, I believe that, although the previously-mentioned approaches would support the main argument of my thesis (whereby the ICC may create impunity) the adoption of these approaches would make Article 27 almost impractical when considered along with Article 98(1) the practice of the Court indicates that Article 27 is, in fact, the core principle. (This could be understood as indicating the real rule in the practice of the Court.)

One view is that the PTC and the Prosecutor can lawfully issue a circulated arrest warrant against Al-Bashir, but that the Rome Statute, via Article 98(1) also makes it possible for states, including state parties, legally to disregard it, when it issued against states non-party to the Statute. Gaeta voiced this argument when she stated that parties to the Statute are not obliged to carry out the ICC's request for surrender of Al Bashir, because he, as serving head of a state non-party to the Statute, enjoys personal immunity under customary international law, and a state party can thus lawfully, under Article 98(1) decide not to comply with the request of the Court.<sup>223</sup>

One may argue that, whenever a competent Court has issued, as it is legally entitled to do, the warrant of arrest for a head of state not party to the Statute, there is a duty at least for states party to a conflict, SC members, and state parties to cooperate. The SC was acting under Chapter VII of the Charter when it referred this situation to the ICC, and under Article 25 the UN members 'accept and carry out the

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<sup>221</sup> See the Preamble of the Statute.

<sup>222</sup> See *Decision on the Prosecution's Application for a Warrant of Arrest against Al Bashir*. *Supra* note 189, Para 42.

<sup>223</sup> Gaeta P. *Supra* not 173, at 323-324.

decisions of the Security Council'.<sup>224</sup> At the least, the SC Resolution binds Sudan and Chad,<sup>225</sup> as conflicting states and the latter is also a party state; nevertheless, Sudan and many other states do not cooperate with the Court. The SC seems unwilling to prosecute Al-Bashir; although it rejected the African Union request for deferring implementation of its binding order pursuant to Article 16 of the Statute, Resolution 1828, in 2008, provides to the ICC concerning the warrant of arrest for Al-Bashir 'their intention to consider these matters further',<sup>226</sup> and this appeared to be an impunity signal to the Sudanese officials.<sup>227</sup> Al-Bashir's warrant of arrest remains outstanding, due to the many aforementioned legal and political constraints and limitations, insufficient will, political considerations, etc., and the ICC has no power to enforce its demands. Some have also lobbied the SC for a deferral of the Sudan situation from the ICC.<sup>228</sup> As will be explored further in Chapter Six, it would not be possible, realistically, for the SC to exercise its enforcement power for all international humanitarian crises; the use of force is generally unpalatable for most states.<sup>229</sup>

One scholar has suggested that '[s]ince Sudan is to be treated as bound by the Statute and as if it were a party to it, then the tension between Articles 27 and 98 becomes easier to resolve.'<sup>230</sup> However, I think, though of course the ICC should apply its provisions and Sudan can be bound by the Statute, the referral by the SC cannot change the treatment of Sudan by other states from that of a non-party state to that of a state party, and it is thus unlikely that other states will treat Sudan as a state party. As has been mentioned, state parties, via ratification of the Statute, have accepted the removal of their national immunities (for alleged crimes within the jurisdiction of the ICC) but non-party states such as Sudan have not, and the ICC cannot remove national immunities in non-party states. This is evidenced by the

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<sup>224</sup> See SC Res. 1593 (2005), Para 1; the UN Charter Art. 25, which provides 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'; see also Happold M. 'Darfur the Security Council and the International Criminal Court', 55 *International and Comparative Law Quarterly* (2006), 226, at 230.

<sup>225</sup> Chad and Sudan could be characterised as parties to the conflict in Darfur and thus covered by the terms of Resolution 1593; see the SC Res. 1593, *Id.*

<sup>226</sup> SC Res. 1828 (31 July 2008).

<sup>227</sup> Sluiter G. 'Obtaining Cooperation from Sudan -- Where is the Law?' 6 *Journal of International Criminal Justice* (2008), 871, at 871 and 878.

<sup>228</sup> E.g. the Head of African Union and Arab League, *AU renews calls for the SC to defer ICC charges against Sudanese leader*, English News, 31-01-2012, available at: [http://news.xinhuanet.com/english/world/2012-01/31/c\\_131383783.htm](http://news.xinhuanet.com/english/world/2012-01/31/c_131383783.htm) (accessed 27/03/2012).

<sup>229</sup> Craven M. 'Humanitarianism and the Quest for Smarter Sanctions', 13 *European Journal of international Law* (2002), 43, at 44.

<sup>230</sup> Akande D. (2009), *Supra* note 171, at 336.

recent practice of states both party and non-party to Statute which Al-Bashir has travelled to, whereby these states treated him as an official of a non-party state and respected his immunity.

Given that the Prosecutor indicted Al-Bashir for the crime of genocide<sup>231</sup> and that the ICJ has implicitly recognised a universal obligation for all states to cooperate with a court which has jurisdiction over crimes of genocide,<sup>232</sup> one may argue that the Prosecutor's use of the term 'genocide' may automatically trigger cooperation obligations for all states. This is true for state parties to the Statute; however, for non-party states the obligation only exists when the jurisdiction of the Court has been accepted, otherwise there is no obligation for non-party states.<sup>233</sup> Furthermore, not all states have ratified the Genocide Convention to be obliged by it. One may argue that states are nevertheless obliged to prosecute or extradite under *jus cogens* norms, but there are not sufficient sanctions to be applied against a non-compliant state. In summary, it may be stated that the Rome Statute provides conditions making impunity possible in theory, i.e. the tension between Articles 27 and 98; and secondly that SC Resolution 1593 excluded non-party states, and Resolution 1828 seems to show insufficient cooperation and will among the SC members and other states both party and non-party to the Statute for the prosecution of Al-Bashir. There are of course the complicated issues of states and regional lack of cooperation with the Court as well (on the part of, e.g., the African Union and the Arab League). Nevertheless, pursuant to the ICC's Statute and the SC resolutions, at least the acts of non-cooperation by Sudan and Chad – as states party to a conflict and bound by the resolutions – are international wrongful acts.

The ICC, being treaty-based, is mainly reliant on cooperation by states; indeed, Cryer asserts that the international justice system is 'completely dependent' on states for the arrest, detention and surrender of defendants.<sup>234</sup> The regime of cooperation in the Statute is based on requests in the Statute rather than orders, and

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<sup>231</sup> See the second arrest of warrant for Al-Bashir (2010). *Supra* note 186.

<sup>232</sup> The ICJ recognised that the *Genocide Convention* implicitly contains such a duty to cooperate with a competent court; see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia Herzegovina V. Serbia & Montenegro)*, 2007 ICJ Report; and ICJ Report of 1996, Para 443. The *Genocide Convention* provides that individuals committing genocide 'shall be punished whether they are constitutionally responsible rulers, public officials or private individuals'; see *Convention on the Crime of Genocide. Supra* note 32, Art. IV.

<sup>233</sup> Akande D. (2009), *Supra* note 171, at 341.

<sup>234</sup> Cryer R & *et al.* (2010), *Supra* note 135, at 509.

ICC can not enforce states' cooperation with the Court.<sup>235</sup> Cassese asserts the ICC is 'a giant without arms and legs – it needs artificial limbs to walk and work. And those artificial limbs are state authorities.'<sup>236</sup> The Statute forbids trial in absentia,<sup>237</sup> thus the Court before trial must obtain his custody. Therefore, it has become almost impossible for the ICC to proceed with the prosecution of Al-Bashir to date, and it is unlikely that this would happen in the near future. In particular, even if the ICC's Prosecution could overcome some of the obstacles, the legal leeway for the non-surrendering of Al- Bashir, which has made Article 27 almost inoperative, and political and practical constraints due to conflicts of interest and problems of regional cooperation, would remain. As a result of all the aforementioned legal and practical issues and the lack of enforcement power, the arrest of warrant for Al-Bashir remains at large and is currently enjoying impunity.

### 3.7. Conclusion

As has been suggested above, the question whether amnesties constitute a form of impunity is largely indeterminate in the sense that it is dependent upon a resolution of the definitional question as to whether the granting of an amnesty involves an exemption from justice, and that may be seen to depend, in addition, upon the circumstances surrounding the granting of such an amnesty. That being said, it is clear that insofar as the Rome Statute does not expressly exclude the possibility of granting amnesties by way of an exemption from prosecution – whether in the broader 'interests of justice', or pursuant to the principle of complementarity or of *ne bis in idem* – this does at least create the possibility of impunity resulting. At the very least, however, it is such as to make clear the difficult relationship between the provisions of the Rome Statute that purport to determine what do or do not constitute the 'interests of justice', and its overt rationale which is to combat 'impunity', read as something which is somehow extrinsic to the Statute itself. However, the ICC in practice did not recognise the national amnesty law in Uganda; yet this does not mean that this is a policy to be applied to all similar future cases. As the Prosecutor's Policy Paper on the interests of justice considers non-retributive forms of justice, I have argued that there is a possibility for the ICC that national amnesties may be admitted.

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<sup>235</sup> *Id.*, at 510.

<sup>236</sup> Cassese A. (1998), *Supra* note 30, at 13.

<sup>237</sup> Rome Statute Art. 63.

There is increasingly a trend whereby the validity of immunity as a shield for international crimes should be limited for state officials; hence, the Statute rejected the immunity of high officials for the commission of international crimes within its jurisdiction. In practice, also, several states party to the Statute have, via new provisions, made possible the surrender of nationals of states non-party to the ICC. However, the law of immunity retains its significance for states' high officials for the proper functioning of international relations and remains the subject of controversial debate. Article 98 (1) does not, in fact, create new immunity, but it may bar states' officials from being surrendered to the ICC, and consequently may lead to non-prosecution before the ICC and thence impunity; and Article 98(1) in practice has been raised in connection with the non-compliance by member state Malawi in the case of Al-Bashir.

Customary law on the immunity of serving heads of state stipulates that a head of state is granted personal immunity. The Rome Statute therefore constitutes a break from traditional international law, in theory, through the adoption of Article 27 for states party to the Statute. However, in practice and in light of the traditional immunity under customary international law, the yet-to-be-enforced Al-Bashir arrest warrants have sparked intensive opposing arguments on the obligation of state parties to comply with the Court's requests. For the Al-Bashir case, I have endeavoured to show its legal and practical complexities and the barriers faced by the Court in practice in attempting to commence prosecution of the incumbent head of state under the Rome Statute. As the first case involving an incumbent head of state before the ICC, it showcases many such legal and practical issues; along with the lack of cooperation by states and the lack of enforcement power of the ICC, insufficient will and political considerations on the part of the SC have ensured that the ICC's warrants of arrest remain outstanding to date, and Al-Bashir is thus enjoying *de jure* and *de facto* impunity so far.

## ***Chapter IV: Impunity through defences in the Rome Statute***

### ***Introduction***

The availability of defences is integral to the right of the human to a fair and just trial,<sup>1</sup> as has been recognised in most major law systems and in the prior international criminal courts.<sup>2</sup> During the Rome Conference there were vigorous debates relating to defences and the exclusion from criminal responsibility of the accused.<sup>3</sup> Some NGOs at the Rome Conference even proposed that international crimes within the jurisdiction of the Statute ought not to be subject to defences;<sup>4</sup> this viewpoint was likely due to the most heinous nature of the crimes within the jurisdiction of the ICC, which made it difficult to invoke possible defences for such crimes.<sup>5</sup> The drafters of the Rome Statute, however, finally agreed upon a set of codified defences, and the Statute.<sup>6</sup>

The different procedural defences,<sup>7</sup> and all types of substantive defence,<sup>8</sup> which may lead to the exoneration of accused in a *due process*, are not the subject of this Chapter. Rather, the concern is merely to highlight the link between several definitions of defences and how they may give rise to impunity. The significance of defences in a criminal procedure is to ensure defendants are either guilty or acquitted, with the degree to which the defendant has participated in the commission of crimes resulting in a corresponding degree and type of liability, and for the defence of superior orders to ensure that the liability falls on the ‘real criminal’, etc.<sup>9</sup>

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<sup>1</sup> Bowett D.W. *Self-Defence in International Law* (1958), at 3-4; Gilbert J. ‘Justice not Revenge: The International Criminal Court and the ‘Grounds to Exclude Criminal Responsibility’ - Defences or Negation of Criminality?’, 10 *The International Journal of Human Rights* (2006), 143, at 143.

<sup>2</sup> See the Treaty of Versailles, June 28, 1919, Art. 227 and 228; the Nuremberg Charter Art. 8 and 16 (b), (d), and (e), and the right to counsel in the Tokyo Charter Art. 9; E.g. in civil law systems; see the French Penal Code, 22 July 1992, Art. 122-2, and the *Belgian Penal Code* of 1868, Art. 71; for a common law system see section 17 of the *Canadian Criminal Code*.

<sup>3</sup> See the *United Nations Conference of Plenipotentiaries on the Establishment of the an International Criminal Court* in Rome (15 June -17 July 1998), Vol. II at 132-133, Para 26-28, UN Doc. A/CONF.183/13; see also the *Draft Statute of the International Criminal Court*, UN Doc. A/CONF.183/2/Add.1 (14 April 1998), at 57.

<sup>4</sup> E.g. Human Rights Watch, *Comments on the Draft International Criminal Court Bill 2000*.

<sup>5</sup> Gilbert J. *Supra* note 1, at 143; Gaeta P. ‘The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law’, 10 *European Journal of international Law* (1999), 172, at 188-189.

<sup>6</sup> Rome Statute Art. 31, 32, and 33.

<sup>7</sup> E.g. *ne bis in idem*, non –retroactivity, *ratione personae*, etc., Rome Statute, Art. 20 and 24.

<sup>8</sup> E.g. insanity, intoxication, etc., see Rome Statute, Art. 26 and 31, (1), (b).

<sup>9</sup> Cryer R. ‘Superior Orders and the International Criminal Court’, R. Burchill *et al* (eds), in *International Conflict and Security Law* (July 2009), 49 at 53, Cambridge online available at: <http://dx.doi.org/10.1017/CBO9780511495137.006> .

In most legal systems<sup>10</sup> defences have been divided into two forms: those that serve as justification (considering an unlawful act to be lawful)<sup>11</sup> and those that excuse (recognising the unlawful nature of an act but removing the perpetrator from blame).<sup>12</sup> I will argue that, in contrast to the ‘justification’ category of defences, there is link between the ‘excuse’ defences and impunity, as the conduct is unlawful but not punishable. However, the Rome Statute does not categorise approaches to defences; instead, the section on defences in the Statute is simply entitled ‘Grounds excluding from criminal responsibility’.<sup>13</sup>

As a preliminary analysis, this chapter will examine the different doctrines of defences and the different defences in national and international law. Some specific issues regarding defences will then be examined: firstly, the defences of insanity and intoxication; secondly, the defence of superior orders in Article 33(2) thirdly, the self-defence of property which is essential for a military mission in Article 31(1) (c). The fourth section will deal with the plea of duress under Article 31 (d) and the final section deals with Article 28, which concerns military and civilian superiors’ responsibility. Concerning the categorisations, the first leads to the recognition of impunity; the second and third issues would give rise to impunity; and the fourth and final issues may facilitate impunity.

Considering briefly each of the above issues, it should be noted that, in the defences of insanity and intoxication in the Rome Statute. I will argue that, there is link between these defences and impunity, but such defendants are morally blameless and not legally punishable and these defences have accordingly been recognised as absolute defences. The Chapter, then, focuses on the very intricate issues of defences in the Rome Statute in relation to war crimes, and how they may give rise to impunity. In practice, the main area in which defences play an important role is in relation to war crimes, because of the broad range of crimes included therein; in

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<sup>10</sup> E.g. for a common law system, see the *Criminal Code of Canada*, 1985, C-46, Art. 8 (3), and 17; as to a civil law system, the *penal code of Germany* (1871), also distinguished between justification and excuse; see the *German Penal Code of 1871*, translated by Gerhard O.W. Mueller and Thomas Buergethal (1961), at 6 and 8; see also Art.52 and 53.

<sup>11</sup> E.g. self-defence has been categorised as a defence of justification, see Cassese A. *International Criminal Law* (2008), at 255-56; Eser A. ‘Justification and Excuse’, 24 *The American Journal of Comparative Law* (1976), 621, at 623.

<sup>12</sup> E.g. Dressler J. ‘Justifications and Excuses: A Brief Review of the Concepts and the Literature,’ 33 *The Wayne Law Review*, (1987), 1155, at 1166; Eser A. *Id*, at 635.

<sup>13</sup> See the Rome Statute Art. 31.



contrast, for genocide and crimes against humanity, the exclusion of criminal responsibility through defences may be a rare and extraordinary situation.<sup>14</sup>

The second type of defence in the Statute that will be discussed is the defence of superior orders for war crimes in Article 33(2). One of the most controversial topics at the Rome Conference was whether or not the defence of superior orders for war crimes should be included in the Statute.<sup>15</sup> I will argue that the inclusion of superior orders as a defence in the Statute has departed from customary international law,<sup>16</sup> in which superior orders may only be considered a mitigating factor. Although the Statute adopted the defence of superior orders only under certain conditions<sup>17</sup> and in relation to the limited scope of war crimes, it recognised superior orders as a defence, which signifies that liability can be excluded completely.

The third defence to be examined is the extension of the defence of self-defence to include defence of property essential for a military mission in Article 31(1) (c). This is a very controversial issue,<sup>18</sup> and ‘self-defence’ of military property has never been recognised as a defence before;<sup>19</sup> it will be discussed that this Article hereby goes beyond *lex lata* (the law as it exists).<sup>20</sup>

The fourth defence will be the plea of duress, which has been recognised as a complete defence for all crimes in the Statute,<sup>21</sup> but could also act as a mitigating factor under the Rules of Procedure.<sup>22</sup> There are different and opposing approaches regarding the scope and nature of duress and as to whether it should be adopted as a defence or a mitigating factor among scholars.<sup>23</sup> The plea of superior orders usually

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<sup>14</sup> Kress C. ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’, 30 *Israel Yearbook on Human Rights* (2001), 103, at 151; Schabas W. ‘General Principles of Criminal Law in the International Criminal Court Statute’, 6 *European Journal of Crime, Criminal Law, and Criminal Justice* (1998), 84, at 105.

<sup>15</sup> Garraway C. ‘Superior Orders and International Criminal Court: Justice delivered or justice denied’, 863 *International Review of the Red Cross* (1999), 1, at 1.

<sup>16</sup> Cassese A. ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *European Journal of International Law* (1999), 144, at 156; Frulli M. ‘Are Crimes Against Humanity more serious than War Crimes?’, 12 *European Journal of International Law* (2001), 329, at 340; Gaeta P. (1999), *Supra* note 5, at 187.

<sup>17</sup> Rome Statute Art. 33(1).

<sup>18</sup> Frulli M. *Ibid.*, at 339; Cassese A. (1999), *Supra* note 16, at 154-155

<sup>19</sup> Cryer R. ‘The Boundaries of Liability in International Criminal Law’, 6 *Journal of Conflict and Security Law* (2001), 3, at 17.

<sup>20</sup> Cassese A. (1999), *Supra* note 16, at 154.

<sup>21</sup> Rome Statute Art. 31.

<sup>22</sup> See *Rules of Procedure and Evidence*, Adopted by the Assembly of States Parties, First session (3-10 September 2002), Official Records ICC-ASP/1/3, Art. 145, (2), (a), (i), see also Berman M.N. *Supra* note 40, at 4.

<sup>23</sup> Newman M.S.C. ‘Duress as Defense to War Crimes and Crimes Against Humanity, *Prosecutor v. Drazen Erdemovic*’, 166 *Military Law Review* (2000), 158, at 168; E.g. Cryer R. (2001), *Supra* note

overlaps with the plea of duress.<sup>24</sup> I will argue that, generally, the availability of the plea of duress as a defence for all crimes within the jurisdiction of the ICC may reduce the role of deterrence of the ICC, and may facilitate a situation in which some perpetrators may escape punishment. The defence of duress was rejected as an absolute defence in the *Erdemovic* case in the ICTY,<sup>25</sup> which became a highly controversial issue among scholars,<sup>26</sup> but those who support the judgment argue that this is a policy approach which will enhance the role of deterrence of the Court for future crimes.<sup>27</sup>

The fifth issue regarding defences to be considered concerns the dichotomy of the standard of liability between military commanders and civilian superiors in Article 28 (a) and (b). The Article has recognised a higher threshold of liability for civilian superiors, and many scholars have argued that this distinction concerning liability was unnecessary.<sup>28</sup> I will argue that this distinction is also problematic in practice, as it is not always easy to distinguish between *de jure* and *de facto* military superiors. The recent practice of the ICC in *Bemba Gombo* case<sup>29</sup> indicated such theoretical and practical difficulties which may lead to the delay of prosecution. This case has also indicated the fact that the judges of the ICC in practice have desired to eliminate the double threshold of liability. I will argue that this distinction of liability may give rise to impunity for civilian superiors.

#### **4.1. The different doctrines of defences in international law**

Systems of national law have endeavoured to tackle the difficult dilemma regarding defences through one of three main approaches, although they have not always met

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19, at 17; see also Sliedregt E.V. 'Defences in International Criminal Law', paper presented at the Conference, *Convergence of Criminal Justice Systems* (2003), 1.

<sup>24</sup> Cryer R. (2009), *Supra* note 9, at 55; see also *Prosecutor v. Erdemovic, Separate and Dissenting Opinion of Judge Cassese* ICTY, IT-96-22-A (7 October 1997), Para 15.

<sup>25</sup> See *Prosecutor v. Erdemovic*, Judgment, ICTY, IT-96-22-A, (7 October 1997), Para 19.

<sup>26</sup> Rua W. I. 'Duress, International Law and Literature', 4 *Journal of International Criminal Justice* (2006), 724, at 724; Cryer R. (2001), *Supra* note 19, at 17, footnote 94; and see generally Newman M.S.C. *Supra* note 23.

<sup>27</sup> McDonald G. k. 'The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War,' 156 *Military Law Review* (1998), 30 at 49.

<sup>28</sup> Cryer R. 'General Principles of Liability in International Criminal Law', in D. McGoldrick, P. Rowe & E. Donnelly(eds), *The Permanent International Criminal Court- Legal and Policy Issues* (2004), 233, at 259; Vetter G. R. 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)', 25 *Yale Journal of International Law* (2000), 89, at 110 and 120.

<sup>29</sup> It has qualified *Bemba* as a military commander, see *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Pre-Trial Chamber II (15 June 2009).

with great success.<sup>30</sup> The first and traditional doctrine was the act of State doctrine, which was propounded actively by Hans Kelsen, in which individuals have no direct responsibility for violations of international law. Rather, their acts lead to responsibility only by way of being attributed by imputation to their State. Since one State has no jurisdiction over another State no criminal liability can be established over the individuals concerned other than by the state of nationality itself.<sup>31</sup> However, Kelsen also asserted that individual criminal liability signified justice to a greater extent than collective responsibility did.<sup>32</sup> Nevertheless, the individual can not be tried in a court of a foreign State and thus state immunity was accepted as a complete defence. The second approach, the doctrine of *respondeat superior*, or *Befehl ist Befehl* ('order is order') theory, is one which accepts much of Kelsen's thesis, but also admits some scope for individual criminal liability. According to this theory, individual criminal liability depends upon the question as to whether or not the soldier has committed a crime in obedience to superior orders.<sup>33</sup> This theory was asserted by Oppenheim at the beginning of the twentieth century as follows:

[v]iolations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals and cannot be punished by the enemy; the latter can however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.<sup>34</sup>

Although the above doctrines are different in starting points, conclusions, and applicability, both of them lead to impunity through the assertion of immunity on the part of individuals.<sup>35</sup> However, the Nuremberg Tribunal put an end to these doctrines in the aftermath of World War II, and for the first time individuals became fully

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<sup>30</sup> Dinstein Y. *The Defence of 'Obedience to Superior Orders' in International Law* (1965), at 8; see also Slidregt E.V.(2003), *Supra* note 23, at 1-2.

<sup>31</sup> Kelsen H. *General Theory of Law and State*, translated by A. Wedberg (1961), at 191, he asserts: Certain actions of individual human being are considered as actions of the State... Not every individual is capable of performing actions which have the character of acts of the State; ...The judgment by which we refer a human action to the State, as to an invisible person, means an imputation of a human action to the State. The problem of the State is a problem of imputation. The State is, so to speak, a common point into which various human actions are projected, a common point of imputation for different human actions. The individuals, whose actions are imputed to the State, are designated as "organ" of the State. See also Kelsen H. 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' 1 *International Law Quarterly* (1947),153, at 159.

<sup>32</sup> *Id.*, at 165.

<sup>33</sup> Dinstein Y. *Ibid.*, at 8.

<sup>34</sup> Oppenheim L. *International Law* (1906),Vol, II , at 264-265.

<sup>35</sup> Dinstein Y. *Ibid.*, at 59, he asserts, 'both of them lend international offenders a mantle of immunity from responsibility'.

subjects of international law quite independently of the question of State responsibility.<sup>36</sup> After that, those approaches (act of State doctrine and *respondeat superior*) were no longer available as defences for international crimes.

The third theory is the doctrine of *absolute liability*, which dictates that a soldier must consider every superior order that is given to him; if it is evidently an order to commit a crime, he must disobey and he may not be punished for this. If he chooses to obey he does so at his own risk, as his obedience to superior orders will not prevent him from being convicted.<sup>37</sup>

As a matter of fact, these doctrines are dangerous if applied separately, and are also opposite to each other and may not help to solve the dilemma mentioned above. For example, the act of State doctrine cannot be reconciled with the interests of criminal law, and absolute liability is inconsistent with the requirements of military discipline. It seems that the better solution for solving the dilemma in a national legal system is not to select one of those doctrines but to consider both, '*inter alia*', in a legal procedure. A suggested solution is that, in general if a soldier commits an offence in obedience to superior orders this removes the responsibility for his illegal behaviour. However, if the illegality of an order is clear, the soldier must manifestly refuse to obey the superior orders; otherwise he will be legally liable and will face punishment for his actions.<sup>38</sup> This solution is designed to recognise and deal with the potential conflicts arising for soldiers who are obliged to obey the rules of military discipline but at the same time act within the law, 'the manifest illegality principle'.<sup>39</sup> The manifest illegality principle was applied for war criminals after World War 1 at the Leipzig trials in Germany.<sup>40</sup> It appears that in the case of war

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<sup>36</sup> See Chapter II, the first section.

<sup>37</sup> Dinstein Y *Ibid*, at 8.

<sup>38</sup> *Id*, at 8.

<sup>39</sup> *Id*, at 9.

<sup>40</sup> See e.g. the *Llandovery Castle* Case: Helmut Brummer-Patzig, the commander of a German submarine attacked the *Llandovery Castle*, despite being fully aware that it was a hospital-ship. His subordinates- Dithmar and Boldt- who participated in the attack and massacre of the survivors sought to rely on a defence of following Patzig's orders before the court in Leipzig. However, the Court held that: 'the firing on the boats was an offence against the law of nations... the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law.' The Court finally held that such orders are known universally to be illegal and thus found them guilty. Nonetheless, the court acknowledged the defence of superior orders in this case as a mitigation factor and sentenced them to just four years imprisonment. For *Llandovery Castle* case, see 'Judicial Decisions Involving Questions of International Law, Crime War Trials I, Supreme Court at Leipzig, Judgment in the Case of Kart Heynen, rendered May 26, 1921' 16 *American Journal of International Law* (1922), 674, at 721- 22; see also *The Laws of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents*, in D. Schindler (eds), at 868 to 882;

crimes in the Leipzig Trial the illegality of such orders was clear and *respondeat superior* was not acceptable as a defence.

#### ***4.1.1. The distinction between defences among national legal systems***

In this section, I will argue that the distinction between defences of justification and excuse is theoretically and practically important. In particular, it is significant for the basic understanding of how defences operate in a criminal process. I will also argue that a link exists between the ‘excuse’ defences and impunity.

Generally, defences have been considered a justification or excuse in most national criminal law systems.<sup>41</sup> In the Canadian Criminal Code, for instance, self-defence and necessity are categorised as justifications.<sup>42</sup> In the amendment of the German penal code, defences are classified into justifications and excuses, but some defences such as necessity are categorised in both - justification and excuse.<sup>43</sup> The German penal code of 1871 had already distinguished between justification and excuse.<sup>44</sup> The distinction between justification and excuse is also well established in the Italian Criminal Code. In Italy, claims of legitimate defence, necessity and duress are justifications.<sup>45</sup> In the US Model Penal Code a ground of defence is divided also into justification and excuse. It provides that a ground of defence is affirmative when it involves a matter of excuse or justification within the defendant’s knowledge on which he can fairly be expected to supply supporting evidence.<sup>46</sup>

a) Justification is normally due to an individual’s situation,<sup>47</sup> in which the action under consideration is not in fact a crime but lawful.<sup>48</sup> The justification is related to the assessment of the conduct in an objective way; the situation which has

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Mullins C. *The Leipzig trials: An Account of the War Criminals Trials and a Study of German Mentality* (1921), at 27-31.

<sup>41</sup> Eser A. (1976), *Supra* note 11, at 621-622; see also generally Alexander L. ‘Self Defense, Justification and Excuse’, 22 *Philosophy and Public Affairs* (1993),53; McAuley F. ‘The Theory of Justification and Excuse: Some Italian Lessons’, 35 *The American Journal of Comparative Law* (1987),35; Berman M. N. ‘Justification and Excuse, Law and Morality’, 53 *Duke Law Journal* (2003),1, at 7-8; Sliedregt E.V. (2003), *Supra* note 23, at 2; Dressler J. *Supra* note 12, at 1164. It is also theorised based on the rights theory of moral interest, the theory of lesser harm, and justification based on ‘public benefit’; see Greenawalt K. ‘The perplexing Borders of Justification and Excuse’, 84 *Columbia Law Review* (1984), 8, 1897, at 1915. He asserts that: ‘Justifications typically arise out of the nature of the actor’s situation, excuses out of the actor’s personal characteristics.’

<sup>42</sup> The *Criminal Code of Canada* 1985, C-46, Art. 35 and 612(1).

<sup>43</sup> The *German Criminal Code* of 1998, Art. 34 and 35. Also in its amendment on 5 November 2008 duress categorised as excuse in Art.35 (2).

<sup>44</sup> The *German Penal Code* of 1871. *Supra* note 9, at 5-8.

<sup>45</sup> See the *Italian Criminal Code (Codice Penale)*, Art. 52.

<sup>46</sup> The *American Law Institute, Model Penal Code* (1962), section 1.12. (3), (c), at 20.

<sup>47</sup> Greenawalt K. (1984), *Supra* note 40, at 1915.

<sup>48</sup> Berman M.N. *Supra* note 40, at 4.

led to the justification is considered to oblige the evaluation in moral and/or legal terms of an act which would otherwise be wrongful and unlawful.<sup>49</sup> Justification is based on several theories; the first, moral interest theory, considers that self defence, for instance, may be justified on the grounds that individuals have an innate right to personal autonomy and that when that right is compromised in an unlawful manner, the innocent individual may safeguard her interest as required by the circumstances, including killing the one threatening her autonomy.<sup>50</sup> The second theory of justification is based on the idea of 'lesser harm', in which certain conduct may be permitted when the interests of the defendant prevail over those that are protected by criminal law.<sup>51</sup> For example, trespass on other people's land or private property usually are unlawful conduct, but are justifiable if an incident occurs in the interest of protecting the life of human who is threatened by a natural disaster. The third theory concerns justification on the basis of 'public interest', in which unlawful conduct is justified where it is performed for the benefit of society. For example, the action of an executioner in killing a convicted criminal is justified because of his public duties.<sup>52</sup> The significance of these considerations is that the justification category of defences, denies the legal liability of the accused from the beginning if it has been reasonably approved during the judicial process. The justificatory conditions ensure that what would be deemed an offence under other circumstances is now considered morally right and legally permissible.<sup>53</sup>

b) An excuse defence is normally due to the personal character of an individual;<sup>54</sup> the action is still considered a crime, but the defendant (such as in a case of insanity) is not punishable.<sup>55</sup> Excuses are also advocated based on utilitarian value in certain theories of punishment, especially that of deterrence. It should be noted that, for instance, an insane or coerced actor is excused because she is 'undeterrable'. The deontological 'moral theories' concerning penal law imply that the punishment is inefficient, and most advocates of these theories suggest that,

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<sup>49</sup> Mousourakis G. 'Justification and Excuse', 7 *Tilburg Foreign Law Review* (1998-1999), 35, at 37.

<sup>50</sup> Dressler J. *Supra* note 12, at 1164.

<sup>51</sup> *Id.*, at 1164; Mousourakis G. *Ibid.*, at 38.

<sup>52</sup> Eser, A. (1976), *Supra* note 11, at 629-30; Dressler, J. *Supra* note 12, at 1164-65.

<sup>53</sup> Mousourakis G. *Ibid.*, at 37.

<sup>54</sup> Greenawalt K. (1984), *Supra* note 40, at 1915

<sup>55</sup> Berman M.N. *Supra* note 40, at 4.

though the excused actors are often dangerous persons, they are not morally blameful for their actions.<sup>56</sup>

The second advantage of the categorisation of defences as excuse and justification appears in practice in terms of the punishment for some crimes. Concerning complicity for instance, the US Model Penal Code<sup>57</sup> provides that each actor is subject to punishment regardless of the question of the guilt of the others, but an accessory before or in the act is punishable only if the act is unlawful. An accessory is not to be punished if he has facilitated an action which is justified by ‘justifying necessity’, whereas he is merely excused in the case of ‘excusing necessity’. This applies also in the case of accessories after the fact and to receiving stolen goods.<sup>58</sup> The point is that in the offence of complicity, the guilt of the principal offender determines the validity of the charges against any accessories. For example, where a charge of theft has not been established, then one can not be convicted of receiving stolen property. Hence the acquittal of the principal becomes the “justifying necessity” that exonerates the accessory. Another practical advantage of this distinction is that a successfully excused defendant might be liable to pay compensation for any damage resulting from his criminal action.<sup>59</sup> For example, in a case of murder by an insane person or a minor, he/she will not be punished, but their parents or relatives may have to pay compensation to the victim’s family.<sup>60</sup>

The question arises as to how this distinction may relate to the *question of impunity* in general. In this regard, it should be remembered that in the justification category of defences, the defendant’s action is not considered a crime, but lawful. For example, in the defence of self-defence, if the defendant used reasonable force to defend herself from an imminent attack, and successfully raises the defence of self-defence in court, she denies the crime from the beginning and she is not liable. In contrast, a defendant raising a defence in the excuse category, such as insanity, in fact is someone who has committed a crime; but due to (e.g.) mental disease, lack of

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<sup>56</sup> Dressler, J. *Supra* note 12, at 1164.

<sup>57</sup> See the *US Model Penal Code* Section 2(7). It provides: ‘An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.’ A similar regulation is also codified in the *Iranian Criminal Code*, Art.42.

<sup>58</sup> Eser, A. (1976), *Supra* note 11, at 622.

<sup>59</sup> Cassese A. (2008), *Supra* note 11, at 257.

<sup>60</sup> Some national criminal codes make such provisions for criminals with mental disorders; see e.g. the *Iranian Criminal Code* Art.50.

*mens rea*, she is not punishable, and is morally blameless. Since such a defendant in fact has no capacity to appreciate the unlawfulness or nature of her actions, there is no advantage for society to punish her since she is not deterrable. Therefore, there is a link between the excuse defences (whereby the actions under consideration are still criminal) and impunity; excuses do give rise to impunity, but this impunity is acceptable. Hence, in a broader definition of impunity, it may be said that impunity is not always illegal or immoral, but may be recognised by the law. Thus, the categorisation of defences into justifications and excuses can have serious practical and theoretical implications.

The prior international tribunals did not, however, make such a division of defences.<sup>61</sup> The Rome Statute has also not distinguished between the two types of defence; although the *ad hoc* Committee made reference to both excuses and justifications, this was not accepted in the final draft of the Statute.<sup>62</sup> It has nevertheless become clear that there are fundamental differences between excuse and justification defences; accordingly, if the Statute had codified defences in such a way as to adopt such a distinction, the aforementioned basic theoretical and practical advantages could also have been applicable to the ICC.

#### ***4.1.2. Historical narrative of defences in prior international tribunals***

The prior international tribunals recognised the right to defence as a requirement of a fair and just trial in their statutes and recognised different types of defences in practice.<sup>63</sup> In particular, it appeared among the war crimes trials in the aftermath of the first and second World Wars and the right continued to be guaranteed later on in the procedures of the *ad hoc* tribunals. The first outline of a procedure for the defence of a prisoner of war in “judicial proceedings” is found in the 1929 Geneva

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<sup>61</sup> The only exception is in the Statute of the ICTY, which makes mention of ‘military necessity’ as a ground of justification; see the Statute of the ICTY Art. 2(d), and 3 (b).

<sup>62</sup> See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, GAOR, Fiftieth Session, Supplement No.22, A/50/22 (1995).

<sup>63</sup> Kopel D. B. Gallanr P & Eisen J.D. ‘The Human Rights of Self-Defense’, 22 *BYU Journal of Public Law* (2008), 43, at 58; Brownlie I. *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998), (Hague Academy of International Law Monographs), at 65; see also the *International Convention on Civil and Political Rights* (ICCPR), UN GA, Res. 2200A (XXI), (16 December 1966), Art.14; the *Convention for the Protection of Human Rights and Fundamental Freedoms, also called the European Convention on Human Rights* (ECHR), ETS No.5 (4 November 1950), Art. 6.



Convention Relating to the Treatment of Prisoners of War.<sup>64</sup> This treaty declares that a prisoner must be advised that he is “entitled to assistance by a qualified counsel of his choice,” and if he fails to choose a counsel, “the protecting power may obtain a counsel for him”.<sup>65</sup> The Leipzig war trials also recognised for defendants a right to defence and a right to counsel.<sup>66</sup> The same provision can be found in the 1937 League of Nations proposed convention for the creation of an international criminal court.<sup>67</sup> The Nuremberg Charter also guaranteed that a defendant ‘shall have the right to conduct his own defence before the Tribunal or to have assistance of counsel’<sup>68</sup> and the Tokyo Tribunal with slightly more detail provided the same right for defendants.<sup>69</sup>

As to legal defences which enable a defendant to avoid or limit her liability: none of the prior international tribunals codified different defences independently in their Statutes and Charters. However, different types of defences, such as the defence of self-defence, insanity,<sup>70</sup> and the plea of superior order were respected in the post-World War II tribunals in practice.<sup>71</sup> Similarly, the current *ad hoc* international tribunals have respected self-defence, though neither the ICTY nor the ICTR have codified the defence of self-defence in their Statutes; instead, their Statutes have emphasised that the conduct of fair trials is ‘[a] right of accused’,<sup>72</sup> thus leaving decisions regarding defences’ applicability to the tribunals.<sup>73</sup> In practice, in the *Kordic & Cerkez* case, for instance, where the defendant in a meritless defence argued that the Bosnian Croats were victims of Muslim aggression in Central Bosnia

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<sup>64</sup> *Convention between the United States of America and other powers, relating to Prisoner of War*, signed at Geneva (July 27, 1929), Art. 42,60-67, in *the Laws of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents*, in D. Schindler(eds), at 350 and 354-355.

<sup>65</sup> *Id.*, Art. 61-62.

<sup>66</sup> See *Treaty of Versailles*, June 28, 1919 Art.227and 229.

<sup>67</sup> See the *Convention for the Creation of an International Criminal Court, League of Nations*, (16 Nov1937), Art.29, in *Historical Survey of the Question of International Criminal Jurisdiction - Memorandum submitted by the Secretary-General*, UN Doc. A/CN.4/7/Rev.1 ; the UN. Charter also has recognised the right of individuals or collectives to use force in self-defence, as an exception to its prohibition on the use of such force when there is a military attack against a state. See the UN. Charter Art. 51. It provides: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security.’

<sup>68</sup> See the IMT Charter Art. 16 (d).

<sup>69</sup> The IMTFE Charter, Art. 9(d).

<sup>70</sup> E.g. defendants Rudolf Hess and Julius Streicher were resorted to the plea of insanity at IMT, see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 14 November 1945- 1 October 1946, Official Documents (1947),Vol, II, at 24, 156, 481-7.

<sup>71</sup> See Nuremberg Charter Art. 8 and IMTFE Charter Art. 6.

<sup>72</sup> See the ICTY Statute Art.20 and 21 and the ICTR Statute Art. 19 and 20.

<sup>73</sup> Cryer R. *Supra* note 19, at 16.

and that they were fighting a war of self-defence,<sup>74</sup> the ICTY's Trial Chamber held that:

[T]he Statute of the International Tribunal does not provide for self-defence as a ground for excluding criminal responsibility. "Defences" however form part of the general principles of criminal law which the International Tribunal must take into account in deciding the cases before it.<sup>75</sup>

However, and in contrast to the previous international tribunals, the Rome Statute codified defences in more detail.<sup>76</sup>

Therefore, both the basic right to defence and the different types of legal defences available under different systems of national law and international tribunals are significant and necessary requirements of a fair and just trial; this is accepted as a matter of humanitarian law. Furthermore, legal defences are necessary for a due process trial, in order to find the defendant guilty or not appropriately; and it is advantageous to identify different categories of defences which have different consequences, etc. In particular, the defence of superior orders makes it possible for the real criminal, who was actually responsible for the commission of crimes, to be punished.<sup>77</sup> Thus, the inclusion of defences in the Rome Statute has been a necessary development in the progress of humanitarian law. As has been mentioned, generally there is a link between excuse defences and impunity, as the defendant pleading an excuse defence has committed crimes but is unpunishable; in contrast, there is no direct link between justification defences (such as self-defence) and impunity. However, some parts of the codification of defences in the Statute are controversial and either depart from customary rules or are new codifications. Therefore, in this Chapter I seek to focus on the most controversial parts of these provisions, in order to explore how some of these definitions of defences may facilitate or create impunity.

