

THE FINAL BALANCE SHEET? THE INTERNATIONAL CRIMINAL COURT'S CHALLENGES AND CONCESSIONS TO THE WESTPHALIAN MODEL

Jackson Nyamuya Maogoto*

[... The approval of this Court [International Criminal Court] was indeed 'a turn in the road of history.' By ceding the authority to define and punish crimes, many nations took an irrevocable step to the loss of national sovereignty and the reality of global government. I, for one, am heartened to see that the United States took the right turn on the road of history, and I will work hard to ensure there is no backtracking.]¹

I. Introduction

French political thinker Jean Bodin offered the first systematic approach to the theory of sovereignty in his work, *Les Six Livres De La Republique*² in 1576. He defined sovereignty as the 'State's supreme authority over citizens and subjects.'³ Half a century later in 1625, Hugo Grotius in his seminal work *De Jure Belli ac Pacis Libri Tres*,⁴ maintained that the laws governing relations among nations must first safeguard the sovereignty of States themselves holding that rules preventing interference in another State's jurisdiction would help safeguard this sovereignty. According to Grotius, other principles of international law⁵ would emerge as a consequence of the lasting arrangements that sovereign States make among themselves.⁶ Essentially, sovereignty began as a domestic term in a domestic context. It referred to relations between rulers and those they ruled, between the 'sovereign' and his or her subjects. As the term entered the parlance of international law, States continued to emphasise the

* LL.B (Hons), (Moi); LL.M (Cantab; PhD (Melb). Lecturer in law, University of Newcastle.

¹ John Ashcroft (then US Senator, now current US Attorney General), commenting on the International Criminal Court during a hearing on the matter in the US Senate. 'Is a UN International Criminal Court in the U.S. National Interest?: Hearing before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations', 105th Cong 1 (1998) 29.

² J Bodin, *The Six Books of a Commonwealth*, (6 Vols, Kenneth Douglas McRae, ed, 1962).

³ *Ibid* Vol I at 84.

⁴ Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [The Law of War and Peace] (Francis W Kelsey, trans, 1925).

⁵ Jeremy Bentham (1748-1832) is generally credited with coining the phrase 'international law' in his *Introduction to the Principles of Morals and Legislation* (1789). Before that the accepted expression had been 'law of nations,' which Bentham regarded as insufficiently explicit since it seemed 'to refer to internal jurisprudence.' Telford Taylor, *The Anatomy of the Nuremburg Trials: A Personal Memoir* (1992) at 6.

⁶ Grotius, *De Jure Belli*, above n 4 at 102-104, 133.

domestic implications of the concept and worked to establish each others' right to exclusive jurisdiction and control over their own territory.

Following the Thirty Years' War, the 1648 Peace of Westphalia attempted to codify an international system based on the coexistence of a plurality of States exercising unimpeded sovereignty within their territories thus enshrining untrammelled State sovereignty and freedom from outside interference as the foundation of modern international law. After three decades of war between Catholics and Protestants, the Peace of Westphalia sought to separate the powers of church and State. In so doing, it transferred to Nation-States the special godlike features of church authority. States inherited sovereignty, and with it an unassailable position above the law that has since remained the central element of international relations. Sovereignty is a notion which, perhaps more than any other, has come to dominate our understanding of national and international life. Its history parallels the evolution of the modern State. Much of the confusion surrounding the concept arises from the many connotations it has acquired over the centuries, in particular from its association with notions of, national interest, national independence and national security, but also with the notion of strength understood as the State's capacity to impose its will whether on its own citizens or other States. Like private ownership, sovereignty implies absolute rights to territory and the prohibition of trespass by others. The enclosure of territory by sovereign boundaries separates internal from external space.

To be sovereign is to be subject to no higher power. For more than three centuries, international relations have been structured around the legal fiction that States have exclusive (sovereign) jurisdiction over their territory and its occupants and resources. Most of the fundamental norms, rules, and practices of international relations rest on the premise of State Even many characteristic violations of sovereignty are themselves rooted in State sovereignty,

that is, in the absence of political power or legal authority above States. There has always been tension, however, between State sovereignty and other values that call into question its primacy. Sovereignty is a legal fiction that continues to evolve. It is not an immutable feature of the human condition. In fact, the Permanent Court of International justice pointed out in 1923 that ‘the question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations’.

Although hardcore realists still cling to the notion that States are supreme, reality points to the fact that international law norms have developed rules whose aim is to modulate the behavior of States. This implies violation of or intrusion upon local authority. International penal process has significantly contributed to the threatening of the overall concept of sovereignty. The significance of international penal process and its accompanying tenet of international justice reflects an evolution in the perception of sovereignty heralding a qualitative shift which necessitates an ethical vision in which human values supersede State rights. This Article is premised on the contention that international penal institutions have contributed to a diminution of the State’s supremacy by acknowledging that though States remain the principal actors on the international scene, there is limitation on their internal power and authority manifest in the International Criminal Court’s (ICC) goal of attempting to influence the behavior of individuals at all levels of authority and power through enforcement of international criminal and humanitarian law. This entails an ‘interfering’ in political processes to alter outcomes by placing restrictions on the State’s freedom of action and exercise of its sovereign power.

Although the State has expanded its capabilities for control and involvement in some areas, overall the trend in international criminal and humanitarian law has been toward the

‘diminution of State authority’ with authority being relocated both upward to international penal institutions and downward as individuals and groups assert themselves as subjects of international law. The institutionalisation of international penal process represents a shift in authority from States to the international community. International penal process when put in opposition to the State, is the enemy of State power. The notion of international justice now points towards a sphere that though controlled by States, is ineffaceably external to power. Given the far-reaching transformation of the social and political landscape we have witnessed in the last century, there has been a transformation of the concept and practice of sovereignty through the development of international penal process.

The International Criminal Court was the last great international institution of the 20th Century. In the words of Sadat and Carden:

It is no exaggeration to suggest that its creation has the potential to reshape our thinking about international law. For if many aspects of the Rome Statute demonstrate the tenacity of traditional Westphalian notions of State sovereignty, there are nonetheless elements of supranationalism and efficacy (in spite of the complementarity principle) in the Statute that could prove extremely powerful. Not only does the Statute place State and non-State actors side-by-side in the international arena, but the Court will put real people in real jails. Indeed, the establishment of the Court raises hopes that the lines between international law on the one hand, and world order, on the other, are blurring and that the normative structure being created by international law might influence or even restrain the Hobbesian order established by the politics of States.⁷

This Article examines the organization and operating principles of the Court. Many aspects of the *Rome Statute*⁸ challenge fundamental tenets of the structure of international law existing heretofore. No analysis could address all the aspects of this new international institution and the Article seeks to focus attention on some of its major features impacting on State sovereignty--the focus of this Article. Part II of the Article explores the structure and competence of the Court and in particular the powers of the prosecutor, general principles

⁷ Leila Nadya Sadat & S. Richard Carden, ‘The New International Criminal Court: An Uneasy Revolution’ (2000) 88 *Georgetown Law Journal* 381, 387.

⁸ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999 (not yet in force) (*‘Rome Statute’*), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the

underlying the jurisdiction of the Court, the formulation of the complementarity principle in the Court's Statute, the manner in which cases will come to the Court and be decided and the State cooperation regime. It examines the State cooperation regime governing the conduct of investigations and prosecutions on State territory and the arrest of suspects and their surrender to the Court noting that the Court's enforcement jurisdiction is paltry, at best, suggesting the unease of States to the idea of a permanent international penal process. Part III, is a general reflection on the merits and demerit of the International Criminal Court.

II. Structure and Competence of the International Criminal Court

The *Rome Statute* envisages that the Court will have four organs: the Presidency, the Judiciary (which is composed of three divisions: Appeals, Trial, and Pre-Trial Divisions), the Office of the Prosecutor, and the Registry.⁹ The Statute provides that the judges are all to be elected as full-time members of the Court,¹⁰ and that the Prosecutor, Deputy Prosecutors,¹¹ and Registrar¹² shall also serve on a full-time basis. This was a major improvement over earlier proposals for the ICC, virtually all of which conceived of the Court as a 'stand by' institution,¹³ whose personnel would largely be part-time.¹⁴ The Statute also expressly addresses the need for continuing oversight by the States Parties by establishing an Assembly of States Parties and providing rules for its organization and operation.

Establishment of an International Criminal Court on 17 July 1998. The final vote recorded was 120 in favour, seven against and 20 abstentions

⁹ Ibid art 34.

¹⁰ Ibid art 35(1). There is a provision permitting the Presidency to reduce Judges' terms if the workload so warrants. See ibid art 35(3). Art 40(3) adds that judges 'required to serve on a full-time basis shall not engage in any other occupation of a professional nature.' Ibid art 40(3).

