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THE INTERNATIONAL CRIMINAL COURT:

**A Contextual Study of a Nascent Court within the
International Criminal Legal System**

by

Ronald Ian Mackay Rennie

**Submitted in partial fulfillment of the requirements for the
degree of Master of Law**

at

**Dalhousie University
Halifax, Nova Scotia
September 2002**

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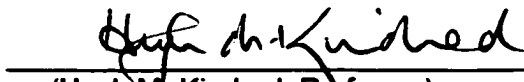
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**DALHOUSIE UNIVERSITY
FACULTY OF LAW**

The undersigned hereby certify that they have read and recommend to the Faculty of Graduate Studies for acceptance a thesis entitled "The International Criminal Court: A Contextual Study into a Nascent Court within the International Criminal Legal System" by Ronald Ian Mackay Rennie in partial fulfillment of the requirements for the degree of Master of Law.

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DEDICATION

**This work is dedicated to my parents,
Robert and Margaret Rennie,
for their encouragement and support in making my
educational aspirations a reality.**

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ABSTRACT

The *Rome Statute* of the International Criminal Court (ICC) represents an exciting and revolutionary development in the field of international law generally and international criminal law specifically. Unfortunately there are many ways in which academics, the media and political decision-makers misinterpret its intent and its nature. This thesis considers these traps and embarks upon an analysis of international criminal law by considering the content of the Statute and how it proceeds to establish an International Criminal Court, capable of bringing those most serious perpetrators to account. The subject matter of the ICC reveals a Court with a very limited jurisdiction, over a very limited category of international crimes, in a specific context. The backbone of the Court is a novel concept, called "complementarity." The concept is worth exploring in detail, for it reveals a Statute that introduces a new vocabulary of how an international court is capable of functioning, yet at the same time being respectful of the primary right of States to prosecute international crimes themselves. Yet the concept is even more intriguing, for it establishes the Court as an institution that neither centralizes international criminal judicial authority, nor establishes a hierarchy of international criminal law. It actually reinforces the decentralized nature of international law. The ICC is required to presume that States are acting in full propriety in the manner in which they dispose of suspected international criminals, unless there is evidence to the contrary. Prosecutorial and judicial discretionary power is restricted and supervised by the disparate personalities within the international legal system. This approach has profound implications for truth and reconciliation commissions (TRCs) and amnesties associated with them. The whole notion of complementarity rests on a unique view of international law as being decentralized and exercised through consensus, negotiation, equality, deliberation and communication, rather than through the establishment of hierarchies of law and institutions or imposition and command. This is a reflexive vision, supported by contemporary international legal practice – especially the proliferation of "regional arrangements." It is not a well-recognized system however. Opposition to the *Rome Statute* is mired in the expectation of seeing the familiar patterns of the centralized and hierarchical domestic legal systems, projected into the international. Both Indian and American arguments reflect a lack of imagination and a lack of vision to break free from the chains of traditional legal thought.

LIST OF ABBREVIATIONS

- ASPA.** American Servicemembers' Protection Act 2001
- CIA.** Central Intelligence Agency
- CICR.** *Comité international de la croix rouge* (same as ICRC)
- CSCE.** Conference for Security and Cooperation in Europe (1973 to 1994)
- CSIS.** Canadian Security and Intelligence Service
- ECHR.** European Convention on Human Rights
- ECJ.** European Court of Justice
- ECOSOC.** Economic and Social Council (United Nations)
- EU.** European Union
- ICC.** International Criminal Court
- ICCPR.** International Covenant on Civil and Political Rights
- ICJ.** International Court of Justice
- ICRC.** International Committee of the Red Cross
- ICTR.** International Criminal Tribunal for Rwanda
- ICTY.** International Criminal Tribunal for the former Yugoslavia
- ILC.** International Law Commission (subsidiary organ of United Nations General Assembly)
- IRA.** Irish Republican Army (Provisional)
- KGB.** Komitet Gosudarstvennoi Bezopasnosti (Russian State Security)
- MOSSAD.** *ha-Mossad le-Modiin ule-Tafkidim Meyuhadim* or The Institute for Intelligence and Special Tasks (Israeli State Security)

NATO. North Atlantic Treaty Organization

NGO. Non-Governmental Organization

OAS. Organization of American States

OECD. Organization for Economic and Cooperative Development

OIC. Organization of the Islamic Conference

OSCE. Organization for Security and Cooperation in Europe (post 1994)

PICT. Project on International Courts and Tribunals

PNICC. Preparatory Commission for the International Criminal Court.

RCMP. Royal Canadian Mounted Police

RPF. Rwandese Patriotic Front

RUF. Revolutionary United Front (Sierra Leone)

SFOR. Stabalization Force (Bosnia)

SOFA. Status of Forces Agreement

TRC. Truth and Reconciliation Commission

UN. United Nations

UNMIK. United Nations Mission in Kosovo

UNTAET. United Nations Transitional Administration in East Timor

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There are others who deserve acknowledgement, including the library and administrative staff of Dalhousie Law School, not to mention the staff of the Faculty of Graduate Studies and the Dalhousie Student Union. They helped make my latest sojourn to The Hague possible. I should also express my appreciation to the staff of the libraries of the Peace Palace, the Asser Institute and the International Criminal Tribunal for the former Yugoslavia – all in The Hague. I am a great believer in the research revolution that the Internet has brought about; to this end I have made extensive use of their online facilities and unashamedly at that.

I will look back at my year at Dalhousie as a particularly engaging period, but also one of formidable challenge. It is my hope that this thesis will be a credit to all of these individuals and organizations. Hopefully it will provide a modest addition to the increasing annals of qualitative literature, concerning the International Criminal Court, the tribunals and frontiers of international criminal law for the 21st Century.

R. Ian Mackay Rennie
Halifax, Nova Scotia
September 2002.

Chapter 1

Chapter One: The State of the Field

Introduction

On 22 April 2002 a ceremony took place in the New York headquarters of the United Nations.¹ Ten States deposited their ratifications to a multilateral treaty called the *Rome Statute*, thereby authorizing the creation of the International Criminal Court.² In accordance with the *Rome Statute's* requirement of a minimum of sixty ratifications, the treaty entered into force on 1 July 2002.³ The treaty authorizes the establishment of a permanent global court, to bring to account individuals for specific international crimes.⁴

¹ Secretary General of the United Nations, The Secretary General Off the Cuff, "Rome, Italy, 11 April 2002 - Press conference with President Carlo Ciampi following ratification of the *Rome Statute of the International Criminal Court (ICC)*" (11 April 2002), online: United Nations <<http://www0.un.org/News/ocg/sgcuff.htm>>(date accessed: 25 April 2002).

² *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF.183/9, reprinted in William A. Schabas, *An Introduction to the International Criminal Court*, (Cambridge, UK: Cambridge University Press, 2001) at 167-247[hereinafter the *Rome Statute*]. Other documents associated with the Statute and the ICC include: *Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Elements of Crimes*, UN Doc. PCNICC/2000/INF/3/Add.2, reprinted in Schabas, *ibid.* at 248-292 [hereinafter the *Elements of Crimes*]; and *Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Rules of Procedure and Evidence*, UN Doc. PCNICC/2000/INF/3/Add.3, reprinted in Schabas, *ibid.* at 293-382 [hereinafter the *ICC Rules of Procedure and Evidence*].

³ *Rome Statute*, *supra* note 2 at Article 126. By 1 July 2002, there were 76 States Parties to the *Rome Statute* that had ratified. (Source: "Multilateral treaties deposited with the Secretary-General- TREATY I-XVIII," UN Treaty Database Online: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>> (date accessed: 5 July 2002).

⁴ For current information regarding the Advance Team's efforts in setting up the Court, see their web site at < <http://www.un.org/law/icc/>>. The first meeting of the Assembly of States Parties will be held from 3 to 10 September at UN Headquarters. See: PCNICC, *Report of the Preparatory Commission for the International Criminal Court*, PCNICC Doc. No. PCNICC/2002/2 (24 July 2002), online at the ICC web site mentioned in the previous sentence.

Despite the optimism following ratification, numerous States remain resolute in their opposition to the *Statute*, including: the Peoples' Republic of China, India, Pakistan, Indonesia and Japan.⁵ The representatives of more than two-thirds of the global population have not accepted the *Statute* or the jurisdiction of the International Criminal Court. The United States reluctantly signed the *Rome Statute* in 2000, but on 6 May 2002, withdrew its signature. It considered the *Statute* seriously flawed. This action paved the way for the final enactment on 3 August 2002 of the anti-ICC legislation known as *American Servicemembers' Protection Act of 2002*.⁶ This Act actively attempts to undermine the membership of those States that have ratified the *Rome Statute* and prevents any form of cooperation by the United States with the Court. The United States is now negotiating bilateral treaties in order to provide exemption for "covered allied persons" and "covered United States persons" by States Parties to the *Rome Statute*.⁷

⁵ *Supra* note 3.

⁶ *American Servicemembers' Protection Act of 2002*, 2002 H.R. 4775 § 2001-2015 annexed to *Supplemental Appropriations Act for Fiscal Year 2002*, 2002 H.R. 4775 [hereinafter ASPA]. The text of ASPA was obtained from the web site of the Washington Working Group on the International Criminal Court <<http://www.wfa.org/issues/wicc/ASPA-HR4775.html>> (date accessed: 18 August 2002). It should also be available at the US Federal Legislative Library web site <<http://thomas.loc.gov/>>, although that web site was not non-functional at the time of writing. The Act was signed by President Bush on 3 August 2002 (see: "U.S.: 'Hague Invasion Act' Becomes Law: White House 'Stops at Nothing' in Campaign Against War Crimes Court" *Human Rights Watch* (3 August 2002), online: Human Rights Watch <<http://www.hrw.org/press/2002/08/aspa080302.htm>> (date accessed: 17 August 2002)). The House of Representatives and Senate passed the harmonized Act on 23 and 24 July, respectively.

⁷ The terms "covered allied persons" and "covered United States persons" are those used in ASPA at § 2015. On 12 July 2002, the Security Council agreed to a resolution exempting American personnel from the jurisdiction of the Court for one year, which ended the American threat to terminate U.N. peacekeeping operations (Edith M. Lederer, "U.N. Reaches Deal on War Crimes Court" *Associated Press* (12 July 2002)). The text of the relevant Security Council Resolution (*Resolution 1422 (2002)*, SC Res. 1422 2002, UN Doc S/RES/1422 (12 July 2002), online United Nations web site <<http://www.un.org>> (date accessed: 18 August 2002)) is contained in Security Council, Press Release SC/7450, "Security Council Requests International Criminal Court Not to Bring Cases Against Peacekeeping Personnel from States not Party to Statute: Unanimously Adopts Resolution 1422 (2002); Request is for 12 Months, with Annual

Despite such hullabaloo, the *Rome Statute* represents a significant development in international criminal law, if not international law generally. Controversy and limited participation are not necessarily indicators of certain failure; they are however indicators that the Court has a long way to go in order to achieve legitimacy in the eyes of some of the planet's most influential and populous States.

Exploration of a New Legal Field

The International Criminal Court is an entirely new court. Its jurisdiction represents the frontier of a pioneering field of law –“international criminal law.” A quick survey of university legal courses reveals that international criminal law is rapidly becoming a widely taught subject at law schools.⁸ A number of American universities maintain regular internships at some of the main international courts and tribunals.⁹ The topic is far-reaching. There are broad implications for human rights, extradition law, administrative law, public international law, criminal law and the laws of war (“international humanitarian law”). Sometimes the separation between law and politics (international relations) is not always clear. One might argue that law strives to limit the exercise of absolute power, whereas politics strives to justify the exercise of absolute power.¹⁰ At other times the field may

Renewals Intended” (12 July 2002), online: United Nations <<http://www.un.org/News/Press/docs/2002/sc7450.doc.htm>>. This negotiated settlement only amounted to a temporary reprieve. The passage of ASPA has re-established the American antagonism to the ICC.

⁸ Including the University of Edinburgh, the University of Glasgow, Rutgers, and McGill. The McGill course syllabus is online: McGill Law School <<http://www.law.mcgill.ca/>>(date accessed: 24 April 2002).

⁹ Including Harvard and Northwestern, from the author's own experience as an intern at the International Criminal Tribunal for the former Yugoslavia (2000 and 2001) and at The International Court of Justice (1999).

¹⁰ Consider: Anthony Carty, “Why Theory? - The Implications for International Law Teaching,” in Philip Allott, Tony Carty, Martti Koskenniemi and Colin Warbrick, eds. *Theory and International Law: An Introduction* (London: The British Institute of International and Comparative Law, 1991) at 83. Professor Carty explains why it is that international lawyers and international relations academics do not generally get along. The roots rest in the disillusionment in the aftermath of World War I. Refer generally to Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989) – one of the central themes of this book is that legal realists represent apologists, while legal idealists represent utopians.

appear to lack coherence. Frequently the quality of secondary analysis is wanting. Such traits should not be surprising in a new area of law that develops by the day. The aim of this thesis is to examine the manner in which the International Criminal Court is designed to operate, as specified in the *Rome Statute*. Rather than simply re-describing the *Rome Statute*, a contextual approach will be adopted. The provisions contained in the *Rome Statute* will be examined within the context of the emergent international criminal legal system, drawing heavily upon the two *ad hoc* international criminal tribunals (the ICTY and ICTR). The goal will be to gain a greater appreciation for the emergent legal field and present a framework in which to understand its complexity.

Sources

Where possible, reliance is made on primary sources including the *Rome Statute* itself, various documents relating to the Statute (such as the *travaux préparatoires*) and related documents concerning the *ad hoc* tribunals.¹¹ Academic literature on international (criminal) law falls largely into the following categories: legal realism (*l'étatisme*); legal positivism (absolute or universal human rights); universalism; and parallelism (sometimes referred to as "dualism").¹² Like any categorization, this one probably does not do justice to the variety of outlooks present.¹³ They

Ronald Dworkin describes the approach using human rights as "trumps" designed to counter and limit administrative discretion by recourse to realist 'policies.'" (R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at xi as cited in Martti Koskenniemi, "The Effects of Rights on Political Culture," in Philip Alston et al., ed., *The EU and Human Rights* (Oxford: Oxford University Press, 1999) at 101.

¹¹ In this respect access to the Internet has been crucial. It has provided a means of obtaining recent documents in a timely and cost-effective manner.

¹² Sandra L. Bunn-Livingstone, *Juricultural Pluralism vis-à-vis Treaty Law* (The Hague: Martinus Nijhoff Publishers, 2002) at 72-74.

¹³ For a comprehensive discussion on the historical development of various perspectives in international law (and the sovereignty of States), see: Luzius Wildhaber, *Wechselspiel Zwischen Innen Und Aussen: Schweizer Landesrecht, Rechtsvergleichung, Völkerrecht* (Basel un Frankfurt am Main: Helbing & Lichtenhahn, 1996) at 19-49. Note that Martti Koskenniemi reduces these categories even further to two – the legal realist v. the legal idealist (what he calls "apologist v. utopian").

may not always be distinct at times. Nevertheless the categorization is convenient for the purposes of this thesis.

Conceptual Bases of Existent International Criminal Law Literature

Presuppositions

The conceptual bases of the existing literature need to be considered before embarking on any extended analysis. Certain presuppositions tend to colour the analysis from the start, potentially distorting how one perceives the International Criminal Court and international criminal jurisdiction. Bias exists in many forms permeating not only thinking but also the use of language and terminology. Certain terms used in certain ways, represent indicators of a certain outlook. It may be inappropriate to use such terms to describe the International Criminal Court. The language may restrict our ability to depart from established concepts and to examine new innovations in international law. Nowhere is this more evident, than in the confusion arising from the use of ambiguous terminology in the Statutes of the two *ad hoc* tribunals, where one refers to “primacy” and “concurrent jurisdiction.” There are four main schools of thought that must be considered. Unfortunately each school has deficiencies, which render each an inappropriate filter through which to examine the International Criminal Court and its jurisdiction. Such deficiencies arise due to inherent bias.

Legal Realism

Traditional international law would normally propose two doctrines that direct the behaviour of States in international law: obligation and consent. The two doctrines exist in tension.¹⁴ Adherents to classical international law would argue

¹⁴ For Koskenniemi, the objective/subjective has to be a false dichotomy. The two have to coexist. Like electromagnetic poles in physics, they cannot exist independently for the relative relationship to one, defines the other. They have an inherent duality. Left without mediation or balance, one will “devour” the other – hence the need for what he calls “mediation.” Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, *supra* note 10 at 464. To the Taoists, this is the embodiment of the *ying* and the *yang*; these forces of opposition (lightness and darkness; physical reality and spirituality; male and female; and life and death) need to

that States are the sole holders of legal personality in the international domain. Since they are absolutely sovereign, their freedom of action is limitless. Anarchy of a sort occurs, as States attempt to optimize their self-interest – often called “legal realism.”¹⁵ There is a hint of classical liberalism in this approach and an analogue to the self-regulating, free-market economy. Proponents would include Oppenheim and Hedley Bull.¹⁶ The State is omnipotent. Its consent is essential to the legitimacy of any international legal rule. There is no place for morality. The conduct of States is perceived as being entirely objective, amoral and “clinical.”

Legal Positivism

Legal positivists would hold that international law is a set of rules that describe what behaviour is and ought to be. Hans Kelsen visualized law as a system of hierarchical norms, adhered to, voluntarily and through coercion – but also through the centralization of both enforcement and legislative authority.¹⁷ Coercion and centralization are crucial elements to positivism. Austin felt that international law was not quite law as it lacked the enforcement capability of punishing offending States; while, Hart felt that the lack of a central authority did not deprive international law of its legal character, although it did make it defective.¹⁸ In the

be in balance for a harmonious universe to exist; see Patricia Ebrey, *Chinese Civilization: A Sourcebook*, 2d ed. (New York: Free Press, 1993), pp. 77-79.

¹⁵ Sandra L. Bunn-Livingstone, *supra* note 12 at 72-74.

¹⁶ See generally: Lassa Oppenheim, *A Treatise on International Law* (London: Longmans, Green & co., 1905-06) and Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 1977). In Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41* (Cambridge, Massachusetts: Harvard University Press, 1942) at 56-79, Kelsen suggests that this nihilist argument is the weakest counter to the legalistic argument that war is forbidden in principle. Oppenheim’s approach denies the legal order in total, as it is incompatible with absolute state sovereignty. For Kelsen “a more serious” argument is that war is morally forbidden and that it is a sanction for wrongful State behaviour. The problem is that the victor is not always right and a war of aggression may not necessarily be motivated by wrongful behaviour on the part of the victim-State. For Kelsen though, the “most striking objection” is to consider war as neither a sanction nor a delict. In that case who decides what is a “just war?”

¹⁷ Hans Kelsen, *ibid.* at 45-55.

¹⁸ *ibid.*

absence of the utopian dream of centralized legislative authority (a world government), Kelsen saw a centralized judiciary as vital: it being capable of determining when an individual State committed the ultimate transgression, and therefore when use of the ultimate coercive action was appropriate - "the just war."¹⁹ Legal positivists emphasize the expression of legal centralism - possibly analogizing international law to domestic law.²⁰ Thus for Kelsen, the "just war" was the international analogue of the domestic criminal prosecution.

Since positivism not only dictates what law is, but what it ought to be, it is intolerant of legal diversity or "juricultural pluralism."²¹ There is only one interpretation. Yet the intolerance is also directed toward legal discourse, for positivism also denies that there is any other theoretical approach to understanding international law.²²

That international theory of law of the past hundred years seems both curiously repetitive and practically inconsequential follows from its dogmatic insistence on the conceptual primacy of 'international society' to international law. For neither 'rules' nor 'behaviour' offer a fully transparent wherewithal to reach the meaning of social events or actions (law or not-law, sanction or violence?). Interpretative assumptions are needed – assumptions which cannot, however, be validated by further reference to empirical facts because it is through them that lawyers invest the facts of State practice with legal meaning.

"Uncompromising" supporters of absolute inviolate human rights may fit into this category too.²³ Positivism engenders certainty but also rigidity and inflexibility.

¹⁹ *Ibid.* at 45 and 52.

²⁰ Bunn-Livingstone, *supra* note 12 at 67.

²¹ *Ibid.* at 68.

²² Martti Koskenniemi, "Theory: Implications for the Practitioner," in Philip Alston and others, ed., *Theory and International Law: An Introduction*, *supra* note 10 at 11.

²³ Martti Koskenniemi suggests that "rights" as a concept emerged in support of liberalism's efforts to constrain government and politics against realists bent on applying social utility and clinically "objective" policies. Thus "rights" became a "trump" (in Ronald Dworkin's words) to counter and limit administrative policies based in legal realism. See: Martti Koskenniemi, "The Effects of Rights on Political Culture," in Philip Alston and others, *supra* note 10 at 101.

Yet for a State to impose an obligation upon itself, through consent, is to restrict its freedom of action. Obligation is the antithesis of consent. How can a fully sovereign State bind itself to adhere to an obligation? Malcolm Shaw describes this incongruity as the "paradox of dualism."²⁴ The international legal system is founded upon this contradiction. In public international law, the limits upon what powers the State may exercise are defined in the *United Nations Charter* – to which all member States of the United Nations must comply.²⁵ One might compound the paradox by considering customary law. How can a State be bound to adhere to international norms or treaties to which it did not freely consent? This is not an easy question to answer, but the fact remains that such obligations have been deemed to exist by some international criminal legal experts and tribunals.²⁶

Universalism

For the universalist, an emphasis is placed on the obligation of the State to international norms, conventional or customary. There is no absolute sovereignty of the State. World Federalists represent an extreme position, advocating a global

²⁴ Malcolm N. Shaw, *International Law*, 3d ed. (Cambridge: Cambridge University Press, 1994) at 185.

²⁵ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 at Article 2. Substitute State for Members. See also *Statute of the International Court of Justice*, Annex to *Charter of the United Nations*, *ibid.* <<http://www.icj-cij.org/>> (date accessed: 16 March 2002) [hereinafter the *ICJ Statute*] at Article 36. The ICJ Statute requires the precondition of State Consent to its jurisdiction over a specific case (or generally).

²⁶ For example in the investigation following the NATO bombing of Kosovo in 1999, Louise Arbour (and her office), the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, concluded that the United States and France were bound by the Protocols of the Geneva Conventions even though they had not ratified them. It was felt they were so widely applied that they now constitute customary law. Of course this was not a judicial decision and therefore its precedential value is not much. Would the ICTY judges have decided differently? See, International Criminal Tribunal for the former Yugoslavia, Office of the Prosecutor, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (The Hague: 13 June 2000), online: <<http://www.un.org/icty/>> (date accessed: 6 June 2001) and Michael Cottier, "Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000," in Fischer, Horst, Kreß, Claus and Lüder, Sascha Rolf, ed. *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin Verlag: Arno Spitz, GmbH, 2001).

court capable of imposing its jurisdiction over the State.²⁷ Advocates of natural justice represent a less extreme position, but argue that all secular law is subordinate to some higher law – sometimes divine, sometimes philosophical. Examples might include St. Augustine and Grotius; Bentham; or the Islamic scholars who explained the *Koran* – the *Ijma*.²⁸ Liberal notions of the right to property or economic prosperity may also fall under this category.²⁹

There are two problems with this approach. First, efforts are made to analogize the international legal system (and courts) to their domestic counterparts.³⁰ This is

²⁷ For example one need only visit the web site of the World Federalist Association and read John B. Anderson, "...Without Global Law there Can be no Justice" and the WFA Statement of Goals and Beliefs (16 November 2001), online: <<http://www.wfa.org/about/>> (date accessed: 10 January 2002). Note the date on this document was incorrectly listed as 16 November 2002. Also see: Interview with William Pace by *Diplomatie judiciaire*, [undated], online: *Diplomatie judiciaire* <<http://www.diplomatiejudiciaire.com/UK/ICCUK3.htm>> (date accessed: 12 July 2002).

²⁸ See generally, Thomas Aquinas, *The Treatise on Law: [Being Summa theologiae, I-II; QQ. 90 through 97]* (Notre Dame: University of Notre Dame Press, 1993). Charles Montesquieu, *The Spirit of the Laws*, trans. A. Cohler et al. (Cambridge and New York: Cambridge University Press, 1989) and Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Printed for E. Wilson and W. Pickering, 1823). For a survey of Islamic law, consider: N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1978). Also consider the arguments put forward for universal legal principles independent of jurisdiction in Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1987). One might add to this list the contemporary focus on globalization: see Bonaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) and William Twining, *Globalization and Legal Theory* (London: Butterworths, 2000).

²⁹ A variant of natural justice even exists, called the "liberal theory of international law:" where the legitimacy of a legal rule or State behaviour rests upon a legitimate democratic regime with a free economy – see William W. Burke-White, "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation" (2001) 42 Harv. Int'l L.J. 467 [echoing Anne-Marie Slaughter, "A Liberal Theory of International Law," (2000) 94 Am. Soc. Int'l L. Proc. 240].

³⁰ Consider for example: Stephen Edwards, "Israel Feels Chill from War Court: Standoff Looms over Jenin Probe Amid Fear Findings Could be Used Against Israeli Soldiers," *National Post* (27 April 2002), online: *National Post Online* <<http://nationalpost.com/>>(date accessed: 27 April 2002){also on cover page of paper}. In this article Stephen Edwards described the Court as a "supranational war crimes tribunal." While the author was neutral with respect to the Court, his outlook is a popular assumption that Court is like a domestic court asserting its primacy of law and jurisdiction over all others. The Court might exercise primacy over an individual, but it does not exercise primacy over a domestic court system.

reminiscent of the positivists. The analogy is only superficial.³¹ The domestic legal system exists within a hierarchical system of government that asserts its dominion over its population. The international legal system exists decentralized and within a system that lacks a legislature. It merely exercises its authority only when a State has deferred a case to it or consented to its jurisdiction. There is no international institution with dominion over States, let alone individuals. The boundary between the judiciary and the executive (not to mention the legislature) is far more indistinct than in the domestic system.³²

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting...Among the principle organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut...There is however, no legislature...in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

Thus the comparison of the two jurisdictions may amount to a denial of the *sui generis* character of international (criminal) law. It is comparing "apples to oranges."

³¹ For example the International Criminal Court and the *ad hoc* tribunals may reflect a mixed civil law, common law character but that is where the comparison ends. See William Schabas, "Common law, <<Civil Law>> et droit pénal international: Tango (le dernier?) à La Haye," 13 R.Q.D.I. 1 (2000) at 287-307.

³² *Prosecutor v. Tadic*, IT-94-1, ICTY, Appeal Chamber, Decision, 5 October 1994, online: ICTY web site <<http://www.un.org/icty/tadic/appeal/decision-e/51002>> (date accessed 7 December 2001) at Paragraph 43. [A parallel reference also exists: *International Criminal Tribunal for the former Yugoslavia: Decision in Prosecutor v. Dusko Tadic* (Establishment of the International Tribunal) [October 2, 1995] 35 I.L.M. 32 (1996)+] Contrast the approach taken here in discussing this Decision to that of Christopher Greenwood, which almost exclusively focuses on the Decision from the point of view of international humanitarian law: Christopher Greenwood, "International Humanitarian Law and the Tadic Case" (1996) 7 E.J.I.L. 265. For a discussion of the indistinctiveness between judiciary and executive in Canada and the United Kingdom, see B. Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions between Punitive and Restorative Paradigms of Justice" (1998) 3 Can. Crim. L. Rev. 69 at 73.

The second criticism with the approach of universalists is that their arguments are predicated upon the assumption that there are universal international legal norms. By assuming that there exist binding norms, universalists could be regarded as being supranationalists, holding that States be bound by these norms. The position is in opposition to legal realism, although it may be closely related to positivism. Universalists would advance that the International Criminal Court must be authoritative, not compromise, and apply the "law."³³ They believe in a universal natural justice. Some military manuals of law refer to natural justice.³⁴

Yet can it be said that there really are universal norms or even rules? When one refers to the 1949 Geneva Conventions and the 1977 Protocols,³⁵ they are considered by some to be universal in scope and application and therefore customary law, binding on all nations whether ratified or not.³⁶ Yet the British

³³ Louise Arbour, "The Responsibility to Protect: A Step Forward in Human Rights Protection: A Discussion of the Report of the International Commission on Intervention and State Sovereignty" (The Dalhousie University Chapter of the Canadian Lawyers' Association for International Human Rights (CLAHR), Kings College, Halifax, Nova Scotia: 27 March 2002) [unpublished].

³⁴ For example: Canadian Armed Forces, *Military Justice at the Summary Trial Level V. 20 9/01*, CFP B-GG-005-027/AF-011 (Ottawa: Office of the Judge Advocate General, 2001) [draft], online: DNET/JAG < <http://www.dnd.ca/jag/>> (date accessed: 15 November 2001) at 1-10. This may be reflective of a higher level of influence from the Quebec civil law in Canadian military legal system. This could be the subject of further research.

³⁵ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1949) 75 U.N.T.S. 31; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (1950) 75 U.N.T.S. 85; *Convention (III) Relative to the Treatment of Prisoners of War*, (1950) 75 U.N.T.S. 135; *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, (1950) 75 U.N.T.S. 287 [hereinafter the *Geneva Conventions of 1949*]; and *Protocol Additional to the 1949 Geneva conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, (1979) 1125 U.N.T.S. 3 [hereinafter the *First Protocol*]; and *Protocol Additional II to the 1949 Geneva conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 U.N.T.S. 3 [hereinafter the *Second Protocol*].

³⁶ Consider: International Criminal Tribunal for the former Yugoslavia, Office of the Prosecutor, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, *supra* note 27 at Paragraph 42. In the Report it was suggested that France and the United States were both bound by the Protocols since they were now customary law, even though neither had ratified them. Note that this Report is not a judgement from the Tribunal. It could

government expressed reservations to the First Protocol: to apply exclusively to conventional weapons; not to apply where the defence of military necessity is advanced; not to include the commission of criminal or terrorist acts; to allow for the use of medical aircraft for other purposes that are military in nature; and that under certain circumstances, the nature of the offences may deprive the offenders of protection under the Protocol – including a response in kind.³⁷ Similarly the French government expressed reservations including its inability to guarantee the protection of installations containing dangerous forces and that the *gendarmerie nationale* was an integral part of the French armed forces.³⁸ The existence of reservations and the diversity of interpretation *vis-à-vis* international human rights treaties tend to undermine the proposition that there are universal legal norms.³⁹ In contrast, the *Rome Statute* prohibits reservations.⁴⁰ By such prohibition, the *Rome Statute* represents an effort by the negotiators to make it into a statement of universal norms.

however have a degree of authority in that the Office of the Prosecutor is representative of the Secretary-General.

³⁷ Schedule to the *Geneva Conventions Act (First Protocol) Order 1998* (U.K.), S.I. 1998/1754.

³⁸ ICRC, "Adhésion de la France au Protocole I du 8 juin 1977," 842 R.I.C.R. 549, online: ICRC < <http://www.icrc.org/> > (date accessed: 5 May 2002).

³⁹ Sandra L. Bunn-Livingstone, *supra* note 12. Consider also: Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (London: Sage Publications, 1990) at 46-87; and Jerome J. Shestack, "The Jurisprudence of Human Rights," in Theodor Meron, ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) at 69-105. Shestack, Renteln and Bunn-Livingstone argue that there are universal legal norms, but that the way in which they are implemented differs due to cultural relativism and pluralism. The norms are not absolute but relative. For a discussion of the problem of reservations also consider Hugh M. Kindred, ed. *International Law Chiefly as Interpreted and Applied in Canada*, 6th ed., vol. 1 (Halifax: Dalhousie University, 1999) [temporary edition] at 21-22 with specific reference to the *Reservations to the Convention on Genocide Case*, Adv. Op. [1951] I.C.J. Rep. 15 and how the issue appears to be unsettled still.

⁴⁰ *Rome Statute*, *supra* note 2 at Article 120 - although Article 124 allows for a transitional provision where the State Party may decline to accept jurisdiction of the Court for seven years. The *Elements of Crimes* also aims to restrict diverse interpretations of the crimes described in the *Rome Statute*.

Ironically while universalist-proponents of the International Criminal Court see the body as a supranational entity, upholding international human rights, it is this same vision of the Court that some of its opponents seize upon.⁴¹ American opponents see the Court as a body that would indict American military personnel serving abroad and as a tool for challenging American foreign policy.⁴² Such an outlook is illogical, for an overriding precondition in the *Rome Statute* to its jurisdiction being admissible, is that there must be evidence of an unwillingness or inability to initiate domestic legal process or an abuse of process or lack of good faith.⁴³ There are numerous other safeguards to avoid the situation of a supranational court asserting primacy, as Phillippe Kirsch, one of the key negotiators, observed upon publication of the Statute:⁴⁴

...This Statute contains numerous checks and balances which will ensure that the Court operates in a credible and responsible manner, consistent with its role in the upholding the rule of law. This Court is not a threat to any State which is committed to the security and well-b[e]ing of individual human beings. The court will serve the objectives of such States by contributing to long-term stability.

⁴¹ Lee A. Casey and David B. Rivkin, Jr., "The International Criminal Court vs. The American People," 1249 *The Heritage Foundation Backgrounder Executive Summary* (5 February 1999) at 2. The Heritage Foundation is very much a voice piece of the Bush administration. Other opponents have a position opposite to that of the American government in that they feel that it is not supranational enough: see Dilip Lahiri, "Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, On the Adoption of the Statute of the International Court" (17 July 1998), online: Web site of the *Rome Statute of the International Criminal Court* < <http://www.un.org/law/icc/>>(date accessed: 14 May 2002).

⁴² Madeline Morris, "High Crimes and Misconceptions: The ICC and Non-Party States," (2001) 64 *L. & Contemp. Probs.* 14, especially at 37-43. Compare Michael Scharf, "The ICC's Jurisdiction Over the Nationals of Non-Party states: A Critique of the U.S. Position," (2001) 64 *L. & Contemp. Probs.* 67 at 77. Scharf dissects Madeline Morris' article.

⁴³ Thus the context is important. *Rome Statute*, *supra* note 2 at Article 17 and especially Article 17(2). See chapter three also.

⁴⁴ Philippe Kirsch, "Ceremony for the Opening of Signature on the Treaty on the Establishment of an International Criminal Court 'Il Campidoglio,' Rome, July 18, 1998" in M. Cherif Bassiouni, compilation, *The Statute of the International Criminal Court: A Documentary History* (Ardsley, New York: Transnational Publishers, Inc., 1998) at xix.

These checks and balances are frequently called *complementarity*.⁴⁵ It appears as though opponents to the *Rome Statute* do not take into account these safeguards or, alternatively, feel that they are inadequate. The supranationalist has much in common with the positivist.

Parallelist

Parallelists are capable of accommodating the proliferation of international courts and tribunals. Different jurisdictions are regarded as operating in parallel to one another.⁴⁶ Parallel lines never intersect. There is a hint of federalism in this approach. There is no supreme court in the international legal realm that can impose its will upon all jurisdictions, as there is in a federal domestic legal system. Each jurisdiction operates independently of the other, reminiscent of the federal division of powers. Intrusions and overlap are unwelcome and regarded as a potential excessive exercise of power – *ultra vires*. Each jurisdiction is a discrete and self-contained unit. There is a minimum of interaction, if any at all.

The parallelist outlook holds that State consent takes priority over State obligation in certain areas. States remain the sole personalities in the international legal system and all international law flows from them. A sort of anarchy results from their interaction, and in the process, order becomes established. The approach is embodied by the role of the International Court of Justice (ICJ); only States have legal personality before it and its jurisdiction is only possible with their consent. While each Member State of the United Nations is obliged to comply with a decision of this Court, should a State Party fail to comply, the other State may defer the matter to the Security Council.⁴⁷ The Security Council may then make

⁴⁵ This will be explained in more detail in chapter three.

⁴⁶ Stephen M. Schwebel, Address to the General Assembly of the United Nations (General Assembly, New York, 27 October 1998), online at ICJ web site: < <http://www.icj-cij.org/> > (date accessed: 20 January 2002). Malcolm Shaw would call this dualism, however parallelism is preferred since it implies more than two entities involved in the relationship (i.e. multiple jurisdictions).

⁴⁷ *Charter of the United Nations*, *supra* note 26 at Article 94.

recommendations or decide upon measures to give effect to the judgement.⁴⁸ The Security Council in turn is composed of fifteen States with five States having permanent seats (with vetoes). These five represent the hegemonic order of the victorious States of World War II (1945).⁴⁹ Thus the deferral contingency is a bulwark to maintaining State sovereignty and consent as primary ingredients in the formulation of international legal rules. It is at this point that concurrent jurisdiction of the Security Council and the International Criminal Court exists in matters concerning crimes of aggression that are also acts of aggression. For a parallelist, the *Charter* specifically authorizes the Security Council to have the primary exercise of jurisdiction in such matters;⁵⁰ for the universalist the reverse holds true. In reality neither holds true, exactly.

Yet there is interaction between international courts and tribunals. Parallelism is not entirely appropriate as different international legal jurisdictions cross one another in terms of their scope. Parallelists deny any workable form of complementary relationship between the international and domestic jurisdictions. They see each court as supreme, in its respective domain. There exists disjunction.

Reflexive Law

There may be a means of transcending some of the difficulties posed by the limitations of the dominant schools of thought. Gunter Teubner describes a

⁴⁸ *Ibid.* at Article 94(2).

⁴⁹ Shabtai Rosenne, *The Law and Practice of the International Court 1920-1996. Third Edition. Volume I: The Court and the United Nations* (Netherlands: Kluwer Law International, 1997) at 19 to 25. Rosenne is critical of this structure as it is not reflective of the current power structure of States. Most notably the United Kingdom is a shadow of what it was in 1945. It would seem logical for India to have a permanent seat given its position as a nuclear power, a major regional entity and the fact that it contains nearly one quarter of the world's population. This may be a source of some of Mr. Lahiri's vocal opposition to the role of the Security Council and certain members being allowed to participate in referrals to the Court, who might not necessarily be States Parties to the *Rome Statute*. (*supra* note 42)

⁵⁰ *Charter of the United Nations*, *supra* note 26 at Chapter VII.

concept, which he calls "reflexive law."⁵¹ He considers there to be three stages in legal evolution:⁵²

- 1) A formal law stage, where the focus is "on establishing basic rules by which private parties orient their affairs and resolve disputes;"
- 2) A substantive law stage, where "purposive, goal-oriented intervention" results in the emergence of a regulatory regime; and
- 3) A reflexive law, where other institutions are involved and the goal is to influence behaviour by means other than regulation.

With the increasing complexity of interactions within societies, it has been argued that substantive law is inadequate for it is: uneconomical; forever expanding, creating the danger of unharmonized legislation; allowing an unwieldy administrative bureaucracy to emerge; and making law generally inaccessible to all but the "experts," or in the words of noted legal historian S.F.C. Milsom:⁵³

...So long as the legislature casts those entitlements [to allocation] in terms of definite rules and rights, of course, there is no problem about judicial control. But one of the pressures behind the whole shift is that which has pushed law itself off principles and into details. Complexity defies specification. There are too many

⁵¹ For a discussion of reflexive law see: Gunther Teubner, "Substantive and Reflexive Elements in Modern Law," (1983) 17 Law & Soc'y Rev. 239; and Eric. W. Orts, "Reflexive Environmental Law" (1995) 89 Nw. U.L. Rev. 1227 at 1255.

⁵² Teubner, *ibid.* S.F.C. Milsom probably subscribes to Teubner's reflexive law approach. He believes that through globalization the relationship in modern society has changed from man and man as equals, to manager and managed. This vertical relation is reminiscent of the western medieval world in that there are those with "power to allocate and those with some entitlement to allocation." While this may be similar to the "dependent structures of which the feudal unit was a simple model," his extension to include the role of discretionary power of administrators is intriguing (if not Weberian). Milsom has probably identified the second, substantive law stage (or the regulatory State). Whether this is an indication of "history running backwards," remains to be seen. Given that the ICC is in many respects a court of high office (or chivalry), one cannot wonder if there is something in this. See: S.F.C. Milsom, *Studies in the History of the Common Law* (London: The Hambledon Press 1985) at 221.

⁵³ S.F.C. Milsom, *ibid.*

details, too many possible factors; and in the end you have to leave it to somebody's discretion...Perhaps even in so central a citadel it would be wiser and more just to accept guidelines for a discretion rather than a capricious multitude of rules, and to concentrate the law upon ensuring that the discretion is properly exercised.

Moving beyond Milsom, reflexive law promotes decentralization and voluntary compliance by those interested groups.⁵⁴

Advocates of reflexive law typically envision the municipal model of a legal system where there is a form of domestic monism – a centralization of judicial authority, law making and enforcement in the apparatus of the State. In international law generally and international criminal law specifically, there is a decentralization of judicial authority, law making and enforcement. Therefore from the outset one must exercise a certain degree of caution in applying reflexive law to the international legal system, since it has largely been theorized in the domestic legal environment.

Legal theorists who propose the idea of reflexive law tend to associate the concept with the Hegelian idea of an evolutionary process.⁵⁵ Thinkers such as Nonet and Selznick would present a three-stage model of legal development: repressive, autonomous and responsive law.⁵⁶ For Habermas stages would include "rationality structures," pre-conventional, conventional and post-conventional.⁵⁷

⁵⁴ To some degree this may be the system envisioned in the *Rome Statute*, where there is not only the authority invested in officials of the Court but also various participative roles enshrined for States, the Security Council and NGOs, not to mention checks on the exercise of discretionary powers by Court officials. This was discussed at an interview between Professors B. Archibald and H. Kindred (17 August 2002). This will be the subject of chapters three and four with a practical case study in chapter five.

⁵⁵ For example consider: Philippe Nonet and Philip Selznick (USA); and Jürgen Habermas, Niklas Luhmann and Gunther Teubner (Germany). These are mentioned in Gunther Teubner, *supra* note 52 at 242; Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper, 1978); Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?* (Frankfurt: Suhrkamp, 1971).

⁵⁶ Teubner, *ibid.* at 243.

⁵⁷ *Ibid.* at 244 citing Habermas generally.

Gunter Teubner would identify these stages as formal law, substantive or regulatory law and finally reflexive law.⁵⁸

There is difficulty with an evolutionary model when applied to international (criminal) law. Can it be said that it has evolved and if so, from what? Is it still evolving? Is it really "primitive?" These are very difficult questions that are well beyond the scope of this thesis. The concept of a Hegelian *continuum* is debatable, in that the *Rome Statute* may amount to an increasing degree of regulation (and therefore an increase in "substantive" legal character), but as will be shown, it does not amount to "so central a citadel" of legal or judicial authority. The *Rome Statute* is designed to operate in a complementary relationship with the domestic courts, the traditional approach to prosecuting international crimes.

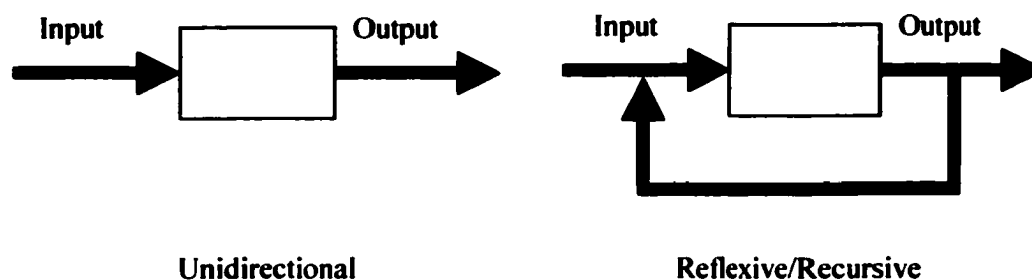


Figure 1 – Block Diagrams of “Two” Cases of Legal Systems Approaches: Unidirectional (Formal or Substantive) and Reflexive

If one sets aside the evolutionary questions concerning international law, there are two systems approaches possible for the realization of legal norms. Figure 1 captures the essence of Teubner’s arguments about domestic law, when applied to international law. In the left-hand diagram, a stimulus or challenge confronts the legal system, labelled as an input. The legal system reacts and responds in some form, for instance the creation of legislation. The output is a function of the input, but the input is independent of the output. The relation between input and output

⁵⁸ Teubner, *supra* note 56 and Orts, *supra* note 52.

is one-sided or unidirectional. It is disjunctive. For Teubner this is typical of both formal and substantive law.⁵⁹

In the reflexive system (the right-hand diagram), the output is a function of the input but the input is also a function of the output. The relation is bi-directional and fully conjunctive. Output and input are mutually dependent upon one another. A feedback loop exists. The feedback is accomplished by emphasizing procedure over purpose and deliberative communication from multiple sources constantly monitoring the output. The regulative, imperial and monist approach gives way to law by deliberation and consensus.

There are some weaknesses to the outline above. Some critics of this post-modern approach have questioned whether formal law has ever existed.⁶⁰ Surely all law is reflexive to some degree. Statutes and legislation are amended and revised. International conventions are negotiated along with additional protocols. Even demagogues "fine tune" their legal rules in order to meet challenges to their despotic regime. Rather than considering two independent forms, perhaps the unidirectional case is simply a specific and extreme case of reflexive law where the level of feedback is negligible or inadequate. Thus the reflexive model is a general model. Different approaches to stimuli, within a legal system, can be differentiated by the degree of reflexivity, where the variable is the amount of feedback.