#### ***4.2. Defences in the Rome Statute***

The approach of referring to 'grounds for excluding criminal responsibility' in the Rome Statute, Article 31, was finally accepted instead of defences at the Rome Conference. This Article considers defences all together, including self-defence,

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<sup>74</sup> See *Prosecutor v. Kordic and Cerkez*, ICTY, Trial Chamber Judgement, IT-95-14/2, (26 February 2001), Para, 448.

<sup>75</sup> *Id.*, Para 449.

<sup>76</sup> See Rome Statute Art. 31 to 33.

<sup>77</sup> Cryer R. (2009), *Supra* note 9, at 53.

which is often regarded as a *justification*, and intoxication, insanity and duress, which are usually categorised as *excuses*.<sup>78</sup> ‘Mistake of fact or mistake of law’ and ‘superior orders’ have also been codified as defences in the statute.<sup>79</sup> This section of the present paper seeks to focus mainly on the most controversial parts of these provisions; however, before doing so I wish first briefly to examine the two type of absolute defence in the Statute, namely insanity and intoxication. Defences in the Statute have been the subject of a vast literature by scholars.<sup>80</sup> I attempt to discuss which types of defences in the Statute may or do give rise to impunity and how this takes place. The various sub-sections focus on the most controversial aspects of defences in the Statute, i.e. the defence of superior orders, the defence of property which is essential for a military mission, duress, and the different thresholds of liability for military and non-military superiors.

#### ***4.2.1. Absolute defences in the Rome Statute: insanity and intoxication***

In both insanity and involuntary intoxication defences, defendants have committed unlawful acts but they are not punishable. The first of these, insanity (at the time of committing the crime) is a complete defence in both common law and civil law systems.<sup>81</sup> The Statute provides:

[A] person shall not be criminally responsible if, at the time of that person’s conduct: (a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;<sup>82</sup>

The Rome Statute does not address itself to the situation of an accused person who is found to be insane; in consequence, Amnesty International has highlighted that rules will need to be established providing procedures consistent with international law and standards for dealing with this situation when the acquitted person continues to suffer from mental illness.<sup>83</sup> According to Schabas, the Statute neither provides a consequence of the plea of insanity other than acquittal, nor should it provide any other consequence. If an individual who was insane at the time the

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<sup>78</sup> The Rome Statute, Art.31.

<sup>79</sup> *Id.*, Art. 32 and 33.

<sup>80</sup> In addition to the above see, McCoubrey H. ‘From Nuremberg to Rome: Restoring the Defence of Superior Orders’, 50 *International and Comparative Law Quarterly* (2001), 386; see also *below* note 90.

<sup>81</sup> Gilbert J. *Supra* note 1, at 45; Schabas W. *Supra* note 14, at 107.

<sup>82</sup> *Rome Statute* Art. 31(1), (a).

<sup>83</sup> Amnesty International, *The International Criminal Court: 16 fundamental principles for a just, fair and effective international criminal court*, Doc: IOR 40/012/1998 (29 April 1998).

crime was committed poses no threat either to him- or herself or to others by the time of trial, this person ought simply to be released; should a danger still be posed,....<sup>84</sup> However, the excluding of criminal responsibility due to insanity is linked with the lack of *mens rea* as an essential element of a crime and could be as an absolute defence in the Rome Statute.

The second of these two defences, intoxication, is also provided for by the Rome Statute in Article 31,<sup>85</sup> and again this is linked with the element of *mens rea* of the accused at the time he/she committed crimes.<sup>86</sup> Article 31 refers to 'intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law...'.<sup>87</sup>

Some suggest that voluntary intoxication might be a mitigating factor, while other delegates in the Rome Conference completely denied it should be a defence for international crimes.<sup>88</sup> In discussion it was pointed out that acceptance of voluntary intoxication as a defence could lead to a great number of crimes going unpunished and hence lead either to impunity or, in case of its being accepted as a mitigating factor, to individuals not receiving the appropriate punishment. Accordingly, it was finally decided by the drafters of the Rome Statute to exclude the defence for those in a state of voluntary intoxication, who should be held criminally responsible. However, the problem is that in practice it will not always be easy to distinguish between voluntary and involuntary intoxication. It is of course possible that an individual might become intentionally intoxicated in order to commit a crime but subsequently claim involuntary intoxication. It was on this basis that several Arab countries at the Rome Conference objected to this provision.<sup>89</sup> However, as Schabas argued, this plea is one that rarely occurs in the case law. He argues that codifying an uncontroversial definition of the intoxication defence is absurd, as the ICC is not

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<sup>84</sup> Schabas W. *Supra* note 14, at 107.

<sup>85</sup> A comparison between insanity and intoxication was made by *Preparatory Committee* in 1997 that intoxication 'was thought to be the person's inability to distinguish between right and wrong,' while the insanity 'was the loss of a person's judgment.' See *Initial Summary Reports on December 1-12 Meetings of the United Nations Preparatory Committee on the Establishment of an International Criminal Court* (December 18, 1997), at 10. Available at: <http://www.iccnw.org/documents/5PrepCmtSummaryCICC.pdf> (Accessed 22/08/2012).

<sup>86</sup> Gilbert J. *Supra* not 1, at 145.

<sup>87</sup> Rome Statute Art. 31(b).

<sup>88</sup> *Report of the working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 (2 July 1998), at 4 and 8.

<sup>89</sup> *Id.*

intended to deal with low-level war crimes but leaders, organisers and planners of crimes on a large scale.

Both the insanity and the intoxication defences can be categorised as excuses, whereby the conduct of a defendant comprises a crime and is unlawful but the defendant is not responsible. Thus, there is link between these defences and impunity; however, these individuals are not morally responsible as they cannot distinguish between right and wrong action and lack *mens rea*. It might accordingly be said that this type of impunity is positive and acceptable; impunity such as this, however, is not the main concern of this thesis.

#### ***4.2.2. Defence of superior orders in the Rome Statute***

The defence of obedience to superior orders in international law and in the ICC has been the subject of a vast literature among scholars.<sup>90</sup> The arguments concerning the plea of superior orders in the Statute firstly concern the question of whether or not the Statute should include the defence of superior orders as a defence. The second argument is concerning the scope of defence, in which it is considered as to whether or not it should include all crimes within the jurisdiction of the ICC. The third argument is related to the question of whether the plea of superior orders should be accepted as a defence or as a mitigating factor; and finally, there is an argument regarding the question of the manifest illegality of war crimes in the Statute and whether or not the Statute has followed the customary rule concerning the defence of superior orders. I will argue that the Statute has here departed from customary law and provides a situation in which the plea of superior orders, under the conditions stipulated in Article 33, can be accepted as complete defence at the ICC. Prior to the above different arguments, it is worthwhile to examine the plea of superior orders in the prior international tribunals briefly.

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<sup>90</sup> In addition to the above, see Cryer R. 'Superior scholarship on superior orders: an appreciation of Yoram Dinstein's "The Defence of "Obedience to Superior Orders" in International Law", 9 *Journal of International Criminal Justice* (2011), 959; Eser A. 'Grounds for Excluding Criminal Responsibility', *Commentary on the Rome Statute of the International Criminal Court*. O. Triffterer (eds), (2008), 863; Grayson J.W. 'Superior Orders and the International Criminal Court', 64 *Nordic Journal of International Law* (1995), 243; Lippman M. R. 'Humanitarian Law: The Development and Scope of the Superior Orders Defense,' 20 *Penn State International Law Review* (2001-2), 153; Sato H. 'The Defense of Superior Orders in International Law: Some Implications for the Codification of International Criminal Law,' 9 *International criminal Law Review* (2009), 117; Harris L. 'The International Criminal Court and the Superior Orders Defence,' 22 *University of Tasmania Law Review* (2003), 200; Wilner M.A. 'Superior Orders as a Defense to Violations of International Criminal Law,' 26 *Maryland Law Review* (1966), 127.

Prior to the Nuremberg trial in 1945, the plea of superior orders was a defence if an order was not manifestly illegal.<sup>91</sup> As a corollary to that doctrine, Oppenheim also recognised the possibility of a defence of superior orders. As outlined in the volume edited by Lauterpacht, it is noted that:

Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisal.<sup>92</sup>

According to his doctrine obedience to ‘military orders’ only constitutes a defence when they are not manifestly unlawful; thus, in the case of a soldier who obeyed an order of a superior which at that time appeared lawful, the soldier was not responsible.<sup>93</sup> However, this doctrine has not been followed by the post-war tribunals; in the Leipzig Trials after World War I also, superior orders as a *defence* was rejected in the *Llandovery Castle* case.<sup>94</sup> After World War II, the Nuremberg Tribunal flatly rejected the existence of a defence of superior orders on the basis that, almost by definition, any order to commit a war crime must be manifestly unlawful. According to article 8 of the Nuremberg Charter:

The fact that the Defendant acted pursuant to order of this Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.<sup>95</sup>

As this Article makes clear, a defence of superior orders is not admissible as such, but only as a *mitigating* factor in the assessment of the severity of the punishment to be meted out. The case law also rejected such a plea in the case of *Keitle* at the Nuremberg Tribunal; *Nelte*, who was one of the counsels for the defence, argued that his client *Keitle* had been merely a tool of an overwhelming will, but the Tribunal dismissed this argument and held that is not acceptable that Hitler made use of individuals if they were aware of what they were doing and that the relationship between leaders and followers does not obviate responsibility.<sup>96</sup> Consequently, a plea

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<sup>91</sup> McCoubrey H. (2001), *Supra* note 80, at 386.

<sup>92</sup> Oppenheim L. *International Law, War and Neutrality*, in H. Lauterpacht (ed), (1944), Vol, II, at 454.

<sup>93</sup> McCoubrey H. *Ibid*, at 386.

<sup>94</sup> See *Llandovery Castle* case. *Supra* note 40.

<sup>95</sup> See the Nuremberg Charter Art. 8.

<sup>96</sup> See *Trial of the Major War Criminals before the International Military Tribunal* (1947), *Supra* note 70, Vol, I, at 77.

of superior orders, which was a defence prior to the Nuremberg trial, was changed to a potential plea in mitigation of sentence rather than as a defence in the military tribunals after World War II.<sup>97</sup> Similarly, the plea of superior orders was allowed as a mitigation factor by Control Council Law No 10, Article 2 (4) of 1945.<sup>98</sup> The same approach has been followed more recently in the ICTY<sup>99</sup> and ICTR<sup>100</sup> Statutes. Therefore, the plea of superior orders is a mitigating factor under customary international law rather than a defence; but the Rome Statute adopted a different approach.

The first, controversial argument, which has been an issue both under international law and at the Rome Conference, concerns whether or not the defence of superior orders should be included in the Statute.<sup>101</sup> In fact, during the Rome Conference there were vigorous debates relating to defences in general, and in particular for the exclusion of criminal responsibility for the defence of superior orders.<sup>102</sup> This may be a function of the discord between military discipline's requirement of obedience and justice's requirement that crimes be punished.<sup>103</sup> The defence of obedience to superior orders is mainly characteristic of war crimes trials, but it could be invoked wherever there exists a hierarchical system of authority.<sup>104</sup> Many human rights NGOs also have expressed view against the inclusion of the superior orders as defence in the Statute.<sup>105</sup>

The second argument is concerned with the scope of the defences in the Rome Statute. In the 1994 draft Statute prepared by the International Law

<sup>97</sup> See the Nuremberg and IMTFE Charters Art.8 and Art.6 respectively.

<sup>98</sup> See *Allied Control Council Law No. 10*, (20 Dec 1945), see also *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10*, by Telford Taylor, in *The Military Legal Resources* (15 August 1949).

<sup>99</sup> The ICTY Statute Art.7 (4).

<sup>100</sup> The ICTR Statute Art.6 (4). A similar approach was also taken by the International Law Commission in 1996 in its *Draft Code of Crimes against the Peace and Security of Mankind*, UN Doc. A/CN.4/L.522, and Corr.1 Art. 5.

<sup>101</sup> Garraway C. (1999), *Supra* note 15, at 1.

<sup>102</sup> See *the UN Conference on the Establishment of the ICC. Supra* note 3, Vol, II, at 107, 1017 and 132-133; see also the *Draft Statute of the International Criminal Court*, UN Doc. A/CONF.183/2/Add.1 (14 April 1998), at 57; Garraway C. *Ibid*, at 1.

<sup>103</sup> Garraway C. *Id*, at 1.

<sup>104</sup> Dinstein Y. 'Defences', in G. K MacDonald & O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (2000), 367, at 379.

<sup>105</sup> E.g. Human Rights Watch, *Comments on the Draft International Criminal Court Bill 2000*, it provides: "The principle that there can be no defense of superior orders is well established under international law. This principle was incorporated into Article 8 of the Nuremberg Charter, which explicitly prohibited the application of superior orders as a defense....The draft Bill should be amended to explicitly provide that the defense of superior orders is not available for the crimes set out in the Bill."

Commission, the admissibility of defences for each crime within the Jurisdiction of the Court, including the defence of the superior orders, was suggested.<sup>106</sup> However, at the Rome Conference, after a long and difficult discussion concerning defences, in order to reconcile between the aforementioned different approaches the defence of superior orders was limited to war crimes in Article 33.<sup>107</sup> The most controversial debate is related to this exclusion, in Article 33(2) of the superior orders defence from cases of genocide and crimes against humanity.<sup>108</sup> Scholars' views have been divided into two main schools concerning the defence of superior orders and the manifest illegality test under Article 33 of the Statute. The first view belongs to those scholars who have argued that the defence of superior orders should be recognised, as it is in Article 33, for war crimes, and possibly for the other two core crimes of crimes against humanity and genocide.<sup>109</sup> Some of these scholars argue that Article 33 has the balance right and that the superior orders defence should be allowed for war crimes but not for the other two core crimes.<sup>110</sup> Other scholars criticise Article 33 (2) and affirm that its position does not exist in customary law; Cryer, for instance, is of the view that the superior orders defence should not be automatically excluded even for cases of crimes against humanity or genocide.<sup>111</sup>

The third argument relates to whether superior orders should be accepted as a defence or as a mitigating factor. The Preparatory Committee on the 18th of December 1997 suggested that a superior order should not relieve an individual from criminal responsibility, as a defence, but that the Statute should follow the standard established by customary international law, in particular as codified by the Nuremberg Charter, the ICTY and ICTR, and the Draft Code of Crimes against the Peace and Security of Mankind,<sup>112</sup> and such an order should be accepted as a mitigating factor. In the final draft the Preparatory Committee provides 'there seems

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<sup>106</sup> See the *Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty-sixth session* (2 May - 22 July 1994), GA, Official Records, forty-ninth session, supplement No. 10, UN Doc. A/49/10, (SUPP), Art. 14 (1), at 83; it provides that: '1. The competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime.'

<sup>107</sup> See Rome Statute Article 33.

<sup>108</sup> Frulli M. *Supra* note 16, at 339.

<sup>109</sup> Cryer R. (2009), *Supra* note 9, at 65; Harris L. *Supra* note 90, at 212-13.

<sup>110</sup> McCoubrey H. (2001), *Supra* note 80, at 392-393; see also generally, Triffterer O. (2008), *Supra* note 90, 915-929.

<sup>111</sup> Cryer R. (2009), *Ibid*, at 63-67 and Cryer R. (2001), *Supra* note 19, at 14-16.

<sup>112</sup> See *Initial Summary Reports on December 1-12 Meetings of the UN Preparatory Committee* (December 18, 1997), *Supra* note 85, at 13, h.



to be an agreement on seeing certain superior orders as a mitigating circumstance.’<sup>113</sup> There were in fact two main approaches at the Rome Conference regarding the defence of superior orders.<sup>114</sup> Many insisted on maintaining the Nuremberg standard; they argued that the Statute should follow the two *ad hoc* (ICTY and ICTR) tribunals in regard to superior orders. However, other delegations were more cautious concerning superior orders defences.<sup>115</sup> Ultimately, however, according to the Chair of the Working Group, after a series of long and difficult debates at the Conference<sup>116</sup> the two opposing positions found a compromise<sup>117</sup> and agreed on Article 33, whereby superior orders were adopted as a defence for war crimes only. This Article provides that:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the Superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.<sup>118</sup>

This Article has adopted a conditional liability approach and required for the defence of superior orders three conditions. The first is that the accused should be under a legal obligation to obey the instruction; some interpreters have suggested that this requires the accused to be legally compelled to obey, and not for instance under threat of loss of his or her job if obedience is refused.<sup>119</sup> The second condition is that the accused ‘did not know that the order was unlawful’, and the third that the order was not manifestly unlawful. The uncertainty in this Article concerns the location of the burden of proof. Garraway suggests in regard to Article 67(1) (i) of the Statute that the burden of proof ‘can be placed on accused’,<sup>120</sup> but this view has not been

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<sup>113</sup> *Id.*

<sup>114</sup> See generally *UN Conference of Plenipotentiaries on the Establishment of the an International Criminal Court Supra* note 3.

<sup>115</sup> *Id.*, see the *original proposal of the United States*, UN Doc. A/CONF.183/C.1/WGCP/L.2 (16 June 1998).

<sup>116</sup> Cryer R. (2009), *Supra* note 9, at 52; he quotes Saland, who was the head of the Working Group at the Rome Conference; see also the Rome Conference, *Id*, Vol. II. *Ibid*, at 132, Para. 28.

<sup>117</sup> Cryer R. (2009), *Id*, at 63; he argues that the adoption of Article 33(2), was ‘based on a compromise on the inclusion of superior orders in the Rome Statute’.

<sup>118</sup> See the Rome Statute Art. 33.

<sup>119</sup> Garraway C. (1999), *Supra* note 15, at 4.

<sup>120</sup> *Id.*

specified in the Statute nor in the Rules of Procedure and Evidence.<sup>121</sup> Cryer argues that 'Article 33(2) is unclear on whether the relevant awareness of the context for crimes against humanity or specific intent for genocide is that of the superior or the subordinate.'<sup>122</sup> Furthermore, the Article does not prevent the accused from raising superior orders as a part of another defence such as duress.<sup>123</sup>

The fourth argument pertains to the question of the manifest illegality of war crimes; on this issue also scholars has been divided into two schools. The first view advocates the approach taken in Article 33; for example, McCoubrey asserts that cases reaching the ICC will most likely involve 'manifest illegality' in most instances anyway, and that the requirements of Article 33 are actually quite strict for the availability of a superior orders defence. He opines that Article 33 'is very far from being a carte-blanche for the commission of war crimes under the shelter of "orders"; it is on the contrary a protection for personnel who have been led unwittingly into unlawful conduct which they neither comprehended nor intended.'<sup>124</sup> Similarly, Garraway insists that '[t]he majority of [war] crimes [as listed under Article 8 of the Statute] are so manifestly illegal that the issue [of non-manifest unlawfulness as per Article 33] would never arise.'<sup>125</sup> However, one may question, if it is truly the case that such a defence (of superior orders in the case of non-manifest illegality of orders) would never happen, why this Article, after very difficult discussions and compromises, has been adopted in the Statute. It might have been extensively limited, but there is a possibility in practice for a defence to be raised by defendants accused of war crimes that they followed orders which did not seem illegal for them at that time.

Scholars such as Frulli, in order to justify the distinction made in Article 33 (2) between war crimes on the one hand and crimes against humanity and genocide on the other, have raised the idea that war crimes are less serious than the other two core crimes.<sup>126</sup> Frulli asserts that the exception of the recognition of self-defence for war crimes in Article 31(1) (c) for defence of a property which is essential for a

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<sup>121</sup> See *Rules of Procedure and Evidence*, Adopted by the Assembly of States Parties, First session (3-10 September 2002), Official Records ICC-ASP/1/3.

<sup>122</sup> Cryer R. (2009), *Supra* note 9, at 64.

<sup>123</sup> Garraway C. *Ibid*, at 4.

<sup>124</sup> McCoubrey H. (2001), *Supra* note 80, at 392.

<sup>125</sup> Garraway C. (1999), *Ibid*, at 4.

<sup>126</sup> Frulli M. *Supra* note 16, at 339; see also Cryer R. (2009), *Supra* note 9, at 65-67.

military purpose, as well as Article 33(2) affirm this argument.<sup>127</sup> Initially, such a contention might seem appropriate, but in fact I argue that it is not. Firstly, the Statute and its negotiation history at the Rome Conference have not articulated any such hierarchy. Secondly, the idea that crimes against humanity or genocide possess more seriousness than war crimes is debatable and is in contrast to the current practice of the ICTY. The *Tadic* case provides '[a] prohibited act committed as a crime against humanity, that is with an awareness that the act formed part of a widespread and systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime.(...)'.<sup>128</sup> Thirdly, it is hard to distinguish which of these international heinous crimes are more serious than the others; in fact, all international crimes are very serious, and war crimes, for instance, may be committed against an enormous number of victims. It seems that the policy of the Statute is one of showing a soft approach towards jurisdiction over war crimes in comparison with the other core crimes. There are several indications of this fact. On the one hand, Articles 33 and 31(as will be discussed in the next section) have departed from customary international law concerning war crimes, and on the other hand Article 124 provides that a state party, after the ratification of the Statute, can postpone the jurisdiction of the Court over war crimes for a period of seven years.<sup>129</sup> One may argue that this distinction between war crimes (non-manifestly illegal) and the other two core crimes (manifestly illegal) in Article 33 (2) might be because of political reasons.<sup>130</sup> Indeed, it might appear that the war crime provisions in the Statute are believed to have been essential in enticing some states to join the ICC. Regardless of the reasons behind this, these considerations confirm that the approach taken by the Rome Statute is a softening of the international legal approach to war crimes, despite such violations currently being increasingly displayed before the international community's scrutiny in the modern age.<sup>131</sup> In fact I would argue that this soft policy toward war crimes was a significant ground for the distinction being made in Article 33 (2) and that this distinction was also a result of political

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<sup>127</sup> Frulli M. *Id.*

<sup>128</sup> *Prosecutor v. Tadic*, ICTY, IT-94-1-A, Sentencing Judgment (14 July 1997), at 7.

<sup>129</sup> See the Rome Statute Art. 124; this Article has been extended for the next seven years in the ICC's first review conference in 2010 in Uganda.

<sup>130</sup> Frulli M. *Supra* note 16, at 340, she also accepts the political reason as a matter of concern, but she attempts to justify the distinction based on the idea of the greater seriousness of the crimes of genocide and crimes against humanity.

<sup>131</sup> McCoubrey H. (2001), *Supra* note 80, at 386, he argues (incorrectly, in my view), that such a softening is only apparent and not real.

considerations in the form of compromises concerning including the superior orders defence in the Statute<sup>132</sup> at the Rome Conference.

In addition to the aforementioned arguments, scholars such as Garraway have asserted that Article 33 is not at all a withdrawal from the position of the prior international tribunals and the Nuremberg Charter (i.e. from customary international law). He has argued that, due to the fact that the alleged crimes at Nuremberg were so heinous, ‘the absolute nature of the denial of the superiors defence made little or no difference’.<sup>133</sup> However, I argue that the Statute has departed from customary international law both in the recognition of superior orders as defence and on the issue of the non-manifest illegality of war crimes. The inclusion of the superior orders defence in Article 33 is a ‘regression’ in the progress of international criminal justice, since it was generally rejected in the post-war tribunals. As many scholars, such as Cassese and Gaeta for instance, have argued, superior orders never was a defence in customary international law even for war crimes, though it appeared as a mitigation factor; and given the manifest list of war crimes in Article 8, the circumstances of Article 33’s applicability seem unclear.<sup>134</sup> Assuming a case meeting Article 33’s requirements, however, an accused would be in possession of an absolute defence that would warrant an acquittal.

This conclusion is first of all at odds with *lex lata*, under which any order to commit an international crime — regardless of its classification — is illegal and therefore may not be urged in defence by the subordinate who obeys the order. Secondly, it is all the more surprising because Article 8 of the Rome Statute is intended to specify and enumerate through an exhaustive list the war crimes falling under the ICC jurisdiction...it would be ‘manifest’ in the text of the Rome Statute itself....Article 33 must be faulted as marking a retrogression with respect to existing customary law.<sup>135</sup>

It is true that, as noted in the above quote, with such specifications of war crimes as are found in Article 8 of the Rome Statute, any crime there enumerated would be nothing less than ‘manifest’ in the text of the Statute. Therefore, Article 33 (2) recognises a complete defence<sup>136</sup> of superior orders, through a claim of obedience to superior orders, where the order was not manifestly unlawful, in the case of war crimes, while it was mitigation factor in customary law. Given the fact that war

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<sup>132</sup> E.g. see Cryer R. (2009), *Supra* note 9, at 63; he argues that the adoption of Article 33(2), was ‘based on a compromise on the inclusion of superior orders in the Rome Statute’.

<sup>133</sup> Garraway C. (1999), *Supra* note 15, at 1.

<sup>134</sup> Cassese A. (1999), *Supra* note 16, at 156; Gaeta P. (1999), *Supra* note 5, at 187; Frulli M. *Supra* note 16, at 340.

<sup>135</sup> Cassese A. (1999), *Id.*, at 156-157.

<sup>136</sup> *Id.*

crimes have been codified in more detail in Article 8 of the Statute, such a claim may be difficult to justify before the Court, but the claim has been provided as a defence instead of a mitigating factor, and so criminal responsibility may be excluded. Where a subordinate has met the other requirements of Article 33 (1) such as being under obligation to obey orders, superior orders could be used as defence, or the accused could raise other defences, such as duress, mistake of fact, etc.,<sup>137</sup> which are recognised as defences under the Statute.<sup>138</sup> Given the Statute's proclamation in its preamble, it seems that, instead of softening its approach, it should have followed a restrictive approach concerning the defence of superior orders and followed customary international law in order better to achieve its main objective of combating impunity and deterring such crimes. However, what remains is the question of the liability of superiors; it is not easy to bring them to trial.<sup>139</sup> The difficulties surrounding the case of President Al-Bashir (discussed in Chapter III) have proved the importance of such practical issues.

Therefore, it may be stated that the drafters of the Rome Statute 'restored' superior orders as a defence in Article 33 through their adoption of a different approach to the international tribunals following World War II and the statutes of the *ad hoc* tribunals on this matter. In fact, Article 33(2) through the recognition of the complete defence of obedience to superior orders for subordinates, who may claim that their orders were not manifestly illegal in order to escape from liability, does create impunity, or can at least facilitate impunity.

#### **4.2.3. Self-defence**

The principle of self-defence and defence of others, with its conditions of application such as a threat of imminent death or serious bodily harm, is recognised in most national criminal procedures. The European Convention for the Protection of Human Rights, for example, has recognised self-defence as removing the obligation of respecting the right to life.<sup>140</sup> Self-defence is codified in the Rome Statute in Article

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<sup>137</sup> With a mistake of fact there is no direct link with impunity as there is no *means rea*, e.g. the case of a soldier who obeyed an order and attacked civilians, when he had been told he was attacking a military base.

<sup>138</sup> See the Rome Statute, Art. 31 and 32.

<sup>139</sup> McCoubrey H. (2001), *Supra* note 80, at 393.

<sup>140</sup> See Art. 2(2), (a), *the Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), *Supra* note 63. It states: 'Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a), in defence of any person from unlawful violence; ...'

31. Similarly to other Articles concerning defences, this Article was a difficult and controversial topic at the Rome Conference and was attended by lengthy discussion as to the conceptual differences in various legal systems involved in defining such terms as ‘self-defence’.<sup>141</sup> Article 31(1) and (c) provide as follows:

[A] person shall not be criminally responsible if, at the time of that person’s conduct:...The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;<sup>142</sup>

We can gather from this the requirements needed for self-defence to be acceptable under Article 31(1) (c). First, the accused must have been acting ‘reasonably’; second, his or her reaction should be proportional; third, it should be against an imminent attack or force; and finally, their action must be unlawful. The most controversial aspect of Article 31(c) concerns the inclusion within the grounds of self-defence a reference to defence of property necessary or a military mission; and this question prompted extended discussion in both the Preparatory Committee<sup>143</sup> and at the Rome Diplomatic Conference.<sup>144</sup>

The working group provided five footnotes to accompany the Article. The first of these specified that this provision only applied to individuals and would not apply to the use of force by states. ‘This provision only applies to action by individuals during an armed conflict. It is not intended to apply to the use of force by States, which is governed by applicable international law’.<sup>145</sup>

Furthermore, footnote 2 was applied to the word ‘imminent’ in line 4 and stated: ‘This provision is not intended to apply to international rules applicable to the

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<sup>141</sup> See *Summary Records of the Meeting of the Committee of the Whole* UN Doc. A/CONF.183/C.1/SR.I. (20 November 1998), Para 26 and 28; see also *United Nation Official records*, *supra* note 3, Vol, II, at 132; see also Schabas W. *Supra* note 14, at 108.

<sup>142</sup> Rome Statute Art. 31 (1), and (c).

<sup>143</sup> See the *Preparatory Committee of the Establishment of the International Criminal Court*. *Supra* note, at 11, e.

<sup>144</sup> See *Diplomatic Conference Committee of the Whole Summary Record of the 24 Meeting*, UN Doc. A/CONF. 183/C.1/SR. 24 (20 November 1998), and *Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGPP/L.4/Add.3 (7 July 1998).

<sup>145</sup> *Id*, Vol, II, *supra* note 3, at 274, some delegations were of the view that this was applicable only in the context of a lawful operation, referred to the whole paragraph. Footnote 5 contained the important interpretative statement that cases of voluntary exposure were understood to be dealt with under Art. 31, Para, 2.

use of force by States'. Therefore, it seems that the new doctrine of *pre-emptive* defence (which is based on the existence of a mere threat to the security of a state) has no place in the Rome Statute. Neither has it been accepted among the international community yet.<sup>146</sup>

There are at least two issues that arise concerning the recognition of the right of self-defence for essential property in war crimes. First, there is a *practical issue*, namely how it is possible to imagine what kind of property would be so important and essential to 'accomplishing a military mission' that it would be justifiable for those who committed widespread war crimes to go unpunished (or how their defence should be recognised). Although in practice it would be very hard to identify such essential property,<sup>147</sup> if found or exemplified the question then arises as to how it could be acceptable to commit war crimes in defence of such property. Second, there is the issue of principle. It might be quite legitimate, for example, to target enemy personnel in defence of military installations, but that, of course, is not what is contemplated by this article. What is suggested is that there may be certain instances in which the commission of a war crime may be excused because of the need to defend that installation or equipment. To the extent, furthermore, that this particular defence was an entirely novel one, the provisions of Article 31(1) (c) have never been recognised as constituting a defence before.<sup>148</sup> It would appear to increase greatly the available scope of 'self-defence' for war crimes.<sup>149</sup> Cassese asserts that 'it is highly questionable to extend the notion at issue to the need to protect [such property]. This extension is manifestly outside the *lex lata* and may generate quite a few misgivings'.<sup>150</sup>

As argued by Cassese, this Article goes beyond *lex lata* (the law as it exists) and clearly the extension of the notion of self-defence to include protecting a 'property which is essential to accomplish a military mission' is highly controversial. The recognition of such defences for military property in this Article once again indicates the soft approach of the ICC in the jurisdiction of war crimes, and it may run

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<sup>146</sup> The new doctrine of *pre-emptive* defence has been theorised by the US President George W. Bush in 2002; see also Ronzitti N. 'The Expanding Law of Self-Defence', 11 *Journal of Conflict and Security Law* (2006), 343, at 343; see also the *UN Nations General Assembly Fifty-ninth Session Report, Follow-up to the outcome of the Millennium Summit*, UN Doc. A/59/565 (2 December 2004), Para 189 and 191, 2 December 2004.

<sup>147</sup> See Gilbert J. *Supra* note 1, at 149.

<sup>148</sup> Cryer R. (2001), *Supra* note 19, at 17.

<sup>149</sup> Frulli M. *Supra* note 16, at 339; Cassese A. (1999), *Supra* note 16, at 154-155.

<sup>150</sup> Cassese A. *Id.*, at 154.

contrary to the main purpose of the ICC. It does raise the obvious question as to whether, in excluding criminal responsibility for purposes of the Statute (but not necessarily for purposes of customary international law) it might facilitate impunity through its absolution of such acts from criminal liability. If, for example, a person were to be brought to trial before the ICC, and with reasonable grounds assert that he killed civilians in order to protect some property which was essential for a military purpose, the Court should accept this as a complete defence and such an accused would not be held responsible for his wrongdoing.

#### ***4.3. The defence of duress***

Another defence that is commonly raised in conjunction with superior orders is the defence of duress, which has been listed in Article 31 of the Rome Statute as one of the grounds which exclude criminal liability. There are several arguments concerning duress in connection with the Statute. The first argument is concerned with the duress regulations in the ICC and the question of whether it was adopted as a defence or a mitigating factor. The second argument concerns the scope of duress, i.e. whether or not duress should be applicable to all crimes in the ICC. I argue that despite the ICC's Rule of Procedure, which state the possibility of a plea of duress acting in mitigation, the Statute also make it possible that duress be available as a defence for all crimes, and in the latter situation it may facilitate impunity. Prior to these arguments, it is worthwhile knowing what the situation regarding duress has been in the different criminal justice systems and in the post-war tribunals.

Duress in many national criminal systems has been recognised either as a defence or as a mitigating factor which may cause the criminal responsibility of individuals to vanish as the result of a threat of coercion or in circumstances which have effectively removed his or her free will. However, in most legal systems duress is not acceptable for all types of crime; for instance, if B murdered C because of a serious threat to his body by A (third party) this would not be recognised as an absolute defence. Some legal systems, such as common law countries, exclude this defence for the most serious crimes, such as murder, treason, piracy or sexual assault.<sup>151</sup> The logic of this position is based on the fact that the defence of duress assumes that the accused has avoided a greater harm, which does not apply when an

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<sup>151</sup> E.g. the *Criminal Code of Canada*, C 46, Art. 17. In the UK the House of Lords has held in (*R v Howe* [1987] AC 417, that duress does not apply as a defence to charges of murder and attempted murder in (*R v Gotts* [1992] 2 AC 412).



individual has killed another person in order to save his or her own life.<sup>152</sup> A similar principle is found in Sharia law behind the exclusion of the defence of duress in case of murder. According to the Sharia law, it is unacceptable to kill people simply because of a threat to one's own body.<sup>153</sup> A further reason for this may be found in the principle of non-discrimination: if both murderer and victim are recognised as having equal value no preference can be made between them and the murderer's defence of duress must therefore be rejected. In some civil-law countries duress is also excluded for serious crimes such as murder. For example, in Iran, according to the Iranian Criminal Code, duress is excluded for murder, although in some circumstances it may be acceptable as a mitigating factor.<sup>154</sup>

Prior to the Rome Statute the defence of duress was more often seen as a mitigating factor than as an absolute defence,<sup>155</sup> and often it was linked with the superior orders defence.<sup>156</sup> Although the plea of necessity was often rejected in the Military Tribunals after World War II, duress, by contrast, was accepted as a defence as part of the plea of superior orders.<sup>157</sup> The Rome Statute codified duress in Article 31. Although duress and necessity are generally distinguished as two distinct defences in the common law system,<sup>158</sup> the Rome Statute in its final draft, in contrast to the pre-Rome Conference proposal, does not distinguish between necessity and duress, but mixes them together.<sup>159</sup>

Concerning the first argument mentioned above, regarding whether duress is to be considered as defence or a mitigating factor: duress has been listed under '[g]rounds for excluding criminal responsibility' in Article 31 (1) (d) of the Rome Statute, and could thus comprise a complete defence, and it is also available for all crimes within the jurisdiction of the ICC.<sup>160</sup> Some believe that this is a revolution in international law.<sup>161</sup> However, the Rules of Procedure and Evidence provide: 'the

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<sup>152</sup> Gilbert J. *Supra* note 1, at 151.

<sup>153</sup> Jafari Langroudi M. J. *Alfaregh* (2006), Vol, I, at 350-352, in Farsi.

<sup>154</sup> *Iranian Criminal Code* Art. 211.

<sup>155</sup> Gilbert J. *Ibid*, at 151.

<sup>156</sup> E.g. *Law Reports of Trials of War Criminals Selected and prepared by the UN. War Crimes Commission, The German High Command Trial London Publisher for the UN. War Crimes Commission by the Majesty's Stationery Office* (1949), XII, 'the plea of superior orders and military necessity,' at 12, and 72.

<sup>157</sup> *Id*, at 127, and Vol, X at 54-57.

<sup>158</sup> Werle G. *Principle of International Criminal Law* (2005), at 144; it could be said that necessity is a justification and duress is a mere excuse.

<sup>159</sup> Eser A. (1999), *Supra* note 90, at 869-870.

<sup>160</sup> See the Rome Statute Art. 31 (d).

<sup>161</sup> Gilbert J. *Supra* note 1, at 153.

Court shall take into account, as appropriate: (a) Mitigating circumstances such as: (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress'.<sup>162</sup> This is only rule that states that duress is adopted as a mitigating factor in the ICC. One may argue that this Rule of Procedure, which is procedural in nature, cannot be interpreted in a contrary fashion to the substantive law - the Rome Statute - and deny the complete exclusion of liability - duress as a defence - which has been clearly stated in Article 31. I think it may be said that the judge of the ICC either can decide to allow duress as a defence under the Statute or as a mitigating factor pursuant to the Rules of Procedure.

It has been mentioned that the plea of duress is usually mixed with the defence of superior orders.<sup>163</sup> In fact, superior orders has also adopted as a defence in the Statute in cases of war crimes, so it is clear that the plea of duress in conjunction with superior orders can be accepted as defence at the ICC. It is significant to imagine different scenarios in this connection. The first scenario is one in which a military commander in a war orders soldiers to kill civilians when he is behind the soldiers and says to them that they will be shot to death if they refuse the order; this is obviously coercive and this should be recognised as a defence due to the absence of moral choice available to the soldiers and the fact that there is no other option for the soldiers enabling them to escape from the situation. Duress should here be treated as a defence on the basis of 'coercion or lack of moral choice',<sup>164</sup> or perhaps extreme necessity, which is broader than duress.<sup>165</sup> The second scenario is where a commander in the above example says to the soldiers that if they do not follow the orders they will be put on military trial or may be hanged or may lose their jobs; duress here should not be accepted as a defence, but it may be justifiable for it to be

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<sup>162</sup> See the *Rules of Procedure and Evidence of the ICC*, Art.145 (2), (a), (i).

<sup>163</sup> Cryer R. (2009), *Supra* note 9, at 55; *Prosecutor v. Erdemovic, Separate and Dissenting Opinion of Judge Cassese*, *supra* note 24, Para 15; see also this case's Trial Chamber, IT-96-22-T (29 November 1996), Para 20. This Case in the ICTY tribunal is an example of the accompaniment of duress with superior orders. The Sentencing Judgment states: '20. On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defence of duress accompanying the superior order will, as the Secretary-General seems to suggest in his report, be taken into account at the same time as other factors in the consideration of mitigating circumstances.'

<sup>164</sup> See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, UN Doc. S/25704 (3 May 1993), Para 57.

<sup>165</sup> *Prosecutor v. Erdemovic, Separate and Dissenting Opinion of Judge Cassese. Ibid*, Para 14.

accepted as mitigating circumstances. This is due to the fact that the degree of duress does not comprise a strong and immediate threat.

In practice the ICC has not dealt with the plea of duress so far. As has been mentioned, duress was a mitigating factor under previous international tribunals and not a complete defence. However, in the ICTY in the *Erdemovic* case, one of the primary issues of the case in both the Trial and the Appeal Chambers concerned the question as to whether or not duress affords a complete defence to a soldier who has killed innocent people. *Erdemovic* stated that he was under military hierarchy obligation to obey his commander's orders and affirmed that his actions were undertaken under duress, as if he had refused the order he would have been killed.<sup>166</sup> The Trial Chamber found that his duty was nevertheless to disobey and provided that the defence of duress would be taken into account as a mitigating circumstance only.<sup>167</sup> The majority in the Appeals Chamber rejected duress as a complete defence;<sup>168</sup> the Chamber found that no customary rule exists in international law on the question of duress as a defence to a charge of killing innocent persons,<sup>169</sup> and accordingly looked to the 'general principles of law recognised by civilised nations' for guidance on this issue. The majority in the Appeals Chamber concluded:

[D]uress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives...In the result, we do not consider the plea of the Appellant was equivocal as duress does not afford a complete defence in international law to a charge of a crime against humanity or a war crime which involves the killing of innocent human beings.<sup>170</sup>

The ICTY Appeal Chamber, in the above citation, in its majority decision denied the availability of duress as absolute defence for all crimes; however, it seems that

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<sup>166</sup> *Prosecutor v. Erdemovic*, ICTY, Transcript of Proceedings, (20 Nov 1996), at 828-29; see also Appeal Chamber, IT-96-22-A (7 October 1997), at 6, Para 7, he claims that 'he received the order from Brano Gojkovi and he told him "If you don't wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you."'

<sup>167</sup> *Prosecutor v. Erdemovic*, ICTY, IT-96-22-T, (29 Nov 1996), Para. 18-20.