¹¹ Ibid art 42(2).

¹² Ibid art 43(5).

¹³ See, eg, *Report of the International Law Commission* (ILC Draft Statute), UNGAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994) 59, cmt, §3.

¹⁴ Under the scheme envisaged by the ILC in 1994, only the Registrar would have been a truly full-time member of the Court. Leila Sadat Wexler, 'The Proposed Permanent International Criminal Court: An Appraisal' 29 *Cornell International Law Journal* 665, 695-96.

2.1. *The Office of the Prosecutor: A Watershed for States Trust and Distrust of the International Penal Process*

Under the 1994 ILC Draft Statute for an international criminal court, only States and the Security Council could lodge complaints with the Court.¹⁵ The *Rome Statute* in addition also permits the Prosecutor to bring cases before the Court on his or her own initiative.¹⁶ Defining the powers of the Prosecutor was a highly contentious issue during the PrepCom I meetings, specifically with respect to whether the Prosecutor should be able to act *proprio motu* or *ex officio*, that is, on his or her own motion, in bringing cases to the Court. This issue created a deep schism among the PrepCom I delegates, with many smaller nations, some European nations, and the NGOs strongly supporting a Prosecutor able to act independently of State referral,¹⁷ and many larger countries, including most of the permanent five members of the Security Council, opposing an independent Prosecutor.¹⁸ Many States were concerned that the independent Prosecutor could become an ‘independent counsel for the universe,’ unaccountable to anyone and liable to file complaints against States on the basis of political prejudices rather than legal concerns.¹⁹ However, numerous procedural safeguards are built into the Statute to prevent the Prosecutor from abusing his or her power.

¹⁵ See 1994 ILC Draft Statute, above note 13, arts 23, 25.

¹⁶ See *Rome Statute*, above note 8 arts 13(c), 15(1).

¹⁷ The issue arose at PrepCom I (IV) in August 1997, during discussions on art 23 of the ILC Draft. Supporters of an independent Prosecutor included Germany, Finland, Norway, Costa Rica, Tanzania, South Korea, Italy, Austria, Trinidad & Tobago, Argentina, Greece, Switzerland, Liechtenstein, and New Zealand. Among the NGOs, both the Lawyer’s Committee for Human Rights and Human Rights Watch issued reports detailing the need for an independent Prosecutor. See Lawyer’s Committee For Human Rights, ‘The International Criminal Court Trigger Mechanism And The Need For An Independent Prosecutor’ (July 1997); Human Rights Watch, ‘Commentary For The August 1997 Preparatory Committee Meeting on The Establishment of an International Criminal Court: Materials For Working Groups 1 and 2’ (1997). The Lawyer’s Committee for Human Rights also refuted ideas that an independent Prosecutor would be uncontrollable. See Lawyer’s Committee For Human Rights, ‘The Accountability of an Ex Officio Prosecutor’ (February, 1998).

¹⁸ Opponents of an independent Prosecutor at PrepCom I (IV) included the United States, the Russian Federation, China, France, Israel, India, Malaysia, Egypt, and Syria. The United Kingdom appeared to be undecided.

¹⁹ The United States objection to an independent Prosecutor perhaps stems from the Clinton Administration’s disenchantment with the investigation of Independent Counsel Kenneth Starr and from the movement in the United States to allow the independent counsel law, 28 USC §§ 591-599, to lapse. See ‘U.S. Justice Department

The *Rome Statute* grants broad powers to the prosecutor's office of the ICC.²⁰ Article 15 of the *Rome Statute* provides that the prosecutor of the court 'may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.'²¹ Thus, the ICC prosecutor may, on his/her own initiative, launch investigations and indict individuals for crimes within the ICC's jurisdiction. The prosecutor may investigate alleged crimes based on the referral of the UN Security Council, State Parties, victims, NGOs, or any other reliable source.²² The prosecutor determines the reliability of the source, as 'he or she deems appropriate.'²³ Some groups tout the ability to obtain referrals from non-State sources (NGOs, victims, etc.) as a most important victory because they feared States would be unwilling to refer situations to the court.²⁴ This is especially so based on the experience of State-based complaints procedures in the human rights field. States rarely bring referrals and it is doubtful whether the ICC will enjoy any greater cooperation and diligence on the part of States in triggering court action.

With the authority to initiate investigations on his/her own, the ICC prosecutor has potential to become an effective inquisitor with the authority to use his/her office in different States and regions of the world wherever any matters of concern to the court arise without being unduly shackled by national sovereignty concerns in matters that warrant his/her attention. Though the Pre-Trial Chamber of the court has the power to deny the furtherance of an investigation by the prosecutor,²⁵ the prosecutor has the power to investigate situations with no oversight

Says Independent Counsel Statute Should Go', *Agence France-Presse*, 3 March 1999, available in 1999 WL 2556408.

²⁰ Senate Hearing, above note 1, testimony of Ambassador David J Scheffer (acknowledging the powers and limitations of the office of prosecutor). Prosecutors with any semblance of independence are currently disfavoured in the United States.

²¹ *Rome Statute*, above note 8, art 15.

²² *Ibid.*

²³ *Ibid.*

²⁴ See Human Rights Watch, 'Summary of the Key Provisions of the ICC Statute'. Available at <<http://www.hrw.org/campaigns/icc/docs/icc-statute.htm>> (visited 15 January 2000) .

²⁵ *Rome Statute*, above note 8.

before he/she must submit it to the Pre-Trial Chamber.²⁶ In addition, he/she may return with a new request based on new evidence regarding the same situation.²⁷ Therefore, a persistent prosecutor, backed by groups or individuals, may pursue a particular individual or group he/she believes responsible for a crime until the Pre-Trial Chamber allows the investigation to proceed towards court action. The United States and several other nations felt this power was too broad. This is a critical reason for the United States declining to ratify the Statute.

One of the greatest concerns expressed by non-signing States is the prosecutor's power to initiate an investigation without supervision of any kind. There is no requirement that the prosecutor act on the request of a sovereign State or at the direction of an international organization such as the United Nations Security Council. The prosecutor is completely independent, without any accountability (other than to the ICC).²⁸ Nothing in the Statute it is argued, appears to limit this power. Proponents of the court claim that the power of the prosecutor is not as broad or unlimited as the Court's opponents make it out to be. The limitations they point to arise in Article 53 of the Statute and consist mainly of a set of factors the prosecutor should consider before pursuing an investigation. Article 53 states:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this statute. In determining whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available . . . provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is . . . admissible under Article 17; and
- (c) Taking into account the gravity of the crime and the interest of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.²⁹

²⁶ Ibid. This includes the power to go to the site of a crime, talk independently to witnesses and collect evidence. See *ibid.* When national authorities are investigating, the prosecutor may still be present, and may still take voluntary testimony outside of the national investigators presence. See *ibid.*

²⁷ *Ibid.*

²⁸ Art 15 requires that the prosecutor, upon reaching the conclusion that there is a reasonable basis to go forward with an investigation, must submit a request to the Pre-Trial Chamber of the court for authorisation to proceed with the investigation. *Ibid.*

Opponents of the Court argue that these discretionary considerations amount to limitations addressing only whether a crime has been committed, whether jurisdiction exists, admissibility of evidence, and other potential overriding political concerns. These reservations are minimal. The Statute contains qualifications that allow the prosecutor to have great leeway in initiating investigations. For example, ‘reasonable basis’ is a low bar to investigation. Therefore, the discretion of the prosecutor is quite broad, extending to all aspects of evidence gathering, taking of oral and written testimony, and so forth.³⁰

2.2. *Scope of the Court’s Jurisdiction*

2.2.1. *Jurisdiction Ratione Materiae*

The ILC Draft Statute originally conceived of four separate jurisdictional hurdles that would be prerequisites to the exercise of the Court’s jurisdiction in any particular case: First, none of the crimes except genocide were within the Court’s ‘inherent’ jurisdiction (*competence propre*), but instead were subject to a complex regime of State consent that was bypassed only in cases referred to the Court by the Security Council;³¹ Second, States could (again, except in the case of a Security Council referral) limit the jurisdiction of the Court accepted by them in advance by lodging a declaration to that effect with the depositary;³² Third, the Security Council had to make a determination of aggression for a complaint on that basis to be receivable by the Court. Fourth, assuming subject matter jurisdiction (competence) to be generally present, all cases had to be ‘admissible’ in keeping with the principle of complementarity on which the Statute of the Court was predicated.³³

²⁹ *Rome Statute*, above note 8. The remainder of art 53 spells out the Prosecutor’s duties if he or she chooses not to continue the investigation, and the Pre-Trial Council’s power of review of such a decision.