A problem arises with respect to the inherent stability of a feedback system. In any system incorporating a feedback loop, it is possible that feedback is continually returned to the input. An ever-increasing accumulation of feedback, augmented every time a feedback loop may occur. The magnitude of the feedback becomes so great that the system eventually becomes so unstable that it fails. This is what

⁵⁹ Teubner, *ibid.* at 240 using example of excessive welfare regulation which tends to stifle individual initiative and ingenuity, exacerbating the underlying social problems that the regulation was intended to address in the first place.

⁶⁰ Teubner, *ibid.* citing Duncan Kennedy, "Legal Formality" (1973) 2 J.L.S. 351.

happens when a microphone is placed next to the amplified speaker and a horrible, deafening tone results (damaging the speakers).

Teubner rightly points out the problem in the reflexive legal model. There exists a presumption that all monitoring is provided at an equal level. It does not take into account those that do not participate or those who participate more actively than others. There is a danger that certain interest groups may co-opt the apparatus to portray a false image of reality and thereby distort the system inputs to promote outputs in their favour.⁶¹ He calls this "asymmetric" feedback. Teubner suggests the creation of autonomous organizations, which attenuate and filter input and restore symmetry before the feedback is returned to the decision-makers.⁶² By so doing stability is achieved. Though this approach achieves stability, by its very nature, the filtering process is, regulatory and relatively non-reflexive. Thus a necessary tension exists between regulation and reflexivity in order to ensure system stability.⁶³

Plan of the Thesis

The four schools of thought do not entirely capture the reality of the international criminal legal jurisdiction or the *Rome Statute*. They do however represent predominant academic opinions, which have a very significant influence on

⁶¹ One might consider the co-opting of the World Conference Against Racism in September 2001 by anti-American and anti-Israeli interests (including a long list of NGOs) as a situation in which the UN reflexive system became unstable. Despite attempts to calm the conference down and moderate its tone, it vociferously attacked both the United States and Israel over the Palestinian issue. The European Union and the UN High Commissioner on Human Rights (Mary Robinson) also voiced similar concerns. In the end, the United States and Israel withdrew from the Conference. See: "S. Africa Trying to Revive U.N. Racism Meeting" *CNN* (4 September 2001), online: <http://www.cnn.com/2001/WORLD/africa/09/03/racism.conference/> (date accessed: 23 August 2002); and World Conference Against Racism <http://www.un.org/WCAR/pr.htm> (date accessed: 23 August 2002).

⁶² Teubner, *supra* note 52 at 276 suggests independent citizen action committees in the realm of consumer protection (such as the German *Verbraucherzentrale* and *Stiftung-Warentest*) as models of such autonomous bodies providing such filtration and correcting of the feedback so that it does not result in a runaway loop.

⁶³ This should evoke memories of Koskeniemi's false dichotomy and duality concept (Koskeniemi, *supra* note 10 at 464).

decision-makers. While this thesis will not reject these opinions outright, it will reconsider them to assess some of the contradictions evident in the literature and in statements of policy from decision-makers. Reflexive law provides an additional means of understanding how law operates, although it must be considered with extreme caution since it is rooted in a conceptualization of domestic law. It is not a dominant school of thought, but it does provide an extra "tool" for analytical reasoning.

Through an awareness of these outlooks, analytical "traps" may be avoided. The approach adopted is contextual and rooted in practical experience – perhaps even "empirical." It represents another manner of perceiving the complexity of the international criminal legal system. The aim is to employ mediating strategies to view opposing schools of thought concurrently, through: "mediating definition, recourse to procedure; and contextualization."⁶⁴ Attention to the precise use of language, focus on the procedures of the various courts, and the contextual relationships between the courts (domestic and international), represent the underlying approach to the thesis. In this manner a new appreciation for the *Rome Statute*, the ICC and the international criminal legal system may be achieved.

There are six chapters in total. In chapter two, the first substantive chapter, the traditional relationship between States, in their joint efforts to deal with international crimes, is examined. An exploration of the nature of international and transnational organized crime reveals that the traditional approach sometimes fails, especially where the apparatus of the State becomes co-opted for criminal activity. It is here that the subject matter of the International Criminal Court becomes evident – high crimes of public office. The Court's jurisdiction is actually quite narrow and incomplete. The core crimes are specific and uncommon crimes,

⁶⁴ Martti Koskenniemi, "Theory: Implications for the Practitioner," in Philip Allot and others, *supra* note 10 at 47.

committed in a certain context. Though its jurisdiction may be narrow, chapter two reveals why the Court is necessary.

Complementarity, the cornerstone of the *Rome Statute*, is considered in chapter three. It defines the relationship between the Court and domestic courts. It is an important concept, but is poorly understood as an abstraction. The dimensions of complementarity reveal the concept as a function of conjunctivity – the degree of cooperation and mutual recognition between international and domestic courts. There is a vocabulary that has been developed in the *Rome Statute* to describe the approach and attention is paid to it. The Court does not assert its jurisdiction over “subject” States. Instead there exists a deferential system, with numerous safeguards to ensure that complementarity is achieved. A secondary system of safeguards can be identified in the regulation of judicial and prosecutorial discretionary powers. Chapter four examines such regulation, revealing insight into the nature of the international legal system and comparing how the regulation works in the ICC in comparison to the ICTY and ICJ.

In chapter five, truth and reconciliation commissions with limited amnesties are examined in the framework of the *Rome Statute*. Using the ICTY as a comparator, one can see just how the entire system of complementarity, through the consideration of issues of admissibility, operates in the ICC. The result is that not only are amnesties more tolerated within the framework of the ICC, so are quasi-judicial TRCs. The approach is far less supranational than the manner in which the ICTY treats them.

In chapter six, this difference between the ICC and ICTY approaches is pursued in slightly more detail. The nature of the *Rome Statute's* approach, to the prosecution of international crimes where States are unwilling or unable, is quite different to that of the ICTY; the ICC's jurisdiction is “asserted” in a highly reflexive manner. It has to be in order to respect its overriding doctrine of complementarity which in turn reinforces the decentralized and disparate nature of

the international legal system. This is an approach that is not particularly unique within contemporary international law – for instance, it exists through the proliferation of international organizations; especially what are called “regional arrangements.” Opposition to the *Rome Statute* centres on a rejection of this view of contemporary international law. It is not because it is ineffective, but because legal and political thinkers expect to see the structures of their domestic legal system mirrored in the international. Thus they expect to see some form of centralization and hierarchy – whether an ICC asserting its primary jurisdiction over individuals or a Security Council overseeing and checking an ICC subordinate to it.

Ultimately the real test for the future of the ICC is two-fold: to either encourage States to bring individuals accused of international crimes to account or in very unusual instances to assist the State by acting where it and its judicial system have gone awry; and to prove that complementarity can work – namely that the ICC can function within a decentralized international legal system without the recourse to judicial centralization or supranationalism in the exercise of its jurisdiction.

Chapter 2

Chapter Two: Subject Matter of the ICC

Introduction

It is quite common for an analysis of the *Rome Statute of the International Criminal Court* to involve a discussion of the subject matter of the Court.⁶⁵ Invariably such analysis becomes very *doctrinaire*, simply ending up in the reading of those relevant provisions of the *Statute* and the *Elements of Crimes* that describe the so-called "core crimes."⁶⁶ Such an approach lacks context. One cannot abstract the crimes from their context; otherwise one falls into the trap of seeing their prohibition as absolute, transcendent legal obligations that bind the State. The difficulty is that at times, the State is either unwilling or incapable of prosecuting international crimes, particularly when its apparatus has been co-opted by criminal elements. The role of the individual, capable of orchestrating the core crimes in the context specified by the *Rome Statute*, is the critical element in understanding the subject matter of the Court and its purpose.

The goal of this chapter is to examine the subject matter of the International Criminal Court. Rather than simply examining the crimes as specified in the *Rome Statute*, this chapter will consider their contextual relationship to the State. Transnational crimes and international crimes will be explored in some detail. The traditional, inter-State approach to combating such crimes will be investigated.

⁶⁵ For example see William Schabas, *supra* note 2 at 21-53; Herman von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court" in Roy S. Lee, ed. *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) at 41-78; or Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Ardsey, New York: Transnational Publishers, Inc., 2002) at 129-259

⁶⁶ *Elements of Crimes*, *supra* note 2.

Ultimately the traditional approach must be inadequate somehow, to give rise to the need for the International Criminal Court.

The traditional approach is premised upon a State that functions responsibly and in conformity with the international legal norms to which it has consented to adhere. It is when the State acts irresponsibly that international crimes may be committed with impunity by public or private individuals. The reasons why a State might go "awry" include the corruption of public officials or the lack of control by the State over "criminal activity" in its jurisdiction. There are many threats to the State in this regard: transnational corporations; covert intelligence activities; aggression by another State; terrorism; mercenarism; the existence of the extra-juridical State ("the shadow state"); rogue State governments; the presence of rebel forces; and even rogue non-governmental organizations (including corporations). The threats have become even greater in an era of government deregulation, privatization, globalization and the "black" economy. The *Rome Statute* does not even pretend to address all of these threats – but it addresses a few. Its jurisdiction is actually quite narrow. What it does, is try to bring to account those individuals, alleged to have committed the core crimes described, when the State is unwilling or incapable of so doing. The persons who are "capable" of committing these core crimes, in the context described in the Statute, are necessarily public officials (*de facto* or *de jure*). Persons on the "margin" of the *de jure* State would still fall under this ambit, since they have links to the State and are public officials in a *de facto* sense. The International Criminal Court is therefore a court that brings those to account, who commit the core crimes, under the banner of the State or an entity that is state-like.

Transnational Organized Crimes

"Transnational" is simply an adjective describing something that "extends beyond national bounds or frontiers."⁶⁷ All transnational crime is organized in some

⁶⁷ The *Oxford English Dictionary*, 2nd ed., s.v. "transnational."

manner; its capability to operate across State boundaries, in multiple jurisdictions, necessarily implies a highly organized, concerted and well-planned activity. It is hardly spontaneous. The perpetrators of transnational organized crime are very adept at employing the latest in technological innovation – including computers, telecommunications, accounting processes, the media and transportation.⁶⁸ It is the *epitome* in “free enterprise,” driven entirely by the motive of profit, regardless of how it is obtained.

A multilateral approach has been adopted to tackle this category of crime. The United Nations for instance, has introduced the *Palermo Convention* and its Protocols as one means of facilitating multilateral cooperation by States and their law enforcement agencies.⁶⁹ The titles of the four documents associated with the Convention reveal some (but not all) of the issues associated with transnational organized crime.⁷⁰

- *United Nations Convention against Transnational Organized Crime (12 December 2000)*;

⁶⁸ United Nations Office for Drug Prevention and Crime Control, “Summary of the United Nations Convention Against Transnational Crime and Protocols Thereto” (undated), online UNDCP web site <<http://www.undcp.org/palermo/convmain.html>>(date accessed: 30 April 2002) at Paragraph 2.

⁶⁹ *United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, Annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001) [hereinafter *The Palermo Convention*]. For the draft Convention and Protocols see: *Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its First to Eleventh Sessions*, UN GAOR, 55th Sess., Annexes, Agenda Item 105, UN Doc. A/55/383 (2000), at 25 [hereinafter *The Palermo Convention*]. The Convention includes: *United Nations Convention against Transnational Organized Crime (12 December 2000)*, 40 I.L.M. 335 (Annex 1); *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime (12 December 2000)*, 40 I.L.M. 353 (Annex 2); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime (12 December 2000)*, 40 I.L.M. 377 (Annex 3); and *Protocol against the Illicit Manufacturing of an Trafficking in Firearms and their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (12 December 2000)*, 40 I.L.M. 384 (Annex 4).

⁷⁰ *The Palermo Convention*, *Ibid.* at Annexes 1, 2, 3 and 4.

- *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime (12 December 2000);*
- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime (12 December 2000); and*
- *Protocol against the Illicit Manufacturing of and Trafficking in Firearms and their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (12 December 2000).*

The Convention requires States Parties to criminalize the laundering of proceeds from a crime, and to criminalize the corruption of public officials.⁷¹

This last obligation demonstrates an important characteristic of transnational organized crime; it tends to co-opt the apparatus of the State through the corruption of public officials. When public officials are corrupted, they no longer work in the interests of the State and therefore compromise its integrity. When the integrity of a State to function as a rational entity is compromised; adherence to international norms and legal obligations is no longer certain. The State can become capable of violating those obligations and thus capable of committing international crimes. Thus not only is transnational organized crime a threat to the State but it may be a threat to all States and their coexistence.⁷² It is a threat to the international legal order.

⁷¹ Palermo Convention, *ibid.* at Article 6. *Ibid.* at Article 8.

⁷² See: Canadian Security Intelligence Service, *Transnational Criminal Activity (1998) 10 Backgrounder Series* (Ottawa: CSIS, 1998). The Canadian Security Intelligence Service has defined transnational crime as being a product exclusively of organized criminal syndicates (at 1). It lists 18 groups of this nature operating in Canada ranging from the Sun Yee On triad to Russian *vory v zakone*. The Russian Interior Ministry (MVD) estimates that such criminal organizations control 25 to 40 per cent of Russia's gross national product (GNP) and 50 to 80 per cent of Russian banks (at 4). CSIS identifies four foundation activities: narcotics trafficking, illegal arms dealing, money laundering and the export of Russian natural resources (at 4). CSIS is therefore of the opinion that transnational crime is a cause of the destabilization of states through the

While the example the spousal murderer who is fleeing a national jurisdiction may represent a transnational crime, it is of a wholly different class to the type discussed above; it may be better termed a domestic crime, which has developed extra-territorial aspects, due to the flight of the suspect from the jurisdiction where the act occurred.

International Crime

Unfortunately there are divergent views on what makes a transnational crime differ from an international crime. In *R. v. Finta*, it was argued that the international crime must have a greater egregious character than a domestic crime.⁷³ Professor Bassiouni suggests that international crimes must be: "a threat to the peace and security of mankind" or involve a "significant international interest;" and be "shocking" or "egregious" conduct by the standards of "commonly shared values of the world community."⁷⁴ Professor Bassiouni suggests a list of 22 categories of criminal activity that could be considered as international crimes, including the core crimes of the *Rome Statute*, but also: mercenarism, drug offences, trafficking in obscene publications, theft of national treasures, bribery of public officials and

corruption of public officials and threats to the economic security of the nation. Thus rather than attack transnational crime, the *Rome Statute* aims to attack those who have been likely corrupted by elements of transnational crime in order to commit international criminal acts. Not only is this a "catch-up game," but the *Rome Statute* only addresses symptoms of an overall underlying problem confronting States. This CSIS paper is based upon *Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems*, UN Doc. A.CONF. 169/15/Add.1 (4 April 1995) cited in Gerhard O.W. Mueller, "Transnational Crime: Definitions and Concepts," in Phil Williams and Dimitri Vlassis, eds., *Combating Transnational Crime: Concepts, Activities and Responses* (London and Portland, Oregon: Frank Cass, 2001) at 14. One might also consider Letizi Paoli, "Criminal Fraternities or Criminal Enterprises," *ibid.* at 88-108 – this is the origin of my use of the term "the ultimate in free enterprise."

⁷³ Jordan Paust, M. Cherif Bassiouni, Sharon A. Williams, Michael Scharf, Jimmy Gurulé and Bruce Zagaris, *International Criminal Law: Cases and Materials* (Durham, North Carolina: Carolina Academic Press, 1996) at 19, referring to *R. v. Finta*, [1994] 1 S.C.R. 701, online: ICRC CD-ROM: *Droit international humanitaire-International Humanitarian Law*, 30 December 1998, Version 5, (Geneva: International Committee of the Red Cross, 1998).

⁷⁴ Paust, *ibid.*, citing M.C. Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* 36, 45 (1987).

counterfeiting.⁷⁵ Some critics suggest that the list is far too encompassing.⁷⁶ Paust and Bassiouni rightly point out that there are difficulties with this list; foremost is the difference in nature of the criminal act carried out by an individual and that which is carried out by an individual in her capacity, as an agent of the State.⁷⁷ Crimes that require "state action" are deeply political in nature and have the fewest penal characteristics. Crimes which have the least political content, such as drug trafficking, have a greater penal and enforcement character.⁷⁸

While this may be true, it still does not answer the question of what exactly is an international crime. Some of the acts on Professor Bassiouni's list, in a certain context, have the capability of undermining the integrity of the State – for example an organized, wide-ranging effort to destabilize the State's monetary policy through the wide-scale counterfeiting of its currency. Yet if it is an isolated act of one person photocopying several thousands of dollars in an *ad hoc* manner, the character of the crime is quite different. It is therefore submitted that Professor Bassiouni's list encompasses too much, as it does not take into account the context of the crime and its impact upon the integrity of the State to function within the international community. Perhaps the term "international crime" would be better described as a "contextual international crime" or "a crime directed at undermining the integrity of the State." But are all such contextual crimes international crimes? No.

⁷⁵ *Ibid.* at 11 citing Bassiouni, *International Crimes: Digest/Index of International Instruments 1815-1985* (New York : Oceana, 1986).

⁷⁶ Kristin Henrard, "The Viability of National Amnesties in View of Increasing Recognition of Individual Criminal Responsibility at International Law (1999) 8 MSU-DCL J. Int'l L. 595 at 608.

⁷⁷ Paust *et al.*, *supra* note 74 at 12.

⁷⁸ *Ibid.*

There is a second element necessary in defining an international crime. The prohibited act also must be recognized at international law (conventional or customary) as an international crime:⁷⁹

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

Thus, egregiousness (or gravity), the degree of organization and the requirement that the act be prohibited by international law – these are the elements that establish whether an act achieves the status of an international crime. But there still remains one element to consider – the type of individual involved.

Individual Accountability v. State Accountability

It is at this point that individual accountability and State accountability may be separated. The matter of States carrying out international crimes or delicts against other States is well within the realm of public international law. It could amount to aggression. Traditionally such acts are remedied by: bringing the matter to the attention of the Security Council (Chapter VII of the *United Nations Charter*); submitting the issue to international arbitration or adjudication; or acting in self-

⁷⁹ ILC, *Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May – 26 July 1996*, UNGAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996) at Article 19(2). International delicts were also defined at Article 19(4) as any other internationally wrongful act which did not meet the definition at Article 19(2). It should be noted that James Crawford concluded that Article 19 did not reflect current international law, in that the Article 19 provisions were far too general and far too encompassing. Instead, the International Law Commission opted for specific crimes as representing international crimes: genocide, aggression, apartheid, forcible denial of self-determination and other wrongs which "shock the conscience of mankind." See: James Crawford, ILC, *Fourth Report on State Responsibility*, UNGAOR, 53rd Sess., UN Doc. A/CN.4/517 (31 March 2000) at Paragraph 46 and 47. Thus an international crime is one of those specified, or some other serious breach of international rules. It should be noted however that in the context of international crimes, one now refers to crimes committed by individuals rather than by a State.

defence.⁸⁰ Approaches to conflict resolution rely upon the assumption that the States are willing to resolve conflict. States gone awry may not be interested in resolving conflict, but rather in promoting it.

International criminal law operates to bind States to norms through the liability of those individuals who represent the State in an official capacity (*de jure* or *de facto*):⁸¹

International law is assumed to be a system of binding norms, regulating the mutual behaviour of states, that is, of the individuals who represent states, then the state cannot be assumed to be sovereign.

The traditional approach to holding such individuals accountable has been through domestic State law.⁸² For Kelsen, international law regulated the relations between States, whereas domestic municipal law regulated relations between individuals.⁸³ International law specified a "material element" while domestic law not only specified material elements but addressed the personal element too.⁸⁴ For Kelsen, international law required domestic law for its implementation and ultimately directed the development of domestic law. While this may have had an impact on sovereignty, the effect was not direct. Although Kelsen described the relationship between the two as "supplemental,"⁸⁵ "[o]nly in conjunction with the national legal orders does international law form a significant whole."⁸⁶

⁸⁰ *Charter of the United Nations*, *supra* note 26 at Chapter VI ("Pacific Settlement of Disputes"), Articles 33-38; and at Chapter VII ("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"), Articles 39-51.

⁸¹ Hans Kelsen, *supra* note 16 at 79.

⁸² *Ibid.* at 80.

⁸³ *Ibid.* at 82.

⁸⁴ *Ibid.* at 84.

⁸⁵ *Ibid.* at 84-88. Hence what he means by "states cannot be assumed to be sovereign," for they are obligated to comply with international norms as are their agents within the State itself. Thus international law has an impact on the citizen within the State. The term "direct effect" has been imported from European Union law. Unlike international law, European Union law does have primacy over the Member States of the European Union. The European Union legal order is enmeshed within the legal orders of each

Where the organs of a State have been co-opted by criminal influence – namely through the subversion of public officials, the individual is liable through the “principle of responsibility based on fault” for her failure to uphold her duty to the State to adhere to its international legal obligations.⁸⁷ Certain indicators are suggestive of the commission of an international crime in this context – “for private or personal use;”⁸⁸ “not justified by military necessity;”⁸⁹ “not in the furtherance of a political objective;”⁹⁰ the euphemism for negligence of “being in a position that he should have known;”⁹¹ and “superior responsibility.”⁹² Liability flows from international law, through the executive (and all organs of State) to the individual.⁹³

Member State. See: Klaus-Dieter Borchardt, *The ABC of Community Law* (Brussels: Director-General for Education and Culture, European Commission, 2000) at 95-99. Also see Luzius Wildhaber, *supra* note 13 at 50-59 and especially his remarks concerning the European Court of Human Rights and how States are bound by conventional law to apply the principles found in the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [hereinafter *European Convention on Human Rights*], online: OSCE <<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>>(date accessed: 20 February 2002), even if the Treaty has not been ratified (he draws upon the United Kingdom in particular, but before the entry into force of the Human Rights Act 1998 (U.K.), 1998, c. 42 [hereinafter the UK Human Rights Act] which was the ratifying Act that has been in effect since 2 October 2000).

⁸⁶ Kelsen, *supra* note 16 at 89. Could Kelsen have identified complementarity back in 1942, though not necessarily by the label we attach to it today? Some authors would disagree with this outlook as being that of Kelsen, for they tend to focus on his outlooks on the domestic legal scene and apply them to the international rather than his outlooks on the international: see Fernando R. Tesón, *A Philosophy of International Law* (Boulder, Colorado: Westview Press, 1998) at 5.

⁸⁷ Kelsen, *supra* note 16 at 102.

⁸⁸ *Elements of Crimes*, *supra* note 2 at Article 8(2)(b)(xvi) footnote 47 when referring to pillage.

⁸⁹ *Ibid.* at Article 8(2)(b)(a)(iv) referring to the war crime of destruction and appropriation of property.

⁹⁰ *Promotion of National Unity and Reconciliation Act, 1995* (South Africa), Act 95-34 (26 July 1995) at Article 20.

⁹¹ *Rome Statute*, *supra* note 2 at Article 33

⁹² *Ibid.*

⁹³ Kelsen, *supra* note 16 at 99. This has probably been true for some time in international law – at least since Kelsen was writing in 1942.

An international delict can be committed only by those individuals whose duty it is to fulfill the international obligations of a state; these are certain organs of the state, ordinarily the executive.

Thus the corruption of public officials may be a serious problem caused by transnational crime, but it is the breach of public duty by officials, which leads to the commission of international crimes or crimes against the community of States. Organs of the State need not always belong to the executive. Again it must be noted that such crimes represent a subset of all possible international crimes – for example environmental pollution might not necessarily fit into the subset.⁹⁴

Traditional Approach – Inter-State Cooperation

Traditionally there are a number of principles upon which States rely in order to assert their extra-territorial criminal jurisdiction over individuals. These include:⁹⁵

1. Territorial Principle – where the offence was committed within the State's jurisdiction (and typically the offender has fled the jurisdiction);
2. Nationality Principle – where the accused is a national of the State (akin to “flag state jurisdiction”);
3. Protective Principle – where the State asserts its jurisdiction over individuals involved in activities beyond its borders affecting its physical security, currency and official marks;
4. Representational Principle (or Agreement Principle) – where the State acts on behalf of another State as is required by international legal instruments

⁹⁴ ILC, *Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May – 26 July 1996*, *supra* note 80 at Article 19(3)(d). This does not mean that it is not a crime. It is just not of the class of crimes being discussed.

⁹⁵ Maurice Flory, in Rosalyn Higgins and Maurice Flory, eds., *Terrorism and International Law* (London and New York: Routledge, 1997) at 31. This text is dated, describing the state of the law only to 1992. Nevertheless it is still useful. Note that the ICC will rely primarily upon the Territorial Principle and the Nationality Principle (*Rome Statute*, *supra* note 2 at Article 12).

(such as the requirement that the United Kingdom extradite Augusto Pinochet to Spain or NATO Status of Forces Agreements);⁹⁶

5. Universality Principle – where certain grave acts in of themselves warrant the exercise of jurisdiction (such as piracy, genocide, and crimes against humanity);⁹⁷ and
6. Passive Personality Principle – where a State asserts its jurisdiction on the basis of the nationality of the victim.

A number of these bases of extra-territorial jurisdiction are controversial and not well accepted internationally. Rosalyn Higgins suggests that the Passive

⁹⁶ Sometimes this may be known as the "Agreement Principle;" see: Hugh M. Kindred, ed. *supra* note 40 at 14.

⁹⁷ Some States have implemented universal jurisdiction over certain international crimes simply by their nature rather than any connection to those States. Consider Belgium's indictment of 18 June 2001 of Ariel Sharon for war crimes, crimes of genocide and crimes against humanity, allegedly committed during Israeli incursions into Lebanon in 1982. This is in accordance with the *Loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces conventions*, 16 June 1993, online: *Diplomatie judiciaire* < <http://www.diplomatiejudiciaire.com>>(date accessed: 26 May 2002)[hereinafter the 1993 *loi*]. See: Stéphanie Maupas, "La campagne belge d'Ariel Sharon" (Brussels: *Diplomatie judiciaire*, 31 January 2002) and Stéphanie Maupas, "Les revers de la compétence universelle" (Brussels: *Diplomatie judiciaire*, 8 July 2001) online: *Diplomatie judiciaire* < <http://www.diplomatiejudiciaire.com>>(date accessed: 2 February 2002). The implications of such acts are felt well beyond the Belgian borders. Reciprocal extradition treaties exist that bind other States indirectly to the 1993 *loi*. A decision on 26 June 2002 by the Belgian *cour d'appel* undermined the applicability of the 1993 *loi* and argued that Sharon could not be indicted. Israel has suggested that it should not apply in any event as Sharon was investigated by an Israel Parliamentary Inquiry and dismissed as defence minister. The 26 June decision is being appealed, as the present decision undermines the *loi*. See: Ian Black, "Judges Decide Belgian War Crimes Law Cannot be Used to Try Sharon," *The Guardian* (27 June 2002), online: *The Guardian Unlimited* < <http://www.guardian.co.uk/israel/Story/0,2763,744717,00.html>> (date accessed: 27 June 2002). There is no indication that the Inquiry was in bad faith. Thus, as we shall see, the Belgian *cour d'appel* probably decided correctly, for if the decision had been otherwise it would have violated the principle of complementarity on a state-to-state basis. Lousie Arbour supports this approach over the system of complementarity in *Rome Statute* (see *supra* note 34). It may not be entirely compatible with the concept of complementarity and therefore it is submitted that the resulting harmonization of domestic laws to implement the *Rome Statute* will bring this whole issue of extradition and extra-territorial prosecution of universal crimes under control. It is also submitted that the era of universal jurisdiction has passed and is no longer necessary in light of the presence of the International Criminal Court.

Personality Principle can be ambiguous and uncertain, despite it first being described in the *Lotus* case.⁹⁸ Universality is limited to a specific set of offences *erga omnes* (to all) including slavery, piracy, some war crimes but not terrorism.⁹⁹ Ultimately the main means of asserting extra-territorial jurisdiction is through international cooperation of the judiciary and police enforcement agencies; and the harmonization of extradition and deportation regulations.¹⁰⁰ The State may either prosecute or extradite (*aut dedere aut judicare*).

Yet such tactics do not always work. In the case of terrorism for example, the Irish government refused to extradite suspected Irish Republican Army (IRA) terrorists. There was a high probability that the United Kingdom would violate their human rights by sending them to face certain torture at the notorious Maze Prison in Belfast.¹⁰¹ In other cases extradition is often precluded for reason of the “political offence” bar – where the crime the individual is alleged to have committed – was political in nature and not criminal.¹⁰² Who determines what constitutes a political bar and for what reason (or motivation)? Such a question is vital, for it is at the root of why the traditional inter-State mechanisms of combating international and transnational crime are inadequate. How can the nationality principle apply when the nationality of an individual is in question (for instance refugees or *sans papiers*)? Assertion of the protective principle can easily involve the violation of

⁹⁸ Higgins, in Higgins and Flory, *supra* note 96 at 24 citing *The Lotus Case* PCIJ Reports 1927, Series A, No.10; 4 ILR 5 & 153.

⁹⁹ *Ibid.* Kristina Miskowiak describes universalism by means of the misleading label of “inherent jurisdiction” of the ICC. See Kristina Miskowiak, *The International Criminal Court: Consent, Complementarity and Cooperation* (Copenhagen: DJØF Publishing, 2000) at 20.

¹⁰⁰ Consider David Schiff, in Higgins and Flory, *supra* note 96 at 125 and 185-200 (for the Schengen system of cooperation in the European Union) and Paust et al., *supra* note 74 at 497-706.

¹⁰¹ Leonard Leigh, in Higgins and Flory, *supra* note 96 at 176. The European Court of Human Rights had apparently recognized the danger of torture and the Irish government was simply echoing their concerns. Consider the Irish cases Leigh mentions: *Finucane v. MacMahon et al.*; *Clarke v. McMahon* [1990] 1 I.R. 228; and *Carson v. McMahon* [1990] 1 I.R. 239.

¹⁰² Maurice Flory, in Higgins and Flory, *supra* note 96 at 30.

another State's sovereignty.¹⁰³ In the case of universal crimes, do all States accept such acts as being truly universal?¹⁰⁴ The traditional approach to extra-territorial jurisdiction relies upon the integrity of the State and its public officials in the exercise of their discretionary powers. Discretionary power could be exercised as a shield to avoid prosecution (domestic and inter-State) and to perpetuate impunity. It is when officials and the apparatus of the State have been co-opted by criminal elements that this system falters. Therefore there exists a constraint on the subject matter falling within the ICC's jurisdiction.

The State, Gone Awry

Corruption of Public Officials

The corruption of public officials undoubtedly compromises their independence in the performance of their duties of State, in favour of their benefactor. Their benefactor could be: any of a variety of domestic groups, transnational organized criminal elements, the intelligence services of foreign powers or transnational corporations. Inducements might include gifts, money or even political support. The international community has tried to legislate guidelines for States to cooperate and stop the corruption of public officials, including: the European

¹⁰³ For example, consider State sponsored assassinations (such as the purported MOSSAD killing of Canadian engineer Gerald Bull for his work on the Iraqi Super Gun in 1990 in Brussels); and the violation of the territorial integrity of other States to abduct sought-after individuals (such as MOSSAD's abduction of Adolf Eichmann from Argentina or Mordechi Vannunu from Italy). See John Pike, "Mossad: The Institute for Intelligence and Special Tasks" (9 May 2002), online: Federation of American Scientists < <http://www.fas.org/irp/world/israel/mossad/>>(date accessed: 18 May 2002). Consider also the diverse involvement of several States in the abduction of Abdullah Ocalan by Greek intelligence agents from Kenya on behalf of Turkey in 1999 (see: Abdullah Ocalan, "Statement by Abdullah Ocalan (PKK) on his Abduction from Kenya" (26 November 1999), online: Arm the Spirit <<http://www.hartford-hwp.com/archives/51/162.html>>(date accessed: 26 May 2002). States involved included Israel, Turkey, Greece, Kenya and the United States.

¹⁰⁴ Consider the arguments presented in chapter one regarding the question of whether there really are universal or absolute international norms. Consider the arguments regarding diversity of interpretation and reservations to some of the "key" international human rights instruments; in Sandra L. Bunn-Livingstone, *supra* note 12. Also one might wonder about Belgium asserting the extra-territorial scope of its laws to its former colonies, such as Rwanda or the Democratic Republic of the Congo – is this not a return to some sort of imperialism? Interview with K. Knop and Ian Rennie (10 May 2002).

Union,¹⁰⁵ the Organization of American States;¹⁰⁶ the Organization for Economic and Cooperative Development (OECD);¹⁰⁷ the United States;¹⁰⁸ and Canada.¹⁰⁹ Yet such legislation is directed only at "legitimate business" and not at activities carried out by illegitimate businesses or intelligence organizations. How can one regulate criminal activity, which by definition operates outside of the law? In theory intelligence activities are supervised by various systems of government, but there is always the potential for abuse under the guise of national security. There are also great *lacunae* within the domestic implementing legislation (where applicable), including: the "unexplored" issues of foreign investment; State responsibility; the threat of destroying the reputation of public officials by claiming that they are corrupt in order to hinder anti-corruption initiatives; relationships between money laundering and political parties; the issue of payments to family, friends and front-companies of political officials; and hidden transactions, bank accounts and numbered companies.¹¹⁰

The Rogue State

An extreme situation may arise where a regime in control of a State is corrupt from the outset of assuming the reins of power (either lawfully or not). Such regimes often make no effort to hide their corruption. Examples might include Pinochet in Chile, Saddam Hussein in Iraq, Noriega in Panama or Suharto in Indonesia. Not

¹⁰⁵ *Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*, Official Journal C 195 , 25 June 1997, 0002 – 001at Articles 2(1) and 3(1) respectively, online: Eur-Lex < <http://europa.eu.int> >(date accessed: 6 May 2002).

¹⁰⁶ *Organization of American States: Inter-American Convention Against Corruption*, 29 March 1996, 35 I.L.M. 724.

¹⁰⁷ *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Done at Paris, Dec. 18, 1997*, 18 December 1997, 37 I.L.M. 1.

¹⁰⁸ *International Anti-Bribery and Fair Competition Act of 1998*, (United States) Pub. L. No. 105-366, 112 Stat. 3302.

¹⁰⁹ *Corruption of Foreign Public Officials Act*, 1998, S.C. 1998, c. 34.

¹¹⁰ Alejandro Posadas, "Combating Corruption under International Law" (2000) 10 Duke J. Comp. & Int'l L. 345 at 413.

only is the apparatus of State co-opted for a dictator's own personal gain but its apparatus is used to maintain her hold on power – including the commission of international crimes.¹¹¹ Ultimately this represents an extreme condition of the corruption of public officials.

The Shadow State

Corruption of public officials knows no borders and occurs equally in the developed world as it does in the lesser-developed one.¹¹² It has been suggested that in certain countries, there exists a *façade* of State legitimacy behind of which, exists an extra-judicial or "shadow State," founded upon: corruption, bribery, influence peddling, violence and a culture of "kleptocracy."¹¹³ Such a proposition raises questions: if the *de jure* State is not actually the *de facto* State, how can the State operate in a responsible manner in conformity with its international commitments? If it does not, who is held individually accountable? The State? The legal realists' argument that the "shadow State" engenders more stability than the legitimate State, poses a problem of whether it is "just" to attack the apparatus of illegitimacy

¹¹¹ Consider for example the case of Iraq, where Saddam Hussein used chemical weapons in his war with Iran during the 1980s. The use of chemical weapons is contrary to international law (the Hague Rules, *infra* note 153). See Patrick E. Taylor, "Officer Says U.S. Aided Iraq in War Despite Use of Gas" *The New York Times* (18 August 2002), online: The New York Times <<http://www.nytimes.com/>> (date accessed: 18 August 2002). Kelsen, *supra* note 16 at 4, was of the opinion that if we limit our definition of a lawful regime to one which is a liberal democracy, excluding totalitarian or autocratic regimes such as in the Soviet Union (in 1942), then we would be making a political judgement of a system of social organization. Such judgements are not scientific. Kelsen's approach has dominated traditional inter-State relations, largely because the nature of such autocratic regimes did not threaten international peace and security. Only in the 1990s have such regimes, especially through international and transnational criminal activity, threatened international peace and security. Therefore the international community is not condemning the regime *per se*, but its carrying out of international criminal activity.

¹¹² Posadas, *supra* note 111. He provides several historical examples including that of the Prince Consort of the Netherlands and the Prime Minister of Japan who were found in the 1970s to have been taking bribes from Lockheed Martin. Other examples might include those allegations surrounding the German businessman Karlheinz Schreiber and allegations of corruption of politicians in Germany and Canada; see: John Hooper, "Schreiber: The Man Who Would Topple Kings," *The Guardian* (14 January 2000), online: The Guardian <<http://www.guardian.co.uk/>>(date accessed: 20 May 2002).

at the cost of destabilization.¹¹⁴ Yet is not the apparatus of illegitimacy already a form of destabilization?

What happens when corporations back up such illicit or legitimate regimes, in return for business concessions? The problem has arisen in a number of African States (the Congo, Nigeria, Angola, Uganda, Kenya and Sierra Leone).¹¹⁵ In the case of Sierra Leone, one need only consider the support of a number of Canadian mining corporations in providing the government with weapons and the employment of Private Military Companies to help bolster the teetering-

¹¹³ William Reno, "Clandestine Economies, Violence and States in Africa," (2000) J.I.A. 53:2 at 433.

¹¹⁴ *Ibid.* It would be a myth to suggest that all "shadow States" exist uniquely in the lesser-developed world. In the United States an extra-executive exists beyond the normal controls imposed upon government in the form of "think-tanks," advisory groups or even consultancy and press relations firms. Consider the RAND corporation (<http://www.rand.org/nsrd/cmep/about.html> is the URL to their web site) or the "Carlyle Group." (see: Oliver Burkeman and Julian Borger, "The ex-presidents' club" *The Guardian* (31 October 2001), online: News from Reality <<http://www.hereinreality.com/carlyle.html>>(date accessed: 11 July 2002). While the United States is probably far from being a "shadow State," there may be some potential. Consider the American Defense Department's Office of Strategic Influence which was set up in November 2001 to churn out propaganda to influence decision-makers (primarily allied) and sway public opinion in support of American policy. See: Gerry J. Gilmore, "Strategic Influence Office 'Closed Down,' says Rumsfeld" *American Forces Information Service News Articles* (26 February 2002), online: <http://www.defenselink.mil/news/Feb2002/n02262002_200202263.html> (date accessed: 15 May 2002). Consider: Jessica Hodgson, "Pentagon Steps Up Propaganda Efforts," *The Guardian* (19 February 2002), online: <<http://media.guardian.co.uk/attack/story/0,1301,652789,00.html>>(date accessed: 15 May 2002). Symptomatic is the emergence of shadowy figures such as Otto Reich (John Patrick Leary, "Public Diplomacy? Contra Warrior Otto Reich Returns to the State Department," *Counterpunch* (12 March 2002), online: Counterpunch <<http://www.counterpunch.org/ottoreich1.html>>(date accessed: 16 May 2002)) and stresses on international relations with Cuba (Council on Hemispheric Affairs, Press Release, "Cuban Bio-Terror: Fact or State Department Fabrication?" (9 May 2002), online: Council on Hemispheric Affairs <<http://www.coha.org/>>(date accessed: 14 May 2002) [authored by Winter Casey, Alex Volberding and Larry Birns]) or and possible complicity in an aggression on Venezuela (Ed Vulliamy, "Venezuela *coup* Linked to Bush Team," *The Observer* (21 April 2002), online: *The Observer* <<http://www.observer.co.uk/>>(date accessed: 21 April 2002); and Duncan Campbell, "American Navy 'Helped Venezuelan Coup,'" *The Guardian* (5 May 2002), online: *The Guardian* <<http://www.guardian.co.uk/>>(date accessed: 5 May 2002)).

¹¹⁵ Reno, *supra* note 114. One could add to this list the rebels of Afghanistan who were supported by both Pakistan and the United States against the Soviet Union. These same rebels would eventually form the nucleus of the Taliban and Al Qaeda.

government's hold on power.¹¹⁶ If a government is unwilling and incapable of prosecuting offences against the State or other States because it is simply a front of legitimacy for a wholly corrupt shadow State, the entire traditional system of individual criminal accountability enforced by States falters.¹¹⁷

Ultimately the individuals running the *de facto* government are individually responsible for their acts. In order to avoid the widespread disruption of a society, a reconciliation policy is usually necessary to gradually reform such regimes. It probably has to be carried out in concert with re-education, the introduction of widespread judicial reform, the enmeshment of the society into international legal expectations, the use of limited amnesties and the re-establishment of a centralized State.¹¹⁸

¹¹⁶ Three small "junior" mining firms approached the Sierra Leonean government to obtain mining concessions: Rex Diamond (headquartered in Toronto); AmCAM Minerals (headquartered in Toronto); and Diamond Works (based in London but also Canadian). These companies were not just involved in mining but also supplied arms to the government in an effort to bolster it and protect their mining interests. Rex Diamond purchased \$US 3.8 million worth of military helicopter parts from Russia (that proved defective). AmCAM owns a South African security firm, ArmSec International (SL). Diamond Works is reputed to have links and possibly have been a customer of the South African "private military company," Executive Outcomes. In 1995 the Sierra Leonean government granted Diamond Works a 25-year mining concession in the Kono district – it is widely believed that Diamond Works in return contracted Executive Outcomes to intervene against the Revolutionary United Front (RUF). Backed by mercenaries from Executive Outcomes, Nigerian and Guinean military forces, the government eventually managed to wrestle control from the Liberian backed RUF of the lucrative diamond producing areas. "Mercenaries grab gems" *Weekly Mail and Guardian* (9 May 1997), online: < <http://sn.apc.org/wmail/issues> > (date accessed 27 October 2001). Executive Outcomes has a very close relationship with Sandlines, which in turn has very strong ties to elements of the British Ministry of Defence. INS Resource Information Center, "Questions and Answers Series: Sierra Leone – Political, Military and Human Rights Chronology 1991-1997" Doc No. QA/SLE/98.001 (Washington: United States Department of Justice, April 1998).

¹¹⁷ There exists an argument that to assert the impropriety of such shadow States or hold countries to the same standards as western States amounts to a form of moral imperialism. While the argument may be appealing from the point of view of the entire structure of the international legal system (and States in particular) being eurocentric, the logical culmination of such an argument is to deny the entire structure of the international legal system. It is an argument of an extreme legal realist. It is therefore rejected.

¹¹⁸ Consider Philip C. Aka, "Nigeria: The Need for an Effective Policy of Ethnic Reconciliation in the New Century" (2000) 14 *Temple Int'l. & Comp. L.J.* 327 at 328.

Rebels – Pretenders to the Organs of State

While the "shadow State" problem raises serious issues, so does the status of rebel forces. Rebels, like those in control of the "shadow State," are not public officials. Nevertheless they are in a position to commit international crimes. For example an enemy commander in an international armed conflict might order her troops to employ the use of hollow-point bullets against other forces, as an explicit plan to terrorize them – a war crime.¹¹⁹ The rebel commander may have sufficient resources at her disposal to carry out such crimes in their appropriate context. The commander could be considered to be a *de facto* public official, claiming to occupy the office of an organ of State. Therefore, she too is individually accountable, like those running the "shadow State."¹²⁰

Terrorism

A serious difficulty arises with the terrorist. No international definition of terrorism has been successfully concluded in international law. The legal approach is complex and requires coordination and harmonization of approaches in multiple jurisdictions.¹²¹ Most States prefer to deal with terrorists on an individual case by

Enmeshment into the international judicial system of legal expectation is probably the most important aspect, however the threat of an international criminal court becoming involved could also act as deterrence. In the case of Nigeria, Royal Dutch Shell is the company that influences the government and opponents of the government have targeted its infrastructure. Re-education may sound rather Maoist. It is advanced however since attitudes cannot be changed overnight. To think that they can is to adopt the stance of a revolutionary. Re-education is ultimately a part of reconciliation. See chapter five.

¹¹⁹ *Rome Statute*, *supra* note 2 at Article 8(2)(xix).

¹²⁰ *Convention (III) Relative to the Protection of Civilian Persons in Time of War*, *supra* note 36 at Article 4. Note that treatment in accordance with the Convention does not necessarily mean the recognition of the legitimacy of their claim to the State.

¹²¹ This is the approach adopted by the United Nations in a series of treaties aimed at suppressing terrorist activity. See <<http://untreaty.un.org/English/tersumen.htm#4>>. *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, New York, 14 December 1973; *International Convention against the Taking of Hostages*, New York, 17 December 1979; *International Convention for the Suppression of Terrorist Bombings*, New York, 15 December 1997; *International Convention for the Suppression of the Financing of Terrorism*, New York, 9 December 1999; *Convention on Offences and Certain Other*

case basis, partly for fear of provoking reprisals, and partly because there may be some sense of sympathy with their cause, although not always their means.¹²² Thus in the European context there exists a two-pronged approach, dealing with terrorism as both a criminal and political phenomenon.¹²³ Few are willing to elevate a terrorist act to the peacetime analogue of a war crime (such as an indiscriminate attack).¹²⁴

*Acts Committed on Board Aircraft, Tokyo, 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971; Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, Rome, 10 March 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991. Although dated, for an overview, see: Paust et al., *supra* note 74 at 1175-1224. Article 2(1) of the last Convention listed does contain a definition, but it is not explicitly for terrorists but for bombers:*

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

¹²² Flory, in Higgins and Flory, *supra* note 96 at 34.