<sup>168</sup> See *Prosecutor v. Erdemovic*, Judgement, ICTY, IT-96-22-A, (7 October 1997), Para 19, and Joint Separate Opinion of Judge McDonald and Judge Vohrah, Para. 88-91. In the Judgement it is stated that: 'For the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah and in the Separate and Dissenting Opinion of Judge Li, the majority of the Appeals Chamber finds that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. Consequently, the majority of the Appeals Chamber finds that the guilty plea of the Appellant was not equivocal. Judge Cassese and Judge Stephen dissent from this view for the reasons set out in their Separate and Dissenting Opinions. *Erdemovic* had claimed that he was under threat of being shot to death (see *Prosecutor v. Erdemovic*, Sentencing Judgment, ICTY, IT-96-22-T, (29 November 1996), Para. 80, but the Court did not confirm this, see *Ibid.* Para. 91.

<sup>169</sup> *Prosecutor v. Erdemovic*, ICTY, Appeals Chamber. *Id.*, Para 55.

<sup>170</sup> *Id.*, Para 88-89.

the duress has been rejected on evidentiary grounds. The Appeals Chamber provided that the appellant '*Erdemovic*'s claims regarding extreme necessity and duress via order and threat from his hierarchical military superiors had not been proved.<sup>171</sup> '[T]he Trial Chamber considered that these were insufficiently proven since the Appellant's testimony in this regard had not been corroborated by independent evidence'.<sup>172</sup> As to the first issue, (unavailability of duress as defence) it seems that the evidentiary ground was not necessary; it only would be applicable where the Court was examining the availability of duress as a mitigating factor on evidentiary grounds. The Appeals Chamber did, however, point out his situation as mitigating circumstances.<sup>173</sup>

Many scholars have criticised the majority's judgment concerning the non-availability of duress as a complete defence harshly; one commentator argued that *Erdemovic* did not have free will for the commission of crimes and should not have stood on trial; his trial at the ICTY was described as 'self-defeating'.<sup>174</sup> Cryer noted that the rejection of duress as a defence in the *Erdemovic* case has been the subject of many negative remarks and did not embody the law, observing that this case rejected the defence of duress for killings only and not for all offences.<sup>175</sup> The above criticisms by scholars, are in fact similar to the minority opinion in the Appeals Chamber including Judge Cassese, believe that that duress could be a complete defence;<sup>176</sup> according to Judge Newman, the minority's decision was based on precedent in international law, while the majority's decision was based on policy considerations: 'including the fear that allowing such a defence may encourage heinous conduct committed by radical elements in the world.'<sup>177</sup> Although there are reasonable grounds for the above criticisms by scholars, it seems that the same policy consideration by the majority should be applicable for the ICC to combat impunity.

The second argument concerning duress addresses the issue of whether duress should be adopted as defence for all crimes in the ICC, or should be excluded for some crimes. Scholars of one opinion hold that duress in circumstances such as

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<sup>171</sup> *Id.*, at 8 (b).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* This conflict of decisions by the Appeal Chamber would be justifiable if the plea of duress has been raised in several counts of crimes by the same defendant.

<sup>174</sup> Rua W. I. *Supra* note 26, at 724.

<sup>175</sup> Cryer R. (2001), *Supra* note 19, at 17, see footnote 94.

<sup>176</sup> *Prosecutor v. Erdemovic, Separate and Dissenting Opinion of Judge Cassese, supra* note 24, Para 11.

<sup>177</sup> Newman M.S.C. *Supra* note 23, at 168-169.

imminent physical threat to life or limb, reasonable acts to avoid that threat, and lack of intention to cause greater harm, should be accepted as a defence. Extreme duress such as an immediate coercive threat to body has been logically accepted as a complete defence in many national law systems,<sup>178</sup> although rejected in others;<sup>179</sup> as has been mentioned, however, in many national law systems where it is otherwise accepted, the plea of defence has been rejected for crimes such as murder, on the grounds of the potential danger to society which could otherwise result.<sup>180</sup> Sharia law also does not recognise the defence of duress for serious crimes such as murder, if the threat is not coercive. However, duress is nevertheless justifiable as a mitigation factor. Professor Cryer has also raised the point that in many states the death penalty has been abolished, so that the refusal to obey an order in such countries does not have consequences which could enable one to consider a subordinate to be following an order under duress.<sup>181</sup> It may thus be argued that the availability of duress as a defence for all crimes including murder could encourage some in the commission of crimes, in particular when it has been pleaded in conjunction with the defence of superior orders under Article 33 as complete defence; this would be an instance of impunity recognised by the Rome Statute. Although the Rules of Procedure and Evidence (RPE) accepted duress in mitigation, which is compatible with customary international law, the main issue is the possible availability of the defence of duress for all crimes under Article 31 is a matter of concern. As Article 51 (5) of the Statute provides in case of conflict between the RPE and the Statute, the Statute 'shall prevail', thus, if duress is accepted as a complete defence for all crimes, may facilitate impunity and would clearly impinge upon the ability of the Rome Statute to act as a deterrent.

Furthermore, if we bear in mind the Statute's proclamation in the Preamble of its intention of ending impunity, the Statute should at least follow national law and adopt a restrictive approach to the availability of duress as defence for such heinous international crimes, often with large numbers of victims, as fall within the ICC's jurisdiction. It seems that Newman rightly stated that the decision of the majority in the *Erdemovic* case was a policy consideration,<sup>182</sup> as the non-availability of such a

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<sup>178</sup> See *supra* note 2.

<sup>179</sup> Such as Poland and Norway.

<sup>180</sup> McDonald G. k. (1998), *Supra* note 27, at 49.

<sup>181</sup> Cryer R. (2009), *Supra* note 9, at 58.

<sup>182</sup> Newman M.S.C. *Supra* note 23, at 169-170.

defence could indeed act as a deterrent to the commission of future heinous crimes. Although the majority referred to an absolute moral principle, McDonald has suggested that this principle derives from the Geneva Conventions: the absolute statement that ‘a soldier should die rather than kill innocent civilians.’<sup>183</sup> As the majority held, ‘those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives.’<sup>184</sup>

#### **4.4. Command and civilian superiors’ responsibility**

The Rome Statute has adopted a different standard and threshold of liability for military and non-military superiors under Article 28 (a) and (b) of the Statute. The main argument of this section is firstly to highlight such a distinction and to argue that it was unnecessary and problematic. I seek furthermore to discuss how the higher threshold of liability may facilitate impunity for civilian superiors.

Command responsibility is based on the doctrine that commanders have a duty to control their subordinates.<sup>185</sup> It has been defined ‘the liability of superiors for crimes committed by forces not ordered by that superior, but tolerated or ignored by him or her’.<sup>186</sup> Hence this doctrine implies, in other words, a form of ‘imputed liability.’<sup>187</sup> The significant of the superiors’ responsibility is that this notion has been explained as “an original creation of international criminal law” for which there are no paradigms in national legal system’.<sup>188</sup> However, it is not always easy to establish indirect responsibility for superiors who did not participate in the commission of crimes, so the application of command responsibility may in practice be confined to a limited number of such cases.<sup>189</sup>

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<sup>183</sup> McDonald G.K. *Supra* note 27, at 48.

<sup>184</sup> *Prosecutor v. Erdemovic*. *Supra* note 168, Para 80.

<sup>185</sup> Park M.W. ‘Command Responsibility for War Crimes’, 62 *Military Law Review* (1973), 1, at 3.

<sup>186</sup> Cryer R. *Prosecuting International Crimes, Selectivity and the International Criminal Law regime* (2005), at 316; for definition of command responsibility see also Garraway C. ‘Command Responsibility: victors’ justice or just desserts?’, Burchill and *et al* (eds), in *International Conflict and Security Law*, Cambridge Online Publication (July 2009), 68, at 68-70.

<sup>187</sup> Bantekas I. ‘The Contemporary Law of Superior Responsibility’, 93 *American Journal of International Law* (1999), 573, at 577; Damaska M. ‘The Shadow Side of Command Responsibility’, 49 *American Journal of Comparative Law* (2001), 455, at 461; see also generally Unterhalter D. ‘The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another?’ 105 *African Law Journal* (1988), 671.

<sup>188</sup> Werle G. (2005), *Supra* note 158, at margin number 368.

<sup>189</sup> Bonafe B.I. ‘Command Responsibility between Personal Culpability and Objective Liability: Finding a Proper Role for Command Responsibility’, 5 *Journal of International Criminal Justice* (2007), 599, at 599 and 568.

In the practice of the Leipzig Trials in Germany after World War I, military commanders were held criminally responsible for offences committed by their subordinates, where they had failed to prevent or punish the perpetrators; this occurred in the *Llandovery Castle* case.<sup>190</sup> Command responsibility was not explicitly mentioned in the Charters of Nuremberg and Tokyo, but in practice they dealt with command responsibility indirectly.<sup>191</sup> The notion of command responsibility was for the first time given specific recognition in treaty form in Article 86(2) of Additional Protocol 1 of 1977 for grave breaches of humanitarian law.<sup>192</sup>

The first major modern case involving command responsibility was the *General Yamashita case*<sup>193</sup> in the US in the aftermath of World War II. General Yamashita was convicted for the actions of his troops in the killing of civilians in Philippines, because his failure to prevent them in fact allowed his soldiers to commit atrocities. Although there was no requisite finding made by the American military commission regarding the knowledge the General actually had concerning the crimes his troops committed, it was believed that ‘the crimes [were] so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused’.<sup>194</sup> He was sentenced to execution by the US Court.

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<sup>190</sup> In the *Llandovery Castle* case, the command of a German U-boat, Helmut Brümmer-Patzig, was found responsible for failure to punish; see also the *Emil Muller* case concerning a camp commander who was acquitted because he had reported the unfortunate condition of the camp, whereupon the responsibility was transferred to his superior. *Supra* note 40.

<sup>191</sup> Cryer R. (2001), *Supra* note 19, at 24-25.

<sup>192</sup> See the *Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, UNTS 1125/3 (Adopted on 8 June 1977), Art. 86(2), it provides: ‘The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility,....’

<sup>193</sup> General Tomoyuki Yamashita was commander of the Japanese 14<sup>TH</sup> Area Army in the Philippines on October 9, 1944. The Japanese soldiers under Yamashita’s command killed between thirty to forty thousand Filipino citizens during the fight for Manila and the main island of Luzon and committed horrific abuses on the civilian populations. The legal question at that time was whether Yamashita was responsible for actions of his troops. He surrendered to US military forces in the Philippines on September 3, 1945, and after trial he convicted to death for the violation of the law of war. See the Second Instrument of Surrender Document, Instrument of Surrender of the Japanese and Japanese-Controlled Armed Forces in the Philippine Islands to the Commanding General United States Army Forces, Western Pacific. (3 September 1945), See 327 *US 1 Cases* Adjudged in the Supreme Court of the United States at October (1945), see also Wilson R. J. ‘A History of the Role of Defense Counsel in International Criminal and War Crimes Tribunals’, in Bohlander M, Boed, R, and Wilson R (eds), *Defense in International Criminal Proceedings, Cases Materials and Commentary* (2006), 31, at 50-52; see also generally Smidt M.L. ‘Yamashita, Media, and Beyond Yamashita, Med Ina, and Beyond: Command Responsibility in Contemporary Military Operation,’ 164 *Military Law Review* (2000), 155.

<sup>194</sup> See *US v. Yamashita* (1946), the US Supreme Court 327 US 1.

The ICTY Statute in Article 7 (3) identically to Article 6 (3) of the ICTR Statute, deals with command responsibility for the acts of subordinates; it provides for the liability of a commander on the basis of failure to act ‘if he knew or had reason to know that the subordinate was about to commit such acts and had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish perpetrators thereof’.<sup>195</sup> The ‘reason to know’ clause stipulates that a commander who is in possession of information of enough quantity and quality as to be put on notice of subordinate criminal activity cannot escape from criminal responsibility by announcing his ignorance, even if such ignorance is amply established.

In the practice of the ICTY tribunal, the *Celebici* case dealt with command responsibility; in it, three persons of different levels of authority over a prisoner of war in *Celebici* camp, namely the deputy warden, the warden and a civilian co-ordinator of affairs of the camp, were charged with several offences against prisoners that had been perpetrated by personnel at the camp.<sup>196</sup> The ICTY in the *Celebici* case compiled a threefold requirement for responsibility of superiors. The first is that there should exist a superior and subordinate relationship; the second that the defendant should know or have reason to know that their subordinates were about to commit, or had committed, such crimes; and finally, the defendant should have failed to take reasonable measures to prevent or punish such criminals.<sup>197</sup> The point is that the *Celebici* case affirmed that the doctrine of superiors’ responsibility applied to all persons, ‘not only military commanders, but also civilians holding positions of authority’<sup>198</sup> and not only the persons ‘on *de jure* (formal) authority’, but also those in a position of ‘*de facto* (informal) command and control, or a combination of both’.<sup>199</sup> Thus, the superior and subordinate relationship may be established either by law, as in the case of *de jure* authority, or may on the basis of proof, as in *de facto* command situations. In the latter case, the evidence should show an effective (*de facto*) control over subordinates. The ICTY in the *Celebici* case held that:

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<sup>195</sup> The ICTY Statute Art.7 (3), and the ICTR Statute Art. 6 (3).

<sup>196</sup> See *Prosecutor v. Zejnil Delalic and others*, ICTY, Trial Chamber Judgment , IT-96-21-T (16 November 1998), at 127-128, Para 345. In this case, for example, *Zdravko Mucic*, as commander of the *Celebici* prison-camp, was charged pursuant to Art. 7(3), with responsibility as a superior for the crimes alleged at the time and found guilty in violation of customs of war. See the above, count no. 49.

<sup>197</sup> *Celebici Case. Id.*, at 127- Para 344-400.

<sup>198</sup> *Id.*, at 142, Para 363

<sup>199</sup> *Id.*, at 137, Para 348.



Mr. Mucic was the *de facto* commander of the *CelebiCi* prison-camp. He exercised *de facto* authority over the prison-camp, the deputy commander and the guards. Mr. Mucic is accordingly criminally responsible for the acts of the personnel in the *CelebiCi* prison-camp, on the basis of the principle of superior responsibility.<sup>200</sup>

According to Garraway, the ICTY extended the concept of control too far in the *Celebici* case, to included ‘substantial influence’.<sup>201</sup> The ICTY jurisprudence indicates that general knowledge (not knowledge of the details) of the base crime is enough to incur command responsibility. In the case of genocide, the superior needs to possess knowledge of the subordinate’s genocidal intent, but need not have a genocidal intent him- or herself.<sup>202</sup>

The ICTR Appeals Chamber in the *Bagilishema* case confirmed that civilian superiors’ command responsibility required ‘a degree of control over [subordinates] which is similar to the degree of control of military commanders;’ it thus confirmed the same threshold of effective control for civilian superiors, but it clarified that effective control need not be employed or established in the same way by civilian superiors and military commanders.<sup>203</sup>

At the Rome Conference the delegates in charge of drafting were divided into two groups; one group advocate similar thresholds of liability for command and civilian superiors, while the second group asserted that these should be different. The first approach was supported mainly by Mexico,<sup>204</sup> while the second (conditional) approach was based on a draft proposal by the United States delegate Ms. Broek<sup>205</sup> and advocated by some other countries’ delegates such as Jordan,<sup>206</sup> Russia,<sup>207</sup> and South Africa.<sup>208</sup> The United States suggested that it is necessary to distinguish between *de jure* and *de facto* civilian superior responsibility (thus differentiating between military and civilian superior responsibility) and that a hierarchy of civilian

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<sup>200</sup> *Id.*, at 279, Para 775.

<sup>201</sup> Garraway C. (2009), *Supra* note 186, at 77.

<sup>202</sup> See *Decision on the Defence Motion on the Form of Indictment, Krnojelac*, ICTY, IT-97-25-T, Trial Chamber, (24 February 1999), Para 46, footnote 26; the ICTY found that the prosecution need prove only the ‘category’ of the perpetrating subordinates and not necessarily their exact identity.

<sup>203</sup> *Prosecutor v. Ignace Bagilishema*, the Appeal Chamber, Judgment, (reasons), ICTR-95-1A-A (3 July 2002), at Para 52. Similarly, in the *Celebici* case also the Pre- Trial Chamber held: ‘for a civilian superior’s degree of control to be “similar to” that of a military commander, the control over subordinates must be “effective”, and the superior must have the “material ability” to prevent and punish any offences.’ See *Celebici* case Judgement, *supra* note 196, Para , 43.

<sup>204</sup> See *the UN Diplomatic Conference, Official records, supra* note 2, Vol, II, at 138, Para 80 and 8, Para 74 and 80.

<sup>205</sup> *Id.*, at 136-137, Para 67 and 68.

<sup>206</sup> *Id.*, at 137, Para 72.

<sup>207</sup> *Id.*, at 138, Para 78.

<sup>208</sup> *Id.*, at 137, Para 71.

superiors could reach as far as the head of state, who could not be made to answer for actions which he did not know of or have direct responsibility for. Accordingly, responsibility based upon what a person knew or should have known must be different in the case of civilian superiors and military ones. The latter should be responsible, and it is expected that a commander ‘should have known’ that his forces were about to commit criminal acts;<sup>209</sup> whereas the former should not be responsible because this standard of negligence is not appropriate in a civilian context, being contrary to normal principles of responsibility under criminal law. Furthermore, civilian supervisors are responsible for their subordinates only while the latter are at work, and not for any acts committed outside the workplace in an individual capacity, whereas military commanders are responsible for forces under their control at all times.<sup>210</sup>

According to Professor Garraway, who was a member of the UK delegation at the Rome Conference, Article 28, concerning command and superior responsibility, was one of the most difficult Articles and was the subject of very extensive discussion: ‘[a]most every word was fought over’.<sup>211</sup> In the end, separate forms of liability were adopted for military commanders and civilian superiors in Article 28 (a) and (b). This new approach in this Article has proved controversial and has involved intricate issues which have been reflected in a vast academic literature.<sup>212</sup> Article 28(a) deals with ‘military commander[s]’ and individuals ‘effectively acting as...military commander[s];’ it thus includes *de facto* military command. Article 28 (b) on the other hand, deals with civilian superiors and all superior-subordinate relationships not included in the compass of Article 28 (a).

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<sup>209</sup> *Id.*, at 137, Para 67.

<sup>210</sup> *Id.*, at 138, Para 68.

<sup>211</sup> Garraway C. (2009), *Supra* note 186, at 79.

<sup>212</sup> See e.g. Karsten N. ‘Distinguishing Military and Non-military Superiors, Reflections on the Bemba Case at the ICC’, 7 *Journal of International Criminal Justice* (2009), 983; Nerlich V. ‘Superior Responsibility under Article 28 ICC Statute, For What Exactly is the Superior Held Responsible?’, 5 *Journal of International Criminal justice* (2007), 666; Slidregt E.V. ‘Article 28 of the ICC Statute: Mode of Liability and/or Separate Offense?’, 12 *New Criminal Law Review* (2009), 420; Ronen Y. ‘Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings’ 43 *Vanderbilt Journal of Transnational Law* (2010), 313; Martinez J. S. ‘Understanding *mens rea* in command responsibility: from Yamashita to Blaskic and beyond’, 5 *Journal of International Criminal Justice* (2007), 638; Meloni C. ‘Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’, 5 *Journal of International Criminal Justice* (2007), 619; Ambos K. ‘Superior Responsibility’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 823, Vol. I B.

Article 28 sets a different standard for military and civilian superiors mainly in two aspects. The first is the way in which the liability of civilian superiors under Article 28(b) (ii) only occurs where the '[t]he crimes concerned activities that were within the effective responsibility and control of the superior'.<sup>213</sup> According to Borden, this condition is a consequence of the fact that military superiors have the responsibility of controlling subordinates at all times, whereas in civilian settings superiority is temporally limited.<sup>214</sup> The second difference concerns *mens rea*; military commanders will be held liable if they 'knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes',<sup>215</sup> but the threshold for the mental element of civilian superiors is different. These latter will be held liable if they 'either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes'.<sup>216</sup> An additional required element for civilian superiors is that they are liable if 'the crimes concerned activities that were within the effective responsibility and control of the superior';<sup>217</sup> there is no such requirement for military commanders in Article 28. The notion of the effective control of the civilian superiors is crucial for the recognition of the superior's responsibility for the acts of their subordinates. In the *ad hoc* tribunals, although they applied a uniform standard of liability for military and non-military superiors, effective control was also a crucial factor in establishing liability.<sup>218</sup>

This different standard and threshold for the mental element is one of the most controversial aspects of this Article. The level of knowledge required before they can

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<sup>213</sup> Rome Statute Art. 28(b),(ii).

<sup>214</sup> Ronen Y. *Ibid*, at 350.

<sup>215</sup> Rome Statute Art. 28 (a), (i).

<sup>216</sup> *Id*, Art. 28 (b), (i), for the different standard of the *mens rea* in Art. 28, see Karsten N. *Supra* note 212, at 984-985; Additionally, in the ICTR see the *Prosecutor v. Jean-Paul Akayesu* case; he was in a position similar to a mayor and was indicted with crimes against humanity and genocide under Art. 6 (1), of the ICTR Statute. The Trial Chamber held that there are different views concerning the *mens rea* requirement for command responsibility, one of which is strict liability, whereby 'the superior is criminally responsible for acts committed by his subordinate, without it being necessary to prove the criminal intent of the superior. Another view holds that negligence which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement.' See Judgment, *Akayesu*, Trial Chamber II, ICTR 96-4-T (2 September 1998), Para 488. Furthermore, in Para 489 the Trial Chamber held that 'it is certainly proper to ensure that there has been malicious intent, or at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent'. Akayesu was a civilian leader, but the command responsibility applied to him and the Court found him liable under Art. 6 (1), for having ordered, or committed, or aided the commission of the crimes of genocide and crimes against humanity.

<sup>217</sup> Rome Statute Art. 28 (b), (ii).

<sup>218</sup> See the *Prosecutor v. Zejnil Delalic and et al.* ICTY, Trial Judgment, *supra* note 196, Para 377 and 378, and Appeal Chamber, IT-96-21-A (20 February 2001), Para 196.

be deemed criminally responsible is different for military commanders and civilian superiors. It is clear that Article 28 adopts a somewhat *stricter* standard for military commanders to the extent that responsibility also lies in cases in which they ‘should have known.’ The important advantage of this strict knowledge requirement for command liability is that it may be in harmony with customary international law.<sup>219</sup> In consequence of this requirement, both subordinates and commanders would be held liable; the subordinate is responsible for the commission of intentional crimes, while the military commanders are also liable for the criminal conduct and consequences of their subordinates’ wrongdoing (as well as their own criminal conduct) and the failure to prevent or repress the subordinates’ actions. Accordingly, this strict approach to command liability found in Article 28 (a) could serve as a deterrent to a commander and encourage him to be aware of what his subordinates are doing.<sup>220</sup> A commentator has characterised this knowledge requirement for superiors as ‘responsibility before the fact.’<sup>221</sup> The responsibilities of military commanders and civilian superiors after the fact (of the commission of crimes) are, however, equal and identical in Article 28 (a) and (b): to stop or suppress the wrongdoing or ‘to submit the matter to the competent authorities for investigation and prosecution;’ furthermore, command and superior responsibility after the fact requires a causal link between the failure to prevent crimes and these crimes’ commission.<sup>222</sup> As in the case of a military hierarchy, when there is either a *de jure* or a *de facto* hierarchy for a civilian superior, a similar standard of command liability would encourage civilian superiors to control their subordinates’ criminal activities and prevent the possibility of their own prosecution. The strict standard of command responsibility has been advocated by scholars; as one commentator has stated, a commander’s neglect of duty must be an absolutely ‘severe’ matter, as commanders have ‘effective control’ over their subordinates, and when soldiers are engaged in genocide or crimes against humanity and their commander fails to notice these taking place, grievous harms are likely to result from the commander’s breach of duty.<sup>223</sup>

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<sup>219</sup> Vetter G. R. *Supra* note 28, at 110; Fenrick W.J. ‘Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia’, 6 *Duke Journal of Comparative & International Law* (1995-96), 6, at 115; see also Cryer R. (2005), *Supra* note 186, at 325.

<sup>220</sup> Martinez J. S. *Supra* note 212, at 664.

<sup>221</sup> Nerlich V. *Supra* note 212, at 674-677.

<sup>222</sup> *Id.*, at 678; Rome Statute Art. 28 (a), (ii), and 28 (b), (iii).

<sup>223</sup> Martinez J.S. *Supra* note 212, at 663.

By contrast, on the civilian side a superior's responsibility in Article 28 requires him or her to have 'consciously disregarded information', and therefore in terms of the degree of knowledge required the Article has adopted a lower standard of responsibility for civilian superiors.<sup>224</sup> As such, a civilian superior's unintentionally negligent disregard of information which indicates that his or her subordinates are about to commit a crime does not serve to impute responsibility onto the superior, which requires 'conscious disregard'<sup>225</sup> of such information. Accordingly, negligent complicity in subordinates' crimes is not punishable, only complicity which is reckless and intentional.<sup>226</sup> One may argue that the Statute by this approach may diminish the efficiency of the Court.<sup>227</sup>

It may be argued that the lower standard of responsibility apparent for civilian superiors is appropriate because military commanders are in the special case of being in charge of an inherently lethal, destructive force. This view urges that the strict standard is contrary to the usual principles of responsibility in criminal law, and is thus not appropriate for civilian supervisors.<sup>228</sup> However, many scholars have harshly critiqued the different standards of liability and the distinctions made between commanders and civilians in this Article. Cryer, for instance, notes that '[a] clear and highly unfortunate retreat from requirements of customary law can be seen here.'<sup>229</sup> The ICC's dichotomy of standards between military and non-military superiors was unnecessary and there are no convincing reasons lying behind this distinction.<sup>230</sup> Vetter has argued that 'under this interpretation, article 28(2) (b) might be superfluous because the scope of the superior subordinate relationship is articulated in both article 28(1) and 28(2)' he argued that this different standard of liability may not be consistent with customary international law.'<sup>231</sup> Amnesty International also criticise this double standard and the different threshold of liability between commanders and civilian superiors; they encouraged the ICC's working group not to

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<sup>224</sup> Nerlich V. *Supra* note 212, at 674; Vetter. G. R. *Supra* note 28, at 123-124; Ambos K. *Supra* note 212, at 870; Ronen Y. *Supra* note 212, at 350, he asserts [i]t is regrettable that ICC Statute Article 28 nevertheless obliges the ICC judges to engage in a delineation of categories.'; Slidregt E.V. (2009), *Supra* note 212, at 430-431.

<sup>225</sup> Rome Statute Art. 28 (b), (i).

<sup>226</sup> Damaska M. *Supra* note 187, at 494;

<sup>227</sup> Vetter G.R. *Supra* note 28, at 116.

<sup>228</sup> See the *UN Diplomatic Conference*, Vol, II, *supra* not 3, at 136-137.

<sup>229</sup> Cryer R. (2005), *Supra* note 186, at 325.

<sup>230</sup> Cryer R. (2004), at 259; Mettraux also argues that this division is a 'superfluous distinction'; see Mettraux G. *The Law of Command Responsibility* (2009), at 25.

<sup>231</sup> Vetter G. R. *Supra* note 28, at 110 and 120.

implement the dual standard of command and superior responsibility as specified in Article 28<sup>232</sup> and called on all states ‘not to implement Article 28 of the Rome Statute directly as it departs from customary international law....’<sup>233</sup>

The Statute makes it plausible that:

a) civilian leaders who may be behind the organisation of heinous atrocities may escape from prosecution by the ICC through the application of the civilian standard of liability. As has been discussed, a civilian superior's neglect of her duty to control subordinates could be accepted as complete defence before the ICC, whereas a military commander would be responsible for the wrongdoing of her subordinates. While the stricter standard of liability can act as a deterrent for the latter, the more lenient standard can facilitate impunity for the civilian superior, who could rely on the defence of neglect, which would not happen if the military standard were applied. Thus, the civilian leaders' standard of liability in the Statute may provide a possible situation that gives rise to impunity.

b) there may be difficulties to draw a distinction between military and non-military; given the differential standards applied in relation to civilian and military superiors, the question arises as to who, aside from a military commander, would qualify as a ‘person effectively acting as a military commander.’ The *Bemba* case<sup>234</sup> is the first case in the ICC which in practice has dealt with command responsibility under Article 28 (a) of the Statute. *Bemba* was a civilian superior; the Pre-Trial Chamber has provided that the ‘notion of a military commander under this provision

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<sup>232</sup> Amnesty International, *FIJI: Comments on the Discussion Paper on Implementation of the Rome Statute of the International Criminal Court*, ASA 18/001/2006 (July 2006), at 5-6.

<sup>233</sup> *Id.*, at 5.

<sup>234</sup> See *Prosecutor v. Bemba Gombo*. Supra note 29; he is a national of the Democratic Republic of the Congo, who was alleged President of the Mouvement de liberation du Congo (MLC), this ‘Movement for the Liberation of Congo’ is an opposition political party in the Democratic Republic of the Congo. Bemba's case, which is a referral by the Central African Republic to the ICC, is only case before the ICC that has involved an accused being charged with command responsibility under Article 28 of the Statute. The Pre-Trial Chamber III of the ICC, on 3 March 2009, requested the Prosecutor to amend the charge against Bemba; the Chamber provided that ‘it appears to the Chamber that the legal characterisation of the facts of the case may amount to a different mode of liability under article 28 of the Statute.’ The different form of liability for him includes ‘superior responsibility’. See *Decision Adjourning the Hearing Pursuant to Art. 61(7), (c), (ii), of the Rome Statute, Bemba*, ICC-01/05-01/08, Pre-Trial Chamber III (3 March 2009), Para 46 and 49. Consequently, the Prosecutor on 30 March 2009 submitted an amended document, and in addition to his previous charges under Art. 25 (3), (a), also charged him under Art. 28 (a), and (b), see Press Release, *Bemba case: The judges asked the Prosecutor to submit an amended document containing the charges*, ICC-CPI-20090305-PR395 (5 March 2009). Also, the *Report on programme performance of the International Criminal Court for the year 2010, to the Assembly of State Parties*, provided that: ‘During the year a total of 1,436 victims were authorized by Chambers to participate in the different proceedings, the largest number being in the Bemba case in the period leading up to the start of the trial’; see ICC- SP/10/16 (5 July 2011), Para, 84.

also captures those situations where the superior does not exclusively perform a military function.’<sup>235</sup> The Pre-Trial Chamber interpreted the notion of a *de jure* ‘military commander’ as referring to commanders ‘who are formally or legally appointed to carry out a military commanding function’, whereas *de facto* military commanders were interpreted as ‘persons effectively acting as military commanders’ as per Article 28 (a).<sup>236</sup> In the *Bemba* case it provided that:

[T]he Chamber considers that this term is meant to cover a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander’s role, yet they perform it *de facto* by exercising effective control over a group of persons through a chain of command.... Article 28 of the Statute is drafted in a manner that distinguishes between two main categories of superiors and their relationships - namely, a military or military like commander (paragraph (a) and those who fall short of this category such as civilians occupying *de jure* and *de facto* positions of authority (paragraph (b)).<sup>237</sup>

The Court did not clearly explicate what a ‘military like commander’ is and how this concept is different from that of a ‘military commander’, nor did it explicitly state whether Bemba qualifies as a *de jure* or *de facto* military commander;<sup>238</sup> but it seems that, though *Bemba* did not have a military title or rank,<sup>239</sup> he ‘qualifies’ as a military commander under the scope of Article 28(a) of the Statute.<sup>240</sup> The ICC’s Pre-Trial Chamber appears in fact to be trying to limit the distinction between civilian and military command responsibility<sup>241</sup> and has adopted the concept of a *de facto* ‘commander’ similar to the ICTY:

[I]ndividuals in positions of authority, ... within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.<sup>242</sup>

Considering that the Statutes of the *ad hoc* tribunals, in contrast to that of the ICC, adopted a uniform standard of liability for military and non-military commanders, it is interesting that the Pre-Trial Chamber referenced the ICTY’s

<sup>235</sup> *Id*, Decision Pursuant to Art. 61(7), (a), (b), of the Rome Statute on the Charge of the Prosecutor Against Jean- Pierre Bemba Gombo, Chamber II (15 June 2009 ), at 142, Para 408.

<sup>236</sup> Rome Statute Art. 28(a).

<sup>237</sup> *Prosecutor v. Bemba Gombo* . *Ibid*, at 141-142, Para 406 and 409.

<sup>238</sup> This has been criticised by Nora Karsten, who insists that *Bemba* meets the criteria to be considered as a *de facto* military commander; for more details see Karsten, *supra* note 212, at 986-8.

<sup>239</sup> *Prosecutor v. Bemba Gombo*. *Ibid*, at 142, Para 408: ‘[t]he concept [of military commanders] embodies all persons who have command responsibility within the armed forces, irrespective of their rank or level. In this respect, a military commander could be a person occupying the highest level in the chain of command or a mere leader with few soldiers under his or her command.’

<sup>240</sup> *Id*, at 184-185. The Court, holds ‘that Jean-Pierre Bemba Gombo is criminally responsible within the meaning of article 28(a), [military command] of the Statute...’.

<sup>241</sup> *Id*, Para 408 to 410, and 412.

<sup>242</sup> *Prosecutor v Zehnli Delahc et al*, ICTY, Trial Chamber, IT-96-21-T, (16 Nov 1998), Para 354.

Celebici case<sup>243</sup> in connection with attributing the command doctrine of liability to an *arguably* civilian superior *Bemba*;<sup>244</sup> this indicates the trend of the ICC to be one of limiting the differentiation of standards in practice. The practice of the ICC in *Bemba* case has also indicated the fact that the distinction between military and non-military superiors is a very complicated issue; this is borne out by the considerable body of case law related to endeavouring to find a suitable distinction and the problems which arise in this context.<sup>245</sup> One may accordingly argue that the distinction between these two modes of liability in Article 28 has also a procedural impact and may be a cause of delay in prosecution and difficulties concerning the interpretation as to whether an accused is a *de facto* military commander or not.

#### 4.5. Conclusion

During the Rome Conference for the establishment of the ICC, the negotiations in regard to inclusion of defences in the Statute, in particular, were very hard, and after protracted negotiations and compromises the Statute finally included defence provisions in more details and playing a greater role as compared with prior international tribunals.<sup>246</sup> This Chapter has discussed the absolute defence of insanity and intoxication and other four types of defences under the Rome Statute which are the most controversial defences therein. These have included: the recognition of superior orders as a defence for war crimes and the non-manifest illegality approach to war crimes in Article 33(2) the absolute defence of ‘self-defence’ of property necessary for a military mission in Article 31(1)(c) duress; and the differences between military and non-military superiors’ responsibility. Defence of property needed for a military mission seems very hard to be justifiable as complete defence for war crimes. Article 33(2) has also departed from customary international law, and reverts to the approach used prior to the Nuremberg trials concerning the defence of superior orders. It is argued that although it may be very difficult in practice to prove

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<sup>243</sup> *Prosecutor v. Bemba Gombo. Ibid.*, Para 409.

<sup>244</sup> *Id.*, Para 457, the Pre-trial Chamber II found him *de jure* military commander, but also provided that Bemba had ‘de facto ultimate control over MLC commanders’; in Para 409 the Chamber referred to him as a *de facto* commander, and in Para 410 to a ‘military-like’ commander; it provides that: ‘the category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units including, *inter alia*, armed resistance movements and militias that follow a structure of military hierarchy or a chain of command.’

<sup>245</sup> Karsten N. *Supra* note 212, at 984.

<sup>246</sup> See the *UN Diplomatic Conference on the 2nd of July 1998*, *supra* note 3; see also the *Draft Statute of the International Criminal Court*, Art. 31, UN Doc. A/ CONF.183/2/Add.1 (14 April 1998), at 57.



a claim made by subordinates that orders were not clearly illegal, Article 33(2) potentially provides a complete defence for military subordinates which could enable them to escape from liability and may act against the deterrent value of the Statute's provisions. Article 31 also goes beyond *lex lata* and the extension of the notion of self-defence to include protecting 'property which is essential to accomplish a military mission' is highly controversial and questionable. It provides a novel type of defence and thus another possibility of exclusion of liability for war crimes, which it is very hard to see as justifying the killing of individuals. These two Articles provide a situation which gives rise to impunity, through recognition of the plea of superior orders as complete defence, and of the plea of self defence of property which is essential for military purposes. In general, the war crimes provision in the Statute indicates the very soft approach towards the jurisdiction of these crimes in the ICC, whereas in a world of increasing, ongoing, and repeated conflicts an opposite approach would appear to be called for.

It has been discussed that duress is usually combined with the defence of superior orders; duress in the ICC can be accepted either as a complete defence under the Statute<sup>247</sup> or as a mitigating circumstance via the Rules of Procedure and Evidence.<sup>248</sup> It has been argued that the availability of duress as a defence for all crimes may encourage the commission of crimes and thus impunity. By contrast, under the major legal systems of the world the defence of duress is excluded for crimes such as murder.<sup>249</sup> However, it can act as a mitigating factor, or even as a defence when the degree of duress is an immediate and coercive threat to body or limb from which the defendant has no choice to escape from the commission of crimes.

From the converse perspective – that of the responsibility of commanders and superiors for the wrongdoings of their subordinates – the Statute shows a dual standard of liability, distinguishing between military and non-military superiors in Article 28 (a) and (b). Strict approaches were adopted towards military commanders, whilst a higher threshold of liability was employed for the civilian side. It has been discussed that not only were these dual standards and thresholds of liability unnecessary; they also lead to theoretical and practical difficulties in assessing

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<sup>247</sup> Rome Statute Art. 31.

<sup>248</sup> The ICC *Rules of Procedure and Evidence*, Art. 145 (2), (a), (i).

<sup>249</sup> E.g. in the Criminal Code of Canada, C 46, Art.17. In the UK see *R v Howe* (1987), AC 417, and for the *Iranian Criminal Code*, Art. 211.

whether or not a defendant is a *de jure* or *de facto* military commander, and accompanying procedural delays. This complicated issue has featured in the current *Bemba* case in the ICC; this Chapter has highlighted just some of the complexities which may arise as a result of Article 28. In the decision of the Trial Chamber in this case, despite arguably having a position as a civilian superior, Bemba was actually qualified as a *de jure* military superior, indicating that the ICC desires to diminish such unnecessary distinctions and different standards of liability in practice. Nevertheless, as the previous international tribunals recognised a uniform standard of liability for military and non-military superiors, the ICC's different thresholds of responsibility for different types of superiors is significant. In particular, the higher level of *mens rea* required of civilian superiors for liability according to Article 28 (b) and the non-recognition of liability for civilian superiors when they neglect to control their subordinates' criminal activities, may give rise to impunity for such superiors; this is opposite to the standard of liability enforced on military commanders, whose plea of neglect would not be accepted pursuant to Article 28(a). Uniform and strict standards of liability for civilian superiors, on the other hand, could serve as a deterrent to such superiors and encourage them to be aware of what their subordinates are doing.

The different types of defences and their possible relation to impunity, as discussed in this chapter, can also be concluded in the following table.

**Defences in national law and in the Statute**

Mansour-23-05-12

**National law defences: justification and excuse**

**(Table of defences)**

<b>Excuse</b> →  Insanity, intoxication, duress,	Unlawful conduct- unreliable  Lack of <i>mens rea</i>	Give rise to impunity but morally acceptable (Lack of ability to distinguish between right and wrong)
<b>Justification</b> →  Self defence, defence of others	Lawful conduct- not liable →  <i>Mens rea</i>	Generally no impunity  Morally and legally recognised

**Defences in the Rome Statute**

Defences in the Rome Statute	No distinction →	Excluding from criminal liability Article 31
<b>Absolute Defences</b> <ul style="list-style-type: none"> <li>→ Insanity</li> <li>→ Intoxication</li> </ul>	Unreliable →	Give rise to impunity, but morally acceptable, lack of <i>mens rea</i>
<b>Defence of Duress</b> <ul style="list-style-type: none"> <li>→ Coercive(excuse) (Mixed in Statute)</li> <li>→ Circumstances, Threat</li> </ul>	Complete defence →  Mitigation in the Rule of Procedure & If applies as complete defences for all crimes →	No impunity exempt From responsibility  No impunity- reduces the severity of a punishment Gives rise to impunity
<b>Superior orders &amp; Defence of property for military mission</b> <ul style="list-style-type: none"> <li>→</li> <li>→</li> </ul>	War crimes →  →	Gives rise to impunity Departed from customary law  Gives rise to impunity, never was a defence
<b>Superior's responsibility for acts of subordinates</b> <ul style="list-style-type: none"> <li>→ Military</li> <li>→ Civilian</li> </ul>	Stricter standard of liability Art. 28 (a) →  Lower standard of liability Art. 28(b) →	No impunity  May give rise to impunity, they would not be responsible where they neglected to control subordinates

## ***Chapter V: Internal Practical Problems within the ICC Statute: Impunity of***

### ***Perpetrators of International Crimes***

#### ***Introduction***

This Chapter aims to highlight the weakness of the ICC through an examination of some of the jurisdictional and procedural issues that concern its work. These matters will be divided into two categories: the generic and the particular. Concerning the generic problems, I will argue that, like any other international tribunal, when compared with a domestic court, it suffers from problems regarding the collection of evidence, protection of witnesses, etc. In addition to this, however, there are a number of specific issues that undermine it as an institution, and which are not endemic to all international criminal law regimes. These are five-fold. The first relates to the complementarity regime of the jurisdiction of the ICC, which may lend itself to abuse and offer a shield to those who wish to impede prosecution by the ICC; the second concerns the rules relating to the admissibility of cases and the high threshold of jurisdiction, including issues relating to the gravity of crimes; the third is the very weak cooperation-regime of the Statute; the fourth concerns the issue of enforcement power; and the final issue being the deficiencies concerning its lack of the universal jurisdiction,<sup>1</sup> its not countenancing trial *in absentia*, and the possibility of the postponement of its jurisdiction over war crimes by state parties.