³⁰ Claims that the prosecutor’s power is limited are questionable. For example, the Human Rights Watch lists the Pre-Trial Council’s power to review a decision NOT to investigate as the main limitation. See Key Provisions of the ICC Statute, above note 24. Review of a decision not to prosecute in no way limits decisions to prosecute. See *ibid*.

³¹ See 1994 ILC Draft Statute, above note 13, arts 21, 22, 25.

³² *Ibid* art 22.

³³ *Ibid* arts 35, 23(3) and 22.

The *Rome Statute* extends the Court's inherent jurisdiction to four crimes:³⁴ genocide, crimes against humanity, war crimes, and aggression.³⁵ In rejecting a 'Court a la carte', the Statute now requires all States Parties to accept the Court's inherent jurisdiction over all crimes in Article 5, and no longer permits reservations with respect to the Court's jurisdiction over particular offences.³⁶ It also reduces, but in no way eliminates, the power of the Security Council over ongoing proceedings by permitting the Council to interfere only if it adopts a resolution under Chapter VII requesting the Court not to commence an investigation or prosecution, or to defer any proceeding already in progress.³⁷

Despite the *Rome Statute's* extension of the Court's inherent jurisdiction over four core crimes, the subject matter of the Court is narrower than Article 20 of the original ILC Draft Statute, which envisaged that the Court would also be able to hear cases involving treaty crimes.³⁸ Restricting subject matter jurisdiction in this way was largely positive, for it permitted the Diplomatic Conference to strengthen the compulsory nature of the Court's jurisdiction, which, as originally conceived by the International Law Commission, was largely optional.³⁹ Because the Preparatory Committee also felt strongly that the Court's Statute should define the crimes within its jurisdiction, rather than simply list them, as the ILC had

³⁴ *Rome Statute*, above note 8, art 5.

³⁵ The Statute does not define aggression. Art 5(2) provides that the Court shall exercise jurisdiction over that crime once it has been defined and adopted in accordance with arts 121 and 123 of the Statute, which detail the process of amending the Statute.

³⁶ *Rome Statute*, above note 8, art 12(1). Subject, of course, to the seven year opt-out for war crimes. See *ibid.* art 124. See above discussion accompanying note 136. It is important to note that 'inherent jurisdiction' does not mean primacy, as some delegations mistakenly believed in Rome. Admissibility and complementarity are still limits on the exercise of jurisdiction in a particular case, even with respect to crimes over which there is inherent jurisdiction.

³⁷ *Rome Statute*, above note 8, art 16.

³⁸ See 1994 ILC Draft Statute, above note 13, art 20.

³⁹ See Leila Sadat Wexler, 'First Committee Report on Jurisdiction, Definition of Crimes and Complementarity' in M Cherif Bassiouni (ed), *The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications* (Association Internationale de Droit Penal, Nouvelles Etudes Penales No 13) (1997); Sadat Wexler, above note 14 at 699.

done, inclusion of some of the treaty crimes was problematic given difficulties in reaching a consensus on their definition.⁴⁰

Frighteningly, to apprehensive States, many advocates of the ICC desire to expand the court's jurisdiction beyond the core offences of genocide, war crimes, crimes against humanity, and aggression.⁴¹ The Final Act adopted by the delegates to the Rome Conference recommends an additional conference to 'consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.'⁴² The amendment procedures under Article 121 of the Statute would allow a wide range of transnational crimes currently the preserve of State-centric mechanisms to be added to the court's jurisdiction.⁴³ This possible expansion of the court's jurisdiction is viewed by its opponents as extremely dangerous as it 'would infringe upon a nation's sovereignty and ability to try crimes that affect domestic policy in their home setting.'⁴⁴ Though transnational crimes (terrorism, hostage-taking, drug-trafficking etc) present serious problems for the international community, some States feel particularly strongly about their inclusion in the *Rome Statute* considering that though proscribed under international law, domestic justice systems remain the primary avenue for prosecuting offenders.

⁴⁰ For a good discussion of the treatment of treaty crimes during the *Rome Statute's* negotiation, see Herman von Hebel & Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Roy S Lee, *The International Criminal Court : the making of the Rome Statute--Issues, Negotiations, Results* (1999).

⁴¹ Gary Dempsey, 'Reasonable Doubt: The Case Against the Proposed International Criminal Court' (16 July 1998) 311 *Cato Policy Analysis* 1, 4-6 <<http://www.cato.org/pubs/pas/pa-311.html>>.

⁴² Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution E, UN Doc A/CONF 183/10 (1998).

⁴³ *Rome Statute*, above note 8, art 121 (outlining amendment procedures). Under this Article, seven years after the Treaty's entry into force, any State Party may propose amendments. Ibid. There is no language restricting the subject matter or scope of amendments. Ibid.

⁴⁴ Cara Levy Rodriguez, 'Slaying the Monster: Why the United States Should Not Support the Rome Statute' (1999) 14 *American University International Law Review* 805, 832-33.

2.2.2. *Jurisdiction Ratione Loci*

The geographic scope of the Court's jurisdiction, *ratione loci*, varies depending on the mechanism by which the case comes to the Court. In the event that the Security Council refers the matter, jurisdiction covers the territory of every State in the world, whether or not the State in question is a party to the Statute.⁴⁵ If the matter is referred by a State Party or initiated *proprio motu* by the Prosecutor, however, the Court's jurisdiction is more restricted but still extensive. In such instances, jurisdiction extends to the territory of a non-State Party only if that State consents to the jurisdiction of the Court, irrespective of whether the acts were committed in the territory of the consenting State or the accused is a national of the consenting State.⁴⁶ The fact that this regime additionally gives the ICC jurisdiction over the citizens of non-States Parties, allowing the ICC to exercise its jurisdiction in certain circumstances within the territory of non-State Parties⁴⁷ is considered by some States to be in direct contravention of standing international law which binds States only to those international agreements to which they consent.⁴⁸

In cases involving a Security Council referral, the Statute's scope is unbounded by geography. Thus, even though Article 10 attempts to separate the Statute from customary international law existing outside the Statute's application, and each definition of crimes purports to define the law only 'for purposes of this Statute,'⁴⁹ the Statute, as all have admitted, and to which the United States has in fact strenuously objected, applies to non-State Party nationals in certain circumstances, and can be applied by the Security Council to all the human beings of the

⁴⁵ See *Rome Statute*, above note 8, art 13(b). Because the Security Council will refer cases only under its Chapter VII powers, referral to the Court, like the establishment of the two ad hoc tribunals, is presumably a measure 'not involving the use of force' that the Security Council may adopt to maintain international peace and security. See *Prosecutor v Tadic*, Case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 34-36 (Appeals Chamber Oct. 2, 1995).

⁴⁶ *Rome Statute*, above note 8, arts 4(2), 12(2).

⁴⁷ *Ibid.*

⁴⁸ See *Vienna Convention on the Law of Treaties*, May 23, 1969, art 34, 8 ILM 679.

⁴⁹ *Rome Statute*, above note 8, arts 6 (genocide), 7(1) (crimes against humanity), and 8(2) (war crimes).

world. It should be noted though that this power of the Council already inheres to the Council independent of the ICC and any attempt to limit this power would have been inconsistent with the *UN Charter*.

Opponents of the ICC argue that the greatest danger of the ICC lies in its broad jurisdiction and the possible expansion and abuse of that jurisdiction. They point to the fact that the ICC can exercise jurisdiction over any national of any State-Party even when in the territory of a non-State Party, as well as over any individuals, regardless of nationality, within the territory of a State Party.⁵⁰ This was yet another of the reasons put forward by the United States delegation to the Rome Conference for initial refusal to sign the Statute since in its final form, the Statute extended the court's jurisdiction to cover nationals of States not party to the Statute.⁵¹ This amounted to an indirect grant of jurisdiction over any person involved in the State where the crimes occurred, regardless of whether their nation was subject to the ICC. The United States delegation sought to amend this provision, but was overwhelmingly defeated. Therefore, the Statute signed in Rome may violate national sovereignty by indirectly allowing jurisdiction over the nationals of States that choose not to become State Parties. A logical ramification of this, the United States argued is that States will be less inclined to send troops to participate in peacekeeping missions, therefore, diminishing security in some parts of the world. Primarily for this reason, although the Clinton administration favoured the ICC, the United States delegation refused to sign the Statute at Rome⁵²

Overall though, with regard to the court's jurisdiction *ratione loci*, there is unease with the nature of the law being made. Legal theory and political reality conceive of international law-

⁵⁰ Ibid art 12.

⁵¹ *Rome Statute*, *ibid*; Senate Hearing, above note 1 at 12 (testimony of Ambassador David J Scheffer).