¹²³ *Ibid.* This is different to the legal realist approach of denying all but the criminal aspect – “we will not deal with terrorists” – an approach often flouted during the Regan and Thatcher years. It is an approach making some resurgence. For example see: United States Department of State Counterterrorism Office Web Site <<http://www.state.gov/s/ct/>> (date accessed: 25 August 2002). On that site, official policy regarding terrorists represents a return to the 1980s:

*First, make no concessions to terrorists and strike no deals;
Second, bring terrorists to justice for their crimes;
Third, isolate and apply pressure on states that sponsor terrorism to force them to change their behavior; and
Fourth, bolster the counterterrorism capabilities of those countries that work with the U.S. and require assistance.*

¹²⁴ The comparison is attributed to A.P. Schmidt, proposed to the United Nations Crime Branch in 1992 in an internal report. Report alluded to in: United Nations Office for

The desire of the State to retain some discretionary power over terrorist offences is well established. To suggest that it be part of the subject matter of the ICC is controversial. Not surprisingly the offence does not appear in the *Rome Statute* of the International Criminal Court.¹²⁵ Yet, its omission represents a certain consistency in the subject matter falling within the Court's jurisdiction. The terrorist offence has the dual character of a criminal act but also of a political one. Thus the nature of the terrorist offence exceeds the narrow ambit of criminal jurisdiction allocated in the *Rome Statute* to the International Criminal Court.

Mercenarism

Mercenaries similarly pose difficulties to the allocation of individual criminal responsibility in public office for the commission of international crimes. Mercenaries owe allegiance to their employer, which is not necessarily the State. They are members of a private army.¹²⁶ Other employers could include private companies, the "shadow State" or even organized transnational criminal groups.¹²⁷

Drug Control and Crime Prevention Web Site <<http://www.undcp.org/>> (date accessed: 20 May 2002) [report unavailable and possibly classified].

¹²⁵ See comments by William Schabas, *supra* note 2 at 28.

¹²⁶ In this sense they are no different from the medieval armies raised by feudal lords. There is however the missing link of fealty that a soldier owes to his lord and the lord to the King. Instead loyalty goes to the highest bidder. For an interesting account, focusing on the international legal history and view of mercenarism, particularly in the wake of their definition in the 1977 Protocols Additional to the Geneva Conventions, see: Abdulqawi A. Yusuf, "Mercenaries in the Law of Armed Conflicts," in Antonio Cassese, ed. *The New Humanitarian Law of Armed Conflict* (Napoli, Italy: Editoriale Scientifica, s.r.l., 1979) at 113. Generally a combatant must have an alien character and be paid an unusually large amount of money in comparison to domestic armed forces for the definition to apply. Foreigners fighting for ideological reasons are excluded (see 115). Members of Al Qaeda therefore cannot be described as mercenaries in the legal sense.

¹²⁷ Consider the employment of Executive Outcomes and Sandline in Sierra Leone. Sandline, "Company Profile," online: Sandline International Homepage <<http://www.sandline.com/>>(date accessed: 5 May 2002). While Sandlines, a Private Military Company, may be the archetype of a mercenary company, it is not alone. Bounty hunters have been active in the Balkans and the American practice of placing cash rewards for the apprehension of individuals such as Milosevic or Osama Bin Laden encourages the practice. Some analysts have even advocated the use of bounty hunters including an American Judge Advocate General Officer (using his rank, an indication of authority): Major Christopher M. Supernor, "International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice" (2001) 50 A.F.L. Rev. 215.

Mercenaries are well known to have destabilized (or propped up) States in Africa, South America and possibly the Balkans.¹²⁸ The link between the individual and the State can be tenuous.¹²⁹ It is for this reason that the *Protocols to the Geneva Conventions* do not accord the same privileges to captured mercenaries as they do to combatants.¹³⁰ Furthermore there exists the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989*, which criminalizes mercenarism and any form of support to the "industry."¹³¹ It does not represent a particularly universal statement of norms, demonstrated by the fact that only 23 States have ratified it.¹³² Leading Private Military Companies such as *Sandline International* claim only to be employed by: internationally recognized States; the United Nations; "genuine, internationally recognized and supported liberation movements;" and to adhere to international humanitarian law.¹³³ *Sandline* adheres to strict confidentiality rules – which *Sandline* describes as "absolute."¹³⁴ Lack of transparency is a characteristic element of the covert and

Also consider: "U.S. Will Hunt Masterminds of Rwanda Genocide," Reuters (12 June 2002), online: Yahoo <<http://story.news.yahoo.com/>>(date accessed 12 June 2002). According to this Reuters report, 15 suspects will be targeted. Already previous rewards have netted the arrest of 22 suspects to date. The bounties are intended to result in the capture of those individuals who have fled Rwanda and are harboured in the Democratic Republic of the Congo.

¹²⁸ Sandline International for instance has been active in Angola, Papua-New Guinea, and Sierra Leone. For more information, review their press releases, online: Sandline International Homepage < <http://www.sandline.com/site/index.html>>(date accessed: 5 May 2002).

¹²⁹ Often such links are hidden or obfuscated. There is a lack of transparency.

¹³⁰ See also ICRC, *Commentaries* (Geneva: ICRC, 1998), ICRC CD-ROM, *supra* note 74 at Article 47 of Protocol I. This commentary provides a history of the criminalization of mercenarism and explains how the provisions denying status of combatant are "timid" against the harsh censure of the "profession" by the General Assembly and the Security Council in the late 1960s.

¹³¹ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989, GAOR U.N. Doc. A/RES/44/34 online UNTS *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49 (A/44/49)*, p. 306< <http://www.un.org/> >(date accessed: 5 May 2002)

¹³² "Multilateral Treaties Deposited with the Secretary-General" (2 May 2002), online: <<http://untreaty.un.org/> >(date accessed: 5 May 2002).

¹³³ Sandline, "Company Profile," *supra* note 117.

¹³⁴ *Ibid.*

murky world of transnational organized crime, the corruption of public officials, arms sales, drug trafficking, money laundering and even the undermining of legitimate State government. Despite the image of respectability and even acceptance by some western governments of groups such as *Sandline*, mercenarism generally remains at the boundary of transnational organized crime.¹³⁵ One could possibly add to this the role of covert intelligence operations.¹³⁶ Thus like terrorism, the dual categorization of mercenarism as both a transnational and international crime and yet sometimes politically tolerated, has resulted in its exclusion from the *Rome Statute* and its continuation as a matter of purely domestic concern. The executive reserves the right to exercise its prerogative.

While transnational organized crime, corporations, mercenaries and possibly unchecked covert intelligence, tend to undermine the strength of the legitimate

¹³⁵ Consider "ITN Interview with UK Shadow Defence Secretary" (9 October 2000) reproduced in "Comment by Sandline International," *ibid.* The interviewee was Ian Duncan-Smith, now the leader of the British Conservative Party, who was in favour of the employment of mercenaries. It is interesting to note an apparent divergence of opinion between the UK Ministry of Defence and the Foreign and Commonwealth Office with regard to the legitimacy of the employment of mercenaries. This may reflect an institutional divergence within the UK government between the legal realist and the international legalist. Also see: Chris Talbot, "Carve-up of Diamond and Mineral Rights Exposed, as Britain Continues Recolonisation of Sierra Leone" *World Socialist Web Site* (26 June 2000), online: < <http://www.wsws.org/>>(date accessed: 5 May 2002) which contains a detailed outline of the "Arms for Diamonds" scandal where the British government broke an arms embargo and participated with Sandline in an intervention in Sierra Leone to prop up a faltering government. For a more detailed examination of the inter-relationship between other mercenary groups (that are more transparent than Sandline) and organized crime; consider the following article which describes activities in Balkans involving Albania "freedom fighters," the multi-billion dollar drug trade and organized criminal elements: Michel Chossudovsky, "Kosovo 'Freedom Fighters' Financed by Organized Crime" *World Socialist Web Site* (10 April 1999), online: < <http://www.wsws.org/> >(date accessed: 5 May 2002). The use of mercenaries was also being entertained by the academic community, particularly in the International Politics Department at the University of Wales, Aberystwyth (from the author's own experience in 2000-2001).

¹³⁶ The role of the CIA or KGB in destabilization of regimes and the promotion of such activities is well documented. Consider the American support for the Nicaragua contras and the circumstances that led not only to the ICJ case but to the prosecution of individuals such as Oliver North and Elliot Abrams. This area represents where the law and public accountability hits the barrier of national security and state secrecy – the traditional reserve of the political realist.

State, in being willing and capable of prosecuting those accused of international crimes, there are other influences that weaken the resolve of the State. One is the prevalent trend toward deregulation of government. Advocates of reflexive law may argue that government is too regulating and hindering free enterprise. Habermas might describe a loosening, of the tight grip of the State, as a "deliberative democracy."¹³⁷ Yet deregulation may actually facilitate criminal activity; crime is after all, the ultimate in free enterprise – what one author describes as "criminogenic asymmetries."¹³⁸

A picture now emerges of a situation where transnational organized crime tends to undermine the ability of the State to function properly by co-opting its apparatus for criminal enterprise. In the process the ability of public officials to steer the State into compliance with its international legal obligations may be compromised. If certain internationally prohibited acts are committed, the acts are sufficiently egregious, they are organized and deliberate and the complicity of officials of States (*de jure* or *de facto*) is involved, an international crime occurs. Traditionally the bases of extra-territorial jurisdiction were applied to deal with such influences causing the State to go awry. That system falters in the face of the corruption of

¹³⁷ One might consider the views of Jürgen Habermas to be consistent with Teubner. Habermas believes that the Nation-State has come to an end due to the influence of, multinational corporations, multicultural fragmentation and differentiation, globalization and the externalization of State sovereignty. (See: "The European Nation-State: On the Past and Future of Sovereignty and Citizenship" in Jürgen Habermas, *The Inclusion of the Other*, ed. By Ciaran Cronin and Pablo de Greiff (Cambridge, Massachusetts: The MIT Press, 1996) at 105-127. Habermas sees the communication between the different groups of society as a means of validating different views on what should be law. Thoughtful and rational actions are the cornerstones of his "deliberative democracy" rather than a mechanistic approach. (William Rehg, "Preface" in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory on Law and Democracy*, trans. William Rehg (Cambridge, Massachusetts, 1996) at ix. and xvii.

¹³⁸ Nikos Passas, "Globalization and Transnational Crime: Effects of Criminogenic Asymmetries," in Phil Williams and Dimitri Vlassis, eds., *supra* note 73 at 22-56. Contrast with R. Randall Rainey and William Rehg, "The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy" (1996) 69 S. Cal. L. Rev. 1923. Rainey and Rehg suggest that reflexive law may help to augment a democracy by achieving a truly Habermasian "deliberative democracy."

public officials, the rise of the "shadow State," activities carried out by rebels, security services (a form of aggression), terrorists and mercenaries. Since the nature of international crime may ultimately lead to the destruction of States, the effect is parasitic.

Subject Matter of the ICC

Overview

By looking at the subject matter of the International Criminal Court, it becomes evident that its focus is the weakest link in the sequence of events that lead to the State going awry and the commission of serious international crimes. The weakest link is the public official (*de facto or de jure*). According to the *Rome Statute*, generally persons can only be held criminally responsible and liable for punishment if they committed the material elements of the crime with intent and knowledge (*actus reus* and subjective *mens rea*).¹³⁹ Persons may have intent where, in relation to their conduct, they mean to engage in that conduct; or in relation to a consequence, that person means to cause that consequence or is aware that it will be arrived at in the ordinary course of events following the act.¹⁴⁰ Wilful ignorance is no excuse: "knowledge" is taken to mean awareness that a circumstance exists or a consequence will occur in the ordinary course of events following the act.¹⁴¹ Individuals may be held accountable for crimes if committed as an individual, jointly or with another person (even if the others were acquitted).¹⁴² They may be held accountable if they gave orders, solicited or induced the commission of crimes (realized or attempted).¹⁴³ Assisting (aiding and abetting) in the commission of the crime and contributing to the commission in any

¹³⁹ *Rome Statute*, *supra* note 2 at Article 30(1).

¹⁴⁰ *Ibid.* at Article 30(2).

¹⁴¹ *Ibid.* at Article 30(3).

¹⁴² *Ibid.* at Article 25(3)(a).

¹⁴³ *Ibid.* at Article 25(3)(b).

other way are also grounds for individual criminal accountability.¹⁴⁴ In the case of genocide, incitement is also a criminal act.¹⁴⁵ Persons under eighteen are excluded on the grounds that they are children.¹⁴⁶ Official capacity, immunities and special procedural rules have no relevance in the jurisdiction of the Court.¹⁴⁷

Superior Responsibility

Military commanders (or their non-military equivalent) are criminally liable for their failure to exercise proper control over their forces where they knew or should have known that their forces were about to commit any of the core crimes of the *Statute* and failed to take measures to prevent the crimes or submit the matter to competent authorities for investigation and prosecution. In any other superior/subordinate relationship, the superior is criminally liable if they failed to exercise proper control over their subordinates where the superior: knew or was wilfully ignorant that their subordinates were committing or about to commit such crimes; the crimes concerned activities that were within the responsibility and control of the superior; or that the superior failed to take all necessary measures within their power to prevent, repress or submit the matter to competent authorities for investigation and prosecution.¹⁴⁸

Core Crimes

The International Criminal Court has jurisdiction over the four most serious types of international crimes committed by individuals: the crime of genocide; crimes against humanity; war crimes and the crime of aggression.¹⁴⁹ There are other crimes over which it has jurisdiction but these are not considered to be within the

¹⁴⁴ *Ibid.* at Article 25(3)(c) and (d).

¹⁴⁵ *Ibid.* at Article 25(3)(e).

¹⁴⁶ *Ibid.* at Article 26.

¹⁴⁷ *Ibid.* at Article 27.

¹⁴⁸ *Ibid.* at Article 28.

¹⁴⁹ *Ibid.* at Article 5.

core of its subject matter.¹⁵⁰ The Court will not exercise its jurisdiction with respect to the crime of aggression until the Statute is amended seven years from its entry into force (1 July 2009) at the first Review Conference – and then only in accordance with the *Charter of the United Nations*.¹⁵¹

Genocide

Article 6 of the *Rome Statute* contains a description of the crime of genocide, supplemented by Article 6 of the *Elements of Crimes*. The crime of genocide includes acts that are intended to destroy, in whole or in part: national, ethnical, racial and religious groups.¹⁵² This may include the prevention of births within the group and the forcible transfer of children from one group to another.¹⁵³ “Public” officials (*de jure* or *de facto*) are the only persons with organizational capability to realize such crimes.

Crimes Against Humanity

Article 7 of the *Rome Statute* defines crimes against humanity. The Article contains a list of various acts, which on their own would be heinous crimes.¹⁵⁴ However the context of each act is important, to pass the threshold into an international criminal act. The act must have been “committed as part of a widespread or systematic attack directed against any civilian population, with

¹⁵⁰ William Schabas, *ibid.* at 52. He notes these as “offences against the administration of justice,” citing *Rome Statute*, *supra* note 2 at Article 70 and the *ICC Rules of Procedure and Evidence*, *ibid.*, at Rules 162-169 and 172. These would include such crimes as perjury, bearing false witness, forgery, influencing witnesses, contempt of court, and activities related to bribery.

¹⁵¹ *Rome Statute supra* note 2 at Article 5(2), 121 and 123. Also *Charter of the United Nations*, *supra* note 26. The core crime of aggression is not actually defined yet; therefore it is not further discussed here. It will be discussed at length in chapter six however.

¹⁵² *Rome Statute*, *ibid.* at Article 6.

¹⁵³ *Ibid.* at Article 6(d) and (e).

¹⁵⁴ *Ibid.* at Article 7(1). Acts might include: murder, extermination, enslavement, deportation or forcible transfer, imprisonment or other severe deprivation of fundamental liberties, torture, rape, sexual slavery, force pregnancy/sterilization, persecution, enforced disappearances, *apartheid*, and other inhumane acts that intentionally cause great suffering or serious injury to mental or physical health.

knowledge of the attack.”¹⁵⁵ The categories are not necessarily distinct; for example, crimes of genocide could also be crimes against humanity and war crimes.

Attacks directed against any civilian population, involve the carrying out of these enumerated crimes “pursuant to or in the furtherance of a State or organizational policy to commit such attacks.”¹⁵⁶ Like the crime of genocide, crimes against humanity are not average “spontaneous” crimes – but crimes carried out on a wide scale and that are invariably well planned and systematic.¹⁵⁷ The only person(s) capable of such crimes are those in public office (*de jure* or *de facto*).

War Crimes

Article 8 of the *Rome Statute* sets forth the Court’s jurisdiction over war crimes. Like the other two core crimes already mentioned, war crimes are of concern “when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”¹⁵⁸ While there is a lengthy list of offences applicable, they can be summarized as offences occurring in certain types of conflict. In times of armed conflict of an international character¹⁵⁹, the offences relate to serious contraventions of the *Geneva Conventions and Protocols*,¹⁶⁰ the *Hague Rules*,¹⁶¹

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* at Article 7(2)(a).

¹⁵⁷ If one can ever call a crime “average.” See *Elements of Crimes*, *supra* note 2 at Article 7(2).

¹⁵⁸ *Rome Statute*, *supra* note 2 at Article 8(1).

¹⁵⁹ *Ibid.* at Article 8(2)(a) and (b).

¹⁶⁰ All four *Geneva Conventions*, *supra* note 36.

¹⁶¹ The Hague Rules refer to a series of conventions and declarations made initially in 1907 and updated since regarding how warfare is conducted (*Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*, [hereinafter the Hague Rules] online: ICRC CD-ROM, *supra* note 74. The *Hague Rules* have been added to since 1907 and contain a large number of additional and related treaties concerning the limits on the use of force in armed conflict. See also: Adam Roberts and Richard Guelff, *Documents on the Laws of Wars*, 3d. ed. (Oxford: Oxford University Press, 2000) or for a history, see: Françoise Bugnion, “*Droit de Genève et*

and the *Hague Convention for the Protection of Cultural Property*.¹⁶² In times of armed conflict not of an international character, Article 3 common to the four *Geneva Conventions of 12 August 1949* would apply and any offence directed to non-combatants or those members of the armed forces that are *hors de combat* by sickness, wounds or detention, would be prohibited.¹⁶³ In instances of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence" none of these offences would apply, since there is no war.¹⁶⁴ There may still be a crime, but not necessarily a war crime – perhaps a crime under national military or domestic law.

A Narrow Jurisdiction – Targeting High “Public” Officials

The "egregious" character of an international crime is similar to the *Rome Statute's* requirements of: "committed with intent to destroy,"¹⁶⁵ "committed as part of a widespread or systematic attack,"¹⁶⁶ or "committed as part of a plan or policy or as

droit de La Haye" (2001) 844 I.R.R.C. 901, online: ICRC <<http://www.icrc.org/>>(date accessed: 30 May 2002). The principle behind the Hague Rules is that the exercise of warfare is not without its limitations. Everything from the use of the white flag of truce, to the prohibition of dum-dum bullets and chemical weapons is considered in these rules. Also: "Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations Annexed Thereto of 18 October 1907," in Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915) at 100.

¹⁶² *Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954*, online: ICRC CD-ROM, *supra* note 74. [*Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954*, 249 UNTS 240]

¹⁶³ *Rome Statute, supra* note 2 at Article 8(2)(c). Offences include: violence to life and person; outrages committed upon personal dignity; hostage taking; summary executions; indiscriminate attacks; serious violations of the Geneva Conventions; perfidy; intentional targeting of cultural and religious monuments; pillage; rape; sexual slavery; conscription of children under fifteen; and declaring no quarter. See also Article 8(2)(e).

¹⁶⁴ *Rome Statute, ibid.* indicates that Article 8(2)(c) does not apply in cases of internal disturbances or tensions (indicated at Article 8(2)(d)) but also that Article 8(2)(e), comprising an assortment of crimes such as attacks directed at UN personnel, would not apply in cases of internal disturbances or tensions (indicated at Article 8(2)(f)).

¹⁶⁵ *Rome Statute, ibid.* at Article 6 in reference to Genocide as an international crime.

¹⁶⁶ *Ibid.* at Article 7(1) in reference to Crimes Against Humanity as an international crime.

part of a large-scale commission of such crimes."¹⁶⁷ All instances of war crimes are not necessarily within the jurisdiction of the Court, for they may not have sufficient "egregious" character to merit classification as international crimes under the *Rome Statute*. Crimes of genocide and crimes against humanity however may be sufficiently egregious in their own right to merit classification as international crimes, without qualification (other than definition). This is reflected in Article 1 of the *Statute*: "...[the Court] shall have the power to exercise its jurisdiction over persons for the *most serious crimes* of international concern, referred to in this *Statute*."¹⁶⁸ Those committing such egregious acts require significant organizational and institutional resources. Such resources generally exist only in the organs of State (or bodies capable of usurping the State).¹⁶⁹ The individual accountability of those capable of mustering such resources to perpetrate international crime becomes the issue.

The label of "international crime" is uncertain or unclear. It does not necessarily include transnational organized crime or terrorist acts – although it may under certain circumstances. While international crimes are generally defined by conventional and customary international law, the compliance by a State is dependent upon the role of those individuals who occupy public office (or claim to). Their public duty is derived from their association with the organs of State, which in turn has agreed to comply with the relevant international laws. It is when this office

¹⁶⁷ *Ibid.* at Article 8(1) in reference to War Crimes as an international crime.

¹⁶⁸ *Ibid.* at Article 1 [emphasis added].

¹⁶⁹ The Al Qaeda terrorist network probably fits into this statement. What is significant about such groups is that they do have sufficient influence, power and wealth to co-opt an entire State such as Afghanistan or Yemen to participate in their enterprises. They also have sufficient resources to carry out significant atrocities such as the indiscriminate attack on the World Trade Center or the destruction of cultural property and systematic abuse of human rights (war crimes and crimes against humanity). There are suggestions that Al Qaeda may even have the ability to precipitate a thermonuclear war ("U.S. Breaks Taboo with South Asian Peace Mission," Reuters (12 June 2002), online: Yahoo News < <http://in.news.yahoo.com/>>(date accessed 12 June 2002)). In a sense this is a manifestation of the "shadow State" problem. Thus transnational organized crime and international crime may not always be distinct from one another (CSIS, *supra* note 73).

is compromised, that the State begins to fail in compliance. Failure could be motivated by blissful ignorance, blatant negligence or corruption. The agents of the State could be senior officials, supervisors, members of the executive, or superior commanders in the field. One need only examine the indictments made by the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, to realize that the occupations of those indicted for international crimes included medical doctors, clerics, teachers, military personnel, police officials, and local politicians – those individuals in privileged positions of responsibility within the State. The core crimes of the International Criminal Court are defined: crimes of genocide; crimes against humanity; and war crimes – but in the context the co-opting of the apparatus of State to achieve a threshold level of egregiousness by the individual agent of the State. Thus the core crimes are offences carried out under the banner of the State. This is a very narrow conception of the Court's subject matter and jurisdiction. In the words of M. Cherif Bassiouni: "The ICC will not be a *panacea* for all the ills of humankind."¹⁷⁰

Conclusion

"Transnational crime" is a difficult concept to define, as is "international crime." The two are related. The egregiousness of the act, its prohibition by international legal instrument and the fact that the only persons capable of carrying out such crimes are necessarily high officials of public office (either *de jure* or *de facto*), are important elements to international crime. The corruption of public officials, the emergence of the extra-judicial State, the presence of rebels, the status of terrorists and the role of mercenaries represent ways in which these high officials can become corruption – frequently by transnational organized crime. Reflexive law and the withdrawal of the State from certain regulatory involvement may exacerbate this cooption. Nevertheless, the subject matter of the Court is quite narrow.

¹⁷⁰ M. Cherif Bassiouni, "Preface," in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) at XXI.

The Court targets those individuals in high public office that carry out those international crimes, as specified in the *Rome Statute*.

This line of reasoning raises some serious issues. Perhaps the most intriguing is what happens when an agent of the State performs her duties well, but has been beguiled by those corrupt officials elsewhere in the system of government? Provided that her performance was solely in the *bona fide* aim of furthering the interests of the State and that she derived no personal benefit from the situation, might these pose some degree of mitigation? Could her acts really be considered as illicit acts to the same degree as those who attempted to further interests other than the State? A further complication arises in the instance of an entire population that has been mobilized by their political leaders to carry out international crimes – for instance the hundreds of thousands of Rwandese that participated in the genocide in 1994. Surely by remaining silent or how ever remotely participating, they were complicit – but not necessarily to the same degree as their leaders. A line could be drawn with regard to whether they achieved a personal gain or simply acted in the furtherance of the political objective in good faith (if that is possible for such crimes). It is here that the realm of the truth and reconciliation commission, limited amnesties and restorative justice might apply. This will be addressed in chapter five. Just exactly who can draw this difference is answered by considering where discretionary power to prosecute (or not) lies. How this power may be exercised in a jurisdiction "shared" by domestic and international criminal courts is a major issue. Should an international court impose its will on a State? Does this not violate the principle of State sovereignty? Should another State impose its laws on the other, also violating State sovereignty? The answers to these questions lie in the next three chapters, which concern complementarity and the limitations on the exercise of discretionary powers by the international courts (and their judiciary), the international executive and the international legislature.

Chapter 3

Chapter Three: Complementarity: The Tension Between the ICC and the Domestic Jurisdiction

Introduction

The *Rome Statute* is a constitution and therefore outlines how the International Criminal Court interacts with the international community (or at least the States Parties).¹⁷¹ One of the great achievements of the *Statute* is that it has created a vocabulary to describe this interaction. In the language of the *Statute* words such as “complementary,” “issue of admissibility” and “deferral” replace concepts that presuppose the traditional inter-State abstraction of the international legal order. Traditional labels include: “primacy,” “concurrent of jurisdiction,” “State consent,” or “State obligation.” The new labels represent a specific use of language with specific meaning. Immanent to them is the conception of a novel form of interaction between international courts and domestic legal systems. They represent the culmination of decades of legal drafting by diplomats, government functionaries and legal experts. This is why it is necessary to be aware of the traditional approaches to international criminal law, so that one can avoid potential traps cloaked in terminology. It is also why rather than adopt any one of those frameworks described in the first chapter, a contextual approach is necessary to determine empirically what exactly the ICC is all about.

In this chapter an exploration of the use of language within the context of the *Rome Statute* is carried out, in the general context of international criminal law. The precise meaning of language is of great importance. The focus is the relationship between the International Criminal Court and the domestic legal

¹⁷¹ Philip Allot, *Eunomia: New Order for a New World* (Oxford; Oxford University Press, 1990) at 133. Professor Allot considers that the constitution of a society represents the abstraction of how that society views itself.

jurisdiction. A referential point is discernable through comparisons to the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). To this end, the key terms used by the two *ad hoc* tribunals, is salient – “primacy,” “concurrent jurisdiction” and “*ne bis in idem*.” “Complementarity” is frequently used by academics to describe the relationship between the two jurisdictions (domestic criminal and international criminal). The meaning of this word is explored briefly but the focus will be on its root adjective, “complementary.” Complementary is a function of “conjunction.” A mathematical metaphor is gradually employed to visualize complementarity as a general solution to the relationship between the two jurisdictions. The dynamic metaphor of a calculus equation is appropriate. Calculus is the study of change and therefore reflects the vibrant nature of complementarity.¹⁷² One must keep in mind that the approach is not intended to propose a theory, but rather to gain a unique perspective, amongst the multitude of possible visualizations.¹⁷³ Once the complementary relationship

¹⁷² The use of metaphor is often helpful where words may not capture the essence of a concept; consider the facetious article: Philip Allot, “New International Law: The First Lecture of the Academic Year 20-,” in Allot, Carty, Koskenniemi and Warbrick, *supra* note 10 at 113. The goal is to capture the “poetry of law” and its changing mood. Sandra Bunn-Livingstone uses the metaphor of a cell and the analogy to stoichiometry in an effort to capture the reality of diverse interpretations of and reservations to treaty law in her book: Sandra L. Bunn-Livingstone, *supra* note 12 at 64-65. The use of metaphor is therefore one approach to trying to describe a system whose description may be constrained by the limits of our language.

¹⁷³ In this respect this approach is more in line with imaginative post-modernism (William Twining, *supra* note 29 at 195) and the use of contextualization and plurality (Anthony Carty, “Critical International Law: Recent Trends in the Theory of International Law” (1991) 2 E.J.I.L. 66 at 67 and Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, *supra* note 10 at 132). The post-modernist would advance the theory that all theory is impossible. Naturally there is a paradox in the previous proposition. The post-modernist would however advocate the use of differing views on a subject matter. One might contrast this approach to G.W. Leibniz’s original intended use of differential calculus as a universal language for use in all subjects – a typical outlook of the 17th Century with regard to science and the search for universal laws of nature. For a description of this approach see: C. Henry Edwards and David E. Penney, *Calculus with Analytic Geometry: Early Transcendentals*, 5th ed. (Upper Saddle River, New Jersey: Prentice Hall, 1997) at 213. One might also consider Sir Isaac Newton (at 99) who independently developed integral calculus around the same time. Integration and differentiation are opposite functions, but together comprise the duality of calculus – the study of change or dynamism. Leibniz and Newton (and others including Rene Descartes) reflect the general trend of their era to advance a universal natural law founded in reason.

can be expressed, then it is but a small step to understanding the *Rome Statute* terms of “admissibility” and “deference.” Thus, first a literal approach to define complementarity is used, followed by a purposive approach, through the description of the procedures contained in the *Rome Statute*, designed to achieve complementarity. The provision of a comprehensive summary of how the relationship between the International Criminal Court (and *ad hoc* international criminal tribunals) and the domestic legal system is designed to operate, is the goal. If a procedure has been established for the operation of an international criminal court, then the framework for the implementation of the procedure comprises an international criminal legal system.¹⁷⁴ Crucial to the procedure is the relationship with the domestic courts. Complementarity embodies this relationship.

Terminology of the International Criminal Legal System

Old Terms

“Primacy”

“Primacy,” in the ICTY and ICTR Statutes appears immediately *after* mention of the term “concurrent jurisdiction” and under the overall heading of “concurrent

¹⁷⁴ Since the *Rome Statute* is a multilateral treaty, it could be defined as conventional law and therefore is representative of a primary source of international law as described in the *ICJ Statute*, *supra* note 26 at Article 38(1)(a). Contrast this fact with the statutes of the two *ad hoc* tribunals (*infra* note 167) where they are based upon the Chapter VII action of the Security Council for the maintenance of international peace and security. Bruce Broomhall differentiates between the two approaches – describing the “executive” approach of the tribunals and the “consensual” approach of the *Rome Statute* (Bruce Broomhall, “Rules of Procedure and Evidence: Article 51,” in Otto Triffterer, ed., *supra* note 171 at 686). Ultimately States are not as eager to allow the Security Council to have a wide discretionary power as to the interpretation of the extension of their consent from the Charter to the creation of international courts and tribunals. This is why they prefer the treaty approach encapsulated in the creation of the *Rome Statute* to that of the tribunals. This includes the States that participated in the *Rome Conference* in July of 1998 – a much larger set of States than those that would ratify the *Statute*. States want some degree of control over the discretionary exercise of power by the Security Council. The nature of the exercise of such power may be legislative in nature, in that it prescribes obligations upon States (rather than enforces them which is an executive action). What is important is that such power has been exercised and that States want more involvement. It is this increased involvement in the *Rome Statute* that Broomhall describes as a “higher degree of sophistication than achieved before.” (Broomhall, *ibid.*)

jurisdiction.”¹⁷⁵ The *Rules of Procedure and Evidence* of each tribunal uses the heading “Primacy of the Tribunal.”¹⁷⁶ Neither term independently describes the jurisdiction accurately. Neither tribunal has the power to “assert jurisdiction” directly over natural persons of a State;¹⁷⁷ otherwise a supranational court would exist.¹⁷⁸ Yet there exists primacy in a sense, but not deriving from the tribunals *per*

¹⁷⁵ *Statute of the International Tribunal for Rwanda*, SC Res. 955 (1994), 1994, UN Doc. S/RES/955 (1994) (8 November 1994) [hereinafter *ICTR Statute*] at Articles 8. *Statute of the International Tribunal*, SC Res. 827 (1993), 1993, UN Doc. S/RES.827 (1993)(25 May 1993) last amended by UN Doc. S/RES 1411 (2002) (17 May 2002) [hereinafter *ICTY Statute*] at Article 9. For an up to date version see their respective websites: <<http://www.ictr.org/>> and <<http://www.un.org/icty>>. Henceforth discussion will be limited to the ICTY, however the descriptions will equally apply to the ICTR unless otherwise noted. Also note that the ICTY is sometimes referred to as the “International Tribunal” because it was established before the ICTR (hence its case file numbers starting with the prefix “IT-”).

¹⁷⁶ *Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia*, 11 February 1994, IT/32/REV.20 (entered into force 14 March 1994, last modified 12 April 2001) [hereinafter the *ICTY Rules of Procedure and Evidence*] at Rules 7-13 inclusive. The provision is entitled “Part Two. Primacy of the Tribunal.” *Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda*, 29 June 1995 (entered into force 29 June 1995, last modified 31 May 2001) [hereinafter the *ICTR Rules of Procedure and Evidence*] at Rules 8-13. Note that the *ICTR Rules of Procedure and Evidence* is identical to those for the Special Court in Sierra Leone. Both ICTY and ICTR Rules of Procedure and Evidence share the same Appeals Chambers’ judges.

¹⁷⁷ *ICTY Statute*, *supra* note 167 at Article 6 and *Rome Statute*, *supra* note 2 at Article 25(1).

¹⁷⁸ This assertion is a major departure from much of the secondary writing, which asserts that the Tribunals do exert primacy over domestic courts. For example, consider the frequently referenced: Bartram S. Brown, “Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals” (1998) 23 *Yale J. Int’l L.* 383 at 387 in particular, but the theme runs throughout his article. Consider also: Leila Nadya Sadat, *supra* note 66 at 85 where she argues that the ICC will not operate at the same level as the tribunals as it lacks “primacy” in its jurisdiction; Mahnoush H. Arsanjani, “Reflections on the Jurisdiction and Trigger-Mechanism of the International Court,” in Herman A.M. von Hebel, Johan G. Lammers, and Jolien Schukking, eds., *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser Press, 1999) at 68; Louise Arbour and Morten Bergsmo, “Conspicuous Absence of Jurisdictional Overreach,” in Herman A.M. von Hebel, *ibid.* at 130 where they describe the “reversal” of the “jurisdictional primacy of the *ad hoc* Tribunals” in comparison to the ICC; and even Otto Triffler himself in “Part 1. Establishment of the Court,” in Otto Triffler, *supra* note 171 at 64. Judge Claude Jorda, the President of the ICTY, clarified this confusion in his Press Release of 17 May 2001: ICTY, Press Release JL/P.I.S./591-e, “President Claude Jorda: The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina” (17 May 2001), where he described the relationship between the ICTY and the domestic Bosnian legal system (and specifically a proposed TRC) as being complementary in nature. This is explored further in the following chapters (especially in chapter five of this thesis).

se, but from the fact that the tribunals are subsidiary organs of the Security Council. Since States are bound to comply with Security Council decisions under Article 25 of the *Charter*, decisions of the tribunals may have a similar status since the tribunals were established under the authority of the Security Council.¹⁷⁹ When a State does not comply with the request for deferral, the Trial Chamber may request the President to report the circumstances to the Security Council.¹⁸⁰ Direct invocation of the Security Council is a measure of last resort. Thus primacy may not actually be that of the tribunals, but rather primacy from the Security Council. The Tribunal has no other powers in the extreme case of non-cooperation. Closely related to primacy are the terms "concurrent jurisdiction" and "*ne bis in idem*," both of which are contained in the *ICTY* and *ICTR Statutes*.

Contrast this with the response that the ICTR Registrar had with the Government of Rwanda when what had been proposed as a joint effort to investigate the maltreatment of witnesses. The initiative turned into a Rwandese proposal to stack the ICTR staff with Rwandese nationals, thereby compromising the independence and impartiality of the ICTR: "Statement by the Registrar on the Response of the Government of Rwanda to the Proposal to Establish a Joint Commission to Investigate the Allegations of Mistreatment of Witnesses Coming from Rwanda," ICTR Statement No. ICTR/INFO-9-3-09.EN (28 March 2002), online: ICTR <<http://www.ictr.org/>> (date accessed: 12 July 2002).

¹⁷⁹ This echoes Broomhall, *supra* note 175. The authors listed above (*ibid.*) may actually be describing the "executive" nature of the tribunals with the term "primacy" – namely tracing the authority of the tribunals to the Security Council under Chapter VII of the Charter and therefore to its binding authority on Member States of the United Nations under Article 25 of the Charter. It is the Security Council which has primacy over States and this is the so-called primacy that the tribunals are claimed to have.

¹⁸⁰ *ICTY Rules of Evidence and Procedure*, *supra* note 177 at Rule 11. Morten Bergsmo makes this point suggesting: "primary responsibility for enforcing criminal liability for violations of the subject-jurisdiction of the Court rests on the States Parties." (Morten Bergsmo, "Preamble" in Otto Triffterer, ed., *supra* note 171 at 15) He suggests that in the case of a Security Council referral of a situation to the Court, "the matter stands in a different light." (*ibid.*) Surely primary responsibility still rests on the States Parties or for that matter on all States – after all the subject matter represents a subset of international crimes. The only difference with the role of the Security Council referral is that the Security Council has the option of making use of the ICC as a Chapter VII tool for non-States Parties. This is an option not a requirement. Thus it may equally establish an international criminal tribunal along the lines of the *ICTY* or a "special court" along the lines of the one in Sierra Leone.

“Concurrent Jurisdiction”

In terms of “concurrent jurisdiction,” the term is likely borrowed from the *NATO Status of Forces Agreements*, where visiting forces come under the jurisdiction of both the sending State and the receiving State.¹⁸¹ The *Status of Forces Agreement* mentions concurrent jurisdiction:¹⁸²

In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

¹⁸¹ Mark R. Ruppert, “Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say “No” (1996) 40 A.F. L. Rev. 1 at 4 and 5. Also consider the appearance of the term in the domestic federal context where the separation of powers may not be absolute: W. R. Lederman, “The Concurrent Operation of Federal and Provincial Laws in Canada,” (1963) 9 McGill L. J. 185, reprinted in Dianne Pothier and A. Wayne MacKay, *Constitutional Law 2000-2001*, vol.1 (Halifax: Dalhousie University, 2000) at 3-79. Lederman suggests the “double aspect doctrine” which is followed-up by examples provided by Professors Pothier and MacKay in the Canadian constitutional framework. It is interesting that their attention is drawn to sharing and conflict. In French, *la compétence concurrente*, implies a competition or rivalry between two bodies. One French author has described this situation as “*ce problème de coexistence de juridictions e d’éventuels contentieux parallèles...*” (see: Mireille Couston, “*La multiplication des juridictions internationales: Sens et dynamiques*,” (2002) 1 J.D.I. 5 at 32. Thus the sense is slightly different to the English in that under the NATO SOFAs, the rivalry has been resolved by an effective distribution of competencies of jurisdiction.

¹⁸² *North Atlantic Treaty Status of Forces*, 19 June 1951, TIAS 2846 4 U.S.T. 1792; 1951 U.S.T. LEXIS 301, at Article VII (3) (Date Signed August 23, 1953) [hereinafter SOFAs; emphasis added] The importance of the NATO connection can be understood by the nature of the peacekeepers drawn initially from NATO countries. SFOR for instance (Stabalization Force in Bosnia) is actually a NATO force much like KFOR (in Kosovo) – both have UN approval. Later on, the connection is more significant through the intervention by NATO on behalf of the United Nations and NATO countries. Recall that this approach invokes the Representational Principle, described in chapter two.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

The tribunals (like the sending States) have a "primary right to exercise jurisdiction" in cases of international crimes but, at their discretion, may defer the matter to the domestic courts. Thus an individual accused of the domestic crime of murder may also be accused of an international crime against humanity. The international criminal tribunals have the primary right to proceed with prosecution for international crimes over the State's right to prosecute for domestic crimes. This is not primacy, in a supranational sense, but concurrent jurisdiction. In such a situation one might wonder if it is possible for an accused to be tried for two different crimes concerning the same act in two different jurisdictions. It is here that the principle of *ne bis in idem* may apply.

ICTY "Non-bis-in-idem"

The ICTY *Rules of Procedure and Evidence*, govern how primacy is exercised.¹⁸³ It becomes evident in the ICTY *Rules of Procedure and Evidence* that primacy does not imply that the domestic courts are overridden. The Prosecutor may propose that: the Trial Chamber make a formal request to the domestic court to defer its jurisdiction to the Tribunal, but only if any one of three conditions is satisfied:¹⁸⁴

¹⁸³ *ICTY Statute, supra* note 176 at Article 9(2) and *ICTR Statute, ibid.* at Article 8(2). Also consider: *ICTY Rules of Procedure and Evidence, supra* note 177 at Rules 7bis to 13 and *ICTR Statute, ibid.* at Rules 8 to 13. Keep in mind that both sets of *Rules of Procedure and Evidence* have the status of a constitutional document for the tribunals at a par with the Statute.

¹⁸⁴ *ICTY Rules of Procedure and Evidence, supra* note 177 at Rule 9; and *ICTR Rules of Procedure and Evidence, ibid.* at Rule 9. The "or" used in the provision is likely meant in

- (i) *The act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;*
- (ii) *There is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or*
- (iii) *What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,*

The first condition listed is reflective of the concurrent jurisdiction of the tribunals in that they may exercise a primary right to exercise jurisdiction if the crime has been mischaracterized as an ordinary crime by the domestic courts – for example murder as opposed to murder committed as a crime against humanity.¹⁸⁵ The second condition requires that there must be evidence that domestic courts are not carrying out a *bona fide* investigation or prosecution of the accused, before the Trial Chamber may request the deferral of the case to the ICTY.¹⁸⁶ The third condition amounts to reinforcement of the discretionary right of the tribunal to

the “exclusive or” sense. The heading in both sets of documents is confusing, entitled “Primacy of the Tribunal.” The Secretary-General’s Report (see *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* U.N. Doc. S/25704 (3 May 1993) at Paragraph 64, reproduced in Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds., *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, vol. 2 (The Hague, The Netherlands: Kluwer Law International, 2000) at 293) has the heading “Concurrent Jurisdiction and the Principle of Non-bis-in-idem.” The Statute has headings “Concurrent Jurisdiction” (*ICTY Statute, supra* note 176 at Article 9; and *ICTR Statute, supra* note 176 at Article 8) and “Non-bis-in-idem” (*ICTY Statute, ibid.* at Article 10; and *ICTR Statute, ibid.* at Article 9). The *ICTY Rules of Procedure and Evidence (supra* note 177) title is probably an artefact from what may have been at one time, development in a supranational direction.

¹⁸⁵ It is this subtle difference that may be overlooked by Aaron Schwabach when querying why the court martial of American Staff Sergeant Frank Ronghi for raping an Albanian Kosovar in January 2000 was not turned over to the ICTY. See Aaron Schwabach, “NATO’s War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the former Yugoslavia” (2001) 9 *Tul. J. of Int’l & Comp. L.* 167 at 183. The alleged act amounted to rape as “ordinary crime.”

¹⁸⁶ *Bona fide* is not used in the tribunal basic documents or in those of the International Criminal Court. A more “correct” term is “unwillingness and inability to genuinely prosecute.” For a discussion on this see John T. Holmes, “The Principle of Complementarity” in Roy S. Lee, ed., *supra* note 66 at 75-76.

assert its primary right to exercise jurisdiction. The label confusingly attached to this process is "*ne bis in idem*," in the Statutes of the tribunals (and *Rome Statute*).¹⁸⁷

The concept of *ne bis in idem* is common in international legal documents and generally well accepted as a legal principle.¹⁸⁸ The *European Convention on Human Rights* describes the concept:¹⁸⁹

¹⁸⁷ *ICTY Statute*, *supra* note 176 at Article 10(2); *ICTR Statute*, *ibid.* at Article 9(2); and *Rome Statute*, *supra* note 2 at Article 17(2).

¹⁸⁸ The ICTY and ICTR Statutes use the term *non-bis-in-idem* rather than *ne bis in idem*. The difference is not considered to be important. *International Covenant on Civil and Political Rights*, 19 December 1966, G.A.Res. 2200(XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1996) [hereinafter ICCPR; also available online: UNHCR < <http://www.unhcr.ch/> > (date accessed: 2 November 2001)] at Article 14(7) states:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country;"

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Liberties, 22 November 1984, E.T.S. No.117 at Article 4.1:

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State;

European Convention on the International Validity of Criminal Judgments The Hague, 28.V.1970 online: Council of Europe < <http://conventions.coe.int/> >(date accessed: 6 May 2002) at Titre III - Section 1 - *Ne bis in idem*; *Treaty on European Union* at Article 31:

Common action on judicial cooperation in criminal matters shall include: a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions; (...) c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation; (...);"

and *Convention implementing the Schengen Agreement*, 19 June 1990 (Articles 54 to 58 : *Ne bis in idem*). See also online: EU Parliament < <http://www.europarl.eu.int/> >(date accessed: 6 May 2002). The last two provisions (from the European Union) are now integrated into the *Consolidated Version of the Treaty Establishing the European Community* O.J.C. 340, 10.11.1997, pp. 145-172 at Article 249 [hereinafter *The Treaty of Amsterdam*].