The characteristic response to these defects is to view them either as an inevitable, but nevertheless unsatisfactory, consequence of the various political compromises at the Rome Conference that were arrived at in order to enable states to ratify the Statute,<sup>2</sup> or as an ultimately beneficial outcome given the level of possible non-cooperation with the ICC. My position is that such evaluations fall short insofar as they do not recognise the possibility that the deficiencies may be problematic, not because they fall short of what might otherwise be desirable or ‘possible’, but

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<sup>1</sup> O’Callaghan D. ‘Is the International Criminal Court the Way Ahead?’ 8 *International Criminal Law Review* (2008), 533, at 548; For the Universal Jurisdiction see generally Abbas A. ‘The International Criminal Court and Universal Jurisdiction,’ 6 *International Criminal Law Review* (2006), 349; Writ H.V. ‘Universal Jurisdiction under Attack,’ 9 *Journal of International Criminal Justice* (2011), 1043; Kaul H. P. ‘Preconditions to the Exercise of Jurisdiction’ in A. Cassese, P. Gaeta, & J. R. W. D. Jones (eds), *The Rome Statute of International Criminal Court: A Commentary* (2002), 583, Vol. I, B; Gallagher K. ‘Universal Jurisdiction in Practice,’ 7 *Journal of International Criminal Justice* (2009), 1087.

<sup>2</sup> O’Callaghan D. *Id.*, at 533, at 544, 551- 555.

because there is a generative link between the impunity to which they give rise and the idea that the interests of justice are best served by the criminalisation and prosecution of international crimes. In the same way that Foucault described the emergence of prisons as sustaining the idea of criminality and the ‘slow rise of the project of reform’ despite their failure to diminish the crime rate,<sup>3</sup> so it might be said, it was important for the ICC to remain weak in order to bolster demands for the criminalization and prosecution of international crimes. In that respect, one may note the way in which the Rome Statute has served not so much to empower the ICC, but to empower individual states and endow them with the right to exercise their power for prosecution of international crimes. To the extent that is the case, it is also plausible to suggest that some powerful states were keen to support the creation of the ICC at the Rome conference, but at the same time needed it to be *weak not strong*.<sup>4</sup> The ICC had to allow impunity to flourish rather than be the vehicle for its elimination. The reality is one of a court created after many years of effort, with no independent power, and without the various parties having adequate obligations to cooperate with the Court,<sup>5</sup> and which is compounded by political difficulties. Whilst it may suffer by comparison with the *ad hoc* tribunals, which can create binding obligations on all UN states members to cooperate with the courts,<sup>6</sup> some of its weaknesses (*vis* the issue of non-cooperation and lack of enforcement power) are not unique.<sup>7</sup>

Reflecting on the above considerations, this chapter is divided into five sections: the first is related to the generic problems of the ICC; the second is concerned with the limited subject matter jurisdiction of the Court; the third with the nature of complementarity and issues regarding the admissibility of cases; the fourth

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<sup>3</sup> Foucault M. *Discipline and Punish*, in P. Rabinow (eds), (1986), at 226, 231-2.

<sup>4</sup> E.g. Sceffer C, the US delegation at the Rome Conference while strongly advocated the establishment of the ICC actively sought to eliminate its jurisdiction. He has argued constantly in support of a very strict concept of complementarity, see, *The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (15 June 17 July 1998), Vol, II, at 123, Para 28 and 297 Para 42.

<sup>5</sup> Cogan K J. ‘The Problem of Obtaining Evidence for International Criminal Courts’, 22 *Human Rights Quarterly* (2000), 404, at 411.

<sup>6</sup> See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*(1993), UN Doc, S/25704 (3 May 1993), at 31, Para 125.

<sup>7</sup> E.g., concerning the non-cooperation of Croatia with the ICTY; see also Rastan R. ‘Testing Co-Operation: The International Criminal Court and National Authorities’, 21 *Leiden Journal of International Law* (2008), 431, at 438; see also the cooperation issues by the Rwandan government, the NATO, and the Belgrad authorities with the Prosecutor of the ICTY and ICTR; see Ponte D.C. *Madame Prosecutor, Confrontations with Humanity’s Worst Criminal and the Culture of Impunity* (2009), at 59-60, 84, 92-93, and 370.

with the issues of insufficient cooperation and enforcement encountered by the Court; and the fifth section with several significant deficiencies of the Court, such as its lack of universal jurisdiction. Each of these deficiencies point to the evident weakness of the ICC.

**5.1. Generic issues in the ICC's procedural system; collecting evidence, identification of witnesses, protection of victims, etc.**

The generic procedural problems faced by the ICC in practice are much greater than for a domestic court. Generally, there are two major domestic criminal traditional systems: the 'accusatorial' or 'adversarial' in common law and the 'inquisitorial' model in civil law systems.<sup>8</sup> The aim of any domestic procedural system is to find the truth in a *due process* through one of these systems. However, the ICC's criminal procedure is a mixture of both systems and may be understood *sui generis*.<sup>9</sup> The ICTY and ICTR, like the ICC, have incorporated elements from both systems, but the adversarial procedural elements and more heavily were reflected in the *ad hoc* ICTY and ICTR.<sup>10</sup> In prior international tribunals, the procedural law was left to the judges; the Statute, in contrast, 'reserves' the authority to create the Rule of Procedure and Evidence (RPE).<sup>11</sup> However, the Statute gives power to the ICC's judges to adopt regulations,<sup>12</sup> which includes procedural rules.<sup>13</sup> As Cryer *et al* asserts, 'the procedural law of the ICC has become voluminous, multi-layered and complex.'<sup>14</sup> Some also argue that this hybrid system may lead to uncertainty, for instance for the ICC via 'the avoidance of 'technical terms' with a special meaning in domestic systems, creates uncertainties.'<sup>15</sup> Another disadvantage of the *sui generis* character of the proceedings before the Court is that there is no common practice to

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<sup>8</sup> Cryer R & *et al.* *An Introduction to International Criminal Law and Procedure* (2010), at 425. The main differences between these two systems is related to the role of the judges and parties during criminal procedure, for the adversarial or accusatorial system each party present the case to the court with their own investigations and the judge acts as a referee. In contrast, in the inquisitorial system, judges and the state administrative body are obliged to conduct criminal investigations, see at 426.

<sup>9</sup> Caianiello M. 'First Decisions of the Admissibility of Evidence at ICC Trials', 9 *International Criminal Justice*(2011),385,at 393; Ambos K & Miller D. 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective', 7 *International Criminal Law Review* (2007), 335, at 356.

<sup>10</sup> Kress C. 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique compromise', 1 *Journal of International Criminal Justice* (2003),603, at 605; Cryer R & *et al.* (2010), *Ibid*, at 429.

<sup>11</sup> Rome Statute Art. 51; see also Cryer R & *et al.* *Id.*

<sup>12</sup> *Id.*, Art. 52.

<sup>13</sup> Cryer R & *et al.* *Ibid*, at 429.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at 429; Ambos K & Miller D. *Ibid*, at 337-40.

rely on for the ICC's judges.<sup>16</sup> Regardless of its procedural system, there are some procedural issues which are not unique to the ICC, but common generic problems facing the ICC are those which are faced by any judicial system in terms of its criminal procedure. Such problems relate to the collection of evidence, identification and credibility of evidence and witnesses, assessment of the evidence, protection of victims and witnesses, and etc.

#### **5.1.1. Collecting evidence**

The prosecutor is charged in the collection of evidence, the questioning of perpetrators, victims, witness expertise and so on, and should take the necessary measures in the investigation stage.<sup>17</sup> Due to the widespread nature of the international crimes, it may include an extensive collection of materials. Importantly, a different aspect of investigation of the ICC to the ICTY and ICTR is that, in contrast with these *ad hoc* tribunals, the scope of investigation and the collection of evidence by the ICC's prosecutor is included by both sides, thus, he/she is obliged to both collect evidence and investigate the 'exonerating circumstances equally.'<sup>18</sup> Additionally, the prosecutor is responsible for the maintenance and the security of the collected materials and protection of victims and witnesses.<sup>19</sup> Despite the fact that the Prosecutor has no police and is without independent executive power, in practice, his investigation mainly relies on the cooperation of states and other international organisations.<sup>20</sup> Although the Prosecutor has authority to request the cooperation and compliance of states and intergovernmental organizations or enter into argument with them,<sup>21</sup> obtaining the cooperation by state parties is complicated task. The Rome Statute has also recognized the denial of cooperation in practices such as broad range of 'national security',<sup>22</sup> which states may rely on (this will be discussed in the following section). In particular, with the exception of a referral by the SC, for other cases the Prosecutor has no power to compel states to cooperate in the collection of evidence, or other important aspects.

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<sup>16</sup> Blattmann R & Bowman K. 'Achievements and Problems of the International Criminal Court, A View from Within', 6 *Journal of International Criminal Justice* (2008), 711, at 718.

<sup>17</sup> Rome Statute Art. 54(1), (b).

<sup>18</sup> *Id.* Art. 54 (1), (a).

<sup>19</sup> See the ICC *Rule of Procedure and evidence* Art. 10, ICC ASP/1/3(09/09/2002), see also Ponte C.D. *Supra* note 7, at 290-304.

<sup>20</sup> E.g. Peace-keeping forces, Amnesty International, the SC and etc.

<sup>21</sup> Rome Statute Art. 93, see also Caianiello M. *Supra* note 9, at 387.

<sup>22</sup> See Rome Statute Art. 93 (4), and (5).

As compared to the situation of domestic courts, collecting evidence is usually much more difficult in the case of an international tribunal. This is because of language barriers, the attendance of witnesses and distances that need to be covered. Translation for international courts takes a long time, and misunderstanding in such translation may cause difficulties in obtaining the truth. The significance of distance, timing, and cost are the reasons why local jurisdiction has been recognised among the different legal systems, making it easier and quicker for investigators to collect evidence and for victims and witnesses to access the court. The ICC, on the other hand, is located hundreds of miles away from where the crimes it has so far investigated were committed. The most significant, in practice, all of the situations<sup>23</sup> in the ICC so far has demonstrated that its scope of investigations is enormously broad. Compared to domestic crimes, the international crimes and procedures are generally ‘more complex’, in particular when concurrent crimes (for example, crimes against humanity and war crimes often happen simultaneously) need to be considered,<sup>24</sup> and that despite such difficulties, the Prosecutor does not have at hand a state executive or judicial machinery to assist in the investigative stage, nor the ability to arraign witnesses or sift through relevant evidence.<sup>25</sup>

As an illustration in the *Thomas Lubanga Dyilo* case,<sup>26</sup> the Prosecution was forced to rely predominantly upon documents, reports from NGOs (e.g. from Amnesty International) a single live witness<sup>27</sup> (*Christine Peduto*, a United Nations staff member, whose testimony appears to have been key to the Pre-Trial Chamber I decision) and a large number of written statements<sup>28</sup> and summaries of mostly anonymous witness declarations. The Defence strongly criticised the investigative value of these last two sources: *Lubanga’s* lawyer argued persuasively that a written

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<sup>23</sup> Since the ICC came into force in first July 2002 it has seven situations to date: the situation in Darfur, which was the first referral by the SC Res 1593(31 March 2005), the situation in Libya, which was the second referral by the SC, Res. 1970 (26 February 2011), Kenya in 2009, which was initiated by the Prosecutor under the authorisation of the Pre-Trial Chamber II, ICC-01/09 (31 March 2010), and three further referral situations by states, the DRC, ICC-OTP-20040419-50(2004), Uganda, ICC-20040129-44 (29 January 2004), the Central African Republic, ICC-OTP-20050107-86 (7 January 2007), a situation which was brought through declaration to the ICC under Art.12(3), of the Statute by Cote d’Ivoire, ICC-02/011 (2011).

<sup>24</sup> Kerb C. ‘The Procedural Text of the International criminal Court’, 5 *Journal of International Criminal Justice* (2007), 537, at 543; Cryer R & *et al.* (2010), *Supra* note 8, at 458.

<sup>25</sup> May R & Wierda M. *International Criminal Evidence* (2002), at 51.

<sup>26</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, ICC-CPI-20070129-196; see also generally, the Trial Chamber I, ICC-01/04-01/06-T-209 (14 July 2009).

<sup>27</sup> *Id.*, although in the trial chamber the Court was heard many witnesses in this case.

<sup>28</sup> The written statement instead of the oral testimony has been allowed in the ICTY and ICTR, see RPE Art. 92 (A).



statement cannot be questioned effectively because there was no opportunity for cross-examination, and that the summaries of witnesses' declarations were not reliable, as they represented only the Prosecutor's view of the statements made. Although these remarks have a broad foundation, they were nevertheless not relevant to the confirmation hearing, and did not lead the Chamber to find the evidence given by the Prosecutor insufficient. As a commentator states, '[t]his is the procedural structure that the drafters of the Statute considered to be proper in order to avoid the transformation of the confirmation hearing into a 'trial before trial.'<sup>29</sup> Yet this was not to avoid the very real evidential problems that were disclosed.

The ICC in practice continues to develop the rules for evidence designed to overcome some of these difficulties. For example in the *Lubanga case* Trial Chamber interpreted the words 'testimony of a witness' contained in Rule 68, in a broad sense:

Turning to Article 69(2) and Rule 68, in the judgment of the Chamber the latter provision is directed at the "testimony of a witness" in a broad sense, given that the various forms of testimony that are specifically included in the rule are audio- or video- records, transcripts or other documented evidence of "such" testimony (namely, the testimony of a witness). The Chamber highlights, particularly, that the "other documented evidence" ... is referred to separately, and in addition to, the audio- or video- records in the opening paragraph of Rule 68; moreover, in sub-rules a) and b) "previously recorded testimony" is referred to without limiting its scope to video or audio evidence.<sup>30</sup>

However, the above broad interpretation of the RPE does not mean that the prosecutor has been authorised to collect or request for all type of evidence, as there are strict limitations. The Court, for instance, cannot obtain evidence that may violate the Statute or 'internationally recognised human rights',<sup>31</sup> where the violation leads to essential doubt on 'the reliability of the evidence.'<sup>32</sup> Additionally, there are limitations in relation to 'national security'<sup>33</sup> which may exclude or limit the cooperation by states for collection of evidence. The collecting of evidence and

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<sup>29</sup> Miraglia M. 'Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in Lubanga', 6 *Journal of international Criminal Justice* (2008), 489, at 493.

<sup>30</sup> *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses*, Trial Chamber I, Judgment, ICC-01/04-01/06-1603 (15 January 2009), at 9, Para 18.

<sup>31</sup> Rome Statute Art. 96 (7), provides: "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a), The violation casts substantial doubt on the reliability of the evidence; or (b), The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings." This Article partly based on ICTY Rule 95, that clearly excludes such evidence that may obtain via the violation of internationally recognized human rights and the Statute; see also Rastan R. *Supra* note 7, at 452.

<sup>32</sup> Rome Statute, Art 69 (7).

<sup>33</sup> *Id.* Art. 72 and 93 (4), see also Rastan R. *Ibid* , at 536.

assessment of its reliability is much more complicated in practice for the ICC than domestic courts, as indicated in *Lubanga Dyilo case* Trial Chamber 1, in 2012, where such difficulties for the Prosecutor, i.e. delay of investigation, high expense, and reliability, were accounted for:

The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The Prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court...<sup>34</sup>

In addition to these everyday problems of evidence-gathering, it is also necessary to bear in mind that international crimes frequently relate to the acts of local authorities, their leaders, or of powerful individuals, who may frequently have power to interfere with an investigation in different ways, such as concealing evidence (either partially or completely) threatening the witnesses and victims who are to appear or participate in the court, or otherwise securing general non-compliance with the evidence-gathering process.<sup>35</sup> In Darfur, for instance, there are public reports that President al Bashir's forces had attacked and tortured individuals who were under suspicion of having cooperated with the prosecution.<sup>36</sup> Whilst these are serious obstacles, however, they are not entirely peculiar to the work of the ICC, as many such concerns would also affect the work of national criminal courts in their everyday operations. In addition, some international actors may withhold valuable evidences and obstruct investigation.<sup>37</sup>

However, it is nonetheless clear that it is generally more difficult for international tribunals due to the possibility of the frequent interference by national authorities as well as the associated difficulties in the collection of evidence and its link to authorities.<sup>38</sup> It would not be stretching matters to suggest that both of these

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<sup>34</sup> The *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber 1, ICC-01/04-01/06-T-359 -ENG ET WT 14-03-2012 (14 March 2012), at 5.

<sup>35</sup> Ponte D.C. *Supra* note 7, at 41 and 84, the lack of cooperation by the Kigali government in Rwanda, they did not allow many witnesses to leave Rwanda.

<sup>36</sup> E.g. Sudan Tribune, 'Sudan tries a man accused of spying for the ICC' (23 December 2008), at: <http://www.sudantribune.com/spip.php?article29662>. (Accessed 10/08/2012); see also *Prosecution Document in Support of Appeal against the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir*, ICC-02/05-01/09 OA (6 July 2009), at 4 Para 5. Also in DAR-OTP-0164-0398, BBC News, 'Sudanese 'war crimes spy' jailed', (28 January 2009), at: <http://news.bbc.co.uk/1/hi/world/africa/7856289.stm> (Accessed 10/08/2012).

<sup>37</sup> Peskin V. *International Justice in Rwanda and the Balkans, Virtual Trials and the Struggle for State Cooperation*, (2008), at 30, he asserts that '[n]ot unlike the targeted states, international actors may also hamper investigations and block indictments by withholding valuable evidence in their possession.'

<sup>38</sup> E.g. see Ponte D.C. *Supra* note 7, at 124-125 and 374.

considerations may be such as to create a situation in which two equally undesirable consequences may ensue: in one, the court may be encouraged to loosen the evidential requirements for purposes of establishing proof of the offence (which will be examined below) in the other criminals may be allowed to escape from prosecution as a consequence of the insufficiency of available evidence. The result of these various forms of interference would be impunity of perpetrators.

### ***5.1.2. Identification and credibility of evidence and witnesses***

For the creation of any case before a tribunal, the identification of evidence,<sup>39</sup> and its reliability is of paramount importance. In the first place the identification and evaluation of evidence, must be treated with great caution, because of the ‘many difficulties inherent in the identification process, resulting from the vagaries of human perception and recollection.’<sup>40</sup> In fact, distance, lighting, and the amount of time that the witnesses observed the accused or the scene of a crime are equally important considerations for such an assessment.<sup>41</sup> A witness can be easily mistaken about identification; hence, domestic criminal systems from around the world typically recognise that extreme caution is required before an accused person may be convicted based upon identification of a witness under difficult circumstances.<sup>42</sup> The principles developed in various jurisdictions recognise the frailty of human perception and the risk that a miscarriage of justice could result from reliance on even the most confident witnesses asserting their identification of an accused without sufficient opportunity to confirm their observations.<sup>43</sup> Due to such difficulties of reliability and identification, the Trial Chamber, I (2012) has also withdrawn the evidence from three victims of crimes:

[T]he Chamber has not relied on the testimony of the three victims who testified in Court because their accounts are unreliable. Given the material doubts that exist as to the identities of two of these individuals, which inevitably affect the evidence of the third, the Chamber decided to withdraw permission originally granted to them to participate as victims.<sup>44</sup>

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<sup>39</sup> Rome Statute Art. 93 (a), (k), and 96 (2), (b).

<sup>40</sup> See *the Prosecutor v. Dragoljub Kunarac et al*, Judgment, IT-96-23&23/1(22 Feb. 2001), at 200, Para 561.

<sup>41</sup> May R. & Wierda M. *Supra* note 25, at 178.

<sup>42</sup> See *Prosecutor v. Zoran Kupre[ki] et al*, Appeal Judgment, IT- 95-16-A (23 Oct 2001), at 11, Para 34.

<sup>43</sup> *Id*, Para 34.

<sup>44</sup> *The Prosecutor v. Thomas Lubanga Dyilo* (14 March 2012), *Supra* note 34, at 5.

The second problem confronting the court is the reliability of evidence. The mere identification of the witnesses before the Court is not enough to complete the assessment of the witnesses and to determine whether the circumstances of the case means that an identification is reliable. 'It is insufficient that the evidence of identification given by the witnesses has been honestly given; the true issue in relation to identification evidence is not only whether it has been honestly given but rather whether it is reliable.'<sup>45</sup> The reliability of evidence in any case also depends on many other circumstances: for instance, 'the origin, content, corroboration, truthfulness, voluntaries, and trustworthiness of the evidence.'<sup>46</sup> Due to such concerns, evidence may be excluded in the ICC,<sup>47</sup> with the Statute expressing that 'a fair evaluation of the testimony of a witness'<sup>48</sup> as in practice in *Lubanga case* (2012): after significant expenditure and great length of trial, finally the Chamber has withdrawn 'the right of six dual status witnesses to participate in the proceedings, as a result of the Chamber's conclusions as to the reliability and accuracy of these witnesses.'<sup>49</sup> This issue of reliability and identification may happen frequently at any court, but it is substantially more difficult for the ICC than for a domestic court, and may cause the delay of prosecution and lead to greater expense for the ICC.

One may argue that the ICC could minimise the aforementioned procedural and practical problems. The Registry Office of the ICC has established, in addition to the ICC-UN liaison office in New York,<sup>50</sup> field offices in the situation countries, with the purpose of supporting the Court's offices in performing their respective mandates in these countries.<sup>51</sup> These field offices may well be in a position to facilitate some issues such as the identification of witnesses. Nevertheless, it is also clear that they

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<sup>45</sup> See *the Prosecutor v. Dragoljub Kunarac et al.* (Feb, 2001), *Supra* note 40, at 200, Para 561.

<sup>46</sup> Cryer R & *et al* (2010), *Supra* note 8, at 465-6.

<sup>47</sup> See the Rome Statute Art. 69 (7).

<sup>48</sup> *Id.* Art. 69 (4),

<sup>49</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, (14 March 2012), *Supra* note 34, at 5.

<sup>50</sup> See the *Liaison Office of the International Criminal Court to the UN*, in the ICC's website.

<sup>51</sup> These field offices are located in Kinshasa, Baudouin, in the Democratic Republic of Congo, Kampala in Uganda, Abeche Tchad, in Chad and, Bangui in the Central African Republic. See ICC-ASP/5/2 (8 August 2006), at 40 (e), and ICC-ASP/6/3(30 MAY 2007), at 6. See also the *report by Judge Philippe Kirsch President of the International Criminal Court Address to the UN GA* (1 November 2007), at 3. The field operations of the Court are targeted at facilitating victims' applications for participation and reparations, protecting and relocating witnesses where necessary, supporting counsel for the defence and conducting outreach programmes to the affected communities, see the ICC- ASP/6/8, (Assembly of States Parties), Sixteen Section (30 November to 14 December 2007), at 52, Para 188.

are not in a position to solve all of the procedural deficiencies, and will still face obstacles relating to state cooperation, funding and security.<sup>52</sup>

## ***5.2. Particular procedural jurisdictional issues, which may serve to facilitate***

### ***impunity***

The ICC also has some particular procedural problems, which may restrict and weaken the functioning of the Court in comparison with national courts and *ad hoc* international tribunals. One group of such problems concerns the scope and nature of complementary jurisdiction, the admissibility threshold, the issue of enforcement power, notification of investigation, and challenge of cooperation, with the latter being also common to *ad hoc* tribunals, which altogether makes the ICC an ineffective Court.

#### ***5.2.1. The scope and the nature of the jurisdiction of the court***

The ICC's jurisdiction is limited to just some international crimes,<sup>53</sup> and I argue that the exercising of this jurisdiction is exceptional. This would not be a problem on its own if other certain fundamental conditions were met. However, I maintain that those other conditions do not exist.

Jurisdiction in the Rome Statute has two aspects: one is jurisdiction over the subject matter of the crimes, the other is individual jurisdiction over the accused.<sup>54</sup> As regards the first the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and for the crimes of aggression in the future.<sup>55</sup> Crimes within its jurisdiction have been excluded before the date that it came into force, July 1 2002, and the ICC does not have retroactive jurisdiction over such crimes.<sup>56</sup> There are also

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<sup>52</sup> *Id.*, at 9, Para 48 (ASP) The Court concludes that the present organizational structure is not meeting the requirements resulting from the complex security challenges of its operations in the field and requests funds in the amount of €460,000.

<sup>53</sup> Cryer R & Bekou O. 'International Crimes and ICC cooperation in England and Wales', 5 *Journal of International Criminal Justice* (2007), 441, at 448.

<sup>54</sup> Kircher A. 'Attack on the International Criminal Court: A Policy of Impunity,' 13 *Michigan State Journal of International Law* (2005), 263, at 266.

<sup>55</sup> See the Rome Statute Art. 5. The crime of aggression has recently been defined at the ICC's first review conference in Kampala, Uganda, by the Assembly of States Parties, but the Court's ability to exercise its jurisdiction over the crime of aggression is 'subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute, and one year after the ratification or acceptance of the amendments [relating to the crime of aggression] by 30 States Parties, whichever is later.' The crime of aggression, ICC, RC/Res.6 (11 June 2010).

<sup>56</sup> See the Rome Statute Art. 11(1). The Statute came into force pursuant Art. 126; see also the ICC's website.

several missing crimes in the Statute: significant ones include the crimes of terrorism, drug trafficking, and the use of nuclear weapons. During the negotiation for the adoption of the Statute, a proposal was made that the crimes of terrorism and drug trafficking be considered in the review conference;<sup>57</sup> and was, in fact, discussed in the ICC's first review conference in 2010,<sup>58</sup> but their inclusion in the Statute was rejected. It seems unlikely that state parties would be able to reach consensus on this in future, particularly given the problems relating to the definition of terrorism.

Concerning the second aspect of jurisdiction, the Rome Statute has personal jurisdiction over individuals who are suspected of having committed any of the core crimes within the jurisdiction of the Court in three contexts. The first is when the persons have committed crimes in the territory of a state that is party to the Rome Statute.<sup>59</sup> The second is where the accused is a citizen of state party to the Rome Statute.<sup>60</sup> The third is when the ICC has the power to exercise its jurisdiction over the territory of non-party states in which the crimes was committed. This may itself occur in two situations: firstly in the case where the state accepts the Court's jurisdiction via declaration,<sup>61</sup> and secondly in the case of a referral by the SC under Chapter VII of the UN Charter.<sup>62</sup> The 'trigger mechanisms of jurisdiction' of the ICC for the aforementioned perpetrators are: a) referral by state parties to the Statute, b) referral of a situation by the SC pursuant Chapter VII of the Charter, and c) initiating of cases by the Prosecutor *proprio motu* power.<sup>63</sup> Further, for the commencement of the jurisdiction of the ICC, a mechanism of 'checks and balances' has been established between the Prosecutor and the Trial Chambers in the Statute.<sup>64</sup> Hence, a commencement of investigation by the Prosecutor's *proprio motu* power (non-referral) is always subject to approval and control by the Pre-Trial Chamber.<sup>65</sup> In contrast in a referral situation, the decision of the Prosecutor to investigate is not

<sup>57</sup> Robinson P. 'The missing crimes', in A Cassese, P Gaeta, and J. R. W. D. Jones (eds), (2002), 497, *supra* note 1, at 497.

<sup>58</sup> All of these crimes have also been suggested by states in the first review conference. The Netherlands suggested the inclusion of the terrorism in the Statute; Brazil and Trinidad and Tobago suggested the inclusion of the drug trafficking; and Mexico, the use of and threat to use nuclear weapons, see *the Report on the first review conference on the Rome Statute*, 31 May- 11 June 2010, Kampala Uganda, available at: [http://www.iccnw.org/documents/RC\\_Report\\_finalweb.pdf](http://www.iccnw.org/documents/RC_Report_finalweb.pdf) (Accessed 29/05/2012),

<sup>59</sup> Rome Statute, Art. 12(1).

<sup>60</sup> *Id.*, Art. 12 (2), (b).

<sup>61</sup> *Id.*, Art. 12 (2).

<sup>62</sup> *Id.*, Art.13 (b).

<sup>63</sup> *Id.*, Art. 15 (1).

<sup>64</sup> Cryer R & *et al.* (2010), *Supra* note 8, at 444.

<sup>65</sup> Rome Statute Art. 15 (4).

subject to the approval of the Pre-Trial Chamber. However, when the decision of the prosecutor is not to investigate in the ‘interests of justice’, this decision may be reviewed by the Pre-Trial Chamber.<sup>66</sup> This interplay between the ICC’s Prosecutor and Pre-Trial Chamber for the commencement of cases in the early stage has been known as the most pertinent example of the unique ICC’s procedural provision.<sup>67</sup>

Concerning the subject matter jurisdiction of the ICC, irrespective of its exclusion of some international crimes, two significant standpoints for the crime within its jurisdiction should to be considered. The first is that the Statute, in contrary to the two *ad hoc* tribunals, defines crimes against humanity and war crimes in greater detail.<sup>68</sup> The second aspect is that the Statute not only codified existing customary law, but it codified new crimes and thus contributed to the development of future customary international law.<sup>69</sup> However, one may argue that, despite the ICC’s declaration in the Preamble that it has ‘jurisdiction over the most serious crimes of concern to the international community as a whole,’<sup>70</sup> the subject-matter jurisdiction of the ICC is insufficient due to several significant missing crimes. The significance of this point is that, because the ICC’s claim to put an end to impunity, it may first of all be expected to have subject-matter jurisdiction overall the most serious international crimes, which it does not. The ICC also does not yet have the ability (and will not, at least for the next six years) to exercise jurisdiction over one of the core crimes of aggression within this jurisdiction.<sup>71</sup>

In addition, there are still further limitations. The Court is unable to exercise its limited jurisdiction without other requirements, for the commencement of the jurisdiction the Prosecutor needs specific trigger mechanisms. The admissibility test of the ICC has two main branches, complementarity<sup>72</sup> and gravity.<sup>73</sup> In fact, since the implementation of the jurisdiction by the ICC happens in exceptional circumstances,<sup>74</sup> as a consequence of the inability, unwillingness, or inaction of national courts, its entire jurisdiction could be said to be exceptional, in the sense that

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<sup>66</sup> *Id.*, Art. 53 (3).

<sup>67</sup> Kress C. *Supra* note 10, at 606.

<sup>68</sup> Cryer R & *et al.* *Ibid.*, at 150.

<sup>69</sup> *Id.*, at 151; see also Rome Statute, e.g. enlisting children under fifteen years, Art. 6 (b), (xxvi), and (e), (vii), which seems new in the war crimes categories.

<sup>70</sup> *Id.*, the Preamble, Para 9.

<sup>71</sup> See the crime of aggression, ICC. RC/Res.6 (11 June 2010), Statute first review Conference, *supra* not 58.

<sup>72</sup> Rome Statute Art. 17(1), (a), and (c).

<sup>73</sup> *Id.* Art. 17(1), (d).

<sup>74</sup> O’Callaghan D. *Supra* note 1, at 545.

it is subordinate to the normal jurisdiction exercised by national courts. The rule is that states are usually able to prosecute, and the exception is where states are genuinely unable or unwilling to carry on investigations.

### ***5.2.2. The principle of complementarity and admissibility of cases***

The term ‘complementarity’ is new in the legal context of jurisdiction<sup>75</sup> and in international criminal law.<sup>76</sup> This crucial principle led to a vast literature among scholars.<sup>77</sup> The complementarity concept plays a pivotal role in relation between a state’s domestic courts and the ICC, and reflects all of the substantive provisions of the ICC and its implementation of jurisdiction, which relies on this principle.<sup>78</sup> Despite the many advantages of the complementary principle, I will argue that it may potentially provide for the abuse of this principle, and may indeed weaken the Court and thus facilitate impunity. Further, it may also facilitate the possibility of the abuses of this principle and impunity in way that national jurisdiction may impede the exercise of the Court’s jurisdiction. First, I discuss the different discussions at the Rome conference for the adoption of this principle, its definition, then the different attitude among scholars concerning this principle. Finally, I discuss concerns around the admissibility of cases and how the notion of the complementarity and has worked in practice so far.

The word complementarity first appears in *ad hoc* discussions of the Committee as a derivative of the term ‘complementary’, found in the preamble of the 1994 ILC Draft Statute.<sup>79</sup> The Draft Statute provides that the ICC is intended ‘to be complementary to national criminal justice systems.’ The delegations adopted the

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<sup>75</sup> Miskowiak K. *The International Criminal Court: Consent, Complementarity and Cooperation* (2000), at 45.

<sup>76</sup> Razesberger F. *The International Criminal Court, the Principle of Complementarity* (2006), at 21.

<sup>77</sup> In addition to the above see, Newton M.A. ‘The Complementarity Conundrum: Are We Watching Evolution or Evisceration?’ 8 *Santa Clara Journal of International Law* (2010), 115; Radosavljevic D. ‘An Overview on the ICC Complementarity Regime,’ 1 *USAK Yearbook* (2008), 125; Yang L. ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court,’ 4 *Chinese Journal of International Law* (2005), 121; Benzing M. ‘The Complementarity Regime of the International Criminal Court: *International Criminal Justice* between State Sovereignty and the Fight against Impunity,’ 7 *Max Blanck Year book of United Nations Law* (2003), 591; Sheng A. ‘Analizing the International Criminal Court Complementarity Principle Through a Federal Courts Lens,’ 13 *ILSA Journal of International and Comparative Law* (2006-7), 413; Kleffner J.K. ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law,’ 1 *Journal of International Criminal Justice* (2003), 86.

<sup>78</sup> The Rome Statute Art. 1 and 17.

<sup>79</sup> See *Report of the International law Commission on the Work of its Forty-Sixth Session* (1994), at 3, Para 3. It provides ‘...the international community could complement and assist national efforts.’ U N. Doc. A/49/355 (1994).



word quickly and it was defined in cursory fashion in the Preparatory Committee, in 1996, as a phrase ‘to reflect the jurisdictional relationship between the International Criminal Court and national authorities, including national courts’.<sup>80</sup> Later at the Rome Conference, discussion relating to this principle was a cause of difficult and intense arguments among state delegations. However, the majority of delegates’ statements were in favour of this principle in the Rome Statute;<sup>81</sup> advocating it with respect for their national sovereignty. As one delegate observed, the Court should exercise jurisdiction only in the cases where national trial procedures are not available or ineffective, so as to preserve national sovereignty and avoid jurisdictional conflicts.<sup>82</sup>

The definition of complementarity, arises from an announcement by several countries’ delegations at the Rome Conference of the necessity for the definition of this principle.<sup>83</sup> In the end, however, complementarity was not defined, and was left ambiguous in the Rome Statute.<sup>84</sup> The preamble of the Statute states that the ICC ‘shall be complementary to national criminal jurisdiction’<sup>85</sup> and in Article 1 that it ‘shall be complementary to national criminal jurisdictions.’<sup>86</sup> Therefore, the concept of complementarity in the Rome Statute must be understood through the related Articles and through delegates’ statements in the Rome Conference, that it means that the Court would complete the national jurisdiction as a *last resort*, where states are unwilling or unable genuinely to prosecute such grave international crimes. Accordingly, the States Parties of the Statute have priority and primacy of jurisdiction over the crimes within the jurisdiction of the Statute.<sup>87</sup>

A difference in attitude concerning complementarity, maybe seen from discussions at the Rome Conference, although the majority supported this principle, a few countries raised concerns about the adoption of complementary jurisdiction. For

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<sup>80</sup> See the *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/51/22, Supplement No.22 (March- April 1996), I, at 36, Para 153.

<sup>81</sup> See the *UN Diplomatic Conference* (1998), Vol. II. *Supra* note 4, E.g. , Canada, at 68, Para 67, China at 75, Para 37, Japan at 67, Para 42, Germany at 83, Para 20, U.K at 98, Para 22, France at 101, Para 70, Mexico at 107, Para 20, Denmark at 114, Para 1, and etc.

<sup>82</sup> *Id.*, Ayub Delegation from Pakistan. *Id.*, at 78, Para 91; see also AI Bunny Delegation from Syria, at 83, Para 19.

<sup>83</sup> *Id.*, e.g. statements by Malawi from Indonesia and Nasr from Lebanon (20 November 1998), at 73, Para 10 and at 94, Para 42.

<sup>84</sup> El Zeidy M. *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008), at 157.

<sup>85</sup> See the Preamble of the Rome Statute Para 10.

<sup>86</sup> *Id.*, Art.1.

<sup>87</sup> *Id.*, Art 17 (1), (a), and (b).

example, Telicka, from the Czech Republic, stated that the ICC should have inherent jurisdiction over crimes instead of mere complementary jurisdiction. He asserted that the complementarity principle would place severe constraints on the Court's effectiveness; instead, the Court needed to be equipped with safeguards against sham investigations and show trials, and adding that:

His delegation could not accept the idea that, if a national justice system investigated or prosecuted a case, the Court should not be entitled to exercise jurisdiction, for that interpretation of the complementarity principle would seriously undermine the Court's effectiveness.<sup>88</sup>

Moreover, Halonen of Finland at the Rome Conference noted that:

[T]he exercise of the jurisdiction of the International Criminal Court was limited by the principle of complementarity,... The role of the Court must not be marginalized through further restriction.<sup>89</sup>

Similarly a commentator argued that the complementarity would significantly 'limit the jurisdiction, role and authority of the ICC that many fear it could become only a meaningless, residual institution.'<sup>90</sup> While inherent jurisdiction of the ICC was recognized, it would enhance the ICC's capability to prevent impunity for international crimes,<sup>91</sup> the ILC has also suggested inherent jurisdiction of the ICC for some crimes.<sup>92</sup> Brown accepted that the experience of the ICTY and ICTR concerning their practical enforcement of primacy led to the opinion that the primacy is not a feasible option for the ICC. He asserts '[i]nherent jurisdiction would allow the ICC to assert jurisdiction over cases involving core crimes without deferring to the jurisdiction of any interested state.'<sup>93</sup> It seems even granting inherent jurisdiction to the Court, the ICC would face issues regarding enforcement and cooperation.

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<sup>88</sup> See the *UN Diplomatic Conference*. *Supra* note 4, Vol, II, at 74 Para 21.

<sup>89</sup> *Id.*, at 98 Para, 31.

<sup>90</sup> Brown B.S. 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals.' 23 *Yale Journal of International Law* (1998), 383, at 425.

<sup>91</sup> *Id.*

<sup>92</sup> In the ILC Draft Statute inherent jurisdiction was suggested for the crime of aggression, and this approach was supported by a great number of states at the *Preparatory Committee* in 1997; see *Working Group 3 on Complementarity and Trigger Mechanisms: Committee on the Establishment of an International Criminal Court* (August 4-15, 1997), at 4, Art. 21 and 22. The Lawyers' Committee for Human Rights also supported inherent jurisdiction 'if the ICC is to operate as an independent and effective international judicial forum. In our view, both practical and legal reasons point to the need for expanding the court's inherent jurisdiction to include not only genocide, but war crimes and crimes against humanity as well.' See *The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor*, Lawyers Committee for Human Rights (July 1997), at 3; see also Press Release, *Proposed International Court should have Inherent Criminal Jurisdiction, Legal Committee told*, UN. GA/L/2878( 1 November 1995).

<sup>93</sup> Brown B.S. *Ibid.*, at 426.

However, complementarity has been advocated extensively by scholars, with some insisting on positive complementarity,<sup>94</sup> as it insists that the ICC is a ‘court of last resort’.<sup>95</sup> Many account advantages of this principle. Cassese and Cryer & *et al* and Livada, discuss the practical advantages with respect to primary jurisdiction and efficiency of the Court, arguing that it would be inappropriate for the ICC ‘to be flooded with cases from all over the world.’<sup>96</sup> Furthermore, it is likely to enhance national proceedings in an indirect way, and encourage states to comply with their primary liability to prosecute heinous international crimes.<sup>97</sup> Others also argue philosophically that the complementarity principle is justified by the requirements of national sovereignty and the primacy of national jurisdiction.<sup>98</sup> Although, the principle of complementarity seems to reflected state sovereignty, the Statute does not allow state parties to do nothing when confronted with a crime and may thus be seen to be a limitation of sovereignty of states.

Due to the significance of complementarity the Assembly of States Parties (ASP) adopted a Resolution on complementarity in the ICC’s first review conference in Kampala, Uganda in 2010.<sup>99</sup> Accordingly, the states adopted to assist the exchange of information between the ICC and state parties to the Statute, as well as and other international organizations such as civil society. Further, they ‘aimed at strengthening domestic jurisdictions, and requests the Secretariat of the [AS] Parties to report to the tenth session of the Assembly on progress in this regard.’<sup>100</sup> The ASP adopted the establishment of a complementarity ‘Extranet’, in order to ‘provide information on events relating to complementarity, identify the main actors and their

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<sup>94</sup> This idea of ‘positive complementarity’ did not appear in the Rome Statute; it is a concept due to interpretation by scholars and by the Prosecutor Policy Paper in ; see Sriram C. L & Brown S. ‘Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact,’ 12 *International Criminal Review* (2012), 219, at 228 ; see the International Criminal Court, Office of the Prosecutor (OTP), *Report on the activities performed during the first three years* (June 2003-June 2006), (12 September 2006), Para, 95; and the OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010), Paras 16 and 17.