⁵² David A Nill, 'National Sovereignty: Must it be sacrificed to the International Criminal Court?' (1999) 14 *BYU Journal of Public Law* 119, 133.

making as predominantly contractual and consensual. Yet, while the *Rome Statute* takes the form of a contract between States, the law is clearly intended to have the status of custom and even of jus cogens obligations. For objecting States, there seems to them to be a schizophrenia about the status and binding effect of the prescriptive norms that the text attempts to redress by, in certain limited cases, deferring to the sovereignty of States but significantly in other aspects disregarding sovereignty.

2.2.3. *Jurisdiction Ratione Personae*

Firstly, the Statute provides for jurisdiction *ratione personae* over natural persons only (thereby excluding organizations or States).⁵³ The ILC, in early discussions on the question of an international criminal court, proposed adding State culpability.⁵⁴ The proposal was rejected as ‘science fiction.’⁵⁵ Secondly, unlike the ILC Draft, which was silent on the age of criminal responsibility, the Court’s jurisdiction is limited to persons over eighteen years of age.⁵⁶ The Rome Statute establishes personal jurisdiction over the individuals in the Member States.⁵⁷ Necessarily, personal jurisdiction by an international organisation raises sovereignty issues (though not for the first time as this is manifest from the experience of the post-World War II international military tribunals as well as the ad hoc international criminal tribunals of the 1990s). Many proponents of the ICC minimise the potential intrusions on sovereignty that may occur. ‘Sovereignty concerns will have to be addressed; but . . . international law is gradually moving away from a State-centrist approach towards a more moral, human rights approach. It is imperative that this reality be recognised in the jurisdiction and the powers of

⁵³ See *ibid.* arts 1, 25(1). As a final note on judicial jurisdiction in the ICC, the Statute does not permit trials in absentia. Thus, the Court must always have the defendant in its custody to obtain personal jurisdiction, in the sense that United States lawyers use the term. See *ibid.* art 63(1).

⁵⁴ See Sadat Wexler, above note 61 at 678 note 75.

⁵⁵ *Ibid.*

⁵⁶ See *Rome Statute*, above note 8, art 26.

⁵⁷ See *Rome Statute*, *ibid.*

the court.⁵⁸ This move away from a state-centred approach is certainly consistent with the trend towards declining State sovereignty.

A crucial test for the ICC will take place over sovereignty. The individual, not the State, will be subject to the jurisdiction of the court. It has been suggested that States may ‘run the risk of having their nationals sent to be tried by judges possibly from enemy or rogue nations.’⁵⁹ The United States thought it unlikely that any State will cede to the court’s jurisdiction over their citizens, except when it suited their political goals.⁶⁰ Therefore, the ICC would find cooperation only when a State deemed it expedient. Even some who espouse the concept of an ICC acknowledge the problem that sovereignty presents:

States are understandably jealous of their right to investigate and try international criminals in their own courts. National pride leads States to have faith in the competency and fairness of their domestic judicial systems. They do not want to surrender control over criminal cases to another tribunal. Certainly, with the exception of the core crimes, States are capable of prosecuting the majority of international crimes fairly and effectively, and the Statute [for the International Criminal Court] should encourage national prosecutions when feasible. Moreover, victimized States have incentives to pursue cases that an international tribunal might lack.⁶¹

The United States delegation attempted to resolve this at the Rome Conference by preserving the right of reservation to specific aspects of the Statute. This proposal was soundly defeated by the rest of the delegates. While there may remain the option of amending the Statute, some groups are adamantly opposed to such a thought. The fear that amendments to the ICC,

⁵⁸ Grossman et al., below note 121 at 1438.

⁵⁹ Christopher L Blakesley, ‘Obstacles to the Creation of a Permanent War Crimes Tribunal’ *Fletcher Forum*, Summer/Fall 1999, at 77, 90.

⁶⁰ The Human Rights Watch expresses the concern that nations will avoid jurisdiction by invoking a ‘national security’ privilege. See Human Rights Watch, Section M: The Protection of National Security (visited 5 May 2000) < <http://www.hrw.org/reports98/icc/jitbwb-15.htm>>. It states, ‘[National security] must be balanced against other important and potentially competing interests. These would include the interests of victims, and of the international community as a whole.... Deference to a national security must be tempered by the need to ensure the protection of international security, which is seriously compromised by the commission of heinous crimes and the impunity that so often surrounds them.’ Ibid.

⁶¹ See Senate Hearing, above note 1 at 6 (statement of Senator Jesse Helms) (recalling the World Court’s attempt at exercising jurisdiction over the United States for its support of the Nicaraguan Contras, and the fact that the United States ignored the court due to lack of jurisdiction).

particularly by powerful nations, would only make it a tool of the UN Security Council⁶² is counterbalanced by the reality that it is unlikely that those States which have demonstrated their support for the concept of the ICC by ratifying the Statute will subsequently vote to amend the Statute by limiting the court's jurisdiction.

Within the context of its jurisdiction *rationae personae*, it should be noted that the *Rome Statute* may affect criminal procedure in Third States. A notable example is double jeopardy in domestic criminal proceedings. Article 20 of the Rome Statute imposes a double jeopardy limitation on national jurisdictions. As Professor Gennady Danilenko observes,

[u]nder Article 20, no person who has been convicted or acquitted by the ICC for the relevant crimes can be tried again before 'another court' even if they happen to be crimes under domestic laws. The phrase 'another court' includes both international and domestic courts. As a result, subsequent proceedings in domestic courts of State Parties are barred by a final order issued by the ICC. It is not entirely clear whether a domestic trial after a final ICC order by a Third State would be consistent with the general principle non bis in idem. Many States are bound by this principle as a matter of treaty law... Although the practice of the Human Rights Committee indicates that non bis in idem has only domestic application, a question may be raised as to whether it can now be reinterpreted as having international dimensions as well.

2.3. Foundations of the Court's Jurisdiction

One intriguing aspect of the *Rome Statute* which underscores its nature as a constitutive document is that it combines jurisdiction to prescribe, to adjudicate, and to enforce all in one instrument. It is perhaps the implementation and implications of the jurisdictional theories of the Statute that are its most revolutionary features.⁶³ For, through a rather extraordinary process, these three jurisdictional categories classically known to international law have been transformed from norms providing 'which State can exercise authority over whom, and in what circumstances,'⁶⁴ to norms that establish under what conditions the international community, or more precisely the States Parties to the Statute, may prescribe international

⁶² See Bryan F MacPherson, 'Building an International Criminal Court' 13 *Connecticut Journal of International Law* 1, 42 (citing Daniel H Derby, 'An International Criminal Court for the Future' (1995) 5 *Transnational Law and Contemporary Problems* 307, 311.

⁶³ Sadat and Carden, above note 2 at 406.

⁶⁴ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 56.

rules of conduct, may adjudicate breaches of those rules, and may enforce those adjudications. But even this effort to overcome one of the major historical objections to an ICC drew fire from then United States Senator, John Ashcroft who argued that: 'If there is one critical component of sovereignty, it is the authority to define crimes and punishment. This court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats.'⁶⁵ Senator Ashcroft, expressing the sovereignty concerns he felt for the United States, continued, 'No aspect of the Court is more troubling, however, than the fact that it has been framed without apparent respect for--and indeed in direct contravention of--the United States Constitution ...The proposed court . . . neither reflects nor guarantees the protections of the Bill of Rights. The administration was right to reject the Court and must remain steadfast in its refusal to join a court that stands as a rejection of America's constitutional values.'⁶⁶

Arguably a cession of sovereignty that abrogates the fundamental principles of any country, whether that sovereignty be the ability to define crime and punishment or the establishment of constitutional principles, is a cession that cuts too deep.⁶⁷ For present purposes, it suffices to say that the power and legitimacy of these norms was premised on the well-accepted theory of universal jurisdiction that derives from the idea that when criminal activity rises to a certain level of harm (the gravity idea threaded through the Statute), or sufficiently important interests of international society are threatened, all States may apply their laws to the act,

⁶⁵ Senate Hearing, above note 1 at 8.

⁶⁶ Senator Ashcroft concluded:

.... The approval of this Court was indeed 'a turn in the road of history.' By ceding the authority to define and punish crimes, many nations took an irrevocable step to the loss of national sovereignty and the reality of global government. I, for one, am heartened to see that the United States took the right turn on the road of history, and I will work hard to ensure there is no backtracking.

Ibid 10.

⁶⁷ Nill, above note 52 at 135.