¹⁸⁹ *European Convention on Human Rights*, *supra* note 86 at Article 50; also see: Jaime de Lamo Rubio, "*Non bis in idem* y Principio de Buena Fe Procesal: efectos de la invocación tardía de la vulneración del *Ne bis In Idem*," (September 2001) *Artículos Doctrinales*, online: *Noticias Jurídicas* < <http://www.juridicas.com/> >(date accessed: 6 May 2002). Abuse of process and a lack of good faith in international law are generally recognized as being unacceptable. Consider Judge Read's Dissenting Opinion in

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

The actual procedure described in the tribunal Statutes, their *Rules of Procedure and Evidence* (and even in the *Rome Statute*), is not exactly *ne bis in idem* as described by the *European Convention on Human Rights*. It is much broader than *autrefois acquit* or double jeopardy. *Ne bis in idem* incorporates the three-pronged test by which the Tribunal determines: 1) if the crime has been mischaracterized as an ordinary crime; 2) the domestic criminal prosecution (or lack thereof) is held to be valid/invalid by an international court or tribunal on the basis of good faith;¹⁹⁰ and 3) if there are other overriding reasons why the Tribunal should assert its primary right to exercise jurisdiction. Thus *ne bis in idem* is being used in the Statutes of the two tribunals in a particular sense with a specific meaning of its own. Confusion is inevitable in attempting to apply a pre-existing legal term to a rather different legal concept in differing legal contexts.

Their Origins: Legislative History of the Tribunal Statutes

The history behind the drafting of the Statutes is revealing. The Statutes were adopted as emergency measures by the Security Council to deal with extraordinary events. China voted in favour of the Resolution adopting the *ICTY Statute* in 1993.¹⁹¹ It asserted that a stronger legal foundation might have been created, through a negotiated treaty.¹⁹² The Chinese were extremely uneasy

Nottebohm Case (Second Phase), I.C.J. Rep. 1955 4 at 37 cited in at J.F. O'Connor, *Good Faith in International Law* (Aldershot, Hants, England: Dartmouth Publishing Company Ltd., 1991) at 86.

¹⁹⁰ Consider *European Convention on the International Validity of Criminal Judgments*, *supra* note 189 [contained in the Consolidated Version of the Treaty Establishing the European Community, *supra* note 189].

¹⁹¹ *Resolution 827 (1993)*, SC Res. 827 1993, UN Doc S/RES/827 (25 May 1993).

¹⁹² In the case of the *ICTY: Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting Held at Headquarters, New York, on Tuesday, 25 May 1993, at 9 p.m.*, UN Doc. No. S/PV. 3217 (25 May 1993), reprinted in Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis*, vol. 2 (Irvington-on-

though, about the Statute empowering the Tribunal with "both preferential and exclusive jurisdiction [which] is not in compliance with the principle of State judicial sovereignty."¹⁹³ This is a curious comment because the Tribunal never had "exclusive jurisdiction" nor did it have "preferential jurisdiction." The Chinese may have thought that there was a supranational element to the Statute, in that it was being adopted without a representative from the former Yugoslavia present at the preceding debate.¹⁹⁴

In the case of the Security Council Resolution adopting the *ICTR Statute*, Rwanda was represented at the Security Council debate.¹⁹⁵ Rather than unanimous acceptance, Rwanda voted against the Statute and China abstained. The Rwandese vote is important but in the current context, the Chinese one is even more so.¹⁹⁶ The Chinese maintained that the full cooperation from the Rwandese government was essential for the Tribunal to be able to carry out its mandate.¹⁹⁷ While Brazil voted in favour of the Resolution, it too echoed the Chinese concerns

Hudson, New York: Transnational Publishers, Inc., 1995) at 179-208 (especially at 199) [hereinafter *ICTY: Provisional Verbatim Record of the Security Council*]; and in the case of the *ICTR: Provisional Verbatim Record of the Security Council, Forty-Ninth Year, 3453rd Meeting, Tuesday, 8 November 1994, 3:35 P.M., New York, UN Doc. No. S/PV. 3453* (8 November 1994), reprinted in Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, vol. 2 (Irvington-on-Hudson, New York: Transnational Publishers, Inc., 1998) at 298-310 [hereinafter *ICTR: Provisional Verbatim Record of the Security Council*].

¹⁹³ *ICTY: Provisional Verbatim Record of the Security Council, ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *ICTR: Provisional Verbatim Record of the Security Council, supra* note 193 at 298. The debate concerned the Resolution that adopted the *ICTR Statute: ICTR Statute, supra* note 176. For a comprehensive overview see: Payam Akhavan, "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda" 7 *Duke J. of Comp. & Int'l L.* 325.

¹⁹⁶ *ICTR: Provisional Verbatim Record of the Security Council, supra* note 193 at 308. The Rwandese voted against acceptance for several reasons including: the desire to have the *rationae temporis* earlier than 1 January 1994; the integration of the Appeals Chambers with that of the *ICTY*; the desire to have the *ICTR* focus exclusively on the crime of genocide; the likelihood of the participation of judges selected from States that took "a very active part in the civil war," those condemned will be imprisoned outside of Rwanda; that the Tribunal will not invoke the death penalty whereas it exists in Rwanda; and finally that the seat of the Tribunal was not to be inside Rwanda.

¹⁹⁷ *Ibid.* at 305. The Chinese however were swayed not to vote against it.

that a more solid legal basis should have been sought, but that the urgency of the matter required immediate action.¹⁹⁸ Brazil was concerned the Statute had not been reviewed by a panel of jurists, representative of the main world legal systems. Consequentially there were important *lacunae* concerning the relationship between the local courts and the Tribunal – what it referred to as “concurrence of jurisdiction” between the Tribunal and the domestic courts.¹⁹⁹ Such a *critique* is sound, for as we have seen, the wording of the Statutes is confusing with regard to the relationships that exist between the tribunals and the domestic courts.

The intention of the Secretary-General, in drafting the Statutes, was not to override the domestic judicial systems but to encourage the “exercise of their jurisdiction in accordance with their relevant national laws and procedures.”²⁰⁰ With regard to primacy, the Secretary-General stated:²⁰¹

This concurrent jurisdiction, however, should be subject to the primacy of the International Tribunal. At any stage of the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal...

¹⁹⁸ *Ibid.* at 304. It repeated its concerns voiced previously over the ICTY.

¹⁹⁹ *Ibid.* Brazil therefore did not give an overall endorsement to the approach. It also had reservations about the Security Council carrying out activities not specifically prescribed in the Charter of the United Nations. Ambassador Sardenberg stated at 303-304:

The authority of the Security Council is not self-constituted. It originates from the delegation of powers conferred upon it by the whole membership of the Organization under Article 24(1) of the Charter. For that very reason, the Council's powers and responsibilities under the Charter should be strictly construed, and cannot be created, recreated or reinterpreted by decisions of the Council itself.

The Security Council is not a court or tribunal. It is an extension of the States that sit on its seats, with a permanent representation by those States that were victorious in 1945. It is not representative of the international community.

²⁰⁰ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* U.N. Doc. S/25704 (3 May 1993), *supra* note 185 at Paragraph 64.

²⁰¹ *Ibid.* at Paragraph 65.

The wording is substantially lower key than in the Statute,²⁰² tempering primacy with concurrent jurisdiction and "requests for deferral."

The New Conceptualizations

A Regime of Duality

While the usage of the terms "concurrent jurisdiction" and "primacy" are seemingly contradictory, one must remember that they are used together to describe one thing – the relationship between the tribunals and the domestic courts. Echoing Professor Koskenniemi, one might assert that there is a false dialectic inherent in "primacy" and "concurrent jurisdiction."²⁰³ Neither captures the essence of the relationship on its own and the Secretary-General's subordination of one (concurrent jurisdiction) to the other (primacy) still maintains the dichotomy. Yet each represents aspects of the same abstraction, which together they are trying to describe. There is a duality. Had the Statutes undergone scrutiny by legal experts, these problems of expression might have been addressed.

The regime established for the tribunals is a novel one, but the statutes and the *Rules of Procedure and Evidence* have failed to capture their description. The functionality has been fully expressed, but by resort to terms based upon a wholly different abstraction of international law - the exclusive jurisdiction by domestic courts. This became (and still is) a major source of confusion. New labels were needed urgently. The *Rome Statute* is outstanding in this regard, for it introduces a new vocabulary. The use of words such as "complementary," "deferral" and "admissibility" represent dimensions of the relationship, which are labels attached to the functional aspects of "complementarity."

²⁰² The wording in the Statute may reflect the influence of certain interest groups other than States or organizations comprising States. For a list of those comments, which the Secretary-General received, see *ibid.* at Paragraph 14. It is suggested that their comments in particular may have resulted in a leaning of the Statute toward "primacy" which in turn has overtones of a tribunal that is supranational in character.

²⁰³ Martti Koskenniemi, "Theory: Implications for the Practitioner," in Philip Allot and others, *supra* note 10 at 27.

"Complementarity"

The word "complementarity" (or in French, "*complémentarité*") appears nowhere in the *Rome Statute of the International Criminal Court* or the Statutes of the Tribunals,²⁰⁴ yet it refers to the fundamental principle of their essence of being.²⁰⁵ It does appear in the *Rome Statute travaux préparatoires*, but remains devoid of any meaningful definition.²⁰⁶ The *Oxford English Dictionary* describes complementarity through the metaphor of the duality of light:²⁰⁷

A complementary relationship or situation; spec. in Physics, the capacity of the wave and particle theories of light together to

²⁰⁴ *Rome Statute*, *supra* note 2 at Article 1. A check of the entire text was carried out in succession, using the word-searching feature of Word, Adobe Reader and Internet Explorer.

²⁰⁵ John T. Holmes, "The Principle of Complementarity," in Lee, *supra* note 66 at 75. Its importance is reflected by the fact that Holmes' chapter appears right after the introduction. Hans-Peter Kaul has called the concept the "dominating principle" of the relationship of the Court to the national jurisdiction (see: Hans-Peter Kaul, "The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions," in Mauro Politi and Giuseppe Nesi, eds., *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot: Dartmouth Publishing Company Limited and Ashgate Publishing Limited, 2001) at 59. Morten Bergsmo describes complementarity as "an essential quality of the Court's jurisdictional system." (Bergsmo, "Preface," in Otto Triffterer, *supra* note 171 at 15) Other authors equate the concept as a "pillar" to the Court, trying to apply the three-pillar analogy of the legal regime of the European Union. Sir Franklin Berman (see: Sir Franklin Berman, "The Relationship Between the International Criminal Court and the Security Council," in Herman A.M. von Hebel, *supra* note 206 at 173-178) attempts to apply such an analogy suggesting that complementarity resides along with the idea of the most serious of crimes of international concern and (rather unconvincingly) crimes that fall under the subject matter of the Statute as being in the realm of customary law. This last category seems problematic, since the crimes that fall within the subject matter of the *Rome Statute* are generally conventional crimes defined in treaties already and redefined yet again in the *Rome Statute* – which is also a treaty. They are conventional crimes regardless of whether they are customary. Perhaps the other two pillars might be territoriality/nationality bases of jurisdiction (*Rome Statute*, *supra* note 2 at Article 12) and the referral mechanism of the Security Council (*Rome Statute*, *ibid.* note 2 at Article 13(b)).

²⁰⁶ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1, (Proceedings of the Preparatory Committee During March-April and August 1996)*, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) at 36-41, reprinted in M.Charif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Ardsey, New York: Transnational Publishers, Inc., 1998) at 408-412. The use of *travaux préparatoires* in English common law is well accepted: consider: *Pepper v. Hart*, [1993] A.C. 593 (H.L.).

²⁰⁷ The *Oxford English Dictionary*, 2nd ed., s.v. "complementarity."

explain all phenomena of a certain type, although each separately accounts for only some of the phenomena.

To determine what the term connotes, one must look at the root word, "complementary."

"Complementary"-The Root Word

The *Oxford English Dictionary* definition of "complementary" implies a conjunctive relationship, where the two objects under comparison are mutually dependent upon one another. If one were to consider the metaphor of geometry, the sum of the complementary angles of a right-angled triangle, by definition, must add up to 90 degrees.²⁰⁸

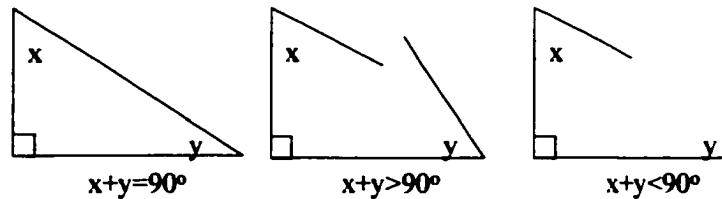


Figure 2 - Complementary Angles in a Right Triangle

The two angles ("x" and "y") are mutually dependent or functions of one another. Their sum must be 90 degrees otherwise a triangle is impossible (see Figure 2).

²⁰⁸ *Ibid.*

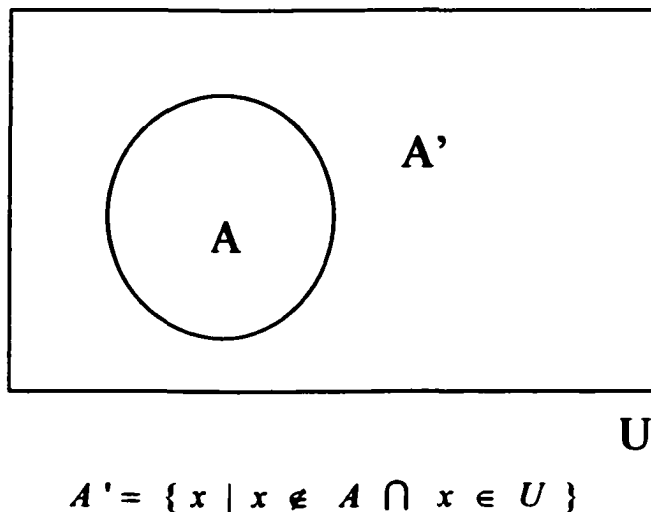


Figure 3 – Venn Diagram and Corresponding Algebraic Equation of the Disjunctive Meaning for Complementary

In finite mathematics however, the complement of a set has a disjunctive meaning too. For example, the complement of all pennies in a pocket of change (A at Figure 3) would comprise the set of all other change, exclusive of all pennies (A' at Figure 3).²⁰⁹ The complement of the set of all other change (exclusive of all pennies) is the set of all pennies. The function works both ways – there is a bi-directional aspect to it. Unlike the triangles' example however, the two sets under comparison are mutually exclusive.²¹⁰ The term “complementary” connotes two seemingly opposite, yet simultaneous meanings – mutual exclusivity and mutual inclusivity (interdependence).

²⁰⁹ Curiously the disjunctive meaning is not present in the *Oxford English Dictionary* definition of “complementary.” For more on set theory, see at Margaret L. Lial, Raymond N. Greenwell and Charles D. Miller, *Finite Mathematics and Calculus with Applications*, 5th Ed. (Reading, MA, United States: Addison-Wesley Educational Publishers Inc., 1998) at 231 and 248.

²¹⁰ In other words the intersection of A and A' is the empty set (which is what the equation accompanying the Figure says) and their union is the universal set (U).

Mapping these meanings onto the international legal jurisdiction equates to: a complete separation of powers (disjunctive) or some sort of overlapping jurisdiction or partnership (conjunctive). Disjunctive complementarity may entail the separation of powers (akin to federalism), mutual exclusivity of the international and domestic jurisdictions, opposition and hostility. Yet the validity of the other jurisdictions (including the national) is tolerated, provided that they remain limited to their "spheres" of influence. The relationship with conjunctivity is neutral. The identification of "opposition" is typical of the parallelist approach,²¹¹ for example as expressed by the former President of the International Criminal Court, Stephen Schwebel:²¹²

In so far as their jurisdiction does not duplicate that of pre-existing courts, the creation of specialized and regional international courts is to be welcomed. It reflects the vitality and complexity of international life. It evidences the understanding that the effectiveness of international law can be increased by equipping legal obligations with means of their determination and enforcement.

Disjunction presupposes divisions of power that are distinct, independent, and mutually exclusive. Opposition and hostility arise when one jurisdiction "trespasses" into the other. The NATO SOFA agreements' provision of "primary right to exercise jurisdiction" by the receiving and sending States, also represents

²¹¹ Echoing Schabas, *supra* note 2 at 92 and Shane Spelliscy, "The Proliferation of International Tribunals: A Chink in the Armor" (2001) 40 Colum. J. Transnat'l L. 143.

²¹² Stephen Schwebel, *supra* note 47. Contrast this outlook to that of Judge Schwebel's successor to the American ICJ seat, Thomas Buergenthal (Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is it Good or Bad?" (2001) 14 LJIL 268 at 274), who has a much more conjunctive (rather than disjunctive) vision of the interactions between proliferating international courts and tribunals:

...Here it is important for all international tribunals, the ICJ as well as the other specialized and regional courts, to recognize that they are all part of the same legal system and that this fact imposes certain obligations. Of these, the most basic one is the obligation to accept the methodological and doctrinal unity of the international legal system. This means, among other things, that each tribunal has an obligation to respect the general and special competence of the other judicial and quasi-judicial institutions which comprise the system, to recognize that it has an obligation, when rendering judgements, to take account of the case-law and, most importantly, to promote and be open to jurisprudential interaction or cross-fertilization.

a separation of powers based on the type of offence committed, in what capacity and by whom.²¹³ It too, is a form of disjunction.

Primacy suggests an extreme disjunction, in the ordinary meaning of the term. It implies supremacy and therefore lacks conjunctivity. Primacy may however not be reflective of the Tribunals *per se*, but rather of the binding nature of Security Council decisions and its authority permeating through its subsidiary organs. In the case of the Tribunals, the provisions of the Statutes referring to "concurrent jurisdiction" appear to adopt the mostly conjunctive approach, but the provisions referring to mandatory "primacy" give a distinct disjunctive or even anti-conjunctive character.²¹⁴ The ICTY and ICTR *Rules of Procedure and Evidence* water down the disjunctive character in favour of a more conjunctive one. Cooperation with the domestic jurisdiction is important: in the sharing of information,²¹⁵ the execution of warrants of arrest, and the implementation of transfer orders for a witness.²¹⁶ Nevertheless there remains a disjunctive element in that under the *ne bis in idem* principle, the Tribunal may assert its primary right to exercise jurisdiction when:

²¹³ Namely the target of the offence (or victim) being the sending State or its agents, warranting the sending State to have primary right to exercise jurisdiction. NATO SOFA, *supra* note 183 at Article VII(3)(a). There may be a graduated scale in existence between purely disjunctive and purely conjunctive, with examples falling somewhere between these two extremes.

²¹⁴ *ICTY Statute*, *supra* note 176 at Article 9. The term "concurrent" is also problematic. The *Oxford English Dictionary*, 2nd ed., s.v. "concurrent" defines this adjective in terms of the running of parallel lines in space – a definite allusion to parallelism and the separation of powers, reinforced by giving it a conflicting jurisdictional quality (definitions A.1 and A.4). Yet at the same time it defines the term as "acting in conjunction; cooperating; contributing to the same effect." Thus "concurrent" as a word has a similar double meaning, like "complementary" – disjunctive and conjunctive. Hans Kelsen even had trouble with the description of the disjunctive and conjunctive and attempted to call the conjunctive relationship "supplementary." (see Kelsen, *supra* 16 at 80 and 84). "Supplementary" is defined (The *Oxford English Dictionary*, 2nd ed., s.v "supplementary") as being an addition (implying disjunction) or a completion (implying conjunction) – thus it is also as problematic.

²¹⁵ *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 8 and Rule 11bis(B)(ii) – the flow may be bi-directional. Also *ICTR Rules of Procedure and Evidence*, *supra* note 177 at Rules 8 through 13.

²¹⁶ *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 56 and *ICTY Statute*, *supra* note 176 at Article 29.

the act has been mischaracterized as an ordinary crime; there is evidence of a bad faith prosecution (or lack thereof); or there are overriding reasons for the Tribunal to deal with a case instead of the domestic courts.²¹⁷

The conjunctive definition of complementarity is what is meant when one refers to the concept in the context of the *Rome Statute* of the International Criminal Court. The concept is clearly stated in the Preamble of the *Rome Statute*: “[e]mphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions;”²¹⁸ and in the first Article of the *Statute*.²¹⁹

An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

The Tribunal term of mandatory “primacy” has been dropped, in favour of a power to request the deferral of a case to the Tribunal. This is partly because the ICTY and ICTR have the authority of a Security Council resolution behind them, rather than an international convention (as in the case of the ICC). The tribunals are more disjunctive than the ICC.

²¹⁷ *Secretary-General’s Report*, *supra* note 185. See discussion earlier in chapter three under heading of “*Ne bis in idem*.”

²¹⁸ *Rome Statute*, *supra* note 2 at Preamble. Contrast with *ICTY Statute*, *supra* note 176 at Article 9.

²¹⁹ *Rome Statute*, *supra* note 2 at Article 1.

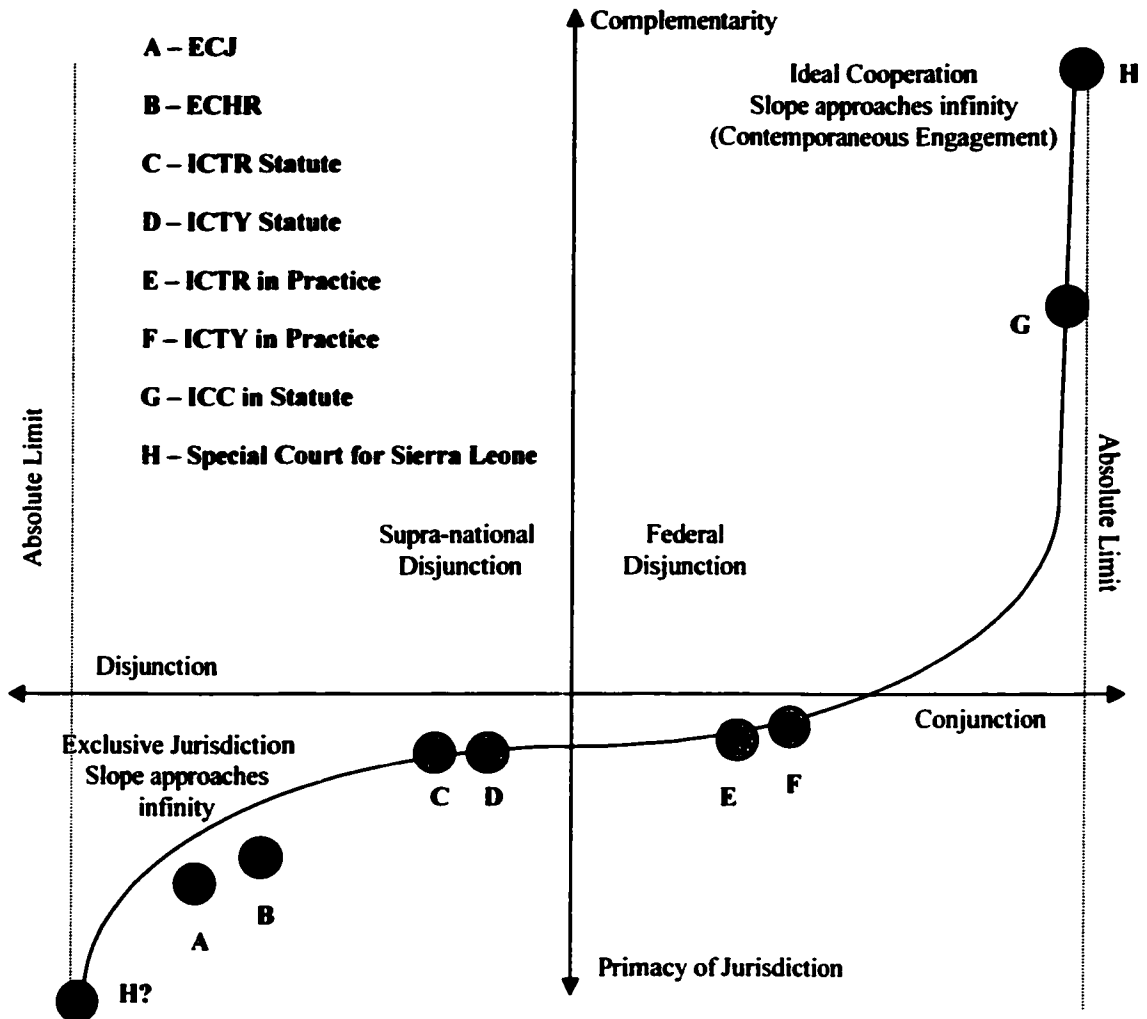


Figure 4 – Complementarity as a Function of Conjunction

Figure 4 provides an illustration of the general solution to what could be a continuum of complementarity with regard to international criminal law. One can visualize the variety of possible complementary relationships between the international and domestic jurisdictions. The relationship is a function of the degree of conjunction. In an ideally conjunctive situation, the relationship (represented by the curve) would approach an absolute limit of conjunction – full cooperation, represented by the right-most asymptote. This is a particular solution

to the curve. Similarly, where either the international or the domestic jurisdiction would deny the existence of the other – a form of primacy or exclusivity of jurisdiction – an absolute limit of disjunction would be approached, as shown by the left-most asymptote. In the case of the middle-range, bounded on each side by the supra-nationalist or federal relationship, a milder form of disjunction may be present where the respective jurisdictions do not actively deny the other. An ideal balance between disjunction and conjunction occurs at the point of inflexion of the sigmoid (at the origin). A number of courts/tribunals have been plotted on the curve taking into account their relative complementary characters.²²⁰

“Deferral”

The system of “deferral” represents how the ICC will implement complementarity procedurally. By contrasting the procedures of the ICTY and the ICC, it will become evident just how discretionary powers are limited and regulated in both. In the case of the ICC the regulation is more sophisticated and more comprehensive.

When it appears to the ICTY Prosecutor that any one of the conditions for the three-pronged *ne bis in idem* test is met,²²¹ she *may* propose to the Trial Chamber that a formal request be made to the domestic court to defer a case to the Tribunal.²²² If it decides such action is *appropriate*, the Trial Chamber *may* in turn formally request deferral from the State concerned.²²³ A state's non-compliance

²²⁰ The European Court of Justice and the European Court of Human Rights have similarly been plotted, but not actually on the curve. This is because they are not normally considered to be international criminal courts. Both incorporate primacy of law applicable to their respective member states. Consider Luzius Wildhaber, *supra* note 13 at 50 and Klaus-Dieter Borchardt, *supra* note 86. Primacy is actually contained as a stipulation within the relevant treaties and so interpreted by the respective courts.

²²¹ *Report of the Secretary-General*, *supra* note 185 and accompanying discussion.

²²² *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 9.

²²³ *Ibid.* at Rule 10 but especially at Rule 10(A).

after a period of 60 days from the formal request, *may* result in the Trial Chamber requesting the President to report the matter to the Security Council.²²⁴

There is a fair amount of judicial discretion permitted to the Prosecutor, Trial Chamber and President of the Tribunal.²²⁵ Although there is no hierarchy of courts (they are equals), the *ne bis in idem* principle and associated tests represent a form of incentive on the part of the relevant domestic courts to ensure that crimes are properly categorized as international when appropriate and that the prosecution of alleged offenders is carried out in good faith.

In the case of the *Rome Statute*, there is a stronger leaning toward the ideal conjunctive limit. Neither "primacy" nor "concurrent jurisdiction" is mentioned at all in the document.²²⁶ While the mechanism of the Court "asserting" its jurisdiction is similar to that of the Tribunals, it is nevertheless different due to the incorporation of "checks and balances" to the discretionary powers allocated to the organs of the Court.²²⁷ Relative to the tribunals, the level of conjunction in the regime of complementarity is much higher.²²⁸

²²⁴ *Ibid.* at Rule 11.

²²⁵ Recall that the Prosecutor is effectively a *judge d'instruction* – and therefore has a judicial quality in the hybrid character between civil and common law. See William Schabas, *supra* note 32 at 287-307. The use of "Tribunal" refers to either the ICTY or ICTR or both in a general sense.

²²⁶ Verified through the use of a word search of the document.

²²⁷ Philippe Kirsch, *supra* note 45 at xvii.

²²⁸ This is probably the difference between the tribunals and the International Criminal Court that Philippe Kirsch alluded to in his recent publication in the McGill Law Journal ("which have priority jurisdiction over domestic systems"): Philippe Kirsch, Q.C., Valerie Oosterveld, "Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court," (2001) 46 McGill L.J. 1141 at 1159. Note that as mentioned in Chapter Two, the nationality and territorial principles are very well established in international law. Universality is not a basis of jurisdiction in the *Rome Statute* for the Court.

State consent to the Court's jurisdiction exists in the act of becoming a Party to the *Rome Statute*.²²⁹ Jurisdiction may be exercised in a case provided that there exists a link to a State Party based on the territoriality principle or the nationality principle.²³⁰ This is unlike the case of the ICTY and ICTR where consent derives from the *United Nations Charter* and the "absolute" obligations to comply with Security Council Resolutions. The absolutist approach has its problems. Only in 1995 did the former Yugoslavia formally accede to the Tribunal's jurisdiction through the Dayton Accords.²³¹ Rwanda voted against the establishment of the ICTR and there remain tensions between the two jurisdictions.²³²

²²⁹ *Rome Statute*, *supra* note 2 at Article 12(1) but also note Article 120 prohibiting reservations.

²³⁰ *Rome Statute*, *ibid.* at Article 12(2). Consider: B. Brown *supra* note 179 at 392 and the discussion in Chapter 2 of the Bases of Extraterritorial Jurisdiction. Territoriality and nationality are the most accepted bases of extraterritorial jurisdiction by States. That said, some commentators have suggested that the delegation of territorial and nationality principles to an international court may not necessarily be in conformity with international law (see: Madeline Morris, *supra* note 43 at 44). Michael P. Sharf refutes this assertion from the standpoint of public international law (along with most of Professor Morris' arguments) in Michael P. Sharf, *supra* note 43 at 99-114 especially. The roots of one of the major objections of the United States can be found in this issue – the possibility that American nationals (citizens of a non-State Party) could conceivably be brought before the Court. For American points of opposition, see: Marc Grossman, "American Foreign Policy and the International Criminal Court: Remarks to the Center for Strategic and International Studies" (Center for Strategic and International Studies, Washington, D.C., 6 May 2002), online: United States Department of State <<http://www.state.gov/>>(date accessed: 6 May 2002).

²³¹ *The General Framework Agreement for Peace in Bosnia and Herzegovina*, Republic of Bosnia and Herzegovina and Republic of Croatia and Federal Republic of Yugoslavia, 14 December 1995, 35 I.L.M. 75 [hereinafter the *Dayton Peace Agreement*] at Article IX. For an overview of the provisions see: Paola Gaeta, "The Dayton Agreements and International Law" (1996) 7 E.J.I.L. 147. The entire issue, of this particular journal, is devoted to a discussion on the Dayton Agreements by various other authors.

²³² Consider ICTR, "Statement by the Registrar on the Response of the Government of Rwanda to the Proposal to Establish a Joint Commission to Investigate the Allegations of Mistreatment of Witnesses Coming from Rwanda," *supra* note 179. There is a curious report that the ICTR will now allow the domestic courts to try accused individuals. There are suggestions that this too may have been a result of pressure applied on the ICTR by the Rwandese government. The ICTR web site does not reflect any such changes to the *ICTR Rules of Procedure and Evidence* as claimed (addition of an Article 10bis). If the report is true, then this could amount to a major shift of the complementary relationship established under the ICTR Statute in favour of a more conjunctive relationship in line with the *Rome Statute*. See: "Plenary Changes Allow National Jurisdictions to Try Suspects," *Hirondelle News Agency* (8 July 2002), online: <<http://allafrica.com/stories/200207100442.html>> (date accessed: 13 July 2002).

“Admissibility”

The term “admissibility” refers to how the Court arrives at the decision as to whether a case should be considered, following either initiation by the Prosecutor or approval of such initiation by the Pre-Trial Chambers. There are two tests that require application in the *Rome Statute*: one called “ne bis in idem” and one called “unwillingness and inability.” Should these tests succeed then the case may be admissible.

ICC “Ne bis in idem”

The *ne bis in idem* test only applies in determining if a case is inadmissible where:²³³

The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.

The wording of Article 20 of the *Rome Statute* describes a slightly modified version of *ne bis in idem* over the previous variation in the *ICTY Statute*:²³⁴

1. *Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.*
2. *No person shall be tried before 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 articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

²³³ *Rome Statute*, *supra* note 2 at Article 17(1)(c). Remembering that there is a presumption that the State is always considered having investigated/prosecuted properly, unless evidence to the contrary can be proven.

²³⁴ *Ibid.* at Article 20.

- a. *Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*
- b. *Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*

The first paragraph establishes the prohibition of trying an accused, if previously convicted or acquitted by the ICC, for the same crime again by the ICC. The second paragraph establishes the prohibition of trying an accused by another court, if previously convicted or acquitted by the ICC for the same crime. This second paragraph seems to include other international tribunals in addition to domestic courts.²³⁵ The third paragraph amounts to a test of abuse of process or a bad faith legal investigation/prosecution in the other court (domestic or international). If such evidence exists, then the double jeopardy rule may be overridden.

The wording of the rule and its placement in the *Rome Statute* is curious. It is placed under the section heading “Part 2 – Jurisdiction, Admissibility and Applicable Law” rather than in “Part 3 General Principles of Criminal Law.” This suggests that rather than being a general principle of criminal law upon which the accused may rely, it is a ground for challenging the admissibility of a case, primarily by a State.²³⁶ This seems to be supported by the explicit referral to Article

²³⁵ Could this amount to a restriction imposed on the ICTY Statute's version of *non-bis-in-idem*, where only national courts and the International Tribunal are mentioned? (ICTY Statute, *supra* note 176 at Article 10) It is certainly wider than the corresponding provision in the ICTY Statute.

²³⁶ If one looks at Article 19(2)(a) of the *Rome Statute*, *supra* note 2, it becomes apparent that a challenge to the jurisdiction of the Court or the admissibility of a case can only be launched by the accused for whom a warrant of arrest or summons to appear has been issued under Article 58. If no such warrant or summons has been issued, she cannot challenge the admissibility of a case at all – although the certain States may (Article 19(1)(b) and (c)).

20(3) in the provisions concerning issues of admissibility.²³⁷ Thus the context of the *ne bis in idem* rule is being changed yet again, to something entirely different to what it meant in the context of the ICTY. Confusingly it still has the same label as both double jeopardy as a general principle of criminal law and within the ICTY context. The *ne bis in idem* now refers to three different legal concepts in three different legal contexts.

Unwillingness and Inability Test

The *ne bis in idem* test for admissibility of case coexists with a second test, “unwillingness and inability.” There are only two scenarios where it can be applied in an issue of admissibility:²³⁸

- a. *The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
- b. *The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*

There exists the presumption that the State is carrying out its duties to investigate or prosecute (or not to prosecute) properly, unless evidence to the contrary exists. Unwillingness is determined by evidence of shielding an accused, unjustifiably delaying proceedings or carrying out proceedings that lack independence or impartiality.²³⁹ Thus evidence of a lack of good faith or an abuse of process is crucial in determining unwillingness. In the case of inability, the condition of the

²³⁷ *Rome Statute*, *supra* note 2 at 17(1)(c).

²³⁸ *Ibid.* at Article 17(1)(a) and Article 17(1)(b)

²³⁹ *Ibid.* at Article 17(2).

domestic legal system is to be considered.²⁴⁰ Thus inability may be indicated by a "substantial collapse or unavailability of its national judicial system."²⁴¹

Both the *ne bis in idem* test and the unwillingness and inability test presume that the State is disposing of or has disposed of a situation in full propriety. Both tests are used in the *Rome Statute* to establish how the Court determines if a case is admissible – those exceptional cases where the State has not disposed of a situation in full propriety. While *ne bis in idem* still protects the individual from double jeopardy, it is also being used primarily as grounds for a State to raise an issue of admissibility. This is in stark contrast to the *ICTY*, where the it could request deferral even if the State prosecuted in propriety and if a crime had been mischaracterized as an ordinary crime or if significant factual or legal questions existed which required the case to be brought within the Tribunal's jurisdiction. While the State is not on trial in the jurisdiction of the ICC, there exists almost a presumption of innocence on its part. This may be what Arbour and Bergsmo, mean (although they still use the word "primacy"):²⁴²

The jurisdictional primacy of the ad hoc Tribunals has been reversed: the ICC may only supplement national criminal justice systems when there is inadequate domestic will or inability to prosecute.

Through this "reversal," the ICC takes on a substantially more conjunctive character than do the two tribunals.

Regulation of Prosecutorial Discretion

The regulation of prosecutorial discretionary powers in the *Rome Statute* represents reinforcement to the underlying concept of complementarity. The

²⁴⁰ *Ibid.* at Article 17(3).

²⁴¹ *Ibid.*

²⁴² Arbour and Bergsmo, *supra* note 179 at 130.

International Criminal Court may initiate proceedings concerning a "situation," upon the actions of three different players – a procedure, labelled as "referrals:"²⁴³

1. When an allegation is made by a State Party to the Prosecutor;
2. When an allegation is made by the Security Council, acting under Chapter VII of the *Charter*, to the Prosecutor; and
3. When the Prosecutor has initiated an investigation of her own accord (*proprio motu*).

The third condition may be indicative of an enormous discretionary power invested in the Prosecutor of the Court, although to be fair there is also power vested in the States Parties and the Security Council. In the *travaux préparatoires* of the *Rome Statute*, it was observed that the discretionary power of the Prosecutor was essential in order to ensure an independent and credible Court.²⁴⁴ There were other negotiators however who considered that the discretionary powers of the Prosecutor had the potential to undermine the intended regime of complementarity.²⁴⁵ It was unrealistic to dismiss the pressure of States, organizations and individuals seeking an investigation, prosecution, or the refraining from any such process.²⁴⁶ There was the fear of an:²⁴⁷

...overzealous or politically motivated prosecutor targeting, unfairly or in bad faith, highly sensitive political situations. Sometimes feared as a 'lone ranger running wild' around the world with excessive powers, the independent Prosecutor was also

²⁴³ *Rome Statute*, *supra* note 2 at Article 13.

²⁴⁴ Silvia A. Fernandez de Gurmendi, "The Role of the International Prosecutor" in Roy S. Lee, *supra* note 66 at 177. Gurmendi refers to *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I, reprinted in Bassiouni, *supra* note 45 at Paragraphs 149-151.

²⁴⁵ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *ibid.* at Paragraph 156.

²⁴⁶ Fernandez de Gurmendi, *supra* note 246 at 181.

²⁴⁷ *Ibid.*

sometimes depicted in the discussions as an overwhelmed man or woman, constrained by limited human and financial resources but overloaded with information provided daily to him or her by thousands of victims and organizations from all over the world. Unable to deal with every complaint, he or she would have to decide on priorities, which would inevitably result in disappointment and challenges to his or her decisions...

A tension exists between the exercise of prosecutorial discretion and the conjunctive concept of complementarity.

The problem is not a unique one. The Prosecutor of the ICTY initiated an indictment of President S. Milosevic in 1999 at the height of the conflict between NATO and Serbia over Kosovo.²⁴⁸ The comments made by the British Foreign Secretary illustrate the unenthusiastic reaction to the indictment.²⁴⁹

The International Tribunal is an independent court set up on the authority of the United Nations. Their decision to indict Milosevic as a war criminal must command respect because it is their independent judgement free of any political interference. Throughout this conflict I have repeatedly brought into the public arena the scale of the brutality and evil which we are fighting in Kosovo. I have highlighted the massacre of unarmed men, the rape of defenceless women, and the violent ethnic cleansing of a whole people. It is right that those who ordered these crimes should be brought to account...

But NATO must have channels to the authority in Belgrade that has the power to implement its objectives. So long as Milosevic retains that power in Belgrade it would be irresponsible of us not to talk to him about the implementation of our objectives in Kosovo.

²⁴⁸ *Prosecutor v. S. Milosevic and others*, IT-02-54, Indictment, 22 May 1999, online: ICTY web site <<http://www.un.org/icty/indictment/english/mil-ii990524e.htm>> (date accessed: 30 December 2001).

²⁴⁹ "Cook's Response to Indictment of President Milosevic," Statement by the Foreign Secretary Robin Cook London 27 May 1999 Foreign and Commonwealth Office <<http://www.fco.gov.uk/>> (date accessed: 8 May 2002). The Secretary-General described the indictment as "complicating the peace process." See: "United Nations Daily Highlights, 99-05-28" online: Hellenic Resources Network <<http://www.hri.org/news/>> (date accessed: 8 May 2002).

At the time, NATO was on the verge of mobilizing its armed forces for a sustained ground-based intervention in the Province.²⁵⁰ The indictment of the President Milosevic could easily have sabotaged diplomatic efforts to end the war.

Louise Arbour, the Prosecutor at the time, has stood by her decision and considers it to have been one "driven purely by a juristic *prima facie* case and evidence" and not by political considerations.²⁵¹ She considers her decision to have been supported by the Security Council; and if it had disapproved, it could have changed her mandate or revoked her appointment at any time.²⁵² She has conceded however that there was a political aspect to her role as Prosecutor and that toward the end of her term, a new position for a political advisor was established.²⁵³

To accommodate the tension between the exercise of prosecutorial discretion and the complementary relationship between the international and domestic jurisdictions, the *Rome Statute* incorporates various mechanisms. In the words of Philippe Kirsch, there exists a system of "checks and balances."²⁵⁴ The phrase is

²⁵⁰ From the author's own experience, the British Territorial Army (Royal Army Medical Corps) was within four days of receiving mobilization orders in May 1999.

²⁵¹ Louise Arbour, *supra* note 34.

²⁵² *Ibid.* Article 16(2) of the *ICTY Statute*, *supra* note 176 sets forth the Prosecutor as an independent organ of the Tribunal and that her office does not receive instructions from any source – including the Security Council. The only "hold" that the Security Council has is through the Secretary-General on the reappointment of the Prosecutor (at Article 16(4)). There are no provisions for her removal either in the *Statute* or the *Rules of Procedure and Evidence*. It is submitted that the only sanction available to the Security Council was in fact exercised against Judge Arbour. There is a hint of this in a recent report in *The National Post*, which suggests that her appointment as Prosecutor of the ICTY was "cut short"; Janice Tibbetts, "Arbour Resists War Court Bid: A Canadian Seat on the 18-Member International Criminal Court is Considered a Sure Bet – Likes Busy Supreme Court" *The National Post* (5 July 2002), online: [National Post](http://www.nationalpost.com/) <<http://www.nationalpost.com/>>(date accessed: 5 July 2002). Could Louise Arbour have been a "lone ranger running wild?"

²⁵³ Louise Arbour, *supra* note 34.

²⁵⁴ Kirsch, *supra* note 45. One might contrast this view with the official American opposition, Marc Grossman, *supra* note 231. Also contrast with: Alfred P. Rubin, "The International Criminal Court: Possibilities for Prosecutorial Abuse," (2001) 64 *Law & Contemp. Probs.* 153; and John Bolton, "The Risks and Weaknesses of the International Court from America's Perspective," (2001) 64 *Law & Contemp. Probs.* 167. It should be noted that John Bolton is the Under Secretary, Arms Control and International Security

problematic, for it evokes images of federalism. The phrase is probably an inappropriate description of a safeguard mechanism in a system that cannot be analogized exactly with a domestic legal system. Instead, terms such as "discretionary diversity" and "controlled discretionary measures" might be preferred. "Discretionary diversity" describes the manner in which discretionary power has been allocated to many different *loci*, as a means of avoiding its concentration and hence its potential as a threat to the regime of complementarity – namely the danger of centralization.²⁵⁵

Discretionary Diversity

Summary of the Procedure for the Processing of a Case (Post-Referral)

Following the referral, if the Prosecutor concludes that a *prima facie* case exists, she *shall* submit a request to authorize an investigation to the Pre-Trial Chamber, with supporting materials.²⁵⁶ She may consider the evidence provided by the Pre-Trial Chamber, including evidence provided by victims. Provided that there is a *prima facie* case within the Court's jurisdiction, the Pre-Trial Chamber *shall* authorize the start of an investigation.²⁵⁷ The remaining roles of the Pre-Trial Chamber are administrative – such as appointing counsel and the issuing of arrest warrants.²⁵⁸ Upon deciding that a *prima facie* case exists, the charges are confirmed and the President *shall* constitute a Trial Chamber.²⁵⁹ There exists a

and therefore voices the views of the Bush administration. Rubin has ties to the Heritage Foundation (see Casey and Rivkin, *supra* note 42), an "NGO" closely aligned with the Bush administration. This raises a question of whether an NGO such as the Heritage Foundation really is an NGO or simply another manifestation of the government executive outside of the constraints of government – bordering very close to the "shadow State."

²⁵⁵ See the next Chapter for the concentration of discretionary powers and how it ultimately leads to a centralizing tendency.

²⁵⁶ *Rome Statute*, *supra* note 2 at Article 15(3).