<sup>95</sup> O’Callaghan D. *Supra* note 1, at 545.

<sup>96</sup> Cassese A. *International Criminal Law* (2008), at 343; Cryer R & *et al.* (2010), *Supra* note 8, at 153; Livada P. D. ‘The Principle of Complementarity and Security Council Referrals’, in M Politi & F Gioia (eds), *The International Criminal Court and National Jurisdiction* (2008), 51, at 57.

<sup>97</sup> Stigen J. *The Relationship between the International Criminal Court and National Jurisdictions the Principle of Complementarity* (2008), at 477; Rastan R. *Supra* note 7, at 453; Sriram C. L & Brown S. *Supra* note 94, at 229.

<sup>98</sup> Sriram C. L & Brown S. *Id.* at 228; Cassese A. (2008), *Ibid.* at 343; Livinda P.D. *Ibid.* at 57.

<sup>99</sup> ICC-ASP/2/Res.3. (2010)

<sup>100</sup> *Id.*

relevant activities.’<sup>101</sup> Consequently, the Secretariat issued a press release in 2011 and announced the Establishment of the Extranet.<sup>102</sup>

The most crucial aspect of the principle of complementarity relates to the question of admissibility. The rules of admissibility filter the types of situations or cases that can be put before the Court.<sup>103</sup> The admissibility of a case has to be considered by the Prosecutor before the commencement of any case by the ICC,<sup>104</sup> and determines which cases will be admissible. There are several situations wherein cases are inadmissible in the ICC. The first is when a case ‘is being investigated or prosecuted by a state’ which has jurisdiction over such crimes, unless the state is genuinely unable or unwilling to prosecute, or such state decided not to prosecute.<sup>105</sup> The second situation is where the ICC is subject to the *ne bis in idem* principle, that the prosecution and trial has already been completed, unless the proceedings were conducted for purposes of shielding the individuals concerned from criminal responsibility, or the trial was not conducted with independence or impartiality.<sup>106</sup> The third situation is when the case ‘is not of sufficient gravity to justify further action by the Court’.<sup>107</sup> In fact, from the above three situations it can be concluded that there is a primacy given to the exercise of jurisdiction to states.<sup>108</sup>

There are some ambiguities in the rule of inadmissibility of cases in the above Article which may be problematic in practice. The most significant are related to the type of investigation, interpretation of the case, and the gravity of crimes. Firstly, the Article does not specify what kind of investigation it is referring to and whether it includes non-retributive investigations, such as those conducted by truth commissions, which in turn concerns the question of amnesty examined in the third chapter. Secondly, concerning how broad a ‘case’ should to be interpreted, the Article is again not clear although in practice of the ICC has consistently reflected that ‘case’ should be identical in both person and charges. For example, in Post-election violence in Kenya, the Appeal Chamber, in *Prosecutor v. William Sammoei Ruto & et al* (2011) held that ‘Chambers have routinely adopted an interpretation of

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<sup>101</sup> See ICC-ASP/10/2, (11 November 2011), at 2.

<sup>102</sup> See Press release, *complementarity*, ICC-ASP-20110802-PR707 (2 August 2011).

<sup>103</sup> El Zeidy M. *Supra* note 84, at 408.

<sup>104</sup> Cryer R & *et al.* (2010), *Supra* note 8, at 154.

<sup>105</sup> Rome Statute. Art. 17 (1), (a), and (b).

<sup>106</sup> *Id.* Art. 17 (2), (c), and Art. 20 (3), see generally Tallgren. I & Coracin A. R. ‘Article 20’ in in Otto Triffterer (eds), *Commentary on the Rome Statute of the International Court* (2008), 669.

<sup>107</sup> *Id.* Art. 17

<sup>108</sup> Jones J. R.W.D & Powles S. *International Criminal Practice* (2003), at 392.

“case” consistent with the same person same conduct test....[t]he determination of admissibility vis-à-vis a “case” should be “understood narrowly to encompass both the person and the conduct which is the subject of the case before the Court”.<sup>109</sup> This approach also has been held in the Pre Trial Chamber in *Germain Katanga case*.<sup>110</sup> The significance of such jurisprudence of the ICC has clarified what is meant by a “case” here, although it has not prevented the matter from being the subject of continues challenges.

Thirdly, there is the question as to what is meant by the ‘gravity’ of a case, as this term has not been further defined in the Statute.<sup>111</sup> The idea of ‘gravity’ in fact is open to being interpreted in many different ways. The question is what constitutes the gravity - the number of victims, - quantitative- the kind of crimes- qualitative-, and so on. The *practice* of the Court in the *Bemba case* defined the gravity as pertaining to ‘the scope, scale, and nature of the crimes’, and the Chamber has rejected the Defence challenge for weak gravity of crimes in this case.<sup>112</sup> The Office of the Prosecutor has sought to extend the gravity criteria in greater detail, which, in addition to the above by the Chamber, includes the nature of the crimes, the manner of the commission of crimes, and its impact on victims.<sup>113</sup> In the most important case which the ICC dealt with the question of the gravity, was in relation to Kenya.<sup>114</sup> The situation in Kenya was the first situation initiated by the Prosecutor’s *proprio motu* power, and the scale of crimes was very limited in comparison to the other contexts such as DRC and Darfur. The number of deaths in Kenya after the controversial election was around 1133;<sup>115</sup> the Pre Trial Chamber authorised prosecution in 2010

<sup>109</sup> *Prosecutor v. William Sammoei Ruto & et al*, Appeal Chamber, ICC-01/09-01/11-183 (12 July 2012), Para 95; *Prosecutor v. Lubanga*, the Chamber also provides that in order to a case to be inadmissible before the ICC, the crimes and perpetrators should be identical in national court and in the ICC, see *Prosecutor v. Lubanga*, Pre-Trial Chamber 1.

<sup>110</sup> *Prosecutor v. Germain Katanga, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga*, Pre-Trial Chamber 1, ICC-01/04-01/07-4 12-02-2008, ICC-01/04-01/07(6 July 2007), Para 20.

<sup>111</sup> The RPE, however, in rule 145 (1), (c), and 2 (b) (iv), provides guidance for the examination of gravity, see also Situation in Kenya, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Pre -Trial Chamber II, ICC-01/09-19 31-03-2010 (31 March 2010), at 27 Para 67.

<sup>112</sup> *Prosecutor v. Bemba Gombo, Response by the Legal Representative of Victims to the Defence’s Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2), (a), of the Rome Statute*, Trial Chamber III, ICC-01/05-01/08-742 (1 April 2010), Para 69.

<sup>113</sup> See *Regulations of the Office of the Prosecutor, Regulation 29(2)*, the OTP, ICC-BD/05-01-09 (23 April 2009), see also *Policy paper on the interests of justice*, the ICC-OTP-2007, (September 2007), at 4-5.

<sup>114</sup> Sriram C. L & Brown S. *Supra* note 94, at 221.

<sup>115</sup> See Situation in Kenya (31 March 2010), *Supra* note, 111, at 58, Para 142 and 145.

without dealing with the complementarity principle. The Chamber otherwise provides that it is not necessary for the assessment of unwillingness or inability for Kenya to prosecute.<sup>116</sup> However, the Pre-trial Chamber examined the gravity and in addition to the factors of gravity in *Bambe* case, the Chamber added the ‘manner of commission’ of crimes and confirmed the gravity.<sup>117</sup> The Prosecutor in this situation also emphasised on the manner of organised crimes in the Kenya as a way of interpreting of gravity.<sup>118</sup>

In general, a link may exist between the gravity threshold and impunity. To explain this, if a crime is committed which falls within the jurisdiction of the Statute, and if the state possessing jurisdiction takes inadequate steps in response, rather than simply assume jurisdiction the Court will examine the gravity of the crime for purposes of determining its admissibility.<sup>119</sup> In such a situation, it is the gravity of the offence which will determine trial before the ICC, even in cases in which the state in question has no desire to prosecute. In such circumstances there is every prospect that neither domestic nor international proceedings will result from the commission of the crime, nor indeed any other form of accountability.

Such a conclusion, of course, depends upon the two criteria of admissibility in Article 17 of the Statute, namely the unwillingness and inability of the state to exercise jurisdiction. In each case, it is clear that there are a variety of different circumstances that might fall under each heading.

a) *Unwillingness*: Article 17 (2) defines what constitutes unwillingness and distinguishes between these different scenarios. The first is that a state may be considered as ‘unwilling’ when a prosecution was made in order to shield the person concerned from criminal liability.<sup>120</sup> The second is when there was ‘unjustified delay’ in the proceedings,<sup>121</sup> and the third when proceedings ‘were not or are not being conducted independently or impartially’, in a way which is incompatible with

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<sup>116</sup> *Id.* Paras 52 and 53.

<sup>117</sup> *Id.*, Para 188.

<sup>118</sup> Press release, ICC Prosecutor to Judges: *Kenya crimes resulted from a policy by identifiable leaders*, Office of the Prosecutor, ICC-OTP-20100303 (3 March 3 2010).

<sup>119</sup> *Prosecutor v. Lubanga, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58*, Pre-Trial Chamber I, ICC-01/04-01/06-8-Corr, Para 41, it provides ‘the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.’ See also *Situation in Kenya*, Pre-Trial Chamber II, *Supra* note 111, Para 57.

<sup>120</sup> The Rome Statute Art. 17 (2), (a),

<sup>121</sup> *Id.*, Art. 17 (2), (b).

an intention to bring such individuals to justice.<sup>122</sup> The Article is silent concerning inaction by state, but the Court in practice established that inaction can be an additional indication of unwillingness, as in the *Lubanga* and<sup>123</sup> *Katanga* cases in DRC.<sup>124</sup> Moreover, it seems that the above factors defining unwillingness are not exclusive; rather, unwillingness may be indicated by other factors, such as inadequate legislation by a state, wherein the case will fall under the jurisdiction of the ICC.<sup>125</sup>

b) Inability: A state is ‘unable’ to prosecute where its judicial system has entirely or partially collapsed, or it is not in a position to detain the accused, or to collect required evidence, or to carry out criminal proceedings.<sup>126</sup> In a similar way to the case of unwillingness, which could be indicated by inaction, inaction could also be a consequence of the inability of a judiciary system to prosecute. While linguistically, inability is a broad term which could simply refer to the state without limitation and could cover any case of inability,<sup>127</sup> the Statute in fact limits the scope of inability, and specifies certain kinds of inability: inability as a result of ‘total or substantial collapse’ or as the ‘unavailability of a judiciary system’.<sup>128</sup> In practice, inability has been an important condition for the exercise of jurisdiction on the part of the Court as demonstrated in the *Bemba*,<sup>129</sup> and Darfur cases.<sup>130</sup>

The total collapse of the judicial system may happen rarely among states, but the situation in Rwanda after the genocide in 1994 is possibly illustrative of this

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<sup>122</sup> *Id.*, Art. 17 (2), (a).

<sup>123</sup> The OTP has interpreted the complementarity test as being fulfilled by inactivity, and not as requiring an obvious manifestation of the unwillingness or inability of a State to conduct a trial. This concept was recognised by *Prosecutor v. Lubanga* in Pre-Trial Chamber I. The case provides that: ‘[t]he first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(1), (a), to (c), 2 and 3 of the Statute’, see ICC-01/04/01/07- Pre-Trial Chamber I (10 February 2006), Para 29.

<sup>124</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, ICC-01/04-01/07-1007 (30 March 2009), Para 47.

<sup>125</sup> E.g. the Lack of war crimes in Sudan in the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution* (1564 of 18 September 2004), (Geneva, 25 January 2005), at 5 and 148 Para 586.

<sup>126</sup> *Id.*, Art. 17 (3).

<sup>127</sup> Stigen J. *Supra* note 97, at 314.

<sup>128</sup> See the Rome Statute Art. 17 (3).

<sup>129</sup> *Prosecutor v. Bemba Gombo*, Trial Chamber III. *Supra* note 112, Para 86. The Chamber held ‘the country’s [CAR] judicial system is lacking in sufficient number of judges, judicial assistants, work facilities, and even prisons, thereby rendering it an inefficient forum on which to hold such a complex prosecution.’

<sup>130</sup> See the *Report of the International Commission of Inquiry on Darfur to the UN. SG* (18 September 2004), *Supra* note 125, at 5.

condition. Of more significance than ‘total collapse’ is the idea of ‘substantial collapse’, which replaced the earlier terminology of ‘partial collapse’ found in the ILC draft in the Rome Conference. Substantial collapse is clearly not total, but it is nevertheless essentially a collapse, in which a state is unable, for instance, to ‘obtain the accused’ or the ‘necessary evidence’.<sup>131</sup>

The idea of ‘unavailability’, for its part, may encompass both the total and substantial collapse of a system, but is not confined to such a scenario.<sup>132</sup> Unavailability includes the lack of or inadequacy of relevant legislation, or the unavailability of procedures under national law for bringing the accused to justice.<sup>133</sup> When an action is not criminalised, the state would not be able to subsequently bring the perpetrators to justice. It seems clear that the idea of the ‘unavailability’ of a state’s judicial system should be construed in a broad enough manner for the ICC not to have to defer to national courts when the state is unable to carry out meaningful proceedings. Otherwise, impunity would effectively be created from the inadequacy of the national system, which is exactly what the Rome Statute was created to avoid.<sup>134</sup>

In general there is obviously a very close relationship between unwillingness and inability;<sup>135</sup> unwillingness may in fact be the result of inability in some situations.<sup>136</sup> In general there is less difficulty in reaching a decision that a state is unable to prosecute than that a state is unwilling to do so.<sup>137</sup> The absence of any requirement to show intent, whether constructive or otherwise, is obviously an important consideration here, particularly in light of the lack of clarity as to the allocation of the burden of proof.<sup>138</sup>

Aside from these general problems, it is unclear as to whether those states designated ‘unwilling or unable’ would include non-parties to the Rome Statute. The question is raised as to what happens when a state is not a member of the Statute, and

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<sup>131</sup> *Id.*, 17 (3).

<sup>132</sup> Stigen J. *Supra* note 97, at 317.

<sup>133</sup> See the Rome Statute Art. 88 and 56(1).

<sup>134</sup> Stigen J. *Ibid.*, at 318.

<sup>135</sup> See International Center for Transitional Justice, ICTJ Side Event During ICC ASP Ninth Session, *Making Complementarity Work: The Way Forward* (9 December 2010), at 1. Available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Events/2010/DiscussionPaper-Complementarity-9Dec2010-ENG.PDF](http://www.icc-cpi.int/iccdocs/asp_docs/Events/2010/DiscussionPaper-Complementarity-9Dec2010-ENG.PDF) (Accessed 09/06/2012).

<sup>136</sup> *Id.*, at 1. (ICTJ).

<sup>137</sup> Kleffner J.K. *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), at 153.

<sup>138</sup> Newton M.A. *Supra* note 77, at 148; Cryer R & *et al.* (2010), *Supra* note 8, at 442.



a situation in such a state is referred to the ICC by the SC or via self-referral by the state party. It seems that in case of a self-referral, it may be unnecessary for any assessment of unwillingness or inability, but at the same time, one may argue that nothing can prevent a sovereign state from reclaiming its jurisdiction.<sup>139</sup> However, other criteria of admissibility, such as gravity of crimes, which is compulsory would remain to be examined.<sup>140</sup>

Finally, the notion of complementarity is that it is necessary in order to encourage genuine domestic procedure for international crimes and facilitate a 'consensual division of labour' between the jurisdiction of the ICC and domestic jurisdiction where suitable.<sup>141</sup> This is logically grounded in the idea that justice has to be rooted in the perception of the local people and victims,<sup>142</sup> in addition to the fact that a court such as the ICC rationally and logistically cannot prosecute all international crimes. As Kleffner notes, such procedures, existing by reason of the complementarity principle, 'contain elements of an interaction between the Court and national criminal Jurisdictions, which may serve to induce states to carry out investigation and prosecutions.'<sup>143</sup> The other rationale behind the principle of complementarity might be that national jurisdictions are, in fact, in a much better position to prosecute and to collect evidence.<sup>144</sup> The practical advantages of national proceedings are clear: even with a large body and enough power, budget, and resources, a court is unable in practice to prosecute all international crimes.<sup>145</sup> In some situations, the domestic court will be able to prosecute international crimes more effectively; however, this does not apply to all cases or all states. On the other hand, the ICC, in being complementary rather than supplementary to national

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<sup>139</sup> Newton M.A *Id*, at 161-162.

<sup>140</sup> E.g. even in a referral situation by the Security Council, the complementarity principle has been applied in the Darfur situation in Sudan (a state non-party to the Rome Statute), which was referred by the Security Council, see the *Report of the International Commission of Inquiry on Darfur*. *Supra* note 124, at 153-154 Para 606-607.

<sup>141</sup> See the Policy Paper, *paper on some policy issues before the Office of the Prosecutor*, ICC-OPT 2003 (September 2003); Cryer R & *et al.* (2010), *Supra* note 8, at 154; Bernhardt observer for the *European Court of Human Rights in the Rome Conferences*, UN DOC. A/CONF.183/SR.3. *Supra* note 101, at 79, Para 100.

<sup>142</sup> Newton M. A. *Supra* note 77, at 141.

<sup>143</sup> Kleffner J. K. (2008), *Supra* note 137, at 82; see also Rastan R. *Supra* note 7, at 442, 453 and 455, he asserts '[t]he Rome Statute sets up a system for the enforcement of international criminal law through the close and co-ordinated interaction of the ICC with competent authorities at the domestic level.'

<sup>144</sup> Cassese A. (2008), *Supra* note 96, at 343; Cryer R & *et al.* *Ibid*, at 151; Razesberger F. *Supra* note 76, at 25.

<sup>145</sup> *Id*, at 343.

jurisdictions, no doubt did provide a generally acceptable way of proceeding which gave due respect to state sovereignty.

The criteria of admissibility outlined here do not, in themselves, entail the creation of a condition of impunity where none existed before, but may be said to foster and legitimise it on certain occasions. On the one hand, the test of gravity does seem to introduce an inexplicable gap in the jurisdictional system such that certain crimes are overtly determined not to be punishable. On the other hand, the looseness of the determinations regarding the inability or unwillingness of the jurisdictional state to punish crimes may certainly enhance the possibility that certain perpetrators may effectively avoid processes of accountability. Quite apart from this, the provisions will undoubtedly result in the delay of prosecution as a result of the challenges of jurisdiction and admissibility of cases either by the accused or states themselves.<sup>146</sup> If justice delayed is justice denied, the spectre of impunity also casts a shadow over the procedural complexities of the Rome Statute.

### ***5.2.3. The fostering of impunity via the principle of complementarity and non-admissibility of cases***

As has been examined, the admissibility criteria in the Rome Statute establish a high threshold for interference by the ICC. The rules governing admissibility may ensure a case is deferred from the Court to a national criminal jurisdiction, and have the potential to foster impunity in several ways.

#### ***a) Impunity via the recognition of a state's decision not to prosecute, inadmissibility challenge,***

The Rome Statute, in Article 17 (1) (b) recognises as valid a decision not to prosecute a person by a state and it provides as one of the inadmissibility criteria for the Court that: '[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned'. The above Article recognises a *decision* not to prosecute by a state concerning such heinous crimes without offering other mechanisms of justice. As was pointed out in Chapter Three, it is sometimes argued that the prosecution of individuals may actually inflame a conflict and risk the perpetration of new atrocities, and that this is often used as an argument in favour of forms of non-retributive justice and local remedies.

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<sup>146</sup> Rome statute Art. 19 (1), and (2).

Article 17(1) (b) might be said to reflect such a concern, but it does so in an absolute way in the sense that it offers no alternative to non-prosecution. One may say, in fact, that it recognises the impunity of individuals, when offered by a state who is able or willing to prosecute, but makes the decision not to prosecute.

In practice, in *Bemba case*, the Defence challenged the admissibility of cases and argued that because the Central African Republic (CAR) authorities previously investigated the same conduct concerning the current charge against Bemba, thus pursuant to Article 17 (1) (b) of the Statute, the case is inadmissible before the ICC. The Pre-Trial Chamber III held that since the decision by the CAR authority was not to prosecute the accused but to close the case, thus rejected the challenge of admissibility and referenced it to the Appeal Chamber in *Katanga case* that a ‘decision not to prosecute’ in terms of article 17(1)(b) of the Statute does not cover the decision of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC’.<sup>147</sup> It seems that the Chamber via such narrow interpretation in *Bemba case* attempted to eliminate the ‘not prosecution’ criteria as a bar to the admissibility of the above Article, as it may be in the interest of justice that some accused should be prosecuted in an international court rather than a domestic court.

#### ***b) Impunity by shielding the perpetrators via complementarity***

Due to the complementarity principle, the Prosecutor, pursuant to Article 18 of the Statute and Rule 52 of the Procedure,<sup>148</sup> should notify states of an initiation of investigations. Furthermore, a state may inform the Prosecutor within one month of having received the notification that it has initiated an investigation over the crime within the jurisdiction of the Statute.<sup>149</sup> In such a case the Prosecutor shall defer the situation to the state concerned, except if the Pre-Trial Chamber, under a request by the Prosecutor, decides to allow the prosecution. However, such a deferral to a state could be reviewed by the Prosecutor after six months of the deferral.<sup>150</sup>

In general, the weaknesses with regard to complementarity is that it may lend itself to abuse of this principle as it can provide a shield to those who wish to evade

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<sup>147</sup> *Prosecutor v. Bemba Gombo*, Trial Chamber III (2010), *Supra* not 112, Para 61-64.

<sup>148</sup> See the Rule 52 of *Evidence and Procedure*, Adopted by the Assembly of State Parties, ICC-ASP/1/3 (September 2002). It provides at 52(2), ‘[a] State may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2.’

<sup>149</sup> *Id.*, Art. 18(2),

<sup>150</sup> *Id.*, Art. 18 (2), and (3).

the prosecution by the ICC.<sup>151</sup> In practice there is considerable scope for states to shield perpetrators from prosecution either before or after a notification by the Prosecutor which would serve as an early warning for states. Firstly, before such declaration by the Prosecutor, states may await an investigation and only initiate it once the Prosecutor makes a notification under the above Article. Through this procedure, states could apply the complementarity principle as a shield for certain international crimes which have mainly happened through the support of the state authorities.<sup>152</sup> Although such a notification of investigation by the Prosecutor could be limited in its scope,<sup>153</sup> this notification may alert an accused and may cause misuse of the information.<sup>154</sup> This may lead to the destruction of the evidence, and the result could be the impunity of perpetrators.

Secondly, a state may, as a strategy, even initiate prosecution after the ICC's Prosecutor has initiated an investigation, as long as the trial has not been started in the Court. In this situation, priority of jurisdiction is still with domestic courts. This priority of jurisdiction of national courts even after the beginning of an investigation by the Prosecutor is result of the lack of primacy and inherent jurisdiction of the ICC. An important point in such a case is how the ICC's investigation in this situation could rightly deal with the commencement of a genuine prosecution in the national courts. When a state's prosecution has only been started after an announcement, or an investigation by the Prosecutor, it is unlikely to be seeking a genuine prosecution and might rather be seen to be using it as a strategy in order to avoid prosecution by the ICC. In practice this has been exemplified in the Darfur situation currently before the ICC, where the Sudanese government has countered the Prosecutor's arrest warrants by announcing that they are investigating the persons under arrest

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<sup>151</sup> O'Callaghan D. *Supra* note 1, at 545.

<sup>152</sup> Cassese A. 'The Statute of the International Criminal Court: Some Preliminary Reflections,' 10 *The European Journal of International Law* (1999), 153, at 159.

<sup>153</sup> Rome Statute Art. 18(1). In a similar way the ICC can limit the disclosure of evidence, as has taken place in the case of *Prosecutor v. Lubanga*, where a decision by Pre-Trial Chamber I that 'any restriction on disclosure to the Defence of the names and/or apporions of the statements of the witnesses...must be authorised by the Chamber pursuant to rule 81 (4), of the Rules' of Procedure and Evidence was upheld by the Appeals Chamber. See the *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber Judgment. ICC-01/04-01/06 (13 Oct 2006), at 2 (i).

<sup>154</sup> Kleffner J.K. (2008), *Supra* note 137, at 171; and see generally, 'Complementarity as a Catalyst for Compliance', in J. K. Kleffner & G. Kor (eds), in *Complementary Views on Complementarity* (2006), 79.

warrant.<sup>155</sup> Sudan has also established a Special Court for Darfur Crimes, in 2005 and challenging the ICC's prosecutions.<sup>156</sup>

Paradoxically, this kind of shielding of perpetrators may happen precisely because of the increasing influential attention of the international community, as a result of which a state may realise that it is difficult to remain passive. Instead, a trial may be held as a sham in order to shield such perpetrators partially or totally. The state authorities would be able to shield the perpetrators through a variety of different methods in such cases: via their acquittal or through the crime in question being prosecuted as an ordinary crime (e.g. genocide as murder) or by being given an inferior punishment, etc. This may occur, in particular, with regard to crimes against humanity, which are usually perpetrated with the assistance or at least acquiescence of national authorities. It is not easy for the Court to *intervene* in such cases, except when it is acting at the request of the Security Council;<sup>157</sup> the particular problem being that it is difficult for the Prosecutor to amass sufficient evidence to prove such shielding is taking place. A commentator has noted that '[p]aradoxically, the establishment of the ICC will probably lead to more shams which in turn will be more difficult to identify than inaction.'<sup>158</sup>

### ***5.3. The cooperation of states and enforcement issues of the ICC***

The most significant factor in the effectiveness of functioning of all international tribunals is the cooperation of states and other international organisations. In this section I argue that the cooperation regime of the ICC is weaker than that of the *ad hoc* tribunal and faces greater challenges of obtaining cooperation, which may foster impunity. As Peskin asserts, '[a] non-cooperative state does not usually remain passive in the face of the tribunal's attempt to "prosecute" it by shaming'.<sup>159</sup> The effectiveness of the international tribunal 'depends ultimately on whether they can obtain and sustain the state cooperation needed to carry out investigations, locate

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<sup>155</sup> See *supra* note, 36; see also generally, *Lack of Conviction - The Special Criminal Court on the Events in Darfur*, Human Right Watch (8 June 2006), Available at: <http://www.hrw.org/legacy/backgrounder/ij/sudan0606/sudan0606.pdf>. (Accessed 22/08/2012),

<sup>156</sup> See Address by Luis Moreno-Ocampo, *Prosecutor of the International Criminal Court, Address to the United Nations Security Council New York* (13 December 2005), see also, *Lack of Conviction...*, Human Right Watch. *Id.*

<sup>157</sup> O'Callaghan D. *Supra* note 1, at 545.

<sup>158</sup> Stigen J. *Supra* note 97, at 259.

<sup>159</sup> Peskin V. *Supra* note 37, at 11.

witnesses, and bring suspects to trial.<sup>160</sup> There are three categories of cooperation issues at the ICC which should be distinguished; namely, the cooperation regime within the Statute, cooperation by states and the Security Council.

a) The regime of cooperation in the ICC (*de jure* issue) is very weak in contrast to that in the *ad hoc* tribunals, and in general it is not obligatory.<sup>161</sup> Indeed, the language of the Statute is ‘request for cooperation’ or ‘shall ...to cooperate’,<sup>162</sup> rather than ‘order’ or ‘obligation’.<sup>163</sup> Moreover, the cooperation in the Statute is subject to many conditions, which may exclude or reduce the judicial assistance provided by state parties to the Court. These conditions include, national security interest,<sup>164</sup> third-party interests,<sup>165</sup> competing requests for extradition from a non-party state,<sup>166</sup> or a competing request for co-operation,<sup>167</sup> a prohibition in domestic law,<sup>168</sup> the immunity of state officials, ‘a pre-existing treaty obligation’<sup>169</sup> and so forth. Many of the above qualifications seem to stem from the treaty nature of the ICC. As Rastan asserts, the majority of these provisions reflect the fact that ‘the Statute only regulates the relationship between states parties and the Court; consistent with the law of treaties, it does not intend to alter the existing relationship between states more generally.’<sup>170</sup>

b) States non-party to the Statute, non-party states in general, and those with an exception to referral from the SC, have no obligation to cooperate with the Court. This derives from the Vienna Convention.<sup>171</sup> In this situation, the power of the Prosecutor to obtain cooperation from states is extremely weak, and is mainly based on the will of states. While the heinous nature of some international crimes produces both strong moral obligation and obligations under international conventions<sup>172</sup> for states to prosecute such crimes, this does not mean that non-party states in general

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<sup>160</sup> *Id.*, at 5.

<sup>161</sup> The Statute only in a few Arts provides the obligation of state parties to cooperate with the Court under the Statute, such as 72(7), (a), (ii), and 86.

<sup>162</sup> *Id.*, (86).

<sup>163</sup> *Id.*, Arts. 87(2), and (3), 89, 57(3), (d), and 72(7), (a), see also Rastan R. *Supra* note 7, at 432

<sup>164</sup> *Id.*, Art. 72 (1).

<sup>165</sup> *Id.*, Arts. 73 and 93(9), (b).

<sup>166</sup> *Id.*, Art. 90.

<sup>167</sup> *Id.*, Art. 93(9).

<sup>168</sup> *Id.*, Arts. 91 and 99.

<sup>169</sup> *Id.*, Art. 97(c).

<sup>170</sup> Rastan R. *Supra* note 7, at 434.

<sup>171</sup> See *Vienna Convention on the Law of Treaties*, UNTS. A/CONF.39/11/Add.2 (1969), Art. 34 and 35.

<sup>172</sup> See Art. 6 and 7 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, UNTS 78 / 277(9 December 1948), entered into force Jan 12, 1951; *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* UNTS 1465/ 85 (1984).

could be compelled to cooperate with the Court. However, non-party states may cooperate with the ICC either by accepting ICC jurisdiction<sup>173</sup> or by providing assistance on the basis of an agreement with the ICC.<sup>174</sup>

In addition, non-party states are also obliged to cooperate with the Court in two particular cases. The first concerns certain crimes generally considered to be against *jus cogens* norms, such as genocide, crimes against peace, torture, and war crimes. States are obliged to cooperate in the prosecution of these crimes regardless of their status under any particular national law. Since many of these crimes are included within the Rome Statute, states are at least obligated to cooperate with the Court in the case of these kinds of crimes within its jurisdiction. The second case regards non-party states' obligations when situations have been referred to the ICC by the SC under Chapter VII of the UN Charter.<sup>175</sup> However, in practice the non-cooperation of states parties and states not parties to the Statute has been clearly exemplified in the Al-Bashir case,<sup>176</sup> in which despite the assurance of two arrest warrants against him, and despite the request by the Prosecutor, states refused to arrest or surrender him to the ICC.

c) The cooperation via the SC should be consider in three aspects: The first concerns the role of the SC in relation to the weak statutory cooperation in the Statute that has been discussed in section (a) above. In this case, one may raise the question whether the SC could enhance the Statuary cooperation of the ICC. As Rastan rightly argued, the SC cannot change the cooperation regime in the Statute and ask the ICC 'to act beyond the powers conferred upon it under the Statute'.<sup>177</sup> The ICC is not a subsidiary organ of the SC, and is therefore not bound by the SC. In addition, 'the principle of attribution holds that an international organization cannot act beyond the powers attributed to it by its constituent treaty.'<sup>178</sup>

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<sup>173</sup> Rome Statute Art. 12(3), and Rule 44.

<sup>174</sup> *Id.*, Art. 87(5).

<sup>175</sup> The Rome Statute Art. 13 (b), see also Wenqi Z. 'On Co-operation by states not party to the International Criminal Court', 88 *International review of the Red Cross* (2006), 87 at 90-92.

<sup>176</sup> The Pre- Trial Chamber I, ICC-02/05-01/09-139 (12-12-2011), at 7; see also Press Release, *Pre-Trial Chamber I informs the United Nations Security Council and the Assembly of States Parties about Malawi's non-cooperation in the arrest and surrender of Omar Al Bashir*, ICC-CPI-20111212-PR755 (11-12-2011), see also Chapter III, the case of Al-Bashir.

<sup>177</sup> Rastan R. *Supra* note 7, at 442.

<sup>178</sup> *Id.*, see also Sarooshi D. 'The Peace and Justice Paradox', in D. McGoldrick, P. Rowe, and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), 95, at 106-7.

The second aspect, here, is the status of a referral of a situation by state parties to the ICC,<sup>179</sup> or initiated by the Prosecutor *proprio motu*,<sup>180</sup> power, the ICC can resort to cooperation by the SC and other international organizations to enhance cooperation.<sup>181</sup> In practice the ICC has made several special agreements through/with international organizations on cooperation and assistance.<sup>182</sup>

The third aspect related to the role of the SC is the status of a referral of a situation by the SC<sup>183</sup> under Chapter VII. In this situation, which is similar to the state of affairs in the *ad hoc* tribunals, the ICC has power to bind UN member states, whether parties or non-parties to the Statute, to cooperate with the Court. The ICC may transmit requests to a state that is not party to the Statute to cooperate with the Court pursuant to the obligation imposed on states related to the SC resolution to cooperate fully with the Court. In fact, in such a situation the SC could impose any sanctions against a reluctant state, whether a state party or non-party to the Statute, under Chapter VII of the Charter. This is the reason why the Appeal Chamber in the *Blaskic* case held that the obligation to cooperate with the tribunal is binding, not only on those states of the former Yugoslavia, but also on all other states.<sup>184</sup> The Trial Chamber of the ICTY in the *Kordic* and *Cerkez* case, for instance, issued a binding order for the purpose of the production of materials compelling third states such as the Netherlands.<sup>185</sup> However, in the case of non-compliance, the ICC will report it to the SC. In practice, the Prosecutor of the ICC has reported the non-compliance several times,<sup>186</sup> but the practice of the SC is not encouraging. In addition, the non execution of the arrest of warrant against Kony<sup>187</sup> and Al-Bashir<sup>188</sup> by the ICC were

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<sup>179</sup> See the Rome Statute Art. 14.

<sup>180</sup> *Id.*, 15(1).

<sup>181</sup> *Id.*, 87(6), of the Rome Statute, in this case the ICC 'may ask any intergovernmental organization to provide information or documents,' or 'other forms of cooperation and assistance ... in accordance with its competence or mandate'; see also Art. 15 of the UN-ICC Relationship Agreement, ICC-ASP/3/Res.1.

<sup>182</sup> See Press Release, *the International Criminal Court and the European Union sign an agreement on cooperation and assistance*, ICC-CPI-20060410-132 (10 April 2006), *Cooperation agreement between the Office of the Prosecutor and Interpol*, ICC-OTP-20041222-85 (2004), see also the UN and the ICC Relationship Agreement, Art. 15, ICC-ASP/3/Res.1.

<sup>183</sup> Rome Statute Art. 13 (b).

<sup>184</sup> *Blaskic* Appeal Chamber, *Supra* note 58, Para 29.

<sup>185</sup> *Kordic and Cerkez Order on Ex Parte Application for Issuance of an Order to the Netherlands Government*, IT-95-14/2 (Jan 27 2000).

<sup>186</sup> Rastan R. *Supra* note 7, at 454.

<sup>187</sup> *Prosecutor v. Joseph Kony et al., Order to the Prosecutor for the Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda*, Pre-Trial Chamber II, ICC-02/04-01/05-131 (30 November 2006).

<sup>188</sup> See *supra* note 176.



mainly on the basis of insufficient cooperation by states and the SC. The ICTY also repeatedly reported the non-compliance of states of the former Yugoslavia, ‘has led to little more than verbal admonition’ by the SC.<sup>189</sup> As the former ICTY and ICTR Prosecutor Ponte notes, whilst the SC has authority to impose sanctions, ‘[t]he imposition of such sanctions is unlikely, because the Security Council rarely takes significant action unless there is a crisis situation, ... [t]he best the tribunal can expect is a Security Council resolution.’<sup>190</sup> She stated during her eight year office the most of time gather political pressure on states such as Serbia and Croatia to comply with their obligation to cooperate.<sup>191</sup>

Nevertheless, this is true that some states wielding the veto power has been blocked the SC’s ability to respond to international affairs in an appropriate time. A clear example of this is the current situation in Syria, where despite crimes that are more widespread than those of Libya, has not been referred to the ICC yet, due to the difficulty of reaching an appropriate consensus between the SC veto wielding members. Success in international trials requires not only the cooperation of the domestic authority, but also active collaboration from the domestic authority and NGOs. The international community pressure and in particular, the powerful international actors, such as the US and the SC play a crucial role for targeting and surrendering of the accused and enhancement of cooperation and effectiveness of the Court.<sup>192</sup>

In general the consequences of non co-operation would be the unavailability of the accused, evidences, and so forth, and thus impunity for perpetrators. In particular, the effects of non-cooperation are more complicated where a state is clearly able, but unwilling, to co-operate with the ICC. As discussed in this section, part of the problem inevitably lies in the limits to the complementarity regime of the ICC.<sup>193</sup> Moreover, even within its procedural and jurisdictional authority, the ICC has no coercive power in the case of non-compliance by state parties.

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<sup>189</sup> Bass G. J. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000), at 223; Rastan R. *Supra* note 7, at 443; Ponte C.D. *Supra* note 7, at 52-57.

<sup>190</sup> Ponte C.D. *Id.* at 42.

<sup>191</sup> *Id.*

<sup>192</sup> Peskin V. *Supra* note 37, at 62 and 90.

<sup>193</sup> Rastan R. *Supra* note 7, at 454-5.

### 5.3.1. *The enforcement issue of the ICC*

In common with *ad hoc* trials, the ICC lacks independent enforcement powers of its own,<sup>194</sup> and therefore, the Court cannot enforce its will on states when they do not desire to cooperate with its requests. States are not obliged to release evidence within their jurisdiction, and the Tribunal has no means of enforcing its will upon states.<sup>195</sup> A state could attempt to influence the result of a trial by giving the Court only partial access to evidence that it possesses, or could also release evidence at a time which suited its own purposes.<sup>196</sup> The outstanding of many arrest warrants issued by the ICC demonstrates the fact that the surrender of suspect or accused is a serious obstacle in proceeding before the Court. Be that as it may, it is vitally important for the ICC -just as for any international tribunal- to arrest and prosecute alleged perpetrators in order to combat impunity for international crimes.<sup>197</sup> Thus, in general there is a link between the enforcement power and the successful operation of the ICC.

In practice, Serbia's non-cooperation with the ICTY during the Milosevic period,<sup>198</sup> the current situation in Darfur, and the Sudan's Government non-compliance are examples of the importance of enforcement for the ICC.<sup>199</sup> Despite the referral of the situation in Darfur by the Security Council, insufficient cooperation by the Sudan's Government has meant that the Court has not been able to collect all evidence or arrest the perpetrators in this case.<sup>200</sup> Most importantly, the ICC does not have sufficient support of the SC, thus, the Court cannot exercise its arrest of warrants against president Al-Bashir. Similarly, there are still outstanding arrest warrants in the Uganda case. The most important arrest warrants against the Lords Resistance Army (LRA) leader, Joseph Kony who allegedly killed thousands

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<sup>194</sup> Peskin V. *Ibid*, at 7.

<sup>195</sup> Cogan K J. *Supra* note 5, at 411.

<sup>196</sup> *Id*, 412.

<sup>197</sup> Groulx E. 'The New International Justice System and the Challenges Facing the legal Profession', 39 *Revue quibicoise de droit international* (2010), 39, at 52. (He was the President of the International Criminal Defence Attorneys Association), see also Cryer R & *et al.* (2010), *Supra* note 8, at 461.

<sup>198</sup> Peskin V. *Supra* note 37, at 30.

<sup>199</sup> *See the Prosecutor v. Bahr Idriss Abu Garda*, ICC-02/05-02/09, and ICC-02/05-02/09-T-4-ENG ET WT 09-06-2009 1/4 NB PT, at 1-3.

<sup>200</sup> *Id*, Pre-Trial Chamber (4 March 2009), at 85 Para 225. 'The Prosecution Application states that Omar al-Bashir has "consistently challenged the Court's jurisdiction and categorically refused that any Sudanese citizen be surrendered to the Court", and that, as a result of his position as Head of State, he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses,.'

and abducted and enlisted hundreds of children, along with those of many other accused are still outstanding.<sup>201</sup>

However, while the ICC can potentially access the SC's enforcement powers in case of a referral by the SC, where the situation before the Court is a referral by state parties,<sup>202</sup> or when it was initiated by the Prosecutor, the ICC faces even greater challenges.<sup>203</sup> The question then becomes: where a state party of the Statute is reluctant to cooperate with the ICC, what kind of power does the ICC have? In this situation the limits to the sanction power of the ICC are one of the main concerns regarding the successful procedural process by the Court. However, where a state party to the Statute has failed to, or is reluctant to cooperate with the Court, the only existing remedy in the Statute is to refer it to the Assembly of States Parties. This provides:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.<sup>204</sup>

It is unclear what benefit such referral might have given the somewhat opaque nature of the Assembly's powers. It is also unclear what decision might be made against such states failing to cooperate in the Assembly of State Parties.

However, in reality, the creation of an independent police for the ICC seems neither viable nor practical. What then, can be done to enhance the cooperation of states and to enforce the ICC's demands? Despite some deficiencies in the structural complementarity regime of the ICC that are examined in the above sections, Peskin has argued that one solution could lie in the power of the legitimacy and moral authority of such international tribunals. Concerning the ICTY and ICTR, he asserts that although they lack independent enforcement power, these 'tribunals possess a great deal of soft power because of their moral claim to being the ultimate judicial guardians of universal standards of human rights.'<sup>205</sup> Additionally, he added that 'to a significant degree, a tribunal shapes its reputation and in turn its soft power by the

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<sup>201</sup> E.g. four outstanding arrest of warrants in the situation in *Uganda*, four in the situation in *Darfur* and one in the DRC.