‘even if it occurred outside its territory, even if it has been perpetrated by a non-national, and even if its nationals have not been harmed by [it].’⁶⁸

The Statute does not propose criteria for sorting the international from the national; That is because the Statute does not focus on this issue at all, leaving it essentially up to the complementarity principle and State consent regime to sort permissible from impermissible assertions of the Court’s jurisdiction (to adjudicate). The one explicit clue is the Statute’s command that the Court is to exercise its jurisdiction only in cases involving ‘the most serious crimes of concern to the international community as a whole.’⁶⁹ This phrase combines both a substantive limit on the Court’s jurisdiction with its underlying premise--that in a world of conflicting ‘sovereigns,’ both territorial (States) and non-territorial (the international community as a whole), some system must be adopted to sort permissible from impermissible assertions of jurisdiction (to prescribe).⁷⁰ As will be shown below, the complementarity principle and State consent regime will generally restrain the exercise of the Court’s prescriptive jurisdiction such that the Court’s reach does not exceed what reasonable theories of power distribution and lawmaking authority between ‘sovereigns’ suggest the proper sphere of the Court’s authority should be.⁷¹

2.3.1. *Complementarity with State Judicial Systems: A Step Back or a Step Forward?*

The *Rome Statute* reflects the practical experience of the international community in the Yugoslavia and Rwanda Tribunals in several important ways, and no doubt represents an improvement over its predecessors. Yet in one respect the ICC will do no better, and may not

⁶⁸ Higgins, above note 115 at 57; see also *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 404 (noting that States may define punishments for offences which are of ‘universal concern’).

⁶⁹ *Rome Statute*, above note 8, art 5 (1); see also *ibid.* art 1.

⁷⁰ As Professor Levasseur noted, the problem is essentially akin to one of conflict of laws: international criminal law as a body of law may apply where an ‘individual’s behaviour (whether a national or a foreigner) has troubled

even equal, its sister institutions, for it will operate not on the basis of primacy jurisdiction, but subject to the principle of complementarity.⁷²

Both the preamble to the Statute and Article 1 express a fundamental principle of the *Rome Statute*: that the Court is to be ‘complementary’ to national criminal jurisdictions.⁷³ Although complementarity is not defined (and indeed, there is no general ‘definition’ section in the Statute, although there are definitional provisions within particular Articles),⁷⁴ an analysis of the Articles on admissibility demonstrates that complementarity does not mean ‘concurrent’ jurisdiction (which it arguably could have under the ILC’s original conception). Under Article 17, the Court may exercise jurisdiction only if: (1) national jurisdictions are ‘unwilling or genuinely unable’ to exercise jurisdiction; (2) the crime is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based.⁷⁵ Article 17 further lays out the factors to determine unwillingness as well as the elements for determining inability on the part of national courts:

2. In order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . . ;
- (b) There has been an unjustifiable delay in the proceedings . . . inconsistent with an intent to bring the person . . . to justice;

the ordre public of a country other than his own.’ Georges Levasseur, *Les crimes contre l’humanité et le problème de leur prescription*, (1966) 93 *Journal du Droit Internationale* [J D I] 259, 267.

⁷¹ Sadat & Carden, above note 7 at 408

⁷² Neither the ICC nor the ad hoc tribunals have a police force to enforce their orders or arrest their defendants. This has been a recurring problem for the International Criminal Tribunal for Yugoslavia (ICTFY). See, eg, Minna Schrag, ‘The Yugoslav War Crimes Tribunal: An Interim Assessment’ (1997) 7 *Transnational Law and Contemporary Problems* 15, 17. However, the two ad hoc tribunals, by virtue of their primacy jurisdiction, may require States to deliver defendants to them--the ICC cannot. See SC Res 827, UN SCOR, 48th Sess, art 9(2), UN Doc S/RES/827 (1993); SC Res 955, UN SCOR, 49th Sess, art 8(2), UN Doc S/RES/955 (1994). For a detailed analysis of the primacy of this ad hoc tribunals, see Chapters V and VI of this Thesis.

⁷³ *Rome Statute*, above note 8, preamble, art 1.

⁷⁴ See, eg, *ibid* art 7(2) (containing definitions respecting the definition of crimes against humanity outlined in paragraph 1 of the same Article).

⁷⁵ *Ibid* art 17(1);

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person . . . to justice.⁷⁶

In light of Article 17, although the stated goal of the court is to complement national court systems, the Statute clearly outlines processes for judicial review of national court decisions.⁷⁷

Under the theory of complimentary jurisdiction, the ICC can exercise jurisdiction if a State shows an unwillingness or inability to genuinely prosecute crimes.⁷⁸ The ICC will be able to assume jurisdiction over a person who has already been subjected to court proceedings in a domestic court if the ICC determines that the proceedings were undertaken ‘for the purpose of shielding the person concerned from criminal responsibility,’ or were otherwise not conducted ‘independently or impartially.’⁷⁹ Of course, the determination as to whether a State is unwilling or unable to ‘genuinely prosecute,’ or whether prior domestic court proceedings were independent and impartial, lies solely with the ICC itself.⁸⁰ Therefore, ‘because it will set precedents regarding what it considers ‘effective’ and ‘ineffective’ domestic criminal trials, the ICC will indirectly force States to adopt those precedents or risk having cases called up before the international court.’⁸¹ This constitutes ‘an unprecedented change in the sources of national lawmaking, one that diminishes the traditional notion of State sovereignty.’⁸² The possibility that individuals are capable of appealing out of the court of last resort of their nation to the ICC means that the ICC will enjoy de facto judicial review. Such a review would result in the imposition of ICC legal theory upon the national court systems through exercise of its power to review whether a State’s court is unwilling or unable to prosecute individuals the ICC has determined fall under its jurisdiction, thus paving way for the ICC to become a

⁷⁶ Ibid.

⁷⁷ But see Human Rights Watch, Section E: Complementarity <<http://www.hrw.org/reports98/icc/jitbwb-07.htm>> (visited 5 May 1999).

⁷⁸ *Rome Statute*, above note 3, art 17.

⁷⁹ Ibid.

⁸⁰ Art 19 of the *Rome Statute* states that ‘[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it.’

⁸¹ Dempsey, above n 41.

⁸² Ibid.

part of the State legal process by reversing or upholding decisions of what were previously courts of last resort.⁸³ But this attractive avenue is unlikely to entice the court. The court will be well aware of the deadly political fallout that any action in this direction will cause and the reality of crippling the court through State withdrawals. Thus only in obvious and definite circumstances will the court address the merit of national court action. On a balance the court will be careful in avoiding matters of such political volatility. In any case, the complementarity provisions of the Statute enshrine a very high degree of deference to national proceedings offering multiple opportunities for challenge and review to safeguard the primacy of national courts.⁸⁴ As such, complementarity provides an escape clause from potential constitutional difficulties, provided the State itself investigates or prosecutes.

The inclusion of complementarity as a ‘cornerstone’⁸⁵ of the ICC and its substantive and procedural details reflect strong respect for State sovereignty interests. Although the final result is accurately described as a ‘delicate balance,’⁸⁶ it is a balance that takes significant account of the concerns of those States most focused on protecting national sovereignty. Overall though, as with other aspects of the *Rome Statute*, the complementarity provisions reflect a willingness of States to agree to limitations in principle on State sovereignty, within the context of a structure that recognises and presupposes the primacy of sovereign States. In order to ensure that they will be able to utilise the complementarity provisions in all circumstances, many States are currently engaged in bringing about wide-reaching changes to their domestic legislation. The need for such changes depends on the state of existing national law. In many cases, the process of implementation of the *Rome Statute* has involved enshrining the crimes within the jurisdiction of the ICC into the domestic legal order. This

⁸³ Ibid.

⁸⁴ See John T Holmes, *The Principle of Complementarity*, in *The International Criminal Court: The Making of the Rome Statute*, above note 35 at 41, 74-75. See also Richard Dicker & Helen Duffy, ‘The International Criminal Court and National Courts’ (1999) VI: 1 *Brown Journal of World Affairs* 53, 58-59.

⁸⁵ See Holmes, *ibid* 73.

allows, for example, the prosecution of crimes against humanity as such rather than as ordinary crimes more commonly contemplated in domestic law.⁸⁷ In other cases, implementation has involved extending the jurisdiction of domestic courts to cover crimes committed outside the territory of the State.⁸⁸ States that provide for this extended jurisdiction have the comfort of knowing that they are able to prosecute any individual appearing on their territory who is accused of crimes against humanity by invoking complementarity.

2.4. *The International Cooperation Regime: Kowtowing to State Sovereignty*

An institutional check on the ICC's power is that it will have to work through States in conducting investigations, obtaining evidence, and apprehending suspects. The extent to which States, by becoming parties to the ICC Statute, take on obligations to assist the ICC in activities on their own territory is very much an issue of sovereignty. As with other areas defining the relationship between the ICC and States, the *Rome Statute's* final text balances the willingness of States to make commitments necessary for the ICC to function, with a recognition that the ICC will operate in a world of sovereign States.⁸⁹ As Fowler notes,

[t]he accommodation of sovereignty begins with the nature of the general obligation that States undertake by becoming parties to the ICC Statute. Proponents of a strong ICC favored a duty to 'comply' with orders, rather than an obligation of 'cooperation,' which was deemed to be vague and weak. Article 86 of the ICC Statute, '[g]eneral obligation to cooperate,' reflects the latter formulation, requiring State Parties to 'cooperate fully with the Court.' In an art form solution, however, specific

⁸⁶ See Holmes, *ibid* at 74.