²⁵⁷ *Ibid.* at Article 15(4). This is without prejudice to a subsequent determination with regard to the "jurisdiction and admissibility of a case."

²⁵⁸ *Ibid.* at Article 57.

²⁵⁹ *Ibid.* at Article 61(10) and 61(11).

general obligation of cooperation by all States Parties.²⁶⁰ In the event of a State Party failing to cooperate and thereby hindering the Court from performing its statutory functions, the Court has a discretionary power to refer the matter to the Assembly of States Parties or to the Security Council (where a case had been referred by the Security Council to the Court).²⁶¹

Internal Regulation of Discretionary Powers of the Prosecutor

Prosecutorial discretion is heavily regulated in the initial stages of a case.²⁶² When a case has been referred to the Court and the Prosecutor believes that there is a reasonable basis to proceed or if the Prosecutor initiates an investigation of her own accord; she is obligated to notify all States Parties and those States, which would normally exercise jurisdiction over the crimes at issue.²⁶³ She has a discretionary power to limit the "scope" of information provided that she believes it is necessary to protect persons, prevent destruction of evidence or prevent the flight of persons.²⁶⁴ There exist similar provisions in *Rules of Procedure and Evidence* for the Tribunals, although rather than being a discretionary power of the Prosecutor, such non-disclosure is only permitted in exceptional circumstances and must be approved by a Judge or Trial Chamber in consultation with the Prosecutor.²⁶⁵ Such limitations on prosecutorial discretion, in the *Rome Statute*, constitute a reinforcement of complementarity, as they incorporate a role for the States Parties.

²⁶⁰ *Ibid.* at Article 86.

²⁶¹ *Ibid.* at Article 87(7).

²⁶² Fernandez de Gurmendi, *supra* note 246 at 180 notes the use of "situation" in place of "case" for Article 13 and 14 of the *Rome Statute*, *supra* note 2. She suggests that the drafters at the 1996 Preparatory Committee feared that if "case" were used this could lead to the politicization of the complaint procedure.

²⁶³ *Rome Statute*, *supra* note 2 at Article 18(1). "Those States" might not necessarily be States Parties.

²⁶⁴ *Ibid.*

²⁶⁵ For example: *ICTY Rules of Evidence and Procedure*, *supra* note 177 at Rule 53.

The Prosecutor has not been entirely stripped of discretionary powers. When deciding to initiate an investigation, she is required to consider whether a "reasonable belief" may be established to suggest that a core crime has been committed.²⁶⁶ She must consider if the case is admissible under the Statute.²⁶⁷ She is required to consider, in addition to the seriousness of the allegation and the interests of victims, whether "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."²⁶⁸ If her discretionary powers are exercised in this last manner to not proceed with an investigation, she is required to inform the Pre-Trial Chamber.²⁶⁹ If she decides: that there is insufficient basis to issue a summons or warrant, that the case is inadmissible, or that a prosecution is not "in the interests of justice;" she is obliged to inform both the Pre-Trial Chamber and the referring party.²⁷⁰ The Pre-Trial Chamber has a power to review a prosecutorial decision not to proceed at the request of a referring party.²⁷¹ The Pre-Trial Chamber also possesses a power to review a

²⁶⁶ *Rome Statute, supra* note 2 at Article 53(1)(a)

²⁶⁷ *Ibid.* at Article 53(1)(b) referring to Article 17 (Issues of Admissibility).

²⁶⁸ *Ibid.* at Article 53(1)(c). This point is addressed by Mahnoush H. Arsanjani, *supra* note 179 at 75. She argues that "in the interests of justice" stipulates sufficient discretionary power not to prosecute, to allow the toleration of truth and reconciliation commissions. This subject will be considered in greater detail in chapter five. Arsanjani considers the granting of an amnesty to be a political act, not a judicial one. Her argument is premised upon a court that performs only a judicial function. It will be argued that the ICC has been designed as a court that fulfils not only a judicial function but an executive role (through the States Parties, the Security Council and the Prosecutor) but also a legislative role (through the Assembly of States Parties). The relationship between all of these different entities simultaneous seized of interests in the same domains of power (or discretion) represents a more sophisticated form of complementarity based on these three focal points (judiciary, legislature and executive). This may be the system of checks and balances that Philippe Kirsch alluded to earlier – not between the ICC and domestic jurisdictions, but between all interested parties having concurrent interests in each of these focal points.

²⁶⁹ *Ibid.*

²⁷⁰ By referring party, one means the State or the Security Council as appropriate. See *Rome Statute, ibid.* at Article 15(2).

²⁷¹ *Rome Statute, ibid.* at Article 15(3)(a). The Pre-Trial Chamber may request the Prosecutor to reconsider a decision. Note that the Office of the Prosecutor remains independent from the Chambers.

prosecutorial decision not to prosecute that is based "solely" on her discretionary power.²⁷²

Prosecutorial discretion, especially to drop a case, is subject to qualifications that do not exist for the two Tribunals. The *Rome Statute* ensures that the exercise of discretion is transparent, subject to mandatory notification of the referring party and scrutinized to some degree by the Pre-Trial Chamber and States Parties. The consequence of such qualification is to shift the conjunctive character of the International Criminal Court far to the right of the complementarity curve described at Figure 4 (above at page 74).²⁷³ In a more practical way, the potential for abuse (intentional or innocent) either by the Prosecutor or the assertion of external pressure on her, is minimized.²⁷⁴ The entire system of checks, reflects the hybrid nature of the Court between: a civil law system, where prosecutorial discretion is generally limited and a duty to prosecute exists; and the common law system, where discretion is wide and a duty to prosecute is not nearly as absolute.²⁷⁵

²⁷² *Ibid.* at Article 15(3)(b)

²⁷³ In all fairness, there is a limit to this view of the International Criminal Court. Without the presence of a domestic jurisdiction, one is only looking at "half of the picture."

²⁷⁴ Silvia A. Fernandez de Gurmendi, *supra* note 246 at 181-184.

²⁷⁵ Schabas, *supra* note 32. Also consider: Kenneth Culp Davis, *Discretionary Justice in Europe and America* (Urbana, Illinois: University of Illinois Press, 1976) at 16-60, which provides an overview of the situation *vis-à-vis* the German prosecutor. While the ICC Prosecutor may be heavily controlled under the *Rome Statute*, there is still a certain degree of discretion possible with regard to prosecution on the part of the State – particularly for less serious crimes. Davis notes that this is the case in Germany too. One might also consider William T. Pizzi and Luca Marafioti, "The New Italian code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation" (1992) 17 *Yale J. of Int'l. L.* 1-40. Pizzi describes the origins of the lack of discretionary power vested in the Prosecutor due to the lessons of arbitrary prosecutions under the fascists. This rigidity is common to civil law systems where there exists a distrust of the judiciary – probably a result of their suspected complicity with the *ancien régime* after the French Revolution. Thus plea-bargaining (*marchandage* in Rwanda) is normally considered to be abhorrent in the civil law system. Consider Damaska who sees the tension between common law and civil law as "centrifugal decision making" and "centripetal striving" – the latter, which allows for a case by case approach (contextual?). Mirjan Damaska, "Structures of Authority and Comparative Criminal Procedure" (1975) 84 *Yale L.J.* 480. It may be interesting to note that while Schabas, *supra* note 32 argues that a civil law system and inquisitorial approach is best for an international criminal court due to the likelihood of intransigence by one of the

Within one month after notification by the Court to the State concerned, that State may inform the Court that it is investigating or has investigated the nationals with respect to the core crimes alleged.²⁷⁶ The State may request that the Prosecutor defer the case to the State, which she is compelled to do unless the Pre-Trial Chamber (on application by her) authorizes an investigation.²⁷⁷ Deferral to the State can be reviewed by the Prosecutor six months later or at any time if there has been a significant change resulting in a State's "unwillingness or inability genuinely to carry out the investigation."²⁷⁸ The State or the Prosecutor may appeal to the Appeals Chamber against a ruling by the Pre-Trial Chamber.²⁷⁹ Thus the system of discretionary negotiation built into the Tribunals has been removed from the Prosecutor of the International Criminal Court and formalized into a system where: the State has primary right to exercise jurisdiction; with checks by the Prosecutor to ensure that the State is investigating/prosecuting in good faith; and counter-checks for the State to challenge an overly zealous Prosecutor – eventually involving the Appeals Chamber (judges) in the event of irreconcilable conflict. This is *not* concurrent jurisdiction as described in the NATO SOFAs. The regulation of prosecutorial discretion by the Pre-Trial and Appeal Chambers reinforces the complementarity between the jurisdiction of the ICC and the domestic courts. Ultimately what powers the Prosecutor can exercise are

parties and therefore the impossibility of a fully functional adversarial system. Notwithstanding that the tribunals and the ICC represent mixed systems (inquisitorial and adversarial), it is curious to note that the last effective war crimes court in the United Kingdom was also a civil law jurisdiction - the *Curia Marescalli* or High Court of Chivalry under James I. While largely a court of honour, its origins stem from the Court of the Lord High Constable and Earl Marshall of England (see: J.H. Baker, *An Introduction to English Legal History* (London: Butterworths, 1990) at 141-142; and especially Maurice Keen, *The Laws of War in the Late Middle Ages* (London: Routledge and K. Paul, 1965)).

²⁷⁶ *Rome Statute*, *supra* note 2 at Article 18(2). The Core Crimes are contained in Article 5 of the Statute.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* at Article 18(3).

²⁷⁹ *Ibid.* at Article 18(4).

overseen by both the judiciary of the Court and by the States themselves, involved in the case.²⁸⁰

External Regulation of Discretionary Powers of the Prosecutor

State Challenge to Admissibility

The Court is required to satisfy itself of the admissibility of a case in accordance with the Statute.²⁸¹ The following entities may challenge the admissibility of a case or the jurisdiction of the Court:²⁸²

1. An accused or person for whom an arrest warrant or summons to appear has been issued;
2. A State which has jurisdiction over a case, on the grounds that it is investigating or prosecuting the case or already has done so; and
3. A State from which acceptance of jurisdiction is required (i.e. a non-State Party to the Statute).

The right of the accused to challenge admissibility is only to when the Court, under Article 58 of the Statute, has issued a warrant for arrest or a summons to appear. This means that an individual cannot challenge an investigation, until it has been completed. The right of the accused always takes second place to the right of the State in issues of admissibility.

The right of a State to challenge admissibility is an extremely innovative step in the *Rome Statute*; there is nothing like it in the governing instruments of the tribunals.

²⁸⁰ In a struggle between the ICC and a State, the “winner” would depend on just how far either objected. Ultimately, the State could carry the issue all the way to the Assembly of States Parties or the Security Council (depending upon who referred the case to the ICC) for a decision. In this manner what is considered to be a legal issue could be deferred to the Security Council (or Assembly) for consideration as a political issue.

²⁸¹ *Rome Statute*, *supra* note 2 at Article 19(1). Admissibility criteria are at Article 17.

²⁸² *Ibid.* at Article 19(2).

It can be made only once²⁸³ and when made, requires the Prosecutor to suspend provisionally the investigation.²⁸⁴ The Prosecutor may however seek a Court order to continue the investigation, collect evidence and testimony, and prevent the flight of those for whom an arrest warrant has already been requested (in cooperation with the State(s) concerned).²⁸⁵ The challenge can only be made prior to or at the start of the trial.²⁸⁶ If the challenge is successful, the Prosecutor may submit a request for review of the decision, if convinced that new facts have arisen that have rendered the earlier decision *per incuriam*.²⁸⁷

The provisions governing issues of admissibility and State challenges, demonstrate both the disjunctive and conjunctive natures of the Court. The provision for challenge to admissibility amounts to a provision for questioning whether the test for unwillingness and inability to investigate or prosecute has been satisfied. It also provides an opportunity for a State to challenge evidence of a bad faith prosecution or abuse of process under the *ne bis in idem* provisions contained at Article 20 of the *Rome Statute*. It allows a State to respond to the charges made against it by the Prosecutor or Pre-Trial Chambers. The challenge cannot be made before the regular Chambers, once the case is underway. In this way the regular Chambers are isolated from what might be a moral or political question, thus protecting the impartiality of Court's judiciary. The Prosecutor and to some degree, the Pre-Trial Chambers are not so insulated.

Deferral Powers of the Security Council

The Security Council may act through a Resolution adopted under Chapter VII of the *Charter* ("Action with Respect to Threats to the Peace, Breaches of the Peace,

²⁸³ *Ibid.* at Article 19(4).

²⁸⁴ *Ibid.* at Article 19(7).

²⁸⁵ *Ibid.* at Article 19(8).

²⁸⁶ *Ibid.* at Article 19(4).

²⁸⁷ *Ibid.* at Article 19(10).

and Acts of Aggression”) to request that the Court “defer” an investigation or prosecution either impending or ongoing.²⁸⁸ The Court must comply. While the deferral may only last for a period of 12 months, the Security Council may request the Court to continue the deferral under another Resolution adopted in the same circumstances.²⁸⁹ This provision was severely criticized in the negotiations leading to the *Rome Statute* – particularly by India, who thought that the power of the Security Council to block prosecutions was a blemish on the independence and impartiality of the Court.²⁹⁰ The deferral power of the Security Council amounts to an additional check on the discretionary powers of the Prosecutor (and on the judges) – not so much on her discontinuance of a case, but rather her prosecution of one. The provision would likely address a situation such as that described above, with the “apolitical” indictment by ICTY Prosecutor Judge Louise Arbour of President Milosevic, in the midst of the Kosovo conflict in 1999. There may be very good reasons not to prosecute immediately, even if there is sufficient evidence to initiate a case. The *Rome Statute* states that the reason would have to be a Chapter VII issue adopted by the Security Council with unanimity. The ICC and the Security Council could be said to exercise a form of concurrent jurisdiction, if that is possible between a judicial and non-judicial (legislative/executive) body. The Security Council does not exercise the ICC’s jurisdiction, but rather exercises its own jurisdiction in matters of aggression and threats to the peace. This is why their respective jurisdictions remain distinct. The Security Council only exercises jurisdiction when a State is prepared to maintain that a potential prosecution should not occur, because it may threaten both its and the community of States’

²⁸⁸ *Ibid.* at Article 16. Note the use of terminology to imply mutual admiration and equality *pari passu* of the two bodies.

²⁸⁹ Schabas, *supra* note 2 at 65. This is known as the “Singapore compromise.”

²⁹⁰ *Ibid.* at 66 citing Lionel Yee, “The International Criminal Court and the Security Council: Articles 13(b) and 16’ in Lee *The International Criminal Court*, *supra* note 66 at 143-152; and Dilip Lahiri, *supra* note 42. Mr. Lahiri felt that the power amounted to the ability of certain members of the Security Council, who refused to ratify the *Rome Statute*, to be able to invoke it without having to be obligated by it. His remarks were probably directed at the United States and China in particular.

peace and security. In such a case the jurisdiction of the ICC can be deferred to the jurisdiction of the Security Council. Thus the ICC has a form of primary right to exercise of jurisdiction. Another way of describing this concurrent jurisdiction would be to suggest that the rule of law has primary jurisdiction unless there are substantial reasons for a "political" pre-emption to apply.

Judiciary and Assembly of States Parties

Generally the judiciary and Assembly of States Parties only become involved in instances of impropriety on the part of a judge, the Registrar, the Prosecutor or their subordinates. The Presidency of the Court will receive all complaints of "serious breaches of duty" and "misconduct of a less serious nature."²⁹¹ In the case of a judge, the Registrar or the Deputy Registrar, removal from office must be put to a vote at a plenary session.²⁹² In the case of the Deputy Prosecutor, the Prosecutor is charged to notify the President of the Bureau of the Assembly of States Parties in writing of any decision made by her.²⁹³ In the case of the Prosecutor, the complaint would be received by the President of the Court and transmitted to the President of the Bureau of the Assembly of States Parties; it would be up to the Bureau to decide any disciplinary measure in absolute majority.²⁹⁴

The *Rome Statute* does not allow the Assembly of States Parties to interfere in the operations of the Court. It can however establish subsidiary bodies including an oversight commission. These bodies are for enhancement of the efficiency and

²⁹¹ *ICC Rules of Procedure and Evidence, supra* note 2 at Rule 24 for "serious breach of duty;" Rule 25 for "misconduct of a less serious nature;" and Rule 26(2) for the Receipt of Complaints.

²⁹² *Ibid.* at Rule 29(1) and (2). The plenary session is composed of the judges from the Chambers Division, chaired by the President of the Court. The plenary is an administrative body that has the power to propose amendments to the *Rules of Procedure and Evidence* (to the Assembly of States Parties) in absolute majority and also the power to amend the *Regulations of Court* (which do not yet exist). *Rome Statute, supra* note 2 at Articles 51 and 52.

²⁹³ *ICC Rules of Procedure and Evidence, ibid.*, at Rule 29(3).

²⁹⁴ *Ibid.* at Rule 30(2).

economy of the Court – not to review the discretionary powers of the Prosecutor or judges.²⁹⁵ The Assembly of States Parties also has the power to amend the *Rules of Procedure of Evidence* and the *Rome Statute* itself.²⁹⁶ While not specifically targeting the discretionary powers of the Prosecutor, such powers allow the Assembly to react to any arbitrary decisions that may amount to financial irregularity. They also allow it to amend the governing documents of the Court to further curtail any excessive discretionary powers that undermine the complementary relationship between the Court and domestic jurisdiction. It must be remembered however that the Assembly will not actually possess this effective amending power until 2009 although it is now in its early stages of operation.²⁹⁷ There exists a temporary legislative deficit.

The Role of NGOs

In chapter two the concept of reflexive law was discussed. While some groups have taken advantage of the concept to advocate a more participatory form of democratic interaction to counter the centralizing and undemocratic nature of the regulatory State, others have exploited it to reinforce their positions, enhance the efficiency of transnational organized crime, and undermine the authority of the State. It is possible to consider these groups as NGOs, but they are oriented toward undermining or even usurping the power of the State for their own criminal or non-criminal ends. One must distinguish these malevolent “NGOs” from benign NGOs that operate to reinforce the efficacy of the State in all of its manifestations (judiciary, executive and legislature). Rather than usurping the State, they tend to

²⁹⁵ *Rome Statute*, *supra* note 2 at Article 112(4).

²⁹⁶ *Ibid.* at Articles 51 and 121 respectively.

²⁹⁷ *Ibid.* at Articles 5(2), 121 and 123. By the same token the Assembly could alter the Court’s mandate or even the subject matter. Under Article 121 for instance, at the first Review Conference, it will decide upon a definition for aggression and whether nuclear weapons use is also a crime (see chapter six). The Assembly therefore could expand the Court’s jurisdiction and powers of the Prosecutor. Generally the Assembly is an institution that parallels the Security Council. It only becomes directly involved in an instance of non-compliance by a State or misbehaviour within the Court by a judge or the Prosecutor.

work within its confines, to perform either a monitoring function or a representational function, on behalf of the population (or segments of it) and therefore in the best interests of the State. They tend to bring to light abuses of executive, legislative or judicial power to any or all of these bodies. They constitute a feedback loop to the system of the exercise of power by the State – including the judiciary. In a sense they represent a check on the exercise of such power. When feedback starts to break down, the conditions for the State to go awry are partially established.

The role of NGOs is enshrined in the *Rome Statute*, in that they are eligible to provide information to the Prosecutor in order for her to determine if an investigation should be made *proprio motu*.²⁹⁸ This is not the case for either the ICJ or the ICTY, although it may be in practice rather than in statute. Some critics have suggested that this may compromise the impartiality of NGOs.²⁹⁹ Some critics have suggested that the institutionalization of NGOs will inevitably mean that the Court will end up relying upon them – a form of privatized provision of evidence.³⁰⁰ The Prosecutor may rely upon NGOs for some evidence, but it is doubtful the Court would rely exclusively upon them for all evidence. The critics' arguments reflect those that one might have against reflexive law in operation on its own.³⁰¹ Regardless, the ICC Prosecutor will have the role of filtering for

²⁹⁸ *Rome Statute, ibid.* at Article 15(2). Information may be obtained from: "States, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable sources as he or she deems appropriate..." Also consider the role of the legal academic community as evidenced by the division of the judiciary between criminal law experts and international law experts (*Rome Statute, supra* note 2 at Article 36(3)). Note that NGOs do not have the power to refer a case to the Court, although they can bring a situation to the attention of the Prosecutor (or even a State Party or the Security Council).

²⁹⁹ Betina Kuzmarov, "An Uneasy Synergy: The Relationship Between Non-Governmental Organizations and the Criminal Court" (2001) 11 W.R.L.S.I. 7 at 36.

³⁰⁰ *Ibid.*

³⁰¹ This is discussed in much more detail in chapter six and concerns the question of the stability of a reflexive system – namely that certain interests do not commandeer the feedback mechanism in order to obtain outputs as they desire. Obviously this cannot happen since there is a filtration going on here – at the very least the rules of evidence.

reliability. There exist rules of evidence and procedural guidelines concerning how evidence is gathered and from where.³⁰² Reflexive law is in operation alongside regulatory and formalistic law.³⁰³ Recourse to NGOs will not be as significant as some might suggest, otherwise it might actually violate some of the discretionary limitations on the judiciary and the system of complementarity – namely accepted international and domestic standards for the continuity of evidence.

Apart from benign NGOs, such as Amnesty International, *Médecins sans frontières* or the International Committee of the Red Cross (ICRC), one must not forget the role of the media. Freedom of the press is regarded as a fundamental guarantee to human rights.³⁰⁴ The free media would play a crucial role in exposing abuses of power (arbitrariness) to the executive, legislature or judiciary.³⁰⁵ Thus it too acts as a feedback system to the State. Like NGOs, it can be used or abused however.

Conclusion

In this Chapter, a comprehensive analysis has been undertaken of the abstraction that is used to describe the relationship between the jurisdictions of the International Criminal Court and the domestic courts - complementarity. Labels

³⁰² Generally the *ICC Rules of Procedure and Evidence*, *supra* note 2 at Rule 104. But note that she is only to seek additional information sources from NGOs in analyzing the seriousness of information received, not to actually argue a case with it (Rule 104(2)). Also *Rome Statute*, *supra* note 2 at Article 69.

³⁰³ As suggested by Orts, *supra* note 52.

³⁰⁴ The *Canadian Charter of Rights and Freedoms* describes freedom of the press as a "fundamental right:" *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 at Article 2(b); *European Convention on Human Rights*, *supra* note 86, being Schedule 1 of the *Human Rights Act 1998* (U.K.), *supra* note 86 at Article 10(1) [but note that unlike the Canadian Charter, this is not a fundamental freedom, but rather qualified by Article 10(2)]; and U.S. Const. amend I.

³⁰⁵ In *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, *supra* note 27, there was mention that the status of media (including television stations) was unique under customary international law. Regardless of whether a media installation was being used for propaganda, it still could not be considered a legitimate target for attack unless being used for other purposes (such as military communications in this case). The enhanced status is consistent with the vital importance of the media as a bulwark to supplementarity.

such as “primacy” and “concurrent jurisdiction” do not capture the concept and their usage tends to confuse rather than clarify. The relationship is a function of conjunctivity – the level of cooperation between the two jurisdictions. The procedures limiting prosecutorial discretion, described in the *Rome Statute*, represent bulwarks to ensuring the high degree of conjunction between the two jurisdictions. Discretionary powers are spread-out in order to avoid their concentration in an omnipotent prosecutor or even judge. By so doing, the drafters of the *Rome Statute* tried to skew the leaning of the Court away from any tendency to become a supranational or centralized court; and thereby reinforced the complementary relationship. The increased role of the State in challenging the ICC and the deferral process (effective veto of Article 16 of the *Rome Statute*) is salient in this regard. The two *ad hoc* tribunals represent prototypes of the approach; and while lacking the conjunctive safeguards contained in the *Rome Statute*, the functionality has some degree of similarity to that of the ICC. The *Rome Statute* itself represents a major evolutionary leap in terms of visualization of a new abstraction in international criminal law – the deferential regime and complementarity. With it, there is a new vocabulary (“deferral,” “referral,” “request for deferral,” “complementary,” “State challenge to admissibility” and “issue of admissibility”). There are additional safeguards incorporated into the Statute to ensure that complementarity is achieved – through controls on discretionary powers and the diffusion of such powers amongst many key players.

Chapter 4

Chapter Four: Structural Constraints on the Exercise of Judicial Authority within the ICC

Introduction

Complementarity represents the backbone of the *Rome Statute*. The concept incorporates a new vision of how international criminal courts (the ICC in particular) work in partnership with the domestic criminal courts to encourage prosecutions of international crime, yet to also act where the domestic courts are either unwilling or unable or in instances where their domestic judicial systems, like the State, have gone awry. The ICC is not a supranational court, asserting its jurisdiction over a State's. A new vocabulary reflects this new idea, using such terms as "deferral," "admissibility," and "complementary." The essence of complementarity is the diversification of discretionary powers amongst many of the players: the accused (to a limited extent), the States, the Assembly of States Parties, the Security Council and even NGOs. In this manner discretionary power is not centralized but decentralized. The "rule of law" becomes almost deliberative, characterized by negotiation and consensus rather than imposition and rigidity of control. Imposition and rigidity of control is the nature of the domestic criminal legal system, not the international criminal legal system. The *Rome Statute* incorporates a reflexive vision of complementarity.

Yet there is another focal point of control that must be considered in the context of the international criminal legal system. It is the judge. Within the hands of the judge there still remains a great deal of discretionary authority. This is because of the requirement for an independent judiciary. If unregulated discretionary power exists, it could conceivably thwart the deliberative approach that so characterizes complementarity. It could also result in the centralization of decision-making at

one place, again undermining complementarity. The regulation of judicial power must originate from somewhere other than political decision-makers in order to preserve the integrity of judicial independence. In such a system, a self-regulation of the judiciary is necessary at the international level. Like complementarity such an approach is steeped in reflexive law, but unlike complementarity it is not described in any Statute. It is a form of inherent control.

This chapter explores how the judiciary of international courts regulates itself. Before any in-depth exploration, one first must understand the nature of the international legal environment. The nature of jurisdiction in the international sense differs from the domestic one. The State still figures prominently, even with the presence of the ICC. The State remains the primary entity in international law. A decentralized legal order is the result. There is a distinct aversion to centralization of international legal authority, which can be traced at least to Kelsen. The proliferation of international courts and tribunals represents a facet of the disparate nature of the international legal system. Inherent judicial regulation in the International Court of Justice (ICJ) and the *ad hoc* tribunals (ICTY/ICTR) represent standards, against which one can compare those present in the *Rome Statute*.³⁰⁶ To whom are the judges responsible and how does that limit their freedom of action? Are there indications of indirect accountability of judicial decisions through the appointment, removal and renewal of tenure of judges? What sources of law are permitted? What sources of law are used in practice? Answers to these questions could provide insight to the scope of the relevant court's jurisdiction and the corresponding freedom the judges might have, or alternatively, think that they might have. The addition or removal of sources of law and/or judicial procedures within a court is normally accomplished through amendments to the courts' statutes. The nature of the amendment process of the statutes of the courts could be another indicator of limitations to judicial power.

³⁰⁶ The comparison is limited since the ICC is not yet in operation.

International courts must operate with constraints, because there is a limitation on the judicial decision-making, in favour of maintaining the decentralized nature of the international legal system. This is a form of internal regulation of international courts that supplements complementarity.

The International Legal Environment

The Concept of Jurisdiction

In the domestic legal system, the concept of "jurisdiction" may delimit the State's right to interfere with the individual, its subject.³⁰⁷ Limitations exist: the sources of law; territoriality; the nature of the subject matter, including divisions of power; the nature of the subjects (for example children or the insane); procedure through natural justice (such as a fair trial or *autrefois acquit*); and the issue of remedies (right of appeal and administrative remedies).³⁰⁸ In the international criminal system, while the individual is the subject of the proceedings, so too is the State in a manner of speaking. The concept of 'jurisdiction' in international criminal law may delimit the right of an international court to interfere with the individual, yet the individual still is a State's subject. This is not to mean that the State is being brought to account, as the ICC, ICTY and ICTR do not have jurisdiction over States but over individuals.³⁰⁹ Rather, the State not only has a vested right in the individual, but also over its right to interfere with her rights instead of the international community.

³⁰⁷ Stuart James Whitley, "Preface," *The Concept of Jurisdiction in Canadian Criminal Law* (LL.M. Thesis, Dalhousie Law School, 1983) at vi. In an earlier draft of this thesis the author described this more diffuse form of complementarity as "supplementarity." While an appropriate label, given that the vocabulary of the *Rome Statute* remains generally unused at this time, the last thing that this field requires is a new label for a new concept. For this reason it is labelled as complementarity, although its nature is quite distinct from the statutory regulation of discretionary powers described in the previous chapter.

³⁰⁸ *Ibid.* This is an overview of the Stuart Whitley's Table of Contents.

³⁰⁹ Contrast with Madeline Morris, *supra* note 43. The "primacy" described in the *ICTY Statute* over domestic courts or the *ICC Statute's* "threat" to defer a case to the Security Council or Assembly of States Parties may amount to an indictment of the legal system within the subject State, however it is not an indictment with legal effect as such.

This is a sensitive topic, for ultimately one is challenging the jurisdiction of the State as being either unwilling or incapable of prosecuting an individual. The credibility of a state's sovereign prerogative may be at stake. The legal creeps close to the political. The delimitation has to exist in a decentralized legal system, where the international courts do not represent any one State and their application of the law must not be seen to be supranational. Decentralized though the international criminal legal system may be, there is a commonality and coherence in the judicial approach to international legal issues, including criminal. It is this commonality and coherence that imposes limitations on just how far a judge can act.

Decentralized Character of International Law

The international legal system has been described as a primitive legal system.³¹⁰ Primitive law lacks the necessary division of labour to allow the centralization of legal legislative and legal coercive power to occur.³¹¹ Kelsen's views on the international legal system rest precariously upon the idea of centralization. They reflect influence from Marx (the division of labour), Hegel (progress), Weber (bureaucracy) and even Darwin (evolution). They are also conspicuously oriented toward the exclusive consideration of the relationship between States and the Permanent Court of International Justice. This is understandable, considering that Kelsen may not have seen the proliferation of international courts and tribunals in

³¹⁰ Hans Kelsen, *supra* note 16 at 40 and 60. "Primitive" is a technical term and it is suggested that it is not an anthropological one for societies that lack the technology of the industrialized societies. It relates more to centralization. The term does evoke the Hegelian presumption of progress; for that reason "decentralized" is preferred. There is a common acceptance the Hegelian evolutionary approach – namely that societies and legal systems develop in stages. Recall Teubner, *supra* note 52. Is it possible that rather than evolution, a legal system just is? The need for stages of evolution seems restrictive.

³¹¹ Kelsen, *supra* note 16 at 5.

his day. He did not dismiss the possibility of "a diametrically opposite evolution of international relations."³¹²

Hans Kelsen believed in an eventual evolution to a world federalist State through the centralization of judicial and legislative authority.³¹³ Kelsen was probably a supranationalist, however he saw such an international system as utopian idealism and its achievement not immediately realizable.³¹⁴ Centralization of coercive power alone was not sufficient to advance from a primitive state of law to a more advanced form.³¹⁵ Writing in 1942, in the shadow of the failure of the League of Nations, Kelsen saw the Permanent Court of International Justice (predecessor to the International Court of Justice) as a potentially significant body in centralizing the international judiciary: "[a]ccording to the patterns of evolution of natural law, centralization of the judiciary must precede centralization of legislative and executive power."³¹⁶

Kelsen recognized that there were two key criteria in common to all international legal orders: coercion and voluntary obedience. He was critical of a legal order

³¹² *Ibid.* at 55. Kelsen also dismisses the liberal approach to international law. He does make allowance for the Soviet and fascist systems as legal systems that were valid and efficacious. He suggests that political ideals may influence how we define what is law. Liberals would apply a moral or political judgment on a system of social organization by arguing that only a democratic regime or a regime with a completely free-market economy is "legitimate." Such judgments do not follow from the "scientific character" of law; Kelsen would not make such judgments – a view of cultural relativism and tolerance. The liberal approach is alive and well: see William W. Burke-White, *supra* note 30 and Anne-Marie Slaughter, *ibid.*

³¹³ Kelsen, *supra* note 16 at 144.

³¹⁴ In the long term this may be true. Kelsen also spoke of "spheres of interest" of States. If these spheres were interfered with, that could constitute a delict in international law (with the exception of the "just war"). See *ibid.* at 52. In the short term or present, he seems to accept the parallelist outlook.

³¹⁵ *Ibid.* at 52.

³¹⁶ *Ibid.* at 150. His conception of the role of the ICJ may reflect the school of dualism (Malcolm Shaw, *supra* note 25). It is submitted that dualism is simply a particular case of the more general concept of parallelism. Rather than a multiplicity of international judicial bodies, dualism simply holds that there are two – the ICJ and the domestic courts.

based upon coercion. Nevertheless, it may be this vision that he had of an international legal order dominated by a coercive United Nations, waging a war in 1942, and perhaps of a reinvigorated Permanent Court of International Justice. Kelsen argued that a major evolutionary leap to centralization could be achieved through the old Roman law doctrine of *bellum justum* – “the just war.”³¹⁷ He believed the rendering of binding decisions upon states by the Court. He also believed in the ability of the Council of the League of Nations (forerunner of the Security Council) to impose binding majority decisions upon states.³¹⁸ The task of deciding which was the just war could be delegated to the Permanent Court of International Justice.

Kelsen also regarded voluntary obedience as a much sounder foundation on which to build a legal order. Reasons, explaining the “appropriateness” of a rule and “respect or love” were all ways in which obedience could be achieved, but the most effective means of achieving compliance to legal rules was through the setting of an example.³¹⁹ Kelsen illustrated his theory with the role of the teacher or saint.³²⁰

While Kelsen’s vision of the international legal order is not exactly what exists today. States have regulated themselves through international cooperation.³²¹ A great many international organizations exist founded upon the consensus of States, negotiation and not upon coercion.³²² Coercion exists, but it is restricted to matters involving the inherent right of self-defence of States and threats or

³¹⁷ Kelsen, *ibid.* at 54. Writing in 1942 could it have been any different?

³¹⁸ *Ibid.*

³¹⁹ *Ibid.* at 6.

³²⁰ *Ibid.*

³²¹ For example the *Palermo Convention*, *supra* note 70 mentioned in chapter two.

³²² For example OSCE or even the UN. See: Organization on Security and Cooperation in Europe, *OSCE Final Act: 25, 1975-2000 Handbook* (Vienna: OSCE, 2001), available online: <<http://www.osce.org/publications/handbook/handbook.pdf>> (date accessed: 27 August 2002) at 12-16.

breaches to international peace and security.³²³ In this manner, the international legal system continues to be decentralized. Entities with legal personality are primarily States, but a multiplicity of international organizations and NGOs also have standing. Some of these organizations are “regional arrangements,” recognized in the Charter,³²⁴ while others such as the *Comité de la croix rouge* represent NGOs with recognition by States and through conventional international law.³²⁵ If one adds to this the multiplication of States through post-war decolonisation, the international legal system has become even more decentralized than it was in 1945.

Proliferation of International Courts and Tribunals

One of the features of the decentralized nature of the international legal system is the proliferation of international courts and tribunals. The Project on International Courts and Tribunals (PiCT) ambitiously tried to identify all international courts and tribunals, including those concerned with international criminal law.³²⁶ PiCT suggests that:³²⁷

³²³ This is Chapter VII of the *Charter of the United Nations*, *supra* note 26.

³²⁴ *Ibid.* at Chapter VIII.

³²⁵ The standing of the ICRC in the Geneva Conventions and their Protocols is mentioned by Schabas, *supra* note 2 at 52 (citing Protocol II and also Article 8(e) of the Statute – namely the deliberate targeting of armed attack against humanitarian relief including that run by the ICRC or its associated Islamic analogue, the Red Crescent Society). Other organizations may have a lesser standing. One might also consider the extensive list of organizations and other entities represented at the Rome Conference with observer status at *Rome Statute for the International Criminal Court*, PCNICC, Annex III reprinted in Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, at 106.

³²⁶ For a detailed on-line survey of the hundreds of international courts and tribunals one should visit the web site of the Project of International Courts and Tribunals (PiCT), being run jointly as a research project from New York University and the University of London. See: Cesare Romano, “The International Judiciary in Context: A Synoptic Chart” (Ver. 2.0, August 2001), online: The Project on International Courts and Tribunals (NYU) < <http://www.pict-pcti.org/index2.html> > (date accessed: 12 July 2002). “The matrix” is of great interest in this regard. Both Shane Spelliscy, *supra* note 212, and Cesare Romano, *supra* note 328 are of the opinion that the interactions between these courts are minimal and therefore consistency of decision-making is lacking. This argument amounts to a rejection of the conjunctive nature of complementarity – either in favour of parallelism or alternatively in favour of a supranational court (Spelliscy

...[t]he institutions and mechanisms listed...have very few legal or functional links among one another, either within or across each major grouping or cluster...

Other writers argue a lack of coherence through a lack of intercommunication.³²⁸

...the real proliferation problem is not derivative of the fact that many international tribunals exist, but rather of the fact that they have proliferated in an environment without any formal relations between them. The development of tribunals in the absence of structured relationships has led to the characterization of the international legal system as a disordered melody, though perhaps one not so optimistic might be more inclined to call it a cacophony rather than a melody.

Such an outlook preconceives that centralization (“formal relations” or “structured relationships”) is essential to coherence. While these arguments may appear convincing at one level, the reality is that they amount to a projection of one’s legal expectations of the domestic system onto the international. A hierarchy of law is not necessarily needed at the international level. The international judiciary renders decisions in a consistent form and there are relations between the various courts and tribunals. Many of their sources of law are identical. They also tend to look at one another’s case law as persuasive authority. Judges often sit in other international tribunals.³²⁹ In a decentralized legal system, the nationalization of

concludes the need for primacy of judicial decisions by the ICJ – it as a supranational court). Thomas Buergenthal's comments earlier seem to refute this idea (supra note 213). Similarly see Rosalyn Higgins, “The Relationship Between the International Criminal Court and the International Court of Justice,” in Herman A. M. von Hebel, supra note 66 at 166.

³²⁷ Romano, *ibid.* at obverse.

³²⁸ Spelliscy, *supra* note 212 at 155.

³²⁹ For example the biography of Judge Guillaume, the current serving ICJ President indicates him as having been a member of the Permanent Court of Arbitration, Member of the Court of Arbitration of the Organization for Security and Co-operation in Europe (OSCE) and designated arbitrator by the International Telecommunications Satellite Organization (INTELSAT), the International Chamber of Commerce and the International Centre for the Settlement of Investment Disputes (ICSID). Judge Buergenthal is a former: judge and vice-president of the Inter-American Court of Human Rights; Judge, Vice-President, President, Administrative Tribunal, Inter-American Development Bank; Member, United Nations Human Rights Committee; Member, United Nations Truth Commission for El Salvador; Member, Panels of Conciliators and of Arbitrators,

international law is avoided.³³⁰ Instead law becomes more communal, exponentially increasing the "sources of legal dialogue."³³¹

...Decisions are less conclusive, other sources may later prevail, and broader forms of agreement become possible, tolerant of differences now seen as minor and transient. The use of persuasive authority is thus essential to law itself and uniformity of law comes not through imposition but persuasion, in the daily world of legal practice...Law is so challenged, however, only in those jurisdictions which have taken the risk of leading, and forming, the Western legal tradition. They have given law to the rest of the world, and it is only fitting that the rest of the world give law back to them, and that each give law back to the others.

Before considering the "sources of legal dialogue" in the *Rome Statute*, it might be fruitful to illustrate them in the context of two referent jurisdictions – the ICJ and ICTY. The reason for this is to illustrate the significance of judicial limitation in the *Rome Statute*.

Referential Courts: The ICJ and ICTY

Judicial Limitation at the ICJ

Inherent Conservativeness of Decisions

While States are obliged to follow ICJ rulings by authority of the *Charter*,³³² in the event of non-compliance by a State, there are two approaches possible. Because

International Centre for Settlement of Investment Disputes, World Bank; and Vice-Chairman, Claims Resolution Tribunal for Dormant Accounts in Switzerland (1999-2000). See: Biographies of Members of the Court, ICJ website <<http://www.icj-cij.org/icjwww/igeneralinformation.htm>> (date accessed: 5 March 2002). Similarly Louise Arbour was a Justice in the Ontario Court of Appeal prior to her appointment as Prosecutor of the ICTY and is now a justice at the Supreme Court of Canada. This represents only a small sampling of these three individuals' backgrounds. It is clear that there is a very significant inter-relationship or "cross-fertilization" between the international courts and tribunals (including national ones) even without formalized structured relations. Therefore the argument to the contrary is contested.

³³⁰ H. Patrick Glenn, "Persuasive Authority," (1987) 32 McGill L.J. 261 at 298.

³³¹ *Ibid.* This should evoke memories of Teubner, *supra* note 52 and Habermas, *supra* note 138. Thus the incoherence that Spelliscy identifies may in fact represent the misidentification of "broader forms of agreement." Could this truly be the "internationalization of law?"

the jurisdiction of the ICJ is predicated upon the consent of States, a State may render a case inadmissible simply by refusing to consent to the Court's jurisdiction.³³³ In the event that the two States before the Court do consent but the ruling is unacceptable to one or both, the ruling could be ignored and the Court may forward the matter to the Security Council. The Security Council in turn, has full discretionary powers as to how to deal with the issue.³³⁴ In the event that the ICJ rendered a decision that was unacceptable to the Security Council too, the Security Council could simply let the non-compliance by the offending State continue. Such an act would seriously erode the prestige of the Court. This continuing threat may temper the Court's approach in boldly exercising its powers – and explain its general conservatism in dealing with controversial issues.

Limited Scrutiny of the Security Council

Generally the judges of the ICJ have been reluctant to question legal decisions emanating from the Security Council.³³⁵ The Security Council possesses the power to simply ignore a decision by the Court with which it does not agree. If such a situation were to arise, the damage to the Court's legitimacy and credibility would be extreme.

³³² *Charter of the United Nations*, *supra* note 26 at Article 94(1) – provided that the State is itself a party to the case before the Court.

³³³ *ICJ Statute*, *supra* note 26 at Articles 34 and 35. For example, consider *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep. 14.

³³⁴ *Charter of the United Nations*, *supra* note 26 at Article 94(2). This regulatory effect is created by the balance, between the provisions of Article 93(1) and Article 93(2). (*Ibid.*)

³³⁵ Rosalyn Higgins describes this as the ICJ giving "consideration only to legal factors when exercising its jurisdiction, notwithstanding the important political role of the Security Council." (Rosalyn Higgins, "The Relationship Between the International Criminal Court and the International Court of Justice," in Herman A. M. von Hebel, *supra* note 66). As will be shown, international criminal courts cannot adopt this approach without adopting a supranational character. They must take into account political factors in addition to legal ones.

There is really only one case where the ICJ might conceivably question a legal decision from the Security Council. Judge de Castro in *Namibia* summarized the scenario.³³⁶

The principle of 'legal-ness' – the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law.

There is an extremely high threshold to be met. Such a decision would undoubtedly launch a severe constitutional crisis within the United Nations and the international community, if one were not already in existence. The ICJ would be entangled in it, whether it acted or not. The scenario is exceptional and most unlikely.³³⁷

Currently, before the International Court of Justice, is the *Lockerbie* case.³³⁸ At issue is whether the ICJ has the power to scrutinize the Security Council in a manner akin to a supreme court scrutinizing the executive for activities that may be *ultra vires*. The Court has been very cautious in approaching this question, but in its landmark decision of 28 February 1998, it probably ruled that it did could assert its competence to rule on the issue.³³⁹ This is certainly within its powers.³⁴⁰ The

³³⁶ Judge Castro in *Namibia*, *ibid.* cited in *Prosecutor v. Tadic*, Case No. IT-94-1, "Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction," *supra* note 33 at Paragraph 30.

³³⁷ It probably applies to the ICTY and ICC. If faced with an outrageously illegal act by the Security Council or the Assembly of States Parties that threatened to compromise their judicial functions, they would probably act.

³³⁸ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamhiriya v. United Kingdom)*, "Preliminary Objections" 28 February 1998, [1998] I.C.J. Reports 1, at Paragraphs 37 and 38, online: ICJ <<http://www.icj-cij.org/>>(date accessed: 16 March 2002).

³³⁹ *Ibid.* The Court was far from unanimous concerning its capability to review Security Council decisions. The judgement is also ambiguous. A broad interpretation of it suggests that the Court may review the legality of the acts of the Security Council, while a narrower one suggests that the ICJ jurisdiction may only apply to interpretation of the *Montreal Convention* and not to the Security Council. Guillaume (the current President) and Fleischhauer voiced such a narrow interpretation. Their outlook can be contrasted with those of Judges Bedjaoui, Ranjeva and Koroma – all of whom supported the idea of the ICJ being capable of reviewing the legality of actions by the Security Council in a

decision is not without its opponents, including from within the judiciary of the ICJ.³⁴¹ The actions of the Security Council in this case may have been questionable, but they hardly satisfy the stringent requirements outlined in the *Namibia* case. *Lockerbie* has yet to be resolved at this level.