<sup>202</sup> Rome Statute Art. 14.

<sup>203</sup> *Id.*, Art. 13 (3), and 15 (3), and (4).

<sup>204</sup> *Id.*, Art. 87 (7).

<sup>204</sup> *Id.*, Art. 87.

<sup>205</sup> Peskin V. *Supra* note 37, at 7.

efficacy of its policies and practices as well as by the skill with which it markets itself.’<sup>206</sup> All of the above factors could be valid and practical for the ICC, especially since the ICC is a more truly international court than the UN ad hoc tribunals. Moreover, it can claim the universal moral standard of bringing justice for all and ending impunity as its objective. However, it seems that the ICC has not been very successful in the later area so far, and this has detracted from its moral and political authority.

One other significant factor that might raise levels of cooperation and address the enforcement issues of the ICC, I think, is public awareness via the media. As Rastin asserts ‘[i]n some situations, third states, civil society, or the media may be able to influence the incentive structures for domestic bodies in order to promote compliance.’<sup>207</sup> Thus if the international community were to put pressure on governments and require them to cooperate with the Court, it would certainly enhance the accountability of such authorities and reduce their non compliance. This, however, is very much a matter for the future.

Ultimately, in the absence or impracticality of effective enforcement powers to obtain state cooperation the ICC’s weak cooperation provisions places limits on its successful operation, thus creating conditions whereby the perpetrators of international crimes may in practice avoid prosecution. For example, a state may attempt to ignore the Court’s requests for an Arrest Warrant, or may let the Prosecutor access only some of the documents he/she needs while concealing the rest, or may try to direct investigations in different ways, or may threaten witnesses, etc. If one of these situations happens, as has in fact happened in the Darfur case,<sup>208</sup> the claims of the ICC to be obviously hampered by its lack of enforcement powers would be fully justified. But at the same time, one may wonder on what basis it may claim to be able to dispense justice, or to combat impunity, when those imperfections or incapacities themselves appear to be the *sine qua non* of its own existence. Thus, the ICC should be judge in light of both the limitations and constrains it faces and the political environments in which it operates.

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<sup>206</sup> *Id.*

<sup>207</sup> Rastan R. *Supra* note 7, at 455.

<sup>208</sup> See the *Prosecutor v. Al-Bashir*, *supra* notes 200.

#### ***5.4. Deficiencies in the institutional mechanisms of the ICC***

Of all the procedural deficiencies of the ICC, three appear to stand out: the possibility of postponement of jurisdiction over war crimes, its lack of universal jurisdiction, and its non-recognition of trials *in absentia*.

##### ***5.4.1. The postponement of jurisdiction over war crimes***

The Rome Statute provides the possibility of further limitation of the subject-matter jurisdiction over war crimes. The Statute provides, in Article 124, for the possibility for a state to suspend the jurisdiction of the ICC over war crimes for a period of seven years after the Statute's ratification and entering into force for that state.<sup>209</sup> The crucial question to be raised is what the logic and reasons were behind such a provision. It is plausible to suggest that this Article was initially included as a 'transitional' provision, justified by the supposition that states currently experiencing internal conflicts or with military engagements abroad could be discouraged from signing and ratifying the Statute otherwise.<sup>210</sup> The Article could thus facilitate the establishment of the ICC via encouraging states to join the Court. This was the reason why the Article clearly indicates a review after seven years of the creation of the ICC.<sup>211</sup> Article 124 has been extended for a further seven years at the first review conference in Kampala, Uganda.<sup>212</sup> It would seem, however, that now, after the establishment of the ICC, the retention of this Article is neither justifiable nor reasonable.

At the ICC's first review conference, interestingly, the states who sought to keep this Article in the Statute were non-members of the Statute themselves, such as Russia and the US.<sup>213</sup> Despite the fact that they have not ratified the Statute, they are nevertheless looking for a legal loophole to avoid any potential jurisdiction of the

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<sup>209</sup> The Rome Statute Art. 124, it provides: 'Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.'

<sup>210</sup> Sriram C. 'ICC hypocrisy over war crimes', Guardian, Tuesday 22 June 2010. Available at: <http://www.guardian.co.uk/commentisfree/2010/jun/22/icc-hypocrisy-article-124-war-crimes> (Accessed 16/06/ 2011).

<sup>211</sup> Rome Statute Art. 124.

<sup>212</sup> See the *Resolutions and Declarations adopted by the Review Conference*, part II, RC/Res.4 (8 June 2010).

<sup>213</sup> Sriram C. *Ibid.*

ICC over their nationals, in case it becomes in their interest to join the ICC in the future.

In practice only two states have implemented this Article, i.e. France and Colombia; in 2008, France withdrew its declaration, and Colombia's declaration expired on the first of November 2009.<sup>214</sup> One may argue that the Article has thus not had a significant effect on the jurisdiction of the ICC so far. However, the recognition of such opt-out provision provides a possibility that, when states want to join the ICC, they could be able to postpone its jurisdiction over their nationals. Moreover, the Statute prohibited such reservations under Article 120, but then recognised them again in Article 124. Hence, such hypocrisy toward war crimes has been characterised as a 'license to kill' by Amnesty International and is against the main objective of the ICC.<sup>215</sup> This Article undoubtedly poses a further limitation to the already limited jurisdiction of the ICC over war crimes and may potentially impair the ICC's jurisdiction and its function.<sup>216</sup>

#### **5.4.2. Universal jurisdiction and the ICC**

The standard grounds for the exercise of criminal jurisdiction by national courts are as follows: when the conduct of the accused occurred within the territory of the state (principle of territoriality) when a crime was committed by the national of a state (active personality principle) when the crime was committed against the national of a state (passive personality principle) and/or the conduct in question was against the interest of a state, such as the national security or sovereignty of a state (the protective principle).<sup>217</sup> One of the most fundamental applications of state sovereignty is achieved by the above judicial criminal jurisdiction.<sup>218</sup>

Occasionally, when a case is lacking any of the above characteristics and the crimes committed are international crimes, some states have sought to establish their

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<sup>214</sup> See *Collation for the International Criminal Court (CICC), delivering on the promise of a fair, effective and independent Court*, available at: <http://www.coalitionfortheicc.org/?mod=article124> (Accessed 20/08/2012),

<sup>215</sup> Amnesty International, *Proposals threaten International Criminal Court's Independence* (8 June 2010), Available at: <http://www.amnesty.org/en/news-and-updates/proposals-threaten-international-criminal-courts-independence-2010-06-08> (Accessed 23/08/2011).

<sup>216</sup> See the ICC Review Conference: *Renewing Commitment to Accountability*, RC/ST/V/M.8 (31 May 2010), at 23.

<sup>217</sup> Wallace M.M R & Ortega O.M. *International law* (2009), at 120-125; Gardiner R.K. *International law* (2003), at 306-307.

<sup>218</sup> Shaw M. *International Law* (2003), at 572; Safferling C. *Towards An International Criminal Procedure* (2003), at 32.

jurisdiction regardless of the alleged offender's nationality or the place of the commission of the crimes, under the principle of universal jurisdiction.<sup>219</sup> The universal justification usually relates to the important nature of international crimes, which might threaten the international community as a whole, or violate the shared values of all members of the community.<sup>220</sup> The crime of piracy, which has long been accepted under customary international law;<sup>221</sup> slave trading; crimes against peace; genocide; and arguably the serious case of the Eichmann trial, are examples of this kind of jurisdiction.<sup>222</sup>

However, there is no common and accepted definition for universal jurisdiction among international conventions and the customary international law.<sup>223</sup> Scholars have defined this principle in different ways. Some have defined it negatively, such as Reydams, who states:

Negatively defined, [universal jurisdiction] means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.<sup>224</sup>

Meron similarly defines universal jurisdiction as one in which states that do not possess territoriality, personality (active or passive) or 'protective principle' links are permitted by international law to prosecute perpetrators of offences.<sup>225</sup> O'Keefe, by contrast, defines universal jurisdiction in a more positive way as prescriptive jurisdiction: 'universal jurisdiction- that is, prescriptive jurisdiction in the absence of

<sup>219</sup> Wallace M.M R & Ortega O.M. *Ibid*, at 125-126; see also generally Bassiouni C. 'Universal jurisdiction for International Crimes: Historical Perspective and Contemporary Practice.' 42 *Virginia Journal of International Law* (2001-2), 82.

<sup>220</sup> Cassese A. 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003), at 591; Cryer R *et al.* *An Introduction to International Criminal Law and Procedure* (2010), at 50; Sriram C.L. *Exercising Universal Jurisdiction: Contemporary Disparate Practice*, 6 *International Journal of International Law* (2002), 49, at 50.

<sup>221</sup> For the reaffirmation of this rule of customary international law see the *Geneva Convention on the High Seas* UNTS 450/82 (1958), Art.19 and the *Convention on the Law of the Sea*, UNTS 1833/3(1982), Art. 105.

<sup>222</sup> Shaw M. *Ibid*, at 595 ; Bass G. J. 'The Adolf Eichmann Case: Universal and National Jurisdiction', in S. Macedo (eds), *Universal Jurisdiction National Courts and the Prosecution of Serious Crimes Under International Law* (2004), at 77-78; the Princeton University Program in Law and Public Affairs, *the Princeton Principles on Universal Jurisdiction* (2001), at 29, principle 2; see also generally Arendt Hannah, *Eichmann in Jerusalem* (1994).

<sup>223</sup> See *Arrest Warrant Case, Dissent Opinion of Judge Van Den Wyngaert* (Judgment of 14 Feb 2002), at 165 Para 44; Razesberger F. *Supra* note 76, at 34.

<sup>224</sup> Reydams L. *Universal Jurisdiction, International and Municipal Legal Perspectives* (2003), at 25.

<sup>225</sup> Meron T. 'International Criminalisation of Internal Atrocities', 89 *American Journal of International law* (1995), 554, at 568; Cassese A. (2003), *Supra* note 220, at 594.

any other recognised jurisdictional nexus.<sup>226</sup> The Princeton Principles on Universal Jurisdiction go further in relating the character of universal jurisdiction to the crime in question: ‘universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.’<sup>227</sup>

Just as universal jurisdiction seems to have both negative and positive connotations, so also can it be divided into two categories: ‘absolute’ or pure jurisdiction and conditional jurisdiction.<sup>228</sup> Pure jurisdiction is where a state seeks to institute jurisdiction over an international crime when there is no nexus between the crimes and the state seeking to exercise the universal jurisdiction. Conditional universal jurisdiction, by contrast, involves the exercise of jurisdiction when there is link between the crime and such states, e.g. the suspect is in the custody of a state which is asserting jurisdiction.<sup>229</sup>

At the Rome Conference, some did suggest that the Court should have universal jurisdiction; for instance, the German and Belgian delegations suggested that it should have automatic universal jurisdiction over the core crimes.<sup>230</sup> In contrast, some states, such the United States in particular, had significant apprehensions as to the scope of jurisdiction that would be afforded to the Court, and the US delegate clearly stated that he could not accept the universal jurisdiction.<sup>231</sup> This was very controversial issue, and in the end universal jurisdiction was not recognised in the Rome Statute.<sup>232</sup> In fact, the Court’s jurisdictional base is far from universal due to the various constraints it operates under. This outcome has been heavily criticised.<sup>233</sup> As O’Callaghan, quoting *Kaul*,<sup>234</sup> noted, the rejection of universal jurisdiction was a ‘painful weakness’ of the ICC system.<sup>235</sup>

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<sup>226</sup> O’Keefe R. ‘Universal Jurisdiction-Clarifying the Basic Concept’, 2 *Journal of International Criminal Justice* (2004), 735, at 740.

<sup>227</sup> See the *Princeton Principles on Universal Jurisdiction. Ibid*, at 18 Principle 1.

<sup>228</sup> Cryer R *et al.* (2010), *Ibid*, at 52; Razesberger F. *Supra* note 76, at 34.

<sup>229</sup> Cryer R *et al. Id.*

<sup>230</sup> See the *UN. Diplomatic Conference. Supra* note 4, at 83, Para 20 and at 186 Para 7.

<sup>231</sup> *Id.*, at 95 Para 61, 62, and 123 Para 20; Scheffer Delegation from the US said that: ‘[H]e did not accept the concept of universal jurisdiction as reflected in the Statute of the International Criminal Court, or the application of the treaty to non-parties, their nationals or officials, or to acts committed on their territories.’

<sup>232</sup> *Id.*, see generally Vol, II; see also Bantekas L & Nash S. *International Law* (2010), at 427.

<sup>233</sup> Kaul P. H. *Supra* note 1, at 613; Sadat N. L. *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002), at 118.



Some scholars, by contrast, have argued that it was right decision for the drafters of the Statute not to adopt universal jurisdiction.<sup>236</sup> Cryer and Bekou have argued that granting universal jurisdiction to the ICC could have increased the hostility of the US against the ICC, as well as that of two other permanent members of the SC, i.e. China and Russia, and that this could have substantially strengthened the opposition to the ICC at a time when it, as a new institution, is in need of all the support it can avail itself of.<sup>237</sup> They have also discussed some of the practical difficulties for the ICC which could arise if it possessed universal jurisdiction, such as issues of trigger mechanisms, issues concerning cooperation of states and concerning the complementarity-based jurisdiction of the ICC, etc.<sup>238</sup> Many of the problems which they have mentioned are genuine difficulties; however, with respect to these scholars, I believe that the lack of universal jurisdiction (not pure universal jurisdiction) is a weakness for the ICC for the following reasons.

The first reason is that a practical alternative would exist in cases where it was not possible or practical for the ICC to exercise universal jurisdiction, i.e. the exercise of universal jurisdiction directly by state parties. It is important to realise that the majority of practical issues which have been discussed by the great scholars mentioned would appear only if the ICC were to exercise universal jurisdiction and not where state parties themselves sought to exercise such jurisdiction. The ICC's issues due to complementarity would not arise when state parties wanted or were obliged to exercise universal jurisdiction, thus limiting the procedural and practical difficulties for them. Furthermore, it must be remembered that the rules of the admissibility of cases, in particular that concerning the gravity of crimes, would filter out many cases from being prosecuted before the ICC; and where there was a link between a crime and a state, e.g. the state had custody of the accused, and the crime was not of such gravity as to be prosecuted before the ICC (see section... on the gravity of crimes) such an accused could be prosecuted by the state party concerned.

The second reason for ICC's lack of universal jurisdiction being a weakness is that through the recognition of universal jurisdiction the ICC could promote the

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<sup>234</sup> *Id.*, Kaul, who was an Alternate Representative from Germany in the Rome Conferences, he was the First Counsellor, Head, Section for Public International Law, Federal Foreign Office, see the list of delegation at the Rome Conference, *Supra* note 4, at 17.

<sup>235</sup> O'Callaghan D. *Supra* note 1, at 548.

<sup>236</sup> Cryer R & Bekou O. (2007), *Supra* note 53, at 52.

<sup>237</sup> *Id.*, at 55.

<sup>238</sup> *Id.*, at 55-57; for practical concern see also Ryngaert C. 'The International Criminal Court and Universal Jurisdiction', 12 *New Criminal Law Review* (2009), 498, at 502.

idea of universal justice and would enhance the accountability of individuals and assist the maintenance of international peace and security. Universal jurisdiction, if it were to be adopted, would also make a red zone, comprising the territories of all state parties, into which international perpetrators could not enter; it would thus play a role as a deterrent. The third reason for the lack being a weakness is that states that have already practised universal jurisdiction have limited it due to certain pressures; they have amended the rules and provided some conditions for the exercising of the jurisdiction, such as the permission of the head of attorney of state, etc. Accordingly, due to the current demise of universal jurisdiction, it might be even more important for the ICC to have universal jurisdiction.<sup>239</sup>

In general and regardless of the ICC's limitations and practical issues that have been argued by Cryer and *et al*, it seems that lack of universal jurisdiction creates an unavoidable gap in the prosecutorial regime of the ICC. It should be considered that concerning such heinous international crimes, the commission of such crimes itself is more significant than their nexus to a state. As international crimes may threaten the entirety of the international community<sup>240</sup> the goal should be that those crimes should not be unpunished. It may be more practical if the state parties to the Statute recognized international jurisdiction of the ICC's crimes. If it were adopted, where a state who has stronger nexus is unable or unwilling to prosecute, then the state parties to the Statute would be obliged to prosecute if there is a nexus between the commission of crimes (e.g. custody of accused). In that way, the state parties to the Statute could fill the gap resulting from the lack of the universal jurisdiction, or when the ICC cannot exercise its jurisdiction because of the insufficient gravity of crimes.<sup>241</sup> As it is, the exclusion of universal jurisdiction in the Statute in the current situation means that the ICC is not in a position to prosecute perpetrators who only temporarily find themselves on the territory of a state party to the Statute – a point which substantially undermines their status as international crimes under customary international law (the one obvious exception here being the crime of aggression).<sup>242</sup>

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<sup>239</sup> Ellis, Mark presented a lecture on 20 February 2012 at SOAS, entitled 'The Decline of Universal Jurisdiction over International Crimes – Is it Irreversible?' He argued in his lecture that, due to the demise of the exercising of universal jurisdiction, it might be necessary for the ICC to recognise universal jurisdiction.

<sup>240</sup> O'Callaghan, D. *Supra* not 1, at 547.

<sup>241</sup> See generally *supra* notes 115-119.

<sup>242</sup> Cryer, R & *et al*. (2010), *Supra* note 220, at 51.

#### 5.4.3. *The impossibility of trial in absentia in the Rome Statute*

Trials *in absentia*, with certain conditions such as notification to the alleged offenders, are largely common in civil law systems.<sup>243</sup> Some countries with common law systems also recognise trial *in absentia*, though the conditions for such a trial may be different in each legal system or state.<sup>244</sup> Among international tribunals, trials *in absentia* were recognised in the Nuremberg Charter.<sup>245</sup> The European Court of Human Rights also, with some conditions such as the defendant needing to have notification of his or her impending trial, has recognised *in absentia* trials.<sup>246</sup> The Special Tribunal for Lebanon, which has been created by the Security Council, has recognised trial *in absentia*.<sup>247</sup> In addition to this, states instituting universal jurisdiction for international crimes have usually recognised trial *in absentia* for such crimes. In the *Arrest Warrant* case Judge Wyngaert asserted that '[t]he "universal jurisdiction" does not necessarily mean that the suspect should be present on the territory of the prosecuting State',<sup>248</sup> and universal jurisdiction *in absentia* is not forbidden by conventional or customary international law.<sup>249</sup> The ICTY and ICTR have not recognised trials *in absentia* in their Statute. However, the judges of the ICTY Appeal Chamber, when faced with an accused who ignored a subpoena by the Court and who was subsequently held in contempt, held that 'by contrast, in absentia proceedings may be exceptionally warranted in case involving contempt of the international where the person charged fails to appear in court, thus obstructing the administration of justice.'<sup>250</sup>

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<sup>243</sup> E.g. see France, *the Code of Criminal Procedure* Art. 320 and 379(2), the Italian *Code of Criminal Procedure*, Article 40 - in Italian it is called *in contumacia*; Iranian *Criminal Procedure* Art 303 and 304, in the Iranian judiciary system the accused should have been notified of the time and place of the prosecution or trial via subpoena or by local and national newspaper where the correct address of the accused is not known. Another condition for a trial *in absentia* is that the accused should have a re-trial if and when he or she finally appears in court, and could also ask for an appeal.

<sup>244</sup> See *the Canadian Criminal Code* Art. 145, and 485(1.1), Indiana appellate courts have affirmed the trial *in absentia* from the commencement of trial, after conducting only minimal inquiries into the reasons for the defendant's absence.' *Gilbert v. State*, - Ind. App. - , 395 N.E.2d 429 (1979), *Taylor v. State*, - Ind. App. -, 383 N.E.2d 1068 (1978), see Willis. M. L. 'Criminal Trials in Absentia: A Proposed Reform for Indiana,' 103 *Indian law Journal* (1980-1), 103, at 103.

<sup>245</sup> See the Nuremberg Charter Art. 12; see also Cryer R & *et al.* (2010), *Supra* note 8, at 427.

<sup>246</sup> See *Colozza v. Italy*, Para, 18, 19, and 28 (ECHR).

<sup>247</sup> See Art.22 of the *Special Tribunal for Lebanon and its Rule of Procedures*, No.106, amended (30 October 2009), and the UN SC Res, 1757 (30 May 2007).

<sup>248</sup> *Congo v Belgium*, ICJ, *Dissent Opinion of Judge Van Den Wyngaert* (14 February 2002), at 170, Para 53.

<sup>249</sup> *Id.*, at 170, Para 54 and 55.

<sup>250</sup> See *Prosecutor v. Blaskic, Appeal Chamber Judgment on the Request of the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II*, IT-95-14 (29 October 1997), Para 59.

At the Rome Conference some delegations were of the opinion that trials *in absentia* would degenerate into show trials that would rapidly discredit the ICC. They believed trials *in absentia* were of little practical utility since the accused may have the right to a new trial when he or she finally appeared before the Court. In contrast a group believed that, due to the nature of the crimes comprehended by the Statute, it might often not be possible to force the accused into a court appearance. In such a case, for the court to be able to promote peace, justice, and reconciliation, trials would need to be held in the defendants' absence.<sup>251</sup> In the event, the first view was the one which prevailed. In the final draft however the Rome Statute has not adopted trials *in absentia*.<sup>252</sup>

It may be argued that recognition of such trial *in absentia* would not meet the legal standard for a fair and impartial trial. According to this view, it is necessary that the accused appear in the prosecution and trial stages in order to defend himself in such a significant indictment. Although this is a strong argument, I maintain that the lack of trials *in absentia* under some conditions could be a deficiency for the ICC, on at least three grounds. The first is that it must always be considered that the jurisdiction of the Court is over the most heinous international crimes with a widespread character. The second reason is that it is impossible for the Court to apply all of the procedural guarantees which exist in a domestic court in general. For example, the Rome Statute, in contrast to the common law system in which the jury is essential for a criminal procedure, makes no mention of a jury. Additionally, as has been mentioned, a warrant of arrest can be issued by the ICC in cases where there is sufficient evidence; and in a case where a state is failing to surrender the accused following the issuance of such a warrant of arrest, the question is raised as to how long the Court should remain open to such cases for prosecution. In a situation where the accused is in contumacy of the Court intentionally and without acceptable reasons, in fact she ought to lose her right of defence in the initial stage of prosecution or trial. The Court could, however, consider the accused for a right of re-trial or a right to appeal a conviction obtained via an *in absentia* trial if she does finally appear in the Court, as is common in many national courts.

The third ground on which the non-recognition of trial *in absentia* should be considered a deficiency for the ICC is that there are actually several advantages to

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<sup>251</sup> See *the United Nations Diplomatic Conference*. *Supra* note, 4, Vol. II, at 355 and 359.

<sup>252</sup> See the Rome Statute Arts. 63. 61 and rule 124 RPE.

making available the option of trial *in absentia*. These advantages, I believe, in opposition to some delegations' view in the Rome Conference, could help the Court to obtain its goal and to combat impunity; they may be stated as follows:

a) Allowing trial *in absentia* could encourage individuals to appear in the Court in order to defend themselves against the accusations made against them. It might also encourage some individuals to appear in the Court where they do not have all the responsibility for the committing of such crimes.

b) Trial *in absentia* has some practical advantages as well; in a situation in which accused persons have declined to appear in the Court, this implies that they intend to escape from prosecution concerning the relevant indictments against them, which, if *in absentia* trials are not contemplated, means that such cases would remain open for a long time. On the other hand, the Court, by initiating prosecution, can save time and money; in particular, the collection of evidence is much easier if it is done close to the date of the commission of crimes. In addition, via trial *in absentia*, when a convicted accused has finally been arrested or surrendered to the Court, the latter would have a conviction already instead of the prosecution only being initiated at a stage at which some evidence might have been destroyed or not available. Although the Court may grant a right for appeal, the long process of trial before an international court, which many have criticised, would nevertheless be diminished in length.

c) States would be more likely to cooperate with the Court in order to arrest and surrender individuals who have been convicted *in absentia* with enough evidence.

d) It should be noted that part of the punishment recognised within the Rome Statute is the remedy to be provided to victims,<sup>253</sup> and if trial *in absentia* were allowed the Court would be able to calculate the size of the property of convicted individuals in favour of victims, bearing in mind the usual relationships between the authorities, leaders, and powerful individuals and international crimes. Perpetrators would thus no longer be able to escape from the entirety of conviction even if they were to remain at large.

Given the potential significance of the possibility of convictions *in absentia* before an international, fair, and impartial tribunal, the absence of such a procedure

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<sup>253</sup> See the Rome Statute Art. 75 (2), and (4), it provides that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to,...'

in the Rome Statute only emphasises the extent to which its terms provide ample opportunity for states to facilitate their own nationals in escaping prosecution by the ICC.

### **5. 5. Conclusion**

This Chapter sought to highlight some of the procedural weakness and difficulties of the ICC for the prosecution of the international crimes within its jurisdiction which may lead to impunity. In a general sense, such weaknesses may not appear remarkable – any international institution will have certain defects as a consequence of either the imperfections of the drafting process or the lack of political will on the part of the signatory states. When viewed from this angle, such imperfections are merely to be lamented. At the same time, it is often to question whether the procedural imperfections of the ICC were not purely accidental, or rather the result of deliberate design, and in that sense one may reflect upon the question whether its weakness as an institution was itself part of its rationale. Whilst the ICC in practice continues to develop the rules for evidence designed to overcome some of its procedural difficulties it is clear that a number of these issues are unlikely to be solved in the near future.

The ICC has obviously not been designed to deal with all international crimes, and in that sense is not so much a Court of international justice, but merely a Court of last resort. The principle of complementarity in the Rome Statute that underpins this idea appears to have many advantages – specifically to encourage domestic prosecution and to localise international justice. However, this principle and the rule of admissibility of cases in the Statute provide considerable scope for states to shield perpetrators from prosecution either before and abuse of this principle i.e. via shielding domestic show trials.

Associated with this is the fact that the ICC, similar to the *ad hoc* international tribunals, lacks independent coercive power and in practice heavily relies on the cooperation of states and other international organisations. Although the ICC can assess the state's refusal to provide assistance and take the relevant measures in the case of a state's failure to cooperate, in general it lacks of power to impose on states or sanction them. It is clear that the lack or insufficient cooperation is not unique to the ICC, but the practice of the *ad hoc* tribunals indicates that to compel states to cooperate with an international courts, even through a binding order

of the SC under Chapter VII, is a very complex and problematic task, and may raise issues such as state sovereignty,<sup>254</sup> ‘national security’,<sup>255</sup> national interests, and so on. It is also clear that the creation of an independent police for the ICC seems neither viable nor practical. In practice of the Court will rely for its effectiveness upon public awareness via the media to influence states authorities and international institution to order to enhance the cooperation and the compliance of states. But here the relative weakness of the ICC - its absence of any guaranteed support from the Secutiry Council, its treaty nature - serves only to undermine the chances of it acquiring that moral and political reputation.

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<sup>254</sup> Brown B.S. *Supra* note 90, at 387 and 393.

<sup>255</sup> Rome Statute Art. 72 and 93 (4), see also Rastan R. *Supra* note 7, at 536.

## ***Chapter VI: External Obstacles for the ICC: Impunity of Perpetrators of International Crimes/External Political Issues***

### ***Introduction***

This Chapter examines some of the significant external complications and problems encountered by the ICC when attempting to exercise its jurisdiction. It seeks to examine the impact of the external environment in terms of undermining the effective functioning of the ICC in combating impunity. The subject of this Chapter is three of the most significant of the external issues confronting the Court: the role of the Security Council (SC) the role of certain powerful states, and their relation to the ICC; and issues related to the question of non-ratification of the Statute.

The first of these external issues, the relationship between the SC and the ICC, was crucial in the Rome Conference, where there were controversial debates among the delegations.<sup>1</sup> The question was what role the SC should play in the ICC's functioning. The traditional response is and was that the SC, as a political body, and the ICC as a judicial body, should be separated from each other; one group of delegations to the Rome Conference, known as the 'like-minded group', took this response and suggested that the ICC should be a completely independent body not subject to any intervention by the SC. They asserted that intervention by the SC via resolutions would be selective and follow a double standard, and would violate the state parties' equality before the Court.<sup>2</sup> In contrast, the other group of countries, which included powerful countries such as the US, demanded a significant role for the SC in the Rome Statute, whereby before initiating any cases the ICC should have the approval of the SC under Chapter VII of the Charter.<sup>3</sup> The outcome of such

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<sup>1</sup> See the *UN Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, Rome* (15 June 17 July 1998), Vol. II, Para 72 and 76 at 69, and Pare 96 at 70, UN Doc. A/CONF. 183/2(14 April 1998), and UN Doc. A/CONF. 183/3, Corr. 1 (15- June 1998). This is known as a heated debate by Mr.TeliCka, delegate from the Czech Republic, see UN Doc. A/CONF.183/2/Add.1 Corr.1 (26 May 1998), Para 23, at74, and Para 47 at 76; see also Cryer R. *Prosecuting International Crimes, Selectivity and the International Crimes* (2005), at 227.

<sup>2</sup> *Id*, see, for example, El Maraghy, delegate from Egypt, at 59, Para 75; Muladi from Indonesia, at 73, Para 10, who asserts that 'the Court must be independent of political influence of any kind, including that of the United Nations and in particular the Security Council, which must not direct or hinder its functioning'; Lahiri from India at 86, Para 47; Halonen from Finland at 98, Para 31; and Livada from Greece at 174, Para 68.

<sup>3</sup> *Id*, at 123, Para 28 and at 95, Para 57; see the US delegates Scheffer and Richardson's official position at the Rome Conference, *Id*, at 123, Para 28 and at 95, Para 57.



sensitive debates was a compromise in the Rome Statute.<sup>4</sup> Accordingly, the SC through resolutions can both refer situations and defer cases currently with the ICC under Chapter VII of the Charter.<sup>5</sup> It is true that, due to difficulties in reaching a consensus among the veto-wielding powers of the SC, Article 16 may have a limited impact on the practice of the Court,<sup>6</sup> but it is a very controversial issue and is significant. It may be argued that, despite the fact that these two organs are independent bodies<sup>7</sup> and the ICC is not a UN member state, this Article has given supremacy over the ICC to the SC. However, it is also clear that without recognition of some kind of exceptional role for the SC, the ICC might never have been established.

The fact that the ICC in practice mainly relies on the support of states and the SC is to place at centre stage an inevitable problem – whether to recognise that role and formalise it in the terms of the Statute, or insist rather that there should be no derogation from the principle of equality, but then accept that subsequent practice will be affected nevertheless by the conditions of inequality.<sup>8</sup> Either way, it is probably too simplistic to criticise the ICC for having too much dependency on the world's major powers simply as a consequence of the terms of Article 16. It may be argued, nevertheless, that Article 16, via potentially exempting some accused from prosecution, indicates the fact that the ICC cannot be an instrument of universal justice.

The second external issue, to be considered in the following section of this chapter, is related to the role of influential states, in particular the US. This concern arises most sharply in the case of the ICC, as a consequence of the fact that the

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<sup>4</sup> Cryer R & White N. 'The ICC and the Security Council: An Uncomfortable Relationship The Legal Regime of the International Criminal Court,' in J. Doria, H.P Gasser & M.C. Bassiouni (eds), *The Legal Regime of the International Criminal Court* (2009), 455, at 457.

<sup>5</sup> Rome Statute Art. 13(b), and 16.

<sup>6</sup> Cryer R & White N. *Ibid*, at 456.

<sup>7</sup> *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, SP/3/ Rev.1.(04/10/2004), Article 2(1), it provides that '[t]he United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality ...'

<sup>8</sup> See the *UN Diplomatic Conference. Supra* note 1, Para 32, at 74; Fehl C. 'Explaining the International Criminal Court: A Practice Test for Rationalist and Constructivist Approaches', in Steven C. Roach (ed), *Governance, Order, and the International Criminal Court, Between Realpolitik and Cosmopolitan Court* (2009), at 98; he asserts that the dependency of the ICC on the SC is a legitimacy problem for the Court.

functioning of the Court is largely dependent upon the cooperation of states.<sup>9</sup> The role of such states could have either of two opposing impacts; it could enhance the effectiveness of the Court or diminish it. Despite the example of the ICC indictment of the LRA leader Joseph Kony, in which the US has recently shown support for the ICC, in general the US has so far often shown opposition to the Court. The US Bilateral Agreements and the possibility of their resulting in non-extradition of accused persons to the ICC, and the question of the compatibility of the Bilateral Agreements with the Rome Statute, will be discussed in this section of the chapter. I will argue that alongside other reasons, such as the concern of the US regarding issues such as the role of the SC<sup>10</sup> and the independent prosecutor,<sup>11</sup> the main reason for the opposition of the US to the ICC is that the US does not support a system of universal justice; the fact is that universal justice as an idea is eliminated by the power of the US.

The third external problem of the Court to be examined in the final section, is the question of the non-ratification of the Statute. The issue here is how non-ratification may impact upon the ICC's functioning and whether universal ratification of the Statute would make a difference to its effectiveness. Generally, the ratification of the Statute by all states could enhance cooperation with the ICC, and non-ratification lead to a situation of criminals escaping from prosecution. Examining the main reasons for non-ratification of the Statute I will argue that, whereas some states have not ratified the Statute because they do not support universal justice, others have made the contrary assertion that it is precisely as a consequence of the lack of universal justice actually present in the structure of the ICC that they are reluctant to become party to the Rome Statute. With the latter contention in mind, it is arguable that even if universal ratification is desirable, it is not a sufficient condition to ensure the elimination of impunity.

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<sup>9</sup> Minogue E.C. 'Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court', 61 *Vand Law Review* (2008), 647, at 649-650.

<sup>10</sup> Schabas W. 'United States Hostility to the International Criminal Court: It's all about the Security Council', 15 *The European Journal of International Law* (2004), 701, at 710.

<sup>11</sup> E.g. Richardson delegation from the US, at the *UN Diplomatic Conference*, UN Doc. A/CONF.183/SR. 5 (20 November 1998), *Supra* note 1, Para 60 at 95, he asserts 'it would be unwise to grant the Prosecutor the right to initiate investigations'; see also UN Doc. A/CONF.183/C1/SR.9 (20 November 1998), Para 125, at 202; for the Prosecutor's authority to initiate an investigation *proprio motu* see the Rome Statute Art. 13 (c), and 15.

### ***6.1. The position of the Security Council and its relationship with the ICC***

In a functional sense the SC and the ICC may be understood to have distinct roles. The SC is a definitively political body,<sup>12</sup> while the ICC is a judicial body whose work should be independent, in theory at least, of political concerns. The main duty of the SC is the maintenance of international order, resolving disputes between states, while the main duty of the ICC, similarly to that of any court, is to bring justice for individuals.<sup>13</sup>

Even if, in principle, the roles of the SC and the ICC are distinct, it is also clear that in the pursuit of their respective agendas, the two institutions may come into conflict. This may occur primarily in two different ways: the overlap of the mandates of the SC and the ICC; and the different demands of peace and justice. The first of these points, that of overlapping mandates, arises due to the fact that international crimes may threaten international peace and security; there is thus a close link between the breach of international peace and security and the commission of international crimes. Since the main duty of the SC is to maintain international peace and security, these two independent institutions thus have mandates which overlap in part.<sup>14</sup> The conflict of these partially similar mandates has appeared, in particular, concerning the definition of the crime of aggression in the Statute, and the on-going issue of the jurisdiction of the Court over this core crime.<sup>15</sup> The second source of conflict between the SC and the ICC relates to the fact that the pursuit of individual justice may, on occasion, contribute to the destabilisation of a delicate political situation; the pursuit of international peace may, in this sense, require the deferral of the pursuit of individual justice. Those wanting to maintain the distinction between individual justice and international peace and security, or between law and

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<sup>12</sup> Koskeniemi M. 'The Police in the Temple, Order, Justice and the UN: A Dialectical View', 6 *The European Journal of International Law* (1995), 325, at 344-345; Birdsall A. *The International Politics of Judicial Intervention: Creating a more just order* (2009), at 125.

<sup>13</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GA, Fifty-first Session, No. 22, UN Doc. A/51/22[Vol.1] (March-April and August 1996), Para 130, at 30.

<sup>14</sup> Sarooshi D. 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council', in D. McGoldrick, P. Rowe & E. Donnelly (eds), *The Permanent International Criminal Court Legal and Policy Issues* (2004), 95, at 95-96 and 100; Cryer R & White N. (2009), *Supra* note 4, at 456 and 461.

<sup>15</sup> In accordance with Art. 5, paragraph 2, of the Rome Statute, the crime of aggression has finally been defined at the review Conference in Kampala (Uganda), but the Court will be able to exercise its jurisdiction over this crime only after 1 January 2017. See *Review Conference of the Rome Statute of the International Criminal Court, Kampala*, Annex 1, (3), (31 May-11 June 2010), Resolution RC/Res.6. Available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) (Accessed 06/07/2012).

politics, would argue that the ICC should be completely independent from any political intervention, and that it should be insulated from the actions of institutions such as the Security Council.<sup>16</sup> Putting into practice the formalist idea that the law and politics are separate, this viewpoint argues that in this sense, the SC as a political body should be separated from the ICC.

Drawing upon the theoretical standpoint presented in the introduction to this thesis I wish in this Chapter to apply two main ideas in the context of the ICC. The first concerns the relationship between law and politics, and specifically the idea that law is embedded in a social context. This is significant due to the fact that law does not exist simply as an abstract set of rules, but as a sort of practice that operates in a given social situation; we may observe that the ICC is a nascent legal structure embedded in a functional social context. It should be noted that legal realism is against the idea of a separation between law and politics, and differs on this point from straightforward formalism.<sup>17</sup> Some legal realists believe that a specific part of the nature of the law extends beyond the normative core of the law into the political world.<sup>18</sup> If international law promises the sovereign equality of all states, which constitutes ‘the linchpin of the whole body of international legal standards’<sup>19</sup> it does so in a context of profound inequality in powers and capacities. And this has obvious implications for the ICC, both as regards its operational effectiveness and its ability to dispense universal justice.

The second idea I would like to apply to the case of the ICC concerns the definition of law used in legal realism – law as determined by practice rather than by the formalism of rules.<sup>20</sup> Scholars working along these lines assert that the law is not a simple rule on paper, but a function of authoritative decision makers,<sup>21</sup> and that the law accordingly operates differently in practice than on paper depending on the

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<sup>16</sup> See *the UN Diplomatic Conference*, *supra* note 1.

<sup>17</sup> Horwitz. M. J. *The Transformation of American Law 1870-1960, The Crisis of Legal Orthodoxy* (1994), at 193 he asserts: ‘[t]he most important legacy of Realism therefore was its challenge to the orthodox claim that legal thought was separate and autonomous from moral political discourse.’

<sup>18</sup> Zamboni M. ‘Legal Realisms and the Dilemma of the Relationship of contemporary law and politics’, *Stockholm Institute for Scandinavian Law* (1957-2010), 583, at 589-590.

<sup>19</sup> Cassese A. *International law* (2001), at 88; sovereign equality also has been defined, in *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* (24 October 1970), UN G.A. Res. 2625, 25 UN GAOR, SUPP. No. 28, at 121, UN Doc. A/8028 (1971), it provides, ‘(a), States are judicially equal; (b), Each State enjoys the rights inherent in full sovereignty;...’

<sup>20</sup> Pound R. ‘Law in Books and Law in Action,’ 44 *American Law Review* (1910), 12, at 34.

<sup>21</sup> Cohen F. ‘Transcendental Nonsense and the Functional Approach’, 35 *Columbia Law Review* (1935), 809, at 842.

context in which it is operating. In this sense the paper rules in the Rome Statute are not what are actually applied: the Statute should apply equally over all states, but the reality, the actual practice of the ICC, is different. Hence, the Statute must be understood in a political environment, the environment which has unequal distribution of power internationally; and this is cognisable not only in the *de facto* unequal distribution of power but also in the law itself, *de jure* (the formalisation of the role of the SC in the Statute should be seen in this aspect). Regarding this point of the *de jure* formalisation of unequal distribution of power, it also has to be considered that although the SC has undoubtedly a political nature, it makes decision on the basis of the Charter of the UN and international law, and accordingly its decisions, and particularly those made under Chapter VII of the Charter, have a 'legal or political-legal' character,<sup>22</sup> thus further increasing the interweaving of law and politics.<sup>23</sup>

In connection with the above points, it should be noted that legal realism emphasises that, in practice, legal decision-making is a complex phenomenon going beyond simple legal processes; the effects of personal interests and peripheral circumstances on judicial decisions by judges need to be borne in mind.<sup>24</sup> The result of all these considerations is to affirm that international law and politics are intimately connected.<sup>25</sup> Law is not autonomous but embedded in social practices; and, specifically, the ICC, in theory and in practice, is limited and constrained by surrounding political structures to the extent that, as will be investigated in the ensuing chapters, the potential exists for the ICC to function as an institution of domination (e.g. by the SC and powerful states).

At the Rome Conference, in the end the controversial arguments concerning the role of the SC in the Statute between one group of states,<sup>26</sup> who were insistent

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<sup>22</sup> See the *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN General Assembly, Fifty- first Session, No. 22, UN Doc. A/51/22[Vol.1] (March-April and August 1996), Para 131, at 31.