⁸⁷ The German Government, for example, has announced a comprehensive revision of the German criminal code to include all the crimes within the Rome Statute. See Summary of the Ratification and Implementation of the Rome Statute of the International Criminal Court by Germany, above note 19. The Federal Cabinet adopted the Act of Ratification of the Statute of the International Criminal Court and the Act Amending Article 16 of the Basic Law. They passed through the Bundestag unanimously and, at time of writing this Article, were before parliamentary committees in the Bundestag, having been introduced to that Chamber on February 24, 2000. See Summary of the Ratification and Implementation of the Rome Statute of the International Criminal Court by Germany (distributed in English by the German delegation during the June 2000 ICC Preparatory Commission session).

⁸⁸ For example, the implementing legislation for both Canada and New Zealand provides, to varying degrees, for universal jurisdiction. See Crimes Against Humanity and War Crimes Act, Statutes of Canada 2000, c.24, P 6 (royal assent 29 June 2000); New Zealand 'International Crimes and International Criminal Court Bill,' introduced by the Hon. Phil Goff.

⁸⁹ See Phakiso Mochochoko, International Cooperation and Judicial Assistance, in International Criminal Court, above note 4, at 305 (describing the end result as 'a balance between the need for perfection on the one hand and States' concern for certain crucial issues on the other').

articles on surrender of suspects and other forms of cooperation require States to ‘comply with requests’ from the ICC.⁹⁰

Part 9 of the Statute, entitled ‘International Cooperation and Judicial Assistance’ is one of the most complex sections of the *Rome Statute*. The 17 Articles of this Part address the interaction between the Court and States in the arrest and transfer of suspects to the Court, and in the conduct of investigations or prosecutions by the Court on State territory. Not surprisingly, Part 9 is the least ‘supranational’ section of the Statute. Although Article 86 requires States Parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes,’⁹¹ the Articles that follow are so riddled with exceptions and qualifications that it is difficult to think of this as anything but an exhortation.⁹² First, the Statute essentially bifurcates the assistance the Court may request of States into two categories: requests for the arrest and surrender of persons to the Court, and requests for everything else the Court might need to conduct investigations and prosecutions under the Statute.⁹³

As a matter of principle, State Parties must comply with a request from the Court for the arrest and surrender of a person;⁹⁴ non-States Parties are under no such obligation.⁹⁵ The same is true with respect to requests for other forms of assistance. An important issue that arises is constitutional prohibitions on extradition of nationals to a foreign jurisdiction that are to be found in many constitutions. The question is whether such prohibitions are consistent with the obligation of state parties to surrender suspects to the ICC. Because the ICC will not prosecute in absentia, the Court must gain physical control over a suspect for a trial to take

⁹⁰ Jerry Fowler, ‘Not Fade Away: The International Criminal Court and the State of Sovereignty’ (2001) 2 *San Diego Journal of International Law* 125, 146.

⁹¹ *Rome Statute*, above note 8, art 86.

⁹² Sadat & Carden, above note 7 at 444.

⁹³ *Ibid.*

⁹⁴ By ‘persons,’ the Statute is presumably tracking earlier drafts under which ‘persons’ included ‘suspects,’ ‘accused,’ and ‘convicted persons.’ Report of the Intersessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc A/AC.249/1998/1/13 at 226 n.281

⁹⁵ *Rome Statute*, above note 8, art 79.

place. State Parties' obligations to cooperate with the Court in the arrest or surrender of persons,⁹⁶ be they nationals or not, are therefore essential to the Court's ability to function. Although some exceptions may apply with respect to the duty to provide 'other forms of cooperation,' as in the case of national security in Article 93(4),⁹⁷ there are no exceptions to the Statute's arrest and surrender obligations. The apparent tension between constitutional prohibitions against extradition of nationals and ICC obligations diminishes upon a closer examination of the fundamental conceptual differences between 'surrender' to an international criminal court and 'extradition' to another state.⁹⁸ Article 102 of the Statute defines 'surrender' as 'the delivering up of a person by a State to the Court' and extradition as 'the delivering up of a person by one State to another.'⁹⁹ This distinction between extradition and surrender is not merely semantic but substantive. Creators of constitution prohibitions contemplated 'horizontal cooperation' between national courts and not 'vertical cooperation' with an international court. As the ICC is not a 'foreign court' or 'foreign jurisdiction,' but rather an international one, the constitutional prohibitions against extradition may not apply. As a purely political matter, there is no guarantee that States would be willing to surrender their nationals to the processes of an international criminal justice system. The *Rome Statute*, for example, establishes an obligation on States Parties to the Statute who are also parties to the underlying treaty proscribing the crime, to surrender the accused to the jurisdiction of the International Court.¹⁰⁰ Nonetheless, without an effective mechanism for requiring the compliance of States with the dictates of international law, such a regime continues to rest on the voluntary compliance of the custodial State. Similarly, the *Rome Statute* requires that the

⁹⁶ Ibid art 89(1).

⁹⁷ See Rodney Dixon & Helen Duffy, 'Article 72: The Protection of National Security Information' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 937, 946.

⁹⁸ See *Report of the Ecuadorian Corte Constitucional, Informe del Sr. Hernan Salgado Pesantes en el caso No. 0005-2000-CI sobre el 'Estatuto de Roma de la Corte Penal Internacional,'* 6 March 2001 at Point 7. It notes the 'semantic nuanced difference' between the two, but goes on to note that as extradition applies only between states, the prohibition on the extradition of nationals does not apply to transfer to the ICC.

⁹⁹ *Rome Statute*, above note 8, at art. 102.

¹⁰⁰ Ibid art 89.

custodial State give priority to the request of the international criminal court for transfer of an accused over the extradition request of another state. The Statute concurrently, however, requires that the requesting State consent to the operation of the Court as a precondition to its exercise of jurisdiction.¹⁰¹

Although States Parties will be required to adapt their national law to ensure that they are able to fulfil their cooperation obligations under the Statute,¹⁰² a significant residual role remains for national law which will continue to control the form and procedure governing requests for assistance,¹⁰³ as well as the execution of such requests, with very limited exceptions.¹⁰⁴ In the case of conduct, the basis of that which constitutes the crime for which the Court is seeking surrender, the requested State is to give priority to the request from the Court unless the competing request represents an existing international obligation to extradite the person to the requesting State, in which case the requested State is to balance the ‘relevant factors’ in determining whether to give priority to the Court.¹⁰⁵

With respect to other forms of cooperation in relation to investigations or prosecutions, States Parties remain under a general obligation of assistance to the Court.¹⁰⁶ This assistance may take many forms, some of which are listed in Article 93(1), and includes the taking of evidence, service of documents, facilitating the voluntary appearance of persons as witnesses or experts before the Court, questioning persons being investigated or prosecuted by the Court, freezing or seizing of proceeds, property, assets, and instrumentalities of crimes, and

¹⁰¹ Ibid art 12.

¹⁰² Ibid art 88.

¹⁰³ See, eg, ibid arts 91(2)(c), 96(2)(e), 99(1).

¹⁰⁴ One such exception is art 99(4)(a), which permits the Prosecutor to execute requests that can be performed without any compulsory measures directly on the territory of a State Party if the State is one on the territory that the crime is alleged to have been committed and there has been a determination of admissibility in the case. The Prosecutor must enter into ‘all possible consultations’ with the requested State Party, as well. Ibid art 99(4)(a).

¹⁰⁵ Ibid art 90(7)(b).

¹⁰⁶ See ibid art 93(1).

other such matters. Conspicuously absent is any subpoena power. That is, neither the judges nor the Prosecutor of the ICC (or defence counsel, presumably) appear to have any power to compel witnesses to appear.¹⁰⁷

As classically conceived, jurisdiction to enforce concerns rules governing the enforcement of law by a State through its courts, as well as through executive, administrative, and police action.¹⁰⁸ In relation to the envisaged international penal process, the most obvious point is that the ICC has no police force.¹⁰⁹ Indeed, it was unthinkable to propose one either before or during Rome, although there was at least some precedent for doing so.¹¹⁰ But the orders of the Court, whether they be arrest warrants, judgments, orders to seize assets, or sentences, will need to be enforced. The delegates were not unaware of the problem and many provisions of the Statute address it directly.¹¹¹ But virtually all of them are premised on three principles. First, the Court will not be permitted to sanction States directly for non-compliance with its orders. Rather, the Court will be required to make findings of non-compliance and direct those to the Assembly of States Parties and the Security Council, in the case of a Security Council referral to the Court. Second, the Court may not compel State compliance with its orders.¹¹² That is, it may not compel the appearance of witnesses, it may not compel execution of arrest warrants, it may not seize bank accounts or government documents of its own accord. There is no subpoena power; there is no mandamus.¹¹³ Third, the personnel of the

¹⁰⁷ Art 93(7) does permit the temporary transfer of persons in custody for purposes of identification or for obtaining testimony, however, the State is not required to agree to the transfer, which is subject, in any event, to the consent of the person transferred. See *Rome Statute*, above note 8, art 93(7).