Narrow Jurisdiction – Preponderance of Parallelism

In the *Ndombasi* case,³⁴² there were significant differences of opinion, on the part of the judges, who generally felt that immunity of State could not be invoked under any circumstances in alleged cases of: genocide, crimes against humanity or serious war crimes. The International Court of Justice condemned Belgium for its issue of an arrest warrant for the Minister of Foreign Affairs of the Congo, on the grounds that the Minister enjoyed immunity from criminal jurisdiction, inviolable under international law (it being a customary legal principle). To many observers this appeared as a legal retreat from the “campaign for universal justice” and a return to the use of immunity of office as a legal shield for commission of

manner akin to a domestic court. Judges Schwebel (President at the time), Oda and the *ad hoc* judge Robert Y. Jennings (also a former President of the ICJ) voted against the Court having jurisdiction. See Andreas L. Paulus, “Jurisprudence of the International Court of Justice *Lockerbie* Cases: Preliminary Objections” (1998) 9 E.J.I.L. 550.

³⁴⁰ *ICJ Statute*, *supra* note 26 at Article 36(6).

³⁴¹ Judges Schwebel, Oda and Jennings (*ad hoc* judge for the UK) were the most vocal opponents. Consider Judge Rezek’s statement as representative of some of the dissenting opinions (arguing for the *ultra vires* review), *supra* note 340:

Ce serait bien une source d’étonnement si le Conseil de sécurité des Nations Unies devait jouir d’un pouvoir absolu et incontestable à l’égard de la règle de droit, privilège dont ne jouissent pas, en droit interne, les organes politiques de la plupart des fondateurs et des autres membres de l’Organisation, à commencer par les deux Etats défendeurs.

³⁴² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, “Press Release 2002/04: The Court finds that the issue and international circulation by Belgium of the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Congo enjoyed under international law; and that Belgium must cancel the arrest warrant,” (14 February 2002) online: ICJ < <http://www.icj-cij.org/>>(date accessed: 15 March 2002).

international crimes and impunity.³⁴³ To some observers this would be an example of the lack of coherence of the law, in a decentralized legal system.³⁴⁴

It must be remembered that the ICJ is a jurisdiction where States are the sole holders of legal personality. Immunity as a state function was at issue, not immunity as a matter of avoidance of individual criminal responsibility. As President Guillaume stated, "...immunity from jurisdiction and individual criminal responsibility are two separate concepts."³⁴⁵ Thus the ICJ decision did not amount

³⁴³ The Court ruled that Belgium had violated customary law that allows the Minister to enjoy full immunity from criminal jurisdiction while occupying that office. To some this ruling appears to contradict the Statutes of the Tribunals (see *ICTY Statute, supra* note 176 at Article 7(2) and *ICTR Statute, supra* note 176 at Article 6(2)). For an account of the outrage see John Kamau, "Uproar as Foreign Ministers get Legal Immunity" *The East African Daily Nation* (28 February 2002), online *Daily Nation on the Web* <<http://www.nationaudio.com/>> (date accessed: 27 February 2002). This argument cannot be, for the jurisdictions are different. The subjects of legal personality in the ICJ are States whereas in the ICTY (or other international criminal courts and tribunals) they are individuals.

³⁴⁴ For example: Shane Spelliscy, *supra* note 212. This argument harks back to Kelsen, *supra* note 16 and the need for a centralized global judicial system (mentioned in A. Cassese, "Reflections on International Criminal Justice" (1998) 61 *M.L.R.* 1 at 6). There is a presumption that multiple jurisdictions ignore the persuasive value of their fellow courts and may develop law in a different direction (Glenn, *supra* note 332). Spelliscy in particular assumes that there is inadequate lateral contact between judges (formal or informal) which is a theme also echoed by Professor Romano of PiCT (*supra* note 328). Respectfully this is not the case as most judges within these jurisdictions were judges either in their domestic jurisdiction or some other parallel court. Coherence in law does not require a centralized court. Most federal legal systems and that of the European Union are testimonials to coherence in a decentralized *milieu*. Spelliscy appears to forward an argument in favour of a centralized world court. The limitation on judicial discretionary powers being discussed in this chapter, represent the imposition of consistency and certainty in judicial decision-making. It is a complex system but it is operational.

³⁴⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, "Press Statement of Judge Gilbert Guillaume, President of the International court of Justice," online: ICJ <<http://www.icj-cij.org/>> (date accessed: 15 March 2002). Many commentators have suggested a retreat from the demise of immunity as a pretext for avoiding individual criminal accountability, including the President of the European Court of Human Rights (Kamu, *supra* note 345). With respect, they may fail to appreciate the uniqueness of the jurisdiction of the ICJ. That said there were many dissenting opinions regarding this case by the judges of the ICJ, arguing that immunity could not be upheld in cases of serious human rights abuses such as genocide or crimes against humanity and for that reason they felt that the arrest warrant should not have been annulled. See especially the joint separate opinions of Judges Higgins, Kooijmans and Burgenthal or the dissenting opinion of Judge Oda, at the ICJ website <<http://www.icj-cji.org/>> (date accessed: 10 May 2002). See also: Rosalyn Higgins, "The Relationship Between the

to a legal retreat from the rejection of the use immunity of State as a means of shielding one from individual criminal responsibility. However, immunity relating to a necessary function of State is (now) a recognized principle of customary law. This displays a prevalent view on the part of the judges, that the jurisdiction of the ICJ is extremely narrow. It is self-contained or insular, in that the majority of judges are not willing to import principles of law from other jurisdictions – such as the general invalidity of State immunity over an individual as a shield from prosecution for international crimes. This is a manifestation of the parallelist outlook.³⁴⁶ Like *Lockerbie*, the judiciary was divided, with some judges of the view that the case law of the ICTY and the *Rome Statute* were sufficient indicators that such a customary law did not exist. They were in the minority however.

Sources of Law

The sources of law for the ICJ are outlined in its Statute:³⁴⁷

1. International conventions which establish rules explicitly recognized by the States bringing the case before the Court;
2. International customary law (“general practice as accepted by law”);
3. “The general principles of law recognized by civilized nations;”
4. Judicial decisions and teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.”

While the ICJ applies these sources, there is a contradiction in its narrow jurisdiction and the application of “general principles of law recognized by civilized

International Court and The International Court of Justice,” in Herman A.M. von Hebel, *supra* note 66 at 163.

³⁴⁶ For example the comments by Stephen Schwebel, *supra* note 47.

³⁴⁷ *ICJ Statute*, *supra* note 26 at Article 38-1.

nations.” The *Democratic Republic of the Congo* case illustrates the paradox. How can an individual's immunity be questioned before a jurisdiction where States are the only entities that have legal personality? The nature of the ICJ requires that it have a narrow and parallelist conception of its own jurisdiction.³⁴⁸ Furthermore the ICJ Statute explicitly denies the ICJ as a criminal jurisdiction.³⁴⁹

Case Precedents

According to the ICJ Statute, the ICJ's own decisions have “no binding force except between the parties and in respect of that particular case.”³⁵⁰ Therefore the ICJ is not even constrained by its own precedents. In practice the judges have skirted around this provision, rationalizing that the Court is bound by the legal principles rather than the particulars of any one case.³⁵¹ Regardless of whether ICJ judges are bound by precedent or legal principles, they have opted to limit their discretionary power in favour of certainty and consistency of their decisions in practice.

Amendments

Amendments to the ICJ Statute may be proposed by the Court to the Secretary-General, however all proposals must be submitted to the General Assembly upon

³⁴⁸ Considering its history it may even have been the court envisioned in the development of the parallelist (or more appropriately dualist) school of thought.

³⁴⁹ Rosalyn Higgins, “The Relationship Between the International Court and The International Court of Justice,” in Herman A.M. von Hebel, *supra* note 66 at 163. Her views are reflections of Article 34(1), of the *ICJ Statute*, *supra* note 26.

³⁵⁰ *ICJ Statute*, *supra* note 26 at Article 59.

³⁵¹ In the domestic situation, it has been argued that precedent is necessary to ensure that law is certain. Persuasive authority on the other hand (which is probably how the ICJ views its prior decisions) allows more flexibility in application of the law (and the exercise of judicial discretion). In the case of the ICJ however, its refusal to incorporate any persuasive authority other than its own may further restrict judicial discretionary power, limiting it to its particular jurisdiction. See: H. Patrick Glenn, *supra* note 332 at 297. President Guillaume's statement regarding the *Democratic Republic of the Congo* case may be important in this regard. The opposition from within the judiciary however may be an indicator of a desire to exercise more discretionary power.

recommendation by the Security Council.³⁵² In other words, the ICJ is first accountable to the Security Council and then to the General Assembly in matters where it decides to change its Statute. While this may not necessarily reflect judicial discretionary limitations over cases before the Court, it does reflect imposed limitations on the judicial authority to govern the Court.

Judicial Appointments

The judges of the ICJ are nominated by: parties to the *Statute of the International Court of Justice*, members of the Permanent Court of Arbitration or national groups (in the case of non-parties).³⁵³ There is a consultation requirement with domestic courts, faculties of law and national academies.³⁵⁴ The Secretary-General performs the role of coordinator.³⁵⁵ Both the General Assembly and the Security Council are furnished with separate lists of nominations and elect members of the Court (by majority of both organs) based on qualifications and the requirement of representation of the "main forms of civilization and of the principal legal systems of the world."³⁵⁶ Judges are elected for nine-year terms and may be re-elected.³⁵⁷ Dismissal of a judge may only occur on the unanimous opinion of the other members.³⁵⁸ There are prohibitions on employment but also the conferral of diplomatic privileges in order to avoid the compromise (apparent or real) of impartiality.³⁵⁹

³⁵² *ICJ Statute*, *supra* note 26 at Articles 69 and 70; and also for UN Amendment procedure see Charter of the United Nations, *ibid.* at Articles 108 and 109.

³⁵³ *ICJ Statute*, *ibid.* at Article 5-1.

³⁵⁴ *Ibid.* at Article 6.

³⁵⁵ *Ibid.* at Article 7.

³⁵⁶ *Ibid.* at Article 8 and 9.

³⁵⁷ *Ibid.* at Article 13-1.

³⁵⁸ *Ibid.* at Article 18-1.

³⁵⁹ *Ibid.* at Articles 16 (prohibition on extraneous employment), 17 (prohibition of acting as counsel), 19 (diplomatic privileges) and 20 (pledge).

While accountability of the judges rests mainly within the judiciary itself (through the provisions referring to dismissal), one might consider the incentive of re-election to amount to an inducement for a judge to limit her discretionary power in favour of those who vote for her (representatives of the State). The sheer length of a term of nine-years, coupled with the fact that the Security Council and General Assembly independently carry out the vote, may obviate this influence.³⁶⁰

The ICJ, as a court with a close working relationship to the United Nations, is well established. There are constraints on the discretionary powers of its judiciary. An inherent conservativeness of decision rendering exists in order to protect the Court's prestige and legitimacy (fear of decisions being ignored). The ICJ is reluctant to scrutinize the quasi-legislative/quasi-executive role of the Security Council, except perhaps in a case that is outrageously improper. This requires a very high threshold and as such, it is highly unlikely ever to happen, if ever. The Court has a narrow view of its jurisdiction - probably with good reason due to the restrictions on legal personality that constitute its jurisdiction. This may explain its reluctance to adhere to the "general principles of law of all civilized nations" source of law, at times – whatever such laws and nations might be. The judiciary of the ICJ is largely independent of external influence, with the possible exception of the promise of a renewal of the term of office. This threat has been obviated by the mechanism of recruitment, which balances the legislative imperfections of the General Assembly and Security Council. It should be noted that despite the positivist and parallelist preoccupation of the ICJ, there are members of the judiciary that see the ICJ's jurisdiction in a much broader light, "enmeshed" into the legal expectations of general international law and open to the persuasive authority of other international courts and tribunals. They remain however in the minority – for now.

³⁶⁰ Recall what was mentioned above: the General Assembly is representative but has little legal effect and the Security Council is not representative but has legal effect.

Judicial Limitation at the ICTY

La compétence de la compétence

Originally, the ICTY perceived a broad judicial discretionary power (*la compétence de la compétence*).³⁶¹ The President of the ICTY, Judge Cassese, described it:³⁶²

A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow conception of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its 'judicial character', as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

Such a broad conception of judicial discretionary power (and jurisdiction) may find its domestic analogue in "inherent jurisdiction" of certain courts. There are problems with this reasoning. How far can the exercise of judicial discretionary power go? In the *Quebec Secession Reference*, the Supreme Court of Canada indicated that it could counteract a decision made through a popular vote (*referendum*), on the grounds that it was contrary to international law and potentially, to the Canadian constitution.³⁶³ This is a rather undemocratic position.

³⁶¹ Or alternatively *Kompetenz-Kompetenz*. See *Tadic*, *supra* note 33 at Paragraphs 11 and 18.

³⁶² *Ibid.* at Paragraph 11.

³⁶³ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217. It should be noted that while this decision was within the jurisdiction of Canada, the decision has a significant international facet. Many of the experts who testified before the Supreme Court were international lawyers of standing, including Luzius Wildhaber (currently the President of the European Court of Human Rights) and James Crawford. See: "Government of Canada Files Reply to Arguments in the Quebec Secession Reference," Canadian Department of Justice (15 January 1998), online: Canadian Department of Justice Web

In the international context, could this freedom accorded to judges steer an international court into undermining the decentralized nature the jurisdiction of states and the promotion of a supranational character? This is the very same problem facing the ICJ. The ICJ's solution has been to adopt a narrow concept of jurisdiction. The ICTY too has been struggling, since its foundation, to narrow its concept of jurisdiction – an extremely difficult task given the broad wording in its *Statute and Rules of Procedure and Evidence*.³⁶⁴

Sources of Law

An examination of the sources of law for the ICTY reveals how it has overcome the problem of wide judicial discretionary power. In exercising its wide discretionary powers, the judiciary of the ICTY paradoxically has limited its powers by deciding to be bound by a plethora of sources of law.

The Secretary-General, in his 1993 Report, described its sources of law:³⁶⁵

...the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise...

The Secretary-General outlined an exhaustive list of conventional international humanitarian law instruments that he felt had become part of customary law in

Site < <http://canada.justice.gc.ca/en/news/nr/1998/reply.html> > (date accessed 14 April 2002).

³⁶⁴ Consider *ICTY Statute*, *supra* note 176 at Article 9(2) in particular – “primacy over national courts.” Also consider the *ICTR Statute*, *ibid.* at Article 8(2) which is even wider in that it accords “primacy over the national courts of all States.” In the case of the *ICTY Rules of Procedure and Evidence*, *supra* note 177, the provisions of Rule 9(i) and especially Rule 9(iii), endow an enormous discretionary power to the ICTY to request a deferral.

³⁶⁵ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* U.N. Doc. S/25704, *supra* note 185 at Paragraph 34 [emphasis added]. “Should” may imply that there exists some degree of discretion accorded to the judges in deciding upon sources of law.

armed conflict.³⁶⁶ In addition, the Tribunal "should apply domestic law in so far as it incorporates customary international humanitarian law," with the exception of the death penalty.³⁶⁷

In practice the Tribunal has invoked international legal instruments well beyond the exhaustive list suggested by the Secretary-General. In examining the *Tadic* Appeals Chamber decision one can find references to: the *International Covenant on Civil and Political Rights*,³⁶⁸ advisory and contentious case law of the International Court of Justice; the *United Nations Charter*, previous decisions of the Tribunal;³⁶⁹ the *European Convention on Human Rights*,³⁷⁰ the case law of the European Court of Human Rights,³⁷¹ numerous General Assembly Resolutions,³⁷² case law of the Inter-American Commission on Human Rights,³⁷³ Israeli and

³⁶⁶ Specifically: Geneva Conventions and Protocols thereto, *supra* note 36; the Hague Rules *supra* note 162; the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, U.N.T.S. 78:1021[hereinafter the *Genocide Convention*]; and *The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, U.N.T.S. 82:251. Why the Secretary-General referred to customary law above conventional is curious. Surely conventional law represents a superior form of international law in that it is more certain than customary international law. Perhaps he was trying to use customary international law as a means of applying conventional law universally to states, which may not necessarily have ratified the appropriate conventions (i.e. the successor Yugoslavian republics). The ICTY was established through an executive action by the Security Council, rather than by treaty. Only after the Dayton Agreement were the legal foundations of the ICTY based upon state consent contained in a multilateral treaty. Therefore the reference to customary law may reflect the dubious legal foundations of the ICTY prior to its confirmation in the Dayton Agreement.

³⁶⁷ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* U.N. Doc. S/25704, *supra* note 185 at Paragraph 36 and 111.

³⁶⁸ *International Covenant on Civil and Political Rights*, *supra* 189.

³⁶⁹ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* U.N. Doc. S/25704, *supra* note 185 at Paragraph 34

³⁷⁰ *Ibid.* at Paragraph 41

³⁷¹ *Ibid.* at Paragraph 43.

³⁷² *Ibid.* at Article 44. This suggests that the General Assembly may in fact have some legal authority, albeit persuasive rather than imperative.

³⁷³ *Ibid.* at Paragraph 45

American case law;³⁷⁴ French and Italian case law;³⁷⁵ the British *Hansard*,³⁷⁶ and numerous secondary sources.³⁷⁷ The list of actual sources of law is immense. The judges have significantly encompassed a greater variety of sources of law than what the Secretary-General envisioned. These sources however may represent interpretative aids to the judiciary in applying the formal sources enumerated by the Secretary-General.

The International Tribunal does not work in isolation.³⁷⁸ Its decisions occur within the context of the entire European and international judicial scenes. The former President of Yugoslavia, Slobodan Milosevic, filed an application through The Hague Regional Court alleging that his rights under the *European Convention on Human Rights* had been violated.³⁷⁹ The Hague Regional Court, in consultation with the European Court of Human Rights, declared the application to have been inadmissible on procedural grounds; Milosevic had failed to exhaust the available domestic remedies within The Netherlands. In a previous case that did reach the European Court of Human Rights, that Court found that the Tribunal offered sufficient procedural guarantees and had a solid legal foundation.³⁸⁰

³⁷⁴ *Ibid.* at Paragraph 55

³⁷⁵ *Ibid.* at Paragraphs 58 and 57 respectively.

³⁷⁶ *Ibid.* at Paragraph 100.

³⁷⁷ *Ibid.* at Paragraph 110 for example.

³⁷⁸ The ICTY is sometimes referred to by its original name, "The International Tribunal." When it was established, there was only one international criminal tribunal. This is why its case file numbers are prefixed by "IT-" whereas those for the ICTR are prefixed by "ICTR-."

³⁷⁹ Specifically he alleged contraventions of the *European Convention on Human Rights*, *supra* note 86: Article 5 (right to liberty and security) in relation to his detention and abduction; Article 6 (right to fair trial); Article 10 (freedom of expression); Article 13 (right to an effective remedy); and Article 14 (prohibition of discrimination). European Court of Human Rights, Press Release Issued by the Registrar, "European Court of Human Rights: Application by Slobodan Milosevic Declared Inadmissible" (27 March 2002).

³⁸⁰ *Naletilic v. Croatia* (1999), decision, Application No. 51891/99, 4 May 2000, online <<http://hudoc.echr.coe.int/>> (date accessed: 10 May 2002). This was a decision by the European Court of Human Rights.

It could be argued that the ICTY judiciary has bound itself by accepting diverse sources of law. It could also be argued that the defendants themselves have bound the ICTY judiciary, through the insistence that these sources be considered and adhered to. The incorporation of these sources may even reflect the operation of the complementary relationship between the ICTY and the domestic legal jurisdictions of the former Yugoslavia, where both jurisdictions are bound by the same sources of law. Yet the domestic legal jurisdiction of former Yugoslavia, The Netherlands and all ties to other legal obligations (such as through the ICCPR, European Convention on Human Rights or even the Treaty of Amsterdam) are integral parts of the domestic legal order. Therefore complementarity cannot be restricted to the relations between the Tribunal and the domestic courts alone, but encompasses the entire domestic and international legal array of international, regional and national legal arrangements and associated courts. The ICTY is enmeshed into this "matrix" as is the ICTR, with appropriate adjustments to legal obligations listed. Regardless of how these limitations came about, they represent substantial limitations on judicial discretionary power. Judge Cassese's remarks in 1994 may not accurately depict the ICTY of 2002.

Amendments

Unfortunately the existing system of self-governance of the Tribunal has resulted in a counter to the attempts to narrow its wide discretionary powers. The internal governance of the ICTY consists of two bodies composed of the judges – the Bureau and the Plenary. The Bureau consists of the President, Vice-President and the Presiding Judges of the Trial Chambers.³⁸¹ The Prosecutor (effectively an agent of the Secretary-General and Security Council) is excluded. Regular judges may draw to the attention of Bureau members; matters, which they feel, should be discussed by the Bureau and/or Plenary.³⁸² Thus the President, Vice-President

³⁸¹ *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 23. At this point focus will centre on the ICTY, however the same can be said for its cousin, the ICTR.

³⁸² *Ibid* at Rule 23(C).

and Presiding Judges of the Appeal/Trial Chambers perform a secondary role in governance.³⁸³ The Plenary meetings of the Tribunal provide an opportunity to accomplish the following tasks:³⁸⁴

- i. *Elect the President and Vice-President;*
- ii. *Adopt and amend the Rules of Procedure and Evidence;*
- iii. *Adopt the Annual Report provided for in Article 34 of the Statute;*
- iv. *Decide upon matters relating to the internal functioning of the Chambers and Tribunal;*
- v. *Determine or supervise the conditions of detention; and*
- vi. *Exercise any other function provided for in the Statute or in the Rules.*

Domestic courts exercise some of these functions, such as “matters relating to the internal functioning.” This might be considered to be an aspect of inherent jurisdiction in the domestic analogue. Yet the Plenary functions are significantly more substantial, incorporating functions that in the domestic model would normally be within the domain of the executive (for instance supervision of conditions of detention or adoption of an Annual Report to provide public transparency of activities).³⁸⁵

One might contest this last assertion, but the *ICTY Rules of Procedure and Evidence* is a misleading document. Its status is not subsidiary to the *ICTY Statute*. Considering it contains detailed “elaborations” of the relationship between the Tribunal and the domestic jurisdictions (mislabelled “primacy” but functionally,

³⁸³ This is reflected in their order of precedence. See *ibid.* at Rule 17(B) in particular.

³⁸⁴ *Ibid.* at Rule 24.

³⁸⁵ *ICTY Statute, supra* note 176 at Article 34 (for the Annual Report) and *ICTY Rules Governing the Detention of those Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal*, ICTY Document No. T-38-Rev8con (The Hague: ICTY, 29 November 1999).

complementarity) and the specification of powers of the Plenary, the *ICTY Rules of Procedure and Evidence* takes on the character of a constitutional document, in its own right.³⁸⁶ For the ICTY, the amendment procedure is completely within the control of the judges.³⁸⁷ There is not even a notification requirement to the Security Council. In January 2002 a slight modification to this amendment procedure was implemented. There is now a consultative role in the preparation of amendments for the *Rules of Procedure and Evidence*: although possessing no voting power, the Registrar, Office of the Prosecutor and Defence Counsel are allowed to participate in an advisory role.³⁸⁸ Input from other players within the Tribunal may represent a slight easing of the tight grip that the judiciary maintains over the amendment procedure. The judiciary of the Tribunal still retains a significant legislative capability.

The *Rules of Procedure and Evidence* has been amended 22 times, whereas the *ICTY Statute* only twice.³⁸⁹ Amendments to the *Rules of Procedure and Evidence* are probably preferable to the *Statute*, since the *Statute* requires adoption of an amendment through a Security Council Resolution, as it is itself based upon a Security Council Resolution.³⁹⁰ The judiciary has in effect by-passed controls on

³⁸⁶ Consider the elaboration (or is it expansion?) of the discretionary powers from Article 10 of the *ICTY Statute*, *supra* note 176 to Rule 9 of the *ICTY Rules of Procedure and Evidence*, *supra* note 177. . Note also that in the case of the ICC, the *ICC Rules of Procedure and Evidence* is explicitly subordinated to the *Rome Statute*, *supra* note 2 at Article 51(5)).

³⁸⁷ *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 6.

³⁸⁸ *ICTY Practice Direction on the Procedure for the Proposal, Consideration of and Publication of Amendments to The Rules of Procedure and Evidence of the International Tribunal*, Rev. 2 (24 January 2002), online: < <http://www.un.org/icty/basic.htm>>(date accessed: 18 June 2002) at Paragraph 2. Contrast to the previous versions: Rev. 1 dated 4 May 2001 and the original dated 18 December 1998.

³⁸⁹ "Basic Legal Documents," online: ICTY web site < <http://www.un.org/icty/> >(date accessed: 16 June 2002).

³⁹⁰ Originally based on Security Council Resolution 827(1993), UN Doc. No. S/RES/827 (1993). The Statute was attached as an appendix to *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* U.N. Doc. S/25704, *supra* note 185.

the exercise of the discretion in directing the Tribunal. The reason for doing so may be in part, convenience. If this is so, rather than a flaw with the running of the Tribunal, there may be an indication of a flaw with the Security Council - in that it is deficient in its ability as a legislative overseer, for amendments to the *Statute* are too cumbersome.

Judicial Appointments

While the Prosecutor is appointed by the Security Council, (and ultimately reports to the Secretary-General),³⁹¹ the judges are elected by the General Assembly, from a list of nominations submitted to the Secretary-General by States (with permanent representation before the United Nations and Members States), but only after being reviewed by the Security Council.³⁹² The approach is generally the same as in the election of judges to the ICJ, despite minor modifications. There is a balance struck between the roles of both quasi-legislative bodies (the General Assembly and the Security Council) - although the Security Council maintains a pre-eminent role.

There is no provision for the removal of a judge from the ICTY, however it would likely follow the ICJ pattern – a unanimous decision by the Plenary.³⁹³ The term of office is for only four years and judges are eligible for re-election.³⁹⁴ The potential inducement by the promise of re-election may have a greater influence in the ICTY than in the ICJ because of the shorter term.

A quick reading of the *ICTY Statute and Rules of Procedure and Evidence* suggests wide discretionary powers attributed to the judiciary. In practice however, the ICTY judiciary has tried to narrow its discretionary powers primarily

³⁹¹ *ICTY Statute*, *supra* note 176 at Article 16. Consider the comments by Louise Arbour, *supra* note 34.

³⁹² *ICTY Statute*, *supra* note 176 at Article 13*bis*.

³⁹³ *ICJ Statute*, *supra* note 26 at Article 18.

³⁹⁴ *ICTY Statute*, *supra* note 176 at Article 13*bis*(3).

through its paradoxical expansive approach to the sources of law. While some success has been achieved through this route, the nature of the internal system of the ICTY's system of governance, the nature of the *ICTY Statute* and the *ICTY Rules of Procedure and Evidence* have limited the extent of the narrowing of judicial discretionary powers. A disjunctive ICTY continues to exist.

Judicial Limitation in the *Rome Statute* of the ICC

The ICC will incorporate various methods of keeping judicial discretionary power narrow. It has to do this in order to maintain complementarity. Like the ICJ and ICTY before it, it uses many of the same means to accomplish this narrow vision of its powers. The manner in which it achieves this is however quite different at times.

Complementarity or Deferral

In the previous chapter the complementary aspect of the International Criminal Court (as defined in the *Rome Statute*) was examined in detail. The ICC judiciary is under an obligation to exercise its discretion in a manner compatible with the complementary relationship between the ICC and the domestic courts.³⁹⁵

There always exists the threat of a State not cooperating with the decisions rendered by the Court, just as in the case of the ICJ and ICTY. In such an event, a matter is eventually deferred to the Security Council or the Assembly of States Parties (depending upon who referred it to the Court).³⁹⁶ This may represent a check on the powers of the judiciary, particularly as a system of appeal to the appropriate international organ by the recalcitrant State. Since the Security Council and Assembly of States Parties represent quasi-legislative/quasi-executive bodies, the rule of law is subordinated to them once procedure has been

³⁹⁵ This is a basic tenet of the Statute – see *Rome Statute*, *supra* note 2 at Articles 1 and 51(5).

³⁹⁶ *Rome Statute*, *ibid.* at Article 87(7).

exhausted.³⁹⁷ Thus while the Court itself may be seized of a matter first, in the event of non-compliance, the matter is eventually deferred to political, non-judicial bodies.

Yet the Security Council also possesses a more immediate deferral power (Article 16 of the *Rome Statute*). This may allow the Security Council, a political and non-judicial body, to exercise some sort of pre-emptive exercise of prerogative power to stop an investigation/prosecution under a Chapter VII justification. Such a pre-emption does not exist in either the ICJ or ICTY system. It is a restriction on judicial powers to authorize an investigation/prosecution.

Sources of Law

Explicitly itemized, the sources of law available to the judiciary, in exercising its powers, constrain the discretionary powers of the ICC judges. Like the *ICJ Statute*, the *Rome Statute* enumerates the sources of applicable law that the ICC will apply:³⁹⁸

1. Foremost the *Rome Statute*, then the *Elements of Crimes* and the *ICC Rules of Procedure and Evidence* apply;
2. Second, applicable treaties and the principles and rules of international law, including international humanitarian law apply;
3. Failing the first two sources,³⁹⁹

...general principles of law derived by the Court from national laws of legal systems of the world [would apply]...provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

³⁹⁷ As mentioned above in the discussion of the ICJ, there is an exception to this rule – the case of outrageously illegal behaviour.

³⁹⁸ *Rome Statute*, *supra* note 2 at Article 21(1).

³⁹⁹ *Ibid.*

The Court may apply principles and rules as interpreted in its precedents.⁴⁰⁰ The Court is obliged to apply the "general principles of criminal law."⁴⁰¹ The primacy of the *Rome Statute* is not really surprising as it is itself a multilateral convention (unlike the ICTY Statute but like the ICJ Statute, which is an integral part of the *United Nations Charter*).⁴⁰² The *Elements of Crimes* and *Rules of Procedure and Evidence* are subsidiary legislation, interpreting the Statute.⁴⁰³ Thus from the outset, judicial discretionary power is significantly constrained in comparison to that of the ICTY, where the judiciary was able to modify the *ICTY Rules of Procedure and Evidence*.

The third category is a source of last resort. While it may involve a certain amount of judicial discretionary power, it is only to be used in the absence of the first two sources. While some commentators have suggested that this source will engender an enhanced role for comparative criminal law,⁴⁰⁴ considering the status

⁴⁰⁰ *Ibid.* at Article 21(2)

⁴⁰¹ *Ibid.* at Articles 22 – 33. These principles are in application by the ICTY too, although not necessarily expressed formally in its basic documents. If they were not applied, the ICTY would not be considered to be operating in accordance with the European Convention on Human Rights, *supra* note 86 at Article 6.

⁴⁰² One might argue that the *ICTY Statute* is now accepted in all former Yugoslav republics through accession to the Dayton Agreement and various national implementing legislation. See: Ivo Josipovic, "Implementing Legislation for the Application of the Law on the International Criminal Tribunal for the former Yugoslavia and Criteria for its Evaluation" (1998) *Y.I.H.L.* 35. This does not change the fact that its legal basis is founded in Security Council Resolution 827 and therefore has the force of a Security Council Resolution rather than a treaty.

⁴⁰³ For instance, see the explanatory note preceding the *ICC Rules of Procedure and Evidence*, *supra* note 2; and also *Rome Statute*, *supra* note 2 at Article 51(5). There is no chance that this document could ever have the same status as its ICTY equivalent.

⁴⁰⁴ This issue was discussed in the course of the preparation of this thesis with the co-supervisor: Interview Professor H. Kindred and Ian Rennie (17 August 2002). Professor Kindred was of the view that this third option would be unlikely to ever be the basis of a criminal prosecution, although it might be useful in a contested case where the first two sources required greater interpretation. There is divergence in this view. Professor J. Verhoeven was of the opposite outlook, arguing that it was an important source of law for the ICC (mentioned in his lectures at *l'Académie de droit international de La Haye* during the public international law course from 22 July 2002 to 9 August 2002 [publication expected in 2003]). Professor Schabas seems to be much of the same view (Schabas, *supra* note 2 at 73). He cites that this is already the practice before the ICTY and ICTR. He may not realize that the limitations on the exercise of discretionary power

of this source, such a contention might be debatable. It is conceivable that this argument may also apply to the second source of law. The laborious elaboration of the particularities of each core crime is described to the smallest detail in the documents under the first category (*Rome Statute, Elements of Crimes and Rules of Procedure and Evidence*). The potential exercise of discretion is minimized.

Restrictions on Diversity of Interpretation

Some academics suggest that there exists an absolute requirement that States prosecute serious offenders of human rights, especially if explicitly so required in treaties such as the 1948 *Genocide Convention*, the 1984 *Torture Convention*, the 1949 *Geneva Conventions* and the *Rome Statute*.⁴⁰⁵ There may exist some doubt as to whether such obligations represent absolute international legal obligations.⁴⁰⁶ While this may be true, the *Rome Statute* does not allow reservations.⁴⁰⁷ It also limits the scope for diversity of interpretation.⁴⁰⁸ Therefore the Member States

of the judiciary may vary between the ICTY and the ICC. It may be that this third source is simply the informal source of law to be used only as persuasive authority where the first two formal sources do not suffice. In this sense the sources may be clarified over those of the ICTY and the possibility of the judiciary enlarging its scope of law actually curtailed by the *Rome Statute*.

⁴⁰⁵ Naomi Roht-Arriaza, "Amnesty and the International Criminal Court" in Dinah Shelton, ed. *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsey, New York: Transnational Publishers, Inc., 2000) at 77; also Garth Meintjes, "Domestic Amnesties and International Accountability," *ibid.* For the treaties: *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 368; the *Geneva Conventions and Protocols*, *supra* note 36; the Hague Rules, *supra* note 162; and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, G.A. Res. 39/46 (Annex), U.N. GAOR 39th Sess., supp. No. 51, at 197, U.N. Doc. A/RES/39/51 (1985), reprinted in 23 I.L.M. 1027 (1984).

⁴⁰⁶ John Dugard also makes this point: John Dugard, "Reconciliation and Justice: The South African Experience" (1998) 8 *Transnat'l L. and Contemp. Probs.* 277 at 281. He feels that state practice is too unsettled to suggest that there exists a customary obligation to prosecute, and in the case of South Africa, it had not been party to the various conventions which may (or may not) indicate a requirement to prosecute alleged perpetrators of international crimes (*apartheid*).

⁴⁰⁷ *Rome Statute*, *supra* note 2 at Article 120.

⁴⁰⁸ This is the point of the detailed listings of the core crimes within the *Rome Statute*, *ibid.* at Articles 6 and 7 and 8; but also their elaboration in the *Elements of Crimes*, *supra* note 2. Also consider Sandra L. Bunn-Livingstone, *supra* note 12 at 173-301 (reservations) and 77-126 (diversity of interpretation).

have consented to its description of offences and are under an obligation to apply the Statute.⁴⁰⁹ Some States Parties' legislatures have already begun the process of harmonizing their laws to accommodate the *Rome Statute*.⁴¹⁰ The *Rome Statute* therefore represents the emergence of a universal interpretation of its provisions and a codification of some aspects of international criminal law.⁴¹¹ This is quite a different approach to the ICTY, where its judges relied upon European and international legal instruments to which it was assumed that the successor States of the former Yugoslavia had acceded.⁴¹² Rather than presuming that such

⁴⁰⁹ *Rome Statute*, *supra* note 2 at Article 12(1) and the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 at Article 18.

⁴¹⁰ See: Constitutional Law No. 99-568 of 8 July 1999, France. Other countries have followed including Luxembourg and the Czech Republic. See: Venice Commission, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court Adopted by the Commission at its 15th Plenary Meeting, (Venice, 15-16 December 2000)*, Document No. CDL-INF (2001) 1 (Strasbourg: Council of Europe, 15 January 2001), online: <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)001-e.html](http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-e.html)> (date accessed: 10 January 2002); also Rudolf Beate, "International Decisions: Statute of the International Criminal Court, Decision No. 98-408 DC, 1999 J.O. 1317," (2000) 94 A.J.I.L. 391 [actual decision: *Décision No. 98-408 DC*, du 22 janvier 1999, J.O., 22 January 1999, 1317, online: <<http://www.conseil-constitutionnel.fr/decision/1998/98408/98408dc.htm>> (date accessed: 14 November 2001). For a summary see: Helen Duffy, *National Constitutional Compatibility and the International Criminal Court* (2001) 11 *Duke J. Comp. & Int'l L.* 5 and M. André Dulait, *Rapport fait au nom de la commission des affaires étrangères, de la défense et des forces armées sur le projet de loi adopté par l'assemblée nationale, autorisant la ratification de la convention portant statut de la Cour pénale internationale*, (11^{ème} législ.):2065, 2141 et T.A. 443 [French Senate No. 259 *Séssion ordinaire 1999-2000* dated 8 March 2000 *Annexe au procès verbal de la séance du 8 mars 2000*].

⁴¹¹ There is a provision in the *Rome Statute*, *supra* note 2 at Article 98, which holds that the Court may not proceed with a request for surrender or assistance that would require the requested State to act inconsistently with its obligations under international law with respect to a third State without that third State's cooperation. This was the provision that the drafters of the *American Servicemembers' Protection Act 2002* (*supra* note 6) were trying to rely upon – through the planned re-negotiation of Status of Forces Agreements to ensure that extradition of American service personnel to the ICC would not happen in any host State. Regardless, this provision does not have an impact on the harmonizing effect that the Statute will have on the Member States and various international provisions concerning human rights and international humanitarian law.

⁴¹² European Union Council of Ministers, "Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'" (16 December 1991) reprinted in Danilo Türk, "Annex 1: Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'" (1993) 4 *E.J.I.L.* 72 [also referred to as *European Political Cooperation, Press Release, P. 128/91*] and also *ibid.*, Annex 2: "Declaration on Yugoslavia" at 73 [also referred to as *European Political Cooperation, Press Release, P. 129/91*]. In both of these documents respect

international instruments are universal, the *Rome Statute* makes them so by prohibiting reservations by States Parties. Coupled with the reservations is the detailed description of offences both in the *Rome Statute* but also in the *Elements of Crimes*. There is less room for diversity of interpretation at the domestic or the international level – a significant limitation in discretionary power at both levels within their respective judiciaries and within their respective political bodies.

Relationship with the United Nations

The relationship between the ICC and the United Nations may represent a further form of constraint on judicial decision-making. The Court is required to recognize and respect the status and mandate of the United Nations.⁴¹³ The relationship between the two is cooperative.⁴¹⁴ Incorporated into the *Rome Statute* is a provision, which allows the Assembly of States Parties to request an advisory opinion from the ICJ through the General Assembly.⁴¹⁵ This may represent recognition of the jurisdiction of the ICJ – along the lines of a separation of powers. The relationship with the ICJ is therefore parallelist (or dualist) and not

for human rights, ethnic minorities and subscription to the commitments to the framework of the Commission on Security and Cooperation in Europe (CSCE) – and hence the European Court of Human Rights. These statements are reflected in the Secretary-General's report that introduced the ICTY Statute to the Security Council (*supra* note 185). Note that CSCE is referred to; its institutional title was changed to the Organization on Security and Cooperation in Europe in 1994 after it had become a regional organization for the purposes of Chapter VIII of the *Charter*, *supra* note 26. See: Organization on Security and Cooperation in Europe, *OSCE Final Act: 25, 1975-2000 Handbook* (Vienna: OSCE, 2001), available online: <<http://www.osce.org/publications/handbook/handbook.pdf>> (date accessed: 27 August 2002) at 12-16.

⁴¹³ *Draft Relationship Agreement Between the United Nations and the International Criminal Court: Discussion Paper Proposed by the Coordinator, Preparatory commission for the International Criminal Court*, UN Doc. No. PCNICC/2001/L.1/Rev.1/Add. 1 (14 March 2001) at Articles 2(2) and 2(3). This document is online: ICC website < <http://www.un.org/law/icc/index.html>> (date accessed: 5 March 2002).

⁴¹⁴ *Ibid.* at Articles 4, 5 and 6.

⁴¹⁵ *Rome Statute*, *supra* note 2 at Article 119 and *A Draft Relationship Agreement Between the United Nations and the International Criminal Court*, *supra* note 415 at Article 13b.

complementary. This may be indicative of a major delimitation between the two courts, further regulating the exercise of judicial discretionary power.

Qualifications

The required qualification for admission to the judiciary is revealing. While the required background is similar to that required for the ICJ and ICTY,⁴¹⁶ the ICC judges are selected from persons who,⁴¹⁷

...have established competence in criminal law and procedure, and the necessary relevant experience...

(as judge, prosecutor or advocate) and those who,⁴¹⁸

...have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.

The proportion of judges qualified in criminal law to those qualified in international law has been fixed at nine to five.⁴¹⁹ Unlike the ICTY this represents a major

⁴¹⁶ For instance "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." (*Rome Statute, ibid.* at Article 36(3)(a))

⁴¹⁷ *Ibid.* at Article 36(3)(b)(i).

⁴¹⁸ *Ibid.* at Article 36(3)(b)(ii). This raises a curious question about the recent efforts to establish an international criminal bar association for the ICC (see Stéphanie Maupas, "The Third Pillar: Creation of the International Criminal Bar" (17 June 2002), online: [diplomatiejudiciaire.com](http://www.diplomatiejudiciaire.com) <<http://www.diplomatiejudiciaire.com/UK/ICCUK9.htm>> (date accessed: 6 July 2002)). Could this initiative be based upon an incorrect analogy of the ICC to a domestic criminal court? The idea of pillars comes from European Law (see Klaus-Dieter Borchardt, *The ABC of Community Law*, *supra* note 86). Presumably the pillars of the ICC are the judiciary and the prosecution – the third would be the international criminal bar. The initiative has been met with varying degrees of hostility from various groups, including lawyers themselves. Yet on the other hand a control over those lawyers who appear pleading cases, might avoid some of the problems associated with counsel in the two tribunals - especially attempts to use it a forum for political grand standing (for example *ICTY Rules of Procedure and Evidence, supra* note 177 at Rule 77 and *Prosecutor v. Dusko Tadic* (2000), Case No. IT-94-1, (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), "Judgement in Allegations of Contempt Against Prior Counsel Milan Vujin," online: ICTY <<http://www.un.org/icty/tadic/appeal/vujin-e/index.htm>> (date accessed: 6 July 2002). [Judgement dated 31 January 2000; Judge Mohamed Shahabuddeen, Presiding].

⁴¹⁹ *Rome Statute, supra* note 2 at Article 36(5).

expansion of the scope of judicial enlightenment from beyond criminal law. It may also represent a counterweight to the separation of powers between the ICJ and the ICC in that there will be judges with expertise in the subject matter of the ICJ – public international law. Rather than a relationship of absolute parallelism, the relationship may be capable of being complementary. Such an approach should seem logical, since international crime is both international and criminal. It must however be remembered that individuals have no standing before the ICJ, therefore the relationship between the two courts will always be independent and parallel. The ICC judiciary will however now possess sensitivity toward issues of public international law.

Judicial Appointments

The nomination of candidates for judicial office begins with their nomination in accordance with the procedure for appointment to high judicial office in their own States or alternatively by the nomination procedure similar to that of the ICJ.⁴²⁰ The State Party will forward the nomination to the Assembly of States Parties.⁴²¹ The Assembly of States Parties elects the judges through a two-thirds majority of the States Parties present and voting.⁴²² States Parties may take into account the need for equitable representation of global legal systems, geographical representation, gender and specific expertise (such as violence against women and children).⁴²³ The term of office lasts for nine years and is not renewable.⁴²⁴ Judges are not to engage in any activity likely to affect their independence (such as employment).⁴²⁵ A judge may be removed from office for serious misconduct

⁴²⁰ *Rome Statute, ibid. at Article 36(4)(a).*

⁴²¹ *Ibid. at Article 36(4)(b)*

⁴²² *Ibid. at Article 36(6)(a).*

⁴²³ *Ibid. at Article 36(8).* Unlike the ICJ or ICTY, gender and specific area of expertise considerations are novel.

⁴²⁴ *Ibid. at Article 36(9)(a).*

⁴²⁵ *Ibid. at Article 40.* Their immunities are similar to the ICJ under Article 48.

only by a two-thirds majority vote by the Assembly of States Parties, after being so recommended by a two-thirds majority vote of the other judges.⁴²⁶ The President of the Court may take disciplinary measures against a judge (reprimand or fine).⁴²⁷ Reprimands are forwarded and recorded by the President of the Bureau of the Assembly of States Parties.⁴²⁸

The nature of judicial appointments is therefore quite different to that of the ICJ and the ICTY. While nomination may involve the Security Council (if the ICJ approach is adopted), it will more likely involve the States Parties themselves since those States that do not sit on the Security Council will be able to avoid the Council vetting their nominations for candidature. The role of the Assembly of States Parties gives the entire system a much greater "democratic" character in that there is no filtration possible by the Security Council and that the elections are based upon a two-thirds majority, rather than a majority of a college of states (of which 5 States have a permanent vote). The duration of a nine-year term is reminiscent of the ICJ, but the prohibition of renewal undermines any residual influence, related to the incentive for re-election, that might exist from either the nominating State Party or the Assembly of States Parties. Removal from office is determined by the other judges (Plenary) but is subject to approval by the Assembly of States Parties. Thus the discretionary powers of the President are limited (in comparison to the ICTY) largely to the imposition of disciplinary measures against delinquent judges and to an advisory role to the Assembly of States Parties. There is a substantial limitation of discretionary power. This may be expected, given the existence of the quasi-legislative Assembly of States Parties.