<sup>23</sup> Wheeler Cook W. 'The Logical and Legal Bases of the Conflict of Laws,' 33 *Yale Law Journal* (1924),457, at 487; Llewellyn K.N. 'On the Good, the True, the Beautiful in Law,' 9 *University of Chicago Law Review* (1941-42), 224, at 264; Llewellyn K.N. 'A Realistic Jurisprudence Next Step,' 30 *Columbia Law Review* (1930),431, at 453 and 'Some Realism about the Realism- Responding to Dean Pound, 44 *Harvard Law Review* (1931),1222 at 1242, Llewellyn asserted that realists believed in law as a vehicle to legitimise their decisions and wanted to improve legal certainty.

<sup>24</sup> Cohen F. *Supra* note 21, at 842-3.

<sup>25</sup> Koskenniemi M. *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (2004), at 428, he argues that if the law were separated from politics the law would become empty, devoid of meaning or substance.

<sup>26</sup> E.g. India, *supra* note 1, at 73.

upon the importance of the separation of powers, and another group,<sup>27</sup> who regarded that as a hopeless dream, reached a compromise.<sup>28</sup> Accordingly, the Statute has given power to the SC both of the referral of situations to the ICC, in Article 13(b) and of the deferral of cases and to prevent the commencement of the prosecution of the Court, in Article 16 of the Statute. The word ‘situation’ is not accidental, but it was intentionally selected so that the SC would not be able to refer a ‘single case or control the discretion of the prosecutor by issuing what amounted to an Act of attainer in Resolution form’.<sup>29</sup> However, in contrast to the situation with the *ad hoc* tribunals, the independent Prosecutor of the Court, under the control of the Pre-Trial Chamber,<sup>30</sup> has authority to make a final decision as to whether to initiate an investigation or not.<sup>31</sup>

For the first group of states, those intent on the separation of politics and law, Article 16 represents an unwanted exception, allowing a measure of politics into the Statute and authorising the impunity of perpetrators of international crimes. For the second group of states, Article 16 was crucially important; not only was the delivery of justice critically dependent upon the enforcement powers of the Security Council, it was only realistic within the frame of global peace and security for which the SC was primarily responsible. In fact, neither of these two positions is entirely sustainable.

As Koskeniemi noted, the arguments of those who press for a more forceful form of international governance by the SC are open to several serious objections. Important among these is the systemic objection that highlights the fundamental difference that exists between policies meant to maintain ‘security’ and those aimed at bringing about ‘the good life’ or justice.<sup>32</sup> The make-up and methods of the SC are entirely unjustifiable if we consider its tasks to extend to weighing up and imposing the requirements of the good life, including rules of international law, between and internal to states.<sup>33</sup> However, although the main duty of the SC is for maintenance of peace and security or order, this does not mean that the Council does not have any

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<sup>27</sup> E.g. the US.

<sup>28</sup> Schabas W. *The International Criminal Court: A Commentary on the Rome Statute* (2010), at 329; he described it as ‘a long and drawn-out compromise’; Cryer R & White N. *Supra* note 4, at 457; Birdsall A. *Supra* note 12, at 124.

<sup>29</sup> Cryer R & White N. *Id.*, at 461.

<sup>30</sup> Rome Statute Art. 15(3).

<sup>31</sup> *Id.*, 53 (1), and (2).

<sup>32</sup> Koskeniemi M. *Supra* note 12, by ‘the good life’ he refers to the rule of the General Assembly.

<sup>33</sup> *Id.*, at 344.

duty towards Justice or any legal character. Additionally, as mentioned earlier, it would not be possible to perceive the ICC as a pure body of law, just as it would not be possible in general to separate law and politics; accordingly, the ICC itself also has some political character. The fact is that the SC has the authority to effect significantly on the acting of the ICC if the veto-wielding powers can reach a consensus. The history of the SC indicates that due to certain difficulties, i.e. difficulties in reaching such a consensus, the SC's impact on the ICC may be limited,<sup>34</sup> but it is nevertheless significant. Consequently, the SC's failure and its practical constraints should be considered.

The first of these issues is the record of the Security Council's failure; here one need merely bring to attention that many atrocities and humanitarian crises have happened around the world, in the former Yugoslavia, Rwanda, Iraq, Uganda, Central Africa, etc., during the time in which the SC and UN system have been in existence. However, the Council's utilisation of power has been mainly a *reactionary* one in the above states. Or, as Koskenneimi observed, it may serve to recall that the Council enacted economic sanctions on several countries, such as Iraq,<sup>35</sup> Yugoslavia,<sup>36</sup> Libya,<sup>37</sup> and Somalia,<sup>38</sup> with entirely insufficient clerical and financial help, and in some cases the related committee which consists of diplomats of the five permanent powers of the Council even failed to report the national implementation of such sanctions.<sup>39</sup> It is also true that some permanent members such as Russia and China have blocked the role of the SC in international humanitarian affairs.<sup>40</sup> All these prove the failure and inadequacy of the UN system to address international humanitarian crises within an appropriate timescale. Additionally, it should be noted that sometimes the conflict of interest- *Realpolitik*- among the veto-wielding powers in the Council creates many difficulties in responding to international crises and meeting the expectations of the international community. This kind of failure should not be justified; and indeed some have criticised the SC for providing insufficient support and funding of the two *ad hoc* tribunals for Rwanda and the former

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<sup>34</sup> Cryer R & White N. *Supra* note 4, at 455-6.

<sup>35</sup> The SC, imposed sanctions against Iraq via many resolutions between 1990 and 2003, such as Res. 660 and 661 (1990), after the Iraqi invasion of Kuwait, Res. 1284 (1999), Res.1302 (2000), and Res.1490 and 1518 (2003).

<sup>36</sup> SC Res. 1160 (1998).

<sup>37</sup> SC Res. 748 (1992), and 1192 (1998).

<sup>38</sup> SC Res. 733, 751 and 794 (1992).

<sup>39</sup> Koskenneimi M. *Supra* note 12, at 345.

<sup>40</sup> Chomsky N. Public Lecture titled at SOAS: *Crises and the Unipolar Moment* (27 October 2009).

Yugoslavia,<sup>41</sup> the very late referral of the situation in Darfur,<sup>42</sup> and more recently the failure of the SC or difficulties it has encountered in supporting the Prosecutor's Arrest Warrant against al-Bashir.<sup>43</sup> These are just some examples of the Security Council's lack of concern regarding the practical implementation of its decisions, which is made possible by the fact that there is actually no accountability of the Council within the UN system.<sup>44</sup>

The second issue which must be taken into account is that of *practical constraints*. There are many practical obstacles and problems which may limit the implementation of the SC's enforcement power and its impact on the ICC. For example, it would not be possible, realistically, to use of force for all international humanitarian crises, and moreover, the use of force is generally unpalatable for most states.<sup>45</sup> Another obstacle arises from conflicts of interest between the different veto-wielding members of the Security Council, regarding, for instance, a referral of a situation to the ICC or support of the Court. This kind of conflict of interest may make it difficult to obtain a consensus between the permanent members, and the result may be the recognition of impunity. A further obstacle would be possible conflict between the SC and the ICC after a referral or prosecution. This could occur due to action on the part of either the ICC's Prosecutor or the Security Council. Firstly, the ICC's Prosecutor, under the control of the Pre-Trial Chamber, has authority to decide that a referral of a situation by the SC will not be prosecuted in the ICC.<sup>46</sup> Secondly, it is even possible that a judgment or decision by the ICC could be disregarded by the Security Council. Such an action on the part of the SC would endanger the international system far more than any unresolved question concerning the lawfulness of the SC actions.<sup>47</sup> These types of problems and obstacles may all

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<sup>41</sup> Koskennemi M. *Ibid*, at 346.

<sup>42</sup> The SC referred the situation in Darfur to the ICC, under Chapter VII of the UN Charter, on 31 March 2005 by Resolution 1539(2005).

<sup>43</sup> E.g. SC Res. 1828 (2008), at 2: the Security Council mentioned 'concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further,...',.

<sup>44</sup> Koskennemi M. *Ibid*, at 346.

<sup>45</sup> Craven M. 'Humanitarianism and the Quest for Smarter Sanctions', 13 *The European Journal of international Law* (2002), 43, at 44.

<sup>46</sup> This may happen by applying the principle of complementarity and non-admissibility of cases under the Rome Statute.

<sup>47</sup> Nolte G. 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections', in M. Byers (eds), *The Role of Law in International Politics, Essays in International Relations and International Law* (2000), 315, at 318. He here was discussing this issue



serve to produce impunity in particular cases. One could also argue that, despite the power of the Security Council, the exercising of power by the ICC may not be much different in a case of referral by the SC to the exercising of power in other cases before the Court. In the previous Chapter it has been discussed that, despite the creation of the ICTR and ICTY by the SC pursuant to Chapter VII of the UN Charter, these tribunals did not have the continuing support of the SC and could not solve the issue of the non-cooperation of states.<sup>48</sup>

The final point to be examined is the ICC's dependency on the cooperation of all states and international players such as the SC. In spite of the aforementioned problems, obstacles, and possible tensions between the two bodies, and despite the precautionary measures taken in this regard by the 'like-minded countries' from within the drafters of the Rome Statute, the ICC's experience has indicated that, without the support of the Security Council, the Prosecutor faces many difficulties. This is mainly due to the fact that the ICC relies heavily on the cooperation of states; for instance, in a non-self-referred case, or a referral by the Security Council, in which the state concerned does not effectively cooperate with the ICC, the role of the SC in supporting the ICC becomes significant. In practice, issues have arisen concerning the enforcement of the arrest warrant against Al-Bashir (discussed in Chapter Three) although enforcement action on the part of the SC would actually be 'greatly facilitated by its invitation to the Prosecutor.'<sup>49</sup> Concerning the Darfur situation, the impunity of the Sudanese authorities is as a result of the lack of support of the SC or its practical difficulties in intervening further in this country.

Just as much as the SC will necessarily fall short in its capacity to deliver justice, so also is it impossible to separate it from the functioning of the ICC. Just as it is not possible and not desirable to remove the relationship between law and politics, law cannot be transferred into a condition of pure morality and humanity (normativity) without being entirely abstracted from the real conditions of the world. A world of law without politics is thus utopian and unattainable. Therefore, the role

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with regard to the ICJ and the Security Council, but a similar situation would obtain regarding the ICC and the Security Council.

<sup>48</sup> Rastan R. 'Testing Co-Operation: The International Criminal Court and National Authorities', 21 *Leiden Journal of International Law* (2008), 431, at 438; Ponte D.C. *Madame Prosecutor, Confrontations with Humanity's Worst Criminal and the Culture of Impunity* (2009), at 59-60, 84, 92-93, and 370; Peskin V. *International Justice in Rwanda and the Balkans, Virtual Trials and the Struggle for State Cooperation* (2008), at 30.

<sup>49</sup> Cassese A. 'Is the ICC Still Having Teething Problems?' 4 *Journal of International Justice* (2006), 434, at 435.

of the SC in the Rome Statute should be accepted not simply as a practical necessity, but as an inevitable component of the Statute's theoretical and normative vision. The 'exception' of SC involvement, in other words, is one that fundamentally determines the character of the justice delivered by the ICC.

#### ***6.1.1. Negotiations at the Rome Conference regarding the role of the Security Council during the drafting of Article 16***

It has been mentioned that the relationship between the ICC and the SC was a vital issue at the Rome Conference,<sup>50</sup> and there were opposite opinions among states' delegations on this topic. Several countries, including, notably, the US, while supporting the creation of the ICC, actively attempted to reduce the independence of the Court. They sought a greater and more legitimate role for the SC in the Statute; they preferred the concept of a 'permanent *ad hoc* tribunal', in which the SC would be able to control all of the cases before the ICC and have a veto right for all of the potential cases. Similarly, it was indicated in the draft ILC Statute that:

No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.<sup>51</sup>

The ILC Draft Statute thus met the demands of one group of countries.. However, this faced difficulty being accepted by other delegations in the Rome Conference, as the ILC provision would have effectively given the SC a veto concerning all potential prosecutions.<sup>52</sup>

Opposed to the demands of the first group, the 'like-minded' countries gave overall support to the creation of the Court and were trying to establish a judicial Court independent of the Security Council. Consequently, at the Rome Conference there was a clash between those promoting their political concerns and those concerned with the judicial independence of the ICC.

The Statute itself reflects neither of these two positions, and Article 16, which might be thought of as a 'compromise' position, was in fact not entirely acceptable to either group. For the like-minded group, it allows a political body into the scheme of

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<sup>50</sup> See the *UN Diplomatic Conference*. *Supra* note 1.

<sup>51</sup> See the *Draft Statute of the International Law Commission of 1994*, text adopted by the Commission at its forty-sixth session, 1994, *Yearbook of the International Law Commission* (1994), Vol, II (Part Two), UN Doc. A/CN.4/SER.A/1994/Add. I (Part 2).

<sup>52</sup> Schabas W. (2004), *Supra* not 10, at 715.

the Statute, an admission which would lend impurity to the justice of its decision-making processes. For the first group, no doubt, the pretension that the ICC could ever dispense an even-handed justice was perhaps one of the most vexatious of its claims. Nevertheless, a proposal by Singapore,<sup>53</sup> amended by Canada,<sup>54</sup> as two of the like-minded group, struck a 'compromise' between these two opposing tendencies,<sup>55</sup> and with slight changes was finally adopted by the Conference. The Rome Statute then provides that:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.<sup>56</sup>

Although the above Article makes a request from the SC for a prosecution unnecessary, it gives a right of veto to the Council, which, by a resolution, could defer the Court's prosecution.<sup>57</sup> Accordingly, the five permanent members of the SC are potentially able to block the Court's prosecution without any limitation as to how many times such a resolution could be renewed. Cryer asserts that, through Article 16, 'the Rome Statute has made it possible for politically motivated selectivity to occur.'<sup>58</sup> Similarly, some have also discussed that this Article arguably raises the question of the impartiality and independency of the Court, which appears to be applying a double standard.<sup>59</sup>

### ***6.1.2. The practice of the UN Security Council concerning Article 16 of the Statute***

The Security Council, through the influence of the US and under Article 16 of the Statute, adopted resolutions 1422 and 1487<sup>60</sup> in order to exempt US citizens from being surrendered to the ICC. The US played a central role in the adoption of

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<sup>53</sup> See the *Rome Conference*. *Supra* note 1, 33 meeting, A/CONF. 183/C. 1/SR.33, Para 16 at 321, and 35 meeting, A/CONF.183/C.1/SR.35, Para 11, at 335 and 7<sup>th</sup> meeting, A/CONF.183/C.1/SR.7, Para 36 at 183.

<sup>54</sup> *Id*, 10th meeting, A/CONF.183/2/Add.1 and Corr. 1 and A/CONF. 183/C. 1/L.7. Speech delivered by Kessel, from Canada, Para 66, at 208 and Para 15 at 213, (15 June 17 July 1998).

<sup>55</sup> Birdsall A. *Supra* note 12, at 124; Schabas W. (2010), *Supra* note 28, at 329.

<sup>56</sup> See the Rome Statute Art. 16.

<sup>57</sup> Johanson S. *Peace Without Justice, Hegemonic Instability or International Criminal Law?* (2003), at 82-83.

<sup>58</sup> Cryer R. (2005), *Supra* note 1, at 226.

<sup>59</sup> Mokhtar A. 'The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute,' 3 *International Criminal Law Review* (2003), 295, at 302.

<sup>60</sup> See the SC Res. 1422 (12 July 2002), and SC Res. 1487 (12 Jun 2003).

Resolutions 1422<sup>61</sup> and 1487<sup>62</sup> under the Rome Statute.<sup>63</sup> In both these Resolutions the SC invokes Chapter VII and says that it is acting ‘consistent with the provisions of Article 16 of the Rome Statute’. The Council in Resolution 1422 ‘requests’ that:

[c]onsistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving 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, [the Court] shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise’.<sup>64</sup>

In Resolution 1487, an identical request is made regarding the twelve-month period starting 1 July 2003.<sup>65</sup> These resolutions aimed at preventing all states concerned from surrendering US citizens to the ICC and express the Council intention to renew their ‘request’ every twelve months, for as long as may be necessary.<sup>66</sup>

Regarding Resolution 1422 there are two significant points which need to be considered: the question of the consistency of this Resolution with Article 16, and the circumstances under which the Resolution was adopted. As to the first question, one may argue that, as Article 16 allowed the Council to block an investigation from commencing or being proceeded with, the Resolution is thus consistent with the Statute. It should be noted, however, that Resolution 1422 was adopted on 12 July 2002 by the Security Council, just a few days after the Rome Statute entered into force on 1 July 2002, and that the ICC did not have any cases for investigation yet. Thus, some assert that Article 16 is limited to the use of deferral on a case-by-case basis by the Council.<sup>67</sup> Some scholars also assert that the compatibility of this resolution with both Article 16 and the UN Charter is considerably doubtful.<sup>68</sup> Hence, one may argue that, because the resolution does not fall within the boundaries

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<sup>61</sup> SC Res. 1422 (12 July 2002).

<sup>62</sup> SC Res. 1487 (12 Jun 2003).

<sup>63</sup> See the Rome Statute Art. 16.

<sup>64</sup> SC Res. 1422, Para 1.

<sup>65</sup> See Res 1487. *Ibid.*

<sup>66</sup> SC Res. 1487. *Ibid.*, Para 2.

<sup>67</sup> Stahn C. ‘The Ambiguities of Security Council Resolution 1422 (2002)’, 14 *European Journal of International Law* (2003), 85, at 87; McKechnie S. ‘Fiddling with Rome: America and the Peacekeepers’, *New Zealand Armed Forces Law Review* (2005), 39, at 45; Laval R. ‘A vicious storm in a teacup: the action by the United Nations Security Council to narrow the jurisdiction of the International Criminal Court’, 14 *Criminal Law Forum* (2003), 195, at 211.

<sup>68</sup> Zappala S. ‘The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002), and Article 98 Agreements,’ 1 *Journal of International Criminal Justice* (2003), 114, at 117-118; Jain N. ‘A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court,’ 16 *The European Journal of International Law* (2005), 239, at 241-242; Cryer R & Whit N. *Supra* note 4, at 468; Sarooshi D. *Supra* not 14, at 116.

of what is countenanced by the Statute, it cannot be binding on the ICC.<sup>69</sup> This was the viewpoint adopted by a state delegation in the meeting for the drafting of the Resolution in the UN, who argued that the Resolution was not consistent with Article 16 and suggested that '[t]he negotiating history makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation - for example the dynamic of a peace negotiation - warrants a 12- month deferral.'<sup>70</sup> Regarding the circumstances under which the Resolution was adopted, it must be pointed out that at this time thousands of US peacekeepers were deployed around the world, and in particular in Bosnia and Herzegovina. The US, in fact, was threatening the Council that they might veto the continuation of the UN peacekeepers' mission in Bosnia and Herzegovina,<sup>71</sup> or might withdraw all other US peacekeepers, because their forces were in the danger of falling under the possible jurisdiction of the ICC in those territories.<sup>72</sup> As the US representative in the Security Council, Negroponte, asserted, '[f]ailure to address concerns about placing peacekeepers in legal jeopardy before the ICC, however, can impede the provision of peacekeepers to the United Nations. It certainly will affect our ability to contribute peacekeepers.'<sup>73</sup>

In addition, opposition during the drafting of the first Resolution by many states also needs to be considered; some asserted that the Resolution would send a message to the world that US peacekeepers were above the law and would establish a double standard in international law.<sup>74</sup> Also, a letter was transmitted by the President of the SC when the Council met to vote on the resolution, that he had received that day from the permanent representatives of Canada, Brazil, New Zealand and South

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<sup>69</sup> Sarooshi D. *Id.*, at 118.

<sup>70</sup> Heinbecker P, the permanent representative from Canada; see UN Doc. S/PV.4568 (10 July 2002), Security Council Fifty-seventh year 4568th meeting, New York (10 July 2002), at 4; see also MacKay, representative from New Zealand; at 5, he asserts concerning Article 16: 'its wording as well as its negotiating history...make clear that it was intended to be used on a case-by-case basis by reference to particular situations, so as to enable the Security Council to advance the interests of peace where there might be a temporary conflict between the resolution of armed conflict, on the one hand, and the prosecution of offences, on the other...'

<sup>71</sup> Bantekas I & Nash S. *International Criminal law* (2003), at 540; Cryer R & White N. (2009), *Supra* note 4, at 467; Laval R. *Supra* not 67, at 195 and 207; Mokhtar A. *Supra* note 59, at 308.

<sup>72</sup> Birdsall A. *Supra* note 12, at 133; Hass V. 'Power and Justice: the United States and the International Criminal Court', 1 *Eyes on the ICC* (2004), 161, at 174; Cryer R. (2005), *Supra* note 1, at 227.

<sup>73</sup> UN Doc. S/PV.4568, *Ibid.*, at 10.

<sup>74</sup> See the speech delivered by MacKay, UN Ambassador from New Zealand, in the meeting for drafting the Resolution, see UN Doc. S/PV.4568 (10 July 2002), at 5. He asserts: "To provide such immunity in any fashion would seem to enshrine an unconscionable double standard. It would appear to place peacekeepers above the law and indeed places the moral authority of peacekeepers and the indispensable institution of United Nations peacekeeping in serious jeopardy."

Africa; this letter expressed the view that the draft Resolution (1422) would damage the international criminal justice system and international endeavours to combat impunity, etc.<sup>75</sup> Eventually, despite such opposition, Resolution 1422, after several meetings by the Council, was adopted unanimously, and it was renewed in 2003 for a further twelve-month period as Resolution 1487.<sup>76</sup> Although the resolution was not renewed a second time, and it lacked any practical effect as there were no allegations of peacekeeper's crimes within the jurisdiction of the ICC,<sup>77</sup> the adoption of Resolutions 1422 and 1487 prove the significant role of the US with regard to the ICC. The US in fact sought to renew the Resolution a second time; their failure may have reflected growing international pressure and opposition to such resolutions, as well as the after-effects of the exposure of the evidence and allegations of torture and abuse by the US forces in *Abu Ghraib* in Iraq and *Guantanamo Bay* in Cuba in 2004.<sup>78</sup> The US was extremely embarrassed by the reports of such abuse,<sup>79</sup> and hence it was difficult for the US to attain another renewal of the Resolution. These two highly controversial resolutions were also arguably incompatible with Article 16, as there was no determination of a threat to peace or act of aggression consistent with Article 39 of the UN Charter.<sup>80</sup> As an author argued at that time, the threat to peace 'said to be involved is a mere figment and pretext'; thus, it was not justifiable 'granting immunity in advance,' before a case was investigated in the Court.<sup>81</sup>

However, and in contrast to these two Resolutions, in other cases the SC has applied this Article on a case-by-case basis; this has occurred on several occasions. For example, paragraph 7 of Resolution 1497, concerning peacekeepers in Liberia, expresses the exclusive jurisdiction of the US over their peacekeepers;<sup>82</sup> this

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<sup>75</sup> Security Council Fifty-seventh year 4572nd meeting Friday, New York, UN Doc. S/PV.4572. SC/7450 (12 July 2002).

<sup>76</sup> SC Res. 1487 (12 Jun 2003).

<sup>77</sup> Cryer R. (2005), *Supra* note 1, at 228.

<sup>78</sup> Condorelli L. 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', 3 *Journal of International Criminal Justice* (2005), 590, at 593; McKechnie S. *Supra* note 67, at 40 and 53; Cryer R & White N. *Supra* note 4, at 471.

<sup>79</sup> Schabas W. (2010), *Supra* note 28, at 330; see also Birdsall A. *Supra* note 12, at 134.

<sup>80</sup> See Article 39 of the UN Charter 26 Jun, 1945), see also Cryer R. (2005), *Supra* note 1, at 227-228; Mokhtar A. *Supra* note 59, at 312-314.

<sup>81</sup> Mokhtar A. *Id.*

<sup>82</sup> SC Res. 1497 (1 August 2003). It provides: 'Decides 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;'

Resolution may be more compatible with Article 16.<sup>83</sup> In Resolution 1593, concerning the referral of the situation in Darfur to the ICC, the SC also recalled Article 16 of the Statute and requested that the ICC should not investigate nationals of non-party states outside of Sudan.<sup>84</sup> Furthermore, in Resolution 1828, in 2008, after the African Union requested the Council to apply Article 16 concerning the Prosecutor's Arrest Warrant against Al- Bashir, a few days later the SC Resolution took note of 'their [i.e. certain members of the Council's] intention to consider these matters further.'<sup>85</sup> Although this Resolution did not explicitly block the prosecution, it sent an impunity signal to the Sudanese officials, which may undermine the efforts of the Prosecutor to bring them to justice.

It is open to argument as to whether there is in fact a link between impunity and the exemption from prosecution which is stipulated in Article 16 and the above resolutions. Those arguing against such a link contend that states such as the US may genuinely and impartially prosecute perpetrators in their national courts with even a higher standard than the ICC. This may be the case, but then again it may not be. To answer the question of the existence of a link with impunity, we must first of all go back to the main reason for the creation of the ICC and all of the previous international tribunals. One of the main reasons for the creation of the ICC and international tribunals in general is based on the idea that states are usually reluctant to prosecute their own nationals where they have committed crimes over other nationals, or they may be unable to prosecute. The creation of the Nuremberg and Tokyo tribunals, as well as the ICTY and ICTR, was based on this idea. More recently, some of the UK and US soldiers who have committed war crimes in Iraq and Afghanistan, have been prosecuted in national courts and have been convicted;<sup>86</sup> however, we have not yet seen an effective trial which includes their commanding officers.

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<sup>83</sup> Cryer R & White N. (2009), *Supra* note 4 at 471.

<sup>84</sup> SC Res. 1593 (31 March 2005) It states in Para 2: *Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,'

<sup>85</sup> SC Res. 1828 (31 July 2008) The Darfur situation had been referred to the ICC by the Security Council under Res. 1593 (31 March 2005).

<sup>86</sup> See, e.g., BBC News, 'UK soldier jailed over Iraq abuse', available at <http://news.bbc.co.uk/1/hi/uk/6609237.stm> (accessed 27/07/2012), and 'Calvin Gibbs, Soldier, Found Guilty In Gruesome Afghanistan War Crimes Case', in Huff Post Politics, available at [http://www.huffingtonpost.com/2011/11/10/calvin-gibbs-soldier-\\_n\\_1087180.html](http://www.huffingtonpost.com/2011/11/10/calvin-gibbs-soldier-_n_1087180.html) (Accessed 27/07/2012).

In the second place such exemption from prosecution may affect the Court's effectiveness and the universality of its performance, and seems also to violate the principle of the sovereign equality of states before the law (which implies that every state should be treated in the same way) since a group of people (i.e. US citizens) who might be prosecuted effectively before the Court will be immunised on the basis of nationality.<sup>87</sup> Furthermore, such exemptions will increase the criticisms directed at the ICC, in particular by non-Western states, for instance that it is an African Court and not an international court, etc.<sup>88</sup> Concerning Third World approaches to international law in general, it may be said that scholars argue that it is vital that a system of individual accountability must be created for all states and that the principle of accountability should apply to all international courts.<sup>89</sup> In addition, it has been observed that resolutions 1422 and 1487, which were issued pursuant to Article 16, were a 'denial of the value of justice' and could damage the legitimacy of the SC itself.<sup>90</sup>

The third concern is that the intervention of the Council by means of such resolutions could undermine the independence of function of the Court, and would also impose obstacles on its functions.<sup>91</sup> Whatever the reasons, such resolutions have been adopted by the Security Council, and the Statute, via Article 16, in fact provides an exception to prosecution, which may lead to impunity of some perpetrators. Indeed, as one delegation argued in the Rome Conference: "[i]f investigation or prosecution could be postponed at the request of a State or of the Security Council, the Court's effectiveness would be impaired."<sup>92</sup> Amnesty International has also strongly criticised the inclusion of this Article in the Rome Statute and argued that 'it

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<sup>87</sup> Mokhtar A. *Supra* note 59, at 319; see the *Declaration on Principles of International Law Concerning Friendly Relations*. *Supra* note 19, it provides '(f), Each state has the duty to comply fully and in good faith with its international obligations and live in peace with other states.'

<sup>88</sup> Thompson-Flores T. 'The International Criminal Court: Will it succeed or Fail? Determinative Factors and Case Study on this Question', 8 *Loyola University Chicago International Law Review* (2010), 57, at 57.

<sup>89</sup> Anghe A & Chimni B.S. 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts,' *Chinese Journal of International law* (2003), 77, at 92-93.

<sup>90</sup> Cryer R & White N. *Supra* note 4, at 478 and 482.

<sup>91</sup> Zeidy M. E. 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422,' 35 *Vanderbilt Journal of Transnational Law* (2002), 1504, at 1517.

<sup>92</sup> Halonen, delegation from Finland, see the *Rome Conference*, UN Doc. A/CONF.183/2/Add.1/Corr.1 (26 May 1998), *Supra* note 1, Para 31, at 98.



subjected the Court to impermissible political pressure, overriding the Court's independence, ...'<sup>93</sup>

## ***6.2. The possible creation of impunity via opposition of some powerful states and via non-ratification of the Statute: political dimensions and the ICC***

As was pointed out earlier, for greater effectiveness of the Court, the Statute's ratification and the cooperation of all states, and in particular of the powerful countries, is extremely significant. This is due to the treaty-based establishment of the ICC and its lack of independent enforcement power, which mean that it ultimately relies on state cooperation.<sup>94</sup> If ratification of the Statute by powerful states would plausibly enhance the effectiveness of the Court in combating impunity, then the opposition of these countries definitely has the opposite effect and may lead to the creation of impunity. Among the five permanent members of the SC, the US, Russia and China have not ratified the Statute. Other significant international players such as India and the majority of Islamic countries have not ratified the Statute either, and many of them do not even have any intention of signing the Statute. The position of the US and its influence on the functioning of the ICC, and its opposition to the ICC via the US bilateral agreements, are the central points of the following section. The section will seek to examine the consistency of such agreements with the Rome Statute, and how such opposition or lack of cooperation by the US and others may lead to impunity and may undermine the role and effectiveness of the ICC.<sup>95</sup> The non-ratification of the Statute by other states is subject of the final section.

### ***6.2.1. The position of the US toward the establishment of the ICC***

The US played a significant role in open discussions and supported the idea of the creation of a permanent international criminal court; it actively participated in the Rome Conference for the adoption of the Statute and signed the Statute on December 31, 2000, under President Clinton.<sup>96</sup> However, the final draft of the ICC was not

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<sup>93</sup> *Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice*, Amnesty International, AI Index: IOR 40/023/2005 (17 June 2005), at 2.

<sup>94</sup> Birdsall A. *Supra* note 12, at 126.

<sup>95</sup> Minogue E.C. *Supra* note 9, at 650.

<sup>96</sup> See the *US Department of State, Diplomacy in action*, International Criminal Court Cases in Africa: Status and Policy Issues. *Congressional Research Service, Report for Congress* (2 April 2010), at 4. Available at: <http://fpc.state.gov/documents/organization/141591.pdf> (11/07/2012), Birdsall A. *Supra* note 12, at 126-127; see also generally the US delegation at the Rome Conferences, Scheffer D. J.

what the US intended or expected. Thus, after Clinton the neo-Conservative government during President George W. Bush's presidency initiated their strong hostility to the ICC by announcing in May 2002 to the UN that the US did not intend to ratify the Statute and resigned the signature of the US to the Statute.<sup>97</sup> Since then, the US has enacted legislation prohibiting any kind of assistance to the ICC, including investigations, arrests, detentions, extraditions, and prosecutions of war crimes,<sup>98</sup> and has concluded a range of bilateral agreements with many states in order to exclude the possibility of surrendering of US citizens to the ICC.

Schabas and Mokhtar argued that the key reason for such hostility by the US administration concerned the inadequate role of the SC in the Rome Statute.<sup>99</sup> Schabas asserts that '[o]nly concerns about the role of the Security Council satisfactorily explain the increasingly hostile attitude of the United States towards the Court.'<sup>100</sup> He provided several justifications for this argument, such as the paradox between the US support for the *ad hoc* criminal tribunals and its opposition to the ICC, and also the positive role of the US during the Rome Conference. In connection with the latter point, Schabas mentioned that the US contribution improved the ability of the Court to address impunity, via the extension of the concept of war crimes to deal with internal armed conflicts, through the guarantees of due process for defendants, the attention to gender issues, and meticulous qualifications for judges.<sup>101</sup> In contrast, other scholars have identified other reasons behind the US opposition, such as the role of the Prosecutor's independent power *ex proprio motu* to initiate an investigation, or the US demands for extraordinary rights for its citizens, or the US concerns surrounding the potential for the ICC to prosecute US nationals serving as peace-keepers around the world, and issues concerning Status of Forces Agreements (SOFAs). Other possible reasons include the US concerns about the applicability of the Statute to non-party states, or general sovereignty concerns,

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'The US Perspective on the ICC', in S. B. Sewall & Kaysen C. (eds), *The United States and the International Criminal Court* (2000), 115, 115-118; McGoldrick D. 'Political and Legal Response to the ICC,' in D. McGoldrick, P. Rowe & E. Donnelly (eds), *The Permanent International Criminal Court* (2004), 389, at 400.

<sup>97</sup> Thompson-Flores T. *Supra* note 88, at 66-69.

<sup>98</sup> See the *American Service Members' Protection Act of 2002*, (ASPA), Title II, at SEC 2003, B.

<sup>99</sup> Mokhtar A. '*Supra* note 59, at 297; Schabas W. (2004), *Supra* note 10, at 710.

<sup>100</sup> Schabas W. *Id.*, at 710.

<sup>101</sup> *Id.*, at 702, and 704-5.

and the US Constitution.<sup>102</sup> Regarding the US Constitution as a possible constraint preventing the US from joining the ICC, a commentator has argued that ‘there is no forbidding constitutional obstacle to US participation in the treaty.’<sup>103</sup> However, it remains a question as to whether or not the US Constitution would permit the extradition of defendants to a foreign national legal system.<sup>104</sup>

The key issue here is whether we are to take the US opposition to the ICC as being ‘exceptionalist’ in the sense that it is prompted by a desire to enjoy certain privileges not enjoyed by other states (as seems to be implied by Schabas in his comments on the role of the Security Council) or whether the opposition is one it believes is capable of being shared by all other States. The question, in other words, is either an opposition to the very idea of universal justice,<sup>105</sup> or an opposition to the idea that universal justice might be achievable within the framework of that particular institution. That it might be the former is suggested by the terms of the US’s official report to Congress, in which it was made clear that one of its crucial objections to the Court was ‘the ICC’s potentially chilling effect on America’s

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<sup>102</sup> See the *US Department of State Report for Congress: US Policy Regarding the International Criminal Court* (Sept 3, 2002), at 3-6; Minogue E. C. *Supra* note 9, at 650 and 677, and Scheffer, delegation from the US, at the UN Doc. A/CONF.183/C1/SR.9(20 November 1998), Para 23-24 at 195; Fehl C. *Supra* note 8, at 75; Bogdan A. ‘The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98’, 8 *International Criminal Law Review* (2008), 1 at 24-5; Scheffer D. ‘Articles-Article 98(2), of the Rome Statute: America’s Original Intent’, 3 *Journal of International Criminal Justice* (2005), 333 at 338-9; Hass V. *Supra* note 72, at 165; Birdsall A. *Supra* note 12, at 129-130; Meyer E. M. ‘International Law: The Compatibility of the Rome Statute of the International Criminal Court with the US Bilateral Immunity Agreements Included in the American Service Members’ Protection Act’, 58 *Oklahoma Law Review* (2005), 97 at 107; Goldsmith J. ‘The Self-Defeating International Criminal Court’, 70 *The University of Chicago Law Review* (2003), 89, at 95, he asserts that the main reason for opposition by US ‘is the fear that its unique international policing responsibilities will expose it to politically motivated prosecutions before an unaccountable court’; Ferencz B. ‘Misguided Fears about the International Criminal Court’, 15 *Pace International Law Review* (2003), 223 at 231-233, he asserts three main objections for opposition of the US to the ICC, which are: the role of an uncontrolled Prosecutor, US nationals’ constitutional rights to a fair trial, and sovereignty concerns; Kircher A.R. ‘Attack on the International Criminal Court’, 13 *Michigan State Journal of International Law* (2005), 263 at 268, 270, and 271; see also generally Pejic J. ‘The United States and the International Criminal Court: One Loophole Too Many,’ 78 *University of Detroit Mercy Law Review* (2001-2002), 267; Conso G. ‘The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute’ 3 *Journal of International Criminal Justice* (2005), 314; McGoldrick D. *Supra* note 96, at 402-407.

<sup>103</sup> Wedgwood R. ‘The Constitution and the ICC’, in S. B. Sewall & C. Kaysen (eds), *Supra* note, 96, at 121, he argued that the US has already used its treaty power to participate other international courts, such as IMT and IMTFE, Iran- US Claims Tribunal established by the Algiers Accord, and etc, and ‘the ICC is carefully structured with procedural protections that closely follow the guarantees and safeguards of the American Bill of Rights and other liberal constitutional systems,...’ see also at 121-130.

<sup>104</sup> *Id.*, at 129-130.

<sup>105</sup> Chomsky N. *Supra* note 40, he asserts that neoconservatives in the US demand the control of the world via access to the main natural resources, and that this was the reason for the occupation in Iraq and intervention in the Middle East; see also generally Thompson-Flores T. *Supra* note 88.

willingness to project power in the defense of its interest.’<sup>106</sup> On the other hand, under President Obama, according to Professor Scheffer, who was one of the US delegates to the Rome Conference, US support for the ICC has increased to the extent that the US may be considered as a *de facto* member of the ICC.<sup>107</sup> For example, in October 2011 President Obama authorised sending approximately 100 US troops to assist regional forces to arrest Joseph Kony of the LRA. It would seem that the US’s opposition to an effective ICC has decreased, and this may eventually affect other outstanding arrest warrants besides Kony’s. Even if the US position has changed, however, the account of US opposition is illuminating insofar as it demonstrates the extent to which the ICC was never contemplated as a mechanism for applying the idea of universal justice. It is open the question whether the appearance of current support, which was as a result of pressure from human rights NGOs on the US government, is anything more than a temporary policy.

#### **6.2.1.1. Article 98 (2) and its practice**

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>108</sup>

Pursuant to the above Article, the US concluded a series of bilateral agreements in 2002<sup>109</sup> with many states in order to exempt US citizens from being surrendered to the ICC or other member states of the Statute who have primary liability to prosecute such perpetrators. The US evidently referred to Article 98 in such agreements<sup>110</sup> and even threatened states with waiving economic and military support funds if they did

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<sup>106</sup> See the US Department of State. *Supra* note 96, at 4.

<sup>107</sup> Lecture presented by Professor David Scheffer at SOAS titled ‘The End Impunity’ (12 March 2012), see also Thompson-Flores T. (2010), *Supra* note 88, at 69-90 and 82.

<sup>108</sup> See the Rome Statute Art. 98 (2).

<sup>109</sup> See Coalition for the International Criminal Court (CICC), *Proposed Text of Article 98 Agreements with the United States* (July 2002 ), available at : <http://coalitionfortheicc.org/?mod=bis&idudctp=13&order=dateasc&show=all> (Accessed 06/07/2012).

<sup>110</sup> See, e.g., *Treaties and Other International Acts Series*, 03-415, *International Criminal Court Article 98, Agreement between the United States of America and the Gabon* (April 15 2003), it provides: ‘Bearing in mind Article 98 of the Rome Statute, ... 1. For purposes of this agreement, “persons” are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party. 2. Persons of one Party present in the territory of the other shall not, absent the express consent of the first Party, (a), be surrendered or transferred by any means to the International Criminal Court for any purpose, or (b), be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.’ Available at: <http://www.state.gov/documents/organization/165197.pdf> (Accessed 12/07/2012).

not sign such an agreement.<sup>111</sup> In total, over 100 states parties and non-parties to the Statute have each signed such a separate bilateral agreement with the US so far.<sup>112</sup> Although these agreements are known as impunity agreements, the US has claimed that the agreements meet the requirements of Article 98 of the Rome Statute. It is worth briefly examining this issue, in order to clarify the nature of the influence of the US over the ICC, either in opposition to it, as the current approach stands, or supporting it in a postulated future change of position.

Regarding the question of the consistency of the bilateral agreements with Article 98, one may argue that the agreements are consistent with the Article, as the latter could be interpreted in a way that certainly could be applied to all of the agreements either before or after ratification by state parties and non-parties to the Statute. It may appear that from the above Article that the US found adequate leeway in it to conclude such bilateral agreements. As such, the US asserted that the Rome Statute in Article 98 (2) recognised that if a state party to the Statute had other international treaty obligations, the jurisdiction of the ICC should not interfere with these obligations, and so agreements such as the US bilateral agreements are countenanced by the Article.<sup>113</sup>

An alternative argument, however, is that the bilateral agreements violate the Rome Statute and are not compatible with Article 98 (2).<sup>114</sup> This argument relies on the fact that for an accurate interpretation of the Article, two important points need to be considered: firstly, the original intent of Article 98 (2) of the Statute, to ascertain which of the negotiations during the adoption of this Article must be examined; and secondly, the fact that this Article has to be interpreted in light of the main purpose and objective of the Statute.<sup>115</sup> To examine the first point, which concerns the original intent of Article 98(2) some have argued that the Article's intention was to

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<sup>111</sup> E.g. Presidential Determination No. 2003-28 (29 July 2003). President Bush ordered that the prohibition of support be waived after Albania, Bosnia and Herzegovina, Zambia, etc. entered into the US bilateral agreements pursuant to Article 98 of the Rome Statute. Available at: <http://www.amicc.org/docs/PD2003-28.pdf> (accessed 18/06/2012). See also Meyer E. M. *Supra* note 102, at 99; Birdsall A. *Supra* note 12, at 135; Hass V. *Supra* note 72, at 173; Meyer Eric M. *Supra* note 102, at 131; Ferencz B. *Supra* note 102, at 236.