¹⁰⁸ See American Law Institute, *Restatement of the Law, the Foreign Relations Law of the United States* (1987) §401(c).

¹⁰⁹ As one French writer has astutely remarked, the Court represents ‘justice sans police.’ Jean-Eric Schoettl, ‘Decisions du Conseil Constitutionnel: Cour penale internationale’, *L’actualite Juridique--Droit Administratif* 230 (20 March 1999).

¹¹⁰ See Sadat Wexler, above note 14 at 673 note 41 (discussing the proposed statute of the London International Assembly which provided for an international constabulary charged with the ‘execution of the orders of the Court and of the Procurator General [of the Court]’).

¹¹¹ See, for example, *Rome Statute*, above note 8, art 70.

¹¹² Sadat & Carden, above note 2 at 415-416.

¹¹³ *Ibid.*

Court will have no right, in most cases, to proceed directly to the execution of their duties on the territories of States, but will work through the authorities present in the requested State, and will be subject to national law.¹¹⁴ There are three important exceptions to this. First, pursuant to Article 56, a judge from the Court may be present ‘to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons.’¹¹⁵ Second, the Prosecutor may be authorised by the Pre-Trial Chamber to take ‘specific investigative steps’ within the territory of a State party without the cooperation of the State, if the State is clearly unable to execute requests for cooperation because its judicial system has collapsed.¹¹⁶ Finally, pursuant to Article 99(4), the Prosecutor may under limited circumstances execute specific requests for assistance (other than arrest warrants)¹¹⁷ directly on the territory of a State Party.¹¹⁸

Criminal prosecution is inherently tied to notions of national sovereignty and the control over persons and territory which are fundamental to that notion. While international cooperation and judicial assistance as set out in the *Rome Statute* is at the very heart of the ultimate effectiveness of the Court by placing an affirmative obligation on States,¹¹⁹ this may be impeded by inherently national interests embedded in prohibiting and prosecuting certain types of conduct. In fact, some argue that the Nuremberg tribunal itself succeeded only because it in some ways substituted itself for the inability of the German government to try war criminals, the obstacle of sovereignty of the German State as a bar to the enforcement of justice having been destroyed by the historic events of May and June, 1945. Arguably, the

¹¹⁴ Ibid.

¹¹⁵ *Rome Statute*, above note 8, art 56(2)(e).

¹¹⁶ Ibid art 57(3)(d).

¹¹⁷ These are requests which can be executed without any compulsory measures. The Statute specifically includes ‘the interview of or taking evidence from a person on a voluntary basis,’ and ‘the examination without modification of a public site or other public place.’ *Rome Statute*, above note 8, art 99(4).

¹¹⁸ Sadat & Carden, above note 8 at 415-416

¹¹⁹ *Rome Statute*, above note 3, Part 9 contains the provisions on the nature and type of international cooperation and judicial assistance by States.

successful establishment of the Yugoslavia and Rwanda tribunals represents a fundamental departure from Nuremberg in that the authority under which they were constituted derives not from their status as occupied territories, but from truly international exercises of Security Council power. Nonetheless, both the Yugoslavia and the Rwanda tribunals were constituted in the midst of continuing national disarray, where the functioning national legal system had been subverted and compromised and could not be said to reflect basic due process requirements (Yugoslavia) or had collapsed altogether and did not exist (Rwanda). It is questionable whether a criminal justice mechanism which expects to operate alongside fully operational national legal systems can do so without considerable political difficulty.

III. Reflections on the ICC: Merits and Demerits of the System

3.1. The Case for the ICC

Much of the desire for a permanent solution arises from the international abhorrence of the atrocities committed in internal and international conflicts. This abhorrence leads to several policy rationales supportive of an international court. The first rationale is deterrence. Many people believe that if a permanent court will punish international crimes, such as genocide and crimes against humanity, such punishment will deter future potential criminals.¹²⁰ Supporters of the ICC hold to deterrence as an important rationale.¹²¹ Some people are concerned that the furtherance of human rights in the world will be stymied as long as there is no price to be paid for violating those rights. They argue that '[i]mpunity not only encourages

¹²⁰ Senate Hearing, above note 1 (testimony of John Bolton, former Assistant Secretary of State for International Organization Affairs).

¹²¹ See Claudio Grossman et al, International Support for International Criminal Tribunals and an International Criminal Court, (1998) 13 *American University International Law Review* 1413, 1417, 1436 (1998). Senator Arlen Specter states, 'I strongly believe that deterrence is a big factor in life. If you prosecute and punish people and they know that punishment is a possibility, it will affect their conduct. I believe that what is going on right now in The Hague is very important as an international precedent and as a matter of deterrence.' Ibid at 1417.

the recurrence of abuses against human dignity, but also strips human rights and humanitarian law of their deterrent effect.’¹²²

Creation of a permanent court would remove the accusation that has dogged the ad hoc tribunals, the fact that they are reactive and narrowly focused to solving the international emergency of the moment thus not wholesome institutions to contribute to universality and specificity in international law. While some movement has occurred in the UN to standardise and codify international crimes, the structure for the international court did not keep pace until the last decade of the 20th Century. The creation of a permanent court would be beneficial to the international community because it would help address what some internationalists see as the main failings of the international system of justice, the lack of a permanent and effective enforcement mechanism.¹²³ A permanent international criminal court would surmount the criticism that whenever ad hoc tribunals are organised to deal with war crimes, it is solely to punish the vanquished. These tribunals are, therefore, open to the valid criticism that their purpose is just to achieve ‘victor’s justice’ and that the tribunals are in use only to exact retribution for the terrors of war.¹²⁴ As Justice Murphy said in his dissent in *Re Yamashita*, ‘[i]f we are ever to develop an orderly international community based on a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.’¹²⁵

¹²² Jelena Pejic, ‘Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness,’ (1998) 29 *Columbia Human Rights Law Review* 291, 292.

¹²³ *Ibid* at 294.

¹²⁴ See MacPherson, above note 62 at 17. See *ibid*. The imposition of a foreign version of justice increases the sense of being wronged by the process as well. This imposition may increase the sense that such justice is just further violence.

¹²⁵ In *Re Yamashita*, 327 US 1, 29 (1946) (Murphy, J, dissenting opinion).

Another reason supporting the establishment of the ICC is the ad hoc tribunals' lack of consistency and failure to establish precedent. Past ad hoc tribunals have been marked by a singular lack of consistency and lack of judicial memory.¹²⁶ 'From a legal standpoint, ad hoc tribunals cannot hope to achieve a desired level of consistency in the interpretation and application of international law because their statutes are inevitably tailored to meet the demands of the specific situation that brought them into being.'¹²⁷ In this context, the ICC will play an important role in standardising international justice. A related concern, in addition to consistency, is whether the political will exists from crisis to crisis to establish a tribunal.¹²⁸ Many people fear that judicial fatigue will set in, resulting in crimes going unpunished. Questions are naturally raised concerning why one conflict deserves a tribunal and another does not.¹²⁹ For example, the UN established tribunals for the former Yugoslavia and Rwanda, but not for Iraq, Somalia, or Sudan. If there were a permanent ICC, the will required to begin an investigation into atrocities would not depend upon the politics of the UN or national leaders.

Finally countries rarely punish war criminals on their own. Frequently, the end of conflict brings a desire to return to normalcy. Additionally, conflicts often end with a negotiated settlement between the warring parties. Settlement often includes amnesty as a condition for the cessation of hostilities, freeing otherwise criminally negligent individuals from prosecution. New governments may also include individuals who are responsible for war crimes. Such countries are naturally unwilling to prosecute war criminals. Supporters of the

¹²⁶ See MacPherson, above note 62 at 23. The legal systems of smaller countries may be intimidated or overwhelmed with the problem of dealing with international criminals. See *ibid.*

¹²⁷ See Pejic, above note 122 at 293.

¹²⁸ See Senate Hearing, above note 1 at 35 (testimony of Michael P Scharf in support of the International Criminal Court).

¹²⁹ See Pejic, above note 122 at 293.

ICC claim that a permanent international institution would have the political distance necessary to bring these criminals, regardless of their positions, to justice.