⁴²⁶ *Ibid.* at Article 46(2)(a).

⁴²⁷ *Ibid.* at Article 47. Also *ICC Rules of Procedure and Evidence*, *supra* note 2 at Rule 30(1) and Rule 32.

⁴²⁸ *ICC Rules of Procedure and Evidence*, *supra* note 2 at Rule 30(4).

Amendments

The power of amending the basic documents of the ICC also reveals severe limitations imposed upon the exercise of judicial discretion, although not immediately. For the first seven years of the Court's operation, the Assembly of States Parties will possess no power to amend the *Rome Statute*.⁴²⁹ In the interim, the ICC will operate much as the ICTY did in its formative years with the judges exercising their discretionary powers to direct the decisions of the Court. Their decisions will have to be in conformity with the limitations on their powers.

After the expiry of the seven years, any State Party may propose amendments to the Statute through the Secretary-General, who is obligated to pass these on to the States Parties.⁴³⁰ The role of the Secretary-General is restricted to simply disseminator, as she simply notifies the States Parties. The Assembly of States Parties only meets once a year.⁴³¹ Three months later the Assembly of States Parties will consider any proposal and may adopt it on a two-thirds majority vote.⁴³² Alternatively the proposal may be handed over to a Review Conference and eventually adopted through a two-thirds majority vote.⁴³³ The Secretary-General of the United Nations also acts as facilitator, for it is through her, on behalf of the Assembly of States Parties (after a majority approval), that the Review Conferences are convened.⁴³⁴

Amendments to the subsidiary legislative documents, like the Statute, downplay involvement by the judiciary in favour of the Assembly of States Parties.

⁴²⁹ *Rome Statute*, *supra* note 2 at Article 121(1).

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.* at Article 112(6) although it may also meet as required in special session. The infrequent meetings may give the Assembly a quasi-legislative character from the start. This could change though if the special sessions are used frequently.

⁴³² *Ibid.* at Article 121(2) and 121(3).

⁴³³ *Ibid.*

⁴³⁴ *Ibid.* at Article 123.

Amendments to the *Elements of Crimes* may be proposed by any State Party, the judges acting in absolute majority or the Prosecutor.⁴³⁵ They must be adopted by a two-thirds majority of the Assembly of States Parties.⁴³⁶ Amendments to the *Rules of Procedure and Evidence* may similarly be proposed and require a two-thirds absolute majority for adoption by the Assembly of States Parties.⁴³⁷

The limitations imposed upon the judiciary are quite significant, in its powers to carry out amendments to the constitutional documents of the ICC. The judiciary does not have the power to suggest amendments to the Statute, although it can have input in changing the secondary instruments of the Court. It is probable that the judiciary may have an informal consultative role through the Bureau. The role of the Assembly of States Parties, coupled with a role by States Parties represent the sole means by which amendments to the Statute are accomplished. Amendments are adopted democratically through a majority vote. This process is quite different to that of the *United Nations Charter* – perhaps even streamlined.⁴³⁸ There is no qualified voting procedure and no veto under any condition. Judicial discretionary power is not entirely eliminated in the secondary legislation, but the Assembly scrutinizes it.

The *Rome Statute* therefore sets out some rather significant limitations on judicial discretionary power. Complementarity itself requires that the Court steer clear of any tendency toward supranationalism – a limitation. The qualifications of the judges suggest a broadening of the scope of jurisdiction to include international

⁴³⁵ *Ibid.* at Article 9(2).

⁴³⁶ *Ibid.* at Article 9(3).

⁴³⁷ *Ibid.* at Article 51(2). There is provision for urgent cases where the judges may, on a two-thirds majority, draw up provisional rules or amendments (or reject existing ones). There is however a requirement that these changes be proposed to the Assembly at its next ordinary or special meeting. See Article 51(3). The *ICC Rules of Procedure and Evidence*, *supra* note 2 at Rule 3 deals with Amendments but simply refers to the provisions of Article 51 of the *Rome Statute* (an indication of the primacy of the Statute).

⁴³⁸ *Charter of the United Nations*, *supra* note 26 at Articles 108-109.

law along with criminal law. This apparent increase in discretionary power is offset by the narrow selection of sources of law available and in particular, the primacy of the *Rome Statute* above all other legal sources, followed by its own detailed, subsidiary documents. It is also offset by the explicit recognition of the status of the UN and the jurisdiction of the ICJ. An examination of the manner in which judges are appointed reveals the increasing importance of the Assembly of States Parties in electing them through a majority vote. This can be contrasted to the manner in which both ICJ and ICTY judges are elected. The accountability of judges for serious misbehaviour rests with the Assembly of States Parties rather than with the judiciary itself. Only in cases of disciplinary action will the President act, although with the supervision of the Assembly of States Parties. Amendments to the *Rome Statute* rely primarily upon the Assembly of States Parties. The role of the judiciary has been reduced in governing the Court. In the case of the ICTY this power to amend the quasi-constitutional *Rules of Procedure and Evidence*, amounted to a legislative power being exercised by the judiciary. This power has passed to the Assembly of States Parties in the framework of the *Rome Statute*. Overall, the *Rome Statute* limits the exercise of judicial discretionary power and vests it with the Assembly of States Parties.

Conclusion

In describing further limitations on judicial power uniquely at the level of international courts, insight has been gleaned regarding the interaction of complementarity on the international courts themselves. The international legal environment is adverse to the concept of centralization or supranationalism. In exercising judicial discretionary power within such a framework, the ICJ has opted for a very narrow conception of its jurisdiction but one that is also very conservative. By so doing the centralization that Kelsen envisioned has never been realized. The proliferation of international courts and tribunals, the rising influence of NGOs and an increase in the number of States in the wake of decolonisation has increased the decentralization of the international legal order.

In such an environment, international courts have regulated themselves in order to preserve this decentralized character. This was evident in the extremely narrow concept of jurisdiction within the ICJ. There are however judges who want to adopt a much broader concept. In the case of the ICTY, initially a wide concept of jurisdiction was adopted with broad discretionary powers. The result of such an approach has been the acquisition of a supranational character on the part of the ICTY. This character flows from the ICTY being a subsidiary organ of the Security Council, established under a Chapter VII Security Council Resolution. The judiciary has tried to narrow the ICTY's wide discretionary powers by expanding the available sources of law, but the narrowing is incomplete due to the nature of the ICTY Statute and the way in which it governs itself. It still retains a supranational character in the way in which it asserts its jurisdiction and therefore is disjunctive.

The *Rome Statute* sets up a somewhat different structure of judicial limitation. It describes its jurisdiction as both criminal and international. The judicial limitations are in place through complementarity, the primacy of the Statute as a source of law, and its statutory comity to the United Nations. By submitting requests for advisory opinions through the General Assembly to the ICJ, the ICC will have to recognize and respect the jurisdiction of the ICJ – what might be a parallelist approach in recognizing other international jurisdictions. The accountability of judges rests primarily with the Assembly of States Parties rather than with the judges themselves (except in less serious disciplinary matters). The appointment of judges is mostly in the hands of the Assembly of States Parties. After seven years, the Amendment procedure for the Statute will be in the hands of the Assembly. In the initial “formative” seven years, the judiciary will have some degree of freedom in rendering the precedents, but only in conformity with the restrictions imposed upon its discretionary power. Amendments to the *Rules of Procedure and Evidence* are also entirely subject to the approval of the Assembly

of States Parties. Thus governance of the ICC by the judiciary is far more restrictive than in the situation of the ICTY.

The *Rome Statute* entails a fully participative approach, investing roles for numerous domestic and international entities in helping to direct the Court's decision-making. Complementarity ensures that such a deliberative approach is possible. Yet in addition to complementarity as described in the *Rome Statute*, a secondary mechanism is operative. It is a subtle mechanism but relates to inherent restrictions on judicial power at the international level. Whether the sources of such limitation comes from the nature of the decentralized international legal system, the sources of law or the nuances of the internal organization of the various international courts, in the case of the ICC the result is a supplemental means of regulation, reinforcing complementarity. In the next chapter an illustration of both complementarity and its interstitial analogue will be accomplished by considering the truth and reconciliation commission.

Chapter 5

Chapter Five: A Case Study of Complementarity – Truth and Reconciliation Commissions and Amnesties

Introduction

While it is difficult to forecast how the ICC will operate in the near future, the image of the Court portrayed in the last three chapters makes such predictions feasible at least in terms of how it ought to function. There are many examples where its restricted subject matter, the complementary relationship between it and the domestic courts (limits on the Prosecutor and judiciary as stipulated in the *Rome Statute*) and the limits inherent upon the ICC judiciary outside of the *Rome Statute* could be considered. One might consider these areas as potential sources of “conflict.” “Conflict” may not be the appropriate word to describe the interaction. They are “challenges,” which confront this emerging and complex legal interaction. Examples of such challenges could include: the relationship between the ICC/Assembly of States Parties and the United Nations;⁴³⁹ access to information that might be considered classified by a subject State;⁴⁴⁰ the provision of classified information from one State to the ICC, but without permission from the subject State;⁴⁴¹ extradition;⁴⁴² competing requests;⁴⁴³ conflicts of international legal

⁴³⁹ *Draft Agreement between the United Nations and the International Criminal Court*, *supra* note 415.

⁴⁴⁰ *Rome Statute*, *supra* note 2 at Article 72

⁴⁴¹ *Ibid.* at Article 73.

⁴⁴² This is ultimately the Pinochet problem. Consider: Roman Boed, “The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations,” (2000) 33 *Cornell Int’l L.J.* 297; and Christine Chinkin, M., “International Decision: United Kingdom House of Lords, (Spanish request for extradition). *Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (no. 3)*. [1999] 2 *WIr* 827” (1999) 93 *A.J.I.L.* 703.

⁴⁴³ *Rome Statute*, *supra* note 2 at Article 90.

obligations;⁴⁴⁴ what happens when the Security Council refers a case to the ICC, where an individual/State is not a State Party;⁴⁴⁵ whether the ICC could have jurisdiction over individuals who may have committed international crimes under its jurisdiction while occupying a position of responsibility for an international organization (such as the United Nations Security Council) instead of a State; the relationship with international organizations;⁴⁴⁶ and the truth and reconciliation commission (TRC) coupled with amnesties. TRCs and amnesties have become a rather popular means of redirecting States gone awry, onto the path toward normalcy. It is for this reason that their study presents a useful opportunity to study the mechanism of complementarity in action alongside how judicial discretionary power to prosecute is regulated. If the ICC were to deny amnesties outright, or the validity of TRCs, would it be interfering with this process?⁴⁴⁷ How should it decide?

The aim of this chapter is to answer these questions. This chapter is divided into two parts. In Part I, a brief examination of the validity of amnesties at international law prior to the introduction of the *Rome Statute* is considered. All possible variants of TRCs are considered, however it becomes evident quickly that one cannot dismiss any one of these variants as invalid and along with them any associated amnesty. A more sophisticated assessment of the use of discretionary power by a jurisdiction is necessary. John Dugard's assessment of the South African TRC and associated amnesties is useful in this respect, although it is only

⁴⁴⁴ In particular *Ibid.* at Article 98. This is the provision that ASPA tends to rely upon in making States renegotiate their SOFAs in order to bring it into effect.

⁴⁴⁵ Madeline Morris, *supra* note 43. This was the basis of Mr. Lahiri's objection for India. Can the Security Council refer a case to the ICC under Chapter VII of the Charter – and if so does that mean that the jurisdiction of the ICC is backed-up by the Security Council Resolution and therefore applicable even to non-State Parties? Consider Mr. Lahiri's comments, *supra* note 42.

⁴⁴⁶ This is the subject of the next chapter.

⁴⁴⁷ Consider *Rome Statute*, *supra* note 2 at Article 27(2). The Article is restricted to immunities of persons in official capacity – what about all persons?

the informed opinion of one academic. The United Nations' position is then examined initially with respect to Sierra Leone and the *Lomé Peace Agreement*.⁴⁴⁸ Latest developments appear to have harmonized its position with that of the two *ad hoc* tribunals – namely that amnesty is not forbidden *per se*. It is a matter for the domestic jurisdiction, with the exception of those most egregious of international crimes committed by those most responsible acting as agents of the State. In such exceptional cases, both the fiduciary nature of the individual's position and the nature of the crime necessitate international prosecution by the international community.

In Part II, just how the ICC determines the validity of an amnesty is considered. There exist two tests: 1) the test to determine if the domestic courts are unwilling or incapable of dealing with a situation; and 2) the *ne bis in idem* test, primarily aimed at instances of determining if a domestic investigation, prosecution or acquittal was carried out in bad faith, an abuse of process or simply a "sham" to shield the accused. The justification for asking for a deferral to the ICC from the domestic courts (or the "issue of admissibility" in the words of the *Rome Statute*) is significantly more restrained than was the case in the ICTY. The State is presumed to be acting in propriety, unless there is evidence to the contrary. Furthermore through the system of discretionary diversity contained in the *Rome Statute*, there are many more entities that can either promote or challenge the application of both tests. These entities include the States themselves, NGOs and the Security Council. They are non-judicial bodies. Thus a role for political decision-makers is built into the *Rome Statute*. The section closes with a discussion of the potential for TRCs of a very different nature to those tolerable under the system of *ad hoc* tribunals. There is a wider scope for TRCs of a quasi-judicial character under the *Rome Statute* thanks to its increased conjunctivity than

⁴⁴⁸ *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone and The Revolutionary United Front of Sierra*

in the case of the ICTY. Thus the South African TRC and amnesties would likely be tolerated under the *Rome Statute*, but not under the *ICTY Statute*. Thus the *Rome Statute* may indicate a greater potential for the toleration of amnesties and a wide variety of TRC variants by the ICC.

The Validity of Amnesty at International Law Prior to the *Rome Statute*
Possible Variants of TRCs

Table – Discretionary Combinatorial Matrix of Domestic Variants of TRCs

Type	Executive	Judicial	Legislative	Description/Example
A	1	1	1	Balanced TRC – full involvement by all branches of State (ideal)
B	1	1	0	Undemocratic TRC - Chile
C	1	0	1	Extra-Judicial TRC – Sierra Leone
D	0	1	1	Extra-Executive TRC – South Africa
E	1	0	0	Exclusively Executive TRC – Rwanda or Uganda
F	0	1	0	Exclusively Judicial TRC – “pure rule of law” (ideal)
G	0	0	1	Exclusively Legislative TRC - “rule of mob”
H	0	0	0	Non-State TRC – rejection of formal TRC

The table above might come to mind if one thinks of all possible variants of involvement by the three branches of the domestic jurisdiction. Any one of these variants may be suitable for a given context. The table represents a “truth” table based upon the presence of influences from the three branches of the State: the executive, judiciary and legislature.⁴⁴⁹ A fully balanced TRC is probably

*Leone (RUF/SL), 18 May 1999 (entry into force 25 May 1999) [hereinafter *Lomé Peace Agreement*], online: < http://www.sierra-leone.gov.sl/ncddrr/lome_pea.htm >.*

⁴⁴⁹ The truth table is based upon the logical construct of the executive and judiciary and legislature. Thus since any one of these variables may be adequate or not, a total of 2³ or eight possibilities exist. William Burke-White, *supra* note 30 at 479 for example considers only two variables in his categorization of TRCs: legitimacy and scope. His approach is heavily steeped in the relationship of the individual to the State to determine legitimacy and the legislated protection (through conventional and customary law) of individual rights authorized by individuals to the State to determine scope (a test of proportionality). This approach presupposes the primacy of international human rights and the rise of the individual in international criminal law. It may also presuppose a

unrealizable, since the conditions which give rise to a need for the TRC, occur when the apparatus of the State goes awry – or one of the branches fails to exercise effective control. Perhaps a fully balanced TRC is represented by a properly functioning domestic judicial system. Those situations where only one branch is effective represent cases of the State gone awry: the exclusively executive, exclusively judicial and exclusively legislative variants. The option to have no official TRC may amount to a collective denial of a past too difficult to confront.⁴⁵⁰ Some advocates of universal human rights might insist that any TRC that is judicial in nature is acceptable,⁴⁵¹ although they might equally argue that it must be non-judicial, in order to allow prosecution by international courts of international crimes.⁴⁵² Advocates of legal realism might argue that the State (executive and/or legislature) has full discretion in overriding the judicial prosecution of such cases.⁴⁵³ There might be compelling reasons not to prosecute all instances of violations.⁴⁵⁴ Thus the decision to establish a specific variant of

universal form of human rights law. The existence of such a legal order has been questioned throughout this thesis and the *Rome Statute* does not necessarily create such an order. By William Burke-White's liberal approach, the option of no TRC at all seems to be excluded as viable. It may be that his approach is too restrictive.

⁴⁵⁰ Confronting the truth is not necessarily a guarantee of restoring harmony (Johnathan Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission," (1999) 49 Univ. of Toronto L.J. 315 at 317).

⁴⁵¹ Lousie Arbour, *supra* note 34 or A. Cassese, *supra* note 346 both hold that primacy of the rule of law as sacrosanct in the operation of the ICTY in this context.

⁴⁵² This will be explored shortly, but consider President Jorda's views expressed in ICTY, Press Release JL/P.I.S./591-e, *supra* note 179.

⁴⁵³ Marc Grossman, *supra* note 231 for example.

⁴⁵⁴ Alex Boraine was of this opinion in assessing the South African approach to the granting of amnesties. Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000) at 384-5. He also recommended caution in applying the South African approach to all situations. Thus blindly applying any one to all circumstances is inappropriate. Naomi Roht-Arriaza suggests that collective denial was an appropriate choice for Japan in dealing with its painful legacy in World War II ("Overview" in Naomi Roht-Arriaza, *supra* note 407 at 226). Also consider Tomochika Okamoto, *The Distortion and the Revision of History in Postwar Japanese Textbooks, 1945-1998* (M.A. Thesis, Sociology Department of Queen's College, City University of New York, 1998) [unpublished], online: <<http://member.nifty.ne.jp/Tomochika/>> (date accessed: 2 July 2002) at Conclusion.

TRC is very much context specific and is generally an assessment of how the domestic discretionary powers are exercised.

The Exercise of No Discretionary Powers to Stay Prosecution

The failure to exercise discretionary power to not prosecute equally raises problems. Those who often are alleged to have committed atrocities are frequently the only individuals that are competent to enter into negotiation for peaceful resolutions to conflict. Thus the indictment of Milosevic by Louise Arbour in 1999 was hardly beneficial to a peaceful resolution of the Kosovo conflict.⁴⁵⁵ This situation represents at least one practical reason why discretion should be exercised in prosecuting individuals for international crimes. There may be pressing reasons of a non-judicial nature for an amnesty, regardless of whether it amounts to impunity.

The example of Rwanda provides another vivid illustration of what happens when little or no discretionary power is exercised. In genocide of national scale, there were vast numbers of individuals who were complicit in some form. Nearly 150,000 persons remain in detention since the RPF assumed power in 1994. The Rwandese executive is of the position that all persons against whom an accusation was made, should be held individually criminally accountable. The Rwandese justice system has become overwhelmed. Crowded prisons put an enormous drain on the resources of the government and the nation, not to mention a judiciary still recovering from being one of the first casualties of the genocide. Many of those detained and still awaiting trial suffer deplorable conditions, which are in contravention to their basic human rights under the ICCPR.⁴⁵⁶ Despite efforts to diffuse the problem through the introduction of plea bargaining

⁴⁵⁵ Arbour, *supra*, note 34 and for the Indictment itself see *supra* note 250.

⁴⁵⁶ ICCPR, *supra* note 189 at Article 9. "Rwanda: Elections May Speed Genocide Trials But New System Lacks Guarantee of Rights," Human Rights Watch News (4 October 2001), online: Human Rights Watch <<http://www.hrw.org/press/2001/10/rwanda1004.htm>> (date accessed: 4 October 2001).

(*marchandage*),⁴⁵⁷ restoration of the judicial system and the introduction of a regional tribal court system (*Gacaca*),⁴⁵⁸ the RPF remains in a vindictive mood to all those whom it deems even remotely connected to the genocide.⁴⁵⁹ While there is a National Unity and Reconciliation Committee, this TRC remains dominated by the executive, with the President at its head. It is simply an instrument for denunciation of persons or entities that are suspected of complicity with the genocide. Thus in the case of Rwanda, its TRC is essentially of the exclusively executive variant.

Discretionary Power to Grant Amnesties

Ultimately the exercise of a discretionary power by officials in one or more branches of State is necessary in order to decide whether there are compelling reasons not to prosecute. Whether the decision explicitly grants an amnesty, defers prosecution to a later date or confers immunity, does not matter in this

⁴⁵⁷ For a comprehensive overview see: *Prosecuting Genocide in Rwanda: A Lawyers Committee report on the ICTR and National Trials* (New York: Lawyers Committee for Human Rights, July 1997) at VIII(C) [unpaginated]. Plea-bargaining is objectionable to the civil law system as it represents a deviation from the truth and the exercise of discretionary powers by the judiciary inconsistent with the limitations on such discretion imposed by the legislature through statute.

⁴⁵⁸ *Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990* (Rwanda), 30 August 1996, Article 2 online: Prevent Genocide International Homepage <<http://www.preventgenocide.org/law/domestic/rwanda.htm>> (date accessed 18 October 2001). This is a translation into English. Also note that on 19 June 2002, the first *Gacaca* trials were held: Emmanuel Mutabazi, Ladislav Niyongira, and Ephrem Rugiriza, "The *Gacaca* Ballet Comes on Stage" *Judicial Diplomacy* (19 June 2002), online: *Judicial Diplomacy* <<http://www.diplomatiejudiciaire.com/UK/RwandaUK11.htm>> (date accessed: 4 July 2002). It should be noted that the Lawyers Committee for Human Rights, *supra* note 462, has suggested that the *Gacaca* courts likely violate the ICCPR, *supra* note 189 at: Article 14(1) and Article 26 (right to equality before the law – not in the case of RPF personnel); and Article 14(3)(b) (right to defence counsel – denied under *Gacaca*); and Article 14(5) (right to appeal – denied under *Gacaca*). The popularity of the *Gacaca* system amongst legal academics is probably a result of wanting to see reflexive law in operation, outside of the parameters of the State – and therefore an endorsement of modern liberal theory. Also consider Sadat, *supra* note 66 at 57.

⁴⁵⁹ RPF personnel are not subject to the normal judicial system but rather to the military system of courts.

discussion. The decision not to prosecute may represent a major step forward on the path to reconciliation within a divided society.⁴⁶⁰

Reconciliation in South Africa is a process which started not only when enemies sat on opposing sides of a table but also when victims told their stories and perpetrators confessed their atrocities. It is a process which must continue long after the Commission has completed its task.

Yet it may also be representative of a situation where the branches of State have been co-opted by criminal groups to shield themselves or frustrate efforts at making them individually accountable for their acts. The international community is therefore faced with a dilemma. Are there compelling reasons to accept the decision or is it simply subterfuge aimed at preventing a prosecution and further pushing the State toward the commission of international crime and going awry?

The Confused Situation Prior to the Rome Statute

South Africa

John Dugard tried to carry out an assessment of whether the South African Truth and Reconciliation Commission was compatible under international law.⁴⁶¹ Although there were numerous international conventional instruments regarding *apartheid* and related crimes alleged to have occurred, South Africa was not a party to any at the time in question. Yet Professor Dugard considered that in the case of international crimes, "states do not enjoy absolute freedom of choice in deciding upon the measures to be taken" after a regime change.⁴⁶² Despite attempts to determine whether the South African amnesty was legally valid under customary international law,⁴⁶³ the South African courts failed to address such a

⁴⁶⁰ Boraine, *supra* note 459 at 377.

⁴⁶¹ John Dugard, *supra* note 408.

⁴⁶² *Ibid.* at 280.

⁴⁶³ *Ibid.* at 299, citing *Azanian Peoples Organisation (AZAPO) v. President of the Republic of South Africa* 4 SALR, 683-5 (CC).

question.⁴⁶⁴ Professor Dugard nevertheless concluded that it was, taking into account the following factors:⁴⁶⁵

1. The amnesty was the result of a "political compact included in a liberal Constitution that was given form by a statute enacted by a democratically elected Parliament;" [legitimate]
2. The TRC and related committees were independent of the government and broadly representative of the people; [independent and democratic]
3. The TRC was sufficiently funded and resourced to investigate fully and thoroughly; [effective]
4. Safeguards were in place to protect the procedural rights of the "accused;" [lawfully respectful of human rights]
5. The TRC had the power to award compensation to victims in accordance with the ICCPR; [lawfully respectful of human rights]
6. The TRC was obliged to submit a report of its findings in a reasonable time (3 years); [effective] and

⁴⁶⁴ Ibid. at 307.

⁴⁶⁵ Ibid. at 307. In the square brackets an adjective summarizing the factors has been added. This analysis is preferred over the Joinet Report (*Annex II: Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Appendix B: United Nations: Economic and Social Council: Distribution: General: E/CN.4/Sub.2/1997/20, 26 June 1997: English: Original: French: Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities: Forty-ninth Session: Item 9 of the Provisional Agenda: The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, in 59 Law & Contemp. Prob. 249. at 264 [hereinafter the Joinet Report] at 262, online: LEXIS (Secondary Legal, Law Reviews Combined) < <http://www.lexis.com/research/lawschool>>). This report is lengthy and incorporates some 50 guidelines to what makes a TRC-related amnesty invalid. This may be an attempt to curtail the exercise of discretionary power. It does not have any legal force however (and neither do John Dugard's factors for that matter).*

7. The Amnesty was not unconditional. [not disproportional]

For Dugard a TRC has to be legitimate, independent, democratic, effective and legally respectful of human rights – only then is an amnesty valid if conferred through such a TRC, where the amnesty is not unconditional.

The United Nations' Position

The United Nations considers unconditional or blanket amnesties for international crimes to be invalid at international law, no matter how pragmatic or popular their use might be domestically.⁴⁶⁶ The United Nations Security Council's unenthusiastic support for the blanket amnesty of the *Lomé Peace Agreement* of May 1999,⁴⁶⁷ demonstrates how blanket amnesties may not be entirely valid under international law, where international crimes are involved.⁴⁶⁸ This is despite the fact that the Agreement was a precondition to the establishment of peace in Sierra Leone. The Government of Sierra Leone eventually ignored the blanket amnesty

⁴⁶⁶ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, 55th Sess., 915th mtg., U.N. Doc., S/2000/915, (2000) at Article III, Paragraphs 22 and 23. Charles Villa-Vicencio also raises this point: Charles Villa-Vicencio, "Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet," (2000) 49 *Emory L.J.* 205 at 214. See also Sadat, *supra* note 66 at 67, although she suggests that if blanket amnesties for international crimes are not already prohibited at international law, they should be as "they undermine the rule of law and are, for the most part, simply self-serving declarations by government officials exempting themselves from the reach of law..." (*ibid.* at 68) This is an oversimplification of a much more difficult issue. Sadat's outlook may be steeped in the primacy of rule of law and as such may be unrealistic.

⁴⁶⁷ *Lomé Peace Agreement*, *supra* note 453 at Article IX (the amnesty).

⁴⁶⁸ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 471. The RUF was also given control of the diamond mines and cabinet positions in the government. Its position as an effective "shadow State" was entrenched by the Agreement, yet by giving it cabinet positions it was re-integrated into the State. See: Karen Gallagher, "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2000) 23 *T. Jefferson L. Rev.* 149. Gallagher provides a general synopsis of events leading to the repeal of the amnesty. See also: INS Resource Information Center, *supra* note 117); *Situation of Human Rights in Somalia: Report of the Special Rapporteur, Ms. Mona Rishmawi, Submitted in Accordance with Commission on Human Rights Resolution 1997/47*, ECOSOC 44th Sess., UN Doc. E/CN.4/1998/96 (16 January 1998); and David Pratt, "Sierra Leone: Danger and Opportunity in Regional Conflict" *Report to Canada's Minister of External Affairs, The Honourable John Manley, PC, MP* (Ottawa, 27 July 2001).

provisions of the Accord, after the rebel leader, Foday Saybana Sankoh, demonstrated bad faith by reattempting to usurp the State, through the capture of thousands of UN peacekeepers and a failure to disarm his rebel forces in May 2000.⁴⁶⁹ He was subsequently arrested in violation of the Peace Agreement. Other aspects of the Agreement remained in force, including the Truth and Reconciliation Commission and a form of amnesty/rehabilitation for the abducted child soldiers that constituted the majority of the rebel forces.⁴⁷⁰ Thus the treaty was not entirely abrogated nor was the blanket amnesty entirely rejected. This modified approach does recognize that in certain instances full individual criminal accountability may not be appropriate. In the case of Sierra Leone, the Security Council recognized that unravelling the Agreement might not be the best route to dealing with a Chapter VII crisis, opting instead for a Special Court to try only those most responsible such as Sankoh. The role of the Security Council is important in that it is a non-judicial body, along with the non-judicial elements of the Government of Sierra Leone, exercising a discretionary prerogative not to prosecute all instances of war crimes.

The situation with the ICTY is slightly different. It must be remembered that the ICTY is a judicial organ and therefore it possesses limited discretionary powers not to prosecute. Such discretionary powers, at least according to the ICTY Statute, reside in the final deferral of a matter to the Security Council in the case of an uncooperative State.⁴⁷¹ The indictment of Milosevic by Louise Arbour illustrates

⁴⁶⁹ For a description of the events that led to the failure of the Agreement see: *Sixth Report to the Secretary-General on the United Nations Mission in Sierra Leone*, 2000, UN Doc. S/2000/832 (2000) at 1. This was probably in the aftermath of the embarrassing situation that the UN peacekeepers found themselves in – namely the taking hostage of thousands of Indian army peacekeepers. Sankoh has remained in solitary confinement for the last year awaiting trial.

⁴⁷⁰ Security Council, *Sixth Report to the Secretary-General on the United Nations Mission in Sierra Leone*, *ibid.* at 1.

⁴⁷¹ *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 7bis.

that at least in 1999, the ICTY was narrowly focused solely on its judicial role.⁴⁷² Given the danger posed by the indictment to international peace and security and the subsequent appointment of a political advisor to the Prosecutor afterwards, one might wonder if there was a realization that a purely judicial ICTY Prosecutor was undesirable. One might also find that where the Prosecutor failed to exercise such discretionary power not to prosecute, "on the ground" United Nations peacekeepers and NATO intervention forces did exercise such discretion by not always pursuing the indicted.⁴⁷³ Is it desirable to have such discretionary power so informally delegated without oversight?

ICTY President Claude Jorda tried to deal with this issue when considering draft legislation for a TRC in Bosnia.⁴⁷⁴ Although amnesties are not explicitly mentioned in the *ICTY Statute*, there is a provision dealing with domestic pardons and commutation of sentences:⁴⁷⁵

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the

⁴⁷² Sadat, *supra* note 66 at 70-71 suggests that Milosevic did in fact receive a *de facto* immunity through the Dayton Peace Agreement. Professor Sadat's sources in support of this statement are not conclusive. In addition while her report of the United States offering immunity to Milosevic, provided he relinquished power in Serbia in 2000, does not necessarily reflect the views of the international community, notwithstanding the reliability of Sadat's source (she cites Steven Erlanger, "U.S. Seeks Way Out for Milosevic," *International Herald Tribune* (19 June 2000) at 1 and certain utterances by one Professor Williams and Bernard Kouchner at footnotes 111 to 113).

⁴⁷³ For example consider "Carla Del Ponte critique l'action de la Force de stabilisation en Bosnie-Herzégovine" *Le Monde* (23 August 2002), online <<http://www.lemonde.fr/article/0,5987,3214-288108-00.html>> (date accessed: 24 August 2002). She is the current ICTY Prosecutor. She has called for a more aggressive effort on the part of NATO forces in Bosnia to seek out and arrest Radovan Karadzic, the political leader attributed for many of the atrocities in the Bosnian-Croatian conflict in the early 1990s. In an interview with *Agence France Presse*, M^{me} Del Ponte spoke rather harshly of SFOR's inability to capture Karadzic. This has resulted in some tension between her and NATO. NATO denies that it has been "dragging its feet."

⁴⁷⁴ ICTY, Press Release JL/P.I.S./591-e, *supra* note 179. Remember that the judiciary of the ICTY is completely independent of the Prosecutor (who answers to the Security Council directly).

⁴⁷⁵ *ICTY Statute*, *supra* note 176 at Article 28.

International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Thus a discretionary authority is vested in the judiciary and the President in terms of sentencing but there is still none with regard to whether to prosecute.

The President acknowledged that: the Tribunal could not try *all* perpetrators of serious violations of humanitarian law in its jurisdiction;⁴⁷⁶ it could not alone carry out the process of "peace-making;" and its priority lay in trying the:⁴⁷⁷

...highest ranking military and political leaders...those who through the great responsibilities which were theirs and the seriousness of the crimes ascribed to them...truly endangered international public order."

For the Commission, President Jorda was of the opinion that the TRC had a necessary secondary role in: determining the fate of "lower ranking executioners;"

⁴⁷⁶ As of 13 May 2002, 108 individuals have been publicly indicted by the ICTY (see online: ICTY < <http://www.un.org/icty/>>(date accessed: 13 May 2002). This is a far cry from all instances of serious offences against international humanitarian law that have been committed in the former Yugoslavia. The "Rules of the Road" project and was intended to expedite decision making of the Tribunal by filtering the most serious of allegations. In 1996 40 such cases were examined and only 11 allegations followed-up with indictment. In the spring of 1996, Bosnia and Herzegovina had submitted 1,500 alleged instances of international crimes while Croatia had submitted 100. It is a pragmatic approach. In a way the program reinforces complementarity in that it acknowledges the potential of the domestic courts to prosecute the "small fry," eventually. See International Criminal Tribunal for the former Yugoslavia, *Third Annual 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* (The Hague: ICTY, 1996), online: ICTY web site: < <http://www.un.org/icty/rapportan/third-96.htm> > (date accessed: 19 September 2001), paragraphs 80-83. A similar mechanism exists in the case of the ICTR. As of 13 May 2002 there were 52 detainees in Arusha, Tanzania (see online: ICTR < <http://www.ict.rg/>>(date accessed: 13 May 2002). This is a far cry from the estimated 120,000+ persons detained domestically in Rwanda, for alleged offences relating to the 1994 genocide (see: M. Kimani, "News Analysis/ Rwanda's Dilemma: Striking a Balance Between Justice and Reconciliation," in Kimani, M., ed., *Four Reports on the Film Screenings, Reconciliation, and The Gacaca Process* (Arusha, Tanzania: Internews Arusha Office, 30 May 2001), online: < http://www.internews.org/activities/ICTR_Reports/ICTR_reports_may2001.htm > (date accessed: 3 October 2001).

⁴⁷⁷ ICTY, Press Release JL/P.I.S./591-e, *supra* note 179.

reparations for victims; carrying out the “pedagogical work” of analyzing the root causes of the conflict; and providing a forum for the fashioning of a collective “undiluted memory” for history.⁴⁷⁸ Amnesty, for those less serious of crimes, committed by those lower ranking persons, is a matter for the domestic courts with some advice by the Tribunal. Factors in determining seriousness of crimes include the capacity of the accused as an agent of the State and the nature of the crime – especially if an international crime. Those more serious of crimes, alleged to have been committed by the highest-ranking officials of State, where the endangered international public order – they are the subjects of the Tribunal. It is quite evident that amnesty is not viable for them, although pardons and commuted sentences may be. They have to be prosecuted.

President Jorda’s position challenges the wording of the *ICTY Statute*, which established a tribunal with “the power to prosecute person responsible for serious violations of international humanitarian law” in the former Yugoslavia since 1991 as prescribed.⁴⁷⁹ The ICTY is not tasked to deal with “the most serious violations.” Yet this is the redefined task envisioned by President Jorda. Through a continuing oversight of domestic prosecution of those “lesser fish,” it may be President Jorda’s view that the statutory task of the ICTY can be met.

There is a growing view, that the domestic jurisdiction runs extra-judicial TRCs while the international runs international criminal courts or international tribunals. This is a separation of powers, disjunctive and parallel – in tension with the concept of complementarity. The international community often overlooks the relationship.⁴⁸⁰

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *ICTY Statute*, *supra* note 176 at Article 1. [underlining added]

⁴⁸⁰ This assertion may be controversial. Also consider the views of the Prosecutor, as expressed by Louise Arbour, *supra* note 34. and Judge Cassese, *supra* note 346. Respectfully, it is submitted that Judge Cassese’s article missed the principle of complementarity as he described the absolute requirement of bringing individuals to trial

The international community and the institutions for accountability that it creates too often forget this point concerning complementary roles and adopt a somewhat condescending and dismissive attitude toward national efforts at achieving justice.

The President of the International Criminal Tribunal for the former Yugoslavia, echoed the view that a complementary relationship must exist between the Tribunal and a proposed Truth and Reconciliation Commission in Bosnia and Herzegovina:⁴⁸¹

...I consider it my duty to ensure that this national initiative not run counter to the mission of the Tribunal and that it be consonant with the powers conferred on the Tribunal by the Security Council. I also believe it appropriate to reflect on a system for reconciliation which complements the work of the International Tribunal and which allows for a more effective contribution to the reconstruction of national unity without which democracy and deep-rooted lasting peace are impossible...

President Jorda could only envisage a commission functioning successfully, given two overriding conditions:⁴⁸²

1. Its work must be complementary to that of the Tribunal; and
2. The mandate of the Commission must not be similar to that of the Tribunal.

and that there was no room for an amnesty of any sort. This may be understandable given the confusion over terminology and the rapidly evolving nature of complementarity as a doctrine.

⁴⁸¹ ICTY, Press Release JL/P.I.S./591-e, *supra* note 179 [underlining added]. Contrast this with the Prosecutor's suggestion that such a Commission would be "counter-productive to the work of the tribunal" as described in: Jennifer Llewellyn and Sandra Raponi, "Interview: The Protection of Human Rights Through International Criminal Law: A Conversation with Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (1999) 57 U.T. Fac. L. Rev. 83 at 94. The Prosecutor does not have a say in the governance of the Tribunal since that is left to the Plenary, composed of judges (*ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 24) and she is not invited. Louise Arbour's comments were therefore likely personal observations, but of little value in describing the Tribunal. President Jorda's comments are significantly more authoritative (and recent).

⁴⁸² ICTY, Press Release JL/P.I.S./591-e, *ibid*.

While President Jorda was generally supportive of the draft legislation, he was critical of the Commission being imbued with judicial powers including investigative ones. Such powers would undermine the complementary relationship with the Tribunal and as such should be amended accordingly.⁴⁸³ President Jorda effectively established the framework in which a truth and reconciliation commission would operate within the jurisdiction of the two *ad hoc* tribunals – but only extra-judicially. The complementary relationship remains distinctly disjunctive. President Jorda's laudable effort to reconcile the disjunctive character of the ICTY⁴⁸⁴ with the conjunctive character of the ICC, elaborated in the *Rome Statute*, may be problematic, for they are irreconcilable.⁴⁸⁵

The jurisdictional primacy of the ad hoc Tribunals has been reversed: the ICC may only supplement national criminal justice systems when there is inadequate domestic will or inability to prosecute.

Thus the current trend in international law, is that any TRC under the United Nations system, must be of the type described by President Jorda – disjunctive and non-judicial whether in Bosnia or in Sierra Leone.⁴⁸⁶

⁴⁸³ ICTY, Press Release JL/P.I.S./591-e, *supra* note 179. *Promotion of National Unity and Reconciliation Act, 1995 (South Africa)*, *supra* note 91, would likely be considered a significant violation of the complementarity principle in that it allocates the Commission significant quasi-judicial and investigative powers. This does not necessarily mean that had it been implemented after 1 July 2002 or a similar Act adopted in the former Yugoslavia, that it would be invalid to the ICC. The ICC has allowed for a much less positivist approach to the prosecution of international crimes through the system of complementarity as described in the *Rome Statute*. This will now be examined in the text.

⁴⁸⁴ *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 9 (especially Rules 9(i) and 9(iii)) but also *ICTY Statute*, *supra* note 176 at Article 9(2) – the provisions relating to “primacy over national courts.”

⁴⁸⁵ Arbour and Bergson, in von Hebel, *supra* note 66 at 130.

⁴⁸⁶ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *supra* note 471 at Paragraph 39.

An Assessment of the Validity of Amnesty under the *Rome Statute*

Under the *Rome Statute*, amnesty for international crimes is significantly more viable than under the *ICTY Statute*. This is largely due to the greater conjunctive character of the *Rome Statute*.⁴⁸⁷ There exist two tests available to determine if an amnesty (or decision not to prosecute) is sufficiently legitimate to render a case inadmissible to the ICC: 1) the test for unwillingness or inability to prosecute on the part of a State; and 2) the test for *ne bis in idem*.

Admissibility

Unwillingness and Inability Test

There exists a presumption that the State is carrying out its duties to investigate or prosecute (or not to prosecute) properly, unless evidence to the contrary exists.⁴⁸⁸ The unwillingness and inability test is used to determine if such evidence exists and only is applied in two instances, where: the case is being investigated or prosecuted by a State which has jurisdiction over it; or the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.⁴⁸⁹ Unwillingness is determined by evidence of shielding an accused, unjustifiably delaying proceedings or carrying out proceedings that lack independence or impartiality.⁴⁹⁰ Thus evidence of a lack of

⁴⁸⁷ Recall the earlier discussion comparing these two tests to the circumstances under which the ICTY Prosecutor could request a deferral from a State under *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 9. Specifically it appears as though the *Rome Statute* drops the conditions of Rules 9(i) and 9(iii). These two provisions gave the Tribunal its disjunctive character, making it capable of asserting its primary right to exercise jurisdiction over the domestic courts largely at its own unchecked discretion.

⁴⁸⁸ *Rome Statute*, *supra* note 2 at Article 17 generally. The force of such a presumption renders a case inadmissible automatically. Contrast this with Rule 9(i) and (ii) of the *ICTY Rules of Procedure and Evidence*, *supra* note 177, where the ICTY could request deferral even if the State prosecuted in propriety.

⁴⁸⁹ *Rome Statute*, *supra* note 2 at Article 17(1) and 17(2) respectively.

⁴⁹⁰ *Ibid.* at Article 17(2).

good faith or an abuse of process is crucial in determining unwillingness. In the case of inability, the condition of the domestic legal system is examined.⁴⁹¹

If confronted with assessing whether an amnesty accorded by a domestic (State-run) TRC is legitimate, the ICC would have to presume that it was in the absence of evidence of unwillingness or inability to genuinely investigate or prosecute. Thus the presumption is that such an amnesty is legitimate. In determining if the State is unwilling, lack of good faith and abuse of process are crucial elements. In determining the inability of a State to carry out the investigation/prosecution, the state of the legal system is a crucial element. If such evidence is not present, the question of legitimacy of the TRC is inadmissible to the ICC, and therefore a matter for the domestic courts to decide. Does inadmissibility of a case indicate an endorsement of legitimacy of the domestic investigation/prosecution? To answer this question is to establish a hierarchy of law and hence violates the principle of complementarity. It is the wrong approach. What matters is that inadmissibility precludes the case from going before the ICC as the domestic jurisdiction is presumed to be operating properly if no evidence suggests otherwise. This is complementarity.

Ne bis in idem Test

The second test available in scrutinizing a domestic amnesty to the ICC is that of *ne bis in idem*. The test is only applied in one instance where the Court considers an issue of admissibility: where the person concerned has already been tried for conduct which is the subject of the complaint and trial is precluded under the provisions relating to *ne bis in idem* contained at Article 20(3) of the *Rome Statute*. This test applies primarily in instances of sham prosecutions where the purpose of the domestic trial was to shield the accused from the jurisdiction of the ICC (by

⁴⁹¹ *Ibid.* at Article 17(3).

double jeopardy) or if the trial was neither independent nor impartial and never intended to bring the accused to justice.⁴⁹²

In the case of questioning a TRC granted amnesty, the first issue is whether the TRC represents another court before which the accused was tried. In the previous test, there was no reference to any court, just "a State, which has jurisdiction." It would appear that a domestic TRC must have at the very least a quasi-judicial character in order to grant an effective amnesty. Only after such conditions have been met can the test in Article 20(3) be applied.

Professor Schabas raises an interesting point in this regard. While the means of determining the illegitimacy of TRC granted amnesty are focused on prosecution or exemption from prosecution, he raises the issue of where an accused has been prosecuted and found guilty but then her sentence is reduced or she is pardoned.⁴⁹³ Citing the example of Lieutenant William Calley whom the United States convicted of war crimes, Richard Nixon nullified a life sentence by granting him a pardon after a brief period of incarceration.⁴⁹⁴ The argument is that *ne bis in idem* could be used as a shield not to prevent prosecution, but as a shield to prevent an appropriate punishment. Efforts by the States Parties to harmonize their domestic laws so that they are in conformity with the *Rome Statute* may represent a partial solution to this loophole.⁴⁹⁵ One might wonder whether this really is a loophole though. If a State were to systematically grant pardons to persons who were prosecuted for international crimes domestically, effectively defeating the prosecution, perhaps this might be evidence of exactly those conditions in Article 20(3) which render the claim of *ne bis in idem* void – proceedings in the domestic court pursued to shield the person from criminal

⁴⁹² *Ibid.* at Article 20(3) but cross-referenced by Article 17(1)(c).