<sup>112</sup> See CICC, *Status of US Bilateral Immunity Agreements* (BIAs), *Ibid*.

<sup>113</sup> Meyer Eric M. *Supra* note 102, at 99.

<sup>114</sup> Condorelli L. *Supra* note 78, at 594.

<sup>115</sup> Kircher A.R. *Supra* note 102, at 276; Hass V. *Supra* note 72, at 171-172; Meyer Eric M. *Ibid*, at 100 and 117.

include only SOFAs (Status of Forces Agreements)<sup>116</sup> which viewpoint finds support in the statements of the delegates themselves who were involved in the drafting of the Statute.<sup>117</sup> The term ‘sending state’ which was used in Article 98(2) to refer to a third state was used for the first time in US SOFAs<sup>118</sup> such as the agreement between the US and NATO in 1951. Thus, Article 98(2) intended to solve the potential conflict between the Rome Statute and SOFAs, which were existing agreements at the time of drafting the above Article.<sup>119</sup> In the first draft of the Statute, the term ‘third state’<sup>120</sup> was used, but in the final draft this was changed to the ‘sending state’; and it should be considered that, as the adoption of the term ‘sending state’ in this Article resulted from the US delegation’s efforts prior to and during the Rome Conference, it appears that the first intention was to refer to the US SOFAs.<sup>121</sup>

Additionally, the US head of delegation to the Rome Conference, Scheffer, has stated that when they conducted their successful negotiations for the inclusion of this Article in the Statute, their intention was to protect their SOFAs.<sup>122</sup> Accordingly, with a very narrow interpretation it might be said that this Article only applies to SOFAs, while on a somewhat wider interpretation it could be viewed as applying to SOFAs and to diplomatic immunity under the Vienna convention on Diplomatic Relations.<sup>123</sup> Another expert view is that the application of Article 98(2) is not confined only to bilateral extradition treaties and SOFAs, but that bilateral extradition treaties themselves are not necessarily consistent with the ‘sending State’ terminology used in Article 98(2).<sup>124</sup> There is, however, wide agreement among

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<sup>116</sup> A SOFA is a bilateral agreement between one state, which is sending troops and other nationals into another state’s territory, and the receiving state, which permits the sending state to keep its jurisdiction over its personnel during their time in the territory of the receiving state, see Beattie P. ‘The US, Impunity Agreements, and the ICC: Towards the Trial of A Future Henry Kissinger’, 62 *Guild Prac* (2005), 193 at 205; see also Meyer Eric M. *Id*, at 110.

<sup>117</sup> *Id*, at 206; Bogdan A. *Supra* note 102, at 40;

<sup>118</sup> Scheffer D. (2005), *Supra* note 102, at 338; Meyer Eric M. *Ibid*, at 125.

<sup>119</sup> Beattie P. *Ibid*, at 206.

<sup>120</sup> See the *UN Diplomatic Conference Report of the Working Group on International Cooperation and Judicial Assistance*, A/CONF.183/C.1/WGIC/L.11/Add.1 and Corr.1 (18 July 1998), *Supra* note 1, 26 Meeting at 274.

<sup>121</sup> Scheffer D. *Ibid*, at 339.

<sup>122</sup> *Id*, at 338.

<sup>123</sup> Beattie P. *Ibid*, at 207; Hass V. *Supra* note 72, at 172; Schabas W. *Supra* note 28, at 1042. (2010),

<sup>124</sup> Sands P. Crawford J. Wilde R, *et al*. ‘Joint Opinion: In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2), of the Statute’. (5 June 2003), at 18. Available at: [http://www.humanrightsfirst.org/international\\_justice/Art98\\_061403.pdf](http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf) (Accessed 06/07 August 2012).

analysts that Article 98(2) was intended to encompass SOFAs, extradition treaties, and diplomatic relations.<sup>125</sup>

The second point that needs to be considered in the interpretation of Article 98(2) is the fact that the Statute as a treaty must be interpreted in the light of the main objective and purpose of its establishment. As the Vienna Convention on the Law of Treaties stipulates, a party to a treaty must refrain from ‘acts which would defeat the object and purpose of the treaty’.<sup>126</sup> The main purpose of the Rome Statute is the prevention of impunity,<sup>127</sup> as a commentator observes ‘[a]n agreement that does not provide any effective guarantees of investigation and prosecution undermines the purpose of the Rome Statute.’<sup>128</sup> The European Union, for instance, has disputed the expansive US interpretation of the Article’s compass, legally evaluated it, and recommended guidelines for bilateral non-surrender agreements between EU member states and the US.<sup>129</sup> Furthermore, the European Parliament has adopted a resolution asserting that such agreements (as the US bilateral agreements) are not compatible with the Rome Statute or with EU membership.<sup>130</sup>

It seems therefore, that the US bilateral agreements may not be compatible with the Rome Statute.<sup>131</sup> Article 98(2) can only apply to the international agreements involving state parties to the Statute which were in existence at the time of the adoption of the Statute,<sup>132</sup> and any other interpretation of Article 98(2) is counter to the obligation of states to surrender criminals and to the main purpose of the Statute, which is to bring criminals to justice and hence to end impunity.<sup>133</sup> It seems that in a situation in which a state party to the Statute has entered into such agreements after the Statute has been adopted, the Court should not respect such agreements (for what that might be worth). Clearly the States participating in the bilateral arrangements are

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<sup>125</sup> Beattie P. *Supra* note 116, at 207.

<sup>126</sup> See *Vienna Convention on the Law of Treaties*, UNTS 1155/331(1969), Art. 60 (2), (b).

<sup>127</sup> See the Preamble of the Rome Statute.

<sup>128</sup> Jain N. *Supra* note 68, at 249.

<sup>129</sup> A complete collection of EU declarations, resolutions and other documents relating to Art. 98(2), and bilateral agreements see American Non-Governmental Organizations Coalition for the International Criminal Court

AMICC, available at <http://www.amicc.org/usinfo/reaction.html#EU> (Accessed 07/07/2012 ).

<sup>130</sup> *European Parliament Resolution on the International Criminal Court (ICC)*, P5\_TA (2002)0521 (September 2002). It states at Para. 9: “Recalls that it expects the governments and parliaments of the Member States to refrain from adopting any agreement which undermines the effective implementation of the Rome Statute; considers in consequence that ratifying such an agreement is incompatible with membership of the EU.”

<sup>131</sup> Zappala S. *Supra* note 68, at 114 and 133.

<sup>132</sup> Kircher A.R. *Supra* note 102, at 274. He asserts that it intended to cover existing Agreements, in order to prevent legal conflicts.

<sup>133</sup> See the Preamble of the Rome Statute.

putting themselves in a difficult position: on the one hand a state that has ratified the Statute is obliged to cooperate and surrender or prosecute an accused,<sup>134</sup> while on the other hand, by entering into a bilateral agreement, the same state is obliged not to surrender (e.g.) US citizens to the ICC.

The interpretation of the Article preferred by the US government is revealing, of course. If taken to its logical conclusion, it would lead to the bizarre situation in which any state party with sufficient diplomatic power and influence could conclude bilateral agreements protecting its nationals from prosecution by the ICC with countries across the world, resulting in the creation of impunity for its nationals. Only those states without the power to succeed in such comprehensive bilateral agreement creation activities - i.e. weak, developing states - would have their nationals vulnerable to prosecution by the ICC for heinous crimes.<sup>135</sup> However far this may seem to contradict the Rome Statute's main purpose and objective, it is nevertheless plausibly descriptive of a view that might unconsciously be shared by many states participating in the ICC – namely that the idea of 'universal justice' that lies at its heart is, in fact, something to be delivered only in relation to nationals of other states.

To shed further light on this point, it is worth considering the nature of the exception that Article 98 offers under the US interpretation. Many commentators have asserted that this Article represents an exception,<sup>136</sup> but none of them have explained their reasons for referring to it as such. Guzman, on the other hand, characterised Article 98 as an 'escape clause', allowing a state to opt out of its obligations under the Rome Statute concerning the citizens of another state by means of a bilateral agreement with that state.<sup>137</sup> He clarified that states often, when designing an international agreement, include a number of mechanisms by which parties are enabled to circumvent their obligations, on a temporary or permanent basis, under certain conditions.<sup>138</sup> These mechanisms usually consist of 'reservations, escape clauses, and exit clauses'.<sup>139</sup> Accordingly, and because of the presence of the

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<sup>134</sup> Rome Statute Art. 86, 87, 89, and 90.

<sup>135</sup> Beattie P. *Supra* note, 116 at 206.

<sup>136</sup> E.g. Bogdan A. *Supra* note 102, at 11 and 40. He asserts that Article 98 of the Statute 'created a limited exception' to the state parties' responsibility to cooperate with the ICC. Meyer Eric M. *Ibid*, at 124 and 125.

<sup>137</sup> Guzman A.T. *How International Law Works, A Rational Choice Theory* (2008), at 147.

<sup>138</sup> *Id.*, at 147.

<sup>139</sup> *Id.*



above Article he considered the Rome Statute, as a whole, an ‘escape clause’ agreement.

However, to understand whether the term ‘escape clause’ is in fact an appropriate term for the kind of exception Article 98 comprises under the US government interpretation, it is worth stepping back to a more theoretical perspective and considering that an exception can be understood in either of two ways. Firstly, it can be regarded as something that carves out a space of discretion from the general rule, with its existence as an ‘exception’ confirming the parameters of the rule as initially articulated (e.g. ‘The use of force is prohibited except in case of self-defence.’) Secondly, it can be understood as something which does not so much detract from the rule, but is fundamentally determinative of the rule, its existence being the key to understanding what the rule really means (thus being an ‘unexceptional exception’). In this case, the general rule extends only as far as the exception (e.g. ‘States are free to use force in self-defence, but on other occasions it is prohibited.’) The significance of this change in perspective on the question of those expedients or provisions that appear as ‘exceptions’ to generic rules is that it focuses attention not only on the character of the exception, but also upon the context in which the exception is (or is likely to be) invoked.

Guzman’s usage of the term ‘escape clause’ seems to invoke the first representation of the exception as a route out of an otherwise enveloping rule. In actual fact, however, it is clear that Article 98 (under the US government interpretation) does not grant a universal entitlement to all states to escape from their obligations by securing the protection of their nationals by way of bilateral agreements, but only to those states that have the ability to procure such concessions from others. As such, it is not so much an ‘escape clause’ allowing states generally to avoid obligations, but a clause which makes it clear that only certain states (or nationals thereof) will be subject to the jurisdiction of the ICC. The ‘exception’ thus denotes the exceptional character of the justice that is to be delivered – exceptional in the sense that it will be geographically delimited by reference to the nationality of the perpetrators of the crimes in question. Accordingly, it may be considered to fall under the second representation of the exception – one whereby the general rule is determined by, and extends only so far as, the exception. It can clearly be seen that this results in the creation of impunity not merely in an accidental or unintended way, but systematic impunity for perpetrators who are nationals of states with the power to

procure, by means of bilateral agreements, protection for their citizens from prosecution by the ICC.

### ***6.3. States non-party to the Statute and their possible relation to impunity***

Among the five permanent members of the SC, aside from the US, Russia and China have not ratified the Statute. Other significant international players such as India and the majority of Islamic countries have not ratified the Statute either, and many of them do not even have any intention of signing the Statute. Consequently, regardless of the many difficulties internal to the Rome Statute, it is also extremely important to consider the Court's lack of universality of jurisdiction as a result of the non-ratification of the Statute by such states. It is clear that non-party states do not have a direct obligation to cooperate with the ICC (although an exception could be a referral by the SC).<sup>140</sup> Thus, the non-ratification of the Statute has significance that goes beyond the mere limitation of jurisdiction in relation to crimes committed on that territory, but also may contribute to the problem of impunity mainly through the lack of cooperation in different ways, such as non-surrender and non-detention of an accused, non-cooperation in the collection and maintenance of evidence and protection of victims and witnesses, etc. In general, due to the treaty-based nature of the ICC, non-party states have no direct obligation to cooperate; thus, the extension of ratification of the Statute is significant as a consequence of the general proposition that the extension of the scope of a treaty would enhance its effectiveness.<sup>141</sup>

It should be considered, however, that the mere non-ratification by states is not directly related to the incidence of impunity. This is because, firstly, as has been mentioned, the crimes within the Statute are mainly derived from customary international law;<sup>142</sup> thus, a state failing to perform its duty to extradite or prosecute under customary international law would result in impunity whether or not it had ratified the Rome Statute. Secondly, in general impunity subsists in the Statute itself irrespective of universal ratification of the Statute; the main argument of this thesis has been that the Statute may not only serve as a means of combating impunity, it

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<sup>140</sup> See the *Vienna Convention on the law of Treaties*. *Supra* note 126; the Rome Statute Art. 13 (b), see also Gallaant K. 'The International Criminal Court in the System of States and International Organization,' 16 *Leiden Journal of International Law* (2006), 553, at 583.

See the Rome Statute Art. 13 (b).

<sup>141</sup> Guzman A.T. *Supra* note 137, at 76. Such extension of scope could concern the subject matters under the jurisdiction of the Court and the level of universality of acceptance of the Court's jurisdiction via ratification.

<sup>142</sup> Cassese A. *Supra* note 19, at 223.

may also in many different ways legitimise, facilitate or even create impunity. Clear examples in which the Statue appears to be working against its stated goal of combating impunity include Article 16, where impunity may result from resolutions by the SC, and Article 98(2) which may lead to impunity via the exemption of state parties from their obligations under separate bilateral agreements. Thirdly, the ratification of the Statute by itself will not solve the issues relating to problem of cooperation. Universal ratification in general might enhance the effectiveness of the Court, and non-ratification may contribute to the types of impunity which may derive from non-cooperation in a criminal procedure. Nevertheless, non-ratification and impunity have no automatic relationship with one another.

### ***6.3.1. The main reasons for non-ratification of the Statute***

If the Statute is rightly to be regarded as a codification of existing international customary norms,<sup>143</sup> the question arises as to what reasons may be put forward for the non-ratification of the Statute. There are several reasons given by states for such non-ratification. The first reason is that the Rome Statute itself makes it impossible for some states to become party to it; this is particularly true for Islamic states, because of the perception of the incompatibility of Islamic law with certain terms of the Statute.<sup>144</sup> Whilst in other circumstances this is an issue that might have been avoided by resort to reservations, the Rome Statute itself does not provide for that possibility. The Statute states very simply that ‘no reservations may be made to this Statute’.<sup>145</sup> This, of course, reflects upon the longstanding debate on the question of reservations more generally, concerning the tension that exists between the ambition for universality and the desire to maintain the normative integrity of the agreement.<sup>146</sup> The second reason for certain States’ non-participation is the perception that they would become targets of the ICC if they ratified the Statute, or at least make it easier for the ICC to prosecute their citizens; this is especially the case

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<sup>143</sup> *Id.*

<sup>144</sup> See e.g. the definition of torture in the Rome Statute, Article 7(2)(e), as ‘intentional infliction of severe pain or suffering...upon a person’ as a count of crimes against humanity; this would include the lash, which is a legal punishment according to Islamic law in many Islamic states. In addition, non-Muslim judges presiding over cases involving Muslims may be an issue for some Islamic states.

<sup>145</sup> Rome Statute Art. 120.

<sup>146</sup> E.g. Redgwell C. J. ‘Universality or Integrity? Some Reflections on reservations to General Multilateral Treaty,’ 64 *British Yearbook of International Law* (1993), 245, 246- 247; she argued that reservations may facilitate the process of states becoming parties to treaties. See also Redgwell C. J. ‘Reservations to Treaties and Human Rights Committee General Comment No. 25 (52), 46 *International and Comparative Law Quarterly* (1997), 390, at 391-392.

for states which have extensive internal human rights issues, such as Russia, China and many Islamic countries.<sup>147</sup>

The third reason given for non-ratification is the Court's own deficiencies; whereas the US, for instance, has been concerned that the Statute as a treaty should not apply to non-party states,<sup>148</sup> others, such as Islamic states, have criticised the influence of political bodies such as the SC in the Statute, and the inability of the Court to exercise power independently in the face of opposition from the great powers (e.g. the SC invoking Article 16 to defer proceedings) etc.<sup>149</sup> The fourth, and related, reason for non-ratification is the perception that the powerful states would control the ICC. In other words, certain states have a concern that the ICC would not deliver universal justice, equally available to all, but partial, differentiated justice. Third World scholars in general seek to create an international law which serves 'the cause of global justice.'<sup>150</sup> This is one of the main reasons for opposition to the ICC among Islamic states in particular. Some of them have argued that the ICC would be a tool in the hands of the great powers, which would allow it to exercise its jurisdiction only in their own interests.<sup>151</sup> On the other hand, it is plausible to argue that certain other states have the opposite concern: they do not wish to ratify the Statute because they do not support the idea of a system of universal justice.

These explanations need to be treated with some caution. In the case of Islamic States for example, they may be divided into two main categories: those states that have ratified the Statute, such as Jordan, Azerbaijan, and more recently Turkey and Egypt, etc.; and other states such as Syria and Indonesia, Saudi Arabia, etc., which have still not ratified it. Saudi Arabia not only has not ratified the Rome

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<sup>147</sup> Burroughs J. 'US Opposition to the International Criminal Court', 1 *Eyes on the ICC* (2004), 147, at 158 and 160; see also generally Nasser A. E. 'The International Criminal Court and the Applicability of International Jurisdiction under Islamic Law', 4 *Chicago Journal of International Law* (2003), 587.

<sup>148</sup> The *UN Diplomatic Conference*, UN Doc. A/CONF.183/C1/SR.9 (20 November 1998), *Supra* note 4, Para 23 at 198. The ICC has jurisdiction over states not party to the Statute when a crime within the Statute has been committed in the territory of a state party, or a non-party that has accepted the jurisdiction of the Court in this matter, by an accused national of a non-party state; when a crime has been committed by an accused national of a state party, or of a non-party that has accepted the jurisdiction of the Court, against a national of a non-party; and finally when a situation is a referral by the Security Council. See the Rome Statute Art. 12 (2), (a), and (b), 12 (3), and 13(b).

<sup>149</sup> See the *UN Diplomatic Conference*, *Supra* note 4, e.g. the official position by *Muladi*, the delegation from Indonesia, Para 10, at 73, and *Lahiri* from India, Para 47, at 86, and *Hassouna*, Observer for the League of Arab States, Para 67 at 88.

<sup>150</sup> Anghie A & Chimni B.S. *Supra* note 89, at 102- 3.

<sup>151</sup> Reus-Smit C. *The Politics of International Law* (2004), at 162; Megret F. 'Why Would States want to join the ICC? A Theoretical Exploration Based on the Legal National Nature of Complementarity, in Kleffner J.K. & G. Kor (eds), *Complementary Views on Complementarity* (2006), 1, at 44-45.

Statute, it has not even signed it, and there is little prospect of it doing so. Iran, as another major Islamic country, is a signatory to the Rome Statute. There is strong support in Iran for joining the ICC among academic scholars and religious experts. For example, one of the well known religious scholars in Iran believes that there is no contradiction between Islamic Law and the Rome Statute; that all of the crimes within the jurisdiction of the Statute are also crimes under Islamic Law; that the existing Iranian criminal code should undergo any modifications necessary to make it consistent with the Statute; and that the Iranian government should, accordingly, ratify the Statute.<sup>152</sup> Academics also mainly support the ICC, as a means of enhancing human rights and the government's accountability. Others suggest that before any plan for ratification, the Iranian government should fill the gap of provision between the Statute and the national legislation via the criminalisation of all crimes within the jurisdiction of the Statute.<sup>153</sup> It seems that the above two considerations – the support of academics and religious experts' attitudes – might be considered the main reasons for the signature of the Statute by the Iranian government and the existing debate between scholars regarding a possible ratification of the Statute in the future. The simple claim that the ICC is inconsistent with Islamic law and hence would prevent ratification by Islamic states is clearly insufficient.

The question remains, however, as to why powerful states are concerned about the jurisdiction of the ICC over their citizens, given the opportunities available within the statute to avoid prosecution by the ICC via applying the complementarity principle,<sup>154</sup> or via obtaining special dispensation by resolution of the SC, or via securing immunity by means of bilateral agreements, etc. The answer, it seems, relates to the limitations of each of these modes of avoidance. In the first place, and as regards the principle of complementarity, the answer is related to the role of the independent Prosecutor of the Court. The significant point is that, due to the principle of complementarity and the fact that assessments of complementarity lie in the hands of the ICC's judges, the final decision on whether to prosecute is always made by the

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<sup>152</sup> Damad M. Ayatollah. 'The ICC and Islamic Republic of Iran, round table', in Es-haag Alehabib (eds), *International Criminal Court and Islamic Republic of Iran*, the Institute for Political & International Studies, Tehran (2000), at 515; Malekian F. 'The Homogeneity of International Criminal Court with Islamic Jurisprudence', 9 *International Criminal Law Review* (2009), 595, at 621.

<sup>153</sup> Alaei M. 'The ICC, Human Rights, and the Assessment of Ratification.' *Id.*, at 399.

<sup>154</sup> This principle was examined in Chapter V, and stipulates that state parties have primary jurisdiction over crimes within the jurisdiction of the ICC.

Prosecutor. To clarify: according to the principle of complementarity, if a national court finds that an alleged crime is justifiable, the principle would still force a state to surrender a perpetrator to the ICC if the ICC's Prosecutor held that the domestic court's decision was not compatible with the fact or the trial was not a fair and just one.<sup>155</sup> In other words, in a possible conflict between a state's domestic court and the ICC, the final decision would be made by the ICC; thus, citizens of these states may not be fully protected even by their national courts undertaking such cases, because of the application of the complementarity principle.<sup>156</sup> Accordingly, states, by virtue of their priority of jurisdiction, can avoid the ICC's jurisdiction for many cases, but may be unable to avoid it for all of them even after a domestic prosecution.

However, the Statute may also be applied to non-parties in the following several situations. The first is the case where a crime within the jurisdiction of the Statute is committed in the territory of a state not party to the Statute and this state, by sending a declaration, has accepted the Court's jurisdiction.<sup>157</sup> The second situation is via a referral by the SC under chapter VII of the Charter.<sup>158</sup> In this case the ICC will operate on an *ad hoc* basis, but the difference between this situation and that obtaining in the case of an actual *ad hoc* tribunal is that the ICC's independent Prosecutor, under the control of the Pre-Trial Chamber,<sup>159</sup> has authority to decide whether to initiate an investigation or not.<sup>160</sup> The third and the most controversial situation in which the Statute may be applied to state non-parties is one where a crime within the jurisdiction of the Court has been committed against a national of a state party<sup>161</sup> (by nationals of state non-parties) or has been committed in the territory of a state party by a national of a state non-party.<sup>162</sup> This third situation of jurisdiction by the ICC has been one of the main reasons for opposition to the Court on the part of states. They have argued that a treaty should not be applied to non-parties without the latter's consent, whereas the supporters of the Court assert that because of the nature of such heinous crimes as are within the jurisdiction of the

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<sup>155</sup> The Rome Statute Art 53.

<sup>156</sup> Hass V. *Supra* note 72, at 167.

<sup>157</sup> See the Rome Statute, Art. 12(3).

<sup>158</sup> *Id.*, Art. 13(b), see also Oosthuizen G.H. 'Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council,' 46 *Netherland International Law Review* (1999), 313, at 316-318.

<sup>159</sup> *Id.*, Art. 15.

<sup>160</sup> *Id.*, Art. 53(1), and (2).

<sup>161</sup> *Id.*, Art. 12 (2), (b).

<sup>162</sup> *Id.*, Art. 12(2), (a).

Statute, if one of these crimes is committed in the territory of a state party, it is obliged to prosecute the crime not only under the Rome Statute but also under general international law. Consequently, states who have so far avoided being a member of the Statute because of a fear that the ICC may target their citizens can not escape from the jurisdiction of the ICC in all situations in any case.

Turning to the second means of avoiding prosecution by the ICC - special dispensations only available to certain states and regarding the possibility of states securing their nationals against the jurisdiction of the Court via SC resolution, it must be observed that fears exist that this would be insufficient protection from prosecution for states' citizens. Even for powerful states, the experience of Resolution 1422 indicates that it is not always easy for a consensus to be found between the SC's members for the adoption of such a resolution protecting their nationals.

It may be seen that the Statute provides reasons for different states not to be members of it. In a situation in which a state non-party is reluctant to cooperate with the Court and which may therefore lead to impunity, the reason should first be sought in the Statute itself, the details of which remain as significant obstacles to ratification for some states. This is particularly the case for those states who are seeking a universal justice. It should be noted, however, that even with universal ratification of the Statute, the problem of impunity in the Statute itself would still exist. This is due to two main reasons. The first is that impunity has been partly recognised or legitimised in the Statute in general, as has been discussed in this chapter in the case of Articles 16 and 98(2) and may possibly be created via amnesties, immunities, etc. The second reason is that – as was mentioned earlier – the ICC has not been structured for universal justice but for partial justice, and in it justice has been differentiated by reference to the inequalities of power that exist in international society.

#### ***6.4. Conclusion***

The relationship between the SC as a political body and the ICC as a judicial instrument should be seen in light of the relationship between law and politics. Just as law and politics cannot be separated, these two bodies cannot be detached from each other, either in theory or in practice. This results in various peripheral issues,

both *de facto* and *de jure*, which imply that the Statute can not apply equally to all states.

The predominant way in which people have understood the operation of the ICC in relation to the SC is one in which the problems are associated with the influence of politics on the ICC; this influence is conceived of as being one through which the cause of justice is sadly undermined, particularly by the presence and attitude of the US. Hence, for the most part people have thought about the situation in terms of the legal institution of justice being subjected to the unwarranted intrusion of politics into the legal domain which should be concerned with justice alone. In my view, this response is partly right but insufficient. It is true that the role of the SC, and particularly the exemptions from prosecution offered via the Bilateral Agreements and immunity resolutions, have in effect given rise to a type of possibility of impunity, which would seem to run in a direction counter to the main objective of the ICC. However, the common attitude to this is incorrect on three major counts. Firstly, the assumption that the problem is about the introduction of politics into the legal domain assumes that these may be kept apart; even if one took away the SC, the ICC would still be a profoundly political institution in the sense that the conditions of power and inequality that condition international relations would still would have effect on the practice of the ICC. This fact may be seen demonstrated, for example, by the reluctance of some states to become parties to the Statute, or by the practice of the ICC to date, which demonstrates that the principal states who are the subject of the Court's jurisdiction are African states. Secondly, the assumption that a reform of the SC's involvement would remedy the problem is also incorrect. As has been said, without the SC the ICC would still have a set of problems to deal with whenever it operated. Thirdly, it is incorrect to suppose that the idea of universal justice is either uncontroversially desirable or achievable; the reality seems to be that universal justice is not universally desired, and as much as the ICC is concerned with the elimination of impunity as per its stated objective, this is not in practice what its objective appears to be, but rather to direct itself against impunity in certain situations while allowing it to flourish in others. This is simply a reflection of the differentials of power politics, and actually also, and perversely, a condition of the support of universal justice itself. In other words, in order to be in favour of universal justice one has to have impunity, and so far as that is the case the idea of achieving universal justice always undermines itself – the maintenance of impunity being a condition for the pursuit of universal justice.



Accordingly, it has also been argued that the SC resolutions under Article 16, which legally were inconsistent with both the Statute and the UN Charter, provide evidence that the ‘universal justice’ contemplated by the Statute in reality cannot apply equally to all states; thus, the Statute is different in practice than when considered out of context. One may say that, despite the marginal nature of the direct implications of such resolutions, the intention was that exemption from prosecution should be normalised for some states.<sup>163</sup> Thus, it is true to state that the resolutions have to be seen as somehow symbolic of the recognition of the political reality of the unequal distribution of power. In this regard, the significant issue is that the impunity of one may encourage the impunity or unavailability for prosecution of others. The ICC, therefore, in theory and practice, is bound within its surrounding political structures and it should not be unrealistic to say that the ICC has become an institution of domination.

Powerful states clearly have the potential to exert great influence on the ICC. The opposition of the US to the Court, and its bilateral agreements under a misuse of Article 98 of the Statute, could undermine the effectiveness of the ICC and may provide impunity for US nationals.<sup>164</sup> Article 98, then, through potentially providing room for the creation of such agreements, thus provides another possible means for the escaping of some perpetrators from justice. Although recently the US has supported the ICC in a selected case, this support may be temporary, as the US, for its part, does not support the idea of universal justice but that of exceptionalism. The fact is that the structure of the ICC has led to justice being differentiated according to the power of different states, and impunity may be recognised via this lack of universal justice. It seems that not only has the ICC not been capable of ‘marshalling’ universal justice, it was not even able to ‘master’ it as endeavour alone.<sup>165</sup>

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<sup>163</sup> Cryer R & White N. *Supra* note 4, at 476.

<sup>164</sup> Minogue E.C. *Supra* note 9, at 650.

<sup>165</sup> Ryngaert C. ‘Universal Jurisdiction in an ICC Era’, 14 *European Journal of Crime, criminal Law and Criminal Justice* (2006), 46 at 78.

## ***VII. Conclusion***

This study has sought to examine a paradox at the heart of the International Criminal Court (ICC) especially in the context of its governing document, the Rome Statute. On the one hand, the ICC seeks, in the present and immediate future, to combat impunity through the innovation and development of legal means to criminal prosecution; and, in a longer-term hope, to ensure that these doctrines and techniques become established norms to bring justice without impunity, and facilitate peace and security within the global legal architecture. On the other hand, the ICC's Statute and the scope of the mandate of the Court as delineated therein, as well as the actual practice of the ICC, all may contribute to the creation of the very impunity that the ICC was established to prevent.

Consequently, in the course of this thesis I have argued that the ICC is not just a mechanism for bringing perpetrators of international crimes to justice, but may also *create* impunity, *create the potential for* or facilitate impunity, *recognise* or legitimise existing impunity, and *fail to address* existing categories of impunity. The ways in which impunity may arise can be divided into two core groups. The first group covers matters internal to the Statute. New criminalisation, the Statute's definition of crimes, the possibility of different interpretations and the associated flexibility, uncertainty, and departures from customary international law, may all lead to a situation of *de jure* impunity. The potential that the ICC may admit national amnesties and may respect state parties' immunity agreements, thus accepting limitations which may bar the surrender of an accused to the Court, and the provision of defences are also included among these internal matters, along with issues related to the ICC's complementarity of jurisdiction, its inadequate institutional mechanisms and various procedural problems. The ICC has faced many procedural issues similar to those faced by previous international tribunals, such as the lack of or insufficient cooperation, issues in exercising power and insufficient sanctions on non-compliant states, any of which may facilitate impunity. But the very fact that such weaknesses are unexceptional is not to suggest that the only conclusion we may draw is that the ICC is making slow headway in achieving its objectives. After all, one must attend to the fact that its very weakness has itself a productive power: both justifying the exercise of extensive jurisdiction by individual states parties and securing popular support for its own activities. Its acceptability as an institution coming only as a

consequence of the fact that it stands for something more than it delivers. This thesis has demonstrated that, despite the many advantages of the complementarity principle and its implications for the admissibility of cases, such as its encouraging states to prosecute international crimes in their domestic courts and its respect for their primacy of jurisdiction and sovereignty, in particular as in practice it would be impossible for the ICC to prosecute all international crimes, the complementarity principle also has a high capacity to create impunity in a number of ways, such as through the recognition of a state's decision not to prosecute and the resulting inadmissibility of such cases, the shielding of perpetrators, etc.

The second group of ways in which impunity may arise is through the peripheral problems and obstacles faced by the ICC, which are mainly concerned with its relationships with the SC and certain hegemonic states. These relationships are influenced by the nature of the Rome Statute itself and reflect the relation between law and politics in general; they are, it may be said, a reflection of the differentials of power politics, and are actually also, and perversely, a condition of the support of universal justice itself. Accordingly, I have argued that the relationship between the ICC and the SC, and particularly the exemptions from prosecution offered via the US Bilateral Agreements and immunity resolutions, have in effect given rise to a type of possible impunity. However, the assumption that the problem is about the introduction of politics into the legal domain assumes that these may in fact be kept apart; I have argued that this is incorrect, due to the fact that, even if one took away the SC, the ICC would still be a profoundly political institution in the sense that the conditions of power and inequality that condition international relations would still have effect on the ICC whenever it operated. Hence, the reality seems to be that the idea of universal justice is neither desirable nor achievable; as much as the ICC is concerned with the elimination of impunity as per its stated objective, this is not in practice what its objective appears to be, but rather to direct itself against impunity in certain situations while allowing it to flourish in others. Impunity, therefore, is not something extraneous to the Statute, but something generated within it, and the maintenance of impunity is a condition for the pursuit of universal justice.

This then poses the question as to what one may draw from that conclusion. How are we to think about the notions of justice underpinning the Statute or the apparently seamless connection between law and politics/power? What, in particular,

might this critique demand us to think of the Rome Statute? Should we seek to abandon it, rejecting the offer of partial justice that it appears to offer? Or should we rather seek to eliminate the gaps that open up the possibility for impunity? In the first place, it seems to be the case that the latter choice will remain a faint or hopeless cause. Law, as the realists have taught us, is not merely that which is found in the text, but that revealed in practice. This will be the cause of a differentiation between that which is caught within the terms of the Statute and that which is kept outside in practice, and so far as any particular rubric of justice will always seek to differentiate between different forms of impunity (i.e. between those that are justified and those which are not) a categoric opposition to the possibility of impunity will remain beyond the reach of law.

This, of course, leads to an important insight – that whilst it is through the legal categories that impunity itself is partly defined (through the determination of liability to punishment within a particular legal instrument such as the Rome Statute) the rationale for such categories of justice always stands outside the law itself. It is only through the lens of some extra-legal category of impunity that one is able to judge or assess the Rome Statute as being necessary, worthwhile or desirable, but from the standpoint of that same external category, the legal intervention will always be partial. The instrument in question, then, will always have an ambiguous relationship to these extra-legal forms of evaluation – on the one hand it will stand as a representation of those values, giving concrete expression to something which would otherwise remain intangible; yet on the other hand, it will demand to be read as imperfect, transmitting the sense that there is a form of perfect justice to which it is reaching, but yet unable to enact.

If then, one cannot hope to satisfy the desire for universal justice through the rubric of an instrument such as the Rome Statute, are we better off without it? Before attempting to answer this question, we should once again remember that this would demand that we reconcile ourselves to the persistence of impunity for international crimes and accept the possibility that genocide, for example, might just as well go unpunished simply because we are not able to satisfy, in the purest sense, our demand for a form of justice that is truly universal. Two points in relation to this need to be borne in mind. First of all, the concept of justice is not absolute, but relative; it varies between different cultures, societies, and religions, so that a particular act may be known as a crime in one society but not in another, and hence

the punishment of an individual who perpetrates such an act may be viewed as just in one society but not in another. Although it can be argued that human beings *may* share certain core common values, in practice morality is always the product of a particular society, culture or religion. Secondly, justice in general – either based on consensus of common values or not – is not achievable entirely in any legal system, even with the highest possible standards of judicial precision. This is a consequence of the obvious procedural deficiencies, lack of political will, and political fears, etc., that are ever present. These issues, which may lead to criminals escaping justice, exist in all courts and legal systems, and even with a genuine prosecution for widespread international crimes, justice is limited. The amount of punishment for the perpetrators and the suffering undergone by the victims of their atrocities can never be equal.

Yet these points should not be simply reminders of our human fallibility which we put to one side when imagining what an institution like the ICC might do or become. Rather, they should inform our evaluation of it: its place is there to deliver partial justice, allow for both the prosecution of those whose acts are criminalised but yet allow others also to go unpunished. This study has emphasised, in that respect, the significance of the intrinsic relationship between law and politics, in which the ICC as a legal institution is understood to be existing in a political environment – not just any political environment, but a particular one. Like its predecessors, we must understand the ICC as being constantly shaped by the particular political forces that act upon it. This clearly has implications for how we think about the prospect of international criminalisation and what we should be thinking about international crimes and tribunals. If international crimes only exist as defined by institutions such as the ICC and if they punish some people but not others, then this clearly says something about our commitment to justice for those crimes. International criminal law must therefore be understood as a kind of fragile peace, constantly shaped by the political environment in which it operates.

Given that justice can never be applied universally, we return to the question of what our reaction ought to be to the partial justice offered by the Rome Statute: to abandon it or to seek to eliminate the features of it that foster impunity. Clearly the prosecution and bringing to justice of perpetrators should not be abandoned simply because we cannot do it perfectly. The Rome Statute no more deserves to be abandoned simply because it does not offer the impossible vision of perfect universal

justice and law ‘untainted’ by politics than a domestic justice system should be abandoned because of the latter’s own failure to meet this ideal. Rather, let justice be done as far as is possible. If, for whatever reason, it is not possible for the ICC to prosecute nationals of certain countries or perpetrators of certain crimes, this does not mean that it should not prosecute others. Accordingly, my conclusion is that the second of the two offered choices should be taken: though it may remain impossible to attain perfection, we ought to strive to the utmost to eliminate the features from the Statute – those exemptions, and gaps, which may lead to criminals escaping from prosecution – which may lead to impunity. Undoubtedly, some of these issues result from the power of the state parties that provide for the very existence of the Rome Statute, and may therefore be considered to be out of the reach of the law. Like the statutes of prior international tribunals, the Rome Statute is thus accompanied by a gesture of exclusion. In spite of this fundamental flaw, the fact remains that its establishment has been a step forward in the fields of individual criminal responsibility and of international criminal law.

Impunity which arises via procedural problems and obstacles which are internal to the Statute could frequently be eliminated either via the Court’s course of practice or via amendment of the related criminal procedures. However, generally speaking, impunity via peripheral obstacles, difficulties and codifications, with some exceptions, could not be eliminated easily, if at all. Equally problematic is the situation when punishment is not in the interests of justice for a society. The emergence of impunity in cases such as these is inevitable, however unpalatable. This provides an understanding of why, in examining the practice and theoretical logic of the Rome Statute and the ICC, the thesis has focused specifically on the ubiquitous character of ‘impunity’, and how it functions in the creation and maintenance of a wide variety of legal scholarship, jurisprudence and policy-making.

Moving on to more specific recommendations: firstly, it is apparent that for effective functioning of the Court, it is essential for it to have a greater power of sanctions over non-compliant state parties to the Statute; this could eliminate the core issue of the lack of cooperation. The extension of the subject-matter jurisdiction of the Court ought also to be undertaken, so that crimes such as terrorism, drug trafficking, and the use of nuclear weapons fall within the jurisdiction of the Statute; now that the crime of aggression has been defined at the ICC’s first review conference, the amendment to the Rome Statute expanding the ICC’s jurisdiction

over that crime needs to be ratified. In addition, the inclusion of the possibility of trial *in absentia* with some conditions, as is common in the vast majority of states, may help the effectiveness of the Court. Concerning defences, superior orders as a defence in cases of war crimes rather than as a mitigating factor, and the issue of the non-manifest unlawfulness of war crimes under Article 33, which thereby departs from customary international law, should be amended. On this issue of defences, as there are practical advantages to a distinction between defences as justifications and as excuses, and as there are fundamental differences between these two types of defences, the Statute should accordingly codify defences in such a way, which is widely utilised in both common and civil law systems. Furthermore, the dichotomy of jurisdiction between military commanders and civilian superiors is unnecessary and may cause issues of the delay of prosecution; thus, this too should be amended, especially as the ICC's Pre-Trial Chamber appears in fact to be trying to limit the distinction between civilian and military command responsibility and has adopted the concept of a '*de facto* commander'. Finally, as combating impunity is not an easy task and the cooperation of all states and of the international community is significant, the state parties to the Statute should encourage other states to ratify the Statute, and should also work to utilise the media to raise the awareness of people, in particular regarding cases of non-compliant states or institutions; this would have the potential greatly to increase the cooperation of all states, as public opinion can change, if not all, then many things in this age of the global village. Moreover, the possibility of resolving several issues and concerns which have so far made it impossible for some states to join the Court should be considered. Overall, it may be said that progress towards shrinking the field of impunity (rather than ending it entirely) will be expedited by a greater awareness of the importance of the issue, among the public in general and among lawyers in particular.

It is recommended that further research be undertaken about the causes and consequences of impunity, as this study has not been primarily concerned with these issues. Instead, this thesis has attempted to clarify how the ICC may have the opposite impact to its intended goals, via the possible creation and recognition of the very issue which it seeks to address, namely impunity. Additionally, it is important that case studies be undertaken by researchers in the future in order to understand the consequences of the ICC's intervention in different countries. The question to be

answered will be whether the Court's intervention was the right decision and how much it contributed to promoting the international criminal justice system.

It is my hope ultimately that this thesis will contribute to a better understanding of the Statute and of the relationship between the law and politics of international criminalisation. I have endeavoured to develop the idea that the ICC affords an exact depiction of how that relationship may be conceived, and how the cause of justice is both enhanced and retarded in the process.



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