3.2. The Case Against the Court

One major problem for the ICC is that so many people are accused and there are too few judges. In its current conception, the court will not have the capacity to operate more than a few trials at a time. Proponents of the court point to this issue as a reason to allow future growth in the size of the Court.¹³⁰ However, it is difficult to imagine an international court large enough to handle thousands of trials in a timely fashion, such the Rwandan situation would require, and yet remain affordable to the world community.

The Court presumes that after an armed conflict not every country has, or will have, a legal system in place to perform such tasks. Physical distance will still hamper evidence gathering and discovery where there is no credible legal system in place to do it for the Court. Reliance on local legal systems is also problematic because it depends on their willingness to assist. Discovery is nearly always an adversarial situation. Attempting to use local law enforcement when it too may be resistant will defeat such efforts completely. The touted swift justice simply will not occur.¹³¹

The real threat to the Court's stature is the prospect that it will be little used. If the international court is to command respect, it must have sufficient jurisdiction to play a real role in the struggle against international crime. There is no danger that the court will be trivialized as long as it is making a valuable contribution to criminal justice.¹³² Hence, the

¹³⁰ See MacPherson, above note 62 at 56.

¹³¹ Nill, above note 50 at 129-130.

¹³² See MacPherson, above note 62 at 46.

presumption of the ICC's supporters is that it will be used and expanded as necessary into the future.

While some developing States may look to the ICC to model their criminal code, most developed States would resist such a model in favour of their system already in use. It is conceivable that reformers would seek to leverage change in their national judicial systems through seeking to expand the influence of the ICC into the domestic sphere. An obvious area where this would likely occur is capital punishment. If the ICC were to become the model of criminal justice, States continuing to impose capital punishment would come under increasing pressure to alter their laws to conform to the international standard. Indeed, minority interests (including individual defendants with creative defence attorneys) could seek to use the ICC standard to overcome majority chosen positions in criminal law. Further argument is made that the continued existence of the 'prosecute or extradite' notion of international criminal obligations has a distinct advantage which may suffer as a result of the establishment of international criminal jurisdiction over certain international crimes. 'Prosecute or extradite' means that international criminal laws are incorporated into the domestic system, thus resulting in better integration of those laws into the legal culture of the incorporating national legal order. If international crimes are tried before an international tribunal whose decisions and judgments have no precedential value in a national court, and whose persuasive value may be considerably minimised due to political or other considerations, that incorporation effect is lost.

Perhaps the central issue facing the ICC is its effect on sovereignty. Beyond the general threat to national sovereignty, the *Rome Statute* and the ICC directly conflict with many national constitutions. The ICC's supranational jurisdiction cannot be reconciled with the judicial

system created by the constitutions of many States. The seemingly vague and ambiguous crimes that the ICC would prosecute could not pass constitutional scrutiny in a number of countries. And there are no provisions in the *Rome Statute* for many of the protections guaranteed by some Bill of Rights--for example, trial by jury. In many States, the constitution is the supreme law of the land with all other laws (whether national or international) being subordinate. With countless judicial decisions in domestic courts trumpeting the unbridled supremacy of their respective constitutions, it will be interesting to see whether the *Rome Statute* will triumph even where it seemingly contravenes a constitutional provision. While arguably a municipal law provision cannot provide justification for failure to observe an international obligation, with the United States leading the dissident group, it will not be an easy argument to advance. Coupled to constitutional provisions is the fact that judicial power in States is vested in its courts which are ordained and established by the national assembly. Thus arguably only a court of the State may exercise jurisdiction over a citizen for offences committed within the State. Therefore, at a theoretical and significantly a technical level the *Rome Statute* would conflict with State constitutions if the ICC attempted to assert jurisdiction over a citizens for offences committed on a particular State's territory.

Finally, the ICC fails to address the problem that it identifies. Justice is an attempt to set things right, after the crime has been committed. The genocide, ethnic cleansing, and mass rapes have been committed long before the judicial process can begin. By the time evidence has been gathered and suspects apprehended, the value of the judicial remedy begins to degrade, particularly when dealing with crimes on a massive scale. Ultimately, life incarceration remains unlikely for the chief perpetrators if historical precedent means anything.¹³³ The international community appropriately desires the end to crimes against

¹³³ For an alternative view on resolving international crime, see Carrie Gustafson, 'Comment, International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means' (1998) 21 *Houston*

humanity, war crimes, genocide, and aggression. The experience of generations has been that punishment, while important, is at best a poor remedy for the victims. The victim's greatest desire is to avoid victimisation in the first place. Therefore, the best solutions to today's humanitarian crises lie not in adjudication that is too late for the traumatised victims, but in prevention. Perhaps Carrie Gustafson is right, and justice such as is envisioned by the ICC should be abandoned because it only perpetuates violence.¹³⁴ Perhaps adherence to the tenets of the world's greatest moral and ethical philosophers would provide a better solution to both international crime and punishment.¹³⁵ However, prevention, whatever its form, of war and criminal activity may be as difficult to achieve as effective punishment provided for by the ICC.

VI. Conclusion

As a matter of process, the making of the *Rome Statute* was extraordinary. Not only was the Statute voted on by States, thereby erasing any illusions one may have held about the continuing relevance of absolute paradigms of sovereignty in modern times, but the law made by the Statute extends to the entire world in cases involving referrals by the Security Council under Chapter VII. 'The ICC will directly or indirectly affect all members of the international community. When the ICC becomes a reality, Third States will not be immune from the ICC irrespective of whether they ratify the *Rome Statute*. In particular, non-States Parties will not be able to block prosecution of their nationals. The effectiveness of the ICC and its impact on human rights and humanitarian law enforcement as well as on the existing international criminal justice cooperation system will depend on the degree of support it enjoys among the

Journal of International Law 51. Though the *Rome Statute* states that all individuals, regardless of position, are equally liable to investigation and prosecution, State cooperation will not be equally available depending on the position and popularity of the suspect. See *ibid*. Therefore, State leaders will remain much less likely to be prosecuted than lower level functionaries. See *ibid*. This is true even of national leaders considered to be perpetrators.

¹³⁴ *Ibid*.

most influential members of the international community.’¹³⁶ Hopefully, non-participating States, whatever their individual status and influence may be forced into a situation where they will have to acknowledge the existence of the ICC as an effective and broadly-represented international criminal judiciary that even non-States Parties have to deal with.

As for the legal rules comprising the Statute’s substance, several features of the Statute challenge the Westphalian model, and the unwritten ‘constitution’ of international law premised upon it. The Court will exercise jurisdiction over individuals, including Heads of States. The three crimes currently defined within its jurisdiction will cover the internal, as well as the international, commission of atrocities on a massive scale. Their codification in the *Rome Statute* strains the current conception of international law as consensual and poses a challenge to the content and status of customary international law. As argued by Sadat and Carden, ‘the prescriptive jurisdiction of the Court rests on a new theory of universal international jurisdiction which embodies in it the seeds of a new approach to the repartition of competences between national and international legal orders.’¹³⁷ Further the Assembly of States Parties will take decisions by supermajority vote, thus much of the ‘law’ of the ICC, like the law of the European Union, will have a supranational character.¹³⁸

Some see the Court as a monster arguing that: ‘If allowed to stand--and to thrive and grow, as its champions intend--this Court will sound the death knell for national sovereignty, and for the freedoms associated with limited, constitutional government.’¹³⁹ But there are those on the extreme end who feel that sovereignty is an outmoded concept and should be discarded,

¹³⁵ Ibid.

¹³⁶ Gennady M Danilenko, ‘The Statute of the International Criminal Court and Third States’ (2000) 21 *Michigan Journal of International Law* 445, 494.

¹³⁷ Sadat & Carden, above note 7 at 457-458.

¹³⁸ Ibid.

¹³⁹ William F Jasper, ‘Courting a Global Tyrant’ (August 1998) 14 *The New American* No 189 at 10.

dismissing the whole notion of sovereignty as a false idea and suggesting that for legal purposes, we might do well to relegate the term to the shelf of history as a relic from an earlier era.¹⁴⁰ Overall, the continued relevance of sovereignty should be balanced against reality. Though State sovereignty is still a cornerstone of international law it should not be seen as the bulwark from which State prerogatives are defended from foreign infringement, even when this 'infringement' aims to secure the rights on individuals and entities within the domestic sphere.¹⁴¹

¹⁴⁰ J L Brierly, *The Law of Nations* (6th ed, Waldock 1963) 54-5; Louis Henkin et al, *International Law: Cases and Materials* (3rd ed, 1993) 16.

¹⁴¹ The United Nations itself is based 'on the principle of the sovereign equality of all its Members.' *UN Charter* art 2, para 1. One of the fundamental purposes of the UN is to protect the territorial integrity and political independence of Member States. See *UN Charter* art 2, para 4 ('All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State').