⁴⁹³ Schabas, *supra* note 2 at 70.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Dulait, *supra* note 412.

responsibility and a compromise of the independence or impartiality of the norms of due process recognized by international law, inconsistent to bring the person to justice. If such claims are void, then the presumption of inadmissibility could be set aside and the ICC become seized of the matter.⁴⁹⁶

Discretionary Diversity

The Prosecutor possesses a qualified discretionary power not to initiate an investigation, where:⁴⁹⁷

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 judiciary oversees the exercise of this power. If the Prosecutor decides not to prosecute for whatever reason, such a decision may be reviewed by the Pre-Trial Chamber and to some degree the referring party (the Security Council or a State).⁴⁹⁸ It does not matter what these “interests” are, just that a discretionary power not to prosecute does exist. Thus the domestic, quasi-judicial TRCs according amnesties may represent one instance of the exercise of discretionary power but so may “deals,” where accused provide evidence on those more responsible and serious offenders. This is not too distant from *marchandage* or “plea bargaining” in Rwanda – except that the price is immunity from prosecution. It should also be noted that the *Rome Statute* is oriented toward “the exercise of jurisdiction over persons for the most serious crimes of international concern,”⁴⁹⁹ and as such, has accords both the Prosecutor and the judiciary discretionary power to not pursue cases where “sufficient gravity to justify further action by the

⁴⁹⁶ *Rome Statute*, *supra* note 2 at Article 17(1)(c).

⁴⁹⁷ *Ibid.* at Article 53(1)(c). This power is under the supervision of the Pre-Trial Chamber however (Article 53(3)(b)) [underlining added]. Arsanjani, *supra* not 179 at 75 also regards this provision as allowing domestic TRCs to coexist with the ICC under the framework of the *Rome Statute* – naturally in good faith and not as an abuse of process to shield accused from prosecution.

⁴⁹⁸ *Rome Statute*, *supra* note 2 at Article 53.

Court' is lacking.⁵⁰⁰ This allows the ICC to possess the narrow jurisdiction so envied by the ICTY and so necessary to avoid any drift toward a supranational character which would detract from its complementary character to the domestic courts.

While the judiciary supervises the Prosecutor's discretionary powers, the judiciary's powers are supervised from outside of the Court, through external checks – a diversification of discretionary powers amongst various international personalities. Challenges to the admissibility of a case represent such a check. The accused, a State having jurisdiction over the case (and believes it is investigating or prosecuting or already has done so in propriety) and a State from which acceptance of jurisdiction is required (a non-State Party),⁵⁰¹ all have the right to challenge admissibility and thereby meet allegations made of unwillingness and inability on the part of a State or the inapplicability of the *ne bis in idem* test.

The deferral powers of the Security Council, represent yet another check of the ICC Prosecutor's discretionary powers. Through a Security Council Resolution under Chapter VII of the *Charter*, adopted unanimously, the Security Council may request that the Court "defer" an investigation or prosecution.⁵⁰² Despite the language of cordiality, this is probably as good as an order. The *Rome Statute* therefore reserves an unfettered discretionary power for the Security Council – a prerogative to stay proceedings should they constitute a threat to the peace.

In the worst-case scenario, the intransigence of a State may result in the Court deferring the matter to the Security Council or Assembly of States Parties, as

⁴⁹⁹ *Ibid.* at Article 1.

⁵⁰⁰ *Ibid.* at Article 17(1)(d).

⁵⁰¹ *Ibid.* at Article 19(2). Remember that there is a presumption that the State carrying out the investigation/prosecution has done so in good faith, unless it can be proven otherwise.

⁵⁰² *Ibid.* at Article 16.

appropriate.⁵⁰³ An additional pre-emption is possible by the Security Council, in the event that it decides a prosecution should not be initiated (under a Chapter VII action).⁵⁰⁴ The Security Council is permitted to override prosecution in the event that it would help ensure international peace and security.

Conclusion

Just how TRC granted amnesties are received under the *Rome Statute* is a complex issue. The international community (through the United Nations) generally regards amnesties granted for international crimes as being invalid, especially where the beneficiaries are the ringleaders, the most flagrant offenders and those who have shirked their fiduciary duty to uphold the compliance of the State in suppressing such crimes. To this end, it has become increasingly the practice to allow the domestic jurisdiction to deal with the "lesser fish," so long as an international court or tribunal prosecuted "the bigger fish". This is the situation with the ICTY, ICTR and in Sierra Leone. Domestic TRCs therefore are sapped of any judicial character, in order to avoid any conflict of jurisdiction between the international tribunals and the domestic courts. This is a disjunctive approach and reflects the disjunctive character of the Security Council, operating through its subsidiary organs (the ICTY, ICTR or Sierra Leonean Special Court).

The *Rome Statute* enshrines the concept of complementarity and therefore the presumption that a domestic investigation/prosecution is valid unless there is evidence to the contrary. Such evidence is furnished by the unwillingness or inadmissibility test (in the case of a State with jurisdiction either investigating/prosecuting or having investigated and decided to not prosecute) or by the *ne bis in idem* test at Article 20(3) where evidence of a bad faith prosecution or abuse of process exists. The existence of such evidence can negate the presumption that any case is inadmissible to the ICC. A TRC is therefore

⁵⁰³ *Ibid.* at Article 87(7).

⁵⁰⁴ *Ibid.* at Article 16.

acceptable to the ICC provided that the State running it is both willing and capable of genuinely carrying out investigation and prosecution. This implies a TRC that is necessarily quasi-judicial in character. What State would avoid an extra basis to assert inadmissibility of a case by running a non-judicial TRC? The preference for quasi-judicial TRCs represents a major departure from the disjunctive approach adopted by the ICTY, ICTR and Sierra Leonean Special Court. The ICC approach respects complementarity by presuming that the State is fully capable of dealing with international crimes on its own. Only in those exceptional cases where evidence to the contrary exists, may an issue of admissibility be raised. Yet this issue may be challenged by the subject State or by other international entities. This is how discretionary power is supervised in a decentralized legal order. It is a reflexive approach to the international community exercising its decision-making. The "big fish" are still targeted, but in a manner that respects and reinforces the decentralized nature of the international legal order.

Chapter 6

Chapter Six: International Complementarity

Introduction

Complementarity is the structural foundation of the International Criminal Court. It is a concept that is complex and sophisticated. It is a concept that challenges our understanding of what law is. In the domestic legal system one views law as hierarchical, structured and centralized, complete with a means of enforcement. All three branches of State are active in all of its facets. Individual modular units, the States, carry out the daily business of ensuring compliance with legal norms, including the investigation and prosecution of international crimes. International crimes are after all crimes within the State's jurisdiction. Yet it is when the apparatus of State enforcement goes awry that the State fails in its duty to deal with such crimes. The international community steps in where the State is unwilling or unable to act. How it does this without asserting a supranational character is crucial to understanding how complementarity works. The *Rome Statute* sets up just such a system. The previous chapter showed it in action, through the case study of how the Statute deals with TRCs. In that chapter the issue was not whether a TRC or TRC-granted amnesty was legitimate, but rather whether the presumption of inadmissibility of a case could be properly countered to permit the ICC to exert its jurisdiction. This may be more than simply a matter of semantics, considering the presuppositions contained in the immanent meaning of words, discussed in chapter three.

The aim of this chapter is to show the subtle, yet sophisticated, nature of complementarity by discussing how the ICC is intended to operate within the international legal system. This is the relationship between the ICC and other international entities, not uniquely States. Thus the chapter will focus a much

broader vision of complementarity – “international complementarity.” Part I of this chapter summarizes the manner in which the ICC “asserts its jurisdiction,” while at the same time respecting complementarity and reinforcing the decentralized nature of the international (criminal) legal system. Naturally States are the primary international personality, but they are not the only one. While it may be true that individuals and NGOs as having an increasing importance, this chapter draws attention to regional organizations of States – an entity recognized under Chapter VIII of the Charter. Consensus, negotiation and communicative deliberation are not particularly unique in international law, for they are commonplace in such regional arrangements. The ICC represents just another type of regional arrangement established by the international community. The proliferation of such organizations maintains decentralization within the international legal order. Coherence is achieved through a high level of reflexivity. While this gives the international legal order its *sui generis* character, at the same time many legal thinkers and decision-makers are unable to visualize law as having any form other than that in their domestic legal system. To them, law must be centralized, hierarchical and imposed. This is the common denominator of the traditional legal schools discussed at chapter one. In Part II those problems that arise, from this limited perspective, are examined with respect to the opposition to the *Rome Statute* from India and the United States. Both positions are revealing, for they reject a decentralized international legal system in favour of a hierarchical system of law – a projection of municipal law into the legal arena. This chapter therefore brings to light a problem in perception of the nature of contemporary international law generally and the corresponding lack of imagination in the reading of the *Rome Statute*.

A New Legal Proceduralism – International Complementarity

The ICC and Admissibility

Throughout the *Rome Statute*, the central doctrine of complementarity establishes a working partnership between the ICC and domestic courts. There exists a

presumption that the domestic approach to dealing with international crimes is proper – almost a “presumption of innocence” accorded to States in matters of jurisdiction. Only if there is evidence to suggest that a case is no longer inadmissible, can the presumption be countered and the ICC become seized of the case. In instances where the State is investigating or prosecuting or has investigated but decided not to prosecute, only then may the unwillingness and inability test apply.⁵⁰⁵ This test would make a case admissible if there was evidence of: an attempt to shield an accused from responsibility for international crimes; an unjustified delay in proceedings inconsistent with an intent to bring the person to justice; and a lack of independence or impartiality also inconsistent with an intent to bring the accused to justice.⁵⁰⁶ Inability to prosecute is an alternative test that may also be applied.⁵⁰⁷ It is determined by the state of the domestic judicial system.

In the event that a court has already tried the person, for conduct that is the subject of a complaint before the ICC, the principle of *ne bis in idem* is assumed to apply automatically, rendering the case inadmissible.⁵⁰⁸ If however there is evidence of the abuse of the principle to shield the accused from criminal responsibility or evidence that the proceedings in the other court were neither independent nor impartial, then the principle may be suspended, rendering the case admissible.⁵⁰⁹ A final form of inadmissibility exists, where the ICC considers that a case is not of sufficient gravity to justify further action.⁵¹⁰

⁵⁰⁵ *Rome Statute*, *supra* note 2 at Article 17(1)(a) and 17(1)(b).

⁵⁰⁶ *Ibid.* at Article 17(2).

⁵⁰⁷ *Ibid.* at Article 17(1)(a) and 17(1)(b). Both use the term “unless the State is willing or unable genuinely” to carry out the investigation/prosecution. Each test is then identified in Articles 17(2) and 17(3) respectively. Therefore they are construed as being independent of one another. If they were not, this would seriously hamper the ability of the ICC to function.

⁵⁰⁸ *Ibid.* at Article 17(1)(c).

⁵⁰⁹ *Ibid.* at Article 20 – especially Article 20(3).

⁵¹⁰ *Ibid.* at Article 17(1)(d).

In a domestic legal system the determination of these tests for admissibility would rest in the hands of the Prosecutor or judge. In the *Rome Statute* these two individuals still make these decisions. Their discretionary power however is overseen by a number of international legal personalities. States, the Assembly of States Parties, the Security Council, the accused (to a limited extent) and NGOs (through indirect representation before the Prosecutor) are all allocated a role. Whether through powers of referral, deferral, staying an investigation/prosecution, challenging admissibility, or simply refusing to cooperate with the Court – there are numerous mechanisms and tactics available to invoke oversight. This diversification of discretionary power is also reflected in the manner in which the Court governs itself – for instance in how amendments to its documents are achieved. The *Rome Statute* establishes a decentralization of discretionary power throughout the international legal system.

The Rome Statute, Complementarity and Reflexive International Law

The *Rome Statute* sets up a legal system that is not immediately recognizable when compared against a domestic model or even that of the ICTY. Complementarity not only respects the integrity of the States to domestically prosecute international crimes by according them a presumption of capability, but it also respects the disparate nature of the international legal system keeping it decentralized. The centralization of judicial authority that Kelsen expected continues to be absent.⁵¹¹ International legislative and executive authorities remain vaguely defined, if defined at all. Instead a legal order is founded upon negotiation, consensus and communication. This is reminiscent of Kelsen's voluntary character of law – what he might have identified as an extremely

⁵¹¹ In the case of the *ad hoc* tribunals (and to some degree Sierra Leone), under authority of the Security Council, they were endowed with a broad discretionary power to "override" the jurisdiction of a domestic court. This approach is highly disjunctive in character and undermines the concept of complementarity. It represents the operation of the Security Council's supranational character filtering through to the tribunals. Recall *ICTY Statute*, *supra* note 176 at Articles 9 and 10 and more importantly *ICTY Rules of Procedure and Evidence*, *supra* note 177 at Rule 9.

advanced form of law. It is reminiscent of Habermas' "deliberative democracy" and communicative action theory.⁵¹² It is Teubner's final evolutionary reflexive law stage.⁵¹³

The *Rome Statute* is a mirror, reflecting the international legal system, since the international criminal legal system operates within its confines. The ICC is just one of many international organizations and regional arrangements established to represent the collective interests of "like-minded states."⁵¹⁴ These organizations are reflexive in their own right and frequently incorporate some sort of deliberative assembly or even a court or arbitral body. They are founded upon consensus, negotiation and communication between the member States. Thus for example, the Organization for Security and Cooperation in Europe (OSCE) makes decisions on the basis of consensus of all participating States, each of which has an equal status.⁵¹⁵ The OSCE possesses a Parliamentary Assembly (based in Copenhagen) and a Court of Conciliation and Arbitration (based in Geneva).⁵¹⁶ The drafters of the *Rome Statute* adopted the same approach, through the

⁵¹² Discussed in chapter one. See Rehg, *supra* note 52 at xii. Note the three idealizing assumptions in conflict resolution described at xv – and in particular the need for consensus and the presumption of rationality.

⁵¹³ Teubner, *supra* note 125.

⁵¹⁴ Authors such as Romano, *supra* note 328; Couston, *supra* note 182; and Buergethal, *supra* note 213; tend to be preoccupied by the "proliferation of international courts and tribunals." Rather than their proliferation *per se* it might be more appropriate to consider the proliferation of international organizations. If one is preoccupied by the proliferation of international courts, it is easy to reach a conclusion of a legal system dominated by the supranational aspects of "rule of law." Proliferation would amount to a form of centralization, albeit in a parallelist or federal conception. It is argued here that this is not a fair reflection of the disparate nature of the international legal system. Rather, with the rise of international organizations, the disparate nature is reinforced. The ICC is an international organization which happens to have a court. Yet its character is significantly different to the ICTY. In a similar vein the ICJ is a court that belongs to the United Nations (its primary judicial organ).

⁵¹⁵ Organization on Security and Cooperation in Europe, *supra* note 324 at 1. Other organizations might include the Organization of American States or the Organization of African Unity. These regional arrangements are generally independent of the United Nations, although recognized by it under Chapter VIII of the Charter, *supra* note 26.

⁵¹⁶ Organization on Security and Cooperation in Europe, *supra* note 324 at 38 [shown in Figure 3 "Structures and Institutions"].

creation of an Assembly of States Parties (the ICC "legislature").⁵¹⁷ An active role for the Security Council also is enshrined, through the attribution of referral and deferral powers. This is not a separation of powers however. There is nothing to prevent the ICC from investigating or prosecuting a case which has a Chapter VII aspect (for instance an international crime of aggression would probably stem from an act of aggression). Thus the ICC and the Security Council could be dealing with related issues (although not identical issues) at the same time.⁵¹⁸

The United Nations could be considered such a reflexive entity, where the decisions of the General Assembly and Security Council are adopted on the basis of consensus, negotiation and deliberation. Although both the General Assembly and Security Council are reflexive, the *Charter* confers upon the Council the "primary responsibility for the maintenance of international peace and security."⁵¹⁹ The Security Council consists only of 15 States, five of which maintain their seats permanently and possess a qualified voting power.⁵²⁰ This is a far cry from the 189 States, which comprise the United Nations. While Security Council decisions are presumed to have a legal binding quality on States under the *Charter*,⁵²¹ the

⁵¹⁷ *Rome Statute*, *supra* note 2 at Article 112. States are equal (Article 112(1)) and voting is preferred to be on the basis of consensus (Article 112(7)) and failing that through a majority vote by the States Parties present. There is no qualified majority voting as in the case of the Security Council.

⁵¹⁸ *Ibid.* at Article 16 allows the Security Council to delay an ICC investigation provided that it has voted unanimously to do so under a Chapter VII justification.

⁵¹⁹ *Ibid.* at Article 24(1).

⁵²⁰ *Charter of the United Nations*, *supra* note 26 at Article 23.

⁵²¹ *Ibid.* at Article 2(5), 25 and 48. In the case of the recent controversy over Iraq's non-compliance with various Security Council Resolutions concerning the admission of weapons inspectors, it seems that Iraq holds the view that even these Resolutions are negotiable. This view seems to be reinforced by a willingness to negotiate both from within the Security Council and from the international community in general. There are States that do not subscribe to this approach and insist that the Resolutions be complied with, or else Iraq could face a renewed intervention since the admission of weapons inspectors was a condition to the ending of hostilities in 1991. On the other hand, Iraq's position may be justified to some degree in that to simply attack a State or carry out an embargo or even to expel it from the UN, seems a potentially disproportionate act that may be self-defeating to the desired end goal – compliance by the delinquent State.

Security Council is not a representative body of the community of states. The *Charter* entrenched the global power distribution at the end of World War II, through the granting of permanent seats on the Security Council and a permanent veto power over certain resolutions that might be considered, to the five victorious States.⁵²² This seems to undermine the Charter's own recognition of the equality of all States,⁵²³ imbuing it with what might be perceived as a certain hegemonic quality. This may detract from its ability to fully deliberate, negotiate and communicate before reaching a decision. This is probably reflected in the ambiguity contained within the ICTY Statute – to be contrasted by the way in which the *Rome Statute* excels in defining a new vocabulary, it having been drafted in a comparatively more deliberated and reflexive manner. On the other hand there is a trade-off, for by not being fully deliberative, the Security Council is capable of acting in a relatively short time.⁵²⁴

The Municipal Analogue and its Inappropriateness

International law is applied through negotiation, deliberation and consensus rather than through imposition, positivism and the application of universal norms. The

Whether Security Council Resolutions really are binding is not as straight-forward as one might suspect.

⁵²² *Ibid.* at Article 23 (members) and Article 27 (voting). The voting arrangement is often called the "Yalta voting formula," although it is also known as qualified majority voting – a distinct improvement over the League of Nations Council required unanimity on substantive matters. Consider: *Statement of the Delegations to the San Francisco Conference of the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the Republic of China, with which the Delegation of France Associated Itself*, San Francisco, 7 June 1945, UNCIO Doc. 852, III/1/37(1); 11 UNCIO Documents at Articles 1-7, in Louis B. Sohn, ed., *Basic Documents of the United Nations*, 2nd ed. (Brooklyn: The Foundation Press, Inc., 1968) at 70-71.

⁵²³ *Charter of the United Nations*, *supra* note 26 at Article 2(1).

⁵²⁴ *Société des Nations, Convention pour la création d'une cour pénale internationale* (Genève : Société des Nations, 1937) [Genève, le 16 novembre 1937; Série de publications de la Société des Nations ; 1937.V.11. ; 5. Questions juridiques]. It could be argued that negotiations toward some sort of international criminal tribunal go back even further to World War I (Schabas, *supra* note 2 at 1 for example makes this point). Schabas suggests that it really started to be drafted in earnest from about 1989 on. It may even go further back to the medieval period (see *supra* note 277). The point here is that it has taken a long time for the *Rome Statute* to be drafted.

four traditional schools of law (legal realism, legal positivism, universalism and parallelism) falter, for they presuppose the existence of a hierarchical and centralized legal system. The reflexive approach provides a means of overcoming their inherent limitations and capturing the essence of complementarity. Yet it must be used with caution, for even its original proponents defined the concept in the domestic context, not the international one. Nevertheless the *Rome Statute* mirrors the reflexive nature of international law in its procedures. By so doing complementarity is used to establish an international criminal court in a decentralized legal order without a hierarchy of law.

The Rome Statute: Roots of Opposition

Expectations of the Domestic Model Internationally

A Crisis of Legitimacy for Some

Unfortunately the fallacious projection of the domestic model into the international legal system is engrained in these traditional schools of dominant legal thought. It is here that one may uncover the roots of opposition to the *Rome Statute* by the two largest democratic States within the international system. Their opposition to the Statute is not founded in any one school of thought, but rather in an expectation of an international legal order that reflects some degree of hierarchy, structure and centralization. Both positions deny the concept of complementarity in the *Rome Statute* but also the decentralized nature of international law. Ironically they recognize the ICC as having a character that the other claims it lacks.

India – Security Council Invested With Too Much Discretionary Power

India's objections revolved around three issues: the Security Council referral power, the Security Council deferral power and the failure of the *Rome Statute* to prohibit the use of nuclear weapons. .

Under the *Rome Statute*, the Security Council may request the initiation of an investigation by the Court through a referral.⁵²⁵ The Indian government felt that the conferral of such a power to the Security Council was *ultra vires* and exceeded those powers explicitly stated in the *Charter*. Mr. Lahiri, the Indian representative at the Rome Conference in 1998, suggested that by according powers of referral to the Security Council, that would either: make a Security Council referral of greater importance than other referrals; or establish a mechanism whereby sitting members of the Security Council who were not States Parties to the *Rome Statute*, could still make use of the International Criminal Court.⁵²⁶ Mr. Lahiri's position reveals distrust of the Security Council and of those sitting members who are not States Parties to the *Rome Statute*. Such distrust is probably warranted since the Security Council by its very nature incorporates a centralization of coercive authority – potentially the first step to a centralization of judicial or political authority.

In terms of the power of blocking cases before the Court under Article 16 of the *Rome Statute* (the second objection), India felt that this was a political interference with the Court's independence by the Security Council.⁵²⁷

...it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.

Latent in Mr. Lahiri's argument is an underlying presumption of the primacy of the "rule of law." Yet such a "primacy" represents a hierarchy of law to which the Security Council would have to submit. Thus Mr. Lahiri's position, projects the domestic legal model onto the international scene.

⁵²⁵ *Rome Statute*, *supra* note 2 at Article 13(2).

⁵²⁶ Dilip Lahiri, *supra* note 42.

India's third objection to the *Rome Statute* was that the Statute did not classify the use of nuclear weapons as an international crime.⁵²⁸ The *Rome Statute* contains an incomplete inventory of international crimes. An argument does exist that the *Rome Statute* does in fact prohibit the use of nuclear weapons in that they represent a form of indiscriminate attack (a war crime) and may even represent a crime against humanity (through their effects and even more so through the intention of the decision-makers who would authorize their use). Notwithstanding this argument, the threat of the use of nuclear weapons is a political topic that just does not fit into the nature of international crimes covered by the *Rome Statute*. In this respect it is like terrorism or drug trafficking. The issue is not purely legal. There is a political dimension, which if ignored, could amount to the Court undermining the concept of complementarity. This is not to say that the Indian position is wrong, but that it is too simplistic. The approach is consistent with a positivist "rule of law" view of international law.

United States – Security Council Invested with Not Enough Discretionary Power

American opposition to the *Rome Statute* is complicated and at times incoherent. This is partly due to a change in government from the Clinton to Bush administration. President Clinton initially signed the Rome Statute on 31 December 2000. Yet President Clinton advised that there were still "concerns about the significant flaws in the treaty" and that he would therefore recommend that Congress not ratify it.⁵²⁹

⁵²⁷ *Ibid.*

⁵²⁸ William Schabas (Schabas, *supra* note 2 at 49) suggests that India may have been simply grandstanding for political reasons in order to upstage Pakistan's development of nuclear weapons in 1998. While this context may be true and perhaps even his argument, presuming that States negotiate in bad faith is not a productive route in trying to assess international legal development. It must be presumed that they are negotiating in good faith unless there is evidence to the contrary. If anything, it shows the reasons why deliberative communication takes so long and also illustrates the "asymmetry" of a reflexive system – as States pursue their own interests in the course of negotiation.

⁵²⁹ Marc Grossman, *supra* note 231.

Provisions of the *Rome Statute* did not sit well with some American politicians,⁵³⁰ especially when it became apparent that under certain conditions, it was possible for American members of the armed forces and civilian leaders to come under the jurisdiction of the Court. Such concern was amplified by claims of the denial of procedural protections guaranteed under the Bill of Rights and American Constitution (such as the right to trial by jury).⁵³¹ There is a certain inconsistency in this approach noted from within the American legal community, in that there are numerous treaties that do deny such procedural protections and surrender some of the sovereignty belonging to Congress.⁵³² The potential for exposure to prosecution for senior elected and appointed officials in the American government, for “decisions involving such matters as: responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression,” was just too much.⁵³³ This is a curious statement since all three matters are excluded from the *Rome Statute*.

The unsigned of the *Rome Statute* by the Bush administration marks a significant clarification of the American government’s stand. By “unsigned,” the Bush administration cleared the path for a much more hostile approach to the Statute (and the introduction of the *American Servicemembers’ Protection Act of 2002*), without fear of violating the law on treaties.⁵³⁴ The “unsigned” was in effect a

⁵³⁰ Specifically: Jesse Helms, Thomas Delay, Benjamin Gilman, Henry Hyde, John Murtha and Chris Smith; they were the sponsors and co-sponsors of the Bill. In particular refer to: *Rome Statute*, *supra* note 2 at Article 12.

⁵³¹ *ASPA*, *supra* note 6.

⁵³² Congressional sovereignty is equivalent to parliamentary sovereignty in this sense. Consider: Audrey I. Benison, “International Criminal Tribunals: Is there a Limitation on the Treaty Power?” (2001) 37 *Stan. J Int’l L.* 75 at 112 (in particular). There are a number of treaties in existence to which the United States has “surrendered sovereignty” from Congress to an international tribunal. She considers extradition treaties, Status of Forces Agreements, extradition to other international criminal tribunals (such as *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999)), prisoner exchange, the Charter of the United Nations, the World Health Organization and the World Trade Organization.

⁵³³ *Ibid.* at § 3002(9).

⁵³⁴ *Vienna Convention on the Law of Treaties*, *supra* note 411 at Art. 18.

denunciation. Reasons for the “unsigning” were prepared in set of remarks delivered by the Under Secretary for Political Affairs, Marc Grossman on 6 May 2002 at the Center for Strategic and International Studies.⁵³⁵ Mr. Grossman’s remarks were largely derived (*verbatim*) from what would eventually become the preamble to the *American Servicemembers’ Protection Act of 2002*.⁵³⁶ While there was much said in Mr. Grossman’s remarks, he outlined some premises, which formed the basis for the American decision to “unsign” the Statute.

Mr. Grossman indicated the principles of international law, which the United States believed in:⁵³⁷

We believe in justice and the promotion of the rule of law.

We believe those who commit the most serious of crimes of concern to the international community should be punished.

We believe that states, not international institutions are primarily responsible for ensuring justice in the international system.

We believe that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom

⁵³⁵ The remarks are important for they represent the full policy statement of the Bush administration. They are echoed in summary by other members of the Bush cabinet: United States Department of Defense, “Secretary Rumsfeld Statement on the ICC Treaty,” News Release, No. 233-0 (6 May 2002), online: [Defenselink <http://www.defenselink.mil>](http://www.defenselink.mil) (date accessed: 16 May 2002).

⁵³⁶ *ASPA*, *supra* note 6 at § 2002 “Findings.”

⁵³⁷ The third principle does not seem accurate. It should probably read: “We believe that States, not international institutions (with the possible exception of the Security Council) are primarily responsible for ensuring justice in the international system.” Such a revision seems more consistent with the second last paragraph before the subheading “We Will Continue to Lead:”

In situations where violations are so grave as to amount to a breach of international peace and security, and the political will to address these violations is non-existent, the international community may, and if necessary should, intercede through the UN Security Council as we did in Bosnia and Rwanda.

This is an endorsement of the two *ad hoc* tribunals and the peacekeeping missions.

Yet Mr. Grossman outlined four reasons why the Government of the United States felt that the *Rome Statute* did not advance these principles:⁵³⁸

We believe the ICC undermines the role of the United Nations Security Council in maintaining peace and security.

We believe in checks and balances. The Rome Statute creates a prosecutorial system that is an unchecked power.

We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty.

We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.

The only explanation as to why his government felt that the entire system of complementarity was inadequate was because American proposals to set in place a system of "proper checks and balances on the Court were rejected."⁵³⁹ American proposals both before and after the Rome Conference in July 1998 were:⁵⁴⁰

1. To permit a Security Council referral outside of a Chapter VII authorization;
2. That if a State Party referred a situation to the Court that was already under deliberation by the Security Council, the authorization from the Security Council would be required before the ICC could consider it. This was hotly contested and eventually the "Singapore Compromise" resulted and the

⁵³⁸ Although later in the same text he claims that the *Rome Statute* threatens these principles. (see last sentence before subheading "We Will Continue to Lead")

⁵³⁹ Grossman, *supra* note 231.

⁵⁴⁰ United States Department of State, David Scheffer, "Evolution of U.S. Policy Toward the International Criminal Court," Address at American University, Washington, DC (14 September 2000), online: United States Department of State <<http://www.state.gov>> (date accessed: 15 May 2002).

drafting of what would become the Security Council deferral power under Article 16;

3. An "opt out" provision was proposed where a State Party could opt out of crimes against humanity and/or war crimes, but not genocide. If a State so opted, it would forfeit its right to refer matters to the Court. The Security Council could override the "opt out" with a Chapter VII referral;
4. A 10-year transitional period was proposed, during which time a State Party could opt out of crimes against humanity and/or war crimes with a possibility for renewal under certain conditions. A modified version materialized as Article 124 of the Treaty, with a reduction to 7 years and concerning Article 8 (war crimes only); and
5. A final proposal was that Article 12 be drafted: to require express approval of both the territorial state of the alleged crime and the state of nationality of the accused in the event either was not a State Party; or to exempt the court's jurisdiction in conduct arising from the official actions of a non-State Party and acknowledged as such by the non-State Party. Article 12 actually sets forth a precondition where acceptance of the Court's jurisdiction is required from: the territorial state of the alleged crime (or State of registration in the case of a vessel or aircraft) or the State of nationality; or in the case of a non-State Party, a declaration accepting the exercise of jurisdiction.

The nature of the proposals made at the Rome Conference clearly indicate that the American government wanted to establish the ICC as an international institution in a subordinate relationship to another international institution – the Security Council. The idea of endowing the Security Council with a referral power outside of Chapter VII represents a significant expansion of powers beyond what was explicitly allocated in the *Charter*. The proposal to allow the Security Council

a primary right to exercise jurisdiction (through "deliberation") over a State Party referring a situation to the Court is a reincarnation of the wide discretionary powers found in the *ICTY Statute and Rules of Procedure and Evidence*. It allows the Security Council to assert some form of primacy over States Party – and not even restricted to Chapter VII issues. The proposal for an "opt out" clause and the ability of the Security Council to override it under a Chapter VII referral represents yet another method of the Security Council using the ICC system at its discretion.

The last proposal represents one that is truly different. The first part of the proposal represents a significant limitation to how the ICC would assert its jurisdiction. Consent from both territorial state and state of nationality is required. Ambassador Scheffer describes this as remedying the "dangerous drift toward universal jurisdiction over non-party states."⁵⁴¹ This may not be entirely accurate, since it appears more as a means of ensuring that the two primary States involved have given their consent. Consent and universal jurisdiction are two different things. The approach Scheffer describes seems to be more comparable to the ICJ requirement for consent to the Court's jurisdiction as a precondition to even considering a case as admissible.

The second part of the proposal, as Scheffer describes it, was to distinguish acts, which might be incorrectly classified as crimes of aggression, when they were in fact official actions. Scheffer suggested: humanitarian intervention, peacekeeping actions, or pre-emptive defensive actions to eliminate weapons of mass destruction. This is essentially the same argument in the first part – that one of the preconditions to the exercise of jurisdiction by the ICC is the consent of the State in whose name the international crimes may have been committed.

The American position therefore can be summarized as resting on two grounds for objection. In the first, the Security Council is regarded as being the primary

⁵⁴¹ *Ibid.*

international organization in the international legal system. American proposals for its supervisory status over the ICC and to some degree the States Parties amounted to a desire to establish it as a focal point for international criminal judicial power. This is a hierarchical system with a certain degree of centralization. It is the domestic model being applied to the international legal system.

The second grounds for objection is mired in the idea of State consent to the jurisdiction of the ICC. State "consent" is one of those old terms from traditional international law identified in chapter one. The legal system described in the *Rome Statute* truly is reflexive as described in this thesis, based upon voluntary compliance, consensus, negotiation, deliberation and communication. The reflexive mode, including consensus, represents an evolutionary leap in the idea of State consent; all of the active elements of reflexion contribute to general agreement not merely on the part of the State, but by all States and all international personalities. Article 17, concerning how the presumption that a case is inadmissible is countered, represents the ultimate in how the reflexive mode operates. Consent is diversified not centralized. The last American proposal may therefore be in itself a residual element of drafters still thinking along the lines of a municipal model – the idea of consent from one personality only. Unfortunately American legislators continue to perceive the ICC as a municipal type of court projected internationally, where discretionary powers are centralized within its judiciary and prosecutor. This would explain the foundations of the *American Servicemembers' Protection Act of 2002*.⁵⁴² Thus it is the American

⁵⁴² Consider: United States Department of State, David J. Scheffer, Statement Before the House International Relations Committee, Washington, DC (26 July 2000), online: United States Department of State <<http://www.state.gov>> (date accessed: 15 May 2002) where Scheffer outlines why he and the Clinton Administration opposed the American Servicemembers' Protection Act of 2000 (which was a bill at the time, hence the year). Similarly refer to: United States Department of State, David Scheffer, "Evolution of U.S. Policy Toward the International Criminal Court," Address at American University, Washington, DC" (14 September 2000), online: United States Department of State <<http://www.state.gov/>> (date accessed: 15 May 2002) where he states "To argue that our position on personal jurisdiction reflected an underlying opposition to the whole concept of a permanent International Criminal Court or the Rome Treaty itself is a

legislators that have projected their expectations of a domestic legal system onto the international criminal legal system and in so doing, distorted their perception of how the *Rome Statute* sets up the ICC to operate in a decentralized system without a hierarchy of law. There is a relation to the Security Council arguments, in that if prosecution for international crimes is to occur, then legal authority should be subordinated to a centralized political authority which represents the interests of States – the Security Council.

Conclusion

It is possible that the emergence of the ICC is symptomatic of a general trend in the context of the contemporary international law. Although Hans Kelsen saw the international legal system evolving through centralization of international judicial power and then international political power, he did not dismiss evolution in an altogether different direction.⁵⁴³ International law has been developing in this different direction for some time, as shown by the proliferation of regional arrangements. The *Rome Statute* establishes the ICC based on a similar approach steeped in reflexive law – consensus, equality and decentralization. Its respect for complementarity is central. The presumption of a State being capable of dealing with international crimes domestically represents a major advance from the approach of the *ad hoc* tribunals. Centralization of legal power is averted through a system of diversified discretionary oversight by all those international legal personalities with an interest in the investigation/prosecution (or lack thereof)

deeply flawed argument.” This may be an attempt by him to undo the damage that his testimony before the Senate Foreign Relations Committee accomplished on 23 July 1998. His original words may have been inappropriately chosen, in that they may have spawned the false image of a supranational ICC and the vulnerability of American service personnel and civilian leaders to groundless allegations. See: United States Department of State, David Scheffer, “Developments at Rome Treaty Conference,” Testimony Before the Senate Foreign Relations Committee, Washington, DC (23 July 1998), online: United States Department of State <<http://www.state.gov/>> (date accessed: 15 May 2002). Scheffer actually supports the ICC in principle and despite the objections that he and the Clinton administration originally had.

⁵⁴³ Kelsen, *supra* note 16.

of accused individuals of international crimes within the ICC's jurisdiction. Thus decentralization of the international legal system is also respected. There is no hierarchy of law. There are just issues of admissibility. The rule of law is achieved through negotiation, consensus and communication. It is a very different model to the municipal approach where the "rule of law" is achieved through imposition, "arbitrariness" and unilateral action.

Here lies the difficulty with the acceptance of the ICC by some of its most vociferous opponents. India's opposition is rooted in the failure of the *Statute* to operate without interference from the Security Council. It specifically criticizes those members of the Security Council, who are not States Parties, yet who possess some oversight in the exercise of the Court's discretionary powers (especially with respect to admissibility and challenges to it). In this respect India expects a hierarchy of law to exist, subordinating the prerogative powers of the Security Council and States to the discretionary powers of the Court. It expects centralization of judicial discretionary authority within the Court. These are expectations of a domestic legal system projected into the international.

The Indian objection to the failure to classify the use of nuclear weapons as an international crime, further illustrates the lack of appreciation for the concept of complementarity through the simplistic classification of an act having both legal and political character, as uniquely legal.

The American position is extremely confused. There is a total dismissal of the reflexive mechanisms incorporated throughout the *Rome Statute*, but without justification. The Americans argue that the Security Council should have full oversight of the Court. Yet they do more than that – they argue for a hierarchical system of international law where the Security Council is invested with broad discretionary powers well beyond those stipulated in the Charter under Chapter VII; where the ICC and States Parties (to some extent) are subordinated to its

powers. The American position may therefore express a desired centralizing role for the Security Council in the international legal system through an expansion of its power. If this is a correct analysis of the American position, it is a significant rejection of the decentralized nature of the international criminal system and the limited manner in which the Security Council operates within it.⁵⁴⁴

⁵⁴⁴ It may be consistent with the contemporary upsurge in unilateralist views toward international law present amongst the members of the Administration in the United States. See: Peter Beaumont and Ed Helmore, "Will Bush Go to War Against Saddam?" *The Guardian* (1 September 2002), online: *The Guardian* <<http://www.observer.co.uk/iraq/story/0,12239,784319,00.html>> (date accessed: 1 September 2002).

Chapter Seven

Chapter Seven: General Concluding Remarks

Chapter six represents something of a climax in this thesis. International law as a reflexive system, founded upon consensus, negotiation and equality, represents a challenge to our preconceived view of law, rooted in the domestic model. A reflexive approach is evident in the international legal system through regional arrangements like OSCE and the UN (and the multitude of other regional arrangements). It is mirrored throughout the legal regime that the *Rome Statute* establishes for the ICC. Unfortunately this is not the same basis normally understood for the domestic legal system. There exists a relational problem.

Yet the flaw is more significant in that one presupposes the existence of a centralized, hierarchical and even authoritative approach to how courts exercise their jurisdiction. This is the antithesis of the fundamental bases of the contemporary international legal system. International law is *sui generis*. Yet one cannot change the expectations of academics or decision-makers overnight. They expect to see domestic patterns in the international legal system. Regardless of which school one adopts, all seem to view the ICC as a supranational court in the manner in which it exercises its jurisdiction over States – good or bad.

The traditional approach of States in dealing with international crimes, through cooperation and *aut dedere aut judicare* (prosecute or extradite), is undoubtedly the predominant mode. It remains unaffected. Only in those very rare cases where the apparatus of the State becomes co-opted by criminal elements (the State gone awry) does this mode fail. In such cases the ICC may be capable of exercising its jurisdiction, provided certain conditions exist. The subject matter of the ICC does not cover all instances of international crime or even all potential

perpetrators. In this sense it is incomplete. The subject matter is extremely restrictive as are the subjects. Only those high public officials who are directly responsible for a few categories of international crime (genocide, crimes against humanity and war crimes) are targeted. Even those categories of international crime are restricted further, to occurrence within a specific context in accordance with the ICC's governing documents.

The concept of complementarity is intricately linked to the meaning of language. The new vocabulary of the *Rome Statute* captures concepts that are original yet difficult to comprehend, unless we cast off the usual terms associated with international (criminal) law and their accompanying immanent presumptions. A high degree of conjunctivity is established in the *Rome Statute*, where the ICC and the domestic courts coexist and cooperate.

The Statute regulates the exercise of discretion through a series of mechanisms, effectively diversifying checks amongst the key players in the international community (States, Security Council, Assembly of States Parties, Judiciary, NGOs and other lesser players). Discretionary power is monitored through deliberation and communication. While regulation of the discretionary powers of the Prosecutor is significant within the *Rome Statute*, a subtler but equally effective form of regulation exists, checking the discretionary powers of the judiciary. These structural constraints on the exercise of judicial authority exist in all international courts, but they are particularly strong in the ICC as evidenced by a closer reading of the *Rome Statute* and in the context of international criminal law. The Statute does not centralize legal authority in one location.

The emerging picture of the ICC is one of a very tempered court, only "asserting its jurisdiction" in those most exceptional of cases. When so doing, it is under the utmost of control. The case study of the TRCs and associated amnesties reveals how restrictive it is, including the presumption that, in any given situation, the

domestic courts are deemed to be best suited to investigate or prosecute. This presumption is only countered when: there is evidence that domestic courts are unwilling and incapable (due to a collapse in whole or in part of the judicial system), or that they have acted in bad faith or through an abuse of process. This is a somewhat different stand to how the ICTY (and ultimately the Security Council operating through it) regards amnesties – generally viable for those lesser individuals accused but not viable for those who have abused their fiduciary responsibilities both to the State and to the international community to prevent and repress international crimes. The ICTY approach does not presume that a case is inadmissible automatically. A great deal of discretion is invested within the Tribunal. This is not the case with the ICC, where the presumption that a case is inadmissible exists and where oversight of the ICC's discretionary power is diversified throughout the international legal system.

This divergence in approach is representative of a much broader facet of how contemporary international law, not just international criminal law, operates. The contemporary international legal system is decentralized and disparate yet based upon equality, consensus, negotiation, deliberation and communication. A domestic legal system is based upon centralization (of judicial and political power), a hierarchical system of laws (and possibly even institutions), separation of powers, command and coercion. This is exactly what Kelsen describes. While coercion does exist in international law, it is very restricted and generally allocated to the Security Council under Chapter VII of the Charter. Because legal, coercive power is partially centralized (although limited) in the hands of the Security Council, it might be identified as the primary threat to the decentralized order. International organizations and particularly regional arrangements reinforce the decentralized nature of the international legal system by ensuring that the doctrine of "implied powers" does not result in the United Nations' (and in particular the Security Council) accretion of residual powers. The accretion of power in one location would lead to the evolution of a primary international legal and/or political

organization. This is how trends toward centralization and hierarchy are diffused. Thus the reflexive international legal system is self-perpetuating.

Ironically it is the reflexive nature of the *Rome Statute* and the international legal order, which creates controversy. In both the Indian and American cases, there is an inability of legal thinkers to accept an effective international legal system as being disparate and decentralized. Academic criticisms, such as the lack of coherence in a decentralized international legal order, presuppose a centralized legal order and even a hierarchical relationship between courts. This is a projection of one's expectations of the domestic legal model onto the international legal system. It is a denial of the *sui generis* character of international law. India considers that the ICC must itself be a hierarchical court capable of making decisions without the need for oversight of its discretionary power, let alone for its being diversified throughout the international legal system. Its objections to the failure to classify the use of nuclear weapons as an international crime, further illustrates its lack of understanding or recognition of complementarity in the *Rome Statute*, through a lack of understanding of its subject matter restrictions.

The American position is rooted in the argument that States should have primary responsibility for ensuring justice in the international system. Since the Security Council is the main body that regulates the actions of States in the international system, it should have exclusive control over how the ICC would assert its jurisdiction. Thus the ICC should be subordinated to the Security Council primarily under Chapter VII of the Charter, but not necessarily exclusively so. Again expectations of centralized legal and political authority resurface but this time instead of the ICC being at the top of the hierarchy, the Security Council is. American opposition further reflects the inability to get past Article 12 of the *Rome Statute*, seeing it as the only check on the way in which preconditions are established for the exercise of the Court's jurisdiction – and inadequate at that. Provisions concerning admissibility, the real manner in which the Court' exercises

jurisdiction over States, are glossed over. Without admissibility, how can complementarity be achieved? It cannot.

The *Rome Statute* is an exceptional document. It outlines an extremely complex yet sophisticated approach to prosecuting international criminals where States are unwilling or incapable of doing so. Simultaneously, it maintains the decentralized international legal order, without creating a court that asserts its jurisdiction in a supranational manner. It defines concepts and uses a new vocabulary to do so. It departs from the constraints of traditional views of international law. Complementarity is achieved through its procedures. The international diversification of oversight of its discretionary powers gives it a unique reflexive character in the Habermasian sense. In many respects there is a reflection of the existing structure of the contemporary international legal system. Unfortunately the *Rome Statute* may be too *avante garde*. Most legal thinkers and political decision makers remain steeped in their domestic preconceptions of international law. The task confronting the ICC and the Assembly of States Parties is enormous. They will have to prove that the ICC can function as intended. Whether the officials of the Court and the Assembly of States Parties themselves fully understand the context of how the Court is supposed to operate will be crucial to its survival. In an environment where confusion abounds, the success of these tasks is by no means assured.

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